General overview of alternative procedures in criminal proceedings

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Abstract

The plea bargaining is an Anglo- Saxon institution of adversarial criminal procedure primarily of the US, through which US courts resolve most of the criminal cases.
As a result of the admission, the defendant may give up the trial through the court review and agree with the prosecutor on the type and the amount of the punishment for a criminal offence or offences included in the charge. Such an agreement can be implemented in two directions: horizontally and vertically. In the vertical aspect, the plea bargain of the defendant is related to the stage when the prosecutor proposes a sentence bargaining to the judge, whereas in the horizontal aspect the plea bargain is reached between the prosecutor, the defendant and his defense counsel and is endorsed by the judge.
The mediation procedure enables resolution of disputes over certain criminal offenses through mediation. Mediation as an extrajudicial activity is a relief for the court and prevents undiserable legal and social consequences. The mediation between the victim and the perpetrator takes place not only through extrajudicial practices but also within the criminal justice system.

Keywords: *plea bargain, mediation procedure, extrajudicial activities.*

1. Introduction

Criminal proceedings right as a part of the legal system of a society is also a part of the criminal law. In the fight against criminality it is its duty to legally regulate the criminal procedure that the criminal case needs to be clarified and resolved.[1] It equally contributes both to preventive warfare and to the repressive fight against criminality. In this regard, the criminal procedure is presented as a mean of securing the educational and coercive role of justice.
The plea bargaining is an Anglo- Saxon institution of adversarial criminal procedure primarily of the US, through which US courts resolve most of the criminal cases. It is considered that in the US criminal proceedings over 90% of criminal cases are resolved through plea bargainings.[2] The foundation of this institute is pleading guilty by the defendant – *guilty plea.* As a result of the admission, the defendant may give up the trial through court review and agree with the prosecutor on the type and the amount of the punishment for a criminal offence or offences included in the charge. Such an agreement can be implemented in two directions: horizontally and vertically. In the vertical aspect, the plea bargain of the defendant is related to the stage when the prosecutor proposes a sentence bargaining to the judge, whereas in the horizontal

[1] E. Sahiti & I. Zejneli, E drejta e procedurës penale e R. Maqedonisë, Shkup,2017, pg.1
[2] Nikolić, Danilo, Stranački sporazum, Beograd, 2009, pg. 21; Bajović, Vanja , Sporazum o priznanju krivice, Beograd, 2009, fq. 55; Stephen C.Thaman, Miranda u komperativnom pravu, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 9, nr.1/2002, 194.; Lažetić-Bužarovska Gordana, Kalajdjijev Gordan, Misoski Boban, Ilić Divka, Komparativno kazneno procesno pravo, Skopje, 2011, pg. 273. Xhejms B. Xhekobs, Evoluimi i së drejtës penale në SHBA, Revistë Elektronike e Departamentit të SHBA, Çështje të Demokracisë, E drejta penale në SHBA, korrik 2001, pg.10

aspect the plea bargain is reached between the prosecutor, the defendant and his defense counsel and is endorsed by the judge.
Although plea bargains have a long tradition of enforcement in the USA, this institute is still subject to debate between supporters and opponents of solving the criminal cases by a judgment on the basis of plea bargains.[3]

2. Plea bargain- US criminal proceedings

Plea bargains in the US criminal proceedings are not limited to the weight of the criminal offenses which means that these forms of solving criminal cases come to terms both for minor offenses and for serious criminal offenses. Moreover, a large number of agreements refer exactly to serious criminal offenses. Meanwhile, in the European continental legislations plea bargains come to terms for light or average criminal offenses.[4]
When it comes to guilty plea, it is worth to highlight that in the American criminal procedure a specific form of guilty plea comes to term that is called *Alford's Plea*.[5]
The resolution of criminal cases in the USA through plea bargainings in such great proportions has caused that in the criminal proceedings of other states also, in particular of the states of continental Europe which traditionally apply the principle of prosecution and the principle of material truth, provide for different alternative forms of resolution of criminal cases in consensual order (for example: avoidance, shortening or termination with an agreement of the criminal procedure). Meanwhile, in some transitional states legislation a similar plea bargaining to the plea bargaining in the USA is included. (for example in Bosnia and Herzegovina, Kosovo, North Macedonia, etc.).
In the wake of contemporary trends for solving criminal cases through various alternative solutions including a plea bargaining agreement, the LPC of NM has also approved the plea bargaining institute.
The plea bargaining is a procedural institute which in the Republic of North Macedonia is legally regulated by the 2010 Criminal Procedure Code, Official Gazette no. 150/2010. As the plea

[3] Ibidem
[4] Damaška, Marijan, Napomene o sporazumima u kaznenom postupku, HLJKPP, vol. 11, no. 1/2004, pg. 61.
[5] Alford's Plea, means guilty plea by a person who expressly states that he is innocent. Indeed, by this form of admission, the defendant waives the right to trial before the jury, accepting the sentence to be pronounced even though at the same time denies commiting the offence he is charged with. The *Alford* guilty plea is named after the United States Supreme Court case of *North Carolina v. Alford* (*North Carolina v. Alford,* 400 U.S. 25 (1970). Indeed, Henry Alford in December 1963, has been charged with first degree murderer for which the death penalty may be sentenced. The defendant was charged after the statements of two witnesses who proved to have been present when he came out from his flat with a gun by saying that he is going to settle accounts with one person. The same one after a while has returned saying he has done the job. Meanwhile, Alford, seeing that there is strong evidence against him, has agreed with the prosecutor to plead guilty in exchange for an indictment by the prosecutor in a second instance murder for which the death penalty can not be pronounced. Thus, the judge has approved the guilty plea by imposing the most severe punishment that may be pronounced on a criminal offense of the second instance- the punishment of thirty years of imprisonment. Meanwhile, against this verdict, the defendant has filed a complaint stating that his admission is a result of fear of imposing the death penalty, considering himself innocent. The court rejected the appeal on the ground that guilty plea was his was his will and that there is no reason for the court to disobey his will. Further on, the court has found that admitting the guilty plea only to avoid the death penalty does not mean that amission was not a consequence of the conscientious and rational choice of the defendant. As such, this institute can hardly be understood from the perspectives of continental criminal proceedings. However, in the United States, this institute is in harmony with the pattern of adversarial procedure (the procedure of parties), in which the truth is not intended, but it is intended to establish which party is entitled in the concrete case.

bargaining institute presents a completely new but prospective solution to the resolution of criminal cases, in the scope of general reviews related to plea bargaining we will pay close attention and a wider space to it.[6]

According to Article 483 paragraph 1 of Criminal Code the public prosecutor and the defendant with his defense counsel (professional protection is mandatory) *before raising the indictment*, may submit a plea bargain proposal, which if approved by the court paves the way for a more rapid outcome of the criminal proceeding. The plea bargain may also be filed *at the stage of review* of the indictment to the judge or indictment review chamber (Article 335 paragraph 1).

The submitted draft plea agreement, shall have to contain the following: a) Data on the public prosecutor, the suspect and his or her defense counsel; b) Description and legal qualification of the criminal offences covered by the draft plea agreement; c) Proposed criminal sanction by type and duration; d) Statement by the suspect that he or she is consciously and voluntarily accepting the draft plea agreement and any consequences derived thereof; e) A statement by the public prosecutor and the suspect that they waive their right to an appeal, provided a judgment accepting the draft plea agreement is passed; f) Signatures of the public prosecutor, the suspect and his or her defense counsel; g) The costs for the procedure; and h) Date and venue of concluding the draft plea agreement. (Article 485 paragraph 1)

The subject of the agreement is the type and amount of the penal sanction that is proposed in the proposed dispute, and if there is any consent by the suspect, the subject of the agreement may be the legal property claim of the injured party. However, the public prosecutor is obliged to attach, toghether with all the evidence, the statement signed by the injured party with the proposed agreement and the nature and extent of the property claim.

With a proposal agreement it is required that the pre- trial judge, respectively in the case of the review of the indictment, the judge or the indictment review chamber to apply a criminal sanction determined by type and height, in the defined legal framework for the concrete criminal offense but not below the mitigation limits of the sentence determined by the Criminal Code.[7]

The judge of the preliminary procedure shall schedule a hearing for assessment of the draft plea agreement within three days from the receipt of the draft plea agreement. The judge shall summon at the hearing the persons who filed the draft plea agreement and is obliged to examine if it has been submitted voluntarily, whether the suspect is aware of the legal consequences from its acceptance, any consequences related to any legal or property claims and the costs for the criminal procedure. The preliminary procedure judge shall advise the public prosecutor and the suspect and his or her defense counsel of their right to withdraw from the draft plea agreement before the ruling is made. The parties are further informed that the acceptance of the draft plea agreement shall be considered as waiving the right of appeal against any judgment reached on the basis of the draft plea agreement. (Article 488)

A plea agreement can be rejected or accepted by a judgment by which a penal sanction is imposed at the same time. The draft- agreement is **rejected** when the preliminary procedure judge finds that the collected evidence regarding the facts relevant for selecting and determining the criminal sanction do not justify the pronouncing of the proposed criminal sanction, i.e. that the public prosecutor, the suspect and his or her defense counsel filed a motion during the hearing for a criminal sanction that is different than the one contained in the draft plea agreement. When the proposed draft-agreement is refused, the minutes of the hearing and the plea agreement can not be used in the further course of the proceedings and they must be separated from case files. (Article 489) and Article 101 of,LJJ.

[6] E. Sahiti&I.Zejneli, E drejta e procedurës penale e R.Maqedonisë, Shkup,2017, pg.362

[7] Ibidem

If the preliminary procedure judge accepts the draft plea agreement, he or she shall pronounce a judgment where he or she must not pronounce a criminal sanction different to the criminal sanction contained in the draft plea agreement. The judgment shall contain the elements of a judgment of conviction pursuant to Article 404 of the Criminal Procedure Law. The judgment shall be announced immediately and prepared in writing within three days of its announcement. The judgment shall be delivered to the public prosecutor, the suspect and his or her defense counsel without any delay. The injured party shall also receive a copy of the judgment without any delay. If the injured party is dissatisfied with the type and amount of the legal or property indemnification claim awarded with the judgment, he or she may effectuate such right through dispute litigation. (Article 490).

The negotiation of the plea agreement in the Criminal Procedure Code of the Republic of Kosovo[8] is regulated by Article 233 and in accordance to parapraph 3 of this article, the negotiation is done on the initiative of the defense of the defendant or the defendant is not represented by a counsel. In the first case when the defendant wishes to enter into a guilty plea agreement, the defendant's counsel, or the defendant if not represented by counsel, shall request the state prosecutor for a preliminary meeting to commence negotiations for a plea agreement, whereas in the second case when the defendant is not represented by counsel, shall request the state prosecutor for a preliminary meeting to commence negotiations for a plea agreement. Since the presence of the defendant's counsel is extremely important both at the start and during the negotiation of the plea agreement (Article 57), in all cases when a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one (1) year or more of long period imprisonment or life long imprisonment, the defendant must be represented by counsel. According to paragraph 5 of Article 233[8] it is foreseen the possibility that on the initiative of the state prosecutor to negotiate plea bargain.

Written plea agreement is reached exclusively through the negotiation of the state prosecutor on one side and the accused and his defense on the other side. Thus, the court as in the Anglo-Saxon criminal proceedings does not take part in negotiating the guilty plea agreement, nevertheless, it has the authority to determine the time within which negotiations on the guilty plea agreement should be concluded.[9] Thus, according to paragraph 10 of the Article 233, although the court shall not participate in the plea negotiations, but may set a reasonable deadline not longer than three (3) months for the conclusion of the negotiations to prevent delay of the procedure.

For plea agreements consummated prior to the main trial where the defendant participates as a cooperative witness in a covert investigation and provides evidence in a criminal proceeding, a defendant may be sentenced to a minimum of forty percent (40%) of the minimum possible imprisonment set by the appropriate provisions of the Criminal Code. (Article 233 of CPCK, paragraph 7.4).

3.Mediation Procedure

The mediation institute represents a new form of dispute settlement among out-of-court parties. In the mediation procedure, the perpetrator of the offense and the injured party with their free will reach agreement on the existing conflict and the damage caused to the criminal offense. As such, this way of resolving disputes over a category of criminal offenses is present in

[8] Ibidem

[9] Ibidem

contemporary legislation as an alternative to more efficient and faster resolution of criminal cases. [10]

The mediation procedure allows for settlement of disputes over certain criminal offenses through mediation.[11]. Mediation as an extrajudicial activity is a relief to the court and prevents undesirable legal and social consequeces[12]. The mediation bewtween the injured and the perpetrator takes place not only through extrajudicial practices but alsi within the criminal justice system.

The mediation institution, which in itself incorporates indemnification law (restorative justice), represents a contemporary tendency of criminal politics. In this regard, regarding the mediation, a number of recommendations by the United Nations and European institutions should be considered, among them: "*United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters"* and the Committee's Recommendation of Ministers of the Council of Europe (99)10 *"With regard to mediation in criminal matters".*[13] Mediation is conducted when the parties agree freely and after being informed about the rights, the nature of the process and the possible consequences.

In the mediation procedure, with the free will of the parties an agreement is reached between the perpetrator and the victim regarding the existing conflict between them and for the compensation of the damage caused in the case of committing the criminal offense by which the restorative justice is realized. Proponents of restorative law point out that in addition to the bad effects for offenders, their families, and the wider society, the punishment system may intensify conflict rather than resolve it. Instead of approaching the parties closer to each other, it expands the gap that divides them. The effectiveness of the agreement avoids clashing the parties in the court, where eachone stands firmly in its own positions, and the court decision inevitably pleads for one party and punishes the other, thus, potentially opening up the path of a social conflict.[14]

In the Republic of North Macedonia there is also a Law on Mediation[15] which regulates the mediation procedure in general, the establishment, organization, functioning of mediation and the rights and responsibilities of mediatiors.

According to Article 491 paragraph 1 of CPL when a criminal offense is prosecuted upon a personal legal action, the competent individual judge, at the reconciliation hearing and for the purpose of expedience, may propose to the parties to agree on referral to mediation. The parties in the mediation procedure shall be the suspect, his or her defense counsel and the injured party and his or her attorney. The condition for the implementation of the mediation procedure is the

[10] Sahiti, Murati, Procedura penale, op. cit. pg. 332.

[11] Mediation as a form of settlement of disputes between the injured party and the perpetrator has started in the recommendations of the Council of Europe and in the United Nations Declaration for "basic principles of justice for victims of crime and abuse of power" regardig mediation in criminal matters. Most of the programs related to mediation in different countries are related to minor offenses committed by young people who are the first perpetrators of the offense. In many countries the victim- author mediator has a legal basis or is part of the juvenile justice system or as a part of the criminal code" (Latifi, Elezi, Hysi, Politika e luftimit të krimit Prishtinë, 2012, pg. 187 – cited text of V. Hysi). See also Lažetić-Bužarovska, Kalajdjijev, Misoski, Ilić, op. cit. pg. 273. Mediation as a form of settlement between parties in conflict is also recognized by the Albanian Customary Law. The Albanian Customary Law developed over the centuries with the best experience of self-organization and governance, took its normative form in the middle ages and served as a regulator of common life in all Albanian territories. In the conditions of the rule of foreigners and in the framework of self- organization and survival efforts, in addition to other institutions, the mediation institute was developed to prevent disputes and resolve conflicts, with special emphasis on solving the conflict of blood feud and vengeance, as the worst plague of the Albanian society.

[12] Zgjidhja e konflikteve dhe pajtimi i mosmarrëveshjeve, Tiranë, 2004, pg. 170-171.

[13] Sahiti, Murati, Elshani, Komentar, pg.569.

[14] E. Sahiti &I. Zejneli, E drejta e ppm, pg.362

[15] Official Gazzete of NRM, no. 188, date 31.12, 2013.

consent of the defendant and the injured party. The consent may be provided on the record before the individual judge or in a written form, jointly or each of the parties separately. Any consent shall be given not later than three days from the day when the referral to mediation has been proposed. After the parties have given their consent, the individual judge shall enact a decision, thus referring the parties to mediation, then within three days from the given consent, the parties shall jointly nominate one or more mediators from the list of mediators and notify the individual judge thereof. The mediation procedure shall last no longer than 45 days from the day when the parties gave their consent to the competent individual judge. The mediator shall conduct the mediation procedure until a written agreement has been signed, in accordance with the provisions of the Mediation Law. In agreement with the parties, the mediator shall set the terms for the mediation. The mediator shall communicate with the parties together or separately. The presence of the parties during the course of the mediation procedure shall be obligatory. Before the commencement of the mediation procedure, the mediator shall be obliged to introduce the parties to the principles, rules and expenses of the procedure (Article 494).
The mediation procedure may end successfully or fail. The mediator, notwithstanding the mediation epilogue, must notify the individual judge. The mediation procedure may end by signing a written agreement signed by both parties. Other than with a written agreement, the mediation procedure may also end with the following: 1) a written statement by the mediator, after consultations with the parties confirming that any further attempts for mediation are not justified, on the day of submission of the statement; 2) after the expiry of 45 days, confirmed by a notification by the mediator; 3) if the parties withdraw from the mediation procedure at any time without providing the reasons thereof. It shall be considered that the parties withdrew as of the day when the withdrawal statement has been filed; and 4) the mediator terminates the mediation procedure with a decision, believing that the agreement reached is unlawful or inappropriate for enforcement. The written statement, the notification or the decision enacted by the mediator, i.e. the statement of withdrawal by the parties shall be delivered to the individual judge without any delays and he or she shall set a date for the main hearing according to the summary procedure provisions. (Article 495).
Mediation as a form of conflict resolution between the victim and the perpetrator has also found support in the recommendations of the Council of Europe and the United Nations.[16]
According to Article 232 of CP of Kosovo[17] the authorization of the state prosecutor to send a criminal case to the mediation procedure is determined: Before so doing, the state prosecutor shall take account: a) the type and nature of the act; b) the circumstances in which it was committed; c) the personality of the perpetrator; d) his or her prior convictions for the same criminal offence or for other criminal offences; e) his or her degree of criminal liability.

4. Conclusion

The plea agreement is a procedural institute which is regulated by the Penal Procedure Act. The non-participation of the court in drafting of the proposed agreement is the result of the new role of the public prosecutor as a procedural subject which applies the investigative procedure on the one hand, but also as a result of the need to safeguard the impartiality of the court as an arbitrator deciding whether the proposed agreement it will be accepted or not.

[16] E. Sahiti & R. Murati, E drejta e procedurës penale, Prishtinë, 2016, pg.332
[17] Ibidem

When preparing the proposed agreement, the pre- trial judge shall not be present. This prohibition, analogously applies to the judge or panel members for the reviewing of the indictment.
Consensual forms of criminal case resolutions today also apply to international trials, but this way of solving criminal cases is also included in the documents of the Council of Europe and academic rpjects of the European Union.
The mediation institute represents a new form of dispute settlement between out-of- court parties. In the mediation procedure, the perpetrator of the offense and the injured party with their free will reach agreement on the existing conflict and the damaged caused with the criminal offense. As such, this way of resolving disputes for a category of offenses is present in contemporary legislation as an alternative to more efficient and faster resolution of criminal cases.

References

1. Sahiti, Zejneli, *E drejta e procedurës Penale e R. Maqedonisë*, Shkup, 2017
2. Buzarovska, Kalajdiev, Misiki, Ilic, Divna, *Kazneno procesno pravo*, Skopje, 2015.
3. Matovski, Nikola, *Kazneno procesno pravo,* Skopje, (Pjesa e përgjithshme 2003, Pjesa e posaçme 2004).
4. Sahiti, Murati, *E drejta e procedurës penale*, Prishtinë, 2016.
5. Islami, Hoxha, Panda, *Procedura penale*, Tiranë, 2003.
6. Marina, Panta, *Krivična postapka na SFRJ*, Skopje,1979.
7. Sahiti, Ejup, Pozita e të pandehurit në procedurë penale dhe vlera e rrëfimit të tij për ndriçimin e çështjes penale, *"Përmbledhje punimesh"* të Fakultetit Juridik të Prishtinës, 1976, Marfi, Peter, Për provën, Tiranë, 2010.
8. Deklarata e Përgjithshme e të Drejtave të Njeriut e vitit 1948 (*Universal Declaration on Human Rights, G.A.res. 217 A(III), U.N. Doc. A/810 at 71).*
9. Konventa Europiane për Mbrojtjen e të Drejtave dhe Lirive Themelore të Njeriut e vitit l950, me protokollet shtesë *(European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.S. 222, entered into force Sept. 3,1953, as amended by Protocols No 3, 5, 8, i 11 which enterd into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively)*.