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O NEDOSTACIMA SPORAZUMA O PRIZNANJU KRIVIČNOG DELA**

SAŽETAK: Sporazum o priznanju krivičnog dela je institut krivičnoprocesnog prava koji je u Zakonik o krivičnom postupku iz 2011. godine uveden kao jedan od tri sporazuma koji mogu zaključiti javni tužilac i okrivljeni. Autor u radu ukazuje na nedostatke sporazuma u pogledu izostanka visine propisane kazne kao uslova za zaključenje sporazuma, odmeravanja kazne bez izvođenja dokaznog postupka sa akcentom na olakšavajuće i otežavajuće okolnosti, gde istovremeno daje predloge na koji način se mogu sprečiti ili otkloniti problemi u praksi koji bi mogli da se pojave primenom važećih zakonskih rešenja. U svrhu dobijanja odgovora na neka od navedenih pitanja, sačinjen je istraživački upitnik na osnovu kog je autor u određenom sudu i tužilaštvu sakupljala podatke radi dokazivanja iznetih hipoteza. Pored dokumentacione analize, sa metodološkog aspekta u cilju istraživanja korišćeni su komparativni i istorijski metod, strategija predviđanja i metod srednjeg obima.

Ključne reči: sporazum o priznanju krivičnog dela, krivični postupak, težina krivičnog dela, odmeravanje kazne

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UVOD

Sporazum o priznanju krivičnog dela (u daljem tekstu: sporazum) je institut krivičnoprocesnog prava koji vodi poreklo iz američkog krivičnog postupka. Smatran je vrstom pregovora iza zatvorenih vrata, ali su se sudovi vremenom sve više i više oslanjali na ovakvu vrstu pregovora i praktično ga usvojili. Zvanično, 1960. godine Vrhovni sud SAD ga je priznao.[1] Reč je o institutu koji je karakterističan za adverzijalne postupke.[2] Pomenuti institut je privukao dosta pažnje u javnosti i iz ekonomskih razloga, jer podržava borbu protiv kriminala na način koji će smanjiti troškove u najvećoj mogućoj meri, a to je putem zaključivanja sporazuma o priznanju krivičnog dela.[3] Sa aspekta tužioca, zbog oskudnih dokaza i neizvesnosti da može doći do oslobađajuće presude u redovnom krivičnom postupku, sporazum predstavlja pogodnost da završi predmet oslanjajući se na „sigurnu varijantu osude" i brže okončanje postupka, dok sa aspekta suda, zaključivanje sporazuma predstavlja rasterećenje.[4]

U srpsko zakonodavstvo ovaj institut je uveden Izmenama i dopunama Zakonika o krivičnom postupku iz 2009. godine[5] pod nazivom Sporazum o priznanju krivice, dok je kasnije Zakonikom o krivičnom postupku iz 2011. godine[6] označen kao jedan od sporazuma javnog tužioca i okrivljenog, pod nazivom Sporazum o priznanju krivičnog dela.[7] Sporazum o priznanju krivičnog dela bi se mogao definisati kao sporazum sastavljen u pisanoj formi,

[1] Абдуалиулы, Р. (2016). Развитие особого порядка судебного разбирательства и участия в нем прокурора при рассмотрении уголовных дел в Республике Казахстан и Российской Федерации. *Молодой ученый*, (24), 316.

[2] Prvi zabeležen sporazum o priznanju krivice datira iz 1808. godine. Reč je o slučaju *Stivens* u kome je tužilac teretio okrivljenog za četiri krivična dela nezakonite prodaje alkohola. Stranke su se „nagodile" da okrivljeni prizna krivicu za jedno od njih, a da tužilac zauzvrat odustane od gonjenja za preostale tri optužbe. Sudija je bio dužan da izrekne propisanu kaznu od 6,67 $ https://www.academia.edu/11970995/Sporazumi_javnog_tužioca_i_okrivljenog_u_krivičnom_postupku, 7–8.

[3] Levmore, S., Porat, A. (2012). Asymmetries and Incentives in Plea Bargaining and Evidence Production. *The Yale Law Journal*, (122), 694.

[4] Herzog, S. (2003). The relationship between public perceptions of crime seriousness and support for plea-bargaining practices in Israel: A factorial-survey approach. *Journal of criminall law and criminology*, (94), 103.

[5] Zakon o izmenama i dopunama Zakonika o krivičnom postupku, *Službeni glasnik RS, br.* 72/09. od 3. 9. 2009. godine

[6] Zakonik o krivičnom postupku, *Službeni glasnik RS* br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013. i 55/2014. (u daljem tekstu ZKP).

[7] Bajović, V. (2015). Pravna priroda i pravno dejstvo sporazuma o priznanju krivičnog dela. *Pravni život, (*9), 672, fn. 3.

koji predstavlja saglasnost volja javnog tužioca i okrivljenog, gde okrivljeni svesno i dobrovoljno priznaje jedno ili više krivičnih dela koja mu se stavljaju na teret, dok javni tužilac pristaje na neku vrstu blažeg tretmana prema okrivljenom, sporazumevajući se sa njim o vrsti, meri ili rasponu kazne ili druge krivične sankcije, kao i drugim elementima sporazuma. Ovako sačinjen sporazum nema pravno dejstvo sve dok sud ne odluči o njemu.

Sporazum o priznanju krivičnog dela javni tužilac i okrivljeni mogu zaključiti od donošenja naredbe za sprovođenje istrage pa do završetka glavnog pretresa, prilikom čega okrivljeni mora imati branioca.

Odredbom čl. 314. ZKP propisani su obavezni elementi za zaključenje sporazuma i to:

> „Sporazum o priznanju krivičnog dela sadrži:
> 1) opis krivičnog dela koje je predmet optužbe;
> 2) priznanje okrivljenog da je učinio krivično delo iz t. 1. ovog stava;
> 3) sporazum o vrsti, meri ili rasponu kazne ili druge krivične sankcije;
> 4) sporazum o troškovima krivičnog postupka, o oduzimanju imovinske koristi pribavljene krivičnim delom i o imovinskopravnom zahtevu, ukoliko je podnet;
> 5) izjavu o odricanju stranaka i branioca od prava na žalbu protiv odluke kojom je sud u potpunosti prihvatio sporazum, osim u slučaju iz čl. 319. st. 3. ovog zakonika:
> 6) potpis stranaka i branioca (st. 1).
>
> Pored podataka iz st. 1. ovog člana, sporazum o priznanju krivičnog dela može sadržati:
> 1) izjavu javnog tužioca da odustaje od krivičnog gonjenja za krivična dela koja nisu obuhvaćena sporazumom o priznanju krivičnog dela;
> 2) izjavu okrivljenog o prihvatanju obaveze iz čl. 283. st. 1. ovog zakonika, pod uslovom da priroda obaveze omogućava da se započne sa njenim izvršenjem pre podnošenja sporazuma sudu;
> 3) sporazum u pogledu imovine proistekle iz krivičnog dela koja će biti oduzeta od okrivljenog (st. 2).“

U ovom radu biće analizirani negativni aspekti sporazuma o priznanju krivičnog dela, kontradiktornosti i rešenja kako bi se nedostaci ispravili, kao i analiziranje metoda koji su primenjeni u ovom radu.

Imajući u vidu predmet istraživanja ovog rada, autorka je postavila nekoliko hipoteza. Prva hipoteza se odnosi na nedostatak u pogledu nepostojanja visine kazne propisane za neko krivično delo kao uslova za zaključenje sporazuma. Druga hipoteza se odnosi na odsustvo dokaznog postupka prilikom zaključivanja sporazuma i predlaganja sankcije, kojom prilikom se ne uzimaju u obzir olakšavajuće i otežavajuće okolnosti. Kako bi se dobili odgovori na ova pitanja, primenjene su odgovarajuće metode istraživanja.

Komparativnim metodom je učinjeno poređenje ovog procesnog instituta u Srbiji sa zemljom u kojoj je izvorno nastao (SAD) kao i onim zemljama u kojima se primenjuje (Kazahstan, Francuska, Poljska). Ovim metodom su prikazane razlike među pravnim sistemima, koji od njih ovaj institut bolje reguliše, a koji ima nedostatke, kao i razlozi i put implementacije sporazuma u naš pravni sistem. Takođe, putem ankete dobijeni rezultati su pokazali kako na zaključivanje sporazuma i odluke suda reaguju muškarci i žene, starosti od 19 do 63 godine, kao i lica koja nikada nisu bila žrtve krivičnog dela, kao i ona koja su bila žrtve jednom ili više puta.

Strategija predviđanja kao metod je korišćena u svrhu dobijanja odgovora kakav je utisak javnosti-ispitanika u pogledu prednosti odnosno nedostataka sporazuma, da li je po njihovom mišljenju reč o sredstvu za smanjenje broja povrata ili sredstvu za moguće zloupotrebe od strane prestupnika; kakav utisak na njih kao javnost ostavlja sporazum, ali i kakav je njihov stav ukoliko bi nekada bili oštećeni ili okrivljeni.

Poseban značaj za dokazivanje hipoteza je imala dokumentaciona analiza. Do izbora ovog metoda rada kao najadekvatnijeg došlo se nakon zaključka da se veliki broj informacija važnih za ovo istraživanje nalazi u sudskim predmetima, u samim presudama kojima se sporazum o priznanju krivičnog dela prihvata, ali i iz zapisnika. Korišćeni su podaci iz 21 presude Prvog osnovnog suda u Beogradu, jedne presude Višeg suda u Beogradu i tri sklopljena sporazuma u Tužilaštvu za ratne zločine. Kako bi se dobili odgovori na postavljena pitanja, autor je za potrebe istraživanja sačinila upitnik na osnovu kojeg je u Prvom osnovnom sudu u Beogradu sakupila potrebne podatke, popunila upitnike i date podatke razvrstala. Upitnik je sadržao podatke koji ukazuju na težinu krivičnog dela koje se okrivljenom stavlja na teret, o postojanju odnosno odsustvu olakšavajućih i otežavajućih okolnosti važnih za odmeravanja kazne, ličnim prilikama okrivljenog i kazne na koju je osuđen okrivljeni. Istraživanje se odvijalo u nekoliko faza. U prvoj fazi, prikupljeni su podaci iz sudskih predmeta za period od 2015. do 2018. godine, kojom prilikom je popunjen istraživački upitnik koji se nalazi u dodatku ovog rada. U sledećoj fazi autor je podatke prikupljene pred Prvim osnovnim sudom u Beogradu razvrstala prema kriterijumima težine krivičnih dela u pogledu kojih je sporazum zaključen, prema ranijoj osuđivanosti okrivljenih, kao i prema sankciji koja je izrečena, a zatim te podatke iskoristila za dokazivanje postavljenih hipoteza.

Metod srednjeg obima je korišćen u vidu ispitivanja putem ankete sa ponuđenim odgovorima po principu „Likertove skale“, gde su na broju od 59 ispitanika različite životne dobi i pola, dobijeni odgovori koji daju podatke o njihovom stavu o samom institutu sporazuma o priznanju krivičnog dela. Analizirane su njihove reakcije u slučaju da se nađu u poziciji okrivljenog odnosno oštećenog, a da su donete sudske odluke nalik onima koje su korišćene za dokumentacioni metod, kao i njihov stav o poverenju pravosuđa i njihov rad.

ELEMENTI SPORAZUMA

Težina krivičnog dela

U propisima ranije važećeg Zakonika o krivičnom postupku jedan od uslova za zaključenje sporazuma o priznanju krivice je bio da se sporazum može zaključiti samo za ona krivična dela za koja je propisana kazna zatvora do 12 godina. Važećim ZKP-om taj uslov je ukinut i sada se sporazum može zaključiti čak i za najteža krivična dela.[8] Pored ZKP, Obaveznim uputstvom Republičkog javnog tužioca O br. 5/2013 od 26. 12. 2013. godine (u daljem tekstu: uputstvo) regulisano je da se sporazum može zaključiti za sva krivična dela, bez obzira na propisanu kaznu. Čini se da se ovaj esencijalan element sporazuma olako prihvatio, gde se otvara mogućnost da neko ko je izvršio neka od najtežih krivičnih dela, u odnosu na izvršioca lakšeg krivičnog dela, ima mogućnost „dogovora“ sa tužiocem u pogledu kazne. Autor ovog rada smatra da je potpuno apsurdno ostaviti mogućnost bilo kakve vrste pregovaranja i blažeg tretmana po izvršioca, koji je, primera radi, izvršio krivično delo poput silovanja deteta, ubistva na svirep i podmukao način i sl.

Ukoliko govorimo o sporazumu o priznanju krivičnog dela kao pojednostavljenoj formi postupanja, treba imati na umu da je ideja zakonodavca da se takva vrsta postupka, kao i njoj slične, odnosi na krivična dela koja pripadaju grupi tzv. ,,Lakšeg ili srednjeg kriminaliteta“[9]. To su dela koja sa sobom nose manji stepen društvene opasnosti, za koja su propisane manje kazne i za koja nije neophodno ulagati veliku količinu vremena. Države koje primenjuju institut sporazuma o priznanju krivičnog dela (odnosno krivice) takođe određuju granicu u pogledu kojih krivičnih dela je sporazum dozvoljen. Tako npr. Francuska u svom zakonodavstvu ograničava primenu sporazuma za krivična dela za koja je propisana novčana kazna ili kazna zatvora do 5 godina, ili Poljska koja određuje da javni tužlac može zaključiti sporazum sa okrivljenim koji je izvršio krivično delo za koje je zaprećena kazna zatvora do 10 godina.[10] Krivično procesno pravo Rusije takođe kao granicu za primenu ovog sporazuma propisuje granicu za krivična dela za koja je propisana kazna zatvora do 10 godina.[11]

[8] Bejatović, S. (2012). Sporazum o priznanju krivice (Novi ZKP Republike Srbije i regionalna komparativna analiza). *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva.* Beograd: Misija OEBS u Srbiji, 108.

[9] *Ibid*., 111.

[10] Nikolić, D. (2010). Sporazum o priznanju krivice kao forma ubrzanja krivičnog postupka. *Tematski zbornik radova*, 201–202.

[11] Государственная Дума, *Уголовно-процессуальный кодекс Российской Федерации.* Москва, 2001.

Analiziranjem 21 predmeta pred Prvim osnovnim sudom u Beogradu, za pomenuti period, 10 sporazuma je zaključeno za krivično delo neovlašćeno držanje opojnih droga, od kojih je 5 lica osuđivano jednom ili više puta i to za teža krivična dela poput razbojništva, teške krađe ili za isto krivično delo za koje su sklopili sporazum. Posebno je interesantan primer gde je sporazum zaključio okrivljeni koji je pre toga bio 5 puta osuđivan.[12] Kao još jedan apsurdan primer autor izdvaja slučaj kada je okrivljeni zaključio sporazum za krivično delo koje je izvršio tokom izdržavanja kazne zatvora.

Rezultati ankete pokazali su da, ukoliko bi se ispitanici našli u poziciji oštećenog, a okrivljeni je ranije neosuđivano lice, od ukupno 58, 12 (20,7 %) je odgovorilo da bi bili zadovoljni odlukom suda, 20 (34,5 %) bi sumnjalo u odluku suda, a 26 (44,8 %) je odgovorilo da bi bilo nezadovoljno odlukom suda. Situacija se drastično menja kada je reč o licima koji su jednom ili više puta osuđivani, gde je 2 (3,4 %) odgovorilo da bi bilo zadovoljno odlukom suda, 4 (6,9 %) sumnja, a čak 52 (89,7 %) je odgovorilo da bi bilo nezadovoljno odlukom suda.

Poznati su slučajevi zaključenja sporazuma o priznanju krivice i pred Međunarodnim krivičnim sudom za bivšu Jugoslaviju. U postupku pred tim sudom 20 okrivljenih je priznalo krivicu i sklopilo sporazum. Zaključenje sporazuma između tužioca i okrivljenih je postalo predmet kontroverzi i neki autori smatraju da tom prilikom dolazi do izmena istorijski utemeljenih odredbi Međunarodnog suda.[13] Prilikom istraživanja obavljenog u Tužilaštvu za ratne zločine, za period od 2015–2018. godine, podaci pokazuju da su zaključeni sporazumi za krivična dela za koja je zaprećena kazna zatvora od najmanje 10 godina ili doživotnim zatvorom. Kazne koje su izrečene okrivljenima iznose 6, 10 ili, što je neverovatno, 1 godinu i 6 meseci zatvora, pa se postavlja pitanje da li je pravedno da se nekome za krivično delo ratni zločini protiv civilnog stanovništva predloži blaži tretman putem zaključivanja sporazuma? Takođe treba istaći da je od momenta zaključenja sporazuma do donošenja presude proteklo u proseku 7 dana, što vodi utisku da je ovde ekonomičnost postupka ispoštovana, ali ostaje dilema da li je time pravda zadovoljena, s obzirom na zločine koji su počinjeni nad velikim brojem civila, posebno imajući u vidu prirodu sporazuma, koji bi trebalo da bude namenjen za dela lakšeg i srednjeg kriminaliteta.

[12] Okrivljeni je ranije osuđivan za sledeća krivična dela: teška dela protiv bezbednosti u saobraćaju, ometanje službenog lica u vršenju službene dužnosti, nasilničko ponašanje, neovlašćeno držanje opojnih droga, falsifikovanje isprave. Zatim je sklopljen sporazum za krivično delo ometanje službenog lica u vršenju službene dužnosti.

[13] Clark, J. N. (2009). Critical Review of Jurisprudence: An Occasional Series, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation. *The European Journal of International Law,* 20 (2), 427.

Jedno od pitanja u anketi je glasilo: ispitanici treba da predstave situaciju da su okrivljeni za neko krivično delo i da nikada pre nisu bili osuđivani, da im tužilac predloži da priznaju da su izvršili krivično delo i prihvate sporazum, predlažući im blažu kaznu ali bez izvođenja dokaza, kakav bi odgovor dali tužiocu? Rezultati su pokazali da od 59 ispitanika, 24 (41,4 %) je odgovorilo da bi prihvatilo predlog tužioca, dok je 35 (60,3 %) izjavilo da sumnjaju u predlog tužioca i da bi se opredelili za redovan krivični postupak gde se ipak izvode dokazi. Čini se da ispitanici više veruju da je sigurnije utvrđena kazna koja je određena nakon dokaznog postupka nego kada je odmeri i predloži tužilac bez izvođenja istog. Razlika od gotovo 19 % pokazuje da nije reč o ekstremima te da određeni ispitanici imaju poverenja u organe pravosuđa i njihovu praksu.

Odmeravanje kazne

Kao jedan od obaveznih elemenata sporazuma o priznanju krivičnog dela, ZKP propisuje da je sporazum javnog tužioca i okrivljenog o vrsti, meri ili *rasponu* kazne ili druge krivične sankcije. Naučna javnost se dosta uzburkala iz razloga što je reč „raspon“ izazvala brojne dileme i različita tumačenja. Ukoliko bi se stranke samo dogovorile o rasponu kazne, a konkretna mera kazne ostavila sudu na ocenu, postavlja se pitanje – kako sud može izreći konkretnu kaznu u okvirima raspona, bez sprovođenja dokaznog postupka i bez uzimanja u obzir olakšavajućih i otežavajućih okolnosti i ostalih parametara neophodnih za odmeravanje kazne?

Analizom presude Višeg suda u Beogradu koja je bila predmet istraživanja, u obrazloženju presude je konstatovano

> „...članom drugim zamenik VJT-a u Beogradu i okrivljeni saglasili su se da Viši sud u Beogradu okrivljenom... izrekne uslovnu osudu tako što će mu *utvrditi* kaznu zatvora u trajanju od 6 (šest) meseci i istovremeno odrediti da se utvrđena kazna neće izvršiti ukoliko...“

Zatim, u narednom stavu obrazloženja je sud nakon održanog ročišta konstatovao

> „...da u spisima predmeta postoje i drugi dokazi koji nisu u suprotnosti sa priznanjem okrivljenog... da je učinio krivično delo koje mu se stavlja na teret, te kako je *utvrdio* da je predložena uslovna osuda, kojom je okrivljenom utvrđena kazna zatvora u trajanju od 6 (šest) meseci“.

Sud je ovom prilikom prihvatio predloženu sankciju za okrivljenog, ali bez navođenja koje su to olakšavajuće/otežavajuće okolnosti, odnosno bez navođenja koji su to dokazi koji se nalaze u spisima predmeta, pa ostaje nejasno kako je onda sud *utvrdio* predloženu sankciju.

Kako ne bi dolazilo do mogućih zloupotreba, u Srbiji je uvedena kontrola od strane Republičkog javnog tužioca. Nakon zaključenog sporazuma, prvostepeno javno tužilaštvo je u obavezi da, preko apelacionog tužilaštva, obavesti Republičkog javnog tužioca o slučaju povodom kog je zaključen sporazum, kao i da dostavi uz dopis podneske i celokupnu dokumentaciju uključujući i pravnosnažnu sudsku odluku kojom je odlučeno o sporazumu. Na ovaj način Republički javni tužilac vrši nadzor nad postupanjem tužilaštava pred kojima je zaključen sporazum i sprečava eventualne zloupotrebe.[14]

U SAD takva vrsta kontrole takođe postoji, gde Ministarstvo pravde potvrđuje sporazum o priznanju krivičnog dela za najteža krivična dela.[15]

Iako postoji priznanje okrivljenog da je izvršio krivično delo, sud u skladu sa načelom srazmernosti kazne *mora* izvesti dokaze od kojih zavisi odluka o krivičnoj sankciji.

> „Javni tužilac ne izvodi dokaze, pa se ipak sporazumeva o visini kazne, ali javni tužilac ni inače nije državni organ koji izvodi dokaze u odnosu na izbor i meru određene krivične sankcije, a njemu se u ovom slučaju samo daje pravo pregovaranja sa okrivljenim o priznanju krivice i kazni, pri čemu kazna ovde, za razliku od one koju inače izriče sud, ne počiva na izvedenim dokazima, već na saglasnosti stranaka u okviru jednog šireg sporazuma, što je samo po sebi, krupan izuzetak u odnosu na opšta pravila, pa tim pre ovde ne treba u praksi stvarati još dodatni izuzetak da sud može određivati konkretnu visinu kazne, a bez izvođenja dokaza od kojih takva visina kazne zavisi.“[16]

U prilog ovome treba dodati da je odredbom čl. 317. ZKP propisano da, pored priznanja okrivljenog

> „...dovoljno je postojanje bilo kojih drugih dokaza koji nisu sa njim u suprotnosti, umesto da se zahteva postojanje dokaza koji dato priznanje potkrepljuju.“

Ova odredba bi mogla izazvati niz nedoumica jer, kako ističu Simonović i Turanjanin, osvrćući se na Škulićevu konstataciju da

> „...ona u praksi može dovesti do toga da procesno opstane priznanje koje je zaista potpuno „golo“ jer je moguće da postoji čitav niz drugih dokaza koji zaista nisu u suprotnosti sa priznanjem, ali pri tom nisu ni u kakvoj vezi sa njim.“[17]

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[14] Mirkov, Ž. (2019). Practical aspects of the plea agreement in the criminal procedure law of the Republic of Serbia. *IX International Scientific Conference „Archibald Reiss Days 2019“ – Thematic Conference Proceedings of International Significance,* (1), 205–219.

[15] Milovanović, M. (2010). Sporazum o priznanju krivice – *pro et contra*. *Anali Pravnog fakulteta Univerziteta u Beogradu,* (2), 422–423.

[16] Škulić, M. (2009). Sporazum o priznanju krivice. *Pravni život,* (10), 295–296.

[17] Simonović, B., Turanjanin, B. (2013). Sporazum o priznanju krivičnog dela i problem neistinitog priznanja. *Pravni život,* (10), 26.

Prilikom odmeravanja kazne, u redovnom sudskom postupku, neophodna je primena odredbe čl. 54. KZ RS kojom je propisano da:

> „Sud će učiniocu krivičnog dela odmeriti kaznu u granicama koje su zakonom propisane za to delo, imajući u vidu svrhu kažnjavanja i uzimajući u obzir sve okolnosti koje utiču da kazna bude manja ili veća (olakšavajuće i otežavajuće okolnosti), a naročito: stepen krivice, pobude iz kojih je delo učinjeno, jačinu ugrožavanja ili povrede zaštićenog dobra, okolnosti pod kojima je delo učinjeno, raniji život učinioca, njegove lične prilike, njegovo držanje posle učinjenog krivičnog dela a naročito njegov odnos prema žrtvi krivičnog dela, kao i druge okolnosti koje se odnose na ličnost učinioca (st. 1).“[18]

Na sporazum o priznanju krivičnog dela navedena odredba bi se teško mogla primeniti, s obzirom da dokazni postupak pred sudom izostaje i time se prilično narušava načelo srazmernosti kazne. Neki autori ističu da se lične prilike i raniji život učinioca, koje bi se koristile kao *otežavajuće* ili *olakšavajuće okolnosti*, mogu lakše utvrditi od strane javnog tužioca kroz neformalan razgovor sa njim nego prilikom sudskog postupka. Uputstvom je propisano da je javni tužilac dužan da prikupi podatke o svim navedenim okolnostima, a što čini uvidom u izveštaj iz Kaznene ili Prekršajne evidencije, kao i pribavljanjem podataka o njegovom imovnom stanju. Mišljenja sam da se poteškoće mogu javiti u pogledu nekih drugih okolnosti, npr. ukoliko okrivljeni ne da istinite podatke o svojim ličnim i porodičnim prilikama, motivima za izvršenje krivičnog dela, jer je takva situacija moguća, posebno u okviru prava na odbranu okrivljenog, a te informacije su relativno teško proverljive od strane javnog tužioca a čak i ako su proverljive pitanje je u kolikoj meri bi javni tužilac mogao da se bavi istraživanjem tih podataka imajući u vidu ekonomičnost postupka.

Element prinude se latentno pojavljuje i utiče na okrivljenog upravo iz razloga što su uočljive velike razlike u kazni po okončanju redovnog krivičnog postupka i nakon prihvatanja sporazuma o priznanju krivičnog dela.[19] U nekim zemljama, poput Kazahstana, ukoliko tužilac i sud posumnjaju da je reč o priznanju koje je dato usled prinude, takav sporazum neće biti prihvaćen, čime se poštuje princip vladavine prava. Takođe, dozvoljeno je da se prave duže pauze prilikom ispitivanja okrivljenog, kako bi bila postavljena dodatna pitanja, ukoliko iskusni tužilac ili sudija sumnjaju u istinitost datog priznanja. Kada tužilac ili sudija primete da je priznanje dato od strane lica koje je vođeno strahom, ili

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[18] Krivični zakonik, *Službeni glasnik RS* br. 85/2005. – ispr., 107/2005. – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014. i 94/2016. (u daljem tekstu KZ).

[19] O'Keefe, K. (2010). Two wrongs make a wrong: a challenge to plea bargaining and collateral consequence statutes through their integration. *Journal of criminall law and criminology*, (100), 260.

nekim drugim razlozima, a ne krivicom, takvo priznanje neće biti prihvaćeno.[20] Poznati su slučajevi zloupotrebe od strane tužioca, koji namerno kvalifikuje delo kao teže kako bi izvršio pritisak na okrivljenog da zaključi sporazum.[21]

Kada je reč o dokazima, Ministarstvo pravde SAD zahteva da mu se pre priznanja okrivljenog dostave svi oslobađajući dokazi.[22] Autor ovog rada smatra da Ministarstvo na ovaj način pokušava da ukloni mogućnost da se eventualna nevinost okrivljenog ikada otkrije, kako bi pred sobom imali čisto priznanje, bez sumnje u njegovu nevinost.

Ne može se reći da je implementacijom ovog instituta u kontinentalno pravo dokazni postupak u potpunosti isključen, ali se može reći da nema neposrednog izvođenja dokaza pred sudom, odnosno sprovođenja istrage u svom punom obimu.[23] Treba istaći da na ovaj način nije ispoštovano načelo neposrednosti iz čl. 419. st. 1. ZKP kojim je propisano da *sud* zasniva presudu samo na dokazima koji su izvedeni na glavnom pretresu. Prilikom odlučivanja o sporazumu o priznanju krivičnog dela, sud ne održava glavni pretres i ne izvodi dokaze, već se odluka o sporazumu donosi na ročištu, gde sudija procenjuje „validnost i prihvatljivost stranačkog sporazuma“[24] i na osnovu toga donosi presudu kojom sporazum prihvata. Dakle, sud odlučuje o ispunjenosti uslova za zaključenje sporazuma, bez daljeg upuštanja u srž predmeta jer je ograničen propisima koji regulišu sporazum o priznanju krivičnog dela. S druge strane, preduslov za donošenje svake zakonite presude jeste da sud utvrdi istinitost činjenica kojima raspolaže, na osnovu *dokaza*. Uputstvom je propisano da javni tužilac prilikom odmeravanja kazne, koristeći se pravilima iz čl. 54. i čl. 57. KZ, mora voditi računa o pravilima krivičnog prava za odmeravanje kazne, ali čini se da nije u potpunosti adekvatno da organ koji je nadležan za optuženje bude kompetentan da odlučuje u značajnom delu o činjenicama za odmeravanje kazne, što bi bila nadležnost organa za presuđenje.

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[20] Абдуалиулы, Р., (2016). Проблемные вопросы, возникающие при заключении процессуальных соглашений в Республике Казахстан. *Молодой ученый, (*25), 440.

[21] Na primer, ukoliko postoje okolnosti koje ukazuju da je okrivljeni izvršio krivično delo prekoračenje granica nužne odbrane, tužilac će da kvalifikuje krivično delo kao umišljajno ubistvo; okrivljeni prihvata sporazum, misleći da će na taj način izbeći težu kaznu. Više u: Шайхыстанова Салтанат Нурлановна,(2015). Перспективы легализации сделки с правосудием в уголовном законодательстве Республики Казахстан: положительные и отрицательные аспекты. *Молодой ученый,* (2), 389.

[22] Mc Conkie, D. S., (2017). Structuring pre-plea criminal discovery. *Journal of Criminal Law and Criminology*, (107), 5.

[23] Абдуалиулы Р., (2016). Развитие особого порядка судебного разбирательства и участия в нем прокурора при рассмотрении уголовных дел в Республике Казахстан и Российской Федерации. *Молодой ученый*, (24), 317.

[24] Bajović, V. (2009). *Sporazum o priznanju krivice: uporedno-pravni prikaz.* Beograd: Pravni fakultet u Beogradu, 179.

Upravo ovaj kriterijum olakšavajućih i otežavajućih okolnosti izaziva najviše nedoumica, jer prilikom zaključivanja sporazuma o priznanju krivičnog dela nema izvođenja dokaznog postupka, sledstveno tome nema utvrđivanja olakšavajućih i otežavajućih okolnosti, pa samim tim stranke sporazumno daju predlog sankcije. Postavlja se pitanje da li onda sud može da odbije sporazum ako misli da predložena kazna nije adekvatna, da se time ne bi ostvarila svrha kažnjavanja i uticalo na učinioca da ubuduće vrši krivična dela? Ranije zakonsko rešenje je predviđalo da sud može da odbije sporazum ako predložena kazna očigledno ne odgovara težini krivičnog dela koje je okrivljeni priznao (čl. 282v, st. 9. ZKP/2001).[25] U odnosu na ranije važeću odredbu, ZKP/2011 propisuje da je dovoljno da je kazna ili druga krivična sankcija u skladu sa *krivičnim ili drugim zakonom* (čl. 317. st. 1. t. 4).

Na uzorku koji je korišćen za istraživanje, od ukupno 21 zaključenog sporazuma, olakšavajuće i otežavajuće okolnosti nisu konstatovane ni u jednom predmetu. U jednom od predmeta se čak u spisima predmeta iz istrage nalazio izveštaj iz Kaznene evidencije da je okrivljeni osuđivan, a da taj podatak nije bio unet u presudu. Zatim se u samo dva predmeta, od ukupno 21, sud pozivao na čl. 315. ZKP te je prilikom odlučivanja o sporazumu pročitao dokaze poput nalaza i mišljenja veštaka, zapisnika o izvršenom uviđaju saobraćajne nezgode i zapisnika o ispitivanju svedoka, te konstatovao da se u navedenim aktima nalaze dokazi kojima se potkrepljuju činjenični navodi i pravna kvalifikacija krivičnog dela iz sporazuma. U svim preostalim predmetima se u presudi samo konstatuje da postoje i drugi dokazi koji nisu u suprotnosti sa priznanjem okrivljenog, bez njihovog čitanja, te je

> „...na osnovu priznanja koje je utemeljeno i drugim dokazima u predmetu *utvrdio* činjenično stanje kao u izreci presude“.

Čini se spornim to što sud u presudama nije pročitao dokaze ako se već na njih poziva i ukoliko konstatuje da je utvrdio činjenično stanje.

Prilikom istraživanja u Prvom osnovnom sudu u Beogradu, od ukupnog broja zaključenih sporazuma (21) za period od 2015. do 2018. godine, utvrđeno je da je 10 lica ranije osuđivano, od toga 4 lica dva ili više puta. Čini se da nije olakšavajuća okolnost i ne bi bilo adekvatno takvim licima predložiti zaključenje sporazuma s obzirom na to da su bili spremni na ponovno vršenje krivičnih dela, znajući da će priznanjem dobiti blaži tretman. Krivična dela koja im se stavljaju na teret, ili za koja su već osuđivana se kreću od onih koja pripadaju delima „lakšeg kriminaliteta“ do onih koja su teža. Primera radi, licima koja su osuđivana za razbojništvo, tešku krađu ili koja su osuđivana

[25] Bajović, V. (2015).Odmeravanje kazne i sporazum o priznanju krivičnog dela. *Nauka, bezbednost policija,* (2)*,* 190.

(čak) 5 puta pružena je prilika da zaključe sporazum o priznanju krivičnog dela za novo izvršeno delo. U sledećim tabelama će biti prikazan broj zaključenih sporazuma neosuđivanih lica, osuđivanih jednom i osuđivanih dva ili više puta, kao i odnos ranije osuđivanosti i izrečenih sankcija.

Tabela br. 1. *– Prikaz broja zaključenih sporazuma koje su zaključila lica koja ranije nisu osuđivana, koja su osuđivana jednom i koja su osuđivana dva ili više puta*

	Broj zaključenih sporazuma
Neosuđivana lica	10
Osuđivana jednom	7
Osuđivana dva ili više puta	4

Tabela br. 2. *– Prikaz odnosa ranije osuđivanosti i izrečenih sankcija*

	Zatvor	Novčana kazna	Uslovna osuda
Neosuđivana lica	/	/	10
Osuđivana jednom	/	/	7
Osuđivana dva ili više puta	1	/	3

Kao što se iz priloženog tabelarnog prikaza može primetiti, uslovna osuda je izricana recidivistima u gotovo istom broju kao i neosuđivanim licima, što predstavlja nedostatak u pogledu izrečenih sankcija. Interesantno je da od svih zaključenih sporazuma nijedan okrivljeni nije bio osuđen na novčanu kaznu, s obzirom na to da su okrivljeni u 17 slučajeva bili zaposleni (dok su preostala četiri učenici/studenti) i s obzirom na to da javni tužilac prema Uputstvima ima pravo da pribavi podatke o imovnom stanju, baš u odnosu na predlog novčane kazne. Čini se da je blaga kaznena politika neadekvatna prema recidivistima te da bi novčana kazna bila adekvatnija, posebno ako uzmemo u obzir da je uslovna osuda ipak mera upozorenja, a ne kazna.

Ako kazna ili neka druga sankcija mora da bude u skladu sa krivičnim ili nekim drugim zakonom, to dalje znači da bi trebalo uzeti u obzir odredbu npr. Krivičnog zakona o odmeravanju kazne a koja se tiče činjenica vezanih za raniji život učinioca, pre svega njegovu raniju (ne)osuđivanost. Stoga, čini se, nije ispoštovana odredba ZKP, jer tužilac nije uzeo u obzir činjenice koje su bitne za odmeravanje kazne odn. kazna nije *u skladu sa krivičnim i drugim zakonom.* Sud je u svim presudama prihvatio sporazume kao i predloženu sankciju, koristeći u obrazloženju prethodno navedenu konstataciju da je

sankcija u skladu sa dokazima i u skladu sa KZ, dok su u samo dva navedena slučaja pročitani dokazi koji se nalaze u spisima predmeta. Sve navedeno vodi zaključku da se sud u ostalim slučajevima nije upuštao u ocenu dokaza, već je prihvatio sporazum u pogledu sankcije onako kako je predloženo od strane javnog tužioca.

DE LEGE FERENDA PREDLOZI

Efikasnost pravosuđa je izražena kroz suđenje u razumnom roku, te su organi pravosuđa naišli na problem kako ostvariti ovu ideju, posebno kod složenih predmeta. Kao jedan od mehanizama pomoću kojeg bi otklonili problem, korišćen je institut Sporazuma o priznanju krivičnog dela. U ovom radu su prikazani nedostaci sporazuma, kontradiktornosti, kao i poređenje važećih odredbi sa ranije važećim. U ovom delu rada biće ukazano na potencijalne predloge za otklanjanje nedostataka budućim izmenama.

Kada je reč o uslovu da se sporazum o priznanju krivičnog dela može zaključiti bez obzira na težinu krivičnog dela, u naučnoj javnosti osnovano je kritikovan ovakav uslov. Na ovaj način omogućeno je učiniocima najtežih dela da zaključe sporazum, što može dodatno da ih motiviše da nastave sa daljim vršenjem krivičnih dela. Čini se da je vraćanje gornje granice i onemogućavanje recidivistima da zaključe sporazum jedno pre svega pravično rešenje, koje bi smanjilo potencijalnu zloupotrebu sporazuma kako od strane tužioca tako i od strane okrivljenog, kao i pojavu recidivizma.

Kod odmeravanja kazne, javni tužilac i okrivljeni ugovaraju vrstu, meru ili raspon kazne ili druge krivične sankcije. Ovakvim rešenjem ostavlja se sudu da *precizira* kaznu ili neku drugu krivičnu sankciju što je u praksi teško ostvarivo, s obzirom da je u primeni ovog instituta procesna aktivnost suda bitno smanjena a dokazni postupak izostavljen, gde se primećuje odstupanje od načela neposrednosti. U presudama sud je prihvatao već predložene sankcije iz sporazuma, pozivajući se na dokaze kojima se potrkepljuje priznanje, bez navođenja koji su, osim u par presuda gde su navedeni.

Od nekoliko mogućih rešenja kako bi se ovakav apsurd otklonio, izdvajaju se dva. Prema jednom rešenju, okrivljeni bi na ročištu mogao da se usmenim putem izjasni na olakšavajuće i otežavajuće okolnosti utvrđene sporazumom, kojom prilikom bi mogao doprineti preciziranju kazne od strane suda ukoliko je tužilac odredio raspon kazne. Na ovaj način bismo dobili verziju saslušanja okrivljenog kao jednog od dokaznih sredstava te bi se donekle otklonili pomenuti nedostaci, kao i poštovanje odredbe čl. 54. KZ RS. Drugo rešenje koje bi moglo uspešno da otkloni nedostatke sporazuma prilikom

odmeravanja kazne jeste da se izmenama Krivičnog zakona uvedu uski kazneni rasponi, baš kao što je propisano u SAD, odakle je sam sporazum uveden, gde postoje matematički proračuni putem kojih se „određuje“ kazna. Ovakvo rešenje bi u našem zakonodavstvu bilo moguće ukoliko bi postojao dokazni postupak na osnovu kojih bi se kazna određivala, jer kako ističe Bajović,

> „...pravilno utvrđivanje činjeničnog stanja i pravilno odmeravanje kazne u skladu sa tako utvrđenim činjeničnim stanjem tradicionalno se smatraju osnovnim zadacima sudije u krivičnom postupku.“[26]

Sa druge strane, tužilac bi trebalo da se tokom sporazumevanja u pogledu kazne oslanja na odredbu čl. 54. KZ RS. Na ovakav način, zakonsko određenje pojma „raspon“ kazne ili neke druge sankcije bi imao smisla.

Usklađenost predložene sankcije prilikom zaključivanja sporazuma o priznanju krivičnog dela sa drugim zakonima je važan element koji povezuje odmeravanje kazne u ovom postupku sa odmeravanjem kazne u redovnom krivičnom postupku. Ako ZKP propisuje da predložena sankcija treba da bude usklađena sa krivičnim ili drugim zakonom, a ako Krivični zakon sadrži odredbu o odmeravanju kazne, koja se koristi i u redovnom krivičnom postupku, javlja se jedno rešenje koje bi olakšalo tužiocu procenu, a koje je vrlo ekonomično i efikasno. Tužilac po službenoj dužnosti ima pravo da traži izveštaj iz Kaznene i Prekršajne evidencije za okrivljenog još u najranijim fazama istrage, što propisuje i uputsvo. Sledstveno tome, ako se ovi podaci koriste za odmeravanje kazne u redovnom krivičnom postupku, kao olakšavajuće ili otežavajuće okolnosti, u skladu sa KZ, tužilac ih može uzeti u obzir prilikom predlaganja kazne kod zaključivanja sporazuma, gde ZKP propisuje da treba da bude u skladu sa drugim zakonom, što u ovom slučaju to može biti upravo KZ. I ono što je posebno važno jeste da bi sud prilikom odlučivanja o sporazumu trebalo da navede koji dokazi se nalaze u spisima predmeta tj. da ih pročita kako bi se zaista moglo videti na osnovu čega je sud utvrdio činjenično stanje kao u izreci presude, što predstavlja nešto više od konstatacije

> „...da postoje dokazi koji nisu u suprotnosti sa datim priznanjem da je učinio krivično delo“.

Jer u skladu sa čl. 419. ZKP sud može zasnivati presudu samo na osnovu onih dokaza koji su izvedeni na glavnom pretresu. Sud treba da ima dominantniju ulogu u ovom postupku pogotovo kada je reč o izricanju krivične sankcije, jer sporazumom se daje *predlog* krivične sankcije, na sudu je da je precizira (kod predloga raspona), utvrdi i izrekne.

[26] Bajović, V. (2015). Odmeravanje kazne i sporazum o priznanju krivičnog dela. *Nauka, bezbednost i policija, časopis policijske akademije, (*2), 179.

ZAKLJUČAK

Kako je reč o relativno novom institutu, koji je tek nalik na američki *plea bargaining*, koji se u našoj praksi primenjuje tek od 2009. godine, za tako kratak period bio je izložen izmenama elemenata dva puta. Kako je bio predmet brojnih kritika, one su dodatno dobijale na težini iz razloga što je zakonodavac tom prilikom menjao bitne elemente sporazuma, pokušavajući da ih uskladi sa normama zakonodavstva porekla ovog instituta, kako bi sporazum ostvario isti pozitivan efekat, ali su tom prilikom načinjeni propusti u pogledu efikasnosti, pravičnosti, prava okrivljenog, kao i u pogledu svrhe kažnjavanja.

Analizirani su odgovori anketiranih ispitanika različite životne dobi od 19 do 63 godine, sa ciljem da se prikaže kakvu sliku javnost ima o pomenutom institutu. Od ukupnog broja ispitanika (59) 24 su žene a 34 muškarci, gde su 5 (8,6 %) bili jednom žrtve krivičnog dela, 7 (12,1 %) više puta, a 46 (79,3 %) nikada. Cilj istraživanja je bio da se različiti profili analiziraju (a ne samo određena grupa kao npr. pravnici), njihovi stavovi kako u pogledu poverenja organima pravosuđa, tako i samog sporazuma. Rezultati prikazuju njihovu reakciju davanjem odgovora kada bi se našli u ulozi oštećenog krivičnim delom ili okrivljenog.

Na pitanje iz ankete da li, ukoliko je okrivljeni bio ranije osuđivan za lakše ili teže krivično delo, smatraju da će ponuđeno zaključivanje sporazuma uticati na smanjenje stope povratnika ili će doći do pojave zloupotrebe od strane prestupnika, od 59 ispitanika 7 (12,1 %) je odgovorilo da će uticati na smanjenje, dok je čak 51 (87.9 %) ispitanik odgovorio da će doći do pojave zloupotrebe. Ovakav kontrast pokazuje da ispitanici smatraju da ovaj procesni institut nije idealno sredstvo za suzbijanje kriminaliteta i da nemaju optimistične stavove u pogledu toga da blaži tretman po okrivljene može uticati na njihovu resocijalizaciju u pogledu recidivizma, kao i da se na ovaj način ne ostvaruje svrha kažnjavanja.

Sporazum o priznanju krivičnog dela je pravni institut koji u Srbiji sve više dobija na značaju u krivičnom postupku. Teži se rešavanjima predmeta putem pregovaranja, a prenatrpanost pravosuđa predmetima kao i težnja suzbijanja kriminaliteta sve više idu u prilog ovakvom načinu rešavanja krivičnih predmeta. S druge strane, ,,pojednostaviti postupak je komplikovana stvar“[27] te iako postoje nedostaci, treba istaći da je reč o relativno novom institutu koji je nekoliko puta bio predmet izmena i usklađivanja, jer se radi o pravnom transplantu preuzetom iz anglosaksonskog pravnog sistema, te je potreban određeni period da se prilagodi odredbama kontinentalnog prava.

[27] Турањанин, В. (2017). Појмовно одређење и правна природа споразума о признању кривичног дела. *Гласник права,* VIII, (1), 48, фн. 31.

Svakako treba podržati novinu koju je doneo novi Zakonik o krivičnom postupku i ne treba zanemariti brojku koja pokazuje na učestalost njene primene, ali navedene nedostatke na koje je autor u ovom radu istakao trebalo bi uzeti u obzir prilikom neke od narednih izmena Zakonika i korigovati postojeće u skladu sa pomenutim predlozima. Ne treba insistirati na ukidanju ovog instituta, koji mnogi smatraju kontroverznim, već raditi na poboljšanju položaja strana u postupku, pogotovo što sud u ovom slučaju nije u mogućnosti da utvrđuje da li su njihova prava povređena. Cilj istraživanja je bio da se potvrde postavljene hipoteze, a zatim da se dobijeni odgovori iskoriste za unapređenje pomenutog instituta. Svakako će rezultati nakon određenog perioda primene sporazuma o priznanju krivičnog dela pokazati da li je on zaista efikasan, ukoliko odgovor potražimo u sudskoj praksi, statističkim i mnogim drugim podacima.

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UPITNIK

Podaci o sudu

Sud: ____

Broj predmeta: _____________________________________

Podaci o izvršiocu krivičnog dela

Pol:
- ○ muški
- ○ ženski

Starost:
- ○ do 30 god,
- ○ 31–45,
- ○ 46–60,
- ○ preko 60 godina

Bračno stanje:
- ○ udata/oženjen,
- ○ neudata/neoženjen

Zanimanje:
- ○ nezaposlen,
- ○ učenik/student,
- ○ radnik,
- ○ zemljoradnik,
- ○ privatni preduzetnik,
- ○ ostalo

Ranija osuđivanost:
- ○ nijednom,
- ○ jednom,
- ○ dva ili više puta

Podaci o delu

Pravna kvalifikacija dela: ___________________________________

Sticaj:
- ○ ne,
- ○ da, dva dela,
- ○ da, tri i više

Stadijum izvršenja dela:
- ○ pokušaj,
- ○ svršeno delo

Oblik vinosti:
- ○ umišljaj,
- ○ nehat

Da li je imao saučesnike:
- ○ sam izvršio delo,
- ○ imao saučesnike

Da li su činjenice koje su utvrđene u sporazumu prihvaćene kao relevantne u odnosu na ostale okrivljene:
- ○ da,
- ○ ne

Podaci o krivičnom postupku

Da li je bilo sporazuma o priznanju krivičnog dela:

- da, na predlog tužioca,
- da, na predlog okrivljenog,
- ne

Da li je oštećeni istakao imovinsko-pravni zahtev:

- da,
- ne, upućen je na parnicu

Da li je oštećeni prisustvovao ročištu na kome se odlučivalo o sporazumu o priznanju krivičnog dela:

- da
- ne

Podaci o sankcijama

Da li je optuženi oglašen krivim:

- da,
- ne

Koja sankcija je izrečena:

- zatvor,
- novčana kazna,
- uslovna osuda,
- sudska opomena,
- rad u javnom interesu,
- oduzimanje vozačke dozvole,
- vaspitna mera,
- oslobođenje od kazne

Olakšavajuće okolnosti:

- nisu konstatovane,
- stepen krivične odgovornosti,
- raniji život izvršioca,
- okolnosti pod kojima je delo izvršeno,
- lične i porodične prilike izvršioca,
- druge okolnosti

Otežavajuće okolnosti:

- nisu konstatovane,
- stepen krivične odgovornosti,
- raniji život izvršioca,
- okolnosti pod kojima je delo izvršeno,
- lične i porodične prilike izvršioca,
- druge okolnosti

ANKETA
Nedostaci sporazuma o priznanju krivičnog dela

Poštovani, pozivam Vas da učestvujete u istraživanju koje ispituje nedostatke Sporazuma o priznanju krivičnog dela, čiji je zadatak da utvrdi kakav je stav ispitanika o prirodi pomenutog sporazuma kao i da utvrdi kakve su Vaše reakcije na neke od analiziranih odluka sudova koje su donete povodom sporazuma. Učešće u istraživanju je anonimno i dobrovoljno i za popunjavanje upitnika će Vam biti potrebno oko 10 minuta. Hvala na učešću u istraživanju.

S poštovanjem, *Dragana Milošević*

Pol

○ Muški”
○Ženski

Starost? _____________________ (vaš odgovor).

Koliko je Vaše poverenje u sudstvo?

	Potpuno verujem.	Ne verujem
Da poštuju prava okrivljenog	○	○
Da rade pravično	○	○
Da sprečavaju ponovno vršenje krivičnih dela.	○	○
Da poštuju prava oštećenog	○	○

Da li ste več bili žrtva krivičnog dela?

○ Da, jednom
○ Da, više puta
○ Nikada

Priroda Sporazuma o priznanju krivičnog dela je takva da se izvršiocima daje blaži tretman u pogledu sankcionisanja. Zamislite situaciju da Vi nekada u budućnosti postanete žrtva krivičnog dela. Okrivljeni koji je izvršio krivično delo je neosuđivan. Tužilac je okrivljenom predložio zaključenje sporazuma i blažu kaznu, usled priznanja da je izvršio krivično delo. Sud izriče predloženu kaznu. Kakva je Vaša reakcija, da li ste zadovoljni odlukom suda?

○ Da, zadovoljni ste odlukom suda.
○ Sumnjate u odluku suda, jer se o sporazumu odlučuje na ročištu na kom Vi kao oštećeni nemate zakonsko pravo da prisustvujete.
○ Nezadovoljni ste odlukom suda.

Predstavite sebi potpuno istu situaciju kao u prethodnom slučaju, uz napomenu da je izvršilac krivičnog dela lice koje je ranije osuđivano jednom ili više puta, za teža krivična dela kao što su razbojništvo, silovanje ili teška krađa. Kakva je vaša reakcija, da li ste zadovoljni odlukom suda?

- Da, zadovoljni ste odlukom suda.
- Sumnjate u odluku suda, jer se o sporazumu odlučuje na ročištu na kom Vi kao oštećeni nemate zakonsko pravo da prisustvujete.
- Nezadovoljni ste odlukom suda.

Predstavite situaciju da ste Vi okrivljeni za neko krivično delo i da nikada pre niste bili osuđivani. Tužilac Vam predlaže da priznate da ste izvršili krivično delo i prihvatite zaključenje sporazuma, predlaže Vam blažu kaznu uz napomenu da na ročištu na kome sud odlučuje nema izvođenja dokaza. Vaš odgovor tužiocu glasi

- Potpuno verujete tužiocu da je reč o blažoj kazni za izvršeno krivično delo jer poznaje pravo, priznajete krivično delo i prihvatate sporazum.
- U dilemi ste jer izostaje dokazni postupak i sumnjate da je kazna koju Vam predlaže tužilac realna.
- Odbijate da priznate krivično delo i odlučujete se na redovan krivični postupak na kome se izvode dokazi, uz neizvesnost koju kaznu će sud izreći.

Ukoliko je okrivljeni ranije osuđivan za lakša ili teža krivična dela, da li smatrate da će ponuđeno zaključivanje sporazuma uticati na smanjenje stope povratnika ili će doći do pojave zloupotreba od strane prestupnika?

- Smatrate da će uticati na smanjenje.
- Smatrate da će doći do zloupotreba.

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ON THE SHORTCOMINGS OF THE PLEA AGREEMENT[**]

ABSTRACT: The plea agreement is an institute of criminal procedure law that was introduced into the Criminal Procedure Code in 2011 as one of three agreements that can be concluded by the public prosecutor and the defendant. The author points out the shortcomings of the agreement in terms of the absence of a prescribed penalty as a condition for concluding an agreement, determining the sentence without presenting evidence, with an emphasis on extenuating and aggravating circumstances, and provides suggestions on how to prevent or eliminate problems that could occur in praxis by applying valid legal solutions. In order to obtain answers to some of the above questions, a research questionnaire was created on the basis of which the author collected data from a court and public prosecutor's office in order to prove the presented hypotheses. From the methodological aspect, in addition to documentary analysis, the comparative and historical method, prediction strategy and the medium-scale method were used for the purpose of the research.

Keywords: plea agreement, criminal proceedings, severity of the criminal offense, determining the sentence

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INTRODUCTION

The plea agreement is an institute of criminal procedure law that stems from U.S. criminal procedure. It was considered a type of closed-door negotiation, but the courts began to increasingly rely on it with time and practically adopted it. It was officially recognized by the Supreme Court of the United States in 1960.[1] This institute is a characteristic of adversarial proceedings.[2] The institute drew a lot of public attention for economic reasons, as it supports fighting crime in a manner that lessens the costs to the maximum extent possible by concluding the agreement.[3] From the perspective of the prosecutor, due to a lack of evidence and uncertainty on whether they can get a conviction in regular criminal proceedings, the benefit of a plea agreement is that the case may be concluded with a certain conviction and a speedy end to the proceedings, while from the perspective of the court, concluding the plea agreement lessens the workload.[4]

This institute entered Serbian law by the Amendments and Additions to the Criminal Procedure Code from 2009[5], under the name Agreement on the Admission of Guilt, while in the later Criminal Procedure Code from 2011[6], it was categorized as one of the agreements between the public prosecutor and the defendant, under the name Plea Agreement.[7] The plea agreement can be defined as an agreement in written form that represents an alignment of the wishes of the public prosecutor and the defendant, wherein the defend-

[1] Abdualiuly, R. (2016). Razvitie osobogo porjadka sudebnogo razbiratel′stva i učastija v nem prokurora pri rassmotrenii ugolovnyh del v Respublike Kazahstan i Rossijskoj Federacii. *Molodoj učenyj*, (24), 316.

[2] The first recorded instance of a plea agreement dates from 1808. It was recorded in the *Stevens* case, wherein the prosecutor charged the defendant with four criminal offences related to the sale of alcohol. The parties "negotiated" that the defendant plead guilty to one of the charges and that the prosecutor, in return, drop the remaining three charges. The judge was required to issue the prescribed sentence of $6.67 and court costs amounting to $47.12. Available at: https://core.ac.uk/download/pdf/215559239.pdf, 871.

[3] Levmore, S., Porat, A. (2012). Asymmetries and Incentives in Plea Bargaining and Evidence Production. *The Yale Law Journal*, (122), 694.

[4] Herzog, S. (2003). The relationship between public perceptions of crime seriousness and support for plea-bargaining practices in Israel: A factorial-survey approach. *Journal of criminal law and criminology*, (94), 103.

[5] Law on Amendments and Additions to the Criminal Procedure Code, *Official Gazette of the RS,* no. 72/09 from September 3, 2009.

[6] Criminal Procedure Code, *Official Gazette of the RS,* no. 72/2011, 101/2011, 121/2012, 32/2013,45/2013 and 55/2014 (hereinafter: CPC).

[7] Bajović, V. (2015). Pravna priroda i pravno dejstvo sporazuma o priznanju krivičnog dela. *Pravni život,* (9), 672 fn. 3.

ant consciously and of free will pleads guilty to one or more of the criminal offences they are charged with, while the public prosecutor agrees to treat the defendant more leniently, negotiating with the defendant on the type, means and scope of the penalty or other criminal sanction, as well as other elements of the agreement. This type of agreement is not legally binding until the court makes a decision regarding it.

The plea agreement can be concluded between the public prosecutor and the defendant from the time that an order to initiate the investigatory procedure has been issued until the end of the main hearing and the defendant must be represented by a defence counsel.

Article 314 of the CPC prescribes the obligatory elements for concluding a plea agreement:

> "The plea agreement shall contain:
>
> 1) a description of the criminal offence which is the subject matter of the charges;
>
> 2) a confession of the defendant that they committed the criminal offence referred to in item 1) of this paragraph;
>
> 3) an agreement on the type, extent or scope of the penalty or other criminal sanction;
>
> 4) an agreement on the costs of the criminal proceedings, on confiscation of the pecuniary benefits obtained by the crime and the restitution claim, if one has been submitted;
>
> 5) a statement on the parties' and defence counsel's waiver of the right to appeal against a decision with which the court has accepted the agreement in its entirety, except in the case referred to in Article 319, paragraph 3 of this Code.
>
> 6) the signatures of the parties and the defence counsel.
>
> In addition to data referred to in paragraph 1 of this Article, the plea agreement may also contain:
>
> 1) a statement from the public prosecutor on desisting from criminal prosecution for criminal offences not covered by the plea agreement;
>
> 2) a statement from the defendant on the acceptance of an obligation referred to in Article 283, paragraph 1 of this Code, provided that the nature of the obligation makes it possible to commence its execution before submitting the agreement to the court;
>
> 3) an agreement in respect to the goods obtained by the crime which shall be confiscated from the defendant."

This paper will analyse the negative aspects of the plea agreement, the contradictions, and solutions in order to remedy the shortcomings, as well as analyse the methods which were utilized in this paper.

Taking into account the subject matter of this paper, I have presented two hypotheses. The first hypothesis refers to a lack of a defined extent of the sanction prescribed for a criminal offence as a condition for concluding the agreement. The second hypothesis refers to a lack of an investigatory procedure while concluding the agreement and proposing sanctions, and wherein extenuating and aggravating circumstances are not taken into account. To answer these questions, the appropriate research methods were used.

The comparative method is used to compare this procedural institute in Serbia with the country of its origin (the U.S.A), as well as with countries where it is applied (Kazakhstan, France, Poland). This method identifies the differences between the legal systems, which system regulates this institute in a better manner and which has shortcomings, the reasons and the path to implementation into the Serbian legal system. Further, results obtained via survey demonstrate the manner in which men and women aged 19–63, as well as persons that were never the victims of a criminal offence and those that were victims once or in multiple instances, react to the conclusion of the agreement and the decision of the court.

Prediction strategy as a method was used with the purpose of obtaining answers regarding the impression of the public – the survey participants on the advantages or disadvantages of the plea agreement; whether, in their opinion, it is an instrument for reducing recidivism or an instrument with potential for misuse by offenders; what impression they, as the public, have of the plea agreement; but also what their position would be if they were the injured party or the defendant.

Documentary analysis was key to proving the hypotheses. This method was selected as the most adequate after concluding that a large amount of data relevant for this research was contained in court case files, in the very judgements that accept a plea agreement, but also in court records. Information contained in 21 judgment of the First Basic Court in Belgrade was used, as well as one judgement of the Higher Court in Belgrade and three agreements concluded in the War Crimes Prosecutor's Office. To gather information for the research, a questionnaire was created and delivered to the First Basic Court in Belgrade, after which the data from the completed questionnaires was organized and classified. The questionnaire contained data indicating the severity of the criminal offence the defendant was charged with, data on the existence or non-existence of extenuating or aggravating circumstances relevant for determining the sentence, the personal circumstances of the defendant and the sanctions that were issued. The research was conducted in several phases. In the first phase, data from court case files from 2015 to 2018 was gathered, during which a research questionnaire was filled out, which can be found in the Appendix to this paper. In the next phase, the data obtained from

the First Basic Court in Belgrade was classified according to the severity of the criminal offence for which the plea agreement was made, according to the prior convictions of the defendants, as well as according to the sanctions that were issued; finally, the data was used to prove the hypotheses.

A medium-scale method in the form of a survey with multiple-choice answers based on the Likert scale was used; 59 respondents of different ages and genders were surveyed to obtain answers on their positions regarding the plea agreement institute. Their reactions if they were to find themselves in the position of the defendant or the injured party were analysed, assuming similar decisions were made by the court as those that were used for the documentary analysis. The respondents positions regarding trust in the judiciary and its functioning was also analysed.

ELEMENTS OF THE PLEA AGREEMENT

Severity of the criminal offence

In the provisions of the previous Criminal Procedure Code, one of the conditions for concluding the plea agreement was that it can only be concluded for criminal offence for which a maxim sentence of 12 years of imprisonment was prescribed. There is no such condition in the acting CPC and the plea agreement can be concluded for the most severe criminal offences.[8] Besides the CPC, the mandatory instruction of the Republic Public Prosecutor O no. 5/2013 from 26/12/2013 (hereinafter: the Instruction), regulates that the plea agreement may be concluded for any criminal offence, regardless of the prescribed sanctions. It would seem that this essential element of the agreement was too easily accepted, as it leaves open the possibility for a person that has committed the most severe criminal offence, in relation to someone who has committed a less severe offence, to "negotiate" with the prosecutor regarding the sanctions. I believe it is absurd to provide someone who has, for example, raped a child, murdered someone in a cruel or insidious manner, etc., with the option to negotiate and receive lenient treatment.

When we are discussing the plea agreement as a simplified procedural form, it should be kept in mind that the intent of the legislative bodies was that such a procedure, and similar ones, should refer to criminal offences that belong to the class of, so-called, "light or moderate criminality".[9] These are offences

[8] Bejatović, S. (2012). Sporazum o priznanju krivice (Novi ZKP Republike Srbije i regionalna komparativna analiza). *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva.* Beograd: Misija OEBS u Srbiji, 108.

[9] *Ibid,* 111.

that pose a lesser degree of danger to society, for which lesser sanctions are prescribed and for which it is not necessary to invest a significant amount of time. Countries that have implemented the plea agreement also determine the limits regarding which criminal offences it can be applied to. Thus, for example, French legislature limits applying the plea agreement to criminal offences for which a monetary fine or imprisonment of up to five years is prescribed; Poland allows the public prosecutor to conclude a plea agreement with the defendant for criminal offences for which imprisonment of up to 10 years is prescribed.[10] The criminal-procedural law of Russia also sets the limit at criminal offences for which imprisonment of up to 10 years is prescribed.[11]

By analysing 21 case conducted before the First Basic Court in Belgrade in the aforementioned period the following data was obtained: 10 plea agreements were concluded for the criminal offence of unauthorized possession of narcotics, out of which five defendants had one or more prior convictions for more severe criminal offences like robbery and aggravated larceny, or for the same offence for which they concluded the plea agreement. A case where the defendant had five prior convictions is particularly interesting.[12] As another absurd example, I would like to point out a case in which the defendant concluded a plea agreement for a criminal offence that he committed while serving a prison sentence.

The results of the survey show that if the respondents were the injured party and the defendant had no prior convictions, out of 59 respondents, 12 of them (20.7 %) stated that they would be satisfied with the decision of the court, 20 (30.5 %) that they would have doubts regarding the decision of the court and 26 (44.8 %) that they would be unsatisfied with the decision. The situation drastically changes when it concerns persons that have one or more prior convictions, where 2 (3.4 %) of the respondents stated that they would be satisfied with the decision, 4 (6.9 %) that they would have doubts and 52 (89.7 %) that they would be unsatisfied.

Cases where the plea agreement was concluded before the International Criminal Tribunal for the former Yugoslavia have also occurred. Before this Tribunal, 20 defendants confessed their guilt and concluded a plea agreement. The conclusion of such agreements between the prosecutor and the defendant

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[10] Nikolić, D. (2010). Sporazum o priznanju krivice kao forma ubrzanja krivičnog postupka. *Tematski zbornik radova*, 201–202.

[11] Gosudarstvennaja Duma, Ugolovno-processual'nyj kodeks Rossijskoj Federacii, Moscow, 2001. Available at: http://www.consultant.ru/document/cons_doc_LAW_34481./

[12] The defendant had prior convictions for the following criminal offences: grave offences against traffic safety, interfering with a public official in the discharge of their duties, violent behaviour, unauthorized possession of narcotics, forging a document. The plea agreement was concluded for the criminal offence of interfering with a public official in the discharge of their duties.

has become a subject of controversy and some authors believe they change the historically grounded provisions of the International Tribunal.[13] During the research conducted at the War Crimes Prosecutor's Office, it was determined that between 2015 and 2018, plea agreements were concluded for criminal offences for which imprisonment of a minimum of 10 years or a life sentences is prescribed. The issued sentences were imprisonment of 6, 10, or, unbelievably, a year and 6 months, so the question of whether it is just that someone accused of war crimes against civilians be offered lenient treatment via a plea agreement arises. It should also be noted that an average of 7 days passed between the conclusion of the plea agreement and issuing of the judgement, which leaves the impression that expediency of the procedure was honoured, but leaves open the question of whether justice was served given that the crimes were committed against a large number of civilians, particularly if the nature of the agreement is kept in mind, as it is intended to be applied to light or moderate criminal offences.

One of the survey questions was: the respondents should imagine themselves being charged with a criminal offence and that they had no prior convictions and that the prosecutor proposes that they confess to the criminal act and accept the plea agreement, offering a lighter sentence but without presenting evidence – what answer would they give the prosecutor? The results show that out of 59 respondents, 24 (41.4 %) would accept the offer, while 35 (60.3 %) stated that they had doubts regarding the offer and would choose to partake in regular criminal proceedings where evidence would be presented. It would appear that the respondents have more trust in an issued sentence that comes out of evidentiary procedures than when it is determined and proposed by the prosecutor without going through the procedure. The difference of nearly 19% shows that these are not outliers and certain respondents trust the judiciary and its functioning.

Determining the sanctions

As one of the necessary element of the plea agreement, the CPC prescribes that the agreement between the public prosecutor and defendant is on the type, means, or *scope* of the penalty or other criminal sanction. The academic community was stirred up because the word "scope" caused multiple dilemmas and different interpretations. If the parties would only agree on the scope of the sanctions and the concrete means of the sanctions were left up to the court, how could the court issue concrete sanctions within the agreed-upon

[13] Clark, J. N. (2009). Critical Review of Jurisprudence: An Occasional Series, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation. *The European Journal of International Law,* 20 (2), 427.

scope without conducting evidentiary procedures and without taking into account extenuating and aggravating circumstances and other parameters necessary for determining sanctions?

By analysing the judgement of the Higher Court in Belgrade that was the subject of the research, it was found that in the statement of reasons of the court it was communicated that:

> "...by Article 2 the deputy of the HPO (t/n. Higher Prosecutor's Office) and the defendant agreed that the Higher Court in Belgrade should ... issue the defendant a suspended sentence by *determining* imprisonment of 6 (six) months and concurrently ordering that the issued sentence shall not be executed if ..."

Then, in the next item of the statement of reasons, after the hearing, the Court expressed that:

> "...in the court files there is also other evidence which is not contrary to the confession of the defendant ... that he committed the criminal act he is being charged with and that because it was *determined* that a suspended sentence was proposed, by which the defendant's sentence was determined to be imprisonment of 6 (six) months..."

In this case, the Court accepted the proposed sanctions but without stating the extenuating/aggravating circumstances, that is, without stating the evidence to be found in the court files, thus it remains unclear how the Court *determined* the proposed sanctions.

In order to prevent potential misuse, oversight from the Republic Public Prosecutor was implemented in Serbia. After concluding an agreement, the first-instance public prosecutor's office is required to, via the appellate public prosecutor's office, inform the Republic Public Prosecutor on the case regarding which the agreement was made, as well as to deliver with the submission letter the entirety of the documentation, including the final court judgement that decided on the agreement. In this manner, the Republic Public Prosecutor has oversight over the actions of the prosecutor's office that made the agreement and prevents potential misuse.[14]

A similar type of oversight also exists in the United States, as the Department of Justice validates a plea agreement regarding the most severe criminal offences.[15]

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[14] Mirkov, Ž. (2019). Practical aspects of the plea agreement in the criminal procedure law of the Republic of Serbia. *IX International Scientific Conference „Archibald Reiss Days 2019" – Thematic Conference Proceedings of International Significance,* (1), 205–219.

[15] Milovanović, M. (2010). Sporazum o priznanju krivice – pro et contra. *Annals of the Faculty of Law of the University of Belgrade* (2), 422–423.

Despite the fact that the defendant confessed to committing the criminal offence, the court, in accordance with the principle of proportionality of sentencing, *must* present the evidence on which the decision on the criminal sanctions depends.

> "The public prosecutor does not present evidence and yet negotiates the severity of the sanction, but the public prosecutor is otherwise also not a state body that presents evidence regarding the decision and means of a certain criminal sanction, and in this case they are only given the right to negotiate with the defendant about confessing and the sentence, where the sentence is not based on the evidence presented, as is the case with sentences issued by the court, but on the consent of the parties within a wider agreement; this is, by itself, a major exception to the general rules, so it is important not to add an additional exception in practice wherein the court can determine the concrete severity of the sentence without presenting the evidence on which the severity of the sentence is based."[16]

To contribute to this position, it should be noted that Art. 317 of the CPC prescribes that, besides the confession of the defendant, it is sufficient for it to be determined "that the other existing evidence is not contrary to the defendant's confession on having committed the criminal offence". This provision could cause multiple dilemmas because, as Turnjanin and Simonović point out, reffering to Škulić,

> "...in practice, it can lead to a 'naked' confession being procedurally valid, as it is possible for there to exist a whole list of other evidence that is truly not contrary to the confession, but, at the same time, has no relation to it."[17]

When determining the sentence in regular court proceedings, it is necessary to apply the provision of Art. 54 of the Criminal Code of the Republic of Serbia that states:

> "The court shall determine a punishment for a criminal offender within the limits set forth by law for such a criminal offence, with regard to the purpose of the punishment and taking into account all circumstance that could have bearing on the severity of the punishment (extenuating and aggravating circumstances), and particularly the following: degree of culpability, the motives for committing the offence, the degree of endangering or damaging protected goods, the circumstances under which the offence was committed, the past life of the offender, his personal situation, his behaviour after the commission of the criminal offence and particularly his attitude towards the

[16] Škulić, M. (2009). Sporazum o priznanju krivice. *Pravni život*, (10), 295–296.

[17] Simonović, B, Turnjanin, V. (2013). Sporazum o priznanju krivičnog dela i problema neistinitog priznanja. *Pravni život,* (10), 26.

victim of the criminal offence, and other circumstances related to the personality of the offender."[18]

This provision would be difficult to apply to a plea agreement, as there is no evidentiary procedure conducted before the court and that damages the principle of proportionality to a significant extent. Some authors note that the personal situation and past life of the offender, which could be used as *extenuating* or *aggravating circumstances*, may be more easily determined by the public prosecutor through an informal conversation than during court proceedings. The Instruction prescribes that the public prosecutor is required to gather information on all listed circumstances, which is done by studying the criminal or misdemeanour records, as well as obtaining information on the offender's assets. I am of the opinion that difficulties may arise regarding some other circumstances, i.e., if the defendant does not provide truthful information on their personal or family circumstances or the motives for committing the crime; such a situation is possible, particularly within the framework of the right to defence, as such information is relatively difficult for the public prosecutor to verify and even if it is verifiable, it is questionable to what extent the public prosecutor could investigate such information, given the expediency of the procedure.

An element of coercion latently exists and affects the defendant precisely because there are large observable differences between the sanctions issued after regular proceedings and those issued by agreeing to a plea agreement.[19] In some countries, like Kazakhstan, if the prosecutor and court suspect that the confession was given under duress, such an agreement will not be accepted, which maintains the rule of law. Further, it is permissible to take long breaks during the interrogation of the defendant in order to ask supplemental questions, if an experienced prosecutor or judge has doubts regarding the truthfulness of the confession. When the prosecutor or judge observe that a confession was given out of fear or some other reason that is not guilt, such a confession will not be accepted.[20] There have been cases wherein the prosecutor intentionally qualifies an offense as more severe to pressure the defendant to conclude an agreement.[21]

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[18] Criminal Code, *Official Gazette of the RS*, no. 85/2005-amd., 107/2005-amd., 72/2009, 111–2009, 121–2012, 104/2013, 108/2014 and 94/2016 (hereinafter: CC).

[19] O'Keefe, K. (2010). Two wrongs make a wrong: a challenge to plea bargaining and collateral consequence statutes through their integration. *Journal of criminal law and criminology*, (100), 260.

[20] Abdualiuly, R. (2016). Problemnye voprosy, voznikajuŝie pri zaključenii processual′nyh soglašenij v Respublike Kazahstan. *Molodoj učenyj*, (25), 440.

[21] For example, if circumstances indicate that the defendant has committed the criminal offence of exceeding the limits of legitimate self-defence, the prosecutor would qualify it as premeditated murder; the defendant accepts the plea agreement, thinking that would

As it concerns evidence, the Department of Justice of the United States obligates that all exculpatory evidence be delivered to the defendant before a confession is made.[22] I believe that the intent of the Department of Justice is to remove the possibility of the defendant's innocence being revealed afterwards, so that they could have a clear confession without any doubt regarding its veracity.

It cannot be said that implementing this institute into continental legal systems fully removes the evidentiary procedure, but it could be said that there is no direct presenting of evidence before the court, that is, performing the investigation in its full scope.[23] It should be noted that this does not honour the principle of immediacy from Art. 419, para. 1 of the CC which stipulates that the *court* shall base the judgement only on the evidence presented at the main hearing. When deciding on a plea agreement, the court does not hold a main hearing nor is evidence presented, but the decision is made at the preliminary hearing, where the judge assesses the "validity and acceptability of the agreement between the parties"[24] and based on that makes the judgement accepting the agreement. Thus, the court decides whether the conditions for concluding the agreement have been fulfilled, without delving into the essence of the case as it is limited by the provisions regulating the plea agreement. Conversely, the precondition for any lawful judgement is that the court must determine the truthfulness of the facts at its disposal, based on *evidence*. The Instruction prescribes that when determining the sentence, the public prosecutor must, guided by the rules from Arts. 54 and 57 of the CC, take into account rules of criminal law when determining the sentence, but it would appear that it is not truly adequate for the state body responsible for prosecution to be competent to decide on a significant portion of the facts related to determining the sentence, which should be the role of the body issuing judgements.

Precisely this criteria of extenuating and aggravating circumstances causes the most issues, as there is no presenting of evidence when concluding the plea agreement; consequently, extenuating and aggravating circumstances are not assessed and thus the parties consensually propose the sanctions. The question then arises of whether the court can refuse the agreement if it feels the

avoid a more severe sentence. For more, see: Šajhystanova Saltanat Nurlanovna, (2015). Perspektivy legalizacii sdelki s pravosudiem v ugolovnom zakonodatel′stve Respubliki Kazahstan: položitel′nye i otricatel′nye aspekty. *Molodoj učenyj*, (2), 389.

[22] McConkie, D. S. (2017). Structuring pre-plea criminal discovery. *Journal of Criminal Law and Criminology*, (107), 5.

[23] Abdualiuly R. (2016). Razvitie osobogo porjadka sudebnogo razbiratel'stva i uchastija v nem prokurora pri rassmotrenii ugolovnyh del v Respublike Kazahstan i Rossijskoj Federacii. *Molodoj učenyj*, (24), 317.

[24] Bajatović, V. (2009). *Sporazum o priznanju krivice: uporedno-pravni prikaz.* Belgrade: Faculty of Law in Belgrade, 179.

sentence is inadequate, that it would not fulfil the purpose of the punishment and would influence the perpetrator to commit criminal acts in the future? The previous legal solution stipulated that the court can refuse the agreement if the sentence clearly does not correspond to the severity of the criminal offence that was admitted (Art. 282v, para. 9, CPC/2001).[25] Compared to the provision in the prior law, the CPC/2011 prescribes that it is sufficient for the sentence or other criminal sanction to be in accordance with the *criminal or other law* (Art. 317, para. 1, point 4).

Regarding the research sample, out of the 21 plea agreements that were concluded, extenuating and mitigating circumstances were not determined in any case. In one case, case files from the investigation contained information from the Criminal Records that the defendant had prior convictions and that piece of information was not included in the judgement. Then, the court referred to Art. 315 of the CPC in only two cases and presented evidence like the analysis and opinion of the court experts, police reports from the scene of a traffic accident and reports on questioning the witnesses, and determined that the evidence supports the statements of fact and the legal qualification of the criminal act from the plea agreement. In all other cases, the judgement only states that other evidence which is not contrary to the confession of the defendant exists, without presenting it, and thus

> "...based on the confession which is founded and other evidence *determined* that the factual state in the case is like in the issuing of the sentence."

It would appear problematic that the court did not present the evidence if it refers to it and if it states that it determined the facts of the case.

While conducting the research at the First Basic Court in Belgrade, out of the total number of concluded plea agreements (21) from 2015 to 2018, it was determined that 10 persons had prior convictions and 4 of those had 2 or more convictions. It would seem that these are not extenuating circumstances and that it would not be adequate to offer such persons a plea agreement as they were ready to recommit criminal offences, knowing that they would get more lenient sentences by confessing. The criminal offences they were charged with or which they had prior convictions for ranged from "light criminality" offences to more severe ones. For example, persons that were convicted of robbery, aggravated larceny, or that had 5 convictions were provided with the opportunity to conclude a plea agreement in regards to the new offences they committed. The charts below will present plea agreements concluded with persons with no prior convictions, those with one conviction, and those with two or more convictions, as well as the ratio of prior convictions and the sanctions issued.

[25] Bajatović, V. (2009). Odmeravanje i sporazum o priznanju krivičnog dela. *Nauka, bezbednost, policija,* (2), 190.

***Chart no. 1** – The number of plea agreements concluded by persons with no prior convictions, one conviction and two or more convictions*

	Number of plea agreements concluded
No convictions	10
One conviction	7
Two or more convictions	4

***Chart no. 2** – Prior convictions and the sanctions issued*

	Imprisonment	Monetary fine	Suspended sentence
No convictions	/	/	10
One conviction	/	/	7
Two or more convictions	1	/	3

As can be seen from the charts, recidivists received suspended sentences in nearly the same numbers as first time offenders, which is a shortcoming in regards to the sanctions issued. It is interesting to note that no person was required to pay a fine, given that the defendants were employed in 17 cases (while the remaining 4 were students) and considering that pursuant to the Instruction, the public prosecutor has the right to obtain information regarding the defendant's assets, precisely with the aim of proposing a fine. It would appear that the lenient sentencing practices are inadequate as it concerns repeat offenders and that a monetary fine would be more suited, particularly considering that a suspended sentence is a warning measure and not punishment.

If a sentence or other sanction must be in accordance with the criminal or another law, that would mean that the provision of, for example, the Criminal Code on determining the sentence and regards the prior life of the offender, primarily referring to prior (non) convictions, should be considered. Consequently, it would seem that the provision of the CC was not honoured, as the prosecutor did not take into consideration the facts relevant for determining the sentence, that is, the sentence is not "in accordance with the criminal or other law." In all judgments, the court accepted the agreements as well as the proposed sanctions, utilizing the previously-cited affirmation that the sanctions are in accordance with the evidence and the CC in the statement of reasons, while the evidence contained in the case files was only read in two cases. All of the listed leads to the conclusion that the courts did not delve into assessing the evidence in the other cases, but accepted the plea agreements in regards to the sanctions as they were proposed by the public prosecutors.

DE LEGE FERENDA PROPOSALS

The efficacy of the judiciary is manifested through proceedings conducted in a reasonable timeframe, thus the bodies of the judiciary had issues realizing this idea, particularly as it regards complex cases. The plea agreement was utilized as one of the mechanisms to solve the issue. This paper presents the shortcomings of the plea agreement, the contradictions, as well as a comparison of the provision currently in-force with the previous ones. This section will deal with presenting potential propositions to remove the shortcomings with future amendments.

The condition that a plea agreement may be concluded regardless of the severity of the criminal offence is justifiably criticized in scholarly circles. This enables persons committing the most severe criminal acts to conclude an agreement, which can motivate them to continue participating in criminal activities. It would appear that reinstating an upper limit and disallowing recidivists to conclude a plea agreement is, above all, a just solution that would lessen potential misuse of the agreement by both the prosecutor and defendant, as well as lower recidivism rates.

When determining the sentence, the prosecutor and defendant negotiate the type, extent or scope of the penalty or other criminal sanction. This solution leaves it up to the courts to *precisely* determine the penalty or other criminal sanction, which is difficult to do in practice, given that the procedural activities of the court were lessened and the evidentiary process left out when applying this institute and the principle of immediacy was not fully honoured. In their judgements, the courts accepted the sanctions proposed in the agreements, referring to evidence supporting the confessions without stating what the evidence was, except in a few cases.

From the possible solutions that could remove this absurdity, two stand out. According to one, the defendant would need to verbally state the extenuating and aggravating circumstances determined by the plea agreement at the hearing, in the process of which they could help the court determine the precise sentence if the prosecutor determined the scope. This would institute a type of interrogation of the defendant as one of the evidentiary measures, which would, to an extent, mitigate the aforementioned shortcomings as well as honour Art. 54 of the CC. The other solution that could successfully remove the shortcomings of the plea agreement when determining the sentence would be to institute amendments to the CC that would introduce scopes to the sanctions, like it is prescribed in the US, where the plea agreement stems from, wherein there are mathematical formulas by which the sentence is determined. This solution would be possible to implement in Serbian law if there was an

evidentiary procedure based on which the sentence was determined because, as noted by Bajović,

> "...correctly establishing the facts and correctly determining the sanctions in accordance with the established facts are traditionally considered the basic tasks of a judge in criminal proceedings."[26]

On the other hand, the prosecutor should rely on Art. 54 of the CC when negotiating the sanctions. This would make the legal designation of the term "scope" of the penalty or other sanctions make sense.

Harmonization of the sanctions proposed when concluding a plea agreement with other laws is an important element that connects determining the sentence in this procedure with determining the sentence in regular criminal proceedings. If the CPC stipulates that the sanctions need to be in accordance with the criminal and other laws and if the Criminal Code contains a provision on determining the sentence that is also followed in regular criminal proceedings, a solution that would make it easy for the prosecutor to make an assessment imposes itself, and it is also both efficient and economical. The prosecutor has the right to ex officio request a report regarding the defendant from the Criminal and Misdemeanour Records at the earliest phases of the investigation, which is also prescribed by the Instruction. Consequently, if this information is used in regular criminal proceedings as extenuating and aggravating circumstances when determining the sanctions, pursuant to the CC, the prosecutor can take them into account when proposing the sanctions during a plea agreement negotiation, and as the CPC stipulates that it needs to be in accordance with other laws, in this case it can be with the CC. Further, it is particularly important for the courts to state what evidence is contained in the case files, that is, to present it, so that it can be clearly observed based on what the courts determined the facts of the case as they are found in the judgement, which would go beyond stating that

> "evidence that is not contrary to the admission of the defendant to a criminal offence exists";

as, according to Art. 419 of the CPC, the court can only make a judgement based on the evidence presented at the main hearing. The courts should have a more influential role in these processes, particularly when dealing with the issuance of criminal sanctions, because a plea agreement *proposes* the sanctions and it is up to the courts to specify (regarding the proposal of the scope), determine, and rule.

[26] Bajović, V. (2015). Odmeravanje kazne i sporazum o priznanju krivičnog dela. *Nauka, bezbednost i policija, časopis policijske akademije,* (2), 179.

CONCLUSION

We are dealing with a relatively new institute, only somewhat akin to US *plea bargaining*, that has only been implemented since 2009, and for such a short period in existence, its elements have been changed twice. As it was the subject of many critiques, those critiques become more prominent because the legislators changed important elements of the agreement, attempting to harmonize them with the norms of the laws of its country of origin, in order for the agreement to have the same positive effects. But during the changes there were oversights regarding efficiency, justness, rights of the defendant, as well as the purpose of sanctions.

The responses of survey participants of different age groups, 19 to 63, were analysed, with the aim of presenting the opinion of the public regarding this institute. From the total number of respondents (59), 24 were female and 34 male, out of which 5 (8.6 %) were victims of a criminal act once, 7 (12.1 %) multiple times and 46 (79.3 %) never. The purpose of the research was to analyse different categories of people (and not, for example, only legal practitioners), their opinions regarding trust in the bodies of the judiciary, and the agreement itself. The results present their stances if they were in the position of the injured party as well as the defendant.

Answering the question whether they believe that proposing an agreement to persons with prior convictions for lighter or more severe criminal offences would lead to a reduced recidivism rate or would lead to misuse by the offenders, out the 59 respondents, 7 (12.1%) answered that it would lead to reduced recidivism rates, while an entire 51 (89.7%) participant answered that it would lead to misuse. The contrast between the responses demonstrates that the respondents believe that this institute is not an ideal means for the suppression of crime and that they are not optimistic regarding the possibility that more lenient treatment of offenders may affect their re-socialization regarding recidivism, as well as that this does not accomplish the aim of sanctioning.

The plea agreement is an institute that is rising in importance in Serbian criminal proceedings. The tendency is to solve cases by negotiation, and the overcrowding of the judiciary with cases and the tendency to suppress criminality are favouring solving criminal cases in this manner. However, "to simplify a procedure is a complex matter"[27], thus, even if there are some shortcomings, it should be stressed that we are dealing with a relatively new institute which was subject to several amendments and harmonisations, as it is a legal transplant from a Common Law system and a certain amount of time is required for it to be adjusted to the provisions of a Continental Law system.

[27] Turnjanin, V. (2017). Pojmovno određenje i pravna priroda sporazuma o priznanju krivičnog dela. *Glasnik prava*, VIII (1), 48 fn. 31.

The novel institute brought forth by the Criminal Procedure Code should be supported and the numbers that demonstrate the frequency of its use should not be discounted, but the shortcomings that were pointed out in this paper should also be taken into consideration during future amendments to the Criminal Procedure Code and changes should be made in accordance with the propositions. There should be no insistence on abolishing this institute, even though it is considered controversial by many, but work towards improving the protections for the parties in the procedure, especially because the courts, in this instance, are not able to determine if the rights of the parties have been violated. The purpose of the research was to confirm the hypotheses and use the answers obtained to improve the institute of the plea agreement. Certainly, after a certain period of time of it being utilized, the results will show whether the plea agreement is truly efficient, if the answers are sought in judicial practice, statistical and other data.

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QUESTIONNAIRE

Court information

Court: ________________________________
Case number: __________________________

Information on the perpetrator of a criminal offence

Gender:
- ○ male
- ○ female

Age:
- ○ up to 30 years of age
- ○ 31–45
- ○ 46–60
- ○ over 60

Marital status:
- ○ married
- ○ single

Employment:
- ○ unemployed
- ○ student
- ○ worker
- ○ farmer
- ○ entrepreneur
- ○ other

Prior convictions:
- ○ none
- ○ one
- ○ two or more

Information on the offence

Legal qualification of the offence: ______________________

Joinder of offences:
- ○ no
- ○ yes, two offences
- ○ yes, three or more offences

Stage of execution of a criminal offence:
- ○ attempted
- ○ committed

Degree of culpability:
- ○ premeditated
- ○ negligent

Did the perpetrator have accomplices:
- ○ committed the offence alone
- ○ had accomplices

Were the facts determined in the plea agreement accepted as relevant in relation to the other defendants:
- ○ yes
- ○ no

Information on the criminal proceedings

Was there a plea agreement:

- yes, at the proposition of the prosecutor
- yes, at the request of the defendant
- no

Was the injured party present at the hearing where the plea agreement was decided on:

- yes
- no

Did the injured party submit a restitution claim:

- yes
- no, they were advised to litigate

Information on the sanctions

Was the defendant pronounced guilty:

- yes
- no

Which sanctions were issued:

- imprisonment
- fine
- suspended sentence
- judicial admonition
- community service
- revocation of driver's licence
- rehabilitation measure
- remittance of punishment

Extenuating circumstances:

- none determined
- degree of criminal responsibility
- earlier life of the offender
- circumstances under which the offence was committed
- personal and familial situation of the offender
- other circumstances

Aggravating circumstances:

- none determined
- degree of criminal responsibility
- earlier life of the offender
- circumstances under which the offence was committed
- personal and familial situation of the offender
- other circumstances

ON THE SHORTCOMINGS OF THE PLEA AGREEMENT

Greetings,

I am inviting You to participate in a research examining the shortcomings of the plea agreement. The purpose of the research is to determine the attitudes of the respondents regarding the plea agreement, as well as to determine Your opinion on the analysis of some court decisions issued regarding the agreement. Participation is anonymous and voluntary. Filling out the questionnaire will require approximately 10 minutes. Thank You for participating in the research.

Respectfully, *Dragana Milošević*

Gender

- ○ Male
- ○ Female

Age _____________ (Your answer)

What is Your degree of trust in the judiciary

	Completely agree	Disagree
They respect the rights of the defendant	○	○
They act justly	○	○
The prevent reoffending	○	○
They respect the rights of the injured parties	○	○

Were You previously the victim of a criminal offence?

- ○ Yes, once.
- ○ Yes, multiple times.
- ○ Never.

The nature of the plea agreement is such that it provides offenders with more lenient treatment in regards to sanctions. Imagine a situation where you are the victim of a crime in the future. The offender has no prior convictions. The prosecutor proposed concluding a plea agreement and giving the defendant lighter sanctions as a consequence of the defendant confessing to the criminal act. The court issues the proposed sanctions. What is Your reaction – are you satisfied with the decision of the court?

- ○ Yes, I am satisfied with the decision of the court
- ○ You have doubts regarding the decision of the court, as the plea agreement is negotiated in a hearing where you, as the injured party, have no legal right to be present
- ○ No, I am unsatisfied with the decision of the court

Imagine the same situation as in the previous questions, with the exception that the offender is a person with one or more prior convictions for severe criminal offences, such as robbery, rape, or aggravated larceny. What is Your reaction – are you satisfied with the decision of the court?

- Yes, I am satisfied with the decision of the court;
- You have doubts regarding the decision of the court, as the plea agreement is negotiated in a hearing where You, as the injured party, have no legal right to be present;
- No, I am unsatisfied with the decision of the court.

Imagine a situation where You are accused of a criminal offence and have no prior convictions. The prosecutor proposes that you confess to the criminal offence and conclude a plea agreement. They propose lighter sanctions, while remarking that evidence will not be presented at the hearing where the court makes its decision. You answer is:

- You have complete faith in the prosecutor that the sanctions for the criminal offence are lighter because You know the law;
- You confess to the criminal offence and accept the agreement;
- You are unsure because evidence will not be presented and You have doubts that the sanctions proposed by the prosecutor are realistic. You reject to confess and decide to partake in regular criminal proceedings where evidence will be presented, regardless of the uncertainty of the sanctions that the court may issue.

If the offender has prior convictions for light or severe offences, do You believe that a proposed plea agreement will lead to a lower recidivism rate or will it be misused by offenders?

- I believe it will lead to lower recidivism rates.
- I believe it will be misused.