

The characteristics of judgment by agreement in the Albanian legislation

Florian Borici

Public Prosecutor, Prosecution Office Of Kruja/Tirana, Albania

Abstract

This paper treats the procedure of judgement by agreement, that is a new institution of Albanian criminal procedural law. It has been used for the first time in Albanian legislation, with law no. 35/2017, dated 30.3.2017 “On some additions and changes to the Code of Criminal Procedure” and is regulated in the procedural provisions, articles 406/d - 406/f, of the Code of Criminal Procedure. For this reason, the study of this new procedural institute requires a genuine and detailed theoretical and practical analysis, especially in a comparative perspective, through the study of how it has been regulated and implemented in practice in other countries where the development of its largest and that present more similarities with our legislation. This new form of trial is foreseen with the aim of good administration and economy of justice through the fast trial of criminal cases, the response in the shortest possible time in the fight against criminality, as well as offering new opportunities to the defendant for rewarding trial and quickly, respecting the basic principles of due process, fundamental freedoms and rights in the criminal process. In this paper are treated as well the characteristics of judgement by agreement, the comparison between the foreign legislation and the Albanian one and as well its implementation in practice. An historical detailed chrono of this procedure is also explained.

Keywords: Judgment, agreement, Albanian legislation.

Introduction

Judgment by agreement has its origins in the institute of “*plea bargaining*”, which was born and developed in Anglo-Saxon countries since the 18th century. *Plea bargaining*, according to the English legal dictionary, means: “An agreement to allow someone accused of a crime to admit to being guilty of a less serious crime, in order to avoid being tried for the more serious one” so “An agreement which allows the accused to admit his guilt in order to avoid a more severe punishment”, while according to the well-known international legal dictionary Black Law Dictionary¹, “plea bargaining” is defined as “An agreement set between the prosecuting body and the defendant to resolve the case by avoiding the examination of its basis”.

The practice of “plea bargaining” had a wider spread in the United States of America in the early 1970s. The number of criminal cases in the USA during the years 1930 - 1970 had undergone a very large increase. The institutions of justice, the prosecution and the court were looking for alternative means of trial in order to facilitate the work of these institutions, as well as to pursue the crime effectively. Faced with these situations and dilemmas, finally in the 1970s in *Brady v. United States* (1970),² the US Supreme Court recognized the constitutionality of the institution of the agreement.

¹ <https://thelawdictionary.org/>.

² United States Supreme Court; *BRADY v. U. S.*, (1970) No. 270; Argued: November 18, 1969; Decided: May 4, 1970.

According to the Supreme Court, only those agreements which are not the result of pressure, or threats to the defendant, or the result of the corruption of the prosecution, would be recognized.

According to the US Supreme Court, the agreement must be verbal and in written form, where the accused person understands that he is waiving the trial of the case by a jury. After this decision of the American Supreme Court, the institution of "Plea bargaining" began to be widely applied, through a written agreement between the prosecution body and the accused person, where the latter expressly accepts his guilt by waiving the trial of the case by the court and jury in exchange for a lighter sentence. Currently, the number of cases that are resolved by agreement in the USA is over 90%.³

The meaning of the judgement by agreement in the Albanian procedural legislation is given in article 24, paragraph III, Code of Criminal Procedure, which provides that: "The prosecutor can reach an agreement on the conditions for the admission of guilt and the imposition of the sentence, in accordance with article 406/d et seq of this Code."

The European Court of Human Rights, in the case of NATSVLISHVILI and TOGONIDZE vs. Georgia, on the meaning of trial by agreement, has stated that: "*In the judgement by agreement, there is an opportunity for the defendant to make a more favorable change to the charges or receive a reduction in his sentence in exchange for a guilty plea.*"⁴

The normal procedure of judging a criminal case in a court session is usually long in time and expensive in resources. It is accompanied by the development of a direct debate, between the prosecution body and the defendant and his defense, based on the principle of presumption of innocence, adversarial, full examination of the case by an independent and impartial court. The prosecutor's office has the legal obligation to prove the accusation, while the defendant, himself or through his counsel, realizes the defense in terms of innocence or relief of his position. But a hermetic model of the process cannot respond to the necessary requirement of the penal system to be efficient in time and means in the fight against criminality. In order to increase the efficiency of the criminal system, as well as to give the defendant in the criminal process the opportunity to benefit from a reduced sentence, in cases where they waive some procedural guarantees, in Chapter IV of the Code of Criminal Procedure, special judgments are foreseen. These are alternative procedures, in addition to the usual trial procedure, which shorten the time of the criminal process and decision-making. Among them, it is the newest institution provided in article 406/d⁵ et seq., of the Code of Criminal Procedure "Judgment by agreement". This new form of trial is foreseen with the aim of good administration and economy of justice through the fast trial of criminal cases, the response in the shortest possible time in the fight against criminality, as well as offering new opportunities to the defendant for rewarding trial and quickly, respecting the basic principles of due process, fundamental freedoms and rights in the criminal process.

The judgment procedure by agreement is considered a specific procedure. Precisely because of the fact that this type of proceeding constitutes a deviation from the usual

³ https://en.wikipedia.org/wiki/Plea_bargain#United_States.

⁴ European Court of Human Rights - Amiran NATSVLISHVILI and Rusudan TOGONIDZE vs Georgia, Application no, 9043/2005 [https://hudoc.echr.coe.int/eng#{"itemid":\["001-122692"\]}](https://hudoc.echr.coe.int/eng#{) Decision date 25 July 2013.

⁵ Law no. 35/2017, date 30.3.2017 "*For some additions and changes to the Code of Criminal Procedure*".

rules of judicial examination of the criminal case, it is considered as a special trial. The very term “*special*” means the application in certain procedural conditions and situations of rules different from those that are usually applied.

The effects of plea bargaining positively affect at least two aspects, improving the position of the defendant in the criminal procedure and the efficiency of the criminal justice system. Consequently, benefiting from a more favorable treatment, this institution also affects the further humanization of the treatment that the criminal system gives to accused persons. In the accompanying report of the project for changes to the Code of Criminal Procedure, it is stated that: “*This institute, as well as the criminal order, is presented in the project of the ministry with the aim that on the one hand the parties find it in their interest and the expenses in the court are reduced, on the other hand, the prosecutor has more time to investigate and prosecute other crimes and perpetrators, and finally, the defendant finds that he is in a better position, receiving a lighter sentence in relation to the sentence he wants to be reached after judgment.*”⁶

The characteristics of Judgment by Agreement

1. Judgment by agreement is voluntary. It is based on the expressed will of the person under investigation or defendant, who accepts his guilt for the criminal offenses are attributed, waiving the examination of the merits of the case, in exchange for a favorable treatment which eases his position through the application of a more lenient sentence, if the defendant is found guilty. The will of the defendant must be given in written form and confirmed before the court. He must not have a formal defect, otherwise it constitutes a reason for the rejection of the agreement by the court.⁷ The Court of Cassation of Italy, Criminal Section III, in Decision no. 1369/2000, it has been stated that: “*In the case of judgment by agreement, the agreement is an act of disposition with a personal character, and therefore it must be expressed in the forms provided by the law. The will of the defendant must necessarily be expressed personally.*”

The US Supreme Court, in *Brady v. United States*⁸ (1970), it has been stated that: “*only those agreements will be valid which are not the result of pressure or threats against the defendant or the result of the corruption of the accusation.*”

2. Judgment by agreement serves the judicial economy. The purpose of this institute is to avoid the stage of debate on the evidence, to simplify the procedural mechanisms and to reduce the time of trial of a criminal case as a function of judicial economy, in exchange for a more favorable treatment for the defendant. Agreement judgment thus fulfills a dual function and presents itself as two sides of the same coin. On the one hand, the function of simplifying the process, since the court’s decision is based only on the elements gathered by the prosecution body, where as a rule the decision is not appealable, on the other hand, the price that the defendant receives in terms of the relief of the sanction in the cases when he is found guilty, which serves as a driving factor for choosing this kind of judgement.

3. Judgment by agreement has a rewarding character. One of the reasons that encourage the defendant to choose this type of trial procedure is the fact that they

⁶ Relation related to additional of changes, 7905 Criminal Procedure Code.

⁷ Article 406/ë/b “*Rejection of judgement by agreement*” Court of Cassation of Italy, Criminal Section III, in Decision no. 1369/2000.

⁸ United States Supreme Court; *BRADY v. U. S.*, (1970) No. 270; Argued: November 18, 1969; Decided: May 4, 1970

will receive a lighter sentence than the one that would be applied in the case of a normal trial. The European Court of Human Rights, in the case of *Amiran NATSVLISHVILI and Rusudan, TOGONIDZE vs. Georgia*⁹ states that: *“In a plea bargain, there is an opportunity for the defendant to make a more favorable change to the charges or receive a reduced sentence in exchange for pleading guilty.”*

The rewarding character is not clearly stated in the Albanian Code of Criminal Procedure, but is implied by the very nature of this special trial procedure. In contrast to foreign legislation, in our legislation there is no express provision regarding the reward that the defendant will receive in terms of punishment. Unlike the summary trial procedure, which expressly provides for the reduction of the sentence by 1/3, there is no such provision for the agreement. In fact, the goal of the legislator and one of the features of this trial procedure is the reward given to the defendant in relation to the amount of punishment, since he expressly accepts guilt and waives the evidence debate. This purpose is also clear from the accompanying relation of the draft law no. 35/2017.

*“On some additions and changes to the Code of Criminal Procedure” where the rewarding character of the trial procedure by agreement is evidenced.”*¹⁰

4. Judgment by agreement is a judgment which takes place in the state of the acts. The procedure of trial by agreement appears as a form of trial, which is based on the state in which the acts are, that is, only on those evidences that have been collected by the prosecution body during the phase of preliminary investigations, on the basis of which the court creates its conviction in terms of the defendant’s guilt or innocence. For this purpose, the court judges only on the acts found in the prosecutor’s file, not having the opportunity to proceed with receiving new acts or evidence. The Court of Cassation of Italy, Criminal Section III, with Decision no. 48527, dt.05.11.2009 stated that: *“In the case of trial by agreement, the court decides based on the facts contained in the prosecution file, without having the opportunity to receive other evidence.”*

Based on this principle, the court overturned the decision of the lower courts, which in this trial procedure filed an act that did not belong to the prosecutor’s file. According to the Court of Cassation, *“Trial by agreement is a special trial procedure, on the basis of which the defendant and the prosecutor agree on the legal definition of the criminal offense, mitigating and aggravating circumstances, on the type and extent of punishment as well as the benefits. On the other hand, the court has the task of checking the legal definition of the criminal offense, evaluating the evidence and checking the appropriateness of the punishment, as well as verifying that there is no case for dismissing the case. The court decides on the basis of the acts that are in the prosecutor’s file, without having the opportunity to receive other acts. The court considers that the decision cannot be based on other documents that in the present case was included in the trial to prove the mitigating circumstance. The court cannot*

⁹ European Court of Human Rights - *Amiran NATSVLISHVILI and Rusudan TOGONIDZE vs Georgia*, Application no, 9043/2005 [https://hudoc.echr.coe.int/eng#{"itemid":\["001-122692"\]}](https://hudoc.echr.coe.int/eng#{) Decision date 25 July 2013

¹⁰ Part of the accompanying report of the draft law no. 35/2017 “On some additions and changes to the Code of Criminal

Procedure” where the rewarding character of the trial procedure by agreement is evidenced: “This institute, like the criminal

order, was presented in the project of the ministry aiming on the one hand the parties find it in their interest and court costs are reduced, on the other hand the prosecutor has more time for the investigation and prosecution of other crimes and perpetrators and finally, the defendant finds that he is in a better position, receiving a more lenient sentence relative to the sentence to be reached after trial.

conduct evidence research activities of e beyond those brought by the prosecution body “

In the Unifying Decision, no. 2, dated 29.02.2003, the Albanian Supreme Court, in relation to the abbreviated trial, stated that: *“The abbreviated trial has value for judicial economy because it simplifies and shortens the procedures, increases the speed and effectiveness of the trial and, as a result, brings a benefit to the defendant in the reduction of 1/3 of the amount of the sentence and not applying the sentence of life imprisonment. It is important to emphasize the fact that this benefit should not go to the detriment of the administration of justice. For this purpose, the court accepts the request of the defendant or his special defender only when it is convinced in advance that it can finish the case in the state that the documents are, without the need to submit them judicial review.”¹¹*

The conclusions drawn in the Unifying Decision of the Supreme Court no. 2, dated 29.02.2003, regarding the abbreviated trial, I think they have the same value for the trial by agreement, given that the latter is also examined in the state of the acts.

5. Judgment by agreement has a limited area of use. Judgment by agreement applies only to criminal offenses, for which the law provides for a maximum sentence of no more than 7 years of imprisonment. The legislator, seeing the low social risk of these criminal offenses, has given the possibility to the persons accused of these offenses to choose an alternative form of trial, different from the ordinary trial procedure, which can give them the possibility of a fast and favorable trial. On the other hand, seeing that the largest number of criminal cases that are reviewed by the courts fall into the category of criminal offenses for which a maximum sentence of no higher than 7 years is provided, the legislator has thought that this maximum sentence limit is appropriate to balance the workload of the courts and increase the efficiency of the justice system.

6. The agreement has a dual legal nature. It has a procedural and substantive nature. In the procedural aspect, the agreement constitutes the manifestation of the will to choose an alternative trial procedure from that of the ordinary trial. In the substantive aspect, the agreement is an expression of will by which the defendant disposes of his guilt by accepting the punishment. The defendant expressly accepts his guilt in exchange for a lighter sentence. The approval of the agreement by the court results in the punishment of the defendant. Also, the agreement brings consequences on the property of the defendant, since the compensation of the victim of the criminal offense, in cases where a civil lawsuit has been filed in the criminal process, is a condition for the approval of the agreement.¹² So, in a substantial aspect, the agreement brings restrictive consequences on freedom and property of the defendant.

7. The judgement by agreement is an exclusive personal right of the defendant. The acceptance to be tried by means of the judgment with agreement is a procedural and substantial right that belongs only to the defendant and only he can dispose of it with his free will. The defender cannot, in principle, without first obtaining the defendant's approval, resolve the case by agreement. For this reason, the legislator has provided in article 406/d paragraph b) that the agreement must contain, with the consequence of invalidity, the declaration of the defendant's guilty plea. Also based on paragraph e), the agreement must contain the signatures of the parties and the

¹¹ Unifying Decision of the Supreme Court, no. 2, dated 29.02.2003.

¹² Article 406/d/d, of the Civil Code, stipulates that “The agreement is made in written form and is invalid if: d) in the case where the civil plaintiff is legitimized, his written consent for the amount of compensation from the defendant;”

defender.¹³ The will of the defendant expressed in the agreement must be free and independent. It must not be the result of deviations, pressures or threats, but must be the result of a free and conscious choice of the defendant, who must clearly understand the meaning and consequences of this type of special trial. The lack of express will, or a dedicated will, constitutes a reason for the rejection of the agreement by the court. For this reason, the court, before deciding whether or not to approve the agreement, must investigate the willingness of the parties to resolve the issue with agreement.¹⁴ In the case of *Brady v. United States* (1970), the US Supreme Court has stated that: "Only those agreements will be valid which are not the result of pressure, or threats to the defendant or the result of the corruption of the charge."¹⁵

Conclusion

In conclusion, the trial by agreement marks a step forward in the development of Albanian criminal procedure. It offers more opportunities to persons accused of crimes punishable by a maximum of 7 years, to avoid the long and costly judicial process, proposing the solution of the case at the stage of preliminary investigations. In this way, through this special trial procedure, these persons, being convinced of their guilt, can reach an agreement with the prosecution body where they accept guilt in exchange for a milder sentence. For these reasons, the implementation of this institute in practice will facilitate the work of the justice bodies, but at the same time it will affect even more the humanity of criminal punishment.

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¹³ According to the Unifying Decision of the Supreme Court no. 1, dated 10.03.2014, "The rights reserved to the defendant personally, are divided into two categories: those that can be delegated to third parties, including the defender; as well as those rights which are deeply personal to the defendant, the delegation of which cannot be allowed. Among the latter, it can be mentioned, the acceptance of the criminal offense attributed to the defendant; or the acceptance, in a court session, of the suspension of the sentence according to Article 63, of the Penal Code. Among the rights that are included in the first category, it can be mentioned, the right to request a summary trial."

¹⁴ Article 406/ë/bi CPC, provides that: "The court rejects the agreement when it is proven that the defendant's will was subjugated."

¹⁵ United States Supreme Court; BRADY v. US, (1970) No. 270; Argued: November 18, 1969; Decided: May 4, 1970.

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