

# PLEA BARGAINING: A CHALLENGING ISSUE IN THE LAW AND ECONOMICS

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## Abstract

*Plea bargaining is defined as an agreement between the prosecutor and defendant whereby the defendant pleads guilty in exchange for a more lenient sentence. The literature on law and economics has been treating the plea bargaining as a desirable way of accomplishing the maximum prevention with minimum costs for criminal justice system. It is controversial issue for legal scholars who find the plea bargaining a “necessary evil”, demanding its reform or even abolishment. The main aim of the paper is to contribute to a better understanding of the plea bargaining, not only by discussing some of economic reasons affecting both parties when deciding to bargain, but also to provide more in-depth understanding of the wider context in which bargaining is taking place (powerful role of the state attorney, complex relationships between defendants and their attorneys-at-law, effects of bargains on third parties, desirable role of the court and the issue of innocence). Particular attention is given to the plea bargaining in the Republic of Croatia. Any further analysis must take into consideration that the key question of the plea bargaining is not only the interest of procedural economics and mitigated sentences, but also not to jeopardize the defendant rights, particularly not to open the possibility of wrongful conviction of innocent.*

**Keywords:** plea bargaining, prosecutor, defendant, law and economics, criminal procedure, Croatia

JEL classification: C7, K2

## I. INTRODUCTION

Despite numerous complaints regarding the fulfillment of the traditional principles of the criminal procedure law of the continental type, today one cannot disagree with the impact of plea bargaining - a dominant institution of the American criminal procedure (Fisher, 2000, 1072) – on the appearance of various consensual forms of proceeding which enable a prosecutor to settle with the defendant in order to complete the criminal procedure. Even though there are various forms of bargaining, the notion of plea bargaining usually refers to the prosecutor offering some kind of concession when sentencing a defendant in the exchange for a guilty plea. Out of all possible ways of summarized case solving which are necessary for every modern criminal justice system, the plea bargaining is the most controversial and widely discussed (Whitman, 2014, 109). Many legal scholars find the plea bargaining a “necessary evil” and demand its reform or even abolishment, while economic scholars prefer it by considering the prevention as the main goal of the criminal law (Gazal-Ayal & Riza, 2009, 150-151). Starting from the assumption that the parts of the criminal justice system can compare with well-functioning market system, a significant amount of economic literature consider the plea bargaining as a desirable way of accomplishing the maximum prevention with the minimum of allocative inefficiency (the minimum spending of budgetary means which are at disposal to the prosecutors and courts). They are desirable because both parties obtain certain gain: a defendant who has waived his trial rights is given a milder punishment, while the prosecutor can engage saved means in some other (more complex, important) cases (Easterbrook, 1983, 289). According to the one of first and most influential economic models/analysis of plea bargaining (Landes, 1971, 61), a decision to plea bargain or going to the trial depends about the probability of conviction, severity of criminal offence, availability and efficiency of means which are at disposal to prosecutor and defendant, cost analysis of plea bargaining versus trial as well as attitude towards risk (e.g. risk-averse or risk-seeking person). Such a model has been later on improved by adding discount rates and advocacy costs (Easterbrook, 1983, 309).

In the American criminal justice system the plea bargaining is applied in more than 95% of all cases. Dominant theoretical justification of plea bargaining is represented by the “trial shadow theory” according to which bargains are mechanism of voluntary dispute resolution, as it is the settlement in the civil litigation, which are happening in the “shadow” of trials, i.e. in the shadow of

expected trial outcomes. They are the products of parties' prognosis of trial outcomes despite which induce them to bargain. Parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount (Bibas, 2004, 2464). One should bear in mind that the power of evidence in the concrete case has important, even primary circumstance for the prosecutor when determining the price of plea bargain (Alschuler, 1968, 50, 58). Together with the concession exchange which satisfied the interests of both prosecutor and defendant, interests of process economics also represent convincing justification for plea bargaining as non-trial way of overcoming a regulated in detail, complex and expensive criminal procedure. It is necessary to point out in the introductory part differences between the Anglo-American and Continental type of plea bargaining. Those differences are evident in the severity of criminal offenses to which a plea bargaining can be applied, subject and effects of bargaining as well as in the role of the court in the bargaining. (Damaška, 2004, 9-13). In the USA criminal justice system, bargains are applied even in the cases of most severe criminal offenses while the Continental law limits its application mostly for minor and middle-weight criminal offenses. The subject of bargaining between parties in the Anglo-American system comes in terms of different concessions granted to the accused who agrees to self-incrimination, i.e. who pleads guilty of the charges in the indictment. Such a confession is not related only to the factual description of committed offence but also to its legal qualification. In the Continental law, the subject of bargaining is concessions to defendant in the case when the confession of defendant provides a court with incriminating evidence. This raises the question can such evidence be treated as sufficient for the conviction. As far as bargaining effects are concerned, it is typical for the American model that by using the bargaining one avoids the jury trial and proceeds immediately to the sentencing (the court ratifies mitigated sentence obtained through bargaining). Also, bargaining may imply lesser legal qualification of the offense or the omission of some items in the indictment. Contrary to that, the Continental law allows simplified trial, and bargaining is usually allowed only in the cases of mitigating the sentence. Finally, when it comes to court participation in the bargaining, one should point out following – while in the American law the role of the court is reduced to confirming/rejecting the parties' bargaining since any earlier involvement of the court would affect its impartiality, the Continental law provides an opportunity for more active role of the courts in the criminal procedures (initiative for bargaining, mitigating the sentence if the accused admits the offences committed

during the trial). The existence of stated differences is the result of differences in the historical development of bargaining in the criminal procedure, different criminal procedure models (accusatory and inquisitorial type), impact of bargaining on traditional principles of criminal procedure as well as cultural differences (including the role of market in the social life). All of these should be taken into account when examining the impact of American law on Continental law, including an introduction of solutions such as plea bargaining (Langer, 2004, 3-7). After these introductory remarks, the paper provides the analysis of the most important arguments *pro et contra* plea bargaining, including those which stem from its economic analysis (section 2), review and discussion on normative approach to the plea bargaining in the Croatian law (section 3) and concluding remarks (section 4).

## II. ARGUMENTS *PRO ET CONTRA* PLEA BARGAINING

1. Typical reasons for justifying plea bargaining in the criminal procedure should be looked for in the individualistic approach, which in case of bargaining, resembles the rational behavior in the free market by using the economic reasoning applied to the legal problems (Damaška, 2004, 14). Bargaining, namely, enhance interests of parties which had previously made a rational evaluation of all relevant circumstances for conclusion regarding the usefulness of bargain instead of going to the trial. Thus, a prosecutor will bargain in order to reduce the cost of his activity and to (re)direct available means to other cases, while a defendant will bargain in order to obtain more favorable conviction, usually in terms of mitigated sentence. The stated approach, described in the introduction, is subjected to criticism that relations in the criminal justice system cannot be equalized with the market relations (Damaška, 2004, 14), i.e. it overly simplifies the problem (Bibas, 2004, 2464). Bargaining cannot be justified by privileges in sentencing and mutually useful dispute resolution (Alschuler, 1981, 652). This is by far more complex problem which includes numerous important issues that cannot be answered by simply using economic reasoning (Garoupa & Stephen, 2008, 42-43). Those questions are related to the role of the prosecutor in the pre-trial procedure and unequal a position of defendant, complex relations between defendant and his attorney-at-law, possibility that innocent defendants plead guilty and accept the offer of prosecutor, external effects of bargain (ex-

ternalities) and fulfillment of stated sentences' purpose. The prosecutor is "the master" of pretrial procedure (*dominis litis*) and he is in the position to significantly dictate the terms of negotiations by using personal judgments in evaluating criminal responsibility and determining relevant punishment for defendant (Gifford, 1983, 38). His personal and political interests often make the bargaining system subjected to non-objectivity which in turns lead to excessive charges (Alschuler, 1968, 50). Parties in the criminal procedure do not bargaining in the shadow of trial but in the shadow of prosecutor's preferences and political trends (Stunz, 2004, 2548). Defendants are objectively in the uneven position not only due to the absence of "equality of weapons" in the pre-trial procedure, which is particularly evident in the American model in which a defendant in the time of bargaining not only knows which evidences are at the prosecutor's disposal but also due to the psychological pressure. Due to the psychological pressure to which the defendant is exposed, bargains are considered as one form of (psychological) torture (Langbein, 1978, 20). In the criminal law systems which have draconic sentences prescribed prosecutor's attractive offers may have impact on innocent defendants to plead guilty. The offer will be in any cases more substantial and stimulative for defendant to plead guilty in the case when the prosecutor does not have enough evidences. The possibility for convicting innocent defendants, who are bargaining, is not treated as a significant problem by proponents of individualistic approach because such a possibility exist in the case of trial due to its imperfection (Easterbrook, 1983, 320). Bargains do not minimize the risk of unjust convictions of innocent and thus do not improve the public interest in effective law enforcement and adequate punishment of the guilty perpetrators of offenses. Thus, some consider that plea bargaining should be abolished (Schulhofer, 1992, 2009). Taking into consideration that the abolishment of bargaining, particularly in the USA, is non-realistic to expect, more justified are demands which target the limitation of prosecutor's discretion. The impact of prosecutor on the final bargaining results is not questionable, but in any case it is not acceptable that he *de facto* marginalizes the role of the court, which is not excludable taking into consideration that the practice shows that many judges are prone to accept the result of plea bargaining without particular examination. Furthermore, differences in the interests of defendant and his attorney-at-law are also possible which economists discuss in terms of agency costs. This raises many questions of adequate representation of defendant in the criminal procedure, particularly when it comes to financing attorney-at-law, due to which some consider bargaining to have a destructive impact on the relation

between defendant and attorney-at-law (Alschuler, 1975, 1313). Proponents of individualistic approach usually neglect the external effects of the bargaining, i.e. to which degree it serves the public interest for transparency of bargaining as well as interests of victims. Considering the nature of the bargaining those interests will hardly be equal with the self-interest. Here is particularly sensitive the issue of victim's interest who, in particular case, should have the right to veto.

2. Starting from the assumption that the faith in the possibility to find out the truth is the metaphysical mistake, proponents of the bargaining advocate "pragmatic" notion of the truth as a version of event for which there is the consent of both parties. This, naturally, does not have anything to do with the truth and precise determination of facts because one gives the advantage to the communication of parties through process forms which enable achieving of acceptable decision for both parties (identification of truth with the consensual justification). Such consensual notion of truth is subjected to criticism because one should differentiate truthful from agreed claim, as well as wrongful and correct (accurate) court decisions; a decision based upon mutual concessions does not have to be truthful because even an innocent defendant may conclude that to plead guilty in order to mitigate the sentence may be the better solution than the trial. Offered concession to the defendant by the prosecutor (no matter whether he is guilty or not) always represent a reward which he could not expect in the framework of pronounced sentence after the trial and conviction (Damaška, 2004, 15-16). The practice (policy) of sentencing clearly shows that there is an objective difference between defendants who admitted the guilt within the bargaining process compared to those who opted for trial because later are usually are more severely punished. Such practice confirms that even courts, not only prosecutors, can impose a psychological pressure on defendant to accept the bargaining. Hence, this leads to the paradox conclusion that defendants who have decided to use their trial rights are being punished for that, while guilty plea and accepting prosecutor's offer always leads to more favorable treatment.

3. One of the main arguments that speak in favor of bargaining is the turmoil in the substantive criminal law related to the purposes of punishment which justify the convergence of criminal and civil law which become more evident in the bargaining (Damaška, 2004, 17). It has been already said in the introductory part that the economic literature on bargaining consider the prevention to be the sole purpose of punishment. The main purpose here is the special prevention, reparation (if the interest of restorative justice as well can be obtain

through bargaining), as well as resocializing effects which the catalogue of contemporary criminal law sanctions does not exclude (Krapac, 2014, 93). However, significant concessions to defendants must not always be in congruence with the proclaimed purposes of punishment, including maximizing preventive effects with minimal costs. The bargaining practice is often criticized for being overly lenient, which often scandalizes public and it is contrary to demands (positive) of general prevention, while the retribution is unjustly pushed to the background (Kipnis, 1979, 555). Fulfillment of punishment purposes is particularly emphasized when pressing charges against more defendants because this is the case in which the most culpable defendant may be punished in the most lenient way through bargaining process, particularly if this increases the probability of convicting other defendants (Kobayashi, 1992, 507). In most extreme case, the confession of such favored defendant may lead to the conviction of other defendants against whom the evidence were weak and finally to the conviction of innocent defendants who could not stand any chance for acquittal or application of milder type of sentence due to the statements made by favored defendant. Conviction of innocent defendant, who has decided to plead guilty in such cases, neither has any relation to the purpose of punishment nor fair treatment. This is the unfair bargain in which the prosecutor wrongfully acts from the beginning because he favors the defendant with the most culpability with the purpose to efficiently prosecute other for whom he does not have enough evidence, including the possibility that some of co-defendants also confess even though he is innocent. Such way of treatment seriously undermines the basic foundations of the criminal procedure because the goal of legal provisions about criminal procedure is that no innocent person is convicted and that the punishment or other measure prescribed by the law is imposed on the offender based upon the legally conducted procedure in front of the court (Art. 1 § 1 of the Criminal Procedure Act). The real problem lies in the fact that there is a danger that bargaining which is conducted in the shadow of the trial underestimate confessions made by innocent defendants. Thus, a new strand in literature thrives to find ways to incorporate more adequately the defendant's attitude towards his own culpability or innocence, as signaling information, in the bargaining mechanism by using the cost-benefit analysis (Covey, 2009, 130). In the continental systems of bargaining, which as a rule foresee only the mitigation of sentence or milder type of sanction as the possible concession to the defendant, "invisible" gestures in terms of reducing the possible number of accounts by applying the construction of extended criminal offence, which will later be the

justification for the mitigation of the sentence, may happen prior to actual offer to significantly mitigate the sentence for the most culpable defendant.

### III. BARGAINING OF PARTIES IN THE CROATIAN LAW

Provisions on guilty plea of defendants and bargaining, as well as provisions about adjudication based upon the bargaining are encompassed in the part of the Criminal Procedure Act (further in the text: CPA) which refers to the phase of conviction. Parties can negotiate about the terms of conditions of guilty plea and bargaining about punishment and other measures, while a defendant during negotiations must have an attorney-at-law (Art. 360 § 1 of the CPA). If the state attorney, defendant and attorney-at-law before the session or during the session of the Indictment Council signed a statement on conviction based upon the bargaining, the statement must be submitted to the Council immediately upon the beginning of the session (Art. 360 § 3 of the CPA). Such a statement must contain following: (1) description of the criminal offence for which the charges are pressed, (2) a statement of defendant about guilty plea for that criminal offense, (3) agreement on the type and measure of the sentence, court reprimand, suspended sentence, partially suspended sentence, special obligations, surveillance, seizure of object as well as costs of the procedure, (4) a statement of the defendant on property claim filed, (5) a statement of the defendant for accepting the state attorney's imposition of security measure and seizure of proceeds or the benefits gained from criminal offense (6) the signature of both parties and attorneys-at-law (Art. 360, § 4 of the CPA). After the signing of the above statement, the state attorney informs the victim or injured person about it (Art. 360 § 5 of the CPA), but in the cases of criminal offenses against life and limb as well as against sexual freedom for which the sentence of imprisonment of 5 and more years is prescribed, the state attorney must obtain the consent of victim for bargaining. In the case that the victim has died or is unable to give a consent, the approval will be asked from the spouse, living partner, children, parents, adoptees, adoptive parents, brothers or sisters (Art. 360 § 6 of the CPA). After receiving the written statement of the parties and attorneys-at-law about the conviction based upon bargaining, the Indictment Council determines whether the parties agree on the content of the statement and this enters the record after which the indictment is confirmed (Art. 361 §1

of the CPA). If the indictment is confirmed, the Indictment Council is making a decision to accept the statement and adjudicate, i.e. pronounces the sentence or other measure upon which the parties had agreed (Art. 361 § 2 of the CPA). The statement for adjudication based upon the agreement of parties will not be accepted by the Indictment Council, if given the circumstances, its acceptance is not in accordance with the sentencing prescribed by the law or agreement otherwise is illegal.

In such a case the Indictment Council passes the resolution for which no appeal is allowed and it refuses the statement for adjudication based upon the bargaining of the parties (Art. 361 §3 of the CPA). Besides the stated procedural provisions, one should also point out the provision of the Criminal Code (further in the text: CC) regarding the mitigation as well as the limits of the mitigation of punishment. The punishment mitigated from prescribed for a certain criminal offense the Court can pronounce even in the case when the state attorney and defendant had reached an agreement (Art. 48 § 3 of the CC). In such a case, the punishment can be mitigated up to half of the lowest mitigated punishment obtained according to the rules which are valid for other cases of mitigating the punishment (Art. 49 § 2 of the CC). During the bargaining with the defendant and his attorney-at-law, the state attorney still does not have the full freedom because its discretion is limited by the provision in the Act on the State's Attorney Office (further in the text: ASAO). Namely, the state attorney is obliged to check whether the defendant's guilty plea: (1) enables avoidance of the trial and enables faster solution of the other cases, (2) reduces the expected time of conducting the criminal procedure from the point of indictment to the final conviction of imprisonment, (3) significantly reduces the cost of procedure, (4) spares the victims and other sensitive witness the negative effects of publicly making statements during the trial, (5) allows the application of a cautionary measures or replacement of imprisonment with community service, (6) enables the revealing other criminal offenses or other criminal offenders (Art. 74 § 1 of the ASAO). Evaluating the application of one of the stated circumstances must be explained (Art. 74 § 2 of the ASAO). The circumstance, which goes in the favor of the agreement, is also the full admission of the defendant given in the short period after the offense is committed, independently of other extenuating circumstances or protracted circumstances which should be taken into consideration in front of the court for the concrete case (Art. 74 § 3 of the ASAO). Way of negotiations, the form and content of the agreement, the method of

calculating the mitigated sanction that should be applied in the case of an agreement and the cases in which state attorneys and their deputies cannot agree about adjudication based upon the bargaining is prescribed by the Main State Attorney in forms of the instructions (Art. 75 of the ASAO).

From the Guidelines on negotiation and bargaining with the defendant about the guilty plea and sentencing as of 17 February 2010 one should particularly point out the part which refers to cases in which the state attorney must reject the bargaining. These include following: (1) cases of particularly serious criminal offences in which the victims are severely traumatized or lost their lives, or it is about children and juveniles in which cases one can conclude that none of sanctions agreed through bargaining will not be accepted by the victim, i.e. relatives of the victim as well as the public, (2) cases for which the public is particularly interested in and in which the public expect the conviction of that person as well as the bargaining would be considered as favoring the defendant (e.g. the cases of enormous abuses, corruption at the highest level whereby one has to show evidence in front of the court in order to convince the public about the culpability and in which the public expect the court adjudication) and (3) cases of criminal offences in which the state attorney has all the evidences, their proving is extremely simple, and defendant requires significant mitigation of the foreseen sentence.

What does emerge from the above legal provisions and instructions of the Main State Attorney? From the provisions of the CPA one can conclude that the Croatian model, although limited to a concession to the defendant in the form of mitigation the punishment or application of milder sanction, is closer to the American plea bargaining if we take into account that the court controls the settlement of parties. There are no limitations regarding the severity of the criminal offenses for which the bargains are allowed, except in the cases of serious offenses against the life and limb and sexual freedom whereby one needs to ask for the consent of the victim. The provisions of the ASAO and the Guidelines of the Main State Attorney witness that the state attorneys do not have absolute discretion when it comes to selecting cases because for each concrete case they have to explain the relationship between defendant's confession and the benefits that should be obtained by bargaining: shortening of the procedure and faster solving other cases, savings in terms of procedure cost (criminal prosecution), considerate treatment of victims and witnesses for the purpose of avoiding secondary victimization, fulfilling the interests of special prevention

and resocialization through application of alternatives of imprisonment, fulfillment of general prevention in terms of strengthening the trust of citizens in the functioning of the criminal justice system as well as increasing the efficiency of the criminal prosecution of other criminal offenders.

Contrary to the American experience, Croatian practice shows that bargaining is rarely applied. According to the Report of the State Attorney's Office of the Republic of Croatia for 2013, the convictions on the basis of bargaining in cases against adults and younger adults in the reporting period were made in 450 cases or 2.5% out of which a significant part has been done within the jurisdiction of the Office for the Prevention of Corruption and Organized Crime (Croatian abbreviation: USKOK). Namely, in this part of prosecutorial treatment out of 286 cases of convictions 186 convictions were result of the bargaining (58.74%). It is particularly interesting that in the aforementioned Report, among other things, one states that "in some cases, without the bargaining with the particular defendant, the procedure related to the other defendants could not be successfully completed" (Report, 114). If by the successful completion of the process from the standpoint of the prosecutorial interests one considers only a conviction, it is obvious that the above proclamation shows that the guilty plea of one defendant becomes *regina probationis* (the queen of evidence) also for those against whom the state attorney does not have enough evidence and who can be an innocent. In such a context one should support the idea that the state attorney in each concrete case and after obtaining the guilty plea must explain what *further evidence* he has available (Damaška, 2004, 19). From such a request logically arises the possibility of potential changes of the provisions of the CPA *de lege ferenda* regarding the powers of the court (the Indictment Council or the President of the Trial Council at the preliminary hearing) to ratify the agreement. Hence, the court should be allowed to reject the agreement in the cases whereby one can reasonably conclude from the existing state of facts that the state attorney has no other evidence except the defendant's confession which may be false and as such it can be harmful not only to defendant's own interests but to the interests of other defendants as well.

#### IV. CONCLUSION

The contributions of the economic analysis of the plea bargaining are usually focused on the bargain as the mutual exchange of concessions for the purpose

of most acceptable way of concluding the criminal procedure for both parties. They, however, do not take into account to the sufficient degree new impulses which try to make bargaining fit into the wider context which enables better understanding of the powerful role of the state attorney, complex relationships between defendants and their attorneys-at-law, effects of the bargains on third parties (particularly victims) and desirable role of the court. The economic analysis of law focuses often to the issue of limitations of the state attorney's discretion. The full freedom in the selection of cases has been mostly justified with the optimally distributing the available means in order to achieve the maximum preventive effects, while its limitations have been justified by minimizing situations in which the interests of the state attorney does not match the public interest or in which his emphasized role marginalizes the position of the court. The public usually reacts with exaggerated leniency towards defendants, while the problem of innocence worries most of the legal academic scholars. This taken into consideration one should note that, despite the pragmatism of process economics from the standpoint of judiciary overload and insufficiency of budgetary means, as convincing justification of plea bargaining, as well as satisfying party's interests on the principle of *do ut des* (I give you, you give me), bargaining must fit in the fundamental objective of criminal procedure: a clear distinction between guilty and innocent ones. The truth must not be adjusted to the desirable result of parties' interests because in that case bargains would be pure opposition to professional interest in establishing an unlawfulness and culpability (Herzog, 2014, 688). Therefore, right are the authors who point out that the key issue of the bargaining between the state attorney and defendant is how to introduce them in the criminal procedure and keep their simplicity and the possibility of shortening the proceedings, while at the same time not to jeopardize the defendant's rights and not to open the possibility of wrongful conviction of the innocent person (Krapac, 2014, 94, fn 20). Regarding the latter, a mentioned possibility justifies the restriction of prosecutorial discretion, and strengthening the role of the court when confirming the settlement. Judicial scrutiny is also important because of the possible complaint regarding the excessive leniency towards the defendants for such control should not be limited to technical check-up of compliance with the prescribed limits of (mitigated) sentencing, but it must take into account the reasonable balance of exercising the statutory purposes of punishment (retribution, special and general prevention and social reintegration). All previously discussed issues indicate the essential difference between the plea bargaining and settlements in the

civil procedure. The main motive of any future bargaining reform in criminal procedure should be minimizing their potential adverse consequences while at the same time strengthening the legitimacy of the criminal justice system in the area in which the result of criminal procedure for the most part still depends on the party interests. This could be in any case supported by the empirical research results which could provide answers to many important questions about the actual functioning of the bargaining: does the bargaining for the mitigated sentence is preceded with dropping of some charges, to which extent are the innocent defendants are pressured to bargain or how much courts pay attention to achieving the purpose of punishment when confirming the settlement.

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