



## Avoidance and Withdrawal from Criminal Prosecution-Kosovo Context

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### Abstract

Avoidance and withdrawal from criminal prosecution is a special criminal-procedural institute which consists in the possibility of abstention respectively withdrawal of the competent state prosecutor from its legal obligation to prosecute in cases when he considers that the legal requirements for undertaking such an action has been fulfilled. The possibility of application this institute has been foreseen by law, therefore it does not represent any opposition to the principle of legality and obligations deriving from it. As such this institute has been foreseen with the possibility of application only under circumstances and criteria expressly provided by law. This institute is applicable to adults and juveniles perpetrators of criminal offences. This institute is well known by almost all criminal-procedural legislations of contemporary states, of course by several divergences that in most of the time are considered to be normal. Modest results of this scientific paper prove that Basic Prosecutions in the Republic of Kosovo during the period of time 2013-2017 have applied in relatively frequent cases this institute. During my research concerning this article I have used legal, analytical and statistical methods.

**Keywords:** State prosecutor, Avoidance, Criminal prosecution, Legality, Criminal offence.

### 1. Introduction

Avoidance and withdrawal from criminal prosecution is a criminal-procedural institute which grants to the state prosecutor legal possibilities that under requirements foreseen by law not to undertake criminal prosecutions or to withdraw from the initiated prosecution against some perpetrators of minor criminal offences, and in particular cases even for serious criminal offences, although considers to have been fulfilled legal requirements which in principle oblige him/her to undertake such an action.

Application of this institute is estimated to be in the interest of perpetrators of criminal offences as well as in the interest of justice because as such effects in prevention of criminality, reduction of budget expenditures, as well as in delinquents' re-socialization. This institute has a relatively long history of its application as in global terms as well as in relation to Kosovo.

Avoidance and withdrawal from criminal prosecution took an important place in two following basic laws with criminal nature of the Republic of Kosovo: the Criminal Procedure Code and the Juvenile Justice Code.

This institute, although in a way represents avoidance from the principle of legality, in essence, it is not opposite to it. This due to the fact for the possibility of its application the legislator has foreseen concrete legal provisions.

Through this scientific paper, the institute of avoidance and withdrawal from criminal prosecution except it is handled theoretically, it is elaborated also from the practical point of view, where is reflected the activity of the Basic Prosecutions of the Republic of Kosovo for the period of time 2013 - 2017. As it results, Kosovo Basic Prosecutions have applied this institute in relatively frequent cases.

### 2. Meaning (Notion) of Avoidance and Withdrawal from Criminal Prosecution

Avoidance and withdrawal from criminal prosecution in criminal proceedings represents a special institute taking an important place in criminal-procedural legislation as well as in practical activities of prosecution body. This institute grants to the state prosecutor legal possibilities that under requirements foreseen by law not to undertake criminal prosecutions or to withdraw from the initiated prosecution despite the fact that the legal requirements for exercising this function has been fulfilled.

Bearing this in mind, the institute of avoidance and withdrawal “represents some kind of exemption from the principle of legality (Sahiti and Murati, 2013) which in fact grants to the state prosecutor the authority to prosecute perpetrators of criminal offences when considers there is a fulfillment of legal requirements for undertaking such action.

Consequently, by avoidance and withdrawal from criminal prosecution institute should be implied the abstention of competent state prosecutor from its legal obligation for prosecution, or withdrawal from initiated criminal prosecution in cases when he/she considers there is a fulfillment of legal requirements for undertaking such an action, for cases, respectively on persons and criminal offences to which the legislator has granted concrete legal possibilities.

Finally, it should be emphasized the fact that application of avoidance and withdrawal institute from criminal prosecution is optional.

“This means that the issue of possible implementing this institute it is an issue that has been left to assessment of the competent state prosecutor.

Therefore, it is expectable for the state prosecutor to implement the avoidance and withdrawal institute from criminal prosecution only after concluding the existence of a balance among circumstances characterizing the concrete case, which in terms of perspective, make it the matter of imposing criminal sanction unreasonable respectively unnecessary, and the degree of its credibility in relation to their real existence (Hajdari, 2016).

### **3. The Authority to Decide on Avoidance and Withdrawal from Criminal Prosecution**

The authority to implement the avoidance and withdrawal institute from criminal prosecution in the Republic of Kosovo is granted to the competent state prosecutor (*Criminal Procedure Code of the Republic of Kosovo, 2012*). It is the prosecutor which has substantive and territorial competence to initiate, respectively to apply the criminal prosecution for a concrete criminal case.

When it comes to decision-making process about granting avoidance and withdrawal institute from criminal prosecution the competent state prosecutor should bear in mind the following elements: the fulfillment of requirements determined by legislation in force such as: a) the consent of the injured party in cases when for commencement of procedure is required his/her consent; ab) prior permission of the competent body, when for initiating such procedure is required such permission; ac) gravity of criminal offence in which case should be kept in mind: aca) criminal offences punishable by fine or imprisonment up to one year (respectively three years in cases related to juveniles), and acb) criminal offences for which by Criminal Code has been foreseen the possibility to the court to release the perpetrator of the criminal offense from the punishment; and b) the circumstances of commission of a criminal offence (criminal offence is required to have been committed in mitigating circumstances, such that imposition of a criminal sanction make it unreasonable) and c) the following circumstances related to perpetrator of a criminal offence such as: ca) sincerely remorse of a perpetrator for the committed criminal offence; cb) the perpetrator made an effort to stop harmful circumstances of a criminal offence; cc) the perpetrator has made compensation for the inflicted damage prosecutor (*CPCRK, 2012*).

I think that the state prosecutor prior of granting the institute of avoidance and withdrawal from criminal prosecution should (analyze and assess) with the highest professional, moral and legal competence each of these circumstances individually, and only when it considers reasonable to make a decision whether shall avoid criminal prosecution by not initiating it at all or withdraw from criminal prosecution initiated. In fact, concerning the possibility of implementing this institute is considered sufficient to ascertain the fulfillment of only one of these conditions.

### **4. Characteristics of Avoidance and Withdrawal from Criminal Prosecution**

The institute of avoidance and withdrawal from criminal prosecution is constituted by several characteristics which make it a "sui generis" character. Such characteristics, among other things, shall be considered:

1. The specification of implementing authority of avoidance and withdrawal from criminal prosecution. The exclusive competence for application of this institute belongs to the competent state prosecutor. State prosecutor is the authority which exercises the function of criminal prosecution and he has the right and legal obligation to initiate criminal prosecution and to abstain or withdraw from prosecution (Hajdari, 2014). He/she makes this decision upon assessment of respective legal requirements and in a discretionary manner, without being obliged to seek for permission or opinion of any other institutional authority within criminal justice system bodies.
2. The correct specification of cases, respectively persons and criminal offences for which may be applicable the institute of avoidance and withdrawal from criminal prosecution. This institute may be applicable for minor criminal offences punishable by fine or imprisonment up to one year (respectively three years in cases related to juveniles), and for perpetrators of criminal offences for which the initiating criminal proceedings against them is required the consent of injured party or prior consent of competent body. Outside of these situations this institute cannot be applied.
3. Addressing the circumstances of commission of a criminal offence for which may be applicable the institute of avoidance and withdrawal from criminal prosecution. This institute may be applicable only when there are reliable evidence that criminal offences has been committed in particularly mitigating circumstances for instance when they have been committed by negligence (Islami *et al.*, 2003) and in cases when the perpetrator sincerely repents for criminal offence committed, makes a big effort to stop harmful consequences of a criminal offence or compensates the inflicted damage. In order to accord this institute as a rule must be fulfilled, at least, one of these conditions.

4. Time concretization of avoidance and withdrawal institute application from criminal prosecution. This institute may be applicable at different times of existing legal obligation for criminal prosecution. This implies that this institute could be used during the time that prosecution has not yet commenced, but even after it has commenced. It is crucial the fact when the competent state prosecutor considers the fulfillment of legal requirements concerning its application.
5. Considering the institute effects of avoidance and withdrawal from criminal prosecution. This institute prevents the prosecution of a concrete criminal case in court and thus the possibility of imposition of any criminal sanction against a person who has committed a criminal offence and which is liable for its commission "In this case the perpetrator of a criminal offence shall be protected from harmful consequences which affect every person charged and brought before the court, despite the fact whether he/she results to have committed the criminal offence being charged with Markus (2006).

## **5. Reasons for Granting Avoidance and Withdrawal Institute from Criminal Prosecution**

The institute of avoidance and withdrawal from criminal prosecution is very important. Consequently, this institute manifests stretch of interest as in criminal procedure law, in criminal law, Latifi *et al.* (2012) as well as in criminal policy (Milutinović, 1984).

As a matter of fact, the importance of avoidance and withdrawal institute from criminal prosecution is dealing with the fact that through this institute:

1. It is affected in reducing the number of cases which duly should be processed in court proceedings. In cases of application of avoidance and withdrawal institute from criminal prosecution regarding the concrete criminal case, for which there is a fulfillment of legal requirements for criminal prosecution, no prosecution is initiated at all or even if it is initiated the competent state prosecutor withdraws from prosecution so such cases shall not be processed at all before courts. As such, they do not appear in court criminal records, and in cases when it is applicable when no prosecution is initiated they do not even appear in the criminal records of the state prosecutor's office. This approach has a great criminal policy importance bearing in mind the fact in Kosovo Courts wait for resolution about 500000\_cases, of which approximately 1/3 of them are criminal cases (Statistical Reports of Kosovo Prosecutions and Kosovo Prosecutorial Council, 2013 - 2017).
2. Shall be shorten public money expenses which in terms of conducting regular criminal proceedings (standard) would be spent for witnesses, experts, and other lump sum expenses, which shall be estimated of a particular importance due to the fact Kosovo continues to have a very limited budget (Hajdari, 2017).
3. Society shall be protected from re-commission of criminal offences, based on the fact that persons in relation to whom the institute of avoidance and withdrawal from criminal offences was applicable in practice very rarely decide to commit again criminal offences, in comparison to persons against which were applicable regular criminal proceedings, regardless of judgment imposed by the court (Hajdari, 2010).
4. The property interests of the injured party are better guaranteed due to the fact this institute provides favorable conditions for him to realize easier and faster compensation for the inflicted by the criminal offense. This because of the fact, in most of the times, this institute could be applicable only then when the perpetrator of a criminal offence guarantees that shall make a compensation of such damage within time determined by the state prosecutor.
5. Perpetrators of criminal offences shall motivate to be educated with the feeling of repenting for the committed offence, apology and compensation of damage for victims of crime. This is dictated by the fact that this institute can only be implemented in practice if the perpetrator is repented for the committed criminal offence, apologizes to the victim and indicates readiness to compensate the inflicted damage.
6. The institution of state prosecutor shall be motivated to grant more often the avoidance and withdrawal institute from criminal prosecution whenever legal requirements for such possibility have been fulfilled and thus to enforce in practice requirements addressed by the respective international acts, the Constitution of the Republic of Kosovo and the procedural legislation for a more advanced consideration of human rights in criminal proceedings and to prevent stigmatization of perpetrators, which is inevitable almost always when they are brought before the criminal prosecution authorities, especially before the courts.

## **6. Cases Where the Avoidance and Withdrawal from Prosecution May Be Accorded**

The institute of avoidance and withdrawal from criminal prosecution in Kosovo has been foreseen by the Criminal Procedure Code and the Juvenile Justice Code (2010).

This implies this institute may be applicable against adults and juveniles perpetrators of criminal offences. Consequently, against juvenile perpetrators of criminal offences this institute in the form of avoidance from criminal prosecution may be applicable in two following cases:

1. Firstly it may be applicable for criminal offences punishable by imprisonment less than three years or by a fine. In cases of these criminal offences the juvenile state prosecutor may decide not to initiate criminal prosecution although exists a reasonable doubt that the juvenile has committed a criminal offence if he/she considers that it would not be appropriate to initiate criminal prosecution against juvenile because of criminal offence nature, circumstances of its commission, the lack of serious damage or consequences for the injured party, the past of juvenile as well as his/her personal characteristics (JJC Article 53, paragraph 2). Hence, the juvenile state prosecutor may abstain from criminal prosecution against juvenile which is suspected of having committed a criminal offence punishable by imprisonment up to two years if he concludes the damage inflicted to the injured party by commission of a criminal offence is negligible or relatively small (Hajdari, 2010).

2. Secondly, it may be applicable in cases where against juvenile shall be executed punishment of educational measures. In these juvenile state prosecutor may decide not to commence criminal prosecution for another criminal offence committed by juvenile if by bearing in mind the gravity of that criminal offence, as well as the punishment and measure which is being executed, application of procedure and imposition of punishment or measure for the new criminal offence would not serve to any purpose (JJC, Article 53, paragraph 3). In other words, the juvenile state prosecutor would be able to act on this manner if for instance evaluates by means of applying criminal proceedings for the another criminal offence would not facilitate the process of juvenile re-education, on the contrary would make it difficult, because juvenile may be discouraged if the duration of his stay in the juvenile correctional facility is increased (Misra, 2014).

If juvenile state prosecutor decide not to initiate criminal prosecution he or she informs the guardianship authority, the police and the injured party so that each of these entities may undertake legal verifications for which they are authorized.

Against adult perpetrators of criminal offences the avoidance and withdrawal institute from criminal prosecution may be applicable in three cases:

1. Firstly, the state prosecutor may not commence or resign from criminal prosecution when the law provides that the court may release from punishment the perpetrator of criminal offence and the state prosecutor considers that having in mind current circumstances of case only adjudication without criminal sanction is not necessary (CPRC, Article 231 paragraph 1, sub-paragraph 1.1). Such situation may be expressed in cases of commission of criminal offence by exceeding circumstances of necessary defense or extreme necessity. In these cases, court may release from punishment the perpetrator of a criminal offence, when this is estimated to be reasonable due to the circumstances that criminal offence had been committed or to help restore the relationship between perpetrator and the victim (Pavišić, 1998).
2. Secondly, the state prosecutor may not commence or resign from criminal prosecution when the perpetrator of a criminal offence punished by fine or imprisonment up to one year sincerely repents for the committed criminal offence and stops harmful consequences or makes compensation of damage, whereas he considers in terms of case circumstances the criminal sanction would not be reasonable (CPRC, Article 231, paragraph 1, subparagraph 1.2). The state prosecutor could act on this manner for example in the following case: the perpetrator who has committed a criminal offence punishable by imprisonment up to one year, has committed it in particularly mitigating circumstances, and at the same time has to make compensation for the damage caused to the injured party (Pavišić, 1998).
3. Thirdly, the state prosecutor shall not initiate criminal prosecution or shall withdraw from prosecution initiated in any case when criminal prosecution for a particular criminal offence depends by the proposal of injured party for prosecution or prior permission of competent body (CPPRK, Article 79, paragraph 3). Therefore, in criminal matters where is required the proposal or prior permission for criminal prosecution, the state prosecutor abstains from criminal prosecution and if he/she eventually initiated prosecution he should withdraw (Sahiti *et al.*, 2014).

The institute of avoidance and withdrawal from criminal prosecution, although in another way, it comes to expression also in cases of suspension (CPPRK, Article 157) and dismissal of investigation (CPPRK, Article 158). Therefore, when it comes to fulfillment of legal requirements, the state prosecutor is obliged to withdraw, and this is determined for instance, in cases when the defendant after commission of a criminal offence escapes from the country or when the act committed is not a criminal offence etc.

Finally, it should be emphasized the fact that abovementioned possibilities can be used by the competent state prosecutor when he/she considers the fulfillment of legal requirements and when such decision-making process evaluates to be in the interests of justice and the parties.

## **7. Several Data on Avoidance and Withdrawal from Criminal Prosecution**

In order to come to sustainable conclusions and providing concrete and useful recommendations serving to state prosecutor institution, other relevant institutions and the society in general, it was necessary to research and study the work of Kosovo prosecutor's offices in relation to the institute of avoidance and withdrawal from criminal prosecution in Kosovo for the period of time 2013-2017.

The presentation of state prosecution institution activity concerning this institute was accompanied by numerous difficulties. This due to the fact in relation to the activity of this institution concerning the institute of avoidance and withdrawal from criminal prosecution there is a lack of full and concretized data. Such data in most of the time has been reflected in a manner that do not serve framework of this scientific paper.

Such deficiencies were accompanied by the annual reports of the state prosecutor's work, as well as the data included in the books in which criminal cases have been evidenced, from plea agreement until their resolution and proceeding towards the courts and other relevant institutions (Annual State Prosecutor's Work Reports for the Period of Time, 2013 – 2017).



Based on included data in the annual reports of the state prosecutor, in a special table shall be presented the activity of the Basic Prosecutions of the Republic of Kosovo regarding the implementation of avoidance and withdrawal institute from criminal prosecution for the period of time 2013 - 2017.

**Table-1.** Recorded data on number of resolved cases, cases of avoidance and withdrawal from criminal prosecution.

Years	Number of resolved cases	Number of avoidance from criminal prosecution cases	Number of withdrawal from criminal prosecution cases
2013 - 2017	614582	74679	88645

**Note:** Annual State Prosecutor's work reports for the period of time 2013 – 2017.

According to these data during the period of time 2013-2017, Basic Prosecutions of the Republic of Kosovo had resolved in different ways 614582 cases. Within these cases in 74679 cases state prosecutors have been avoided by prosecution whereas in 88645 cases have been withdrawn from the initiated prosecution. Used data prove that the avoidance and withdrawal institute had been applicable in the majority of cases against juveniles (about 15% more) in comparison to adults.

These data indicate the fact of application of this institute to a percentage that is considered to be satisfactory. However, such data should be taken with reservations, because it is possible that a considerable number of cases concerning the avoidance from criminal prosecution, for various reasons, were not included at all in within these records.

Used data prove that avoidance and withdrawal institute from criminal prosecution in 92% of cases was enforced for reasons related to the nature and mitigating circumstances that characterized the commission of a criminal offence and circumstances in relation to its perpetrator.

These data also prove that application of this institute on reasons concerning the lack of criminal prosecution proposal or the lack of permission for criminal prosecution during the period included in research is represented by only about 2% of the cases.

Bearing in mind the advantages of avoidance and withdrawal institute application from criminal prosecution, with special regard to juveniles, I consider that Basic Prosecutions in Kosovo should in the future work harder in terms of advancing their activities in more often application of this criminal-procedural institute.

## 8. Conclusion

By avoidance and withdrawal institute from criminal prosecution should be implied the abstention of competent state prosecutor from his legal obligations to prosecute, or withdrawal from initiated criminal prosecution in cases when considers there is a fulfillment of legal requirements for undertaking such an action, on cases, respectively persons and criminal offences for which the legislator has explicitly granted concrete legal possibilities.

The authority to enforce avoidance and withdrawal institute institutes from criminal prosecution is granted to the competent state prosecutor. This state prosecutor has substantive and territorial competence to initiate, respectively enforce criminal prosecution for a concrete criminal matter concerning which this institute may be applicable.

The avoidance and withdrawal institute is of a great importance. This importance, among other things is manifested as follows: it affects in reducing the number of cases which duly should be processed in court proceedings, it shortens public money expenses which in terms of conducting regular criminal proceedings (standard) would be spent for witnesses, experts, and other lump sum expenses, it affects in reduction of recidivism, better guarantees the property interests of the injured party, the perpetrators of criminal offenses are educated with the feeling of repent for the committed criminal offense, apology and compensation of damage for the victims of crimes etc.

For application of avoidance and withdrawal institute from criminal prosecution is required the fulfillment of particular requirements. These requirements refer to the type and nature of a criminal offence, circumstances related to characteristics of criminal offence perpetrator, apology, stopping harmful consequences, the lack of serious damage and the serious consequences for the injured party, compensation of damage and consideration by state prosecutor in terms of case circumstances that application of criminal sanction would not be reasonable.

During the period of time 2013-2017 Basic Prosecution of the Republic of Kosovo have resolved in different ways 614582 cases.

Within these cases, in 74679 state prosecutors have been withdrawn from the criminal prosecution, whereas in 88645 cases have been withdrawn from the criminal prosecution commenced.

Data used prove that avoidance and withdrawal from criminal prosecution in 92 % of cases has been applicable for reasons related to the nature and mitigating circumstances that characterized the commission of a criminal offense and the circumstances related to its perpetrator, in only about 2% of cases for the lack of a proposal for prosecution or lack of a prosecution permit, and in 6% of cases for other reasons.

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**Citation** | Azem Hajdari (2018). Avoidance and Withdrawal from Criminal Prosecution-Kosovo Context. *International Journal of Social Sciences and English Literature*, 2: 7-12.

**History:**

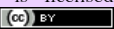
Received: 6 March 2018

Revised: 19 March 2018

Accepted: 26 March 2018

Published: 30 March 2018

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**Publisher:** Eastern Centre of Science and Education

**Funding:** This study received no specific financial support.

**Competing Interests:** The author declares that there are no conflicts of interests regarding the publication of this paper.

**Transparency:** The author confirms that the manuscript is an honest, accurate, and transparent account of the study was reported; that no vital features of the study have been omitted; and that any discrepancies from the study as planned have been explained.

**Ethical:** This study follows all ethical practices during writing.

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