Vsebina

Uvod

Življenje v organizirani družbi zahteva določeno mero strpnosti, empatije in omejitve svobode. Slednje zlasti v obliki zaveze državljanov, da bodo spoštovali nekatera temeljna družbena pravila, ki branijo družbene vrednote. Kršitve teh pravil imajo različne posledice. Sankcije za kršitve zasebnih civilnopravnih razmerij običajno določijo kar stranke same, navadno pa mora stranka, ki odgovarja za kršitev, vzpostaviti tako stanje, kot je bilo pred kršitvijo (*restitutio in integrum*), ali pa plačati odškodnino. Kršitve delovnih obveznosti oziroma različni disciplinski prestopki so sankcionirani z disciplinskimi ukrepi, prekrški pa z globami, opomini, odvzemom predmetov itd. Najhujše kršitve, tiste torej, ki zamajejo temeljni družbeni red in mir ter posežejo v nekatere najbolj temeljne družbene vrednote, so obravnavane v kazenskem pravu. Zaradi teže kršitev je tudi družbeni odziv nanje temu primeren: kaznovanje storilcev kaznivih dejanj je bolj kot zadostitvi individualnih interesov žrtev kaznivih dejanj (denimo z vzpostavitvijo prejšnjega stanja ali povrnitvijo škode kot v civilnopravnih zadevah) namenjeno izkazu javne moralne obsodbe storilčevega ravnanja zaradi ogrozitve ali kršitve temeljne družbene vrednote.[1]

Kazensko pravo je zaradi svoje dvojne narave in vloge – država z njim zagotavlja temeljne razmere za normalen obstoj in delovanje družbe, hkrati pa je njeno najmočnejše orodje oblasti nad državljani[2] – prežeto

[1] Tudi po Durkheimu je naložitev kazni storilcu kaznivega dejanja odziv (primitivne) družbe na kršitev vrednote, ki jo mora družba varovati zato, da si zagotovi obstoj. S kaznovanjem se družba odzove na kršitve t. i. kolektivne zavesti (fr. *conscience collective*). E. Durkheim, THE DIVISION (1997), str. 39, 60 in 108. Prim. W. Wilson, CRIMINAL LAW (2003), str. 37.

[2] Po Foucaultu zgodovinski razvoj kazenskega prava lepo kaže, da je pomembna naloga kazenskega prava tudi razkazovanje moči suverena nad »njegovimi« državljani (»[...] v sleherni kršitvi tiči *crimen maiestatis*, v najneznatnejšem zločincu pa deluje majhen regicid«). V sodobnem svetu pa sredstvo za discipliniranje ljudi (»Zgodovinski trenutek disciplin je trenutek, ko nastane umetnost človeškega telesa, ki pa si ne prizadeva zgolj povečati njegove spretnosti, pa niti ne poglobiti njegovo podložnost,

z mnogimi temeljnimi vprašanji. Gre tako za vsebinska (katera ravnanja so družbeno tako škodljiva, da jih je treba določiti kot kazniva; kakšna in kolikšna naj bo pravična kazen; zakaj sploh kaznovati itd.) kot postopkovna vprašanja (kako ugotoviti, ali je nekdo zares izvršil kaznivo dejanje in je zanj tudi ogovoren; katera sredstva lahko za potrebe preiskovanja zoper nekoga uporabimo že zgolj na podlagi suma; koliko in kakšnih dokazov je potrebnih za končno odločitev; koliko upoštevati pravice obdolženca – če mu jih sploh priznamo –, koliko pa interese žrtev in javnosti itd.). Odgovori nanje niso preprosti in enoplastni, niti trajni. So odraz zapletenih družbenih odnosov, spreminjajo se tako, kot se spreminja družba, in se od družbe do družbe razlikujejo.

Kljub temu pa – prav zaradi moči kazenskega prava – velja, da morajo biti kazniva dejanja in kazni zanje predpisani z zakonom kot poslednje sredstvo (*ultima ratio*), zakonsko pa mora biti predpisan tudi kazenski postopek, v katerem se ugotavlja, ali je nekdo zares izvršil očitano kaznivo dejanje, in v katerem se mu – v primeru obsodbe – odmeri tudi pravična kazen. Tako kot je treba pred inkriminacijo nekega ravnanja skrbno preveriti, ali je resnično tako škodljivo, da ga je treba določiti za kaznivo, je treba tudi pred določitvijo poteka kazenskega postopka (oziroma pred uvajanjem novih načinov reševanja kazenskih zadev) tehtno premisliti, kako ga organizirati, da bo dal kar najbolj pravične rezultate.

Kot pravičen rezultat kazenskega postopka se šteje obsodba zgolj resnično krivega storilca kaznivega dejanja za primerno (pravično) kazen oziroma oprostitev nedolžnega obdolženca, hkrati pa mora biti odločitev sprejeta v pravičnem postopku. Krajše, v pravično organiziranem kazenskem postopku je treba ugotoviti resnico, na kateri bo temeljila tudi končna sodba. To pa je težavna naloga. Tako zaradi izmuzljivosti pojma resnice, saj ni jasno, ali je resnica neko absolutno dejstvo, ki ga ni mogoče prirejati, ali pa je nemara resnično tisto, s čimer se strinja večina vpletenih, in navsezadnje, ali resnica sploh obstaja in jo je mogoče odkriti, kot tudi zato, ker jo je »za nazaj« zelo težko ugotoviti. Kaznivo dejanje je namreč neponovljiv dogodek, ki ga je storilec po vsej verjetnosti skušal izvršiti čim bolj skrivoma, njegove posledice pa kar najbolj prikriti.

temveč oblikovati razmerje, zaradi katerega bo v istem mehanizmu toliko ubogljivejši, kolikor uporabnejši bo, in obratno. [...] Disciplina tako izdeluje podrejena in izurjena telesa, »krotka« telesa.«). M. Foucault, NADZOROVANJE IN KAZNOVANJE (1984), str. 56 in 137–138.

Prepričanja, kako organizirati kazenski postopek, da se bo na koncu dosegla pravična obsodba, so se skozi zgodovino spreminjala in se še danes razlikujejo. Na splošno kazenske postopke razvrščamo v dva tipa: inkvizitornega in adversarnega. Prvi je (bil) značilen za države kontinentalnega pravnega sistema, drugi pa za države anglo-ameriškega pravnega sistema. V državah kontinentalnega sistema je v kazenskem postopku poudarek na iskanju materialne (»absolutne«) resnice. Zato, da se jo najde, državni organi zoper obdolženca vodijo preiskavo. Ker je ta najpomembnejši vir informacij o kaznivem dejanju (če ga je zares izvršil), se v preiskavi obravnava (bolj) kot objekt kazenskega postopka. Nasprotno pa je v adversarnem kazenskem postopku poudarek na procesni pravičnosti. Resnica je pomembna, vendar je prav tako (ali pa še bolj) pomemben postopek, po katerem do nje pridemo. Kazenska zadeva se zato obravnava kot spor med dvema enakopravnima strankama. Obdolženec je tako avtonomen subjekt kazenskega postopka.

V sodobnih demokratičnih državah so se razlike med tema dvema tipoma kazenskega postopka začele brisati. Najprej tako, da so kontinentalne države v svoje kazenske postopke vnašale vse več adversarnih prvin. S sprejemom in uzakonitvijo nekaterih temeljnih adversarnih načel oziroma vrednot (denimo domneve nedolžnosti, načela enakosti orožij in z njim povezane pravice do obrambe s pomočjo zagovornika, privilegija zoper samoobtožbo ter z njim povezane pravice do molka, načela javnosti, ustnosti in neposrednosti, pravice do nepristranskega sodnika) se je položaj obdolžencev v inkvizitornih kazenskih postopkih pomembno izboljšal: postali so (avtonomni) subjekti kazenskega postopka. Trenutno pa smo priča še dodatnemu približevanju: države kontinentalnega pravnega sistema v svoje kazenske procesne zakonodaje uvajajo poseben način reševanja kazenskih zadev, ki je bil do nedavnega značilen (le) za anglo-ameriške ureditve – pogajanja o priznanju krivde.

Pogajanja o priznanju krivde so institut, ki obdolžencu in tožilcu omogoča, da se izogneta (običajno dolgotrajni) sodni poti tako, da rešita kazensko zadevo s sklenitvijo sporazuma o priznanju krivde. Bistveni element sporazuma je obdolženčevo priznanje krivde. Da pa obdolženec v to privoli, mu tožilec v zameno za priznanje ponudi neko ugodnost, navadno v obliki znižane kazni.

Pogajanja o priznanju krivde so se razvila v anglo-ameriškem pravnem sistemu. Utemeljena so zlasti na razumevanju kazenske zadeve kot spora med dvema enakopravnima strankama in na avtonomiji obdolženca. Če kazensko zadevo dojemamo (samo) kot spor med dvema

enakopravnima strankama, potem je zunajsodna rešitev spora povsem ustrezna. Še več, v državah, v katerih poudarjajo pomen individualnih interesov, je taka rešitev povsem v skladu z načelom, da dogovor zmaga nad pravom, ljubezen pa nad sodbo (lat. *pactum vincit legem et amor judicium*).[3] Iz tega sledi, da je avtonomija strank v kazenskem postopku, zlasti obdolženca, pomembno vrednostno izhodišče instituta pogajanj o priznanju krivde.

Tudi v slovenski Zakon o kazenskem postopku (ZKP)[4] je bila z novelo ZKP-K,[5] ki se je začela uporabljati 15. maja 2012, uvedena možnost reševanja kazenskih zadev s pogajanji o priznanju krivde. Položaj je zanimiv: zlasti zato, ker zakonodajalec ni spremenil temeljnega inkvizitorno obarvanega načela kazenskega postopka – načela iskanja materialne resnice. Vsi državni organi, vključno s tožilci, so še vedno zavezani k iskanju materialne resnice. Po drugi strani pa ZKP z novelo ZKP-K dopušča pogajanja o priznanju krivde, v katerih lahko tožilec obdolžencu v zameno za priznanje krivde obljubi nižjo kazen.

Ker so pogajanja o priznanju krivde institut, katerega skladnost z obstoječim kazenskim postopkom ni povsem jasna in samoumevna, menim, da je treba narediti temeljno analizo takega načina reševanja kazenskih zadev.

Najprej je treba ugotoviti, na katerih teoretičnih oziroma normativnih vrednostnih izhodiščih temeljijo pogajanja o priznanju krivde in ali se ta vrednostna izhodišča v praksi tudi udejanjajo. Pri reševanju kazenskih zadev s pogajanji o priznanju krivde se namreč zelo očitno postavlja vprašanje o skladnosti normativnih oziroma teoretičnih vrednostnih izhodišč pogajanj o priznanju krivde s praktičnimi. Če ta niso ista, na katerih praktičnih vrednostnih izhodiščih potem temelji pogajalski način reševanja kazenskih zadev? In kako voditi pogajanja o priznanju krivde, da bodo čim manj nasprotovala ali celo posegala v načela (vrednote) kazenskega prava?

Knjigo sestavljajo štirje deli. V prvem delu bom pogajanja o priznanju krivde umestila v vrednostne okvire kazenskega procesnega prava in predstavila normativna vrednostna izhodišča tega instituta. Pri tem bom upoštevala, da so vrednostna izhodišča kazenskih postopkov in s tem tudi vrednostna izhodišča pogajanj o priznanju krivde različna. Oprla se bom na že uveljavljeno delitev kazenskih postopkov na

[3] Prim. M. Damaška, THE FACES (1986), str. 79.
[4] Ur. l. RS, št. 63/1994 in nasl.
[5] Ur. l. RS, št. 91/2011.

(pretežno) inkvizitorne kazenske postopke, ki so značilni za države kontinentalnega pravnega sistema, in adversarne kazenske postopke, značilne za države anglo-ameriškega pravnega sistema.

V drugem delu je celovito predstavljen koncept pogajanj o priznanju krivde. Ker se je ta institut razvil v državah anglo-ameriškega pravnega sistema, bo večja pozornost namenjena ureditvi pogajanj o priznanju krivde v Združenih državah Amerike (ZDA). Najprej bom predstavila zakonsko ureditev pogajanj o priznanju krivde in ameriško sodno prakso, ki je precej pripomogla k razvoju in uveljavitvi tega instituta. Nato bom ob bok zakonski ureditvi postavila še realnost. Že ta prikaz bo bežno pokazal, ali se normativna vrednostna izhodišča pogajanj o priznanju krivde v praksi dejansko uresničujejo. Za še celovitejši prikaz bom razdelek o pogajanjih o priznanju krivde v ZDA sklenila s predstavitvijo različnih zgodovinskih razlag o razlogih za razvoj pogajanj o priznanju krivde. To pa bo hkrati dobra podlaga za razumevanje globalizacije pogajanj o priznanju krivde. Pogajalski način reševanja kazenskih zadev se namreč vse bolj širi tudi v države kontinentalnega pravnega sistema, kar bom prikazala na primerih Nemčije, Bosne in Hercegovine (BiH) ter Slovenije. Pri vseh treh državah bom predstavila poglavitne razloge, ki so vodili k uvedbi pogajalskega načina reševanja kazenskih zadev, zakonsko ureditev tega instituta in izkušnje s pogajanji o priznanju krivde v praksi. Iz tega bo spet razvidno, kaj so normativna vrednostna izhodišča takega načina reševanja kazenskih zadev v kontinentalnih pravnih sistemih in kako se (če se) ta uresničujejo v praksi.

Tretji del obravnava prednosti in slabosti pogajalskega načina reševanja kazenskih zadev, pri čemer se bom opirala tako na teoretična izhodišča kot na praktične izkušnje. Predstavitev prednosti in slabosti je zelo pomembna za vzpostavitev realnega odnosa do tega instituta in ozaveščanje o morebitnih nevarnostih, ki so sestavni del pogajalskega načina reševanja kazenskih zadev. Poleg tega lahko iz poudarjanja prednosti nekega instituta sklepamo na vrednote, na katere se opira. In nasprotno: če nekatere posledice pogajalskega načina reševanja kazenskih zadev označimo za slabosti, pomeni, da nasprotujejo vrednostnemu okviru kazenskega postopka. Analiza prednosti in slabosti pogajalskega načina reševanja kazenskih zadev bo tako zlasti pokazala dejanska vrednostna izhodišča pogajanj o priznanju krivde oziroma prikazala stanje (ne)uresničevanja normativnih vrednostnih izhodišč v praksi.

Knjiga se sklene s poglavjem, ki odgovarja na ključno vprašanje: kako reševanje kazenskih zadev s pogajanji o priznanju krivde učinkuje na (že in še vedno) obstoječa normativna vrednostna izhodišča slovenske-

ga kazenskega prava. Reševanje kazenskih zadev s pogajanji o priznanju krivde namreč pomembno spreminja pomen temeljnih vrednot kazenskega procesnega prava oziroma celo posega vanje, prav tako posega v nekatera temeljna načela kazenskega materialnega prava, pomembno vpliva na kaznovalno politiko in navsezadnje spreminja tudi podobo kazenskega prava. Da bi se doseg neželenega štiriplastnega učinkovanja pogajanj o priznanju krivde v slovenskem kazenskopravnem prostoru čim bolj omejil, poglavje sklenem z zelo praktično naravnano postavitvijo meja pravičnih oziroma sprejemljivih pogajanj o priznanju krivde.

Plea Bargaining: Legal and Criminal Policy Aspects

Summary

Criminal processes with full adjudication phase are in decline, while solving cases with plea bargaining (as one and the most important type of consensual models) is on the rise. Nowadays it is more difficult to find a country which still resists accepting this solution in its criminal procedure than a country which has accepted it; this being true not only among the Anglo-American countries but also among the Continental ones. Since plea bargaining is very controversial – even in the US where it has been used for more than 150 years, the views about its appropriateness and fairness are still divergent. Serious questions arise whether this mode of solving criminal cases complies with basic values of criminal process.

Plea bargaining has recently been introduced also into Slovenian Criminal Procedure Act. The Amendment (ZKP-K) came into force in May 2012. The author analyses the question of theoretical grounds on which the introduction of plea bargaining can be justified. For this purpose the theoretical (normative) value basis of plea bargaining is being studied and the author examines whether these values are brought to function in practice. The author also examines the questions of the practical advantages (values) of plea bargaining and how they comply with basic principles of criminal (procedural and substantive) law as well as with the penal policy.

The author claims that the most important legal value is justice. In criminal law justice is done if the criminal system operates in such a way that only criminal convictions of the guilty are ensured and – more importantly – that the innocent are acquitted of all criminal charges. This further means that decisions in criminal process must reflect the true state of facts. Since plea bargaining is a part of criminal process,

the guilty plea agreement must be based on the same value grounds: it must assure just results while discovering the truth. The approaches to reaching the truth are different. In the Anglo-American legal systems with adversarial type of criminal process the formal aspect of truth is more important. Therefore, the primary concern lies in organization of criminal process: it must be organized as a dispute between two equal parties. The main normative value of adversarial criminal process (and consequently of plea bargaining) is therefore the defendant's autonomy (the defendant is an equal subject in the criminal dispute). In the Continental countries with (partially) inquisitorial type of criminal process it is believed that the substantive aspect of the truth is more important. Criminal justice agents must search for the so-called material truth. The principle of material truth is, therefore the main value of criminal process (and consequently of plea bargaining). However, serious doubts arise as to the practical implementation of normative values.

Experience from countries with longer bargaining tradition shows that normative values of plea bargaining are too often violated. Instead, they are replaced by more pragmatic practical values: utility and efficiency.

The US experience where over 90 percent of criminal cases are solved through plea bargaining shows that even strict regulation of plea bargaining cannot prevent the circumvention of the normative values in practice. Because of these practical advantages plea bargaining has been accepted with open hands not only by prosecutors and defendants (with their lawyers) but also by the courts. Actually, it was the US Supreme Court which actively supported the spreading of plea bargaining by stating that the US depend on solving cases by plea bargaining and that this is to be cherished because of its benefit for the parties involved as well as for the general public.

It is interesting to realize that the circumstances in which plea bargaining is gaining support and popularity in Continental countries are very similar to those of the American criminal justice system when plea bargaining arose spontaneously. On the one hand the caseload keeps increasing (due to numerous reasons: rising of the crime rates caused by increasing economic inequality in the society, new incriminations which regulate the increasingly complex societal relations, the expansion of the zone of criminality etc.) while on the other hand criminal process is becoming more complicated (due to adoption of numerous adversarial elements in the (partially) inquisitorial criminal process). This led Continental legislators to become open to more pragmatic ways of solving criminal cases; plea bargaining being (because of its

informality and non-transparency) the climax of pragmatism. Due to its practical advantages, plea bargaining has been accepted also in criminal procedure acts of many Continental countries, including Germany, Bosnia and Herzegovina, and Slovenia. The experiences of these countries show that plea bargaining was well accepted and the proportion of criminal cases solved through plea bargaining is increasing.[951] However, in the Continental countries (like in the US) practical deviations from legislation have developed. The fact is that in both legal systems – Anglo-American and Continental – practical values are at the forefront: by solving (majority of) criminal offenses through plea bargaining, the basic practical value of continental criminal process is becoming (economic) efficiency which is a part of a broader concept of utility.

It is undisputable that plea bargaining has many benefits (characteristics that are in accordance with values of criminal process). Economic analysis of criminal law argues that solving cases with plea bargaining reflects absolute equality between the parties (namely, the defendant is finally treated as an autonomous subject) who may – as rational actors – finally dispose freely of their rights. Not only that this is the most efficient (it saves costs of full trial) but it is also the most equitable way of solving a criminal matter at hand. However, this theory is based on problematic (false) assumptions. It has to be emphasized that criminal law is a part of public law and cannot be governed by the same rules which regulate private legal matters. There are several specific counter-arguments to this position. Firstly, to assume the absolute equality between the parties is illusionary; it is obvious that the prosecutor as a state agent has far greater power. While negotiating a plea his powers are even greater due to the fact that he/she may influence the defendant's decision on how to plead by offering him/her a lower sentence (or in some jurisdictions by lowering of the charges) in return for a guilty plea. His/her risks are significantly lower than defendant's. The defendant must make a choice between a) certain conviction for a milder sentence, and b) conviction for harsher sentence or acquittal, since the outcome of the trial is always uncertain. The prosecutor "risks" a) proving defendant's guilt before the court (which is his fundamental task), and b) disposing of case by shorter (and easier) method – plea bargaining. Secondly, agency costs must be taken into account. The prosecutor is an agent of public interest, which is not necessarily fulfilled by solving

[951] It is maybe too soon to speak for Slovenia since Slovenian prosecutors and defendants have been bargaining for less than a year.

the case with plea bargaining since the defendant may be punished too mildly. The defense attorney, on the other hand, is too often influenced by his/her own interests (which make him/her inclined to plea bargaining) and therefore does not always act in the best interest of his/her client. Thirdly, in order to reach an agreement both parties must have access to relevant information. However, in criminal law there is frequently asymmetry of information between the prosecutor (he/she does not know what the defendant knows) and the defendant (the prosecutor is not bound to disclose him/her the facts and evidence in his/her possession). And fourthly, the contract theory is based on the assumption that defendant and the prosecutor are rational subjects who weigh the reasons *pro et contra* before passing the decision which is in their best interest. Even in everyday situations our decisions are often influenced by unconscious, emotional factors. It is therefore even less reasonable to expect the defendant and the prosecutor to behave rationally in such delicate and important issues as criminal matters on the solution of which lies the question of defendant's future. Furthermore, the following psychological factor needs to be considered: innocent persons are more risk-averse and are therefore more prone to plead guilty than the guilty defendants who are usually greater risk-lovers; an assumption based on the fact that they committed an offense.

The second group of arguments which speak for the introduction of plea bargaining, emphasize the fact that all actors in the criminal process including the general public benefit from plea bargaining. The defendant benefits from plea bargaining because a milder criminal sanction is imposed on him/her. For the prosecutor the important advantage of plea bargaining is that it is a resource-saving method (since she/he does not need to collect evidence at such a length and prove the defendant's guilt before the court). The saved resources can be directed towards prosecution of more complex criminal cases. The fact that the parties reach a guilty plea is also beneficial for the courts. The case can be solved by simply confirming the agreement – and again, more time can be spent on trying complicated criminal cases. One of the positive consequences of this fast, economical and efficient way of solving criminal cases is also that more defendants get convicted (and more importantly – soon after the committal of the crime). The public trust in the criminal justice increases and strengthens public sense of security and security itself. And lastly, the victims also support plea bargaining because it assures the conviction of the defendant and evades the possibility of defendant's acquittal.

However, these arguments must again be confronted with counter-arguments; Two of them being crucial. The first one is related to the countries with adversarial type of criminal process. The constant inclination towards faster and simpler disposal of criminal matters (supported by informality and secrecy of plea bargaining) led to the development of some highly controversial bargaining methods and tactics by prosecutors and defense attorneys (e.g. overcharging, bluffing, trade-outs) in order to "encourage" the defendant to plead guilty. Not only this raises serious doubts as to the voluntariness of the guilty plea but also confirms the suspicion that the defendant is everything but an equal and autonomous party in plea bargaining. The defendant becomes an object from whom the guilty plea needs to be obtained as soon as possible. The second counterargument applies to Continental countries. Faster and more economical method of solving criminal matters necessarily means also less qualitative decisions: the case is not as comprehensively investigated as in the regular criminal process. This causes a serious deviation from the basic value of inquisitorial type of criminal process: principle of searching for the material truth.

More specific: the introduction of plea bargaining significantly decreases the importance (or even nullifies) of some basic principles of criminal procedural and substantive law. The main being:

- Principle of legality: criminal offenses and sentences may only be prescribed by law – judge may only be bound by law (and constitution), however in plea bargaining the judge is also bound by guilty plea agreement;
- *Mens rea*: *actus reus* as well as *mens rea* must be established to satisfy the grounds for conviction – however, in the case of plea bargaining the judge is not bound to establish *mens rea* since it is assumed due to the defendant's guilty plea;
- Principle of individualization of criminal sanction: the criminal sanction is "individualized" by the defendant and the prosecutor, however, they do not consider all necessary parameters for the determination of just sentence;
- Right to trial: the key element of plea bargaining is the defendant's waiver of right to trial with all related rights (right to defense, right to public trial, adversariness etc.);
- Principle of separation of prosecutorial, defense, and judicial powers: the prosecutor is taking over key elements of adjudication – by obtaining a guilty plea he/she "decides" upon guilt and the sanction;

- Principle of free evaluation of evidence: guilty plea is again acquiring a prescribed value;
- Presumption of innocence, right to silence, privilege against self incrimination and prohibition of coercion: system that encourages the defendant to plead guilty rests on the presumption of guilt, additionally and furthermore influences the defendant's decision upon giving a testimony and forces him/her into admission of guilt;
- Principle of the search for material truth: in plea bargaining the parties do not aim at establishing complete and truthful factual basis for the decision – on the contrary, the purpose of plea bargaining is to dispose of criminal cases with as little input as possible.

Plea bargaining also affects penal policy by creating an unfounded duality: the defendants who plead guilty (no matter how (non-)genuinely) are punished with (at least for a third) milder sentence than defendants who insist on trial (which is their right). Nevertheless, the most destructive effect of plea bargaining is the shift in orientation of criminal law: guarantistic function of criminal law is giving way to the ideology of efficiency.

By simply recalling the famous Blackstone formulation (»*better that ten guilty persons escape than that one innocent suffer*«)[952] the answer is simple: efficiency is not and should not become the primary goal of criminal law. The collateral damage of increasing the efficiency by plea bargaining is difficult to measure. However, it is easy to conclude that this method of solving criminal cases violates normative values of criminal process (i.e. justice which achieved by the search for material truth in inquisitorial and by treating the defendant as an equal autonomous party in adversarial type of criminal process). The main practical value of plea bargaining is its utility, and especially efficiency.

Can the devastating effects of plea bargaining be prevented? No. The effects on criminal procedural and substantive law as well as on penal policy are unavoidable. However, they can be mitigated, especially by respecting the legal framework of the negotiations. For Slovenian situation this means that plea bargaining should stay an exception to the rule (rule being the full criminal process). Prosecutors as well as defense attorneys should act in accordance with the highest professional

[952] Cited from A. Volokh, n Guilty Men, in: University of Pennsylvania Law Review, 146 (1997) 1, str. 173.

standards and must try to prevent their decision being guided by their private interests. They must especially resist pressuring the defendant. Furthermore, they must try to enable the defendant to become an equal party – especially by giving him/her full instructions on the important circumstances and consequences of his/her decisions. And lastly, the courts must make a thorough evaluation of the criminal file before accepting the guilty plea agreement.

Even though these measures would mitigate the (most) negative effects of plea bargaining and prevent the formation of some controversial practices, the source of the problem is not addressed. Plea bargaining is just a symptom of modern (criminal) legal systems where everything is measured by cost-benefit analysis. Speediness, low costs, efficiency etc. are highly cherished values, but too often reached by violating the rights of the weakest – defendants in criminal matters (defendant waves his/her basic rights that are actually meant to strengthen his/her position in criminal process and provides the main evidence for his/her (self-) conviction). The author suggests that the problem of increasing case backlog is caused by a multitude of causes – and the right ones have not been addressed (e.g. decriminalization of certain acts, adoption of measures aiming at equalizing the citizens and therefore reducing the rate of criminality).