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DOI: 10.46793/LawPG.177T

GLOBALIZATION OF THE PLEA BARGAINING: LESSONS FROM COUNTRIES WITH UNLIMITED SYSTEM

Abstract

Plea bargaining is a global phenomenon among legal transplants of the criminal procedural law. It originated on the American continent, but become popular in the last 30 years around the world. Legislators, faced with the overloaded courts, found solutions in the comparative law that could solve this problem. Plea bargaining is far away from the perfect system of the solving criminal cases, since many critics follow this transplant. However, its positive sides are numerous, so it comes to life in every country where it is introduced. Of course, some states started from the beginning with rapid changes in legislations, completely turning its legal system to the Anglo-American. Others moved with significantly more caution, limiting plea bargaining on certain crimes. The author in this work deals with the agreement in countries with unlimited system of plea bargaining: Germany, Bosnia and Herzegovina and Serbia.

Key words: *plea bargaining, plea agreement, negotiation, limited and unlimited system, felony.*

1. INTRODUCTION

Plea bargaining is an essential component of the administration of justice. Properly administrated, it has to be encouraged.[1]

The term globalization is coined in the second half of the XX century.[2] In the last years, many legal problems acquired a global character, caused by the civilization development, enormous person's familiarity from one country to another and by the same problems that

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[1] Santobello v. New York, 404 U.S. 257, 260, 1971.

[2] W. Coleman, A. Sajed, *Fifty Key Thinkers on Globalization*, Oxon, 2013, 1.

follow various countries. It is, for example, the case with the euthanasia[3], physician-assisted suicide[4] or medical abortion. Citizen participation in the criminal trials is the next global solution in the criminal procedure world.[5] The mentioned period is marked by a strong legislative activity in the world aimed at increasing efficiency of the criminal proceedings.[6] Faced with the overloaded courts, legislators have tried to find better solutions for their legal systems looking into the comparative legal systems. This process is particularly visible in post-communist societies faced with rigorous requirements of the EU accession processes.[7] Changes were necessary in the field of the evidences[8] as well as on the main trial. One of the most famous legal transplants, beside the principle

[3] B. Banovic, V. Turanjanin, *Euthanasia: Murder or Not,* Iranian Journal of Public Health, 10/2014, 1316-1323; V. Turanjanin, B. Mihajlovic, *Right to die with Dignity – the Same Problems and Different Legal Approaches in European Legislations, with Special Regard to Serbia,* in: Human Rights between War and Peace, Vol. 2, 2015, 53-68; V. Turanjanin, *Eutanazija i lekarski potpomognuto samoubistvo pod lupom Evropskog suda za ljudska prava*, u: Krivičnopravni instrumenti suprotstavljanja terorizmu i drugim krivičnim djelima nasilničkog karaktera, Banja Luka, 2016, 558-576.

[4] V. Turanjanin, *Pozitivnopravno regulisanje specifične medicinske usluge u Sjdinjenim Američkim Državama,* u: XXI vek – vek usluga i Uslužnog prava (ur. M. Mićović), Kragujevac, 2012, 349-362.

[5] For example see: V. Turanjanin, *Jury Systems in Europe as the Anglo-Saxon Type of Trial,* in: Arhibald Reiss Days, Vol. III, Belgrade, 2014, 279-285; V. Turanjanin, *European Systems of Jury Trials,* US-China Law Review, 2/2015, 195-207.

[6] For More about factors that determinate efficiency of criminal proceedings, see M. Kolaković-Bojović, *Completion of Criminal Proceedings in Reasonable Time (Okončanje krivičnog postupka u razumnom roku, Beograd),* doctoral dissertation, University of Belgrade, Faculty of Law, 2016, 40-148.

[7] For more about relations between EU accession negotiations and improvement of the criminal jystice system efficiency, see: M. Kolaković-Bojović, *Efikasnost krivičnog postupka, reforma pravosuđa i pristupni pregovori sa EU,* Zbornik Instituta za kriminološka i sociološka istraživanja, Vol. 33, No. 2/2014, 189 – 201; M. Kolaković-Bojović, *Pojam efikasnosti krivičnog postupka-razumemo li ideal kome težimo,* u: Kriminal, državna reakcija i harmonizacija sa evropskim standardima (ur. L. Kron, A. Jugović), Institut za kriminološka i sociološka istraživanja, Belgrade, 2013, 373-384; M. Kolaković-Bojović, *Efikasnost krivičnog pravosuđa kao sredstvo suzbijanja kriminaliteta*, u: Kriminal i društvo Srbije: izazovi društvene dezintegracije, društvene regulacije i očuvanja životne sredine (ur. M. Hugson, & Z. Stevanović), Institut za kriminološka i sociološka istraživanja, Beograd, 2015, 237-254.

[8] V. Turanjanin, M. Vostinic, I. Zarkovic, *Evidences and the New Criminal Procedure Code of the Republic of Serbia*, in: Researching Security: Approaches, Concepts and Polices, Skopje, 2016, 272-284.

of the opportunity,[9] that received the epithet of the globe[10] is the plea bargaining. Originated from the territory of the United States,[11] the plea bargaining has spread through European and world legal systems in the late twentieth century. Plea agreement on the European soil took root in Germany, then in Italy, while today it is characteristic of French, Russian, Serbian, Montenegrin, Bosnian, Croatian legislations etc.[12] However, the way in which this legal transplant is regulated varies from country to country. In this paper, we will analyze legislations in Germany, Bosnia and Herzegovina and Serbia, as well as examples where the plea agreement can be applied on all felonies from the criminal codes (that is not common characteristic of most legal systems in the Europe). At the same time, the plea agreement is regulated in Bosnia very summarily, while it is much elaborated in the Serbian legislation. In the Republic of Serbia, plea bargaining is regulated by articles 313-319 of the CPC.[13] These are very detailed provisions, which distinguish Serbian legislator from the other legislators in the region,[14] mainly from Bosnia and Herzegovina, where legislator very summarily described plea agreement and his conclusion.

[9] D. Cvorovic, V. Turanjanin, *Principle of the Opportunity as a Diversion Form of Criminal Procedure,* in: Arhibald Reiss Days, Vol. III, 2015, 317-328.

[10] M. Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,* Harvard International Law Journal, Vol. 45, No. 1/2004, 1-64.

[11] V. Turanjanin, *Transplantacija sporazuma o priznanju krivice kroz zemlje anglo-saksonskog pravnog sistema,* u: Pravna misao u srcu Šumadije (ur. B. Vlašković), Kragujevac, 2012, 247-262.

[12] See more V. Turanjanin, *Plea Bargaining,* doctoral dissertation, Faculty of Law University at Kragujevac, 2016.

[13] Plea bargaining was formerly regulated by article 282 of the SCPC, titled agreement on guilty plea. Since the guilt (mens rea) is one of the four elements of the felony concept, it had to come to the change in title of this legal transplant. Today, it is, legally, agreement on confession of felony. We will simplify it, so further it will be called plea bargaining. Otherwise, other three elements are act (actus reus), predicted in law and illegality.

[14] This deviation from the ex-Yugoslav countries existed in the moment of the implementing of the plea bargaining. Now, this field is more in detail regulated.

2. PLEA BARGAINING IN GERMANY

„Fast jeder kennt es,
Fast jeder praktiziert es,
Nur keiner spricht daruber."[15]

In recent decades jurisprudence and different solutions imposed by court decisions have a great influence on the legislation, so, Germany reminiscent on the Anglo-Saxon countries.[16] From the plea agreement aspect, which has developed in the basic structure of the criminal proceedings,[17] Germany is a country that represents a sort of paradox. Plea bargaining, in accordance with its extremely compatible nature,[18] found in this European country the first fertile ground for its development.[19] But, for many years plea agreement remained out of written legislation and official regulation. In the practice, parties were reaching plea agreement for many times,[20] which has created legal uncertainty.[21] In the German courts, unacceptable and inexplicable overloaded with cases, parties looked for the exit from such situations in

[15] „Almost everyone knows about it,
Almost everyone does it,
But no one is talking about it."
H. J. Fätkinhäuer, pseudonym Detlef Deal, *Der strafprosessuale Vergleich*, StrVert, 1982, 545. Under this pseudonym the text is published 1982. On this subject: Detlef Deal, Der Spiegel 4/1987, www.spiegel.de/spiegel/print/d-13521783.html, access: Novembar 2011.

[16] M. Bohnalder, *Principles of German Criminal Law*, Oxford – Portland, 2009, 7; E. Siegismund, *The Public Prosecution Office in Germany: Legal Status, Functions and Organization,* 120th International Senior Seminar Visiting Experts' Papers, Resource Material Series No. 60, 2003, 58.

[17] M. Heller, *Das Gesetz zur Regelung der Verständigung in Strafverfahren – No big deal?,* Hamburg, 2012, 5.

[18] For example: M. Feeley, *Perspectives on plea bargaining,* Law & Society Review, Vol. 13, No. 2, Special issue on plea bargaining, 1979, 199-209.

[19] However, there are there are perceptions that it is unclear how German plea agreement is connected with the American type, due to the large differences in the implementation. C. Safferling, E. Hoven, *Plea Bargaining in Germany after the Decision of the Federal Constitutional Court,* German Law Journal, Vol. 15, No. 1, 2014, 3.

[20] This view also in: M. Škulić, *Osnovi uporednog krivičnog procesnog prava i problemi reforme krivičnog postupka,* u: Kaznena reakcija u Srbiji, I (ur. Đ. Ignjatović), Belgrade, 2011, 108.

[21] On this topic: W. Felstiner, *Plea contract in the West Germany*, Law & Society Review, Special issue on plea bargaining, Vol. 13, No. 2, 1979, 309-325.

the informal agreement between them (*Flucht in die Absprache*)[22], which took place outside the margins of the legal regulation, in shadow.[23] To make it simple, the plea agreement was a part of the social reality, so, negotiations between prosecutor, defendant and the judge were not rare.[24] But, there was no empirical data on this phenomenon to the 1970th years of the last century, because meetings of these subjects outside the courtroom were rare.[25] Finally, on 28th May 2009 with fanfare is welcomed Law on agreements in criminal procedure,[26] incorporated into the Criminal Procedure Code (hereinafter: GCPC), at the time when the most European countries already had in their legislations implanted plea bargaining.[27]

In Germany, the plea agreement is an agreement between prosecutor, defendant with a lawyer and a main trial judge, where defendant agrees to plead guilty for the crime for which he is charged and to refrain from presenting evidences in his defense. Prosecutor promises that he will request a sentence within negotiated limits, and agrees to propose a penalty that will not exceed such limits. Thus, while the court in most countries that recognize plea bargaining in various forms appears as an impartial party in the criminal proceeding, in Germany it has the double role: as a party who concludes the agreement, but also as its supervisor.[28] Considering this, , we can

[22] V. Krey, O. Windgätter, *The Untenable Situation of German Criminal Law: Against Quantitative Overloading, Qualitative Overcharging, and the Overexoansion of Criminal Justice,* German Law Review, Vol. 13, No. 06, 2012, 579, 600.

[23] F. Bittmann, *Consensual Elements in German Criminal Procedure Law*, German Law Journal, Vol. 15, No. 1, 2014, 21.

[24] H. P. Mursch, *Grundregeln bei Absprachen im Strafverfahren*, Zeitschrift fur Rechtpolitik, 220.

[25] T. Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure,* in: Crime, Procedure and Evidence in a Comparative and International Context – Essays in Honour of Professor Mirjan Damaška (eds. J. Jackson, M. Langer, P. Tillers), Oxford – Portland, 2008, 43.

[26] BGBI I 2009, S 2353.

[27] Changing the Criminal Procedure Code towards its liberalization and party's disposition with the proceeding in the legal literature is known as "holding the requiem above the old code". On this topic: B. Schünemann, *Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaats,* Zeitschrift fur Rechtspolitik, Vol. 42, 2009, 104; H. Rosenau, *Die Absprachen im deutschen Strafverfahren,* in: Straftheorie und Strafgerechtigkeit (Hrsg. H. Rosenau, S. Kim) Frankfurt, 2010, 45, H. Rosenau, *Die Absprachen in Deutchland,* Law&Justice Review, Vol. 1, 2010, 36.

[28] J. I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View,* The American Journal of Comparative Law, Vol. 54, 2006, 214.

identify the basic characteristics of the plea bargaining in Germany: the accused admits his guilt at trial; the all main parties involved in criminal procedure participate in the negotiations; they negotiate range of penalty- not particular penalty. The most common term for plea bargaining in the German legal terminology is *Absprache*, although we could find terms *Verstandigung*, *Vereinbarung* and *Abrede*.[29] In the other words, plea agreement here is simply an agreement or court agreement, but very rarely plea agreement.

German informal agreements are, like the other countries that have adopted different types of such agreements, based on the American plea bargaining system, but significantly deviates from the original model. The main reason for it, could be found in the role of the court. More precisely in the American legal system judge mostly has a passive role, while the main actors are the prosecutor and defendant with his/her legal counsel, who reaching an agreement on mutual benefits before the trial. So, the court has a right to accept or reject such an agreement (but in the most cases court verifies it).[30] In Germany, the court is in a different position, due to fact that a judge has a main place in the whole criminal procedure, and taking an active role in the negotiations, leading to the greater transparency.[31] He is active in establishing the facts decisive of the specific case, with authority given by GCPC, manages and controls criminal proceeding, examines witnesses and presents evidences. He has access to the prosecutor's file, so, it possesses unrestricted possibility to know all facts gathered to the beginning of the trial.

The German criminal procedure is also characterized with the specificity related to the right of the defense counsel on insight in the prosecutor's files. In this way, defense counsel and defendant can introduce themselves in all facts relevant for the court. Based on that, they consider the risk of the ordinary trial, without plea bargaining. In other words, knowing all facts of the case, they can choose between a

[29] M. Kerscher, *Plea Bargaining in South Africa and Germany*, Stellenbosch, 2013, 5.

[30] On comparision between these two legal systems in terms of plea bargaining: D. Karioth, *Absprachen im Strafprozess mit rechtsvergleichendem Blick auf das „plea bargaining" im anglo-amerikanischen Strafprozess,* in: Arbeiten zu Studium und Praxis im Bundesgrenzschhutz (Hrsg. R. Ooyen, M. Möllers), Lübeck 1999/2000, 114-145.

[31] J. I. Turner, *Can We Manage Plea Bargaining Better?* Insights from Germany, Paper presented at the annual meeting of the Law and Society, 2009, http://www.law.smu.edu/faculty/Turner, November 2011.

trial and plea bargaining. During the plea bargaining procedure, any party may occur as the initiator of the negotiations. Negotiation will be between defendant with defense counsel, prosecutor and judge.[32]

In the German criminal procedure legislation, there are no legal provisions that limit plea bargaining on certain felonies, based on the prescribed sentence. The possibility to apply this legal institute even for the most serious crimes is one of the reasons why the plea bargaining in Germany is criticized. However, such forebodings have not come true. The parties reach a plea agreement, usually in the field of the secondary crime, while its conclusion for the most serious felonies is exceptional.[33] Further, plea bargaining has no place in every criminal proceeding, so, it is impossible to conclude an agreement in the proceedings where defendant is caught *in flagrante* or if he pleaded guilty in the earlier stage of the proceeding (because in the later phase he does not have anything for negotiations). Therefore, this system of agreements favors defendants who know their right to remain silent and have legal counsels capable to make harder court's work.[34]

The court has to set up upper limit that sentence will not pass. It is not allowed to agree certain penalty, so, the parties negotiate about the range of the sentence,[35] which could be higher or lower, but it does not deviate significantly from the range prescribed by the Criminal Code. As it is logical, punishment has to be proportional to the gravity of the crime, but, the reduction of the sentence is by percentage (for example, one third of the prescribed sentence etc.[36]). Usually, the penalty is reduced from one-quarter to one-third of the prescribed sentence.[37] Therefore, they determine limit within a court will impose a sentence,

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[32] J. Hermann, *Bargaining Justice – A Bargain for German Criminal Justice,* University Pittsburg Law Review, 1992, 764. So, while in the American legal system two main actors of the negotiations are prosecutor and defendant, in Germany we have another, third party: a judge. His participation guarantees that a punishment will not be determinate in the higher amount than in the plea agreement. Because of that, there is a greater possibility that defendant will choose plea bargaining. M. Langer, *op. cit.*, 43.

[33] R. Rauxloh, *Formalization of Plea Bargaining in Germany – Will the New Legislation Be Able to Square the Cricle?,* Fordham International Law Journal, Vol. 34, 2010, 304.

[34] T. Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure,* 46.

[35] H. Rosenau, *Die Absprachen in Deutchland*, 67.

[36] G. Küpper, *Konflikt oder Konsens*, HFR 14/2007, 9.

[37] J. I. Turner*, Judicial Participation...*, 235.

although, it is most frequently sentence from the upper limit line.[38] In addition, participants have an opportunity to comment limits, and the parties will reach an agreement in the moment when every party accepts a court's proposal (paragraph 257c point 3.).[39]

3. PLEA BARGAINING IN BOSNIA AND HERZEGOVINA

Plea bargaining in the Bosnian legislations is introduced by the end of 2000, when it enacted Criminal Procedure Code of the Brcko District.[40] The Criminal Procedure Code for the whole Bosnia and Hercegovina,[41] as well as CPC of the Federation Bosnia[42] and Herzegovina and CPC Republic of Srpska[43], were adopted in 2003, when the High Representative for Bosnia and Herzegovina released a set of criminal laws: Criminal Code, Criminal Procedure Code and Law on Witness Protection. With these laws, international community finished its work on the plan of developing criminal legislation in Bosnia and Hercegovina. Based on this legislation, entities adopted laws on the same matter, which represents more or less harmonized versions CPCs with the BCPC. For the first time, there was introduced prosecutorial investigation, but also cross-examination, guilty plea, plea bargaining, criminal warrant etc.[44] This type of criminal proceeding represents a mix of the continental and adversarial Anglo-American law, and it is the result of the reconciliation

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[38] *Ibid.*, 222.

[39] More on this topic in: V. Turanjanin, *Sporazum o priznanju krivice u krivičnom procesnom pravu Nemačke*, u: Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena, Zlatibor, 2013, 300-316.

[40] Official Gazette of the Brcko District, No. 7/00, 1/00, 33/13, 27/14. Bosnia and Herzegovina is a very specific country. It consists from four legislations: legislations for whole Bosnia, for its two entities (Federation Bosnia and Herzegovina and Republic of Srpska) and Brcko District. This is complicated division, so, there are numerous problems.

[41] Official Gazette of the Bosnia and Herzegovina, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 (hereinafter: BCPC).

[42] Official Gazette of the Federation Bosnia and Herzegovina, No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07 i 9/09.

[43] Official Gazette of the Republic of Srpska, No. 50/03, 111/04, 115/04, 29/07, 68/07, 119/08, 55/09, 80/09, 88/09 i 92/09.

[44] D. Kaurinović, *Praktična iskustva u primjeni novih krivičnoprocesnih ustanova: priznanje krivice, sporazum o priznanju krivičnog dela i kazneni nalog,* u: Aktuelna pitanja primjene krivičnog zakonodavstva u BiH, Neum, 2004, 1.

of these two legal cultures.[45] So, Bosnia left the system where the court had a primary role in the procedure and transits to a system in which the focus is on the prosecutor and the defendant. From the set of the transplanted legal institutes, guilty plea and plea bargaining should have a great role in the strengthening of the criminal procedure. In Bosnia, plea bargaining may occur in different forms: negotiations about the legal qualification of the felony, negotiations about the criminal sentence and negotiations on the facts of the committed crime. Usually, actors see plea bargaining as agreements on sentence, but there are authors who believe that other types of negotiations could be considered as part of the legal definition.[46]

Facing charges against him, the defendant has several legal possibilities, starting with the choice of the ordinary criminal proceeding, through the guilty plea procedure to the plea bargaining. According to the BCPC[47], the defendant and his counsel can, until the end of the trial before the court of the first instance and before the appellate court, negotiate with the prosecutor on the conditions for guilty plea (article 231 paragraph 1 BCPC). Both parties have an aim to conclude an agreement that is in their best, conflicted interest. The agreement is usually the result of the criminal cases that may lose both prosecutor and defense.[48] The desire of the defendant to enter into this type of the procedure or to avoid it[49] rests mainly at the strength of the prosecutor's evidences.[50] However, defendant cannot conclude the agreement if he, on the preliminary

[45] H. Sijerčić-Čolić *et al., Komentari zakona o krivičnom/kaznenom postupku Bosne i Hercegovine,* Sarajevo, 2005, 193.

[46] Sporazum o priznanju krivice: primjena pred sudovima BiH i usaglašenost sa međunarodnim standardima za zaštitu ljudskih prava, OSCE, 10.

[47] Due to the volume of this work, as well as equality of the entity's legal solutions regarding plea bargaining, in this work we will rely on this legal text.

[48] M. Simović, *Pojednostavljene forme postupanja u krivičnom procesnom zakonodavstvu Bosne i Hercegovine (zakonska rješenja i iskustva u dosadašnjoj primjeni),* u: Alternativne krivične sankcije i pojednostvljene forme postupanja (ur. S. Bejatović), Beograd, 2009, 207.

[49] It is believed that reasons on which rely defendant's decision to choose ordinary criminal proceeding are reduced on two. First, the defendant chooses any chance to get acquittal verdict because he will be definitely convicted in plea bargaining. Second, he will choose ordinary proceeding in the case when we believe in his innocence. See: M. Colin, *Deal or no deal: why courts should allow defendants to present evidence that they rejected favorable plea bargains,* American Criminal Law Review, 2011, 1.

[50] M. N. Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence during Plea Bargaining,* Fordham Law Review, Vol. 81, 2013, 3612.

hearing, pleaded guilty (article 231 paragraph 2 BCPC). Only in the case when the accused pleaded not guilty, or remained silent (when there is a legal presumption that he is not guilty), he can enter into plea bargaining.

In the negotiations, the prosecutor offers the defendant certain benefits in exchange for the admission of guilt, which are reflected in the sentence proposal below the statutory minimum or more lenient type of criminal sanction (article 231 paragraph 3 BCPC). Since the plea agreement is a kind of the contract, the prosecutor and the defendant will negotiate in order to exchange information. This provision is a cooperation clause, which is characteristic of the adversary systems, set up to gather information about the other persons involved in crime, as well as to provide a potential testimony against those persons. Prosecutors have started to apply cooperation clauses in the particularly important cases, e.g. for war crimes, organized crime and human trafficking,[51] where they have numerous problems in the evidence gathering. So, in this case, the prosecutor could offer immunity as a part of the agreement.[52] These clauses with the testimony obligations are desirable, because they provide valid evidence to the prosecutor, which can be used in the other criminal proceeding.[53] This kind of agreement may contribute to providing evidence to the prosecutor in order to facilitate the prosecution other perpetrators.

As mentioned, in the Bosnian legal theory prevailing understanding that plea agreement can only refer to the sentence reduction, and not to the sort of indictment or to a facts of crime. The prosecutor may offer a more lenient criminal sanction (suspended sentence or judicial admonition instead imprisonment or fine), a less severe sentence (fine instead imprisonment) or to apply the provisions on sentence reduction and reduce imprisonment sentences within legal limits. In addition to this, he or prosecutor can offer security measures, as a specific type of the criminal sanctions. The parties can accurately determine the type and extent of the sentence, or they can determine just limits for the sentence. In

[51] M. Simović, V. Simović, *Napomene o sporazumima u krivičnom postupku,* u: Krivično zakonodavstvo Srbije i standardi Evropske unije (ur. S. Bejatović), Kragujevac, 2011, 171.
[52] *Ibid.*
[53] V. Ikanović, P*regovaranje o krivici nakon desetogodišnje primjene u Bosni i Hercegovini,* u: Pojednostavljene forme postupanja u krivičnim stvarima: regionalna krivičnorocesna zakonodavstva i iskustva u primeni, Beograd, 2013, 188.

any case, they must remain within the framework of the legal provisions.[54]

The competence for deciding on the plea agreement is divided. Usually, the prosecutor sends a plea agreement in written to the preliminary hearing judge or to the trial judge - depending from the phase of the procedure. On plea agreement decides judge for the preliminary hearing to the moment of the referring the case to the judge for the main trial, after confirmation of the indictment. After this moment, on plea agreement decides main judge or panel of the judges (article 231 paragraph 4 BCPC). The court may accept or reject an agreement (article 231 paragraph 5 BCPC). He firstly has to determine: whether the defendant entered into plea bargaining procedure voluntarily, consciously, with understanding and knowing of the possible consequences, including those related to damage and costs of the criminal proceeding; whether there is enough evidence of the defendant's guilt; whether defendant understands that he waive his rights to trial and appeal; whether the proposed criminal sanction is in accordance with the Criminal Code; whether defendant had an opportunity to comment victim's requests (article 231 paragraph 6 BCPC). The lack of the one of these elements inevitably leads to the agreement invalidity. This procedure has to be abandoned and the case referred to the ordinary trial. In the meantime, the defendant and the prosecutor could reach another plea agreement. Otherwise, there will be distortion of the due process principle.[55] The existence of these requirements, the court may determine only through the dialogue with the defendant, which is today, unfortunately, far from ideal. This conversation has to be exhaustive. The court shell gain full confidence in the fact that the defendant understands the consequences of his guilty plea. In practice, this dialogue is often summarized. The court poses the most important questions very quickly, in order to finish a case as early as it is possible.[56]

The court will reject the plea agreement in the case when one of the mentioned requirements missing. The main reason for the rejecting the agreement is proposal of inadequate sentence. This decision is final. Basically, the court here does not render and draft a separate written and

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[54] D. Kaurinović, *Praktična iskustva u primjeni novih krivičnoprocesnih ustanova: priznanje krivice, sporazum o priznanju krivičnog dela i kazneni nalog*, 5.

[55] M. N. Petegorsky, *op. cit.*, 3608-3609.

[56] Sporazum o priznanju krivice: primjena pred sudovima BiH i usaglašenost sa međunarodnim standardima za zaštitu ljudskih prava, OSCE, 22.

reasoned decision, on which parties should have a right to appeal. This decision shall be mandatory entered into a record.[57] The main hearing shall be scheduled within 30 days. Guilty plea cannot be used as evidence in the further proceeding (article 231 paragraph 8 BCPC). However, the problem arises in a case of guilty plea during the main trial, when the court refused to accept such plea. In the minds of judges and all presents is already solidified a confession and presumption of innocence is violated in the further course of the proceeding. This problem can be solved only with the exemption of the trial judges and their replacement with new judges. In that case, criminal proceeding shall start from the beginning.[58] Otherwise, when the court rejects an agreement, the prosecutor with the accused and his lawyer may start new negotiations. A proposed sentence, in that case, will be more severe than earlier. The procedure with new agreement is identical to the first submission.

If the court accepts an agreement, it will continue the proceeding in order to impose a sentence from the agreement (article 231 paragraph 7 BCPC). If the agreement is accepted in the main trial, judge or panel of judges will impose a sentence. The same procedure will be applied if the appellate court revokes a verdict and order a new trial.[59] A court does not have the authority to refuse a proposed sentence and instead impose a sentence that it is more adequate. This can be done only after ordinary trial, ended without plea agreement.

About results of plea bargaining, a court will notify the victim, who normally plays no role during this procedure, but has to be informed about it because of his right to a damage claim (article 231 paragraph 9 BCPC). In the other words, a victim has a right to submit a compensation claim to the end of the main trial. If a court accepts an agreement, this request also has to be addressed. It could be awarded wholly or partially (when for the rest a court may refer a victim to a civil procedure). Past practice has shown that these issues are rarely solved in the plea bargaining processes.[60]

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[57] H. Sijerčić-Čolić *et al., op. cit.,* 625.

[58] *Ibid.,* 625.

[59] M. Simović, V. Simović, *Krivično procesno pravo*, 343.

[60] Sporazum o priznanju krivice: primjena pred sudovima BiH i usaglašenost sa međunarodnim standardima za zaštitu ljudskih prava, 31.

3.1. Right to appeal in the Bosnia and Herzegovina

After initial uncertainty about the existence of the right to appeal against verdict based on the plea agreement, in theory and practice has been taken a view that the appeal is allowed legal remedy in this procedure,[61] except for the imposed sentence. However, BCPC does not exclude right to appeal, but it is pointless to grant right to appeal against agreed sentence. In a case when the court imposes different sentence, defendant would have a right to appeal on this ground.[62] Right to appeal is excluded both in a case when the prosecutor and defendant negotiated fixed penalty and range of the sentence (in this case, the court has to impose the certain penalty).[63] The possibility of the filing appeal on other grounds is not explicitly excluded, but it hardly could have an impact on the verdict in merits.[64] Supreme Court of the Republic of Srpska had also took a view that the appeal is allowed, except against the sentence, because it has to allow to higher courts to examine the correctness of the application of the substantial and procedural provisions, which accepted other courts in Bosnia and Herzegovina. Thus, the existence of circumstances related to the mental state of the defendant at the guilty plea moment, which cast doubt on the ability of the accused to freely give a guilty plea statement, obliges a court to determine a nature of the defendant's mental disorder and impact on the ability to enter into the plea bargaining procedure. Failure of the court to determine such circumstances leads to the essential violation of the criminal procedure provisions.[65] Finally, it is important to mention that, although in the narrower sense, it is possible to appeal against a verdict of the second-degree court based on the plea agreement.[66]

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[61] Opposite view: M. Govedarica, *Donošenje presude bez suđenja u krivičnom postupku Republike Srpske,* Pravna riječ, 15/2008, 190.

[62] Rješenje Vrhovnog suda Federacije Bosne i Hercegovine broj Kž. 251/05 od 07.06.2005. godine, published in: Bilten sudske prakse Vrhovnog suda Federacije Bosne i Hercegovine, 1/2005.

[63] R. Janković, *Mogućnost žalbe protiv presude kojom se optuženi oglašava krivim na osnovu sporazuma o priznanju krivice*, Pravna riječ, 29/11, 671.

[64] H. Sijerčić-Čolić *et al., op. cit.,* 624.

[65] Rješenje Vrhovnog suda Federacije Bosne i Hercegovine broj 07 0 K 005047 11 Kž 2 od 04.05.2011. godine, published in: LJ. Filipović, *Sudska praksa Vrhovnog suda Federacije Bosne i Hercegovine,* Pravna misao, 11-12/2011, 128-131.

[66] R. Janković, *op. cit.*, 678.

Table 1: The ration of the proposed penalty in BCPC and imposed sentences in plea agreements[67]

Felony	Proposed penalty	Imposed criminal sanction
Tax evasion	Fine or imprisonment up to 3 years	Suspended sentence
Accepting gifts and other benefits	Imprisonment of 1 to 10 years	Suspended sentence and fine in the amount of EUR 500,00
Abuse of position or authority	Imprisonment of 6 months to 5 years	Imprisonment of 2 months: suspended sentence
Organized crime	Imprisonment of at least 5 years	Imprisonment: 5 years, 1 year
War crimes against civilians	Imprisonment of at least 10 years	Imprisonment of 5 years
Crime against humanity	Imprisonment of at least 10 years or long-term imprisonment	Imprisonment of 8 years
Hard crime against public transport	Imprisonment of 6 months to 5 years	Imprisonment of 18 months
Endangering public traffic	Imprisonment of 2 to 12 years	Imprisonment of 5 months
Dereliction of duty	Imprisonment of 6 months to 5 years	Imprisonment of 6 months
Murder	Imprisonment of at least 5 years	Imprisonment of 10 years
Serious bodily injury	Imprisonment of 6 months to 5 years	Suspended sentence
Unauthorized production and trafficking in narcotics	Imprisonment of 1 to 10 years	Imprisonment of 4 years
Causing general danger	Imprisonment of 1 to 8 years	Imprisonment of 14 months
Participation in a fight	Imprisonment up to 3 years	Imprisonment of 60 days

In the table above, we could see statistical data related to the plea bargaining in Bosnia. Although this legal transplant is accepted and could be

[67] Verdicts are taken by method of the randomly sample. See more in: B. Simonović, V. Turanjanin, *Sporazum o priznanju krivičnog dela i problemi dokazivanja,* u: Kriminalistički i krivičnoprocesni aspekti dokaza i dokazivanja, Sarajevo, 2013, 29.

applied on every felony, its use is not as common as in the USA. The reason for that lies in a different legal culture and in the court's penal policy, which does not deviate from the penal policy expressed in the ordinary criminal proceedings. The parties most often determine prison sentence, then suspended sentence, while the least frequently they determine fines,[68] which is, after all, expected. Despite criticism, prosecutors and defendants continue to apply plea bargaining process on the whole territory of Bosnia and Herzegovina.[69] There is a tendency of the growth number of cases ended by agreement in relation to their total number.[70]

4. PLEA BARGAINING IN SERBIA

The plea bargaining is regulated by articles 313-319 SCPC. Due to the limited scope of this paper, we will explain briefly basic provisions and process of negotiations. The required condition for plea bargaining is initiative for it. In provisions that regulate the rights and duties of the public prosecutor lays his authority to conclude the plea agreement (as well as both types of testimony agreements). In a case of the plea agreement, an initiative can be viewed in two ways. Firstly, a prosecutor may refer to the defendant or his legal counsel offer for agreement with every necessary element, where, of course, criminal sanction will take a central place.[71] Secondly, a prosecutor may refer to the defendant only invitation for negotiations. Of course, the opposite is possible, but less likely. In practice, the problem can be the refraining of each side from the initiative, because of the fear that could be interpreted as weakness and which would weaken negotiate position.[72] An

[68] D. Kaurinović, *Praktična iskustva u primjeni novih krivičnoprocesnih ustanova: priznanje krivice, sporazum o priznanju krivičnog dela i kazneni nalog*, 6.

[69] Serbia is the only country in Europe that, in addition to Bosnia, had several criminal procedure codes that existed in the same time.

[70] M. Novković, *Normativna i praktična iskustva u regulisanju i primjeni sporazuma o priznavanju krivice kao novog instituta krivičnog procesnog prava u BiH,* Bilten Okružnog suda u Banjoj Luci, 2-4/2006, 22.

[71] Otherwise, regardless of plea bargaining, in the theory has been present notion that the public prosecutor should have the option to propose criminal sanction in the ordinary criminal procedure. Today, this is the legal rule anyway. D. Nedić, *Aktuelna pitanja glavnog krivičnog postupka sa aspekta javnog odnosno državnog tužioca*, u: Mogući pravci razvoja jugoslovenskog kaznenog zakonodavstva i njihove osnovne karakteristike, Beograd, 1999, 139.

[72] D. Kadiev, *Postupak dogovora o krivici a aspekta branioca,* u: Pojednostavljene forme postupanja u krivičnim stvarima, Beograd, 2013, 221.

initiative should run, in practice and for minor crimes, defendant and legal counsel, as it is case in neighboring countries, primarily in Bosnia. In Croatia, defense lawyers usually initiate negotiations in cases where is stipulated the prison sentence in the long or medium term.[73]

When the other party accept negotiation proposals on conditions for the guilty plea, plea bargaining begins.[74] Subject of the plea agreement is regulated by the article 314 of the SCPC. This article prescribes elements that plea agreement has to contain, and elements that are facultative. In the other words, plea agreement has its mandatory and facultative elements. Every plea agreement has to contain six mandatory elements:

1. Factual description of the felony[75];

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[73] N. Cambj, *Sporazumijevanje prema noveli Zakona o kaznenom postupku,* Hrvatski ljetopis za kazneno pravo i praksu, Vol. 20, No. 2/2013, 676.

[74] Before that, we have to state that the negotiation literature splits into two directions: one is reflected in the prescriptive advices how to negotiate successfully and other in the descriptive analysis of the negotiate process. D. Maynard, *Demur, Defer and Deter: Concrete Actual Practices for Negotiation in Interaction,* Negotiation Journal, April 2010, 126. Parties have to negotiate in the prosecutor's office. There is no other place where negotiations could be carried out in accordance with the law, so, this provision is logical from that aspect. The manner and place where negotiations are initiated are not at the same time essential for the place where negotiation will be carried out – it must be in the prosecution office. On this occasion, public prosecutor will instruct the defendant about his/her the right to counsel, but also about rights and obligations arising from the possible plea agreement and about the fact the he has a right to withdraw from the negotiation proposal.

[75] The legislator primarily prescribes that the plea agreement should contain factual description of the felony that is subject of the plea agreement (article 314 SCPC). Only with the complete factual description can be evaluated and illuminated all circumstances. The question is, what does it mean factual description of the crime, is it description given by defendant or prosecutor? This is an important issue, because in this procedure process of proving is not completed or it is essentially shortened. Defendant always has its own view on crime, starting with the explanation of the motives, conditions and circumstances existed at the time of the crime (i.e. that precede or followed), to the real actions of the certain individuals (victims, accomplices, witnesses etc.). The public prosecutor has a quite different view on the facts. Some time, between their two views may be large (significant) differences. If the defendant is actually perpetrator, that does not mean that he knows all circumstances that should be in the description. For example, he could be in a state of affect, or under the influence of drugs or alcohol. On the other hand, the prosecutor did not attend to the criminal event, so, he can have a picture of the event only based on the confession of the defendant and available evidences. If he concludes plea agreement in the earlier investigation phase, he will usually have fewer evidences for building his event image. He will be under the greater influence of the confession and presented facts.

2. Confession[76];
3. Agreement on the type, extent and range of the criminal sanction[77];

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[76] The basic element that must be contained in every plea agreement is a confession for one or more felonies. The decision of the defendant, whether he will confess or not is one of the most important in the criminal proceeding. In order to make the most favorable step, defendant should evaluate whether an indictment correspond to the facts of the crime. Since the prosecutor does not have to present all evidences against him, the defendant must have a sufficient information quantum in order to decide whether to confess or not. J. A. Epp, *Building on the Decade of Disclosure in Criminal Procedure*, London – Sydney, 2001, 46. Confession must be fully. It is fully if essentially and substantially correspond to the charges or to the prosecutor's attitude in the concrete indictment or indictment that should be filled. M. Škulić, *Komentar Zakonika o krivičnom postupku,* Belgrade, 2009, 937. It must be complete and comprehensive, refer to the factual substrate, contain all circumstances of the crime, motives, means, as well as any circumstance that may be known only to the defendant. Thus, confession has to be reasoned. Then, it must be given knowingly, voluntary and with the exclusion of the error possibility, although every required element should be clearly separated and described, it is particularly emphasized for this segment. D. Nikolić, *Sporazumi o priznavanju krivičnog dela kao reprezentativna forma pojednostavljenog postupanja u krivičnim stvarima*, u: Pojednostavljene forme postupanja u krivičnim stvarima: regionalna krivičnoprocesna zakonodavstva i iskustva u primeni (ur. I. Jovanović, M. Stanisavljević), Beograd, 2012, 135.

[77] One of the mandatory elements of every plea agreement is agreements on criminal sentence or more precisely, agreement on the type, extent and range of punishment or other criminal sanction. Since the ancient Romans originated many sentencing rules, like nulla poena sine lege, poena debet commensurari delicta and indicum est actum trium personarum: actoris, rei, iudicis. There are two basic rules for the legally sentencing in the plea agreement. First, the sentence could be determined in the absolute terms, in a case when the prosecutor and defendant strictly determine the sentence that will be imposed if defendant accepts the agreement. This is a system of the absolute sentence determination. The second is the system of the relative sentencing determination, where the prosecutor and the defendant determine a range within the court in the process of agreement verification will specify the sentence. Both solutions have their advantages and proponents. The legislator did not explicitly favor any solution, and theoretically, this could cause problems in the practice and lead to the different plea agreements. In the comparative law, we could find both solutions. The system of the relative sentence determination implies the determination of limits within the court will determine the sentence. Prosecutor and defendant in the agreement determine upper and lower limits for the sentence, but the court determines the precise length of the sentence. In this way the court has a significant control over the plea agreement because it does not allow the parties to determine precise sentence length. However, this is very problematic provision from the Serbian legislator's standpoint. In this legal system, the court has no obligation to collect and present evidences. So, we cannot expect from the court to individualize

4. Agreement on the costs of the criminal proceeding, on confiscation of proceeds of crime and property claim, if it is filed;

5. The waiver of the parties from the right to appeal against the court's decision on accepting of the plea agreement, except in a case when legislator provides a possibility for the lodging an appeal;

6. Signature of the parties and legal counsel.

In addition to these elements, plea agreements may also contain three optional elements:

1. The statement of the public prosecutor to abandon prosecution for felonies that are not covered by plea agreement;

2. Defendant's statement about accepting obligations imposed by opportunity principle (article 283 SCPC), if that obligation could be enforced before the filing of the plea agreement;

3. Agreement on confiscation of assets derived from the crime.

The court has to accept the plea agreement in the process of control. The plea agreement can be submitted to the end of the trial, both in the first instance and if the higher court abolishing the verdict order new trial before the court of the first instance. The court shall schedule the new hearing at which it will decide on the plea agreement. This could be the preliminary hearing. The hearing will be ordered like any other hearing in the criminal procedure, but it has to be emphasized that this is the hearing aimed at deciding on the plea agreement.[78] On this hearing, the court will invite public prosecutor, defendant and his defense counsel (article 315 paragraph 2 SCPC). Very important issue in this field is the question of the publicity. It suffered many changes until now. According to the current provision, this hearing shall be held without public (article 315 paragraph 3 SCPC).

There are three possible court decisions on the submitted plea agreement (one procedural and two in merit). The court can adopt the agreement, reject

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sentence on better ways than the prosecutor and defendant. The role of these parties is just in the negotiations, where they will determine limits for sentence. In this model of sentence determination, the legislator must better protect the defendant's rights. This model should be used in the extremely limited circumstances, usually when parties were unable to agree on the sentence, main hearing is in advanced stage and most of the evidences are presented. The system for the absolute sentence determination represents the determination of the sentence in the precise length. A multitude of the comparative legislations is based on this model. Probably, the most important argument for the claim that legislator should provide this model lies in the fact the court does not collect evidences. Parties are subjects that are the most capable for sentence determination, so, the court should just accept or reject the agreement.

[78] V. Đurđić, *Sporazum o priznanju krivice*, Revija za kriminologiju i krivicno pravo, 3/2009, 98.

it or refuse it. Each of these decisions the court shall issue towards the inside from the specific situation and conditions. When the court takes the agreement in consideration, it will firstly check whether they have fulfilled all necessary legal requirements for the further examination, i.e. does the agreement contains certain shortcomings due to which it has to be discarded. The court will discard the agreement for three reasons (two provided by the law and the third drawn from the spirit of the provisions):

1. If the agreement does not contain data required by article 314 paragraph 1;

2. If defendant, duly summoned, does not come to the hearing and does not justify his absence and

3. If parties, until the end of the hearing, abandon from the agreement.

The other decisions are in merits. The court has to determine a few facts before it adopt the agreement. In the other words: it has to determine:

1. That the defendant knowingly and voluntary confessed crime(s) that are subject of the indictment;

2. That the defendant is aware of all consequences of the agreement, especially that he waives the right to trial and accepts limiting his rights to appeal;

3. That there are other evidences that are not inconsistent with the confession;

4. That a criminal sanction is in accordance with the criminal or other law (article 317 paragraph 1 SCPC).

The court checks the facts above primarily from the plea agreement, since its first move is to check agreement, and then to examine defendant, prosecutor, defense counsel, the victim and its legal counsel. So, it checks these facts through the dialogue with subjects involved in the proceeding.

The third decision is rejecting the agreement. The court will bring this decision if it determines next:

1. There are the reasons referred to the article 338 paragraph 1 SCPC;

2. If there are no complied one or more conditions for accepting the agreement.

In the first place, the court states that the court will reject the agreement if it finds that:

1. That the act he is charged is not a crime, and there are no conditions for security measures;

2. That the prosecution for concrete felony is obsolete, or is subject to amnesty or pardon, or there are other circumstances that permanently preclude prosecution;

3. That there are insufficient evidences for a reasonable suspicion that defendant committed the felony.

After the court finds the existence of the above shortcomings, it will bring the reasonable decision on agreement rejecting. If we look at all decisions, we should note that the court adopts the agreement with the verdict, as the most important decision in the criminal procedure.

The right to appeal is allowed in the limited form. Against the verdict on the adopting plea agreement, public prosecutor, defendant and his legal counsel may appeal within eight days if:

1. That the act he is charged is not a crime, and there are no conditions for security measures;
2. That the prosecution for concrete felony is obsolete, or is subject to amnesty or pardon, or there are other circumstances that permanently preclude prosecution;
3. That there are insufficient evidences for a reasonable suspicion that defendant committed the felony and
4. The judgment does not refer to the subject of the agreement (article 319 paragraph 3 SCPC).

These reasons for appeal do not correspond to the reality and raise numerous questions. Finally, the legislator permitted extraordinary legal remedies against judgment, although it is debatable because of its success.

5. CONCLUSION

The process of globalization has inevitably had to affect the field of criminal procedure. As a typical example of the global legal institute in the criminal proceeding, authors mainly specify plea agreement, which represents the efficient method of simplifying a very long and inefficient procedure. In this work we have covered three systems that implemented plea bargaining in their legislations. In them, negotiations on plea agreement are possible for every felony that exists in the criminal code. This is not characteristic of the numerous European criminal proceedings and this solution has attracted attention of many authors, and a flood of the objections. However, we could say that every legal solution contained in the criminal procedure code related to the limiting plea agreement attracts a lot of criticism. Both solutions have a number of the advantages and disadvantages, but the authors of these lines follow a group that justifies extension plea agreement to all crimes, since it is very necessary in the prosecution of the serious crimes. The power of the United States in this region definitely influenced legal solutions in Bosnia and Serbia.

In Serbia, as in other countries, plea bargaining has its supporters and opponents. However, supporters are more numerous, but particular justified and reasoned objections should not be ignored. Some objections are not correct, for example, discordance with the basic principles of the criminal procedure. It is an objection that has to be rejected. We believe that co-existence of the opposite principles can lead to the more effective criminal proceeding. This is the case both in Serbia and other countries. Plea bargaining is not a perfect legal solution, but we are aware of all difficulties in the criminal procedure without it.

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