



## **Role and Position of the Defendant in the Plea Agreement**

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**Abstract:** *The object of this study is the plea agreement in the criminal procedure of Kosovo. The study focuses on defining the understanding of the plea agreement, specifying the role and position of defendant in the plea agreement, specifying the rights and obligations of the defendant in the plea agreement, and on the elaboration of the importance and effects of the plea agreement for the defendant and withdrawal of such agreement for the reasons that may be related to it. The results of this paper prove that the guilty plea agreement in the Kosovo courts practice has had a direct effect on mitigation the level of sentence or in some cases acquits punishment. Looking into this aspect, the biggest benefits resulted on favor of defendants with the status of cooperative witness. The contribution of this paper is theoretical and practical, since it deals with an issue almost untreated in Kosovo. These issues focus on legal solutions, theoretical approach, as well as operational aspects concretized in the practical activity of criminal procedure subjects. The legal, comparative, tracing and theoretical analysis methods have been helped in the preparation of this study.*

**Keywords:** *defendant; guilt; agreement; cooperative witness; withdrawal.*

### **I. INTRODUCTION**

The plea agreement is a criminal procedure that is important in the context of alternative criminal proceedings. The role of defendant in reaching such an agreement is immense, maybe even irreplaceable. This role is determined by the legal position designated to this criminal procedure subject by the Criminal Procedure Code of the Republic of Kosovo. Consequently, the position of the defendant in the plea agreement consists in: a) undertaking the initiative to enter into this agreement, b)

designating the position of the cooperative witness, c) coherent presence in meetings where the plea agreement is negotiated and d) the possibility of rejecting the plea agreement.

The position that the defendant has in the plea agreement determines his/her crucial role within such agreement. A number of rights and obligations have been assigned to the defendant in the plea agreement with the applicable legislation in Kosovo. He/she entitled to initiate the procedure for reaching a plea agreement, be present in all meetings

where it is discussed about the terms of this agreement, withdraw from the plea agreement, acquire the capacity of cooperative witness, and etc. Meanwhile, the obligations of the defendant are mainly related to: adherence to the terms of the plea agreement, fulfilling the obligations as a cooperative witness (when they are designated such capacity) and compensation of damage to the injured party.

The plea agreement is importance to the defendant because he/she can benefit in terms of mitigation of the punishment, release from punishment or other considerations in the interests of justice. These are some of the issues that this study focuses on. The analysis of the role and position of the defendant in the plea agreement is related to the lack of material on this issue, especially in inspiring criminal procedural parties (especially defendants) and courts to initiate and award a plea agreement in any case where this is possible.

This paper analyzed position of the defendant in the plea agreement due to legislation. In theory and practice there are some uncertainties regarding the role it may have on initiation or renunciation of such an agreement. To clarify this and the final findings of this problematic, the paper is organized in a way that analyzes each important element of the role and position of a defendant in the plea agreement. Looking at this aspect, in this order at the second session analyzes meaning of guilty plea agreement and the role of the defendant in its attainment, the third session analyzes in detail the rights and obligations of a defendant in the agreement on admission of

the guilty plea, the fourth session deals with the importance of the guilty plea agreement and withdrawal of the defendant, and the fifth session presents the conclusions of the proceedings.

## II. MATERIAL AND METHODS

These issues are addressed on focusing on legal solutions, theoretical approach, as well as on concrete aspects of practical activity of criminal procedure subjects. Moreover, the methodology used in this paper consists on analyzing and comparing data, especially the secondary ones, which includes journals and books published in serious scientific databases as well as laws and commentaries of the Criminal Procedure Code of the Republic of Kosovo and beyond it, it is enough to mention the Commentary that is made to the Law of Criminal Procedure of Serbia.<sup>1</sup>

## III. RESULT AND DISCUSSION

### Meaning of the Plea Agreement and Role of the Defendant in Reaching Such Agreement

#### 1) Meaning (notion) of the plea agreement

The plea agreement is a legal instrument that is important in the context of scientific treatments. This agreement is treated by various authors in the sense of a criminal procedure<sup>2</sup> and in the sense of a special alternative procedure. Such approach is considered natural, based on the fact that even within legal addressing its place has been assigned within alternative procedures, and sometimes outside them. Thus, the

<sup>1</sup> Ilić Goran, Majjić Miodrag, Beljanski Slobodan, Trešnjević Aleksandar, Komentar Zakonika u Krivičnom Postupku, Beograd 2013, p. 476.

<sup>2</sup> Alidžanović Vedran, Musić Elis, Sporazum o priznanju krivice – procesni i praktični aspekti

studija slučaja, Zbornik radova, XVII dani kriminalističkih nauka, Pravni Fakultet u Splitu, 2015, issue 18, p. 373.

Criminal Procedure Code of the Republic of Kosovo has listed the plea agreement among alternative procedures, including: temporary suspension of proceedings, mediation procedure, non-compulsory prosecution, acquittal and cooperative witnesses<sup>3</sup> whereas, the Criminal Procedure Code of the Republic of Albania addresses this agreement, specified as an agreement for cooperation (shortened judgment)<sup>4</sup> within Article 37/a, which is about cooperation with justice and Article 37/b, which is about the content of the agreement, and in essence it emerges as a separate criminal procedure institute, which then falls within a number of provisions within this Code.<sup>5</sup>

On the other hand, in United State of America, the plea agreement (plea bargaining) is first and foremost a USA criminal procedure institute, through which USA courts resolve most of criminal cases. It considered that 90% of criminal cases in the USA criminal procedure has solved through plea agreements.<sup>6</sup> The plea agreement in the USA criminal procedure has not restricted to the weight of the criminal offence, which means that this form of solving the criminal case applied to minor criminal offences and serious criminal offences. Moreover, a large

number of agreements refer exactly to serious criminal offences.

This alternative procedure has already been accepted by some European countries, such as the case with Italy, Croatia, Albania and other countries as well.<sup>7</sup> In European legislation, unlike the United States of America, plea agreements apply to minor or moderately severe criminal offences.<sup>8</sup>

Despite this fact, such restrictions have not been done with Kosovo's criminal legislation yet.<sup>9</sup> This approach is an approximation coherence result of Kosovo's Criminal Procedure Code to the basic USA legislation, and in practice, it has followed this very path.

Onwards, the plea agreement is an agreement reached between parties to criminal proceedings, based on which, the state prosecutor, respectively the public prosecutor<sup>10</sup> makes mitigation of accusations by making a mitigated legal qualification of the criminal case or by removing some points of indictment, and by proposing to the court the imposition of a lenient punishment while in exchange, the defendant pleads guilty for the criminal offence he/she has been accused, thus avoiding the main trial before the jury,<sup>11</sup> and probably even benefiting other

<sup>3</sup> Article 233 of the Criminal Procedure Code No. 04/L-123.

<sup>4</sup> Islami Halim, Hoxha Artan, Panda Ilir, *Procedura penale*, Commentary, DANIDA and SOROS, Tirana, 2003, p. 516.

<sup>5</sup> Article 3 of the Law No. 9276, dated 16.9.2004 and Article 37/b of the Law No. 35/2017 added to the Criminal Procedure Code of the Republic of Albania, Law No. 7905 of 21.03.1995.

<sup>6</sup> Fisher George. *Plea bargaining's triumph: A history of plea bargaining in America*, Stanford University Press, New York, 2003, p. 46; Nikolić Danilo, *Stranački sporazum*, Beograd, 2009, s. 21; Bajović Vanja, *Sporazum o priznanju krivice*, Beograd, 2009, s. 55; Stephen C. Thaman, *Mirada u komperativnom pravu*, Hrvatski ljetopis zakazneno pravo i praksu, Zagreb, Vol. 9, Nr. 1/2002, p. 194.

<sup>7</sup> Gagula Amna, *Sporazum o priznanju krivnje kod krivičnih djela homogenog koneksiteta*, Anali

Pravnog Fakulteta Univerziteta u Zenici . 2016, Issue 17, p. 95.

<sup>8</sup> Damaška Marjan, 'Napomene o sporazumima u kaznenom postupku' (2004) 11(1) HLJKPP, p. 61.

<sup>9</sup> Article 6 of Law No. 03/L-003 on Amending and Supplementing the Provisional Criminal Procedure Code of Kosovo No. 2003/26, dated 6 November 2008.

<sup>10</sup> The state prosecutor or public prosecutor is identical terminology. The Criminal Procedure Code in force uses the term "state prosecutor", unlike the earlier legislation that used the term "public prosecutor". It is about the same prosecution body.

<sup>11</sup> Hadari Albulena, 'The Role of Plea Agreement in Resolution of a Criminal Case in the Criminal Proceedings of the Republic of Kosovo' (2018) 2(1) International Journal of Social Sciences and English Literature, 1-6, p. 2.

considerations to the interest of justice,<sup>12</sup> including the possibility of being released from punishment.<sup>13</sup>

## 2) Role of the defendant in the plea agreement

The defendant is in the party position in the plea agreement. This position designates an important role to them, probably even a key role in reaching such agreement. This key role is manifested from the moment of initiating the initiative to start negotiations on the plea agreement until its finalization. The key role of the defendant in the plea agreement is manifested at least in these directions:

1. Initiating the discussion on negotiating the plea agreement. - Although in practice, the discussions on reaching the plea agreement can be initiated by the defence counsel or the state (public) prosecutor, it is indisputable that this initiative can be initiated by the defendant himself.<sup>14</sup> "As a rule, he/she applies such initiative through his/her defence counsel,<sup>15</sup> but they can also submit it to the state prosecutor directly."<sup>16</sup> It based on the fact that he/she is the subject on whose shoulders weighs the charges for committing the relevant criminal offence. Therefore, when the accuser and the legal position of the defendant are clear to him/her, the need to obtain concrete benefits mainly to criminal sanctions is given priority. It expects that in the

majority of cases, such initiative will come precisely from this procedural subject. This possibility of the defendant has been accorded through the applicable criminal procedure legislation in the Republic of Kosovo.

2. Presence in meetings on negotiating the guilty plea. - The solution determined in paragraph 8 of Article 233 of the Criminal Procedure Code clarifies the fact of meeting the criterion of the presence of the defendant in meetings where a guilty plea negotiated. This presence is mandatory, which implies that such meetings cannot be held without the presence of the defendant. Thus, he/she should be present at every meeting where a guilty plea negotiated, and without exception, his/her defence counsel should also be present at such meetings.
3. Agreeing to the terms of the written plea agreement. - The terms of the plea agreement must be clearly defined, reached and concretized in a written agreement. In order for everyone to comply with the legal provisions, it requires that the defendant agrees to such terms beforehand.<sup>17</sup> This is determined by the fact that agreeing on the terms of the plea agreement is one of the most essential elements of the plea agreement.
4. Initiation, respectively consent to be a cooperative witness. - The plea agreement may include a provision that

<sup>12</sup> Sahiti Ejup, Murati Rexhep, Elshani Xhevdet, Criminal Procedure Code of the Republic of Kosovo, Commentary, Publication I, GIZ, Legal Reform Project in Kosovo, Prishtina, 2014, p. 586.

<sup>13</sup> Hajdari Azem (a), E drejta e procedurës penale, Pjesa e posaçme, Kolegji ILIRIA, Prishtina, 2013, p. 40.

<sup>14</sup> Ibid, p. 41.

<sup>15</sup> See Judgment of the Basic Court in Prishtina PP.Nr. 356/2017. In the present case the initiative to negotiate a plea agreement was put into motion

by the defendant's defense counsel, which was done after consulting with the defendant.

<sup>16</sup> Hajdari Azem (b), Commentary, Criminal Procedure Code, College FAMA, Prishtina, 2016, p. 615.

<sup>17</sup> See plea agreement dated September 13, 2018 which entered into between the public prosecutor and the defendants of his defense, approved by the Basic Court in Gjilan. This agreement clearly specifies the obligations of the parties to which they have agreed.

requires the state prosecutor to request the court to issue an order designating the defendant as a cooperative witness.<sup>18</sup> Although in practice the initiation of the procedure for the designation defendant as a cooperative witness mainly comes from the state prosecutor,<sup>19</sup> there is no legal obstacle for such initiative to be applied by the defendant himself, who can apply this procedure through his/her defence counsel or individually. As noted above, such capacity cannot be assigned without the prior consent of the defendant. This means that no defendant can be assigned the status of cooperative witness if they do not agree on such thing. "Some specific rules shall apply for cooperative witnesses, especially regarding the way they are interrogated".<sup>20</sup>

5. Rejection of the plea agreement. - According to paragraph 11 of Article 233 of the Criminal Procedure Code of the Republic of Kosovo, the defendant can reject the plea agreement. They can do this at any time before the court accepts such agreement. Rejection of the plea agreement can be made even after the court has accepted it, but only if the court of the case agrees. "The court may agree to the request for rejecting the plea agreement only if it convinces that there are problems related to the failure of the defendant to understand the consequences of the guilty plea, a guilty plea without sufficient consultation with the defence counsel, etc."<sup>21</sup> In such

cases, it acts as if there had been no such agreement.

### 3) The role of the defendant in the plea agreement in cases when they are designated as cooperative witnesses

Paragraph 6 of Article 233 of the Criminal Procedure Code of the Republic of Kosovo has authorized the possibility that the written plea agreement may include a provision by which the court issues an order by which the defendant is designated as a cooperative witness. In such cases, the defendant's position takes on a different dimension compared to other cases where there is a plea agreement. This different dimension of the defendant's position reflects in these aspects:

1. Expansion of the level of cooperation of the defendant in the prevention of other criminal offences, clarification of the truth in criminal proceedings and successful prosecution of other perpetrators. - This cooperation is required to be coherent and sincere. "In these cases, based on the recommendation of the state prosecutor, the court may impose a lenient punishment to the defendant, ranging between 90% - 40% of the minimum punishment prescribed by the Criminal Code for that offence".<sup>22</sup> The level of mitigation of the punishment depends on the level of assistance and cooperation provided by the defendant, always taking into account the level of danger of the criminal offence.

<sup>18</sup> Compare: Sahiti Ejup (a), Witness testimony as evidence in criminal proceedings, University of Prishtina, Prishtina, 1993, p. 103.

<sup>19</sup> See, Judgment No. 347 of 15 January 2017 of the Basic Court in Prishtina.

<sup>20</sup> T. Markus Funk, Kosovo trial skills handbook, United States Department of Justice, Office of

Overseas Prosecutorial Development, Assistance and Training, Prishtina, 2006, p. 87.

<sup>21</sup> Hajdari Azem (c), Shkathësitë e praktikës gjyqësore, Prishtina, 2013, p. 112.

<sup>22</sup> Sahiti Ejup, Murati Rexhep, E drejta e procedurës penale, University of Prishtina "Hasan Prishtina", Prishtina, 20113, p. 330.

2. Confidentiality of factual allegations declared by the defendant. - This secrecy aimed at clarifying the criminal case is related to the preservation of the content of statements of defendants by other parties and their defence counsels. As a rule, the court shall issue a secrecy order for this issue. This order is required to be strictly observed by other parties and their defence counsels. This dimension of the defendant position as a cooperative witness should be reflected in protecting such defendant. "This protection consists of the legal determination of the state prosecutor's obligation to target for criminal prosecution any violation of the order by which the secrecy of certain data declares. Onwards, the lawyer, the defence counsel, the doctor and any other person who, without authorization, disclose the confidential information that he or she has been aware of while exercising their profession may be subject to criminal prosecution".<sup>23</sup>
3. Holding closed-door hearing session for reviewing the plea agreement and holding closed plea agreement. - The closed-door hearing session for review of the plea agreement in cases when the defendant agrees to be a cooperative witness is considered to be in the function of mitigating the procedure of reaching a plea agreement and identifying the terms and modalities of cooperation of the defendant with the body of proceedings. Meanwhile, it looks like keeping the plea agreement closed, inter alia, is in the function of advancing the effectiveness of fulfilling the cooperation terms by the defendant, a purpose which may be endangered in cases where the plea agreement not attributed this status. In this regard, the fulfilment of the obligations deriving from the plea agreement of the cooperative witness may be endangered by the co-defendants, witnesses of other subjects that have interest in many cases when they have information on the existence of the plea agreement and terms and modalities of cooperation of the defendant with the body of the proceedings.
4. Prohibition of the initiation or continuation of criminal proceedings and imposition of punishment. - The prohibition of initiating or continuing the criminal proceedings and imposing a punishment to cooperative witnesses is a benefit given to them by the case prosecutor or the court.<sup>24</sup> In all these cases, the defendant designated as a cooperative agreement through the plea agreement receives a relaxing infusion within a specific criminal proceeding. Thus, the criminal proceedings did not initiate in the first case against the defendant, which means that it may never be initiate. In the second case, the criminal proceedings initiate against the defendant are terminated. Even in this case, the criminal proceedings may not continue at all, which means that they can cease. In the third case, the imposition of the punishment is prohibited. In such cases, following the applicable legislation, the defendant may be released from punishment, or receive a lenient punishment, but only after the criminal proceedings are completed for all other co-accused, in the manner as specified by law.

<sup>23</sup> Hjadari (b), p. 630.

<sup>24</sup> Pavišić Berislav, Vučković Miloško, Veić Petar, Radulović Aldo, Zakon o Kaznenon postupku

s'komentarom, literaturom i sudskom praksom, Zagreb, 1998, p. 298.

## The Rights and Obligations of The Defendant In The Plea Agreement

Generally speaking, there can be no agreements without a clear definition of the rights and obligations of the parties.<sup>25</sup> Neither the plea agreement is an exception to this rule. Onwards, as a party to such an agreement, the defendant has several of rights and obligations. For the corpus of these rights and obligations, it will be discussed in the continuation of this study.

### 1) The rights of the defendant in the plea agreement

The defendant in the plea agreement is entitled to some so-called essential rights. These are the rights which in the best way possible specify the key position the lawmaker has assigned to the defendant in the framework of such an agreement. The following are considered as rights that the defendant is entitled to:

1. The right to initiate discussions on the plea agreement. - Although the Criminal Procedure Code does not explicitly state, from the way the legal solutions formulate through which the plea agreement is addressed, it can be easy to ascertain the fact that the defendant fully allow the possibility of initiating such procedure. The defendants can present this initiative through their defence counsels, but they can also do this individually through expressing this interest to the case prosecutor. These situations are expected to occur especially in criminal offences that are prosecuted according to the proposal of the injured party, but without excluding criminal offences prosecute ex officio.
2. The right to participate in meetings on the negotiation of the plea agreement. - As noted above, this participation is mandatory. This means that no meeting relates to the plea agreement can be held without the defendant being present. Any eventual holding of such a meeting is illegal and does not effect.
3. The right to comply with the limits of punishment to be proposed. - Through the plea agreement, the defendant can acquire facilitations regarding the punishment and other considerations in the interests of justice, such as release from punishment.<sup>26</sup> Pursuant to paragraph 13 of Article 233 of the Criminal Procedure Code of the Republic of Kosovo, the plea agreement may include the provision where parties agree on the limits of punishment to be proposed to the court by the state prosecutor. This legal provision clarifies the fact that the right of the defendant to comply with the limits of the punishment proposed to the court exists. Looking at this aspect, his/her role in this process should be seen in an active sense. This means that he/she, based on legal solutions, can propose ideas about the degree of punishment and insist on their materialization.
4. The right to reject the plea agreement. - As noted above, the defendant has the right to reject the plea agreement at any time before the court accepts such an agreement. In such a case, the defendants' statements given during the plea agreement negotiation must be considered inadmissible evidence at the judicial review and in any other proceedings.<sup>27</sup>

<sup>25</sup> Compare: Sahiti Ejup (b), *Argumentimi në procedurën penale*, University of Prishtina, Prishtina, 199, p. 228.

<sup>26</sup> Article 73 of the Criminal Code of the Republic of Kosovo, Code No. 06/L-074.

<sup>27</sup> Hajdari (a), p. 42.

5. The right to be a cooperative witness. - In cases of subjective connection, the defendant can acquire the capacity of a cooperative witness. This capacity cannot be imposed on him/her by anyone and under no circumstance. As it results, this constitutes an opportunity, in the sense of a right, which may be considered by the defendant himself. Of course, he/she will consider this right in so far as he/she considers the favours provided with the plea agreement acceptable in terms of facilitation accorded in connection with criminal sanctions.
6. The right to withdraw from pleading guilty included in the plea agreement. - According to paragraph 22 of Article 233 of the Criminal Procedure Code, the defendant is entitled to request a withdrawal from pleading guilty. The request for this a withdrawal should submit to the case court, and it has the authority to accept or reject it. Of course, the court will allow withdrawal from pleading guilty included in the plea agreement in cases when it considers that any of the conditions foreseen by law has been fulfilled. These conditions are: a) the defendant has not understood the nature and consequences of pleading guilty, b) guilty plea has not been done voluntarily and after sufficient consultations with their defence counsel, c) the guilty plea is not supported by material evidence of the case concrete facts contained in the indictment; or d) when there are circumstances that determine the dismissal of the indictment, e.g. when the defendant is criminally accountable.

## 2) Obligations of the defendant in the plea agreement

In addition to the rights above, the written plea agreement must also specify the obligations of the parties (state prosecutor and defendant). In this case, the most important obligations of the defendant will elaborate which, as a rule, may be specified in an eventual plea agreement. As obligations that may be imposed on defendants in the plea agreement, among others, are considered as follows:

1. Adherence to the terms of plea agreement. - Paragraph 12 of Article 233 of the Criminal Procedure Code of the Republic of Kosovo defines that the plea agreement must contain all the conditions of the agreement. Pursuant to this legal provision, the agreement in question must at least include: a) the points of the indictment for which the defendant pleads guilty, b) if the defendant agrees to cooperate, c) the rights waived, and d) the liability of the defendant for compensation of the injured party, including confiscation of all assets which, under the requirements of the law, are subject to confiscation. In accordance with this legal solution, and other solutions through which the plea agreement addressed, such agreement may inter alia include: a) limits of the punishment to be proposed by the state prosecutor to the case court or other considerations in the interests of justice, such as release from punishment, b) an order issued by the court through which the defendant has been declared as a cooperative witness, and c) the concrete measures deemed necessary for the protection of the witness. It is worth pointing out the fact that the inclusion of the last three conditions is not expected to occur in every plea agreement. They may be part of certain agreements, e.g. to the plea agreement where the defendant is



also assigned the capacity of the cooperative witness. "The conditions included in the plea agreement are binding on the parties to the agreement". This means that non-compliance with any of them constitutes a reason for the conscientious party to apply the mechanism of withdrawal from such agreement, which also means its revocation.

2. Fulfilment of the obligations defined in the order designating the defendant as a cooperative witness. - As noted above, the plea agreement may also include the order by which the court designate the defendant as a cooperative witness. As a rule, such order defines: a) criminal offences, with the determination of actions and their qualification, for which the prohibition of initiating or continuing criminal proceedings or imposition of the punishment is ordered, b) prohibition of initiating or continuing the criminal proceedings against the cooperative witness for a criminal offence defined in the order, c) the nature and content of cooperation provided by the defendant as a cooperative witness, and d) the condition of the revocation of the order. Of all these conditions, only the one specified in point (c) relates to the obligations referred to the defendant. This condition places an obligation to the defendant as a co-operative witness with due diligence to respect the nature and content of the cooperation for which he has been accorded. Within the nature and content of the cooperation, one or more of the following conditions may be

included depending on the case: a) the prevention of committing other criminal offences by another person, b) the contribution towards clarification of the truth in criminal proceedings and c) contribution to the successful prosecution of other perpetrators. Failure to comply with such conditions (one or more) is always expected to have the effect of revoking the order by which the defendant was designated as a cooperative witness but also in withdrawing and revoking the plea agreement, in so far as it touches the foundations of such an agreement.

3. Compensation of damage to the injured party. - The committing of a criminal offence may cause material and moral damage to a third person. In criminal proceedings, this third person is called the injured person.<sup>28</sup> As regards the damage suffered from the criminal offence, the injured party may request compensation for material damage, lost profit, as well as moral damage compensation, which is related to the violation of any personal right such as a) honour, b) authority, c) experiencing physical or mental pain, etc.<sup>29</sup> Pursuant to Article 233 of the Criminal Procedure Code of the Republic of Kosovo, the issue of damage compensation is also required to be addressed within the plea agreement, "although the injured parties are never fully compensated for the damage suffered in the criminal offence, where they are victims".<sup>30</sup> Regarding this, paragraph 8 of this Article imposes obligations on the state prosecutor to

<sup>28</sup> Tomašević Goran, Pajčić Matko, Subjek o kaznenom postupku: Pravni položaj žrtve i oštećenika u novom hrvatskom kaznenom postupku, UDK 343. 988 343.138 Primljeno 20. listopada 2008. Izvorni znanstveni rad, s. 822.

<sup>29</sup> Hajdari Azem, Edrejta e procedurës penale, Pjesa e përgjithshme, Prishtina, 2014, p. 83.

<sup>30</sup> Kurtner Luis, Crime – torts: Due process of compensation for crime victims, Notre Dame Law Review, Volume 41, Issue 4, p. 499.

inform the injured party of the agreement reached, after the agreement is in its final form. Onwards, when such a claim exists, the plea agreement must address the claim for compensation of damage presented by the injured party. In such cases, the injured party should be allowed to file a statement to the court on the claim for compensation before the court accepts the plea agreement. Also, in cases when the defendant is designated as a cooperative witness, the state prosecutor has a legal obligation to address the issue of compensation of the damage derived from the criminal offence included in the indictment. The provisions that regulate the plea agreement in both paragraphs (8 and 9 of Article 233), related to damage compensation (legal property claim), does not specify the obligation of the court to resolve the damage party's claim in criminal proceedings for compensation of damage but it requires that the same be treated in the framework of such an agreement.

4. This means that in cases where there is a plea agreement, the court is free to decide whether to give a solution to the claim for compensation of damages or to instruct the injured party that its realization sought in a civil dispute. Despite such possibilities given by the Kosovar lawmaker, the writer considers that for many reasons it would be expected that the court of the case, when there are opportunities for practical action, always resolves the injured party's claim for compensation if the criminal case is solved in consideration of the plea agreement. In such a situation, the obligation to compensate the injured party would be very clear and concrete. The whole corpus of legal provisions dealing with compensation of damage

makes clear the fact of the defendant's obligation to compensate for the damage caused to the injured party by committing the criminal offence. From this rule, this issue makes no exception even when addressing the criminal case through the plea agreement.

### **The Importance of the Plea Agreement for the Defendant and Its Withdrawal**

The issue of the plea agreement is not expected if it does not receive the right treatment, if its importance is not elaborated, i.e. if the advantages that this criminal-procedural institute brings to the parties (the defendant and the state prosecutor) and the general social interest are not explained. Given this fact, further in this study, the writer will first talk about the importance of the plea agreement and then the revocation of the guilty plea agreement for the reasons related to the defendant.

#### **1) The importance and effects of the plea agreement for the defendant**

The plea agreement importance to the defendant, it manifests effects of crucial importance in clarifying the truth of the criminal case in criminal proceedings, but also for the defendant himself. The importance and effects of the plea agreement in relation to the defendant are mainly manifested in these aspects:

1. Release from punishment.- In order to mitigate the punishment, the following conditions must be met: a) to mitigate the punishment, there should be an appropriate recommendation of the state prosecutor to the case court, b) mitigation should be clearly addressed in the plea agreement, and c) mitigation of the punishment should reflect the level of assistance and cooperation provided by

the defendant in clarifying the circumstances of the offence, taking into account the degree of danger of that offence. Depending on the fulfilment of these conditions, the defendant may benefit from punishment mitigation at 90% - 40% of the minimum punishment prescribed by the relevant provisions of the Criminal Code for the criminal offence for which criminal proceedings are conducted.<sup>31</sup> Thus, if there is a minimum punishment of three years of imprisonment foreseen for such criminal offence, the court may mitigate the punishment of the defendant and punish him only a little more than one year of imprisonment.

2. Release from punishment. - The Criminal Code of the Republic of Kosovo (Article 73) foresees the possibility of release from punishment for the perpetrator of the criminal offence. This means that the court may find that a criminal offence has been committed and its perpetrator is criminally accountable, but the punishment is not reasonable due to the small intensity of the offence or for political and criminal reasons. In such cases, the court not only authorize by law to declare that the perpetrator responsible for the criminal offense committed, but also to release him from the punishment.<sup>32</sup> In order to get a release dtatement from the punishment associated with the plea agreement, the following conditions are required: a) for mitigation of the punishment, there must

be a request of the state prosecutor to the court of the case, b) the release from punishment should be addressed as possibility of a plea agreement, c) the defendant must have the capacity of cooperative witness; and d) the cooperation of the defendant has prevented other offences from others or has resulted in successful prosecution of other perpetrators of criminal offences. Consequently, the cooperative defendants can benefit release from punishment only in cases when they are found guilty of a criminal offence punishable by imprisonment of up to ten years. "Thus, no defendant, despite the level of cooperation, can benefit release from punishment if they are found guilty of the criminal offence punishable by imprisonment of up to ten years".<sup>33</sup>

3. Other considerations in the interests of justice, including the interests of the victim, which mainly extend to compensation for damage sustained by the offense. - In addition to the mitigation of punishment and release from punishment, the defendant may acquire, through the plea agreement, other facilitations considered as matters of interest to justice.<sup>34</sup> The interest of justice must always be the clarification of the truth, the detection of other offences and other perpetrators of the offence, and the prevention of other criminal offences. Of course, these issues may reflect different benefits for the defendant, which largely depends on the circumstances that

<sup>31</sup> Article 233, paragraph 7 of the CPCRK.

<sup>32</sup> Salihu Ismet, E drejta penale, pjesa e përgjithshme, College FAMA, Prishtina, 2008, p. 509; Shala Afrim, Hyrje në të drejtën penale, College GJILANI, Gjilan, 2013, p. 199.

<sup>33</sup> See Judgment no. 234/2013 of the Basic Court in Prishtina. The accused was charged with theft of theft. He in the concrete case based on the level of

cooperation offered to the court has benefited from mitigation of the punishment to 90% of the minimum provided for by law for this criminal offense.

<sup>34</sup> Veljko Turanjanin, Sporazum o priznanju krivice u pravu evropskih zemalja: primjer Italije, Strani pravni život, n°2/2011, str. 155.

characterize the concrete criminal case. Thus, in the case "Bllaca", the measure of detention on remand has been replaced with the measure of house arrest for the defendant, for security reasons, the defendant was placed under police custody and supervision for the entire duration of the execution of this security measure, and in the end, the defendant was transferred abroad, perhaps with the purpose that he also cooperates with respect to any case that could be the subject of trial by the Special Court for Kosovo.

## 2) **Withdrawal from the plea agreement on the grounds related to the defendant**

As with any agreement, the Parties may also withdraw from the plea agreement as well. This is defined by paragraphs 11 and 22 of Article 233 of the Criminal Procedure Code. The abovementioned paragraphs address this issue in two manners:

Firstly, paragraph 11 refers to the issue of withdrawal from the plea agreement by the parties (the state prosecutor and the defendant) before its approval by the court of the case. This legal provision grants the defendant the right to withdraw from the plea agreement at any time as long as the court has not accepted such an agreement. The notice of withdrawal from this agreement must be made to the prosecutor of the case. This is explained by the fact that such an agreement has not yet been approved by the court. The reasons, for which the defendant may use this right, are not defined by law. This means that in this respect, the lawmaker has granted full autonomy to the defendant in the sense that he/she can use whatever reason he/she considers important for withdrawal from the

plea agreement. He/she is not even obliged to make the reasons, for the withdrawal, known to the state prosecutor. However, the reason for withdrawal from the plea agreement may be that the defendant does not want to assist in disclosing one of the co-perpetrators of the criminal offence, but as stated above, he/she can do so for whatever reason he/she considers important for their interests.

Secondly, paragraph 22 refers to the issue of withdrawal from the plea agreement after it has been accepted by the court. In these cases, to withdraw, there must be accordance of the competent court. The court may, as a rule, accord with the request of the defendant only if it comes to the conclusion: a) he/she has not understood the nature and consequences of the plea agreement; b) the pleading guilty has not been made voluntarily and after sufficient consultation with the defence counsel c) the pleading guilty is not based on material facts and evidence of a particular case, which are presented in the indictment, or material evidence submitted by the state prosecutor for complementing the indictment and received by the defendant, as well as on other evidence, such as the statements of witnesses presented by a witness or prosecutor, and d) in cases when it is unlikely that the defendant designated as a cooperative witness may prevent other criminal offences from other persons or is unlikely to lead to the clarification of the case in criminal proceedings.<sup>35</sup>

It is worth mentioning the fact that in both cases, although in the second case when there is an approval by the court, the withdrawal makes the plea agreement null and the criminal proceedings continue to be conducted according to standard rules.

<sup>35</sup> See Judgment no. 331/2014 of the Basic Court in Peja.

#### IV. CONCLUSION

The plea agreement is an agreement reached between the criminal procedural parties on the basis of which the state prosecutor mitigates the charges by making more lenient legal qualification of the criminal offence or by removing some of the indictment points, and by proposing to the court the imposition of a more lenient punishment, while the defendant in return pleads guilty to the criminal offence for which he/she was accused, avoiding the main trial before the jury, and taking advantage of other considerations in the interests of justice, including the possibility of release from punishment.

The defendant in the plea agreement has an important role. This role starts from the moment of initiating the negotiations on the plea agreement until its finalization. The role of the defendant in such an agreement manifests a scope in the following aspects: initiating the discussion on the negotiation of plea agreement, b) presence in meetings regarding plea agreement negotiations, c) written consent on the terms of the plea agreement and d) initiation or agreement to be a cooperative witness.

The defendant has a key role in reaching the plea agreement even when he/she designates as a cooperative witness. In these situations, the role of the defendant manifests in: a) extending the cooperation level of the defendant in the prevention of other criminal offences, clarification of the truth in criminal proceedings and successful prosecution of other perpetrators; b) closed hearing session of the plea agreement review, and closed hearing session of the plea agreement and c) the prohibition of initiating or continuing the criminal proceedings and the imposition of a punishment against them.

The defendant is entitled to several rights as regards the plea agreement. The

following are the rights pertaining to the defendant: a) the right to initiate discussions on the plea agreement, b) the right to participate in meetings on the negotiation of the plea agreement, c) the right to comply with the limits of the punishment proposed to the court by the state prosecutor, d) the right to refuse to plead guilty and e) the right to withdraw from the plea agreement.

In addition to the rights, some obligations may also be charged to the defendants with the plea agreement. Such obligations may be: a) the adherence to the terms of the plea agreement, b) the fulfilment of the obligations set by the order designating the defendant as a cooperative witness, and c) the compensation of the damage.

The plea agreement is of great importance to the defendant. This is mainly related to: a) realization of benefits in terms of punishment mitigation; b) realization of benefits in the possibility of release from punishment; and c) realization of other considerations in the interests of justice. Given these facts, the legislator rightfully imposed the obligation that the defendant should be accompanied by their defence counsel in all the discussions to reach the plea agreement. It shall assist him/her professionally to obtain any potential benefits that can be accorded on the concrete case.

This paper provides readers of Indonesia and other countries with information on the legal aspects of addressing a plea agreement, especially regarding the defendant's role in this alternative procedure in Kosovo and beyond it; the scope of application of this alternative procedure (in Kosovo and beyond it); about its importance it has for the effective and fair resolution of criminal cases and the need to be practiced more frequently, not only in Kosovo but also in other countries. All of this

is also due to the faster realization of the right to compensation of victims of crime.

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