

Admitting Guilt and Applying Punishment - A Doctrinal Reference to the Lawyers in Criminal Matters

Andrei Zarafiu, PhD

University of Bucharest, Faculty of Law, Romania

Doi:10.19044/esj.2019.v15n32p119 [URL:http://dx.doi.org/10.19044/esj.2019.v15n32p119](http://dx.doi.org/10.19044/esj.2019.v15n32p119)

Abstract

Within the diverse areas of penal justice, lawyers' knowledge is applied in the investigation and judgement of criminal matters. Theoretical knowledge is significant because it qualifies the practitioner for the penal procedure provisions interpretation. These skills are essential for practitioners in the field of penal justice, taking into account its main purpose of finding truth and solving the penal cases legally and justifiably: in such a way that the persons who committed offences are convicted in accordance with their guilt, on the one hand, and the innocent ones discharged, on the other hand.

Keywords: Applying Punishment, Admitting Guilt, Penal Justice, Simplifying Penal Procedure, Special Penal Procedure

Introduction

The enforcement of the new Code of penal procedure in Romania on the 1st of February 2014 signified a new order in the field of penal justice: one based on European principles joined dialectically with the traditional ones to achieve justice in criminal matters, configured around the idea of due process.

The monographic book, *Admitting Guilt and Applying Punishment* ("Recunoasterea vinovatiei si aplicarea pedepsei"), is devoted to studying a high-interest topic in the field of criminal justice - the special procedure of guilt agreement, recently implemented in the Romanian penal justice, as well as applying punishment in appropriate circumstances, regulated by the Code of penal procedure.

Published by the Hamangiu Publishing House in Bucharest in 2019, the book contains two parts, as the content highlights. The first part presents the procedure of admitting guilt by the defendant during the investigation phase in terms and conditions, provided by the Code of penal procedure. The second part covers aspects of applying punishments by the court of law once

the defendant has admitted using the legal right of simplifying penal proceedings, signing the guilt agreement with the prosecutor.

Methodology of research

During the study on the special procedure of guilt agreement, the author preferred the qualitative method of research, since it was a conceptual work. Amongst the qualitative research methodologies, the classical methods (literature review and content synthesis), as well as the comparative method, were preferred. From this point of view, it could be appreciated that the author approached the topic of the legal institution of guilt agreement in a comparative manner.

Other states' criminal procedure legislation has been taken into consideration, both from Europe, such as France, the United Kingdom, Italy, and the United States of America (Oroveanu-Hantiu et al., 2012, 241-248; Magherescu, 2006a, 307-308). Although they have different names, such as *plea bargaining* in the United States of America (Viano, 2012, 109-245), guilty plea in the United Kingdom (Beard, 2017, 1-10), *giudizio abbreviato* and *patteggiamento* in Italy (Gialuz, 2008, 13), *le plaider coupable*, transaction in France (Papadopoulos, 2004; Magherescu, 2006b, 112-113), the author has pointed out that all these forms of special procedure have in common an essential element despite the substantive differences regarding the content, form, procedure and consequences produced. Each refers to the admittance of committing an offence coming from defendant, followed by signing of the guilt agreement which has the consequence of a reduction in punishment.

The book covers adequate doctrinal references gathered both from national and international research fields and framework decisions pronounced by the national and European supranational courts of justice.

Doctrinally speaking, the book presents highly respected theorists' points of view, while the jurisprudence is as diversified as it is in the justice system in the penal cases solved under the special procedure of the admission of guilt agreement.

Book content

The first part of book contains six chapters, each providing a legal institution of the main topic as well as the other connected institutions of penal procedure law also of great interest for the entire work, as will be subsequently highlighted.

The first chapter presents current foundational information on the special procedure of admitting guilt, including the prevalence of the procedure in penal cases, its relevance in practice and the research methodology used by the author. the special procedure implementation degree of the admission of

guilt agreement as well as its relevance in practice, knowing the fact that at the moment the jurisprudence in criminal matters is frequently met faced with the special procedure in penal cases. As a consequence, many cases are currently solved with the special simplified penal procedure (Rakoff, 2014, 1-12; Magherescu, 2019a, 44).

According to the author, the aims of the book include,

”researching the degree of implementation of the European principles provided by the legislation adopted both in the field of presumption of innocence and solving penal cases in a reasonable time within the home law; analysing the legal consequences as result of releasing the special procedure of the admission of guilt agreement; presenting the appropriate aspects on applying punishments during the special procedure as well as those of judicial techniques, incidental in the special procedure” (Magherescu, 2019b, 8-9).

In the second chapter, pertinent perspectives regarding the principles underpinning the admission of guilt agreement are emphasized. (European Convention on the Human Rights, 1950). It is right that some of them configure the penal proceedings as an entirety, while most have particular importance for those penal cases solved through the special procedure of admitting guilt and the signing of an agreement by the parties involved - defendant and prosecutor - during the investigation phase.

First of all, aspects related to the principle of presumption of innocence are detailed in view of the fact that once the defendant agrees to plead guilty, he renounces both the right not to self-incriminate and the right to silence.

In penal cases in which the prosecutors bring charges against multiple defendants and only some of them choose to sign the admission of guilt agreement, the principle of presumption of innocence and its efficiency will not be limited in regard to the defendants who do not agree to sign it. In this matter, the Anticorruption National Department of Romania states that

”(...) this stage of penal trial means the finalization of penal investigation in accordance with the Code of penal procedure, the fact that cannot restrict the principle of presumption of innocence” (A.N.D., Communication no. 1022/VIII/3 of 31 October 2017).

Secondly, the author identifies another aspect incidental for penal cases solved within the special procedure - the principle of solving penal cases within a reasonable time. As presented in the first case above, solving penal cases within a reasonable time is a European principle which features in the Romanian penal proceedings under the pillars of due process. This is because historically, in particular until 2008, Romania was condemned several times by the European Court of Human Rights over cases in which the national

courts of law infringed the principle of solving penal cases within a reasonable time during the penal proceedings (ECtHR's Decision, Case of Paunoiu c. Romania, 2008).

Many other examples of such penal cases related to the Strasbourg European Court's pronounced decisions are provided, being relevant both for their content and the legal value of the above mentioned principles.

Thus, it is clear that the implementation of a special simplified procedure for the admission of guilt agreement came as an "oxygen spot" in the process of relieving those less complex cases for which the provisions of the penal procedure Code permit the signing of a guilt agreement and finalizing the conflict of penal law through the parties' consent (Magherescu, 2019b, 18).

Thirdly, the author provides readers with discussion of the principle of the right to defence during the simplified penal procedure. The longstanding principle of the right to defence is a fundamental element which characterizes penal proceedings in their entirety. The Romanian legislator considered it necessary to expressly regulate for the fact that the defendant must imperatively be assisted by his advocate either appointed by himself or called by the judicial body *ex officio* at the time of entering into the guilt agreement between defendant and prosecutor. In such penal cases, the advocate's presence is compulsory. As a consequence infringing the defendant's right to defence will be sanctioned with rejecting guilt agreement by the court of law. The legal procedure of the admission of guilt agreement is analysed by the author in the third chapter. Who is entitled to sign the admission of guilt agreement is discussed as are the controversies arising from the Romanian legal doctrine. Among these are the divergent opinions related to the legal entities' juridical status of being entitled to sign the guilt admission agreement (Zarafiu, 2015, 507).

Minors also have a new status within the penal procedure regulations now in force. More specifically, after the legislative modification of the Code of penal procedure, introduced by the Governmental Emergency Ordinance no. 18 of 2016, in which the legislature permitted them to be entitled to be parties to the special procedure in accordance with Article 478 (6) Code of penal procedure.

The third chapter discusses the conditions and legal features of the guilt agreement. The author divides the conditions into three parts. The first condition refers to the nature of the offence, the second to the legal representation of an advocate while the last condition covers the reduction in punishment applicable by the court of law.

The penal procedure in the court of first instance is covered in the fourth chapter. The author analyses the court of law's competencies of verifying the conditions to be met by the entitled parties during the

investigation phase (Rakoff, 2014, 1-12). Moreover, the issues related to the defendant and their advocate's participation in the court of first instance are taken into account.

The entire judicial system in criminal matters has also important advantages. In accordance with this issue, the author argues that

”the judicial system in criminal matters has certain advantages as a consequence of solving penal cases through the guilt agreement procedure, due to the fact that the costs of administering justice are diminished appreciably and conclude in a better organization of justice, knowing the fact that huge costs are spent in cases where the justice administers evidence of judicial examinations” (Magherescu, 2019b, 11).

From the jurisprudence point of view, the author establishes the consequences in cases of infringing legal provisions which regulate the compulsory participation of certain kinds of persons during the court of first instance (Dolj Court of Law, Penal Sentence no. 571 of 5 October 2017).

At the same time, the fourth chapter also refers to the appeal and appeal in cassation, the latter being regulated as a consequence of the Constitutional Court's Decision, which states that

”The main argument in asserting this solution was related to the idea that the parties involved were situated on unequal positions in similar legal situations in accordance with the fundamental principle of free access to justice” (Constitutional Court's Decision no. 573 of 2018).

Certain proposals of de lege ferenda are stated in the book related to enhancing the legal framework which regulates the special procedure of guilt agreement and which the Romanian legislator could take into consideration in the process of amending Code of penal procedure. Thus, these proposals refer to a better understanding of issues regarding the defendant-legal entities as being entitled to sign the guilt agreement, to the defence advocate's participation at trial as well as to their rights during the penal procedure. Related to these issues, the author highlights insisted certain disparities still present in the current regulations (Magherescu, 2019a, 55-56).

The fifth chapter is devoted to the institution of applying punishment, knowing the fact that Article 480 (4) Code of penal procedure regulates a reduction with

”one third of punishment limits regulated by penal law for the imprisonment and a reduction with one quarter of punishment limits regulated by penal law for the fine” (Law no. 135 of 2010 on Code of penal procedure).

The author presents the institution of applying punishment from both a criminological and a judicial techniques perspective. The latter approach discusses the issues related to the postponement of executing punishment, renouncing the guilt agreement's application, and delaying its application.

These legal institutions are highlighted with jurisprudence references gathered from the courts of law in Romania. Relevant judicial decisions pronounced in penal cases solved through the procedure of guilt agreement are analysed.

Conclusion

At the end of the five-year period from the entrance into force of the new Penal Procedure Code of Romania , the special procedure of the admission of guilt agreement has a series of advantages both for the defendant and judicial bodies. Finally, the advantages also relate to the entire judicial system in criminal matters.

The author opines that the procedure of guilt agreement is a form of negotiated justice comparing it with similar procedures implemented in other penal legislation of states all over the world. From this point of view, it is clear that the legal institution is characterized, among other specific features, by a legal diversity.

Nevertheless, it has been stated that the legal provisions of legislation cannot be transposed analogically into the home legislation because each special procedure has its own features regulated in accordance with the penal procedural legislation of the country it belongs to.

The author also noticed pertinently that beyond the general features of the procedure of guilt agreement, this form of special procedure is an atypical one. It presents some serious drawbacks that the Romanian legislator has to take into account in the process of legislative modification of the legal framework of solving penal cases within the special simplified procedure.

However, although it does not concord with the special procedure regulated in other countries having tradition in the implementation of a simplified procedure or a negotiated one, it is appreciated that the Romanian legislator has created a particular model of simplified special procedure. As a consequence, it is appreciated that all these aspects are approached in this book as they will really help readers by outlining adequate notions, conditions, procedures and legal consequences of the special procedure of guilt agreement. For these reasons, the book can be considered a valuable doctrinal reference among lawyers specialized in criminal matters.

References:

1. Beard, J. (2017). Reduction in sentence for a guilty plea, Briefing paper, House of Commons Library. 5974, 1-10.

2. Communication of A.N.D. (2017). No. 1022/VIII/3 of 31 October 2017. Retrieved from <http://www.pna.ro>
3. Constitutional Court Decision. (2018). No. 573 of 2018 regarding the exception of unconstitutionality of Article 434 (2/g) Code of penal procedure, published in the Official Journal no. 959 of 13 November 2018. Retrieved from http://www.dsclex.ro/legislatie/2018/iulie2018/mo2018_573.htm
4. Dolj Court of Law. (2017). Penal Decision no. 571 of 5 October 2017. Retrieved from <https://www.jurisprudenta.com>
5. European Convention on Human Rights. (1950). Council of Europe, Cedex, Strasbourg. Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf
6. ECtHR's Decision. (2008). Case of Paunoiu c. Romania. Retrieved from <https://jurisprudentedo.com>
7. Gialuz, M. (2008). Applicazione della pena su richiesta delle parti. In *Enciclopedia del Diritto*, Tomo I. (pp. 1206) Milano: Giuffrè.
8. Government Emergency Ordinance. (2016). No. 18/2016 on modifying and completing Law no. 286/2009 on the Penal Code, Law no. 135/2010 on the Code of penal procedure as well as completing Article 31 (1) of Law no. 304/2004 on the judicial organization, published in the Official Journal no. 389/2016. Retrieved from <http://legislatie.just.ro/Public/DetaliiDocumentAfis/178639>
9. Jurisprudence of ECtHR of Strasbourg. (2008). European Court of Justice. Retrieved from <https://jurisprudentedo.com/dreptul-la-un-proces-echitabil.html>
10. Law no. 135. (2010). Official Journal no. 486/2010. In "Penal Code. Code of penal procedure". (2018). Bucharest: C.H.Beck Publishing House.
11. Magherescu, D. (2019a). Admission of Guilt Agreement as a Special Procedure of the Penal Trial – A Particular Attention upon the Romanian Model. *Journal of Social Sciences*, 15, 44-57. DOI: 10.3844/jssp.2019.44.57
12. Magherescu, D. (2019b). *Recunoasterea vinovatiei si aplicarea pedepsei*. (pp: 240) Bucharest: Hamangiu Publishing House.
13. Magherescu, D. (2006a). Argumente pentru reglementarea institutiei negocierii invinuirii in codul de procedura penala al Romaniei. *Proceedings of the International Conference One step to Integration: Opportunities and Threats*, Jun. 2-3 (pp: 306-309). Universitaria Publishing House.
14. Magherescu, D. (2006b). The necessity to implement institution of the negotiation of accusation in the Romanian Code of penal procedure. *Proceedings of the 11th International Conference Man in the*

- Knowledge Based Organization, Nov. 23-25 (pp: 109-117). Sibiu: Land Forces Academy Publishing House.
15. Oroveanu-Hantiu, A., Moraru AM. (2012). Procedura simplificata a judecatii in cazul recunoasterii vinovatiei. Acta Universitatis Lucian Blaga, 2, 241-248.
 16. Papadopoulos, I. (2004). Plaidier coupable. La pratique americaine, Le texte français. (pp: 128) Paris: PUF.
 17. Rakoff, JS. (2014). Why Innocent People Plead Guilty. The New York Review of Books, 20, 1-12.
 18. Viano, EC. (2012). Plea Bargaining in the United States: a perversion of justice. Revue Internationale de Droit Penal, 83, 109-245.
 19. Zarafiu, A. (2015). Procedura Penala. Partea Generala. Partea Speciala. 2nd Edn. (pp: 560) Bucharest: C.H. Beck Publishing House.