The Institute of Plea Bargain in the Legislation of Montenegro and Challenges in its Implementation

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Abstract

The subject of research in this paper is the institute of Plea bargaining. The starting point of the research is the positive-legal method, having in mind that only by a detailed analysis of solutions accepted in the domestic legal system can we assess the scope, practical implications, as well as inadequacies and imperfections in the way of regulating the institute or practice, which are the subject of this research. The author points out the numerous shortcomings in the legal regulation of the institute. In order to determine the effectiveness of the plea bargain, and to identify practical repercussions, we conducted empirical research in the form of a survey i.e. a questionnaire. The questionnaire was designed as a means of surveying 189 judiciary civil servants - judges, prosecutors and lawyers, in order to find out how people who do not create, but only implement legal norms, feel about this institute, to what extent they use its solutions, whether they find it justified, if they consider it necessary and appropriate, what their impressions regarding the first few years of implementation of this institute are; what the directions of its further upgrading are, and whether the practical application of this institute attains the appropriate results. Finally, by using a critical method the author gave an overview of the issues related to the plea bargain.

Key words: plea bargain, guilt, defendant, terrorism

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Introduction

When one of the founders of the United States Thomas Jefferson said he believed the jury was "the only conceivable anchor by which the government can bind itself to the principles of its own Constitution" (Penn, 2015), he probably had no doubt that some two hundred years later, in the country of which he was the Founding Father, 90 % of cases will be settled by a plea bargaining. The reasons for the introduction of this institute should be sought in the advantages that the settlement gives (Langbein, 1979, p. 262).

Although initially the practice of negotiating with the defendant was regarded extremely negatively, the late nineteenth and early twentieth centuries were characterized by a significant increase in crime rates, which was a product of industrialization, urbanization, and professionalization of the police (Fisher, 2004, pp. 116–124). In the late 1960s, the fight against crime became a priority of state policy, as America was faced with a serious rise in the crime rate (Stuntz, 2005, p. 15). For these reasons, the plea bargaining is beginning to be looked upon with much more favor. This ultimately resulted in the legalization of the plea agreement in 1970 and its exit from the "gray" zone after two hundred years of practical application. In this way, the agreement gained full legitimacy, and the following year the US Supreme Court stated that resolving the indictment by agreement between the defendant and the prosecutor is an important part of judicial activity, and that it should be encouraged (Mrčela, 2002, p. 353). Today, according to some statistics, more than 90% of cases in the United States are resolved through plea agreements (Nikolić, 2006, p. 35), and it is possible to come across data that show that more than 95% of cases were resolved in this way. (Delacote & Ancelot, 2009, p. 1929).

As the implementation of the plea agreement flourished on American soil, the situation in Europe was significantly different. Namely, the agreement in the proceedings in Europe started much later, which is not surprising if we have in mind the numerous obstacles that

stood in its way. In addition to the understanding that criminal proceedings pursue interests that the defendant should not have, the division into public and private law was strict, which meant that the agreements remained in the domain of private law. Furthermore, the basic principles of criminal procedure did not facilitate the introduction of a plea agreement, and in addition, proceedings in Europe were not under particular pressure for a long time, as the trial was reduced to a replay of the investigation. Also, the uncertainty of the jury trial that existed in America was not a problem in European proceedings (Bajović, 2009, p. 188). On the other hand, the procedure in Europe did not only mean a decision on guilt, but also the determination of the sentence, so conducting the procedure was necessary in situations when the guilt of the defendant was unquestionable (Damaška, 2004, p. 8).

However, due to the large increase in the crime rate, and especially due to the expansion of organized crime, it was necessary to look for new modalities to fight the crime. Also, the global economic crisis conditioned the finding of faster and cheaper forms of criminal procedure (Feješ, 2013, p. 265). Therefore, in order to find an alternative to the classical procedure and increase its efficiency, the institute of plea bargain was introduced into European legislation (Ivičević, 2005, p. 203), so it can be said that there is a constant movement of continental procedure from inquisitorial to accusatory (Krstulović, 2002, p. 373).

Although the institute of the plea bargain originates from the Anglo-Saxon legal tradition, it has recently been recognized and applied by a large number of continental legal systems, including the legal systems of the states of the former SFRY.

Prescribing this institute provided the normative basis for achieving one of the key goals of criminal reform, which is to improve the efficiency of criminal proceedings (Bejatović, 2014, p. 411). The wide acceptance of this institute in the European-continental legislations gave the right to talk about the infection with such solutions (plea bargain infection) in a certain sense.

The subject of the analysis of this paper will be the legal determination of the plea bargain, with special reference to the

omissions and mistakes of the legislator, as well as the analysis of empirical research aimed at identifying problems that arise in the application of this institute in practice.

Imperfections in the legal regulation of the plea agreement in Montenegro

Following the trend of most European countries, the Plea Agreement has found its place in the new Criminal Procedure Code of Montenegro since 2009. However, it took almost a decade to achieve visible results, since in the first years when the agreement was introduced into Montenegrin legislation, its implementation has not taken place at all. From 2009 until today, the provisions governing the plea agreement have undergone numerous changes, but they still do not regulate this institute clearly or precisely enough. It could even be said that the numerous changes that followed the original solution opened even deeper dilemmas regarding the application of this institute.

Namely, a plea bargain can be concluded for all criminal offenses prosecuted ex officio, except for the criminal offenses of terrorism and war crimes. Why the legislator decided to exclude the application of the agreement in relation to these two categories of criminal offenses is not very clear. It is clear that these are the most serious crimes that cause unforeseeable and irreparable consequences, but it is not clear what criteria he was guided by when he excluded the application in relation to these crimes, and not for example, and in crimes against humanity and other crimes from titles of international crimes or other serious crimes in general.

Another change, which followed the initial legal regulation of the plea agreement institute, opened a new dilemma. Namely, the right to initiate the conclusion of the agreement belongs to the state prosecutor,the suspect and his defendant. The new solution, unlike the previous one, gave this right to a larger number of persons, since earlier that right belonged to the state prosecutor, the defendant and his defense counsel, and not to the suspect. The reason for introducing the suspect into the provisions of the agreement should be sought in the

desire of the legislator to allow the conclusion of the agreement before the procedure formally begins, i.e. in the investigation phase. However, there are several problems with this. First, Article 44 of the CPC, which states the rights and duties of the state prosecutor, emphasizes his right to conclude a plea agreement with the defendant, while in this article the suspect is not listed as a person with whom the prosecutor can conclude an agreement. Secondly, although there is an unquestionable need to start informal negotiations even before the beginning of criminal proceedings, i.e. even in the investigation phase, its conclusion should wait at least until the order for investigation is issued for the sake of legal certainity. Third, the parties are negotiating the conditions for concluding the agreement, so the existence of a formal act seems necessary, especially from the aspect of the defendant. Namely, in order to conclude a plea agreement with the prosecutor, the defendant must know exactly what his confession refers to. Therefore, the issuance of an order to conduct an investigation is the earliest moment when an agreement can be concluded. Different solutions would lead to the possibility for the suspect to plead guilty first, and for the state prosecutor to start drafting the indictment after that. Fourth, the following paragraph of the same article deepens the dilemma regarding the suspect and his position in the procedure of concluding the agreement. The paragraph states that "when the proposal referred to in paragraph 1 of this Article is submitted, the parties and the defense counsel may negotiate the plea conditions." The strict interpretation of this norm would lead to the following conclusion: the legislator gave the suspect the opportunity to submit a proposal for concluding an agreement, but in order to negotiate it he would have to wait for the status of the defendant, i.e. he would have to wait for an investigation order against him, indictment or information.

The next in a series of omissions made by the legislature relates to the proposal to conclude the agreement. Namely, it remains completely unregulated what happens if the state prosecutor does not accept the proposal, so the agreement is not concluded. It was necessary to prescribe the obligation of the state prosecutor to destroy the proposal of the suspect, defendant or defense counsel for the

conclusion of the agreement if no conclusion is reached. The need for such a proposal to be destroyed stems from the fact that it, even when it does not explicitly contain a confession, actually implies that the defendant was willing to admit guilt (Kojović et al., 2010, p. 255).

The most obvious mistake of the legislator was hidden in Article 300, paragraph 4, which states: "A plea agreement shall be filed if an indictment has not yet been filed, i.e. no bill of indictment or private lawsuit has been filed with the president of the panel referred to in Article 24, paragraph 7 of this law, and after the indictment is filed i.e. bill of indictment or private lawsuit is filed with the president.". If this position was interpreted without bringing it into connection with the others, it could completely mislead us to the conclusion that a plea agreement is allowed in relation to all criminal offenses, including those for which the state prosecutor is not in charge, but are being prosecuted in a private lawsuit.

Deciding on the agreement and the problems that arise in that regard

The reached agreement does not produce any legal effects in itself. In order for that to happen, the final decision on it should be made by the competent court at a special hearing attended by the defendant and his defense counsel, as well as the state prosecutor. The injured party and his / her attorney shall be notified of the hearing for deciding on the agreement. Although the legislator predicted that in the case of the defendant's absence from the scheduled hearing the agreement will be rejected, there is still not a word about what happens to the agreement if the state prosecutor does not come to the scheduled hearing. However, it is not impossible to imagine that such cases could occur in practice, so it is necessary to fill this legal gap. We also believe that the legislator acted wrongly when he did not allow the defendant to request a return to the previous state in a situation when the court rejects the agreement due to his absence. Since no appeal is allowed against such a decision, it should be allowed to return to the previous state when the conditions for that are met, and this is

especially due to the fact that the defendants will most often miss the mentioned hearing for really justified reasons.

An appeal against a judgment brought on the basis of an agreement is not allowed, but the legislator has allowed the decision deciding on the agreement to be the subject of an appeal. This appeal is always decided by the out-of-court panel, which makes a decision both when the decision was made by the president of the out-of-court panel, but also when the decision was made by a judge of the Trial Chamber. In the spirit of the general rule that the appeal is decided by the court of second instance, it should have been provided that the appeal against the decision, which decided on the agreement, is decided by the out-of-court panel of the immediately higher court. This would certainly give the agreement, and after that the verdict, greater legitimacy (Škulić, 2009, p. 889).

Questionairre

In order to determine the effectiveness of the plea agreement and practical repercussions, we conducted empirical research in the form of a survey, ie a questionnaire. The conducted questionnaire was anonymous, partly open and partly closed, and on a large sample (more than 100 respondents). In addition to open-ended questions, where they were free to give their opinions and comments, for a certain group of questions, respondents had available answers when assessing the impact of certain factors on the conclusion of the Agreement. The questionnaire was conducted on a stratified sample whose strata included judiciary civil servants (judges, prosecutors and criminal lawyers), i.e. persons who deal with the application of the Agreement in practice.

In 2018 and 2019, 198 respondents from the entire territory of Montenegro answered the questionnaire, which contained twenty questions. The questions referred to the problems related to the implementation and legal regulation of the plea agreement. In the continuation of the work, the results of the conducted research will be presented.

Based on the survey, most respondents believe that the decision of the legislator to allow the conclusion of the agreement for all crimes was wrong, i.e. that the older decision should have been kept according to which the conclusion of the agreement was possible only in relation to crimes punishable imprisonment for up to ten years.

Also, in connection with the problem we pointed out in the paper, which refers to the introduction of the term "suspect" in the provisions governing the plea agreement, the vast majority of respondents (77%) believe that the legislator wanted to enable the conclusion of an agreement in the investigation phase. However, those who do not think that the intention of the legislator was to allow the conclusion of the agreement in the investigation phase, as the reasons why the legislator in Article 300 paragraph 1 of the CPC, in addition to the state prosecutor, the defendant and his defense counsel identified the suspect as well, most often state that they do not know why the legislator did so. Also, a large number of answers state that it is about ignorance and unprofessional approach to the problem or the failure of the working group that worked on this legislative intervention, since the law is written without adequate participation of professionals – lawyers, prosecutors and judges, and that in Montenegro laws write bureaucrats in ministries and government, and the majority in parliament only raises their hands (votes).They see one of the reasons in the lack of commitment to the meaning of a specific term and the stage of the procedure in which the suspect appears, the mechanical copying led by other members in which "suspects, defendants and accused" appear together. They say all this is indicated by the fact that nowhere is mentioned the moment before the order to conduct an investigation, how it is decided then, and it is not logical for someone to agree to any plea agreement if it is uncertain whether an order to conduct an investigation will be issued. However, most of the respondents believe that this is a typographical error that was not noticed in time, i.e. terminological negligence, because it is clear that in order to conclude a plea agreement it is necessary to have an identified perpetrator and a reasonable suspicion expressed through adequate evidence that it was this person who committed the criminal offense in question

(investigation phase), because otherwise they would open a wide space for abuse of the said institute, all as provided by the CPC. Considering that the criminal procedure starts from the moment the order on conducting the investigation is issued, when the suspect gets the status of the accused, there is no logical basis for someone to sign a plea agreement before initiating the criminal procedure.

When it comes to the decisive reasons leading to the conclusion of the agreement, the majority of respondents (58% of them) see them in the defendant's assessment that in this way he will be given a milder sentence, ie a sanction, than in regular proceedings. A slightly smaller number of respondents (33%) believe that the main reason for concluding the agreement is more efficient the completion of criminal proceedings and only 9% of respondents cite concessions made by the state prosecutor's office as the determining reason for concluding the agreement.

The analysis of the survey further indicates that almost the same percentage of lawyers, judges and prosecutors who believe that the conclusion of the agreement should be allowed until the end of the main trial (35%), and those who believe that the conclusion of the agreement should be allowed until the main trial (38%). Also, regarding the question of who should initiate negotiations, most respondents believe that it is irrelevant for the conclusion of the agreement, which was confirmed in the answers to the next question when most respondents stated that they believed that initiating negotiations by the defendant and his counsel does not necessarily mean that the plaintiff will be in a better negotiating position.

When asked what the problems they most often faced in practice were when negotiating the Agreement, surprisingly, a large number of respondents stated that in practice they did not encounter any problems during the negotiations. Also, a significant number of respondents indicated that the most common problem in negotiations is the inability to reach an agreement on the amount of the fine. In addition to these, the most significant problem in practice is the inconsistency of the prosecution's practice, the inconsistency of court practice, as well as the prosecutor's insistence on sentences that are the same, and often

greater than those that offender would receive in regular proceedings. What is particularly worrying are the allegations that prosecutors very often use detention against the offender as a means of coercion to agree to the conclusion of an agreement. Lack of timeliness of the state prosecutor's office, i.e. a long period of time from the submitted proposal for concluding the agreement to receiving the answer, was stated as the main problem during the negotiations. Unsuccessful negotiations are also a consequence of the fact that prosecutors often take a "take it or leave it" stance. In addition to the above, the problem in reaching an agreement is often the ignorance of the accused. Defendants state that they often cannot explain to their clients that signing an agreement does not mean that they will always receive the mildest prescribed punishment, i.e. that they will completely avoid punishment. Also, the obstacle to concluding an agreement, in the case of several defendants, is the fear of the accused that in this way he will cause harm to other persons who prove their innocence. Mild penal policy in our country was also pointed out as one of the problems.

Issues related to the court's conduct in deciding on the agreement seem to be particularly important. We asked judicial officials whether the court asked detailed questions when deciding on an agreement to make sure that a guilty plea had the required quality (conscious, voluntary, true, etc.), and whether, in deciding on the agreement, the court checked in detail that the guilty plea was given in accordance with other evidence. According to the vast majority (71%), the court is actively trying to find out about the conditions under which the agreement was concluded and for that purpose asks detailed questions to make sure that the guilty plea is conscious, voluntary, true and of the required quality. However, a slightly smaller percentage of respondents (64%) believe that the court checks in detail whether the guilty plea was in accordance with other evidence when deciding on the agreement.

Finally, a disappointingly high percentage of respondents (51%) testified that political and other influences persuade prosecutors to enter the plea agreement process.

Conclusion

The transition from a judicial to a prosecutorial concept of investigation has been a major and demanding task for the Montenegrin legislature. In addition to the comprehensive changes that needed to be made with the adoption of the new Law, the legislator faced another great challenge, and that is the introduction of a completely new institute into the legal system, such as a plea agreement. It is clear that this job was not easy and that it was not to be expected that it would be done flawlessly, at least in the first attempt, since there was no previous experience. However, it turned out, completely unacceptably, that the original legislative solution was also its best version.

The remarks that are often made to this institute are in fact claims that it is not in accordance with the basic principles, i.e. the principles of criminal procedure. However, the current provisions on this institute are in line with most of the proclaimed principles of criminal procedure. True, there are deviations from several principles, but the nature of this institute and the goal it should achieve, without a doubt, justify deviations from certain established principles. In addition, the principles must be adapted to the real state of affairs and the spirit of the times in which we live. Throughout history, principles have changed and gained or lost in importance, so there is no reason to be different today. After all, insisting on respecting the established principles without exception, even when it does not give the expected results, would make the function of criminal law and procedure as a whole meaningless.

The current legal solution is full of technical errors, legal inconsistencies, gaps and illogicalities. All this undoubtedly has an impact on the practical application of this institute. Therefore, the legislator should with due care change the provisions that regulate this institute. Although errors of a technical nature do not cause special problems in practice, they have no place in the Criminal Procedure Code, so it is incomprehensible that several amendments to the said Law have not been corrected. When it comes to more serious shortcomings, the suspect should, above all, be deleted from these provisions, since the conclusion of an agreement is possible only with

the defendant as the practice has shown. Furthermore, the agreement should either be allowed for all criminal offenses or its application should be limited depending on the prescribed penalty. Singling out only some criminal offenses, for which the conclusion of an agreement is not allowed, has no justification, nor a logical basis, as we have pointed out in the paper. In addition to being an institute that contributes to the efficiency of criminal proceedings, for the plea agreement to be in the spirit of justice the rights of the injured party must not be neglected, but it seems that they are. The least that the legislator would have to do is to prescribe the obligation of the state prosecutor to call on the injured party to file a property claim before concluding the agreement, if he has not already done so.

The conducted research pointed out several worrying facts. The first in a series refers to the fact that prosecutors often use detention against the accused in order to force him to conclude an agreement. This is a classic abuse of the institute of plea agreement, and this practice of the prosecutor undoubtedly affects the voluntary confession of the accused. The lack of timeliness of the state prosecutor's office, i.e a long period of time from the submitted proposal for concluding the agreement to receiving an answer, is also one of the key problems in the application of this institute. The solution could be found in the possible prescribing of the deadline within which the party to which the proposal for concluding the agreement was made is obliged to respond to it.

In order for the plea agreement to achieve its purpose, it is necessary for the courts to unequivocally determine that the guilty plea which is the subject of the agreement was given knowingly, voluntarily and truthfully, and that it is in accordance with other evidence. Of particular concern is the fact that most of the persons who apply the agreement in practice testify that political and other pressures have a great influence on the prosecutor's decision to conclude an agreement with the accused. It is certainly a practice that is not desirable and that promotes all those negative aspects of the introduction of this institute in domestic legislation.

Based on all the above, it is concluded that in order to achieve the expected results, it is necessary to start a serious change in the

norms that regulate the institute of plea agreements. In addition to amending the legal text, it would be necessary to issue instructions to prosecutors to avoid the current problem of inconsistency in the practice of the prosecution. It is also necessary to continue working on the education of judges, prosecutors and lawyers. Finally, a very important condition for the proper application of this institute in practice is the removal of all external influences during its conclusion, which will probably be the most difficult to achieve.

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Sporazum o priznanju krivice u zakonodavstvu Crne Gore i izazovi u njegovoj primeni

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Sažetak

Predmet istraživanja ovog rada je institut Sporazuma o priznanju krivice. Polaznu osnovu istraživanja čini pozitivno-pravni metod, jer se samo detaljnom analizom rješenja prihvaćenih u domaćem pravnom sistemu može ocijeniti domašaj, praktične implikacije, kao i nedostatnosti i nesavršenosti u načinu regulisanja instituta ili u *praxis*-u, koji su predmet ovog naučnoistraživačkog rada. Autorka u radu ukazuje na brojne manjkavosti zakonskog regulisanja pomenutog instituta. Radi utvrđivanja učinkovitosti sporazuma o priznanju krivice, te za prepoznavanje praktičnih reperkusija, sproveli smo *empirijsko* istraživanje u formi ankete, odnosno upitnika. Upitnik je osmišljen kao sredstvo anketiranja 189 nosilaca pravosudnih funkcija – sudija, tužilaca i advokata, kako bi se došlo do saznanja o tome kako lica koja ne kreiraju, već puko sporovde pravne norme, doživljavaju ovaj institut, u kojoj mjeri koriste njegova rješenja, da li ga smatraju opravdanim, da li ga smatraju potrebnim i prikladnim, kakve su njihove impresije povodom prvih nekoliko godina implementacije ovog instituta; koji su pravci njegove dalje nadgradnje, te da li praktična primjena ovog instituta postiže odgovarajuće rezultate. Na kraju, autorka je, koristeći se kritičkom metodom, dala osvrt na problematiku sporazuma o priznanju krivice.

Ključne reči: Sporazum o priznanju, krivica, okrivljeni, terorizam