PLEA BARGAINING IN MONTENEGRO

An Examination of the Workings of the Current System of

Plea Bargaining

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Abstract

The present criminal justice systems face challenges in the modern world characterized by the development of new technologies, fast communication, and the interconnection of different and distant parts of the world; in simple terms the challenges of the Earth becoming “a global village.” This causes crime to be more complex and to grow, and consequently criminal justice systems are being burdened with new types of problems. In this context, systems are forced to try to deal with criminal cases in a more efficient and faster way, to define priorities and look for alternatives to the classical trial which requires significant time, effort and resources. One of these alternative ways is plea agreements, or as is more commonly said plea bargaining. This legal instrument is present in its different forms in a number of national legal systems, as well as in international law. This work deals with its development, application and potential future in Montenegro.

First, the key features and principles of plea bargaining as a legal institution are presented in this work, demonstrating its strongest and most complex presence in the United States as the country of its origin, but also in other countries and in international law. After that, the thesis deals with the development, regulation, as well as the extent of the presence of plea bargaining practices in Montenegro, at the same time providing a comparison with two neighboring counties, Serbia and Croatia. Furthermore, through a number of interviews conducted with Montenegrin prosecutors, defense attorneys and judges as the main actors in this process, the thesis focuses on discovering how the practice functions in reality, and what hides behind the relatively simple legal provisions that regulate this issue. After identifying the key, very interesting, issues that emerge from practical experience, the thesis presents the relevant implications for the future, and a number of related conclusions and recommendations.
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Declaration

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

Signed:
Ana Grgurevic

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Abbreviations

U.S. - United States
CoE – Council of Europe
CPC - Criminal Procedure Code
EU - European Union
NATO - North Atlantic Treaty Organization
DOJ - Department of Justice
ABA – American Bar Association
ICTY - International Criminal Tribunal for Former Yugoslavia
ICTR - International Criminal Tribunal for Rwanda
ECHR – European Convention of Human Rights
ECoHR – European Court of Human Rights
CC – Criminal Code
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INTRODUCTION

Plea Bargaining – A Special Tool

The main topic of this work concerns the legal institution of plea bargaining or as it is often called plea agreements or agreements on the admission of guilt. The origin of plea bargaining is in the United States (U.S.) and the first forms of plea bargaining in that country appeared in the early nineteenth century. There is no universally accepted single definition of plea bargaining and there are many forms which it can take, depending on the legal system and tradition of the country, the approach taken by national legislators, as well as the position and attitude of legal professionals and society in relation to this issue. Some authors define plea bargaining “as a process through which a defendant pleads to a criminal charge with the expectation of receiving some consideration from the state.” (Neubauer, 1979, p.308, cited by Wisharaya, 1995, p.96). As Maynard states (1984, p.77) by referring to a number of American, Canadian and English authors (Alschuler, 1968:50; Baldwin and McConville, 1977:23; Bottoms and McClean, 1976:123; Feely, 1979c:185; Grosman, 1968: Chapter 7; Klein, 1976: Chapter 1; Miller et al., 1978: xxi): “Researchers agree that plea bargaining refers to courtroom transactions in which there is an exchange between prosecution and defense in criminal cases.” As this author concludes, defendants receive some “consideration” from prosecutor for pleading guilty, while the prosecutor gets a guaranteed conviction and a shorter procedure. Within the framework of a criminal proceeding, plea bargaining enables the defendant to admit guilt and thus to get better legal treatment from the prosecutor. Most commonly, this includes negotiations on an admission of guilt, and it is always achieved with the final consent of the court.

Plea bargaining represents a legal institution of criminal law which is essentially an alternative to the classic criminal court procedure i.e. a trial; it contributes greatly to procedural efficiency and cost reduction. On the other hand, it is often
said that it takes away from the quality and fairness of the criminal proceeding. According to Fisher (2003, p.1) plea bargaining may be “as some chroniclers claim, the invading barbarian.” This wording may lead to the conclusion that, for many authors, a regular criminal trial is seen as the standard path while any shortcut on this common path represents an exception or even a violation of a principal rule. A question which is often asked, particularly by the general public is: How can you bargain about guilt? This question represents the essence of the criticism directed towards plea bargaining; it targets its ethical and judicial elements.

**Plea Bargaining in Montenegro and Identified Research Questions and Goals**

The possession of both of the above described characteristics makes plea bargaining somewhat controversial, and therefore generally fruitful grounds for academic elaboration and discussion. It becomes even more interesting when it is introduced and applied in countries where negotiation on guilt is not part of legal history and tradition, and where it represents a complete novelty. This is exactly the case in Montenegro, as well as in all the neighboring countries of the Balkans. The specific and interesting nature of the plea bargaining itself, the indisputable practicality of this legal tool, its current existence but historical absence from the legal systems of Montenegro and countries in the region are the main reasons for devoting my research to this particular criminal procedural instrument.

Additionally, as a Montenegrin lawyer with experience of working in the biggest first instance criminal court in the country, I was able to witness the inefficiency of the Montenegrin criminal procedure. By providing legal assistance to investigative and trial judges, and by drafting key judicial documents, I was also able to detect failing in the procedure, such as its long duration and strict formality, but also opportunities for improvement. Additional years working as the director of the key national judicial training institution enabled me to directly contribute to the drafting of all the major judicial training laws and the judicial training curriculum, as well as to participate in the work of the relevant Council of
Europe (CoE) bodies as Montenegro’s representative. Through this work, I gained additional knowledge not just about criminal law and procedure itself, but also about Montenegrin criminal justice officials, their working mentality and habits, as well as the relevant international legal standards. By the later completion of Masters studies at the Karl-Frenzens University of Graz in Austria in the area of European Integration and European Law, I was able to expand my educational experience, as well as my knowledge of international legal standards and particularly their importance in the context of Euro-Atlantic integration. The efficiency of the procedure, procedural rights guarantees and the usage of alternative methods of case resolution, to which plea bargaining belongs in a wider sense, crystalized as major points of interests when it comes to my further professional legal growth. Following these priorities, I positioned myself in the core of the national rule of law reform processes by becoming a Legal Specialist at the U.S. Embassy in Montenegro, which is my current job. Apart from the political aspect of my work, regular reporting, legal analyses and interpretation of various court cases, laws and legal issues in the country, through the large Embassy legal assistance programs in the area of criminal law, I am also involved in legislation development, and the continuous and dynamic training of criminal justice officials. I have the opportunity to directly communicate with criminal justice members on a daily basis, and discuss criminal law matters. A major part of these assistance activities concern improving criminal procedure efficiency and the usage of plea bargaining as a legal institution which originates from the U.S. My participation in such training activities where I can directly hear relevant discussions, opinions and experiences, but also regularly visit American criminal justice institutions and observe their relevant practices, continuously grew my interest in this topic. From my personal experience I have concluded that plea bargaining has its benefits and potential, that there is a general openness to it in the legal community of my country, but that it has still not found its way into the daily life of prosecutors, advocates and their defendants, and judges. An additional motivating factor for my work is the evident lack of any significant academic work in this area in Montenegro and even the region. As an active
member of the Montenegrin Association of Lawyers and an author published in the oldest Legal Journal of the country, established in 1933, I was additionally motivated to contribute to the legal community by dealing with this topic. Bearing in mind all the above, insider research concerns did exist to some extent, and this issue will be discussed later in Chapter II.

In this context, researching relevant existing legislation, as well as the views and opinions of main actors of the process is the very first step that will enable me to get a deep insight into the level of usefulness and productiveness of plea bargaining in Montenegro. This will lead to concrete conclusions based on research findings which will be a useful reference for the future implementation of this practice by Montenegrin criminal justice actors.

As a first research question, I will primarily examine the motives of Montenegrin legislator in introducing plea bargaining into the Montenegrin national system. What were these motives? The motives for using this legal instrument are universally mainly related to improving efficiency and reducing the costs of criminal proceedings, so this was also the case with Montenegrin legislator. However, a question which can initially be asked when it comes to Montenegro is: Were these motives followed up and supported by proper preceding analysis of the realistic potential for the application of plea bargaining in the country? In my work I will look at: the elements which should inevitably be taken into account before importing such a specific legal institution, such as the possession of relevant skills and knowledge of all the actors of plea negotiations; procedural, legal and other motives of defense attorneys, accused and prosecutors to enter and successfully complete plea negotiations; the sentencing policy of courts; and others. The historical, cultural and social ambience of the country, as well as the opinion and position of legal professionals and the community in relation to plea agreements are also significant factors to be taken into consideration when deciding on whether or not to make such agreements part of the national legal system.
I will further focus on reviewing the relevant legal provisions in force and will answer the research question of how plea bargaining is legally defined and incorporated into Montenegrin criminal procedural laws. Specifically, the Montenegrin Criminal Procedure Code (CPC) from 2009 contains provisions related to plea agreements. These provisions are not numerous, but are clearly aimed at providing a solid basis for the application of this institution in practice. I will examine the relationship and link between these provisions and other provisions and chapters of the law. In addition, the compatibility of the named provisions with the general spirit and nature of Montenegrin criminal proceedings will also be discussed. Incorporating alien and sometimes entirely inadequate legal instruments into national laws is not unknown in countries which are in the transitional process of the development of their democracies through deep reforms of their legal systems and judiciaries. Such endeavors, on one hand, always represent a risk which can disrupt the main concepts and principles of existing legislation and which can potentially lead to the creation of the hybrid laws that are hard to implement. On the other hand, it can lead to significant improvements when it comes to the quality and efficiency of criminal proceedings, as well as positive changes in the quite often historically closed mindsets of the criminal justice elites of those countries.

I will then transfer the research to the practical field and review the current situation with plea bargaining. I will answer the research question: How are the above described provisions being implemented in the daily work of prosecutors, defense attorneys and judges? Recognizing, consolidating and examining the problems and challenges that all actors in plea bargaining regularly face is a particularly important part of this research. It will be conducted from different angles through direct interviews, and taking into account the arguments of all sides involved. My main motivation to deeply and systematically analyze the relevant law provisions and clearly recognize the problems which occur in their application, comes from a fact that plea agreements are obviously not widespread in Montenegrin legal life. On the contrary, it seems like the use of the tool in practice is sporadic and done on an ad hoc basis without strategic and visionary
reasoning behind it. At first glance it can be presumed that the probable causes of such situation are various, starting from the quality of legal provisions and the sentencing policy of courts, to a lack of an innovative and versatile approach in interpreting and applying the law, or better to say the existence of exactly the opposite approach, one that is traditional and quite strict. Apart from that, the cultural aspect and mentality quite often seem to be neglected in the elaboration of legal issues in Montenegro; to the extent possible I will tackle this research question as well: Whether there is a link between culture and mentality and the application of plea bargaining in Montenegro? Based on findings and taking into account a variety of available information and factors, I will offer an answer to the research question: What are the possible solutions to the identified problems in the application of plea bargaining in Montenegro? I will provide grounded solutions to recognized problems, and identify formulas of success in the application of plea agreements in Montenegro. Both positive and negative elements, both the challenges and successes in the application of plea bargaining by Montenegrin prosecutors, defense attorneys and judges will be the focus of this research. They must be considered the basis and guidance for the building and further development of this legal instrument in Montenegro.

In line with all the above, and by answering the identified research questions, the final key goals of this research are: analyzing the quality of the legal regulation of plea bargaining in Montenegro; investigating the level of use, usefulness and productiveness of plea bargaining institution in the criminal justice system of Montenegro; identifying the problems, as well as success schemes, in the application of this practice in the country; discovering the causes of challenges and factors of success in the implementation of the practice; and providing adequate conclusions and recommendations which can be useful in the further development of the practice and study of this issue in Montenegro.

Comparative Experiences

The conducting of adequate comparative analysis will be one additional goal of the research which deserves a special view. My ultimate motivation for
conducting a comparative analysis is to answer the research question of whether there are some plea bargaining experiences of neighboring countries which can be useful for Montenegro to adopt or to learn from. Identifying the best approaches when it comes to the implementation of plea bargaining in Montenegro is very useful and important, and all this bearing in mind the need to improve the efficiency of criminal proceedings on one hand, and keeping their quality and fairness on the other.

The most relevant comparison when it comes to Montenegro and plea bargaining is the one with countries in the region like Serbia and Croatia. The existence of the same legal tradition and very similar legal systems; a joint history as former Yugoslav republics; a similar culture; and the existence of the same language, particularly legal terminology, make a general comparison of Montenegro with these countries natural and valuable. Additionally, just like Montenegro, both Serbia and Croatia have recently introduced plea bargaining into their legal systems; in Serbia it happened in 2009 and in Croatia in 2008. For all three countries, it can be said that this is a “foreign” legal institution not historically present in their legal systems. Furthermore, the countries also share the same key reasons for the introduction of plea bargaining. They are linked to joint problems which these countries and their legal systems have started to face ever since the period of the Yugoslav war in the 1990s and the collapse of the legal, economical and values system; those are the inefficiency of criminal proceedings, and the growing number and complexity of criminal cases. The introduction of plea bargaining practice was aimed at improving the efficiency of criminal procedures in these countries.

Every comparative analysis enables studying the issue from various angles and in a wider context. In my research it can help in identifying good and functional solutions to the common plea bargaining problems of the countries involved, as well as learning from either the successes or failures of other judiciaries. The overall initial impression of the slightly greater success of Serbia and Croatia in the application of plea bargaining in comparison to Montenegro represents yet
one more additional motive for making a comparative analysis. When talking about success, it primarily means a larger percentage of cases resolved by plea bargaining which by definition in all of these countries involves the consent and satisfaction of all sides involved: the accused and her/his defense attorney, the prosecutor and the judge. An application of this institution which receives the firm approval of all the sides involved, surely leads to procedural efficiency and cost reduction, and a smaller workload for courts and prosecution lawyers; it can be considered a success of the criminal justice system in that sense.

Specifically, when it comes to both countries being compared, I will study how the practice is legally regulated in these systems. A special focus will be put on identifying and elaborating differences in comparison to Montenegrin law. I will also provide statistics i.e. present the extent to which this institution is applied in practice in these countries in comparison to regular criminal trials. These different segments analyzed and presented together will demonstrate the functionality of plea bargaining in these countries in comparison to Montenegro, whether there are major differences in legal regulation and in the level of implementation. Comparative analysis will particularly show whether there are certain legal solutions that seem to be the main catalysts of a larger application of the practice in the compared countries, and whether they should therefore be potentially implemented in the Montenegrin system.\(^2\)

**Why should Plea Bargaining be researched in Montenegro?**

There are two main general reasons why I choose agreements on guilt and their application in Montenegro to be topic of my research.

The first reason is that agreements on guilt represent an entirely new concept in the Montenegrin legal system. Due to this fact it is an almost completely unexplored area within the legal professional and academic community in Montenegro. There are number of articles and comments; however this is much less than this topic actually deserves, taking into account realistic circumstances
and potential of this practice. There is no major, in-depth analysis of the reasons which cause the agreements not to be used or analysis that offers concrete proposals on how to improve the situation in this area. As regards regional authors, the situation is somewhat better. This is probably because this legal institution has been applied in some of the neighboring countries for a little bit longer time, and also the fact that these countries have larger populations and consequently larger legal communities. However, logically, none of these regional studies focuses on Montenegro and the specificities of this small society and its legal and judicial system. Through my work I will present issues that are specific to Montenegro in this area, while taking into account the relevant research efforts of local, regional and international legal professionals and academic community members.

The second reason for choosing plea bargaining as the topic of my research concerns the very specific period of time that Montenegro is going through at present. To be specific, in December 2010 it received candidate country status for membership of the European Union (EU). In parallel, in 2015 it received invitation to become a member of the North Atlantic Treaty Organization (NATO), and the process of formalizing membership of this organization is ongoing. Ever since 2012 when the governments of all the EU countries unanimously agreed, the Montenegrin Government has been in the process of intensive EU membership negotiations. This has generally been done through continuous communication and exchange of information between the Montenegrin Government, on the one hand, and the EU on the other. Through this intensive and dynamic process the conditions and timing of the adoption, implementation and enforcement of EU law i.e. *Acquis Communautaire (acquie)* are being negotiated.\(^3\) In this context, some of the strongest requirements of the EU are directed towards strengthening judicial independence and improving the efficiency of court proceedings and the judicial system in general. One significant part of these complex integrative processes is the adoption and implementation of new laws and regulations, and large and extensive changes and amendments to the existing laws and practices in accordance with EU and international standards.
In light of the described massive reforms, I believe that my work has the potential to contribute to a better understanding of one of the legal institutions which is already a part of the Montenegrin legal system, and which is an alternative to classical criminal proceedings. This legal institution indubitably works in favor of the efficiency of the criminal justice system in general. The specific conclusions and recommendations presented in this work have the potential to be taken into consideration in the process of reforming the Montenegrin criminal justice system into a more functional and efficient one.

Overview of Chapters that follow

In accordance with what is presented above, this work will be divided in the following chapters:

*Chapter I – A Review of the Literature*

In this chapter, I will elaborate on the plea bargaining literature consulted during the research process. The focus will be on critically analyzing the existing works of international authors, bearing in mind the lack of relevant Montenegrin and regional authors. I will present the historical path of plea bargaining, the reasons and motives for its creation and development, as well as current observations and analyses related to this legal institution and its practical implementation. Both critical and positive views will be taken into account in order to provide an objective picture and the larger context when it comes to this practice.

*Chapter II – Methodology*

In this chapter, I will present and discuss the research approach and methods used in my work with a specific focus on the motives for choosing them, their special values in relation to the topic and the goals of my research, and why they have priority over other available methods. I will also present the process of the practical application of the chosen methods in the framework of my research.

*Chapter III – Plea Bargaining in Montenegro with some Comparative Practices*
This chapter will contain findings on how and why plea bargaining was introduced into the Montenegrin legal system, how it is regulated in Montenegro, to what extent it is applied in practice and in what way. In line with this, this chapter will also contain a comparative component. I will give an overview of the present plea bargaining legal regulation and the practice of neighboring countries, Serbia and Croatia, which have similar legal systems. I will identify differences between the countries when it comes to plea bargaining, and determine which of the solutions and approaches that exist in Serbia and Croatia could eventually contribute to more fruitful plea bargaining implementation in Montenegro. Such analysis and overview will enable the detection of the right solutions and providing final recommendations for Montenegro in this field.

**Chapter IV – Analyses of the Results - The Interviews with Judges, Prosecutors and Defense Attorneys in Montenegro**

This chapter will include an analytical presentation of the results of interviews conducted with Montenegrin judges, prosecutors and defense attorneys in relation to plea bargaining practices. The interviews with five judges, five prosecutors and five defense attorneys were conducted so as to reveal the general perceptions and positions of the interviewees in relation to plea bargaining, discovering the motives that hide behind positive or negative opinions about it, finding out about their practical experiences in this regard being either successful or challenging, and getting suggestions related to future of plea bargaining in Montenegro. Those directly involved in the process are the ones who can provide valuable and unique practical input that can contribute to a better understanding of the reality of plea bargaining in Montenegro and defining useful conclusions and recommendations in this regard.

**Chapter V – Discussion of Key Findings**

In this chapter, key research findings will be presented and discussed. These findings will be based on the interviews results analysis. Together with the results of document analysis presented in Chapter III and discussions from other
chapters, they will serve as the basis for formulating relevant recommendations for the future.

Chapter VI – Conclusion

In this chapter, concrete recommendations related to plea bargaining in Montenegro will be provided. They will be based on research findings, and all the discussions and elaborations presented in the previous chapters. The recommendations will be targeted at improving the legal and practical framework of plea bargaining in Montenegro in line with such obvious tendencies of Montenegrin legislators and practitioners.

In summary the aims of this study are: analyzing the quality of the legal regulation of plea bargaining in Montenegro; comparing plea bargaining practice in Montenegro with the practice in the neighboring countries of Serbia and Croatia; investigating the level of usage, usefulness and productiveness of plea bargaining institution in the criminal justice system of Montenegro; identifying problems in the application of plea bargaining in Montenegro, as well as successful schemes in the implementation of this practice; discovering the causes of challenges in the application of plea bargaining in Montenegro, as well as factors in the successes in implementation of this practice; and in line with these goals, providing adequate conclusions and recommendations which can be useful in the further development of the practice and study of this issue in Montenegro. These aims will be achieved primarily through the analysis of numerous relevant documents, and interviews with actors in plea bargaining practice in Montenegro.
CHAPTER I

PLEA BARGAINING: PAST AND PRESENT

A REVIEW OF THE LITERATURE

This chapter will critically examine the literature on the definition and nature of plea bargaining; the relationship between plea bargaining and the concept of justice; a historical perspective of its application; its present status in the U.S. as its country of origin, as well as in a number of other countries which have different legal systems and traditions; supporting and opposing views on this practice; and finally the application of this legal instrument in international law.

1.1. What is Plea Bargaining?

When thinking about the definition of plea bargaining it is inevitable that we focus on the U.S. where this institution was born and is now present as the dominant way of resolving criminal cases. As already stressed in the Introduction, there is no single definition of plea bargaining. Various forms and definitions of the process called plea bargaining or negotiation on guilt or agreements on guilty plea or guilty pleas exist in different settings i.e. states, countries and at the level of international law; some are more and some less complicated, some are wide and others are quite narrow. However, many, if not most of them, include some form of negotiations between the prosecutor and the defendant in relation to the charges or sentence or even facts as a way to avoid a long and expensive trial with an uncertain ending, and with a mostly supervisory and controlling role of the court which makes sure that process is not misapplied. Many definitions stress the compromise in plea negotiations in which both sides have to give up their initial expected goal; for the accused this goal is not to be sentenced at all, while for the prosecutor it is to get a conviction with a fully adequate sentence.⁴
Plea bargaining generally anticipates charge bargaining and sentence bargaining. There is one more type of plea bargaining present in the U.S. which is called fact bargaining where the prosecutor and defendant basically bargain about the facts of the case. Unlike charge and sentence bargaining which are widespread and prevailing practices, fact bargaining is not but it does exist. In this form of bargaining the prosecutor and defendant are “stipulating…to facts or to applications of factors” (King, 2005, p.295) which ultimately affects sentencing. Purdey’s (1996) citing of the Probation Officers Advisory Group’s report (p.331) which says that “plea agreements do not always represent the true facts of the case” clearly refers to the existence of fact bargaining. The same can be concluded from the U.S. Supreme Court dissenting opinion of Judge Stevens in the case the U.S. v. Booker to which King (2005, p. 297) refers in his work: “…fact bargaining is ‘quite common under the current system’.”

Two additional main sub-types of plea bargaining, also typical of the U.S., are worth mentioning for the purpose of illustrating the richness and complexity of this practice in this country. Those are the so-called nolo contendere and Alford pleas. The first refers to situations when defendants “refuse to admit guilt but accept punishment as if guilty.”, while the second refers to situations where “defendants plead guilty while simultaneously protesting their innocence.” (Bibas, 2007, p.1363). The complexity of such practices are further explained by Bibas (2007) writing about the U.S. North Carolina v. Alford (1970) case in which Henry Alford, who was charged with first-degree murder and faced strong evidence, pled guilty to second-degree murder and a non-capital crime while at the same time protested his innocence. The U.S. Supreme Court supported such practice and in this case it “…held that defendants may knowingly and voluntarily plead guilty even while protesting their innocence if the judge finds ’strong evidence of [the defendant’s] actual guilt’” (p.1372). The mentioned sub-types of plea bargaining that are applied both at federal and states level, clearly demonstrate the obvious need for extreme procedual efficiency and practicality
present in the U.S. legal system which is quite often questioned by historical, as well as contemporary U.S. authors.

Even though typical for the U.S., different forms and variations of plea bargaining exist in many other countries on different continents and with different legal systems and traditions. It is used for all types of crimes, from misdemeanors through more serious crimes or felonies and all the way to war crimes. The most obvious universal reasons for using it are, on the one hand, the efficiency and lower cost of proceedings, as well as a guaranteed conviction for the prosecutor, and, on the other, the criminal’s certainty of a less severe charge or shorter sentence.

As already mentioned, Montenegro is one of the countries which did recognize the need to have plea bargaining as part of its legal system. The regulation of this practice in Montenegro will be discussed in more details later. Essentially, the Montenegrin legal system limits plea bargaining to sentences only, without the opportunity to bargain about charges. On the other hand, sentence bargaining is allowed in Montenegro for all crimes except war crimes and terrorism related offences.

Even though there is general agreement and understanding about essence of this institution and its purpose, it has always had its strong promoters and opponents. This ongoing dispute and rivalry is present not just in the academic sphere, but also at the practical level. Most interestingly, the dispute is very much present in the U.S. itself, whose criminal justice system practically relies on negotiated guilty pleas and functions thanks to this way of resolving a majority of criminal cases.

**1.2. Situating Plea Bargaining in the Theoretical Framework of Justice**

Before going into a further elaboration of plea bargaining, there is one primary question that naturally arises when talking about this practice and inevitably
represents a starting point: Can we bargain about guilt, and is it justice? As already stressed, in a broader sense this question represents the core of any criticism directed towards the plea bargaining practice; it targets its ethical and judicial elements which are actually its weakest and most controversial parts. When we are faced with the concept of justice as such, this is a completely understandable and justified question asked by many authors, as well as members of the general public who are in the end also the final users of the existing advantages of this legal instrument. Issues of moral correctness i.e. ethics, fairness, equality and rationality, generally linked to the perception of justice, are rightfully raised when talking about providing lenient treatment and lower sentences to somebody who did actually commit a crime, because of the fact that person promptly pleads guilty and by such action contributes to the efficiency of the whole process. Raising these issues becomes ever more justified in those cases, that I will discuss further in the text, when a crime is admitted by somebody who did not actually commit it, again for the reasons of the efficiency and practicality of the criminal proceeding.

Therefore, when talking about plea bargaining the issue of justice is inevitable. Essentially, the assumption is that the main purpose of the criminal process as of any other judicial process is to reach justice in a fair procedure. I will start from this assumption without discussing the other possible goals of the criminal justice system, like the claims that the main goal of the criminal justice system is actually the protection of the interests of the powerful, who are the ones who create the definitions of good and bad behavior in line with their own interests. This issue is nicely discussed by Reiman (2016).

In the context of the criminal justice system’s goal of reaching justice, it may be said that plea bargaining represents a shortened way of reaching justice with negotiations about guilt involved. The main questions one may ask are: Does this represents justice at all, or rather a kind of deviation from justice?; and also, Is that acceptable and for what reasons? The answers largely depend on how one
defines justice, and what the way to reach it in the existing reality and given framework of the criminal and penal law is. If we consider Aristotle’s thinking about “natural justice” or “universal law” that is based on natural rules and supersedes “conventional justice” created by community (Thomson, 1953, cited by Vieru, 2012, p. 117), it is clear that bargaining over guilt as a product of socially created law can be questioned in most cases since it is not in line with a natural feeling for justice. Simply, it is not in accordance with the rules of nature to bargain about guilt, at least when the most serious crimes are in question.

The main critique of the plea bargaining process, however, may derive from theories of retributive justice which concern “punishment for wrongdoing”. They are based on theories of natural law and order; and are a relevant part of all present legal systems and societies. By proper punishment for wrongdoing, the natural order of things is restored and the harm done is compensated for. In line with this, when discussing elements of justice in the context of penal law Kant (1999, p.138) says: “…The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantaged to be gained by releasing the criminal from punishment or by reducing the amount of it…”. Even though extreme forms of punishment theories that follow the principle “an eye for an eye” are outdated and not part of modern criminal law, if you ask any ordinary citizen, or perhaps better a potential victim of crime, whether s/he agrees with the above statement, there is a great likelihood that the answer of the majority would be in some way positive. Most would possibly support that old retributivist Hegel who called a criminal a “breaker” and “a heated, disarmed and cast-down enemy” (Hegel, 1897, cited by Materni, 2013, p.276) who deserves social punishment. A retributive theory of being punished for a committed crime by a sentence adequate to the seriousness of crime is a key barrier that can always be placed in front of the plea bargaining practice since this practice by itself implies a non-adequacy of sentence. However, as Lippke says, when discussing the relationship between
retributivism and plea bargaining, “contemporary plea bargaining practices diverge significantly from retributive requirements” (2010, p. 15).

Some research participants that I interviewed, for example judge J4 (for participants’ coding please see Chapter IV) openly express worries about the sanction’s adequacy to the crime committed, and even ask the question: “Who guarantees that what the accused said is true?” While discussing retributive justice, particularly the role of vengeance in sentencing, Materni (2013, p. 288) who is not supporter of revenge as the main principle which “shapes” the criminal justice system, cites in his work a number of modern authors whose retributive theoretical arguments may be used against plea bargaining as an “unjust” practice. Specifically, Materni (2013, p. 278) cites Primoratz (1989) who says that “justice is to treat offenders according to their deserts, to give them what they deserve”, or Robinson (2010) who claims that “doing justice [is] punishing offenders for the crimes they commit.” These understandings of justice are clearly opposite to the process of bargaining over guilt in which the criminal obviously gets either a sentence for a less serious crime than the one s/he actually committed, or s/he gets a lesser sentence just because s/he pled guilty for the crime s/he did commit, and in both cases it is not “natural” and deserved sentence.7

Furthermore, the utilitarian theory of deterrence examines the benefit to the whole society in the context of justice and criminal and penal law i.e. “it is the greatest happiness of the greatest number that is the measure of right and wrong” as founder of utilitarianism Bentham said (Burns, 2005, cites Bentham, 1776, p.46). The deterrence theory which in its simplest form was established more than 2000 years ago by Plato is focused on the preventive character of sentencing and the demotivation of the perpetrator to repeat the crime. Plato suggests looking into the future and “punishing for the sake of prevention.”(Jowett, 2009, cited by Materni, 2013, p. 289) unlike the retributivists whose focus is on a crime committed in the past and its consequences. The contemporary form of deterrence theory that includes both general and special, i.e. individual aspects of the prevention of
crime, is very much part of modern criminal law as well. General prevention is achieved through “threatening” society with sanctions defined by law, while special prevention is realized through the incarceration and rehabilitation or “healing” of a specific criminal. However, one everlasting question regularly posed by many authors is how large the actual deterrence effect of criminal law and sentencing is. This is especially so considering that almost everywhere the prison population is quite large and that the there are many repeat criminals who are evident proof of the questionability of taking exclusively this approach. Even though, for example Materni (2013, p.291) refers to a number of studies which specifically show small positive effects especially when it comes to special i.e. individual crime prevention⁸, this question still remains open.

If we link this theory with plea bargaining practice, in a broad sense, this practice does serve society as a whole by contributing to the efficiency of the criminal justice system which makes everybody “happy”. The results of the interviews I conducted during my research demonstrate exactly this, an obvious satisfaction with the social benefit the practice brings, but it is less likely to serve as a general prevention of crime. The question of whether this can be at least slightly changed through larger public exposure of this legal institution, which is suggested by some interviewed participants, may be a justified one though.⁹ Based on the results of his study, Smith concluded that the plea bargaining practice is “neutral” when it comes to the “deterrence effect of law”, it rather “allows prosecutors to pursue more cases than otherwise would be possible” by which the practice contributes “to the general deterrent effectiveness of legal sanctions” (1986, p. 966). We can still ask: Is this practice just, or it is just practical? From an individual oriented perspective, it can be said that plea bargaining “favors” a specific criminal for the sake of efficiency, and perceived in this way, it may have effects of crime prevention when it comes to the specific individual involved in the process. Exactly this is stressed by the interviewed attorney A3 (for participants’ coding please see Chapter IV). Generally, however, the discussed deterrence theoretical approach is questionable in the context of plea bargaining. As Niggli (2012, p. 6)
stresses, all preventive theories are detached from the principle of guilt and individual justice. This makes them not fully “compatible” with plea bargaining, which is dominantly focused on the issues of individual guilt. From the viewpoint of preventive deterrence theories, it is probable that plea bargaining cannot serve general crime prevention purposes, even though to some extent it may be effective when it comes to individual prevention; however, the main issue of plea bargaining fairness still remains.

When discussing justice in the context of plea bargaining, another modern theoretical perception of justice which is relevant is so-called restorative justice, dating from the second half of the 20th century. It is focused on restoring the harm that was done by a crime, but with a primary view on those involved i.e. the criminal and the victim. One of the known promoters of the restorative justice theory, Howard Zehr (2003, p.40), defines it “as a process to involve…those who have a stake in a specific offense to collectively identify and address harms, needs and obligations” with the purpose to “heal and put things as right as possible.” Zehr stresses that unlike retributive justice whose primary focus is on the “violation of law”, the focus of restorative justice is on the “violation of people and relationships” (Zehr, 1990, cited by Gavrielides, 2007, p. 24).

One of the problematic issues when it comes to plea bargaining practice is actually related to the marginal role of victims in the whole process. As I will discuss later, this represents a concern for some participants in my research as well who called for greater involvement of the injured party in the whole process. In the U.S., for example, the role of the victim in the process is minimal i.e. non-existent. Some authors see the victim as someone who basically “lost participation in his own case” (Christie, 1977, p. 7). Restorative justice theories put the focus on the relationship between perpetrator and victim in the framework of the criminal procedure, with the goal of “correcting the situation”.

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On the one hand, plea bargaining is very fruitful grounds to apply restorative justice mechanisms when it comes to less serious crimes or financial crimes. For example, very often a financial restitution is part of plea agreements related to financial crimes. Some of the interviewees involved in my research praised the practice exactly because from their own experiences it brings “settlement between parties”. On the other hand, one would expect that the restorative justice concept and plea bargaining would be least acceptable for the most serious crimes, like war crimes for example. The concept of natural justice seems the prevailing one here. However, restorative justice and guilty pleas have found their way into this area as well. When Combs writes about the restorative justice approach and guilty pleas in international law (2007, p.154) she concludes that a defendant’s guilty plea, when functioning on a restorative justice model, provides information to the prosecutor, the victims and society about atrocities which would otherwise not be possible to know about, and it also enables the greater involvement of victims in comparison to typical criminal cases where guilty pleas are used. According to this author, plea bargaining is a way to reach restorative justice in such cases.10

In most of the theoretical and practical discussions, reaching justice is seen as the primary goal of the criminal proceedings. This should be continuously present in the minds of all of those who decide about justice, regardless of the ways they perceive and understand it. In some cases, plea bargaining might be taken into consideration as a helpful tool in this complex process.

1.3. Historical Overview

Some logical questions that the one would ask about plea bargaining before examining the current situation, include how old this practice is, where it originates from, and why and how it was developed. In answering these questions is it again necessary to focus on the U.S. where this legal institution was established and where it has the longest history. While in the other common law countries plea bargaining does not have a strong formal basis, in the U.S. it has a long history of firm formal existence as well. On the other hand, when it comes to
civil law countries, including Montenegro, it is obviously not a legal instrument inherent to such legal systems which by their nature give the judge a major role in the criminal process and do not naturally allow “bargaining” between the parties. If it exists, this practice is a true novelty in the legal systems of these countries. Regardless of the long American history of plea bargaining, it is still not easy to answer all the legitimate questions mentioned above. The obvious problem that every plea bargaining researcher faces when dealing with the historical perspective of this practice is unfortunately a lack of proper evidence and documentation. Friedman (1979, p.247-248) says that “the history of plea bargaining is a fairly blank chapter in the history of criminal justice”. He further suggests that “there was some sort of plea bargaining in the nineteenth century, at least in certain places”, but that there were no systematic studies before 1880. According to him there were only some sporadic allusions to this practice in the 1860s. In order to illustrate this, he mentions two specific cases. One concerns the United Kingdom where Friedman cites a letter from the Home Office to a magistrate in Southwark complaining about offenders who were pleading guilty to a charge of "stealing from a person" in order to avoid a charge of robbery which carried a heavier penalty. The other case concerns the U.S; by citing Miller (1977:80) Friedman describes a case from the same historical period when the New York District Attorney “encouraged defendants to plead guilty to lesser offenses”, but stresses that such bargains were "always under the table".

The very first information which most of the historical plea bargaining research will provide is that it appeared in the U.S. in the nineteenth century. However, different authors approach the issue of the time of its foundation in different ways. To some extent it is indicative that opponents of plea bargaining consider it a relatively new phenomenon in legal history, originating from the nineteenth century, and claim that it “was essentially unknown during most of the history of the common law” (Alschuler, 1979, p.4). However, those who are in favor of plea bargaining stress its longer history. For example, Justice William Erickson of the Colorado Supreme Court wrote that “charge and sentence concessions to secure
pleas of guilty are, and always have been, part and parcel of our criminal justice system."(Erickson, 1973, cited by Alschuler, 1979, p.2). The conclusion which can be drawn is that the time which one considers the beginning of plea bargaining largely depends on how we treat the informal plea bargaining practices which have obviously existed for quite a long time. Evidently, some authors see these informal practices as “real” plea bargaining, while some do not, probably depending on their own general personal attitudes and feelings about the practice.

Furthermore, the differences between pleading guilty, i.e. confession as such, and plea bargaining as a process that includes negotiation on guilt, are also very important in the historical observation of plea bargaining processes. Interestingly, this differentiation between the two also arose amongst the Montenegrin participants of my research who discussed it for different reasons, some claiming that the whole process is much more simple when a standard confession is in question, while others stressed that those who plead guilty in the framework of plea bargaining are essentially better treated than those who regularly just confess a crime. When this differentiation is put into historical perspective, Dervan writes (2012, p.58) that “while the right to plead guilty dates back to English common law traditions, a new phenomenon began to appear in America shortly after the Civil War.” By referring to Aschuler (1979) he further explains that in this historical period the state courts in the U.S. started to receive a great number of appeals that were related to “apparent bargains” between prosecutors and defendants. It is evident that the bargains were appealed and that this was not a widely welcomed practice. On the other hand, it is also interesting to learn about the courts’ response to these appeals and forms of plea bargains. Dervan (2012, p.58-59) again by referring to Alschuler (1979, p. 20) explains that “with resounding frequency, these early experiments with bargained justice were rejected by the judiciary.”, and he further quotes the relevant court wording of that time.
However, regardless of the evidently quite long existence of such informal types of bargaining over guilt and the negative initial attitude of the judiciary towards this process, a big rise of the plea bargaining practice essentially similar to its present form happened in the 1920s. Fisher (2003, p. 6-11) who is one of the most well-known contemporary plea bargaining authors, in his famous book about the history of plea bargaining in America entitled *Plea Bargaining’s Triumph*, talks about “three waves of historical scholarship”. All three strongly reflect the realities of the three major periods of the development of the plea bargaining practice.

According to Fisher (2003, p. 6) the first wave in the 1920s and early 1930s “marked the true age of plea bargaining discovery.” The practice at that time was found to be informal, but pretty regular and widespread. According to Fisher, Miller (1927) and Moley (1928) were the authors who most contributed to the discovery of unofficial plea bargains which existed in the prosecutorial practice of that time. Their contribution was not important just from the angle of revealing the practice, but also from the point of clarifying the leading motives that stood behind it. Through their works Miller and Moley reached the conclusion that the key factors for the initial establishment of this practice were the efficiency of the judicial procedure, and the “easy victories” which prosecutors would reach this way.14 These factors seem to remain obvious and universal key catalysts for the introduction of the practice everywhere, including in Montenegro, which will be discussed later. One of Moley’s main findings of that time which Fisher calls striking (2003, p.7) is “that of 13,117 felony prosecutions begun in Chicago in 1926, only 209 ended in convictions by a jury. He [Moley] declared that the worst aspect of the already dominant plea bargaining regime was its invisibility.” Fisher (2002, p.7) further refers to Miller (1927) who also talked about the invisibility of the practice, and particularly the easiness of prosecutors’ “indulgence” in bargaining with the absence of any public interest. Led by such a surprising discovery, Moley further investigated the specific reasons which stood behind the practice; and he concluded that it was happening due to “caseload pressure”
Fisher finds Moley’s conclusions related to “caseload pressure” a particularly relevant contribution to plea bargaining research in those early times. Many would agree with him, and would see these findings as crucial for the further study of the previously mentioned “practicality” of the U.S. legal system which, as it seems, was born out of necessity.

According to Fisher, the second wave of plea bargaining scholarship happened in the 1970s, and its main representatives are Heumann (1975), Langbein (1978), and Friedman and Percival (1983). They all focused their research on the motives that stood behind the obvious growing trend of plea bargaining practice of that time. Heumann was devoted to the further examination of the relationship between plea bargaining and caseload pressure. Fisher concludes (2003, p. 9) that with his work Heumann “opened the gates to a flood of new theories of plea bargaining’s rise.” Specifically, Heumann conducted research which included analysis and comparison of data and statistics related to guilty pleas and caseloads in different counties of the State of Connecticut. His research resulted in the conclusion that “the notion that plea bargaining and case pressure go together must be reexamined… It should now be evident that guilty pleas will be proffered and accepted for reasons other than case pressure…” (Heumann, 1975, p.527). By this Heumann did not completely exclude the influence of caseload pressure on plea bargaining, but stressed the existence of other factors as well. His study marked the beginning of an intensive scholarly examination of the various potential reasons for the significant development of this practice at that time.

When writing about this new direction that scholars took while researching plea bargaining Fisher (2003, p.9) further refers to Langbein who “…argued that plea bargaining arose because trial rules had grown so complex…” In order to illustrate his claim Langbein (1978, p.15) used the case of *North Carolina v. Alford* which I have already discussed. When it comes to other authors of the “second wave” Fisher noticed (2003, p.10) that Friedman and Percival, “looked to the role that increasingly sophisticated policing and evidence-gathering techniques may have played in the development of plea bargaining.” However, he
sees no proven link between the two, and further refers to McConville and Mirsky (1995) who also did not find a direct link between the development of policing and investigative techniques, and rise of the guilty pleas in the empirical study they conducted.

Finally, according to Fisher (2003, p.10) third wave representatives from the 1990s include Vogel (1999) and Ferdinand (1992), as well as the already mentioned McConville and Mirsky (1995). The research of contemporary authors in comparison to the work of earlier, particularly “first wave”, authors has been clearly done in quite a different realistic setting when it comes to the phenomenon they examine i.e. plea bargaining. Over the last decades this practice has represented the dominant way of resolving criminal cases in the U.S.; this will be discussed later in more detail. It is practically the model of functioning of the U.S. criminal justice system, which is continuously being developed, but at the same time questioned, analyzed and discussed. The need for continuous discussion arises, on the one hand, from the relatively controversial nature of this legal institution which imposes the justice dilemmas described earlier in my work, and on the other hand from the constant development of innovate approaches to its practical implementation. The ethical aspect of plea bargaining, and procedural issues in relation to its application, are the main focus of modern discussions in this area. In his work Fisher concludes (2003, p.11) that all the named authors agree about the three major issues crucial to the proper and reliable study of plea bargaining practice: any conclusions in relation to the factors which cause an expansion of plea bargaining must rely on analysis of the actual cases; “this empirical undertaking … must embrace both statistical overviews and individual case histories”; and any such analysis must include not just courts i.e. actors in the process, but must take into account “larger political and social realities, including community attitudes toward plea bargaining.”. However, he further notices that all the modern authors to a great extent neglect to research the role of judges in this process, and judges were the ones who actually took the long road from strict
rejecting of the practice in the past to generally strong supporting plea bargaining at present.

Bearing in mind the nature and scope of my own research, I found Fisher’s general conclusions related to researching plea bargaining useful, particularly when it comes to incorporating actual cases, statistics and the individual experiences of those who participate in the process. Only after all the named elements are taken into account can a reliable picture about the practice be created, which can actually serve as solid historical material for future plea bargaining researchers.

1.4. Plea Bargaining at Present – The U.S.A.

Some Statistics for Illustration

Regardless of all the barriers and challenges that plea bargaining has faced on its historical path in the U.S., it has survived. Today it is definitely the prevailing way of resolving criminal cases in this country. A large majority of cases are resolved by plea agreements which include bargaining between the prosecutor and the accused. In relation to the research conducted on plea and charge bargaining in the U.S., Devers writes (2011, p. 1-3): “While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process...The overwhelming majority…of cases result in plea bargaining.” Taylor Shannon (2007, p. 1) concludes similarly: “Most criminal cases in federal courts are resolved not by trials, but by plea bargains.” 20 The American courts’ statistics clearly demonstrates such a prevalence of plea bargaining practice in comparison to a classical trial.

From 1990 to 2013, 89% of all the cases in front of the Federal U.S. District Courts ended with a plea of guilty. For example, the U.S. District Courts annual
statistics say that in 2014 out of 76,835 convicted and sentenced people, 75,035 pleaded guilty and the rest went to trial.\textsuperscript{21} The statistics of different states are similar. In one of the smallest and one of the biggest U.S. states, Delaware and California, the situation is similar in this sense. The Delaware Judiciary Statistical Annual Report for 2014 says that 70.2 \% of all the criminal dispositions in front of the Superior Court ended in a guilty plea.\textsuperscript{22} According to California Courts Statistics Report for 2014, in a fiscal year 2012-2013, out of 241,238 felony dispositions, 195,389 felony cases were disposed with a guilty plea before the trial.\textsuperscript{23}

Regardless of the fact of whether they are in favor or against plea bargaining, many modern authors primarily stress the extremely high percentage of criminal cases resolved this way. It is simply a reality.

\textit{The U.S. Supreme Court’s Affirmation of and Support for Plea Bargaining}

In its relatively long history it is to be expected that plea bargaining practice has been challenged in front of the U.S. Supreme Court as the last instance, the Constitutional Court in the U.S. judicial system. However, it survived such types of barriers too, and at present it is a fully constitutional practice strongly supported by the U.S. Supreme Court. This Court started to deal with the constitutionality of plea bargaining quite long after it had actually been practically established and implemented. There are a few decisions of this Court from recent history which should be mentioned in this context, and which represent true milestones in the application of this institution. They all contributed not just to its formal verification, but also to the further strengthening of its position in the U.S. criminal justice system and its complex development.

The very first issue that was challenged in the Supreme Court concerned the voluntarism of the expressed plea of guilty in the famous case of \textit{Brady v. the U.S.} \textsuperscript{24} (1970). In this case, the defendant, Brady, claimed that his guilty plea was made
due to fear and that it was coerced by the fact that prosecution could have asked for the death penalty if he went to trial and did not plead guilty. The Court dealt with three major points in its judgments. First of all, it used the opportunity to fully support the plea bargaining practice as such which is the historical outcome of this case. By defining plea bargaining as a practice “inherent in the criminal law and its administration”, for the first time the Court openly favored the practice and cleared the path to its further development. Furthermore, when it comes to checking the way in which the guilty plea was expressed i.e. whether it was expressed voluntarily, intelligently and knowingly, the Court introduced a standard to review a whole set of circumstances in which the guilty plea was made in order to make a final judgment about the quality of plea. It stressed that “the voluntariness of … plea can be determined only by considering all of the relevant circumstances surrounding it.” And finally, the Supreme Court expressed its trust in the courts’ estimation of the quality of expressed guilt whenever the defendant is “competent” and has “adequate advice of counsel”. In defending its position, the Court stressed that in Brady’s case the defendant had testified twice in front of the relevant courts that he was voluntarily pleading guilty; bearing in mind his determined competence and adequate defense this was found to be enough of a guarantee of the good quality of his will.

After this judgment was adopted, it initiated a series of other decisions by which the Supreme Court further supported plea bargaining practice and “set its position in stone” when it comes to the U.S. criminal justice system. Alchuler (1979, p.40) refers to Brady v. the U.S., as well as the case of Santobello v. New York\(^\text{25}\) (1971), and writes that “by 1970” the Supreme Court “…in a series of decisions which implied that any other course would be unthinkable … upheld the propriety of plea bargaining.” By Santobello v. New York, the Supreme Court not only reaffirmed plea bargaining as a legal institution, but also entered into a deeper discussion of the issue of plea agreement withdrawal, and the consequences of such an action. To clarify, in this case the issue of using a legal remedy was indirectly questioned in situations when a plea agreement was reached through
negotiations and then not respected by the prosecution in later stages, as happened to the defendant Santobello in this case. In its judgment, first of all, the Court again stressed the importance of plea bargaining. It clearly said that if “Properly administered [plea bargaining], it is to be encouraged.” This time it additionally advertised the general reasons for its strong support, and identified case pressure as the main one. As the Court said: “If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” Finally, it answered the question of the non-respect of the reached plea agreement and explained that “…when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Those were more than clear guidelines which provided additional “shot in the arm” to the plea bargaining practice.

This was, however, just the beginning. All the future Supreme Court practice was obviously in favor of plea bargaining; as Casper (1979, p.568) says by referring to cases of Brady v. the U.S. (1970), Santobello v. New York (1971), North Carolina v. Alford (1970), and Bordenkircher v. Hayes26 (1978), “The Supreme Court has rejected several constitutional challenges to the practice and endorsed it as an appropriate and legitimate means of handling criminal cases…” This Court has been dealing, and still does deal, with the various aspects of plea bargaining in its decisions. Each new plea bargaining Supreme Court case has contributed another affirmative dimension and has enriched the practice. Some cases are very illustrative in this sense. For example, in the mentioned Bordenkircher v. Hayes (1978) case, the Court decided that it is not unreasonable for a prosecutor to ask for an enhanced sentence when the defendant refuses to take guilty plea. In other words, the Court’s position is that the prosecutor has a legitimate interest to persuade the defendant to plead guilty. Other, more recent and well-known examples are the cases Lafler v. Cooper27 (2012) and Missouri v. Frye28 (2012). As Work writes (2014, p.486), “The Supreme Court’s acknowledgement in Frye and Lafler” is ‘that plea bargaining is the primary way
that the criminal justice system functions’.” As he further explains, in these cases the Court reiterated defense attorneys’ existing ethical responsibilities to properly inform the defendants about plea offers and their merits, so that they can make informed and voluntary decision about their plea.

These cases have been briefly presented in order to illustrate the continuous and dynamic development of the affirmative practice of the U.S. Supreme Court when it comes to plea bargaining. Through its cases a clean and wide road of plea bargaining implementation in the U.S. was opened a long time ago, and, as can be seen, this road is still being strongly protected by the highest judicial institution of this country.

Ongoing and Everlasting Discussions - Opponents and Supporters of Plea Bargaining in the U.S.

Despite the fact that guilty plea negotiations have conquered the legal system of the U.S., there has always been a significant number of not just those who promote and worship this institution, but also not a small number of strong opponents and major critics. Gazal (2005, p.4) writes that “Very few issues in the American criminal justice system generate such fierce controversy as plea bargaining…” The main points of the debate in this area focus on the issue of the constitutionality of this practice in the context of constitutionally guaranteed rights like the right to trial and the right against self-incrimination; the issue of innocence i.e. the possibility of innocent people being convicted; the issue of the coercive nature of plea bargaining imposed by the government; the issue of the nature and quality of negotiations i.e. the equality of arms in this process and prosecutorial sentence manipulation; the issue of the contractual nature of the plea agreement and the will expressed by the parties in this context; the issue of the balance between criminal procedure efficiency and the right to trial; the issue of the power which is given to a prosecutor by this institution and the position of the judge in the process, and other similar issues. Most of the arguments against plea
bargaining can be narrowed down to a care for the defendant’s rights and innocence, and for the overall purpose of the criminal justice system which is seeking the truth and reaching justice. Most of the arguments in favor of plea bargaining focus on increasing the efficiency and reducing the costs of the criminal proceedings; the impossibility of the criminal justice system to function without plea negotiations; the defendants’ benefit in avoiding a harsher sentence, and the prosecutors’ and judges’ benefits of reducing the caseload and saving time.

The sensitive issue of innocence is naturally the first one that evokes harsh reactions from the opponents of plea bargaining. When it comes to plea bargaining this issue can be generally observed from two perspectives: from the perspective of innocent people being convicted, or guilty people being minimally punished. As many believe, in both of these cases the requirements of justice are not fulfilled. In their discussion many authors start from the obvious and existent U.S. practice of innocent people pleading guilty with the purpose of avoiding the severe sentence that they could potentially receive if they go to trial. The already mentioned Alschuler who calls the whole process “inherently unfair and irrational” (1981, p.652) was particularly focused on the question of innocence. He believed that the danger of convicting an innocent person was much larger with plea bargaining then with a regular trial (1981, p.716). He interestingly describes a person who pleads guilty as “half-guilty” since the person “…can properly receive half the penalty that he would receive if he were really guilty.” (1981, p.706). Another author who dealt with the innocence issue in the framework of bargaining over guilt is Schulhofer, a major opponent of plea bargaining practice. He directly and openly calls for the abolition of the practice, describes it as a “disaster” and claims that “plea agreements…deny defendants the benefits of a vigorous defense and inflict undeserved punishment on innocents who could win acquittal at trial.” (1992, p. 2009). More recently Podgor (2010, p.77-78) has also discussed the relationship between plea bargaining and innocence and claims that there is a problematic “message being sent today…that
trials carry enormous risk, and even if innocent, the best route may be to proceed with a finding of guilt or deferred prosecution.” Furthermore, Dervan and Edkins (2013, p.48) point out the innocence problem hidden behind plea bargaining and even propose rechecking the constitutionality of the practice in light of the large number of innocent defendants who plead guilty. In this context, they believe that the plea bargaining of the present time is nothing like plea bargaining in the 1970s which was the Supreme Court’s starting point in the Brady case. These arguments are obviously related to the U.S. legal system. It is, however, interesting to view them from the perspective of civil law systems. These systems do not have a prevailing practice of plea agreements; on the contrary, the trial remains the key way of resolving criminal cases. In that context, the argument that a great number of innocent people plead guilty by logic is far from the reality of civil law systems.29

A logical following question some would ask, particularly those coming from civil law systems in which the determining of truth by the court is a founding principle of the criminal procedure, is: Why would (presumably) innocent defendants plead guilty? This question is especially legitimate when we know that the earlier described nolo contendere and Alford pleas30 exist in the U.S. legal system. It is justified to think that a constructed criminal justice system as such “forces” the defendants to do this for the purpose of efficiency and certainty, at least in some cases. Obviously when one is faced with an extremely severe threatened sentence and not a small potential to be convicted at trial where a jury decides on guilt, then perhaps admitting guilt and receiving a significantly lower sentence looks more attractive. When discussing the general purpose of the criminal procedure and the position of plea bargaining in relation to that, Alschuler focuses on the effects of the criminal justice system on plea bargaining practice. He claims (1981, p.705) that the U.S. criminal system is designed in a way to influence behavior by the extremely severe sentences it imposes.” As he describes, “the purpose of this system certainly is not to make everybody happy…Indeed, in most nations of the world…American plea bargaining
apparently is regarded as a *reductio ad absurdum* of our nation's commercial mentality." He claims that plea bargaining is not consistent with the “objectives of the criminal law and with the distinctive technique of social control that it embodies.” He finally suggests (1982, p.690) that it is important to ensure that the interests of defendants and the state are not “subordinated” to the interests of the criminal justice system. Lynch (2003, p.24) is an author who also elaborates on this coercive force of plea bargaining and puts it in the context of constitutionality; he claims that it is true that plea bargaining contributes to the speediness of a trial, but in an unconstitutional way. He explains that “the truth is that government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used.” He sees plea bargaining as “the primary technique used by the government to bypass the institutional safeguards in trials”.

The issue of the coerciveness of the criminal justice system can be directly linked with the powerful role which is obviously given to prosecutors as Government representatives in the whole process, and which was clearly approved as such by the U.S. Supreme Court in its *Bordenkircher v. Hayes* decision. Prosecutors are the ones who essentially direct the plea bargaining process in the U.S. and who have significant maneuvering space when it comes to the sentences proposed in the framework of plea negotiations. Some authors find exactly this role of prosecutors very problematic. Burke (2007, p.183-211) generally criticizes the significant power that is given to prosecutors in the plea bargaining process since they are the ones who decide whether to bargain or not based on many motives starting from those related to reducing caseload and enlarging conviction rates, to those related to their passion for prosecutorial work and the type of cases they deal with. Some authors even believe that there is a disparity between the two sides, the defendant and the prosecutor, in the process of plea bargaining. O'Keefe (2010) analyses plea bargaining agreement as a type of contract. By referring to Alschuler (1981) he writes that (2010, p. 260) the “most common contract-based arguments against the practice of plea bargaining are acceptance
under duress, information disparities, disparate bargaining power, and the prohibition on enslavement contracts.” When it comes to the issue of the unequal positions of the two sides in this process and the enslavement character of the contract, Alschuler claims that there is even a limitation of will expressed by the defendant in negotiating a guilty plea agreement. When explaining this limitation (1981, p.697) by referring to Mill (1951) he adds that “The principle of freedom cannot require that [a person] should be free not to be free.” Alschuler believes that “It is not freedom to be allowed to alienate [one's] freedom.”

Far from criticizing the practice, many scholars praise plea agreements as an efficient and constitutional means of resolving cases. They are focused on answering the key points of criticism when it comes to plea bargaining: the problematic issue of innocence and the fairness of the practice, criminal justice system coerciveness which is blamed for causing a larger application of plea bargaining, the inequality of the sides in the process, and the enslavement character of plea agreement. In line with this, they primarily elaborate on the legitimate reasons for replacing a trial with a plea agreement. A justified question that can be asked where the U.S. legal system is concerned is:” What if a defendant does not want to take the risk of receiving a severe sentence at the trial?” Realistically, some defendants probably rather opt for agreements in order to avoid such a risk. Easterbrook (1992, p.1975), who strongly defends plea bargaining, when talking about the usage of plea agreement instead of a trial claims that there are legitimate reasons for a defendant to opt for the former. He stresses that “Defendants can use or exchange their rights, whichever makes them better off.” He believes that plea agreements actually help the defendants, and that any force being put on them to use their rights at trials “…means compelling them to take the risk”. From the perspective of, for example, the Montenegrin legal system as a civil law system, on the contrary, a trial is mostly seen as not that much of a risk, but rather an opportunity to present and discuss all the evidence in a fair environment and before a competent and impartial judge who will make final decision. Bearing in mind the country’s generally lenient sentencing policy,
this “risk factor” is one of the key differences between the two systems. Based on the civil law legal system construction itself, the existence of a lower risk linked to trial may be seen as a factor which reduces the application of plea bargaining in this system.

One of the least disputable elements of plea agreements is their huge contribution to the efficiency and cost reduction of criminal proceedings. Many modern day criminal justice systems are faced with an increasing number of crimes that are characterized by a high level of complexity, an international element, a large number of perpetrators, and very fast and modern methods of their commission. The resolving of such criminal cases in any system takes time, the activation of the whole criminal justice apparatus, and significant budget funds. This is where plea agreements can help. Easterbrook (1992, p. 1975) discusses the time and efficiency components of plea bargaining. He claims that by using plea agreements defendants “get the process over sooner”, and “solvent ones save the expense of trial”. He further claims that plea agreements are beneficial not just to defendants, but also to prosecutors and “society at large”. As he writes: “In purchasing procedural entitlements with lower sentences, prosecutors buy that most valuable commodity, time. With time they can prosecute more criminals.”

Defenders of plea bargaining also deal with the issue of the coerciveness of the criminal justice system in relation to plea bargaining. They do not see the construction of the U.S. system as the main incentive for a larger application of plea bargaining. When discussing this issue, those known supporters of plea bargaining, Scott and Stuntz, explain (1992, p.1919-1921) that the significant difference between the sentences that are the result of a trial and those sentences that are the result of plea agreements “does not imply coercion a priori”. They believe that in a situation when the accused has several bad choices, and such a situation is actually seen as coercion, it does not mean that her/his final choice is not a voluntary one. As they say: “So long as the post-trial sentences have not
been manipulated by the prosecutor, the coercive elements of the plea bargaining environment do not corrupt the voluntariness of the plea agreement”.

Another critique of plea bargaining practice which was largely discussed by supporters of this practice is the inequality of the sides in this process. Defenders of plea bargaining are strongly against the claim that there is an inequality between the sides when this practice is concerned. Remembering the general critique directed towards the unfairness of the process, as well as inequality of the two sides, Church (1979, p.509) defends plea bargaining by stressing four major features of this practice. As he claims: “the defendant always has the alternative of a jury trial at which both verdict and sentence are determined solely on the merits”; the defendant is represented in this process by a competent defense; both sides in the process “have equal access to relevant evidence”; and “both possess sufficient resources to take a case to trial.” According to him, these things make plea bargaining a fair process and exclude the inequality of the sides. In contesting the inequality critiques, Church is joined by Scott and Stuntz (1992, p.1922). In their work they deal with the issue of the disparities of the two sides in having information. They believe that this argument is simply not applicable to plea bargaining. As they explain, plea agreements are not standard contracts with lots of terms and conditions that are hard to understand for a regular “consumer”; with plea bargains the defendant has a knowledgeable lawyer to help him and therefore there is no inequality between the parties in this sense.

When it comes to critiques related to the contractual nature of plea agreements and the prohibition of enslavement in that context, unlike Aschuler who was very firm about the impossibility for one to freely decide about their own freedom in the framework of a contract, Scott and Stuntz (1992, p.1910) believe that “Properly understood, classical contract theory supports the freedom to bargain over criminal punishment.” In their work, where they widely discuss the contractual nature of plea agreements, they deal with the argument of the prohibition of enslavement. Scott and Stuntz argue that it is not the liberty of the
defendant that is being traded for something else, but the risk of enslavement i.e. prison is being traded for the “certainty of somewhat less enslavement.” They stress that if it is forbidden to the defendant to bargain s/he will bear the risk of a very serious sentence.

Many authors are somewhere in between when it comes to this legal institution. It is obvious that this practice is helpful, and even necessary, when it comes to efficiency and the cost of the criminal procedure. In cases of complex organized crime and other forms of serious crime, this practice can be also valuable for getting additional information from those who sign plea agreements, which can consequently lead to the “higher social goals” of bringing higher ranked criminals to justice. However, critiques related to major “natural justice” and the practice’s unfairness remain valid. Many authors do agree with the above mentioned objections of the criticizers of plea bargaining, but still think it is a worthy practice which should be kept and reformed, particularly when it comes to the procedure itself. When making comparison between settlements in the civil cases on the one hand, and the process of plea bargaining in criminal cases on the other, Bibas writes (2004, p.2546-2547) that in the civil settlements it is more like a “business decision” where parties agree how to split money, while “criminal negotiation involves higher stakes”, less information and adequate funding, “more variable representation, and more structural and psychological distortions.” He concludes that the “huge edifice of plea bargaining” cannot be neglected, but suggests reform of “its flaws and inequities.” Furthermore, Sandefur writes (2003, p.28) that even though plea bargaining quite often does include unfair prosecutorial tactics, it is “not unconstitutional, nor does it necessarily violate a defendant’s rights.” He believes that problems lie in the regulation of the trial and plea negotiations, not in the right to make such a contract itself. He suggests that plea bargaining “flaws are procedural, not constitutional, and it needs reform, not abolition.” An interesting proposal concerning plea bargaining reform comes from Gazal (2005, p.2) who proposes not a total, but a partial ban of plea bargaining in cases when “the concession offered to the defendant in return for his guilty plea is
large.” He believes that this would cause those defendants with “relatively high chances of acquittal at trial” not to enter into plea bargains.

The debate over this issue is not typical only for academics in the U.S. It is deeply rooted in the reality of this country’s criminal justice system. A few of the specific, largest practical attempts to abolish this practice in the U.S prove that U.S. legal practitioners are, similarly to academics and theorists, not always in favor of this practice.

Specifically, in 1975, the Alaska Attorney General Avrum Gross banned plea bargaining in Alaska including both sentence and charge bargaining, and including all felonies and misdemeanors. The motives of Attorney General Gross for such step, as Rubinstein and White write by citing Gross (1979, p.368) were the following: “He has said that the purpose of his policy is to ‘return the sentencing function to the judges,’ and to eliminate the former practice under which the courts acted as ‘rubber stamps’ for sentences negotiated in advance by the parties.” The ban naturally produced some effects in terms of reducing plea bargaining practice. In 1988 Judicial Council of Alaska conducted a re-evaluation of the ban on plea bargaining. In relation to the findings of this re-evaluation White Carns and Kruise write (1991, p.29-30) that the Council concluded that the “original ban caused substantial decreases in both sentence and charge bargaining.” The Council also concluded that the ban remained the official policy of the Attorney General’s office, and that charge bargaining became common while sentence bargaining “remained infrequent”. Finally, the Council’s report also concluded that over the past fifteen years the percentage of people convicted to prison sentence increased, and that length of prison sentences became longer. Even though the results were to some extent negative for plea bargaining the practice has been present and far from non-existent in the years that followed. Specific, clear evidence for this was the 2009 Alaska case when the accused killer Jerry Active got a very soft plea bargaining agreement where prosecutors failed to recognize that he had already been convicted for a felony. This case lead to
rethinking the ban on plea bargaining and to a new Alaska Department of Law policy in this area in 2013. The new policy actually bars plea bargains involving sentences for the most serious felony cases, as well as all cases involving sexual assault, sexual abuse of minor and domestic violence.

It is also worth noting that in 1973, the National Advisory Commission on Criminal Justice Standards and Goals which was part of the at that time existing DOJ Law Enforcement Assistance Administration even called for the abolition of plea bargaining in all states by 1978.32

Even though such attempts did have some influence, at the general level they did not stop or significantly affected the practice. One of the DOJ Bureau of Justice Assistance’s latest plea bargaining studies illustrates this (Devers, 2011). It showed an undisputable need for using this institution in the U.S. criminal justice system, but also a need for reforms in this area.33 At the very end of the research it is concluded that the plea bargaining process is “ingrained in the way cases are processed.” Any future reforms and research need to address the “disparities within the system and to find a practical solution for all participants involved.” Unlike the U.S. legal system, it can be concluded, based on the evident existing experiences, that plea bargaining is far from being “ingrained” in civil law systems. This is important to take into account when analyzing this practice in Montenegro, as predominantly a civil law country.

1.5. Plea Bargaining at Present – Other Countries

Plea bargaining is most often linked with the U.S., but, as has already been stressed, it is not exclusive to this country. Its different forms can be seen in many countries throughout the world, which differ between themselves to a greater or lesser degree in terms of their legal systems, history, traditions, social background, level of democracy and other factors. The difference between two major types of legal system, the civil law system and the common law system,
seem to affect the implementation of plea bargaining. It is evident that this practice is much more present in the common law countries, characterized by court precedents as the main source of law. The civil law legal system, unlike the common law one, is based on Roman law; in this system, written laws are the primary source of law and the judge is the central figure who leads the trial, determines the truth and decides on justice.

Some authors link the different attitudes towards plea bargaining with the preferences of the societies and their legal systems when it comes to innocence issues. Givati (2011) interestingly answers the question as to why different countries have different policies regarding plea bargaining. He (2011, p.21) used cross country data on crime prevalence and on social preferences when it comes to judicial mistakes related to the innocence of the accused, and he also analyzed the legal regulation of plea bargaining in those different countries. Based on the analysis, he concluded that different policies reflect different social preferences for the two types of innocence mistakes: punishing the innocent and not punishing the guilty. As he says: “Lower concern for punishing the innocent leads to greater use of plea bargaining”, or in other words, a greater concern about the guilty not being left unpunished leads to the lower use of plea bargaining. Furthermore, his research also shows that higher levels of crime lead to greater use of plea bargaining.

It is clear that civil law systems in which the trial is an opportunity to “reveal” everything by a neutral, third party, and make sure that evidence about the accused’s guilt is properly presented and discussed, do not easily accept plea agreements which include “play” with the evidence and guilt. Canivet (2003, p. 940) explains that the right to a fair trial and the right of due process “are absolute and inalienable; they cannot be negotiated or traded off” regardless of the expected benefit for their holder or third parties.
However, even though civil law systems seem less open to plea bargaining, the fact is that some countries which are major representatives of this system like, for example, Germany, do have certain forms of plea bargaining. Or the opposite, England and Wales, the core of the Anglo-Saxon legal system, do not formally recognize plea bargaining. The joint modern reality in which all the countries of the present world function, however, may be one of the reasons for spreading plea bargaining practices throughout the world. Modern societies with different legal systems, faced with the influx and pressure of new types of crime look for new approaches to fighting it, and new forms of procedural treatment. Canivet (2003, p. 940-941) discusses exactly these problems and stresses that “Even though difficulties are peculiar to each legal culture, the challenges that face justice nowadays are universally common…” He explains that “…more and more judges conceive of their job as managing the flood of cases rather than rendering justice solemnly.” Plea bargaining, as a tool which speeds up the trial, reduces its cost, which has a potential to assist prosecutors with other cases, and still to a great extent reveals the truth, finds its place in many different legal systems.

Some of the different forms of plea bargaining or plea negotiations that can be found outside the U.S. are briefly presented in Appendix A. The plea bargaining mechanisms of the United Kingdom, Germany, Italy, Russia and India are presented for the purpose of illustration of the variety of practices. The chosen countries represent those which have different legal systems, and more or less different historical circumstances, traditions and cultures. From the brief comparative presentation, it can be seen that plea bargaining practice can be adopted in different systems and surroundings. It illustrates a “hybridization” of the criminal procedure which to a large part results in a mixture of the two main legal systems, those of civil law and common law. When explaining “hybridization” Canivet says (2003, p. 941) that a “procedural or substantive hybridization … results in an original construction mixing elements of both great families of legal systems.” It can be said that the Montenegrin criminal procedure does represent exactly the “hybridized” civil law criminal procedure that Canivet
writes about. While keeping the classic civil law trial as the central “place” of truth determination, plea bargaining was introduced into this country’s legal system as a means to avoid this central stage of the civil law criminal process. In practice, the clash of the two may open up space for different challenges that will be discussed later in my work, and that are reflected in the answers given by the participants in my research. For example, when talking about plea bargaining one Montenegrin judge, J4, said (for participants’ coding please see Chapter IV): “I am for the truth and justice. Americans and Anglo-Saxons started this due to practicality.” This is the expected answer of a civil law judge who decides about truth in this legal system.

The previously mentioned Appendix A refers to just some examples of the variations of plea bargaining practice that exist worldwide. Amongst other things, they illustrate, on the one hand, that this method of resolving criminal cases is definitely most developed and used in the U.S., but on the other, that in one way or another plea bargaining has become part of the criminal justice systems of many countries. All of them have the joint goal of seeking solutions to the problems of overburdened courts, and complex and long trials. This can be applied to Montenegro as well.

1.6. Plea Bargaining in International Law

One more interesting proof of the truly offensive nature of plea bargaining is its application in international criminal law and before the international criminal courts. I will briefly touch upon this modus of plea bargaining practical implementation.

Specifically, this legal institution has been used before the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). As of 25 May 2016, 81 accused have been sentenced by the ICTY out of which 20 pleaded guilty. According to the official statistics and
documents that Ferioli analyzed (2013, p.3): “The ICTR had convicted forty-six defendants, of whom eight had pleaded guilty.” Currently available statistics show that there are 62 convicted in total.³⁵

Another international court, the International Criminal Court (ICC) also envisages plea bargaining in its statute known as the Rome Statute.³⁶ Article 65 of the Statute of Rome defines “Proceedings on an admission of guilt”. However, it has not yet applied plea bargaining in its practice. It should also be taken into account that the ICC practice has been very limited so far. Additionally, many legal authors have already posed the question of the application of plea bargaining in ICC cases.

When discussing international law and courts we must inevitably consider the European Court of Human Rights (ECoHR) and its position in relation to plea bargaining and notably the right to a fair trial - Article 6 of the European Convention of Human Rights (ECHR). TO be precise, on 29 April 2014, the ECoHR announced a first decision, which became final on 8 September of the same year, where it directly treated plea bargaining practice in the context of Article 6 of the ECHR. It is in the Natsvlishvili and Togonidze v. Georgia³⁷ case. In this judgment, the ECoHR gave its view of the plea bargaining practice: “The Court noted that plea bargaining between the prosecution and the defense was a common feature of European criminal justice systems and not in itself open to criticism”. The Court stressed the benefits of plea bargaining in terms of the “speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers”. It added that, if applied correctly, plea agreements could also be a very good tool for fighting corruption and organized crime, and could also “contribute to the reduction of the number of sentences handed down and as a result to the number of prisoners”. Furthermore, the Court considered the effects of plea bargaining in relation to waiving of a number of procedural rights. “This cannot be a problem in itself, since neither the letter nor the spirit of Article
6 prevents a person from waiving these safeguards of his or her own free will”, the Court explained.

Finally, the Recommendation R (87)18 of the CoE Committee of Ministers Concerning the Simplification of Criminal Justice demonstrates that the CoE considered the issue of negotiated justice even back in 1987. In Part III entitled *Simplification of ordinary judicial procedures* it provides recommendations to member states and calls on them to introduce “the procedure of ‘guilty pleas’...wherever constitutional and legal traditions so allow…”.

Even though plea bargaining has become part of international criminal law and the practice of the international criminal courts, it has many critics among professionals and academics who do not see it as an appropriate part of international criminal law. Many authors stress the specific role and tasks of the international criminal tribunals as completely contrary to plea bargaining.

Burens writes about truth seeking in criminal proceedings and stresses that it has a much larger significance in the international courts than the domestic ones because of the wider set of objectives the international criminal court trials have. When writing about these courts she says (2013, p.324): “Next to rendering justice for alleged wrongs it is also about national reconciliation, restoration, reparation, peace-building, prevention and deterrence of future violence, re-establishing the rule of law and also the creation of a historical record.” She believes (2013, p.322) that: “…practices of plea bargaining by the ICTY and the ICTR have shown that to a certain extent truth-seeking is sacrificed for efficiency when courts use this procedural mechanism.”

Rauxloh (2010, n.p.). for example, believes that international criminal trials, among other things, serve to reach “accurate historical record of the atrocities“. However, she has concerns (2010, n.p.) that: “…although plea bargaining can encourage admissions of guilt, which serve the historical record and
reconciliation, it can also undermine both aims if the incentive of the bargain is so strong that it triggers non insincere admissions.” In this context she refers to the previously mentioned Plavsic who, right after serving the sentence and being released from prison, said that she pleaded guilty only for tactical reasons.

Historically, the ICTY did not immediately accept plea bargaining.39 It was even openly criticized by the court. Rauxloh (2010, n.p.) and Clark (2009, p.417) refer to Morris and Scharf (1995) and write that the First President of this tribunal Antonio Cassese in his statement given to the members of the diplomatic missions in 1994 was directly reluctant to use plea bargaining in the ICTY proceedings due to the extremely grievous nature of the crimes this court is responsible for.

After this practice was introduced in the ICTY in 2001 and potentially bearing in mind critiques like the ones presented above, the Court itself gave general guidelines about how to properly use this legal institution. This was probably also the result of quite an intensive plea bargaining period for the Court from 2001 to 2003. In the case Prosecutor v. Momir Nikolic40 the Court gave a special view on charge bargaining: “In cases where charges are withdrawn, extreme caution must be urged. The Prosecutor has a duty to prosecute serious violations of international humanitarian law. The crimes falling within the jurisdiction of this Tribunal are fundamentally different from crimes prosecuted nationally. Although it may seem appropriate to ‘negotiate’ a charge of attempted murder to a charge of aggravated assault, any ‘negotiations’ on a charge of genocide or crimes against humanity must be carefully considered and be entered into for good cause.”


When discussing and researching the regulation and application of any legal practice, including plea bargaining, it is useful to refer to the concepts of the “Law-in-Books” and the “Law-in-Action” in order to better understand the process. The difference and link between the two is well explained by the
Wisconsin Law School in the U.S., known for its *Law-in-Action* approach to teaching law: “Knowing the rules is like learning to play scales when you study a musical instrument. Playing scales is essential, but it isn't music. And knowing the rules is essential, but it isn't being a lawyer.” In other words, it is always important to observe and analyze the existing legal norms in the sociological context. As Silbey says (2002, p.860) “Law, legal practices, and legal institutions can be understood only by seeing and explaining them within social context.” Furthermore, a *Law-in-Action* approach in research, as Davis describes, has the “opposite direction” (2017, p.3): “The researcher begins with an observed, real-world problem or phenomenon and then seeks to explain it.”

This is very much applicable when it comes to researching plea bargaining in Montenegro and that why one major focus of my research is on the practical implementation of the existing legal norms. There is an immediately visible situation, not necessarily a problem, in the real world and that is the absence of a widespread application of plea agreements in the practice of the country, even though the relevant provisions have been in existence for a number of years. Through this research, I will try to reveal the reasons for that which are, in any case, expected to partly or even largely depend on the social perceptions of this legal institute.

The existence of plea bargaining provisions in the criminal legislation of the country does not necessarily match reality i.e. the practical social relationships, needs and attitudes. Possible differences between what legal norms say and what they produce or what kind of reactions they cause in practice become even more interesting when they concern legal practices not inherent in the legal system in question. This is exactly the case with plea bargaining in Montenegro. It is to expect that the application of such provisions largely depends on the attitudes of the actors in those legal transactions towards them. It is also to expect that society, including lawyers, generally finds it difficult to accept practices which are not familiar and are somewhat contrary to previous experiences and the established
system of beliefs and values. Halperin explains this issue by referring to Tocqueville (Tocqueville, 2004, p.302-11, cited by Halperin, 2011, p.63): “By identifying the reluctance of lawyers to accept legal change, we highlight the conservative bias of jurists… because they…do not like to see changes in the law they have learned.” Furthermore, when analyzing the large-scale reforms of the Turkish legal system which took place at the beginning of last century Watson concludes (2006, p.13): “Much law in the books reflects the conditions, needs and desires of the society in which it operates. But likewise much is accepted because it was borrowed often without much thought…”

A need for taking into account social reality when creating and amending the “law-in-books” is particularly important in the modern world which is continuously and dynamically changing. Halperin (2004, p.76) discusses legal change in this context and says: “Every lawyer who tries to write the ‘law in-books’ must be innovative in proposing new ideal-types and attentive to the possibility of checking these constructions by confronting them with empirical reality…” He further claims that the “law-in-books…should continuously strive to identify, measure, track…,and ‘understand’ …changes in normative facts.”

When it comes to studying of legal systems and the necessity of analysing the social context in this process, Macaulay (1994, p.10) from the Wisconsin Law School talks about seeking justice and says: “…We know that we must look for it not only in doctrine but in police cars, courtroom, lawyers’ offices and lives of ordinary people as well.” He illustrates this linkage between the law and social reality in the following way: “I found that contract law becomes real when the machine is not delivered on time or when it doesn’t perform exactly as promised and engineers and business executives want to do something about it.” When it comes to plea bargaining, it is generally up to the prosecutor and the accused and her/his attorney whether they will choose this option for ending their case. Even though the legal provisions allow the use of plea agreements in quite a large number of different situations in Montenegro, it is obvious that the prosecutor and
the accused and her/his attorney will not use this option every time, and most of them will never use it. Their decision surely does not depend exclusively on legal norms, but it might be significantly influenced by social factors, such as whether this is seen as a socially acceptable practice, whether they see this solution as a fair practice, whether it is immanent in the culture and tradition of their society, and so on. Simply, lawyers can neither create nor apply and interpret the law by being isolated from their social circumstances and relationships. The law-in-books needs to follow and rely on society. As Halperin says (2004, p.53): “…the best avenues to understand the law are those dealing with practices…”

My research deals with some elements of the society related influences on plea bargaining in Montenegro, such as the reasons for introducing and accepting the plea bargaining practice, the influence of public opinion and the media on the use of plea agreements, and mentality and cultural influences. A further elaboration of these issues, however, would require a larger-scale and even separate form of research. It is undisputable though, that the social setting everywhere, and such is the case in Montenegro as well, forms an unbreakable link with both the creation and the implementation of legal norms in practice.

1.8. Conclusion

Whatever one thinks about plea bargaining, reality leads to a few conclusions about this practice which illustrate a lot: it has a long history; it managed to became part of legislation and case-law; it has developed and taken new forms over the years; it has “invaded” many countries to the smaller or larger extent; it has also entered international criminal law; and finally it has always had its supporters and opponents, as it has today.

It did become a part of the Montenegrin legislation and practice, too. How plea bargaining functions in Montenegro and what is to expect from it in this country will be the topic of my research in the chapters that follow. Before going into
those more specific issues, however, in my next chapter I will present and elaborate on the methodology used in plea bargaining research in general, as well as the methodology that I used in my own research.
CHAPTER II

METHODOLOGY

This chapter will discuss: the approach to research that I opted for and why that was my choice; the research methods I used and the reasons for that choice; the process of applying the selected methods in the framework of my research; and a small scale overview of the research methods generally used by plea bargaining researchers.

2.1. The Research Approach Chosen

A Few Epistemological Thoughts

When talking about social research, the very first idea that generally comes to people’s minds is examining something and collecting information about it, analyzing it, learning about it, and disseminating the gained knowledge further. For me the research was primarily learning and gaining knowledge about the topic of research, but also about the research process itself. These parallel learning processes were equally interesting. Research related learning is naturally best reflected in this chapter of my work which deals with my research methodology. The process of examining and identifying the research approaches and methods that best suit my research and its goals was a revealing experience. It made me better understand the complexity of the research process, the almost unique character of every item of research, and why it is said that you learn about research by doing it.

Through the obvious need to identify and examine my research methods, I was “brought into” the science or philosophy of knowledge, the nature of knowledge and the ways of gaining it i.e. epistemology, and the different directions or branches of this philosophical sphere. Hamlyn (1995), cited by Crotty (1998, p. 8)
explained that “Epistemology deals with 'the nature of knowledge, its possibility, scope and general basis'”. For someone like me who deals with legal issues at the practical daily level, examining philosophical theories like empiricism, rationalism, idealism, constructivism, positivism, anti-positivism, post-positivism and others was very interesting. The interconnection of many concepts and the existence of various different definitions and approaches provided by numerous authors made this process quite challenging as well. Regardless of that, I did find it very interesting and inspiring. Bearing in mind that, quite often, it is hard for researchers to position themselves in only one strict epistemological sub-philosophy, when it comes to the general ways of learning and gaining knowledge what attracts me is the human, experience-related and “wider picture” post-positivism dimension of gaining knowledge. Additionally, the lack of a strict obligation to provide a solution to a given problem seems attractive as well. As Hammersely (2000), cited by Ryan (2006, p. 19) says: “Research can have an open-ended, exploratory character. This reflects the fact that problems sometimes have to be discovered. Furthermore, obvious problems should not always be taken at face value. Discovering the right way to formulate a problem is often as important in the advance of knowledge as hypothesis-testing.”

The Qualitative Approach – The Right Choice for My Research Goals

In order to be able to identify most adequate methods for my research, it was necessary for me to primarily review the given goals of the research, and in line with that, to decide how I would approach it. Opting for an adequate research approach was a precondition for natural identification of the particular research methods, and therefore for the start of the concrete research work. The goals of my research which were elaborated in more details in the Introduction of this work include: analyzing the quality of the legal regulation of plea bargaining in Montenegro; investigating the level of use, usefulness and productiveness of the plea bargaining institution in the criminal justice system of Montenegro; identifying problems in the application of plea bargaining in Montenegro, as well
as successful schemes in the implementation of this practice; discovering the causes of challenges in the application of plea bargaining in Montenegro, as well as factors of success in the implementation of this practice; comparing plea bargaining practice in Montenegro with the relevant practice of neighboring countries which have similar legal systems; and finally, in line with the previous goals, providing adequate recommendations and conclusions which can be useful in the further development of the practice and study of this issue in Montenegro.

Armed with such goals, I started to search for an adequate research strategy. Naturally, the main, basic division which immediately occurs to every researcher is the one between a qualitative and quantitative research approach. As a first time doctoral level researcher, I faced many dilemmas and traps which distracted me when it came to the final choice. One of these traps is typical and Gray (2014) writes about it. He explains (2014, p. 34) that “Novice researchers may be tempted to begin with the design, say, of a questionnaire, so that data can be gathered without delay…” He then refers to the existence of other elements, like epistemology, the theoretical perspective and the research approach, which must be considered first. The elaboration of these elements actually naturally leads researcher in the right direction towards the fulfillment of the research goals. In this context, in order to be sure that the start of my leaning towards qualitative approach was the right one, and bearing in mind the given goals and the epistemological foundation, I examined this issue further.

In a simple way Bell (2005) primarily deals with the division of research approaches into qualitative and quantitative ones, but further stresses and explains other typologies of research approaches that can commonly be seen with many other authors like action research, case study, survey, ethnographic approach, experimental approach, and finally narrative inquiry and stories as forms of research approach.
A similar division of research approaches that is very clearly presented can be found in Denscombe (2003) who provides a very good overview of, as he called them, “research strategies”. Apart from discussing the approaches already mentioned, like action research, surveys, ethnographical and experimental, he further elaborates on internet research, phenomenology and grounded theory research strategies. Denscombe’s explanation of the phenomenology approach, as an interpretivist inductive but primarily qualitative research strategy, assured me that the qualitative approach is the right one for me. This is primarily because of his description (2003, p. 105-106) of the phenomenology research strategy as one which allows the researcher to deal with the complexity of a social reality. He describes it as a research strategy which is adequate for “small scale research where the budget is low and the main resource is the researcher him/herself.”, and which “carries an aura of humanism.” He further explains that this research strategy, which is based on the “lived experiences of people in the everyday world…represents a style of research that is far removed from any high minded abstract theorizing.”

My idea of reaching the research goals without any doubt anticipates digging into the reality which is hidden behind the legal norms that regulate plea bargaining and pure plea agreements statistics. The relevant legal norms can be perfect and can create an impression of the existence of fully regulated, functioning legal processes and relations, but at the same time the reality could be non-functional and confusing. Even the opposite is possible, for norms to be very “modest”, barely existing or widely defined, but in parallel the real processes could still function well. The first scenario is more applicable to Montenegro as a country which is going through overall legal reforms, and is in the transitional period of establishing a functional democratic society. While reading Denzin and Lincoln’s (2005, p. 3) explanation of how “…qualitative researchers study things in their natural settings, attempting to make sense of…phenomena in terms of the meanings people bring to them”, the typical comments of Montenegrin judges, prosecutors and defense attorneys that I hear in my regular professional
interaction with them ran through my head: “Yes, the provisions say that, but in practice we face this situation that causes huge problems and misunderstandings.” or “Yes, that would be great if prosecutors acted differently and changed their practice and attitudes.”. Crotty’s position that “Our interests in the social world tends to focus on exactly those aspects that are unique, individual and qualitative” can be applied to my research (Crotty, 1998, cited by Gray, 2014, p.23).

Being aware that the selection of exclusively one research approach is quite often not made, I still opted for a qualitative approach only. In my research, I did gather statistical data in relation to plea bargaining agreements; it was a small part of the research and for the purpose of numerical illustration of the level of factual presence of this practice in a certain country during a certain period of time. However, my focus when it comes to plea agreements was predominantly on their content and its analysis.

Many researchers find that different methods, being qualitative or quantitative, have their own limitations, and that valid results can only be reached by combining the two. As Cresswell (2003, p. 15) explains “Recognizing that all methods have limitations, researchers felt that biases inherent in any single method could neutralize or cancel the biases of other methods.” However, my main choice was still the qualitative approach, primarily bearing in mind goals of the research, but also its scope, as well as the length limitation.

2.2. Research Methods Used

The next methodological task which was put in front of me in the process of research, and which was much easier once the main direction of research was taken was the identification of specific adequate qualitative methods of data gathering. A very good description of the core elements of every qualitative research was provided by one of Silvermen’s (2010, p.14) explanations of the complex and somewhat chaotic character of qualitative research: “…data
collection, analysis and writing are virtually inseparable in qualitative research …

Doing qualitative research is in many respects no different than doing everyday life: it is complex and sometimes downright chaotic.” It is clear that the possession of good quality data is a primary and extremely important factor when it comes to research quality. Only having enough proper and relevant data provides reliable and useful results; and the way to reach such data is through the selection of adequate research methods.

Before elaborating the process of using the specific methods in my research, I will briefly present a general typology of research methods. Marshall and Rossman (2006, p. 97) distinguish four typical qualitative research methods: “participating in the setting, observing directly, interviewing in depth, and analyzing documents and material culture.” Similarly, Cresswell (2003, p.17) created a chart where he enumerated four types of data sources linked to qualitative research. According to him, in qualitative research data can be reached through interviews with open-ended questions, in documents, from audiovisual sources and by observation. These divisions are with slight biases predominant in most of the authors, with semi-structured in-depth interviews having a leading role when it comes to their practical application in qualitative social research.

While describing “in-depth or unstructured interviews” as one of “the main methods of data collection used in qualitative research”, Legard, Keegan and Ward (2003, p. 138) cite Rorty (1980) and say that the interviewing method “as such…reproduces a fundamental process through which knowledge about the social world is constructed in normal human interaction.” Regardless of the obvious qualities of qualitative social research, some concerns still stand when it comes to this approach and the predominant use of interviews as the research method used in the framework of this approach. This is particularly in relation to the significant time-consumption and cost, as well as skillfulness in interviewing. “While qualitative methods can examine social processes at work in particular contexts in considerable depth, the collection and especially the analyses of this
material can be time-consuming and therefore expensive”, Griffin says (2004, p.9). She further stresses another worry when it comes to this research method: “…qualitative research requires training and experience.” (2004, p. 9). Boyce and Neale (2006, p. 3-4) talk about the disadvantages of specific in-depth interviews as research method and enumerate four key worrisome aspects: interviews “can be time-sensitive” i.e. can take long time; “The interviewer must be appropriately trained in interviewing techniques”; interviews are “Not generalizable: When in-depth interviews are conducted, generalizations about the results are usually not able to be made because small samples are chosen and random sampling methods are not used”; and finally, participants’ “interview responses might be biased”.

However, regardless of these limitations and remembering the fact that the choice of research method largely depends on the research questions and topic, interviews are definitely the only choice in some situations. Accordingly, due to their purpose of “obtaining description of the life world of the interviewee” (Kvale & Brinkmann, 2009, p. 3) and bearing in mind goals of my research, semi-structured interviews were my natural choice. However, even though this method had a central role in my research, document analysis as another method extensively used in my research also provided important information and findings. As Merriam (1988), cited by Bowen (2009, p. 29) says: “Documents of all types can help the researcher uncover meaning, develop understanding, and discover insight relevant to the research problem”, which was exactly the case in my research. The use of semi-structured interviews as the dominant method and the one most relevant for my research was combined with document analysis.

In the following paragraphs, more details on the process of interviewing conducted in the framework of my research will be presented, with a view of the relevant document analysis.
2.3. Semi-structured Interviews

*Interview Questions*

In line with the research goals and the selected research approach, I drafted questions that made a semi-structured interview template. The questions were open-ended and rationalized with the intention of providing original answers to the primary research questions, in a format that is familiar to the specific target groups. All the questions were clear, relatively simple and non-misleading. As Bryman stresses (2012, p. 90), interview questions should be “clear…researchable…have some connection(s) with established theory and research…linked to each other…hold out a prospect of being able to make an original contribution - however small - to the topic … neither too broad…nor too narrow.”

The interview questions followed a certain logic which I identified as most productive in terms of the potential richness of answers and keeping in mind research questions. Specifically, they were drafted in a way that they supervene, one after another. The questions start with general ones focusing on plea bargaining institutions and practice as such, and then they are followed by those which concern the roles and experiences of all the actors involved. After that come questions that touch on specific aspects or segments of the researched practice that may potentially have practical significance and influence. Questions which concern the position of plea agreements in the context of the whole criminal procedure were also included. Finally, the participants were given a chance to provide proposals for the future which they consider important and useful. Key questions were followed by additional questions and possible questions for the sake of further clarification or providing more details. Each group of interviewees had its set of questions: judges, prosecutors and defense attorneys (templates of the interview questions for judges, prosecutors and defense attorneys are attached as Appendices B, C and D). There were slight
differences between the questions for different groups which was caused by the specific role of each group in the plea bargaining process.

I used the very first interview as a “testing interview” with intention not just to get answers, but also to check the quality, usefulness and validity of the research and interview questions, and being ready to ask for a modification of the interview questions if needed. However, it proved that questions were shaped well. They were a good starting point for all the participants due to their open-ended character which enabled elaboration on relevant issues with a truly inside “look”. Since Chapter III is primarily focused on legal regulation and a general overview of plea bargaining practice in Montenegro (and to a smaller extent in two other countries), the interviews were a unique opportunity to supplement this, and discuss other angles of this practice which “shed light on real life”. It was an opportunity to get insightful perspectives on the practice that lies behind the visible legal provisions, and statistical and other manifestations of its practical implementation.

Participants

When it comes to the target groups i.e. the participants in my research, in line with the research goals and approach, purposive recruitment was the natural way to go. “Purposive recruitment is both deliberate and flexible. It is deliberate, as the name suggests, be selecting ‘on purpose’ people who are ‘information-rich’ on the study topic…Purposive recruitment is also flexible, as researchers can refine the types of participants selected during data collection, rather than following a rigid recruitment procedure from the outset.” (Hennink, Hutter & Bailey, 2011, p. 85). In line with this, I decided to take into account a few different participant selection criteria:

a) Profession and experience – the main criteria: Those needed to be legal professionals who have practical experience with plea
bargaining. Logically those are prosecutors, defense attorneys and judges, each dealing with the practice from different angles and each having different role in the process. I decided to interview 15 of them in total, out of which 5 are judges, 5 prosecutors and 5 defense attorneys. A number of 15 interviews in total was reached taking into account the total numbers of judges, prosecutors and defense attorneys in Montenegro which are the following: 264 judges, 105 prosecutors and 777 defense attorneys. Out of the total numbers, very few of them have practical experience with plea agreements. For example, through an analysis of the judgments on the acceptance of plea bargaining agreements in Montenegro (until August 2015 there was 62 such judgments in total), out of 264 judges only 36 or 13.64% judges have experience with agreements on the acceptance of guilt, as they are called in the Montenegrin law (an analysis of these judgments from different aspects is provided in the next chapter). By analogy, similar percentages can be applied to prosecutors and defense attorneys. Additionally, five of the selected interviewees from each category were those who had seen the largest number of agreements concluded or approved. For example, interviewed judge J5 (for participants’ coding please see Chapter IV) had five approved agreements out of total of 16 agreements concluded in her/his court. The theoretical principle of saturation (Glaser and Strauss, 1967, referred to by Hennink et al., 2011, p. 88), as the guiding principle in determining sufficient number of participants for gathering a variety of information and experiences, in my case showed that this initially chosen number 15 was a proper number. In fact, information or data gathered during interviews started to gradually repeat already from the second interview onwards, up to thirteenth interview i.e. participant. Simply, no major new issues were tackled after the thirteenth participant. However, each and every interview added some more or less significant information to the previously recognized key issues
which slowly grew into a number of main subjects for future elaboration and discussion. This practical experience of mine was fully in keeping with the statement of Strauss and Corbin: “Theoretical sampling is cumulative.” (Strauss & Corbin, 1998, cited by Thomson, 2011, p. 48).

b) Regional representation: The north, south and central regions of Montenegro had to be included in the research. The reason is simply for all the regions of the country to be represented. There are significant differences between the northern, on the one hand, and the central and southern parts of the country, on the other. These differences reflect in the north being less developed and less economically progressive, with a higher rate of unemployment and characterized by a more traditional society. 2 participants were from the north, 3 were from the south, and 10 were from the central part of the country where the busiest courts, prosecution and defense attorney offices are located, so it was naturally reflected in the highest number of plea bargaining agreements being concluded in this part of the country.

c) Gender balance: For the purpose of the similar representation of different genders, out of 15 interviewees, 8 were men and 7 were women. In total, out of 264 judges in Montenegro, 112 or 42.42% are men, and 152 or 57.58% are women. With the risk of being confuted by possible existing researches, I believe that gender potentially does not have, or possibly has a negligible effect in relation to the attitude of the interviewees in relation to the topic; however I still included this criterion in order to satisfy general gender non-discrimination requirements.
d) Representation of different courts, prosecution offices and defense attorney offices: Keeping in mind that by Montenegrin law, at the time of research, plea bargaining agreements could have been concluded before the courts of the initial, first instance – Basic Courts (which have jurisdiction for less serious crimes), but also for a certain number of crimes before the courts of higher instance – High Courts (which have jurisdiction for more serious crimes), I wanted to have all of them represented. For reasons of clarity and for the further better reading of the research, a brief overview of the Montenegrin legal system and a diagram of the Montenegrin courts with jurisdictions in criminal procedure is in Appendix E). Prosecutors act based on courts’ jurisdictions, so I included those prosecutors who act before both types of courts. When it comes to defense attorneys, I included attorneys from different attorney offices; in Montenegro there is no legal barrier for any adequately registered defense attorney, who is a member of the Bar Chamber of Montenegro, to represent before any court in Montenegro. In line with this: 3 interviewed judges are from the Basic Courts; 1 judge is from the High Court; 1 judge has recently been elected to the Appellate Court of Montenegro, but this judge was still interviewed because s/he has significant experience with plea bargaining agreements at her/his previous position as a High Court judge; 3 prosecutors are those who act before the Basic Courts; 2 prosecutors are those who act before the High Courts; and all the defense attorneys are from different law offices.

Once I defined the selection criteria, I started with the process of contacting potential participants.

*Process of Interviewing*
When it comes to the procedure of contacting participants, arranging interviews and holding the interviews, it went very smoothly and fast, even though this was my primary concern when the whole process started. My concern was based on the presumption that all the potential participants are generally very busy, and in principle not all of them have time or affection towards academic or even professional work outside of their daily routine job. However, it proved that my fears were totally unfounded. I directly contacted specific judges, prosecutors and defense attorneys whose names were in the judgements on the acceptance of agreements. In only two cases, with the Basic Prosecutor’s Office in the capital city, Podgorica, and the High Prosecutor’s Office in Bijelo Polje, I first contacted the heads of the offices who then nominated the most adequate prosecutors for the interviews. The reason is that through judgment analysis it was not possible to easily identify who the acting prosecutors from the mentioned offices were in the relevant cases. Here I also relied on earlier successful personal and professional communication with the two heads of these offices.

All the contacted participants, except one, were very open to giving interviews and showed a high level of interest in the matter. The mentioned exception was a defense attorney who kindly refused to participate in research, by e-mail, with the explanation that s/he believes s/he cannot provide relevant information and be useful for my research since s/he does not have enough experience and knowledge in relation to plea bargaining. In this case I believe it was more a question of general personal attitude towards the research type of work and the signing of a consent form than a question of experience since s/he stressed that s/he was not willing to sign a form. During the process of interviewing the participants, this defense attorney was replaced by another one who was willing to be interviewed. With every participant I was able to schedule the interview in a very short time. The fact that it was a quiet period of year for trials, August and September, was in my favor. Most of the interviews were held in the offices of the participants with only 3 being held at other jointly selected appropriate locations. Each interview lasted approximately 1 hour with the exception of two which lasted approximately
1 hour and 30 minutes. I recorded the interviews myself by typing the content of answers up on the computer. The reason why I did not opt for the audio recording of interviews is that, while making arrangements for the interviews, I felt a discrete or in some cases even explicit reluctance towards such a way of recording. After talking to participants, my estimation in all the cases was that I would get much better, more extensive and even more honest answers if I typed them directly as participants spoke. Practically, this was not hard since I type very fast. In addition, I had an answer sheet and a sort of check list prepared in advance. I believe that such form of recording the interviews even contributed to a longer and more detailed elaboration of answers, since participants did have a little bit more time to thoroughly think about their answers. In addition, they felt very relaxed. Eye contact and attentive listening were also key. With some of participants, there was a need to track them back to questions. As an interviewer, I did my best to keep my personal opinions, findings and biases related to the subject-matter out of the interview process. During the interviews, I would never ask leading or any kind of manipulative questions, but rather simple and objective ones which asked interviewees for an explanation, elaboration and description of their own opinions and experiences. I would let the interviewees fully express themselves and ask follow-up questions only when I needed further clarification. Such an approach proved to be successful and enabled the interviewees to feel motivated and free to answer in the way that best suited them, but still stick to the topic. Immediately after the end of each interview, I checked and technically corrected all the interview transcripts, as well as translating them into English. Apart from the transcripts, after each interview I additionally made my personal notes which were a way to memorize or additionally stress some specific issues, behaviors or observations.

*Interview Data Analysis*

The next, final and quite often hardest step when it comes to interviews was data analysis. Out of many explanations of the complex process of data analysis and its
final result, Bogdan and Biklen (1982) provide a very simple and clear definition cited by Simon (2011, p. 245); they see it as “working with data, organizing it, breaking it into manageable units, synthesizing it, searching for patterns, discovering what is important and what is to be learned, and deciding what you will tell others”. However, this definition, even though it explains the process in a simple way, does not “warn” about its complexity. This phase was luckily not the hardest one for me since I believe that all the actions I took in advance in all the previous stages, particularly the formulation of questions, as well as the selection of participants and document analysis, made this process a manageable job.

Another thing that made this phase much easier was that it was extremely interesting in terms of the issues and themes that were analyzed. The additional notes which I took immediately after each interview and in addition to the interview transcripts, also helped in the data analysis process. It was a list of my personal key “things”, impressions and observations promptly “caught” on paper, starting from unusual words used by participants to their body language which was a manifestation of certain opinions, and so on. Those were the issues that “popped-up” at each interview and which were later a great supplement in creating a “final big picture”. By good preparation and absolute devotion to the interview process I believe I avoided the typical post-interview question: What should we do with all this raw information now?

Bearing in mind that the number of interviews was not that large, 15 in total, I decided to start data analysis once all the interviews ended. Even though the preparatory activities helped and the interviews were not numerous, the transcripts did include pages and pages of information which required a systematic and careful analytical approach. The main fear in this phase was whether I would miss something important i.e. make a proper selection in terms of what is relevant out of all these data, and whether I would be able to properly present the results in a condensed way. Reading the complete materials many times helped in this sense. Roulston says: “During the reduction and/or coding phase, the analyst must become well acquainted with the data set as a whole in
order to select appropriate examples to support assertions.” (2014, p. 306).

Through the process of intensive and repeated reading of all the transcripts first, and then the coding and thematic categorizing of information for which I used an Excel program, I reached the results which are analytically presented in Chapter IV. This is followed by a relevant results discussion in Chapter V, and it ends with concluding recommendations in Chapter VI. For the sake of better understanding the experiences and opinions of the interviewed participants and better quoting, in the analyses itself codes J1 to J5 are provided for judges, P1 to P5 for prosecutors, and A1 to A5 for defense attorneys. The participants’ age and length of working experience do not have any effect in terms of their attitude or approach to the plea bargaining institution and practice, so due to their irrelevance they are not elaborated at all.

_Insider Research Issues and the University Ethical Review Process_

One of the general ethical concerns before starting the process of interviews was related to my professional relationship with the potential interviewees, and how that would affect the research. Gibbs and Costley (2006, p. 246) write that “Practitioner researchers find themselves in various different contexts within particular professions and/or communities where there are likely to be ethical implications that they have a responsibility to recognize and understand.” As a former court legal assistant and Director of the key judicial training institution in the country for a number of years, I had the opportunity to meet and spend time with almost every judge and prosecutor in Montenegro. This was less applicable to defense attorneys, but still occurred, bearing in mind the small size of the country and number of training activities where attorneys participate as well. My present position of Legal Specialist at the U.S. Embassy in Montenegro also creates grounds for this type of concerns, remembering the long lasting criminal justice assistance programs of this Embassy in Montenegro. My starting dilemma was whether I could be considered a “real” insider researcher, bearing in mind that the research is not related to my specific workplace/employer nor my direct
colleagues. According to Griffith’s (1998, p. 361) definition, an insider is “someone whose biography... gives her a lived familiarity with the group being researched” while an outsider is “a researcher who does not have any intimate knowledge of the group being researched, prior to entry into the group”. Even though such definitions might be too strict and exclusive, they essentially provide proper explanations. Mercer (2007, p. 6) writes that the “power relationships within which the researcher and the researched co-exist; the personalities of the researcher and specific informants; and even the precise topic under discussion” are important elements for understanding the insider/outsider researcher concepts. Considering these definitions and elements, I found myself to be somewhere in between as an “indirect” insider researcher since the participants of my research come from the same profession, and are potentially my regular professional contacts. In line with this, the key questions of concern were: whether the participants would feel comfortable talking about their professional experiences with me, whether they will be worried about anonymity, and whether they will be honest. Starting from the Gibbs and Costly notion of the “ethic of care where the researcher needs to consider ‘self’ as an ethical being within the community of practice being researched” (2006, p. 248), and taking into account the University’s required ethical review process my initial concerns were minimalized. The lack of any subordinate relationship between me as a researcher and participants; no particular sensitivity of the research topic; guaranteed anonymous status; and formal consent for interviews given by participants’ supervisors in the framework of the University ethical review process led to minimal chances for any ethical concerns. On the contrary, the conditions for good, dynamic and relaxed interviews which provided lots of usable information were created. 

When it comes to the University ethical review, in accordance with the relevant regulations I prepared the following documents: a consent form (for participants); ethics self-assessment; interview questions; an invitation letter for participants; a participant information sheet; a protocol (of the relevant Research Ethics
Committee); and letters – a requests for approval to conduct interviews (for the heads of the judiciary, prosecution and the Bar Chamber of Montenegro).

They were all reviewed and awarded a favorable ethical opinion by the University of Portsmouth – Research Ethics Committee of the Faculty of Humanities and Social Sciences (Appendix F, and related to that Appendix G – UPR16 form). For informative reasons I have also attached: the consent form as Appendix H; the invitation letter for participants as Appendix I; the participant information sheet as Appendix J; and letters-requests for approval to conduct interview as appendices K, L and M. All the documents which were intended to be used or sent to participants were translated into Montenegrin by me.51

Before I started the interviews I first requested and received general permission to organize interviews from the President of the Supreme Court of Montenegro, the Supreme State Prosecutor of Montenegro and the President of the Bar Chamber of Montenegro who are heads of the relevant judicial, prosecutorial and defense attorneys structures. Besides receiving written consent from them, they also kindly offered any kind of support in relation to my research. As already stressed, the received written consent did serve as an important stimulus for the interviewees to enter the whole process.

Through the mentioned documents, over the phone and during face-to-face meetings each participant was: thoroughly informed about the research itself and was given the opportunity to ask questions about it; told why s/he was invited to be an interviewee; introduced to the process of conducting the interview and what is expected from her/him; informed about the confidential character of the data gathered by the interview; given possibility of being quoted without name; told about the recording of the interview; told about the interview data access given to relevant University of Portsmouth representatives and regulatory authorities; and given information about the voluntary character of interview and the opportunity to withdraw from participation up to a certain time. Each interviewee was also
given the opportunity to ask me (as a researcher) any questions, but also to consult my primary mentor. Finally, each participant offered the opportunity to formally complain to the relevant Department Head in case s/he had any concerns in relation to the research (contacts details for all were provided).

All the interview related documents and notes, as well as transcripts are kept on my personal computer and password protected.

*The Interviews: A Reflective Account*

Even though I have already touched upon the reflective view of my research under 2.3. *Process of Interviewing* and *Interview Data Analyses*, I believe that the additional brief reflection that follows will be useful for a better further understanding of the research process, the research results and the theme of the research in general. As McClure (2002, p.3) states, citing Boud, Keogh and Walker (1985): “Reflection is a forum of response of the learner to experience” and we use it as “a form of mental processing...to fulfil a purpose or to achieve some anticipated outcome.” (Moon, 2006, p. 37). As is expected from every researcher, particularly first time doctoral researchers, a reflection on research or some of its segments represents a way of learning about the research process itself and the research topic, and a way of discovering “tricks” for doing things better in the future. As Moon concludes “‘learning’…is deemed to be an outcome of reflection in its own right…” With the experience of living through this research I am sure I would be more successful next time. My stress level would be lower, the lived experiences and previously gained knowledge about the whole process would enable even better preparation, more relaxed interviews, and richer interviews results, analysis and conclusions.

In line with the above, I can generally say that conducting interviews was quite stressful, but an extremely interesting experience for me. It required significant preparation in terms of creating interview questions, the identification of proper
interviewees, arranging the interviews, preparing a personal check list to be used during the interviews, and other elements. Special skills were needed to adapt to each participant and their style of communication, and based on that to “get the most out of the person”. It enriched me not just from the perspective of the research process and the subject-matter of my research, but also from the perspective of communication skills. Finally, one of the things that I found helpful in preparation for the interviews was attending the Course on Communication Skills organized by my employer in March 2015. The course equipped me with a certain number of “tips” in relation to both business and private communication that were useful during the process of interviewing, like those related to body language and tone of speaking, the way of asking questions, the purposeful usage of certain terms for the sake of establishing closer and trustworthy contact with the interlocutor, and so on.

2.4. Document Analysis

A very important segment of my research was conducted by the analysis of relevant documentation. In my case this method was supplemental to the semi-structured interviews, as it is quite often the case with this type of research. As Bowen writes (2009, p. 28) citing Denzin (1970): “Document analysis is often used in combination with other qualitative research methods as a means of triangulation—‘the combination of methodologies in the study of the same phenomenon’.” In my research it predominantly served to enable a comprehensive elaboration of the legal regulations and existing practice concerning plea bargaining at the national and international level. This was seen as necessary for a better understanding of practice itself and getting a “complete picture”. As Corbin and Strauss say: “Document analysis requires that data be examined and interpreted in order to elicit meaning, gain understanding, and develop empirical knowledge.” (Corbin & Strauss, 2008, cited by Bowen, 2009, p. 27). I found this method very useful, for the reasons that Bowen further defines (2009, p. 30-31): “…documents provide background and context, additional
questions to be asked, supplementary data, a means of tracking change and development, and verification of findings from other data sources.” Contrary to its usefulness, however, it seems to me that less attention is given to this research method in the academic world than is the case with other methods like, for example, interviews.

In the process of analyzing, the first step was to identify documents that will be the subject of analysis, and to categorize them based on their content and purpose. Bearing in mind the practice I am researching and wishing to provide context and make a link with the interviews results, the laws and bylaws that regulate plea bargaining were the very first choice. They were followed by court case files i.e. primarily judgments based on the agreements on guilt. In order to examine and present the practice from different angles including the legislative, practical, national, international, developmental, historical and so on, it was necessary to have insight into a large number of other documents as well. They include a series of official reports, guidelines, rules, manuals, press releases, newspaper articles, recommendations, and other documents which were also categorized during the analytical process\textsuperscript{52}. The analysis of these documents, together with the semi-structured interviews was seen as a way to provide a complete picture and reach the research goals.

The documents analysis was mainly done by reading, and describing/presenting the read material. In this process, the identification of issues that are most relevant, informative and illustrative was a primary goal. All the interrelated and interconnected information gained by this method was then categorized and presented in a systematic descriptive way, remembering the key research goals and interview results. When it comes to legal provisions, their analysis included not just informative and descriptive but to a limited extent an interpretative segment as well. It was focused on revealing the ratio legis i.e. the purpose of existing legal norms, and motives of the legislator.
This analytical process was extremely time-consuming, both in terms of recognizing the most relevant documents, as well as in terms of reading, the proper identification, abstraction, classification and presentation of the main issues. Additionally, it required a very cautious approach, particularly in relation to some typical risks related to the authenticity, reliability and incompleteness of some documents. However, the interesting content of most of the documents made this process much easier.

To conclude, for this type of plea bargaining research, interviews, combined with some other typical qualitative research method(s) seem to represent the best choice and have the potential to provide good quality results. As support to this statement a brief overview of the research methods used by other plea bargaining authors is presented in Appendix N. This additionally assures me of the correctness of my choice of methods.

2.5. Conclusion

The process of writing about the methodology of my research, and particularly practical application of the research methods was a revealing experience. It was not easy, but it was worthwhile. This segment of my research work will have life-long effects on my understanding of knowledge and the ways of gaining it.
CHAPTER III

PLEA BARGAINING IN MONTENEGRO

AND SOME COMPARATIVE PRACTICES

With the purpose of providing context, background and support for my research, this chapter will discuss: how and why plea bargaining was introduced into the Montenegrin legal system, how it is regulated, to what extent it is applied in practice and in what way. It will also provide a comparative overview of the plea bargaining practices of two neighboring countries, Serbia and Croatia. Finally, it will identify which of the solutions and approaches of these countries could potentially represent good models for Montenegro.

3.1. Plea Bargaining in Montenegro – Legislation and Practice

Plea bargaining was introduced for the first time in Montenegro in 2009 by the adoption of the new CPC. The 2009 CPC is the first Criminal Procedural Code that was adopted in the country after regaining its independence in 2006. Before that, different criminal procedural laws were applied in the country in the periods when it was a constitutive part of other countries. All of these countries were countries with a federal political structure, and had legislation at both federal and republic levels. The criminal procedure before 2009 was a classical civil law inquisitorial criminal procedure characterized by the dominant role of the judge. The investigative judge lead the investigation, while a trial judge presided at the trial. This process was characterized by the quite passive role of the prosecutor who represented the charge based on the investigation conducted by investigative judge. The trial was managed by a trial judge, and s/he or a panel of judges together with the lay judges (all depending on the seriousness of crime) made decisions based on the evidence presented by both sides. After the 2009 CPC, Montenegro kept this typical civil law criminal procedure but with added elements of the adversarial system when it comes to the investigation. The most
significant change was related exactly to the investigation phase of the process which is now fully led by a prosecutor, not an investigative judge. The trial on the other hand remained a typical civil law criminal trial presided over by a judge or panel of judges (depending on the seriousness of crime) with no lay judges or jury. In this type of trial, the judge has a leading role, s/he presides the trial and makes decisions based on the evidence presented. There is no cross-examination, and the judge has judicial discretion in deciding about the facts and sentence based on the evidence provided and in accordance with the CPC and the Criminal Code (CC) rules. Plea bargaining is allowed in all the phases before the actual trial starts.

The fact of Montenegro becoming an independent country in 2006 required the raising of a young democracy after the extremely turbulent and challenging Yugoslav conflict and post-conflict periods of history. A need for the (re)adoption of not just this law, but practically all the other laws emerged. Additionally, Montenegro needed to (re)enter the international community as a new subject. The burdens of the old traditional criminal procedure were present and have been causing problems in a changing society with various forms of new and complex crime appearing each day. The old system was characterized by the slowness and inefficiency of the criminal procedure particularly in the investigative stage, which was causing unacceptably long criminal trials and a significant case backlog. The obvious opening up of the country which brought intensified international communication and a sudden influx of large foreign investments were factors which additionally created the need for change in this and many other areas. These issues were recognized by the Government of Montenegro through its official policies and activities. The two main issues which were clearly identified by the Ministry of Justice as the crucial ones when it comes to reform of the criminal procedure were: “the creation of a normative basis for more efficient criminal proceedings and securing the complete protection of freedoms and rights of people guaranteed by the Constitution and international documents”. This huge undertaking of reforming the criminal procedure
resulted in adoption of the new CPC in 2009 which introduced a completely new concept of investigation now led by the prosecutors instead of the investigative judges. Many other changes and new legal institutions were introduced including plea bargaining.\textsuperscript{55} Naturally, the criminal justice reform process did not include just the CPC, but also a substantive CC, as well as all the other laws linked to the criminal procedure and criminal justice system as a whole. Since its adoption, the 2009 CPC has been amended four times due to the challenges that real life and the law’s practical application generated. As is the case with any reform undertaking, the criminal procedure reform is a long lasting process which is expected to identify problems and crystalize their best solutions. The plea bargaining institution will be the focus of attention of both Montenegrin legislators and practitioners for quite some time. This is due to its huge potential, but also due to its somewhat controversial character in the civil law system, such as the Montenegrin one. Later in this chapter I will focus on plea bargaining provisions and their development since 2009. As a former court legal assistant and the Director of the Judicial Training Center of Montenegro, and currently holding the position of Legal Specialist at the U.S. Embassy in Montenegro, the application, analysis, interpretation and discussion of the criminal law provisions is an integral part of my job. Through providing legal analysis and comments, work on specific cases, and participation in criminal law training events for national, regional and international criminal justice officials both as speaker and participant, I continuously follow Montenegrin legislative developments and case-law, and have the opportunity to learn and discuss the experiences of both Montenegrin and regional academics and practitioners.

\textit{Legal Provisions}

As already said, plea bargaining was introduced into the Montenegrin criminal justice system by the 2009 CPC. In July 2015, these provisions were amended and a number of changes took place. For the purpose of better elaboration and bearing
in mind that the 2015 amendments are not numerous, I will firstly present the original 2009 provisions and then the later 2015 amendments.56

The Criminal Procedure Code from the Year 200957

Articles 300 to 303 (the full text is in Appendix O) of 2009 CPC regulate plea bargaining and make up Chapter XX of the law. The total number of law articles is 517.58

Article 300 deals with concluding agreements on the admission of guilt, as they are named in the law, and primarily defines crimes for which plea bargaining is allowed and who can actually propose the conclusion of the agreement. Plea bargaining is possible for crimes where the envisaged prison sentence is up to 10 years. The prosecutor or the accused and her/his attorney may propose concluding the agreement.59 The legislator, though, does introduce some limitations when it comes to who can enter negotiations on guilt. Apart from, naturally, the prosecutor being one proposer, the other can only be the accused and her/his attorney, not a suspected person.60

Article 301 defines the subject-matter of agreements on the admission of guilt and clearly defines the issues that prosecutor and accused and her/his defense attorney can agree on. The article allows bargaining about the sentence i.e. the criminal sanction. Any possibility of bargaining about the legal qualification of the crime or the facts of the case is excluded. The main precondition, however, for bargaining and agreement itself is for the accused to fully confess the crime or the concurrence of crimes that s/he is accused of.61 Taking into account that the Montenegrin legal system is predominantly a civil legal system and that bargaining over guilt represents a novelty for this system, such solutions are to be expected.
Article 302 defines the process of deciding on the agreement on the admission of guilt, and allows for three options in this sense: the dismissal, rejection or acceptance of the agreement by the court. At the same time the article defines the conditions for each of the three possibilities.\textsuperscript{62}

Article 303 is related to judgment as the final form of deciding on the acceptance of the agreement on the admission of guilt. It states that the court will adopt the judgment in three days from the moment when its ruling on accepting the agreement becomes final. From the perspective of court’s forms of deciding, the dismissal and rejection of agreement are done through regular court decisions i.e. rulings, while the court’s acceptance of an agreement must be additionally validated through the relevant judgment as well.\textsuperscript{63}

Before presenting the previously mentioned 2015 CPC amendments, it is worth noting that in July 2010 the Judicial Training Center of Montenegro issued a publication entitled \textit{The Manual for Application of the Criminal Procedure Code of Montenegro - Explanation of Basic Institutions, Court Practice and Practical Forms}.\textsuperscript{64} It was published with the main purpose of being a tool for the better implementation of the new law, and was prepared by a group of authors composed of two judges, a prosecutor and a defense attorney. When it comes to plea bargaining, apart from a brief explanation of the institution, the publication includes eight model forms that are to be used by actors in the process in its different stages. Those include the following sample forms needed for each case where a plea agreement is being concluded: the invitation for the accused to discuss the possible conclusion of the agreement; records of the negotiations; records of hearing the accused in the framework of the negotiations; the plea agreement; records of deciding on the plea agreement; the decision of the court to adopt the plea agreement; the delivery of the plea agreement in the investigation phase, and the judgment based on the plea agreement. Each document is between one and three pages long (as an illustration, one of those eight documents – the suggested form of the plea agreement, is provided in Appendix T). The question
of whether it was good to follow such recommendations, and the question of the forms’ quality, are being asked by some Montenegrin legal professionals, and that will be discussed later in this chapter.

Amendments to the CPC Plea Bargaining Provisions from the Year 2015

As will be presented later in this chapter, plea agreements statistics clearly shows that this mechanism for resolving criminal cases has not been widely used in Montenegro since its introduction in 2009. Through regular monitoring mechanisms related to CPC implementation, after a little bit more than two years from the adoption of the law, the Government of Montenegro examined the relevant statistics. As a result of this, it adopted the document entitled Information on the Implementation of the Institution of Agreements on Admission of Guilt on 26 June 2012. By that time, there have been only 27 agreements signed throughout Montenegro. However, regardless of such a poor implementation it was again stressed in this document that: “This institution in our criminal procedure can realistically lead to the faster ending of many criminal proceedings and reduction of costs, while at the same time interests of legality and justice will not be jeopardized. This represents basic ratio legis of this institution in our Criminal Procedure Code.” The wish to “enliven” the institution was clearly demonstrated, and this was probably the moment when amendments to the existing plea bargaining provisions became part of the plans for the future.

In June 2013, the Ministry of Justice prepared The Report on the Needs for Modifications and Additions to the Criminal Procedure Code based on the Government Information about the Implementation of the Criminal Procedure Code adopted in December 2012, and the Conclusions that were a follow-up to the Information from January 2013. While praising the obvious improvement when it comes to the efficiency of the criminal proceedings, a series of amendments to the CPC were proposed. All were deeply rooted in practice i.e. the inputs that had been received from practitioners who implement the law in their
daily work. One of the amending proposals concerned agreements on the admission of guilt and suggested: “The need for a change of Articles 300,301,302 and 303 in relation to defining the issue of detention after judgment based on the agreement on the admission of guilt is adopted…, as well as the scope of crimes for which the agreement can be concluded.” These initial suggestions resulted in amendments that were adopted in July 2015. The plea bargaining mechanism was still be regulated in Articles 300 to 303 (the full text is in Appendix P), and it still forms Chapter XX of the new amended CPC, which kept a total of 517 Articles.

Article 300 continues to define the conclusion of plea agreements. There are essentially three major changes that the amendments introduced. Firstly, contrary to earlier regulation, the agreement is now allowed for all crimes except terrorism related crimes and war crimes.\(^{69}\) Secondly, the agreement can be concluded not just by the accused and her/his attorney, but also by a suspect which was not the case before.\(^{70}\) Thirdly, contrary to the earlier solution, the indictment is now submitted together with the agreement as its constituent part (this is in cases when the agreement is concluded before indictment is formally brought up). In this case the indictment is not the subject of the so-called “control” or “check” that is regularly conducted in every criminal case by a non-trial court panel before the trial itself.\(^{71}\)

Overall, the efficiency and practicality of the institution “won” when it comes to the latest amendments. In the elaboration of the amendments legislator stressed that by such proposed solutions:”…even bigger privilege is given to this way of resolving criminal proceedings i.e. to this sort of alternative way of resolving cases, by which higher efficiency and effectiveness of the criminal procedure will be reached…”\(^{72}\)

When it comes to Articles 301, 302 and 303, they were kept essentially the same as in the 2009 CPC.\(^{73}\)
Finally, there are two other CPC changes relevant to plea agreements. The first one concerns the mandatory defense of the accused. In general, mandatory defense implies a legally defined obligation to have a professional defense; it is for example present for the most serious crimes where the accused is obliged to have professional defense and if s/he cannot afford it, the Government will provide it for him. By the 2015 CPC amendments, the duty of the accused to have a defense attorney in cases of plea agreement negotiations was for the first time explicitly added to other cases of mandatory defense in Article 69. The second change concerns detention. In the 2015 CPC, in the amended to Article 376 dealing with detention, it was for the first time defined that after the adoption of a judgment based on the plea agreement, the detained accused is directly sent to serve the prison sentence i.e. there is an automatic switch from the regime of detention to regime of serving the sentence (this is when the time spent in detention is shorter than the prison sentence ordered). 74

The 2015 CPC plea bargaining amendments were not numerous, and yet potentially capable of causing significant changes in practice. The expansion of this practice to almost all crimes, and putting this “tool into the hands” of Montenegrin prosecutors who deal with the most serious cases has the potential to result in a larger number of plea agreements in the future.

Existing Practice

In order to “check” the scope of the application of the elaborated provisions in the daily functioning of the criminal justice system of Montenegro, I will provide some statistical data from the beginning of the year 2010 (when plea bargaining became applicable in Montenegro) to the end of the year 2015 (when the latest amendments were adopted, which made plea bargaining possible for all the crimes except war crimes and terrorism related crimes).
Just by looking at the statistics it can easily be concluded that plea bargaining is not applied to a larger extent in Montenegro. In the period of six years, only 79\textsuperscript{75} agreements were concluded. The yearly breakdown can be seen below.

In the year 2010 – 0.01\textsuperscript{76}: 1 agreement (the number of total criminal cases completed was 7,483\textsuperscript{77})
In the year 2011 - 0.14\%: 9 agreements (the number of total criminal cases completed was 6,567\textsuperscript{78})
In the year 2012 - 0.41\%: 25 agreements (the number of total criminal cases completed was 6,047\textsuperscript{79})
In the year 2013 - 0.27\%: 14 agreements (the number of total criminal cases completed was 5,095\textsuperscript{80})
In the year 2014 - 0.20\%: 10 agreements (the number of total criminal cases completed was 5,073\textsuperscript{81})
In the year 2015 – 0.45\%: 20 agreements (the number of total criminal cases completed was 4,482\textsuperscript{82})

The criminal cases completed include cases in the courts where plea bargaining is applied i.e. the Basic and High Courts of Montenegro. If the total number of cases completed per year is looked at, it is obvious how small a percentage of them were resolved by plea bargaining.

For closer look at the practice, it is useful to give a brief overview of the regional breakdown, types of crimes committed, and types of sanctions negotiated.

When it comes to the regional breakdown, almost equal number of agreements was concluded in the Central part of the country (39) and the rest of the country together (South 15 and North 25, in total 40). In terms of towns the largest number of agreements was concluded in the capital Podgorica (25). The least agreements were logically concluded in one of the smallest Montenegrin towns, Plav. A slightly larger number of agreements would be expected in the central
part of the country. The Central part includes the capital, Podgorica and three other towns, Cetinje, Niksic and Danilovgrad. Approximately one third of the Montenegrin population lives in Podgorica (185,937 out of 620,029\(^{83}\) inhabitants). The capital has the busiest prosecution offices and courts in Montenegro.\(^{84}\) However, even though the number of cases is larger in the Central part of the country, in comparison to the North and South, the number of plea agreements concluded is almost identical. Moreover, 23 agreements were signed in the biggest northern town of Bijelo Polje only, almost as is the case in Podgorica which is significantly larger town (the population of Bijelo Polje is 46,051, and of Podgorica is 185,937\(^{85}\)). The criminal justice actors from the North and South seem slightly more interested in and involved with this practice.

By analyzing content of all the plea bargaining agreements, it can be seen that the crimes for which the agreements were concluded are various\(^{86}\) (an overview is provided in the Appendix Q).

The types of criminal sanctions negotiated were: a prison sentence (in 34 cases), a conditional release-probation (in 38 cases), a fine (in 6 cases) and community service (in 1 case). In some cases, the sentences were followed by the security measure of the confiscation of assets related to the commission of crime. Additionally, the sentences were issued against individuals, and only in two cases against legal entities. Bearing in mind that the system of enforcing community service and the system of electronic surveillance of convicted people are still in the process of being setting up in Montenegro, it is expected that once these systems are fully operational there will be more plea agreements that will include those sentences. This was stressed by one of the defense attorneys I interviewed, A4 (for participants’ coding please see Chapter IV). As s/he explained, the inability to order the electronic surveillance of her/his client who was willing to serve a home detention sentence prevented the conclusion of the plea agreement.
The agreements were concluded before different courts depending on their jurisdiction i.e. the type of crime and sanction envisaged for that crime. Most of the agreements were concluded before the Basic Courts (60); they have jurisdiction over crimes where a prison sentence of up to 10 years is envisaged by law. Nineteen (19) agreements were concluded before the High Courts which have jurisdiction over crimes where prison sentence of more than 10 years is envisaged by law. Additionally, the High Courts have exclusive jurisdiction over some types of crimes including Unauthorized Production, Keeping and Distribution of Narcotic Drugs and Active Bribery.

Even though the vast majority of the proposed agreements were accepted by the courts, there are a few cases when this was not the case (they were rejected or dismissed). Not all the prosecution offices were able to provide an exact number of such cases; their statistical system counts these cases as those where a regular trial took place, and it is not able to present them separately. However, based on the informal input I received from the prosecution offices, there was approximately up to 10 such cases in total, in the whole country. The reasons for rejection and dismissal were the following: the accused did not show up at the plea agreement hearing (CPC Article 302 par.7 of the CPC), and the fallacy of the accused (CPC Article 302 par. 8) determined by a mismatch between the accused’s confession/statement which was basis of the agreement, and her/his statement given to the court at the later stage of the judicial “check” of the agreement. In one case, after the complaint of the injured party against the court ruling on the acceptance of the agreement, the court canceled this ruling and rejected the agreement.

Finally, the Montenegrin CPC includes other institutions that have some resemblance to plea bargaining, including deferred prosecution. Even though these legal possibilities are essentially or somewhat different from plea bargaining, they may potentially limit the usage of plea agreements, and in some situations seem more “attractive” to the accused. Due to their possible influence
on the application of plea bargaining, they are presented in Appendix R in more detail.

As it can be concluded from above presented, plea bargaining is definitely far from having significant practical application in Montenegro. However, even minimally, it is still present in the practice of criminal justice institutions. In Chapter IV and V, which deal with the interviews conducted and their results, some factors that cause the non-usage of this legal institution will be discussed. Before going into that, I will briefly present the relevant experiences of two neighboring countries, Serbia and Croatia.

3.2. Plea Bargaining in Serbia and Croatia

When initially thinking about plea bargaining comparative experiences, apart from those related to the U.S. and to a smaller extent to other countries of the world, I wanted to include countries which are similar and comparable to Montenegro. Due to their joint legal tradition and similar legal systems, the same problems related to the inefficiency of criminal proceedings, as well as the existence of similar forms of plea bargaining, I chose Serbia and Croatia. These countries have similar, but still different approaches to plea bargaining. In my elaboration I will primarily focus on differences in comparison to Montenegro since the answers to some problematic aspects of the Montenegrin practice can potentially be identified this way.

Serbia

In order to illustrate the level of presence of agreements on the admission of crime (as they are named in the Serbian CPC) in the Serbian legal system, I will provide some relevant statistics. The Serbian system of court and prosecutorial statistics is somewhat different to the Montenegrin, so in line with that, the way of presenting essentially the same data is a little different. I took 2014 as an illustrative year.
In the year 2014 – 3.12%: 1,670 agreements (the total number of criminal cases completed was 53,477\textsuperscript{90})

The total number of criminal cases completed are cases completed by the courts of basic and higher jurisdiction where plea agreements can be applied. If we take this number into account, it is easy to conclude that plea agreements are not used to a significant extent in this country either. In the reference year, only 3.12% of criminal cases ended in plea agreements. This is just slightly more than in Montenegro.

The statistical report of Serbian prosecution for 2014, however, stresses that due to the simpler plea bargaining procedure that was recently introduced into Serbian legislation, there is a noticeable growth of 48.62%\textsuperscript{91} in the number of agreements concluded in 2014 in comparison to 2013.

This institution was first introduced into the Serbian legal system in 2009. It has developed since then, and in the present CPC\textsuperscript{92} which dates from 2011 these provisions got their current shape. By this new CPC provisions the application of plea bargaining was extended to all crimes and the procedure was simplified. The Serbian CPC defines three types of agreements which can be considered plea agreements in a wider sense: agreement on the admission of crime, agreement on the testimony of the accused, and agreement on the testimony of the convicted. Out of these three, agreement on the admission of crime represents real plea

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{Year 2014\textsuperscript{93}} & \textbf{Total No. of agreements} & \textbf{Court accepted} & \textbf{Court dismissed/rejected} & \textbf{Unsolved-transferred to 2015} & \textbf{In the jurisdiction of the Special Prosecution for Organized Crime (out of total No.)} \\
\hline
& 2469 & 1670 & 518 & 281 & 38 \\
\hline
\end{tabular}
\caption{Serbia – Plea bargaining agreements 2014}
\end{table}
The conclusion of an agreement is possible for all crimes in Serbia, while the Montenegrin provisions exclude war crimes and terrorism related crimes.

b) The proposing and concluding of an agreement is allowed until the end of trial in Serbia, while in Montenegro this is possible only until the first session of the main hearing i.e. the beginning of the trial.

c) There is the possibility to negotiate about the type and measure, as well as the range of the criminal sanction in Serbia. This is not the case in the Montenegrin system where the prosecutor and the accused can only agree about a specific sanction.

d) The Serbian legislator defines that the element of an agreement on the admission of crime may be a prosecutor’s statement by which s/he gives up the criminal prosecution of the accused for any crime(s) which are not part of the agreement itself. This possibility does not exist in Montenegrin law where the prosecutor and the accused negotiate only about crimes which are subject of the specific agreement.

e) In Serbian law, in order to accept the agreement, the judge must be sure that there is no evidence contrary to the confession of the accused. Unlike the Serbian definition, Montenegrin law imposes a duty on the judge to make sure that the confession is in line with the evidence provided, and requires him to make sure that is it not a fallacious confession.
f) Another possible arrangement between the prosecutor and the accused that is explicitly defined in Serbian law, unlike Montenegrin, is the agreement on the confiscation of property that ensued from the crime (this is related to property that indirectly came out of crime i.e. extended confiscation). This option exists in addition to the possibility of agreeing about the confiscation of property gain that is a specific, direct result of the commission of the crime in question.

g) In Serbian law no rights are given to the injured party in terms of being informed about the plea agreement hearing, or complaining against the court’s decision on the acceptance of the agreement; both options do exist in Montenegrin law.

h) Finally, Serbian law regulates the acceptance of the agreement by one single form of decision, and that is a judgment. In Montenegro the court first accepts the agreement by its ruling, and then based on this ruling the judgment on the acceptance of the plea agreement is adopted.

Out of all the Serbian solutions, the following seem to be the ones which have the potential to improve Montenegrin plea bargaining practice to some extent:

In relation to point b), the proposing and concluding of an agreement being possible until the end of the trial, this seems acceptable to Montenegro as well. Some of the interviewed prosecutors suggested exactly such a solution, since they do not see any barriers to it. They claim that, this way, both the prosecutor and the accused “…have a better possibility to see what … [they] have and don’t have.,” as prosecutor P4 says (for participants’ coding please see Chapter IV). 93

In relation to point d), enabling the prosecutor to give up criminal prosecution for crimes which are not part of the agreement, this could be considered an additional tool in the hands of the prosecutor. It may be an additional motive for the accused to accept the sentence offered by the prosecutor. 94 The introduction of such an option with plea agreements, even though it would essentially mean the
introduction of charge bargaining, would be acceptable and justified. The interviewed prosecutor P4 supported this by saying: “I think they [the prosecutor and the accused] should have possibility to negotiate the crime itself. Let’s negotiate about the crime!”

In relation to point f), Serbian law explicitly defines that all assets can be the subject of a plea agreement (property gain that is result of a specific crime, as well as all property that is an indirect product of crime, like for example, a purchased houses, yachts, and so on). Montenegrin law recognizes the possibility of negotiation about property gain that is result of only of a specific crime. In both Montenegro and Serbia though, the temporary freezing and permanent confiscation of property is regulated by separate laws that exclusively regulate this area including the conducting of financial investigations. However, explicitly defining this possibility in the framework of plea agreements may be useful from the perspective of, for example, organized crime cases and the efficiency of the procedure. It proved to be useful in the work of the Serbian Prosecution for Organized Crime which uses this extended asset confiscation option within their plea agreements.95

The protection of the injured party’s rights deserves special consideration since it touches upon issues of justice and fairness. In Serbian law, no rights are given to the injured party in terms of being informed about the plea agreement hearing, or complaining against the court’s decision on the acceptance of the agreement; both options do exist in Montenegrin law. In both systems, regardless of the plea agreement, there is always the option for the injured party to protect their own rights in the civil procedure. The Montenegrin legislator, however, wanted to provide the injured party with the additional right to appeal against the acceptance of a plea agreement. As a result of that, the court’s two level decision process in relation to plea bargaining was introduced in Montenegro. The approach of the Serbian legislator to the injured party may be seen as a more practical option
which eliminates any “obstructions” from the injured party’s side and simplifies the procedure.

As has been already said, two additional agreements are available in the Serbian system, the agreement on the testimony of the accused and the agreement on the testimony of the convicted. Essentially, these agreements are forms of plea bargaining and include sentence negotiation.\textsuperscript{96} They both involve a cooperating witness in cases of organized crime and war crimes. In Montenegro, the institution of the cooperating witness is limited to organized crime only, and to a total release from the criminal prosecution in case this witness/accused provides crucial testimony to the prosecutor. The opportunity for prosecutors to more widely use the testimonies of both the accused and the convicted in Serbian law is a very practical solution that is in line with potential real life scenarios. They open up space for larger number of negotiated pleas, seem very attractive and could be a good tool for Montenegrin prosecutors.\textsuperscript{97}

One fact that should be pointed out when discussing Serbian plea bargaining practice is that by the latest reform of the Serbian criminal procedure, a number of typical Anglo-Saxon elements were introduced. This includes not just prosecutor-led investigations\textsuperscript{98}, but also cross-examination at trial. Cross-examination does not exist in Montenegro. It looks as if the Montenegrin legislator opted for the slow, careful and partial introduction of certain adversarial elements into its system, while the pace of Serbian reforms in this sense seems to be faster. In both countries, their criminal procedures represent a mixture of inquisitorial and adversarial procedures which by itself creates problems of different types (these issues may be the subject of separate research) and also influences the application of plea bargaining. These criminal proceedings with their characteristics are probably not the best fitting for this practice for now, as is the case with fully adversarial criminal proceedings of the American type. In the observations of some of the participants in my research this was reflected. They stress that the mixture of the two systems causes problems in practice, and that it is better to opt
for exclusively one system, whichever that is. One of the participants, Judge J4 said (for participants’ coding please see Chapter IV): “Agreements and the principle of material truth, this is a combination which is problematic…I don’t know why we don’t immediately transfer to something new, instead of doing it gradually and slowly.”

The general impression is that the Serbian legislator was more open to the application of plea bargaining in practice. In line with that, less formality and more “maneuvering space” in the whole process was provided. On the other hand, the Montenegrin legislator tended to keep a somewhat rigid approach, and a certain level of caution when using this institution is concerned. This is particularly from the perspective of goods jeopardized by the commission of crimes, and injured party interests.

_Croatia_

Following the same matrix as with Serbia, I will first briefly present some statistical data related to the agreement of parties on guilt and sentences, as it is named in the Croatian CPC. I will then comparatively refer to the relevant legislative solutions of this country.

For the statistics, 2014 is the reference year again. The Croatian system of court and prosecutorial statistics is somewhat different to both the Montenegrin and Serbian, so in line with that, the way of presenting essentially the same data is a little different, as can be seen in Table 2.

<table>
<thead>
<tr>
<th>Year 2014²⁹</th>
<th>In the jurisdiction of the Municipal and District Prosecution Offices</th>
<th>In the jurisdiction of the Special Prosecution Office for Organized Crime and Corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total No. of judgments based on agreements</td>
<td>716</td>
<td>292</td>
</tr>
</tbody>
</table>

_Table 2 – Croatia – Plea bargaining agreements 2014_
In the year 2014 – 1.21%: 716 agreements (the number of total criminal cases completed was 59,048)$^{100}$

The total number of criminal cases completed are those cases completed before the Croatian Municipal and District Courts$^{101}$ where plea bargaining is applied. It can be concluded that only 1.21% of all criminal cases ended with plea agreements.

The statistical data of the Croatian Special Prosecution Office for Organized Crime and Corruption show that 68.17% of the total number of convicting judgments that this office won were reached through plea agreements. Plea bargaining is obviously predominantly used for organized crime and corruption cases in Croatia, which is not the case in Montenegro or Serbia.

<table>
<thead>
<tr>
<th>Year 2014$^{102}$</th>
<th>Statistics of the Special Prosecution Office for Organized Crime and Corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total No. of convicting judgments</td>
<td>622</td>
</tr>
<tr>
<td>No. of convicting judgments that ended with the plea agreements</td>
<td>424</td>
</tr>
</tbody>
</table>

*Table 3 - Croatia – Convicting judgments 2014*

However, bearing in mind Montenegro’s recent extension of plea bargaining to almost all crimes where a prison sentence of more than 10 years is defined by law, it is rational to expect that there will be an increased use of this practice by the Montenegrin prosecutorial office specialized for the most serious crimes of corruption and organized crime.

When it comes to the legislative regulation of this issue in Croatia, plea bargaining was first introduced in this country in 2008. From the very beginning the Croatian CPC$^{103}$ allowed plea agreements for all crimes without exception.$^{104}$ Croatian solutions in relation to plea bargaining are generally more similar to the
Montenegrin ones than is the case with Serbia. For example, both systems do not allow the concluding and proposing of an agreement during a trial; in both systems the accused confesses a crime, and the subject of the negotiations between him and the prosecutor is on the type and measure of the sentence without the option to negotiate the range of the sentence, as is the case in Serbia. However, there are still some significant differences:

a) In the Croatian system, the statement on the adoption of the judgment based on the plea agreement, that is proposed by the prosecutor and the accused to the court, is always followed by the indictment (the indictment is also part of the agreement in Montenegro in cases when the plea agreement is concluded before the formal bringing up of the indictment). In the Croatian system, however, unlike the Montenegrin, the indictment is always the subject of initial judicial control.

b) When it comes to the interests of the injured party, Croatian law defines the obligation of the prosecutor to inform the injured party about signing the statement on the agreement with the accused. It further introduces the influential role of the injured party for crimes against life and body, and crimes against sexual freedoms for which a sentence of more than five years is envisaged by law. This solution does not exist in Montenegro.

c) Unlike in Montenegrin law, Croatian law defines that by concluding the agreement the accused does not waive her/his right to appeal against the judgment based on the agreement. The waiving of this right exists in such situations in Montenegro.

d) The Croatian CPC defines that the court decides about the acceptance of the statement on the agreement in the form of a judgment, so there is no two-level decision as is the case in Montenegro (where the court first adopts the ruling and then the judgment on the acceptance of the agreement).

e) When it comes to the possibility of the prosecutor and the accused to negotiate and agree on the confiscation of assets, in Croatia it is the same
as in Serbia. Croatian law clearly allows parties to agree not just about property gain that directly came out of a specific crime, but also about property that indirectly ensued from the commission of the crime. This issue was elaborated in the part related to Serbia.

Apart from the previously discussed possibility related to agreements on the confiscation of all assets being part of the plea agreement, no other solutions in Croatian law seems to have the potential to improve Montenegrin practice if transferred to Montenegro.105

In addition to presenting the relevant statistics and legal provisions, it is worth noting that the Croatian Chief State Prosecutor has demonstrated a significant interest and active role when it comes to plea agreements. Not long after the introduction of this institution into the Croatian legal system, he issued the *Guidelines for Negotiation and Agreement with the Accused about the Confession of Guilt and the Sanction*.106 In this document, clear directions were given to prosecutors in relation to each segment of the plea bargaining process. This is a very useful tool which contributes to the harmonization of practice all over the country, and the legal equality of all the accused. The adoption of such guidelines would be very beneficial to Montenegro. This is bearing in mind the existence of different practices in this area across the country, which will be discussed further in the next chapter. The issuing of similar guidelines is known in the practice of Montenegrin institutions. In 2010, for example, the Montenegrin Ministry of Justice adopted the *Rules on Deferred Prosecution*.107

The tendency to introduce Anglo-Saxon elements into the criminal procedure is also present in Croatian law, like for example, the transition from investigations which were led by an investigative judge to prosecutor-led investigation. However, the legislators and practitioners of this country have been “wandering” a bit when it comes to these types of novelties. Cross-examination was introduced in Croatia for a period of time, but this solution was left by the latest CPC
changes in Croatia. It proved unacceptable in this system. As Djurdjevic explains (2013, p. 334): “...such a drastic cut in the court’s authorities during the main hearing and the introduction of cross-examination proved to be a plant from foreign climes which was not well accepted, nor did it ever begin to live in our continental criminal-procedural tradition. Research into court practice and the opinions of practitioners showed that they resist these new solutions, that cross-examination is not applied in practice...” The Croatian legal system, similarly to the Montenegrin one, seems not to be ready to let the adversarial elements quickly become part of its criminal procedure.

3.3. Conclusion

After the analysis of the legislation and statistics related to plea bargaining in Montenegro and two neighboring countries it is clear that plea agreements are not used much in all three countries. They are least used in Montenegro (less than 0.50% of all criminal cases are completed this way), then in Croatia (1.21%), and in Serbia they are used to a somewhat larger extent (3.12%). Serbia does seem most open to the acceptance of adversarial novelties. Consequently, it is reflected primarily in the legal regulation of plea bargaining in this country, and to a small extent in the practical application of this institution. Generally, however, in all three countries “plea bargaining percentages” are very small. The essence of the “problem” is probably the tradition of the criminal procedures of these countries which is based on Roman law. The key principle of the criminal procedure in these systems is the determination of truth by the court which manages the trial. It looks like it is still the leading one for the judicial systems of the three countries (with Serbia being most distant from this principle by its latest reforms of its criminal procedure, and particularly the inclusion of cross-examination in the trial). This can be said regardless of the fact of whether the principle is explicitly still kept as a leading one in the criminal procedural codes of these countries, or it arises from the totality of the provisions contained in the laws. Only the Montenegrin CPC has actually kept the principle of truth within its provisions.
With changing societies in these countries characterized by new forms of complex and growing crime, their legal systems are faced with the need to work on improving the efficiency of criminal procedure. This inevitably implies the application of alternative ways of completing criminal cases, which proved to be successful in other systems.

In the next chapter I will present the attitudes, opinions, dilemmas and experiences of Montenegrin prosecutors, judges and defense attorneys in relation to plea bargaining. Their answers, comments and suggestions demonstrate their unanimous support for this institution. However, by contrast, their answers and comments also demonstrate the different practical challenges they face in their daily work, as well as their concerns related to the convergence of the two major legal systems, the inquisitorial and the adversarial one.
CHAPTER IV

-ANALYSES OF THE RESULTS-

THE INTERVIEWS WITH JUDGES, PROSECUTORS
AND DEFENSE ATTORNEYS IN MONTENEGRO

This chapter will include the analytical presentation of the results of interviews conducted with Montenegrin judges, prosecutors and defense attorneys in relation to plea bargaining practice. The interviews with five judges, five prosecutors and five defense attorneys were conducted for the purpose of revealing the general perceptions and positions of the interviewees in relation to plea bargaining, discovering the motives that hide behind their positive or negative opinions about it, finding out about their practical experiences in this regard, being either successful or challenging, and finding suggestions related to the future of plea bargaining in Montenegro. Those directly involved in the process are those who can provide valuable and unique practical input that can contribute to a better understanding of the reality of plea bargaining in Montenegro, and defining useful conclusions and recommendations in this regard. In this chapter, the interview results will be presented, while in Chapter V they will be discussed. The relevant conclusions and recommendations will be subject of Chapter VI.

The results reached proved to be valuable. Some of them are not new or unknown to me as a Montenegrin lawyer. However, many of them are a complete novelty to me, and I believe to the general legal community of the country. They could definitely only be reached through interviews as research method. Some refer to practices not generally known to exist; some refer to differences in practices that exist throughout the country; some demonstrate the importance of a personal approach to the matter; and so on. I believe that results reached justify the research approach and methods chosen.
4.1. The Roles of Judges, Prosecutors and Defense Attorneys in the Plea Bargaining Process

Before examining the results presentation and analysis, is it necessary to generally refer to the role of each category of interviewees, i.e. judges, prosecutors and defense attorneys, in the plea bargaining process in Montenegro, and to their feedback.

*Judges*

The role of a judge in the whole process of plea bargaining in Montenegro is the least active, but still a very important one. This is primarily from the perspective of the main task of the judge, to “verify” the whole process and makes sure that it was done in accordance with the law, that the accused is aware of the essence and consequences of her/his act, and that everything is done in accordance with the available evidence. As was mentioned earlier, such a role of the judge does not always exists in other countries; this role can be more or less influential. This position of the judge in the Montenegrin system enables primarily a good perception of the type and quality of the agreements submitted, as well as the relevant behavior and attitude of prosecutors, defense attorneys and the accused, as well as the injured party. The stage of the process before the judge is the final one where the totality of the “picture”, composed of small separate hidden parts or phases, finally becomes visible. Given this quite important role in the process, several issues were predominant in the answers of the interviewed judges. From the totality of judicial opinions it is clear that they a) do have affection for this institution as such and in their own “surroundings”, and that they appreciate its potential advantages; b) do recognize that there are different problems in the practical application of this legal institution and they elaborate well their own thinking related to the causes of this practice; and c) have some specific suggestions for future action, but in principle, they do not provide complete answers about what the right ways to resolve this situation are.
Prosecutors

The prosecutor’s role in the process of plea bargaining in Montenegro, as is the case with all the other countries which have this practice, is extremely important. The prosecutor is the key actor or one side of the process together with the accused and her/his defense attorney. The prosecutor is able to significantly contribute to the usage of agreements or, on the contrary, to discourage the implementation of this practice. The interviews conducted with prosecutors lead to three major conclusions: a) prosecutors do like this legal institution in general, as well as when it comes to its availability in the Montenegrin legal system, and they appreciate all of its potential advantages; b) they all stress the lack of practical implementation of plea bargaining and believe that it is not good, that this institution should be used more, and in their answers they do identify the causes of such a low level of implementation; and c) they do have specific proposals about which steps should be taken in order for this institution to be used to its full capacity. In principle, the prosecutors were a little bit more specific in their observations in comparison to judges. This is understandable, bearing in mind their fully active role in this process, and them being one side of the agreement.

Defense Attorneys

A side which is equally important in the whole process and which can largely influence the practice in this area is that of defense attorneys. Similarly to prosecutors, interviews with them showed three major issues: a) that defense attorneys do like the institution of plea bargaining, appreciate the fact that it is part of the Montenegrin legal system and think that it is very useful; b) they do recognize problems related to the non-implementation of agreements on the acceptance of guilt in practice, think that this is not good, and do elaborate on the reasons for such a situation in practice; and c) do have certain recommendations on how to improve the situation. Just like prosecutors, remembering their active
role in the process, defense attorneys are also more precise when it comes to their opinions, conclusions and proposals than the judges are.

4.2. The Interviews Results Analyses

As already stressed in Chapter III, for the sake of better understanding the experiences and opinions of the interviewed judges, prosecutors and defense attorneys, and better quoting, the five interviewed judges are coded J1 to J5, the five prosecutors P1 to P5, and the five defense attorneys A1 to A5. Even though such coding is not relevant to the results as such, it may be helpful in recognizing some specific positions or opinions typical (but not exclusive) to the members of each group. The participants’ age and length of professional experiences is not elaborated at all since it is clear from the interviews conducted that it does not affect their attitude and approach to plea bargaining practice.

There are six reporting themes: the nature of the plea bargaining institution as such, their own attitude to and relationship with plea agreements, the legal regulation of the practice, the practical implementation of plea bargaining, the position and importance of plea agreements in the context of the whole criminal procedure, and suggestions for the future. The reporting themes were defined once all the interviews were thoroughly analyzed. The themes were largely affected by the pattern of the interview questions. In answering the questions, the participants would follow a certain pattern as well. Led by my questions, they would usually start with their general opinion about the institution, its nature and purpose, which caused the creation of the first and second reporting themes on the nature of the plea bargaining institution and their own attitude to and relationship with plea agreements. In answering my further questions, they would then transfer to their own specific practical experiences with plea bargaining. This would usually be the longest and most useful elaboration that provided lots of valuable information. Through the presentation of their own experiences, which was
enriched and clarified through additional questions from me, they practically answered most of the interview questions.

All the information reached this way was categorized into the main reporting themes: the legal regulation of the practice, their positive and negative experiences with the practice, and suggestions for the future. When discussing their own experiences they would refer to specific examples to support their positive opinions or to express criticism in relation to some specific issues. While talking about their personal experiences, they would answer most of the interview questions including those related to the injured party’s rights, the attitude of their colleagues in relation to this practice, and so on. Through presenting their own plea bargaining cases they would quite often also refer to other participants in the process and to legal provisions. The relationship between plea bargaining and other similar available CPC mechanisms for resolving criminal cases was mostly discussed separately by participants. They would comment on deferred prosecution only when additionally asked about this, but some participants would at the same time, on their own, make comments about regular confession issues as well. The question about deferred prosecution seemed to be motivating for them to share their relevant opinions and experiences in this regard. That is the reason why it was produced as an individual reporting theme.

Bearing in mind the large amount of interrelated and interconnected information that was reached through the interviews, these six themes crystalized as the most practical and clear way of presenting it. They fully reflect the answers of all the research participants.

\( a) \) \textit{The nature of the plea bargaining institution as such}\n
All the participants generally consider agreements on the acceptance of guilt a very good legal institution, which contributes to the efficiency and low-costs of the procedure, satisfies all the parties involved, and from a wider perspective, reduces case back-log. \textit{“It’s a good institution because the costs are lower,}
everything is done faster, it lasts a shorter time…it’s a good institution because of the economics of the procedure”, prosecutor P3 claims. Judge J1 additionally stresses and interestingly describes another good element of the agreement and that is its settlement character, or as s/he said the very important effect of reaching a kind of “settlement between parties”. As s/he claims, “…the parties get closer. There is always space for conflicts if parties don’t conciliate.” As defense attorney A4 claims, by plea bargaining “…the prosecutor is enabled to complete the case in an elegant way...taking care of the economics of the procedure, rationality, time and so on.” Furthermore, prosecutor P4 says: “I think that with this institution a large number of cases can be completed fast, and that by this the number of backlog cases can be reduced.”

b) Their own attitude to and relationship with the agreements on the acceptance of guilt in Montenegro

All participants stress their positive personal attitude towards this legal institution and consider it a good practice that they are completely open to. All claim that the fact that it is a novelty in the Montenegrin legal system does not affect their own opinion about it at all. One prosecutor, P5, even said: “As for novelties, I’m always for that. …this institution has a privilege with me.” Keeping this in mind, s/he added that s/he is maybe not the “best” prosecutor to ask about this. “I have a fully positive opinion about this institution…The efficiency of the proceeding is the main reason for the positive attitude. There is no reluctance, and especially not for the reason of this being a new institution”, Judge J5 claims. Judge J1 stresses that “when parties agree the court will never disrupt it in principle.” Defense attorney A5 expresses her/his opinion about plea agreements in the following way: “This institution can ‘do a good job’, it is useful by its nature…it is given so that the cases can be resolved in an efficient and speedy way, that all parties are happy; finally, it’s not us who made it up, not a small number of countries have it…In normal conditions this is something which is necessary in the system…This is my general
opinion and that is completely clear.” Her/his colleague, Attorney A4 concludes: “Wherever there is an opportunity, defense attorney should initiate the agreement.”

By the nature of their roles in the process, the prosecutors and defense attorneys were specific about what generally personally motivates them to enter a plea agreement. Apart from that being the enlargement of overall procedural efficiency, those are also specific types of cases that are motivating. Cases where the outcome of trial is not certain and when the evidence is weak are some of those. In this context, Attorney A2 explains: “...when it is obvious that the evidence against him [the accused] exists, then we can directly negotiate with the prosecutor, so to say; therefore, it is not certain what will happen in front of the court, and with the plea agreements we are tactical and we get certainty when it comes to the sentence.” Prosecutor P4 claims something similar: “Prosecutors are generally motivated by the efficiency of the procedure, or when we are as prosecutors ‘at the edge’ when it comes to evidence. If the procedure in front of the court is uncertain both for me and the accused, then we can try and ‘lower the limits’ as it were.”

Cases in which there is the potential for money to be returned to the state budget also trigger some of the participants to enter plea agreements. Prosecutor P1 talks about her/his own case in which a €10,000 fine and €141,000 of tax money was agreed to be paid; s/he says that money return: “...was a condition for us to accept the agreement. This is a good agreement from the aspect of the state budget.” This same prosecutor also finds cases when a crime is committed by accomplices as motivating to initiate the concluding of a plea agreement. In these situations, as s/he claims, the agreement is signed with one perpetrator, which makes prosecution of the other easier. S/he explains this in the following way: “One of the key reasons which would motivate them [prosecutors], for example with the crimes where we have accomplices committing the crime, where you can sign an agreement with one accused, and then he testifies
against the other in some other role. That is, for example, a motive to sign an agreement with a person from a criminal organization.”

Prosecutor P4 claims that with the new provisions which allow the application of plea bargaining for all crimes (except terrorism related ones and war crimes), one motivation would be precisely to use it in the more serious and complex cases. As an illustration s/he says that currently, for example, s/he is working on a very serious case where 46 witnesses are involved: “I can barely agree with all of them when to come with their defense attorneys! The best and easiest thing for everyone, including the Judge, would be for the defense attorney to tell him: ‘You will get five years in court, and if you agree with the prosecutor it will be four’, done deal!”

Prosecutor P3, explains that in all the cases of plea agreements s/he has concluded, the defense attorneys initiated the conclusion of the agreement, in all these cases the evidence was complete and strong, and a confession existed and was clear, so in these cases s/he was motivated precisely by all these elements to avoid a trial by the negotiation and conclusion of the agreement: “I’m actually motivated by this economics, it’s all done fast, we don’t lose time at trial, this one session is completed fast, all in one day and everything is written in two hours. But we have never concluded an agreement on our own initiative…it was upon the proposal of the defense attorney…and with all the cases it’s not just that the accused accepted the agreement, but we had both evidence and a confession, and then we opted for a plea agreement.”

Naturally, the interest of the client and getting a lower sentence for him is a general motive of attorneys in proposing the conclusion of agreements. Attorney A5 clearly explains this: “Our motive is the interest of the client, but the proper moment for concluding the agreement should be recognized.” “I look at what I can do to bring some betterment to the accused, I look for reaching
a lower sentence for him. The motive is, therefore, a lower sentence and, certainly, speeding up the procedure”, an attorney A1 says.

Regardless of their general positive opinion about the institution, some judges, however, stress a necessary level of caution when it comes to plea agreements. Judge J3 emphasizes the important role of the judge in checking the agreements: “There is something with the agreements that must be taken care of, and that is for it to be done exactly as the legislator defined. It is not a rule that, if the prosecutor submitted proposal and the accused accepted it, the court will accept this agreement in every case. The court must do all these checks...If the court checks the agreement in a proper way, then in my opinion this institution is most beneficial.” Finally, even though Judge J4 believes that “The institution is a step forward in the Criminal Procedure Code; a good solution that simplifies the procedure”, and regardless of the potential formal approval of an agreement which fulfills all the legal conditions, s/he still worries about the truth: “Who guarantees that what the accused said is true?”

c) The legal regulation of plea bargaining in Montenegro

All the participants described the Montenegrin legal provisions related to plea bargaining as generally good, representing a solid framework for the application of plea bargaining; a general positive view is prevailing. “I think the provisions are good, especially now with the latest amendments”, Judge J5 says. Attorney A3 says that “The legal provisions are good. …The problem is in people’s heads, not the provisions.” Prosecutor P2 agrees: “The provisions are generally framed in an excellent way”. “The new changes to the Criminal Procedure Code will contribute to larger implementation”, Judge J2 claims. As can be seen, some specifically praise the recent extension of the practice to almost all crimes (except war crimes and terrorism related crimes). However, some also praised the introduction of the prosecutor’s obligation to submit the indictment together with the agreement (in cases when the agreement is concluded before the formal bringing up of the indictment). In fact, according to
some of them, the lack of this obligation in the past led to the conclusion that from a formalist standpoint, the criminal procedure starts without the indicting act. In relation to this issue Judge J4 says: “I think it’s better to have a formal indicting act prior to adjudication; now that has been introduced, I think it is a proper thing, there’s no adjudication without indictment.”

All the participants agree that human rights are well protected when it comes to plea bargaining provisions. As Judge J1 explains: “In the end….the Court takes care of that [human rights].” Attorney A2 briefly says: “Human rights…it is all fine. Just like with the court settlement, the agreement is reached and that’s it.” “Everything is fine in relation to that [human rights], the accused is told everything on three occasions, everything is told to him before the negotiations, what his rights are, what the disadvantages are. He is aware of what he is entering into”, Prosecutor P5 explains.

However, regardless of the general positive opinion about the legal framework in this area, a number of participants expressed some criticism. Most of the prosecutors have objections and thus offer proposals for specific legislative changes that should take place, which, in their opinion, would contribute to the better implementation of this practice in Montenegro (please see details in Section f below). As already said, the majority of participants believe that human rights and the injured party’s interests are well protected, but one prosecutor, P3, believes that they should be better protected and provided a specific recommendation in this regard (please see in Section f again).

In the context of the lack of motivation for plea agreements, Prosecutor P4 generally criticizes the ranges of sentences defined by law for certain crimes as being too large: “Please tell me what kind of range it is……between 2 and 10 years, what a sentence range!”
Furthermore, Judge J1 objects to the overly formal character of the procedure: “Generally the institution is good, useful, but here it is too formalized and complicated...It is really too much formality.”

Attorney A1 referred to the whole CPC and the concept of the Montenegrin criminal procedure which is according to him not good, and which consequently negatively reflects on the human rights of the accused (this will be discussed further in Section e). Finally, Attorney A4 stresses that there were initial discussions between some legal professionals about whether giving up the right to trial is unconstitutional; however, these discussions are in her/his opinion unfounded: “There was some thinking that the accused’s basic constitutional right to procedure in front of the court is jeopardized, but I believe there’s no ‘space’ for this, he is simply giving up the right to appeal himself.”

d) The practical implementation of plea bargaining in Montenegro
Most of the participants’ answers are directly or indirectly related to problems in the practical implementation of plea bargaining and the reasons that stand behind these problems. All of them evidently recognize the non-usage of plea bargaining in Montenegro and are naturally thinking about the causes of this reality. None of the participants think that these agreements are significantly applied in practice, and none of them think that this is good. “Well, we had a very small number of agreements in practice...”, Judge J1 says. Attorney A3 describes the situation in the following way: “In practice these are just initial steps. However, we are going in the right direction, maybe slowly but we are going.” Her/his colleague, Attorney A4 explains: “It must be said that during the last five years this institution hasn’t become part of practice. We have a few agreements here and there, and this surely deserves criticism.” When asked about the applicability of plea agreements in practice Prosecutor P2 answers: “Until now it wasn’t like that [applicable], but maybe something will change in the future.” The primary focus of the participants’ answers was the problematic aspects of this practice, but to a lesser extent positive issues and
developments as well. In their answers they focus on the key reasons for the limited usage of agreements in practice, and the causes of the practical challenges they face. It is very noticeable that quite often blame in relation to existing practical problems is put on the “other side” of the process.

First of all, the general passive position of prosecutors and defense attorneys where proposing agreements is concerned is stressed by many participants, from each interviewed group. “The prosecution should be active!...The attitude should be changed, it should be an active attitude of prosecutors, as well as defense attorneys”, Judge J5 stresses. Prosecutor P5 says: “Everything is somehow there, but still they are not applied enough, passiveness exists on all sides...there should be more initiative from us, prosecutors”. Another prosecutor, P3, claims that attorneys are quite passive: “I think attorneys should be a little bit more active because a defense attorney is something different in comparison to us. When a defense attorney says something to a suspect or the accused, he believes the attorney more, we are the ones who practically decide on his sentence. It’s a different relationship between the attorney and the suspect, the attorney can talk to him about whatever he wants.” On the other hand, Defense Attorney A5 claims that: “For the plea agreements prosecutors do not have the courage...inventiveness, wish, intention, they are completely passive for a thousand reasons”. Most of the interviewed defense attorneys claim that prosecutors do not wish to conclude agreements and thus do not offer lower sentences; some defense attorneys believe that prosecutors should be active in a way to convince the other side that the proposed agreement is good and in that sense should refer to specific case-law in order to justify the proposed sentence. Attorney A1 says: “I believe that the prosecutor should be the first one to initiate an agreement, he is the one who should offer and put pressure on the other side...The institution is not being applied due to the rigidness and the total lack of understanding of the institution by the prosecution.” Attorney A5 thinks similarly: “If the application of the agreements is wanted, I think that prosecutor should be inspired, to offer and to convince the other
side, to find similar cases from case–law and to show that example…” As a result, the same A5 attorney claims that many of her/his colleagues did try to offer agreements once or twice and when they were rejected by prosecutors, they gave up: “Some attorneys offered once, twice to conclude an agreement, but there is no adequate answer from the prosecutors.” Judge J1 agrees with the attorneys: “In my opinion, the prosecutor is most important, he needs to force the use of the institution.” On the other hand, some prosecutors like P5 claim the opposite: “The attorney always thinks and expects that he is a great help to the prosecutor by wanting the agreement, and that he has to have some ‘discount’ because of that. They [attorneys] always ask for very low sentences…attorneys obstruct with the low sentences they ask for.” When it comes to this rigidness in offering lower sentence on the part of the prosecutor, Judge J4 explains this by saying: “As for prosecutors I see them as being sentimentally attached to the charges, and they do not want to grow through the procedure”. Similarly, Judge J3 claims that for some agreements that s/he knows from her/his own practice, the sentences were just like those that the accused would get at a trial: “I think that the sentence which the accused got through the agreements would be exactly like that at the trial itself...I would order these same sentences.”

Apart from the above mentioned reasons for prosecutorial passiveness, there are many other various reasons recognized by all the participants. The sentencing policy of the courts was mentioned by some participants as a discouraging factor when it comes to concluding agreements, since the accused can quite often expect a more lenient sentence in the court than through an agreement. Judge J2 says: “The sentencing policy of courts is lenient and it does not leave good negotiating opportunities for the prosecution.” Prosecutors fully agree with this. In order to illustrate this, Prosecutor P4 elaborated a particular case that s/he worked on where it can be easily concluded how lenient the court sentencing policy is. In this case, the accused recidivist (who committed a crime for third time) was given a prison sentence 2 months longer than the minimal sentence
envisaged by law for that specific crime; s/he was sentenced to 2 years and 2 months in prison and minimal sentence for the crime in question is 2 years. S/he concluded her/his elaboration by saying: “This is the key problem. As a prosecutor I can never ever accept an agreement in such situations.” When talking about the lenient court sentencing policy another prosecutor, P1, says: “The court does not participate in negotiations directly, but it certainly influences the application of the institution through its sentencing policy… That is why sentencing policy is a problem with these agreements.” On the contrary, defense attorneys, even though they do admit that it has some influence, do not believe that it is a major reason of prosecutorial passiveness. Attorney A1 claims that: “Maybe it [court sentencing policy] has some small influence, but it is the smallest one.” Attorney A4 notices that “lately there is a slightly more severe sentencing policy present” and prosecutor P5 agrees with that: “Sentencing policy was really lenient, now it’s a little bit more severe.”

In connection with sentencing, some judges do believe that the range of sentences defined by law is very lenient for some serious crimes, which limits the judges in ordering more severe sentences. Judge J4 explains: “When we have serious crimes, in my opinion, the legislator is very soft there. I am for this solution the Americans have when it comes to these serious crimes, five times one hundred years regardless of the length of life, I support this.”

Furthermore, when it comes to the effect of the courts’ sentencing practice, Prosecutor P1 stresses the lack of unified court sentencing practice as a factor which also makes plea bargaining harder to apply. S/he notices: “Every time when negotiations happen a prosecutor has a dilemma in relation to the choice of sanction... It’s not strange that this institution is present in Anglo-Saxon law since in the practice of their courts you have some rules, the accused knows what he can expect in court. You don’t have to think which judge you will end up with, whether a judge will like you… There should be unified practice with the courts as well.” In relation to the non-uniformity of
practice there are some interviewees who stress this problem, but from the perspective of prosecutorial practice. The same prosecutor, P1, further explains: “I think that at the level of prosecution standards should be set up…we should have standards…let’s say for the range of sentences when we negotiate. So that, when we negotiate, the accused gets the same he would get from another prosecution office…what we do now, practically nobody controls.” Judge J1 shares the same opinion: “They [prosecutors] don’t have any kind of legal opinions that are being adopted and that they can stick to…the courts issue legal positions and there is nothing like that for the Prosecution Office. The Supreme Court judges have experience, we respect their opinion, and we find the legal opinion [we need]…”

Another factor which was recognized by many participants as particularly problematic for plea bargaining practice is the formalism of the procedure. The whole procedure in this area is seen as too formal by many participants. Judge J1 says: “It is a huge task that doesn’t reflect adequately…It is easier for me to write the judgment, than both the ruling and the judgment”. In one illustrative case, as the Judge says, “We did reduce costs, but it was painful, just like we had trial”. Some participants characterized the procedure as burdened with lots of document writing, Prosecutor P1 explains: “There are some disadvantages to this in our system, and that is the strictly formal procedure which precedes the conclusion of the agreement and which is for the prosecutors who work on the case, depending on the procedural phase, very demotivating…As for the form, this is even more complicated than the indictment itself. A lot of writing is involved.” Some attorneys, like A4, share their opinion: “Prosecutors are afraid of this institution, but it does really put additional work on them. This is especially the case if it happens after the indictment, because they have already gathered and prepared everything and they go to trial where in such cases all this is finalized very fast. In this phase of the procedure we can see rejection by prosecutors...with the conclusion of
the agreements there is truly lots of work for prosecutor.” “There’s a lot of formalism present”, attorney A1 agrees.

One factor which is found influential when it comes to plea bargaining by a number of participants is public and media influence. As some believe, the media and the public sometimes discourage prosecutors from concluding agreements. Judge J1 describes this in the following way: “The public is very important…the public definitely influences a prosecutor, whenever you have a public person, nothing happens. The prosecutor immediately says ‘We’ll throw the ball to the court!’ And then it’s easy, you got the sentence you deserved. The prosecutor tells me the following himself ‘Everything is different when you have a judgment; when a lay person hears about the agreement, you can’t explain to him what it is really about; the public immediately considers it problematic; they will say - this person, because he is a public person, should make a payment for humanitarian purposes for this, and I would get worst sentence for the same thing’.” Some prosecutors agree with this. Prosecutor P1 believes that the public indirectly affects the prosecutor’s will to negotiate in some cases. S/he used an example from her/his own practice to explain this, and referred to the crime of brokering in prostitution (pandering) where a prison sentence of 1 year is envisaged by law111; s/he further stresses: “This is interesting to the public, but they simply can’t understand this sentence. There is no direct pressure from the public, but for every case we do take care of the fact of how it will be interpreted by the public.” On the other hand, some prosecutors claim completely the opposite. Prosecutor P2 says: “The public doesn’t affect it at all, we have laws that we apply, the public is a lay public, it is only important to implement the law.” P3 answers in a similar way: “The public, for me, I’m not interested in that at all. I do my work in the framework of laws and by following my beliefs…” Attorney A1 believes that there is a certain influence in this sense, but which can be minimalized or removed by professionalism and authority: “The public is a factor which has a certain influence, it goes primarily towards the prosecution or court to some
extent… they [prosecutors and courts] are afraid of public trust in the institutions, they justify their work to the public as institutions. But when it comes to this pressure from the public, it is resolved by the thing we lack, and that is the authority. Therefore, by professional responsibility and knowledge, this is what makes authority.” Her/his colleague, Attorney A5, strongly believes that public pressure exists: “I know, I spend days and days in the courtroom…Prosecutors are still under pressure from the public, but also their supervisors, attorneys and the accused themselves. It is this - ‘Just that somebody doesn’t think I did some shady business with the defense attorney’.” Attorney A3 thinks the same: “Prosecutors are worried that ‘somebody’, and most often it is their supervisor, does not think that through the agreement they made a concession larger then needed. This is important to them.” Interestingly, Judge J1 also mentions this supervisor aspect: “It seems to me that there is a certain fear for their job with prosecutors, it is a completely different system in comparison to the courts; it is a hierarchy, like in the army.”

As a follow up to the knowledge issue mentioned by Attorney A1 in the previous paragraph, it is interesting to note that some participants, mostly attorneys, say that there is lack of knowledge in this area including within their own professional group. Attorney A5 criticizes her/his colleagues, attorneys, in this sense: “I believe that also for them [attorneys], there should be organized some sort of promotional campaign and education. To make the agreement closer to them…there are attorneys who are not introduced to this practice and area, and they even submit wrong proposals in relation to the conditions of the [agreement] conclusion.” Attorney A1 agrees with this: “I think that the majority of attorneys don’t fully understand this institution, except what the law strictly says…they don’t understand the essence, but regardless of that, the prosecutor is still the most important one.” Her/his colleague, Attorney A3, believes that prosecutors are those who need education in this area: “I think that prosecutors should be educated [in plea bargaining].” When talking about the
prosecutors’ role in the process, one judge, Judge J1, also stresses the importance of education: “Training is important.”

When discussing knowledge it is always indirectly linked to the issue of professionalism. A great number of participants, including attorneys themselves, stress the unprofessionalism of attorneys in the context of plea bargaining. Many see this attorneys’ relationship with plea agreements as quite unprofessional. Specifically, many participants find the main reason for attorneys’ passiveness in this area in a lack of financial motivation on their part. In other words, plea agreements do not pay off for attorneys. Prosecutors P1 and P4 describe this in the following way: “The accused himself is in the mood for negotiation and he has the initiative; attorneys when they see that it won’t bring money to them, they act contrary to that” and “It pays much better for attorneys when they go to trial.” Defense attorneys themselves do not claim differently. “Additionally, attorneys have this inert dimension, attorneys get more money from trials, and with the agreement and completion of the case this way, their fee is lower”, Attorney A5 openly says. Another attorney, A2, explains it in the following way: “The problem here is this financial interest which is most important for defense attorneys; it is therefore the disloyalty and unprofessionalism of attorneys towards their clients.” Judges think the same. Judge J5 claims: “Attorneys always opt for trials, there are more court sessions, and they are paid more that way.” Another judge, J2, has the impression that both prosecutors and defense attorneys “avoid agreements whenever they can”.

In this context, some participants find the way attorneys present the plea bargaining option to their clients problematic. Prosecutor P5 thinks the following: “The accused knows as much about the agreement as his defense attorney tells him. If a person has been convicted already, then he knows a lot about the agreement, but he won’t initiate it unless his attorney suggests that to him. And usually the attorney tells him ‘You’ll be better in court’…even if
the accused wants to try something different, he [the attorney] hampers him.” Prosecutor P2 thinks the same: “They [the accused] read [about plea bargaining], but when they have an attorney, attorneys obviously like to earn money, and they don’t propose agreements.” Judge J5 shares the same opinion: “For attorneys it pays off better to go to trial for money…the openness of the accused is important, but it should all be presented to them in the right way, then there would be more interested in the agreement. Quite often they don’t even know about this option, from my private life I know people, friends and others who went to court but didn’t know about this option, and maybe they would have used it [if they had known]. But it is also a matter of the way of thinking of our people. Here everybody wants to go to court…”

The last sentence in the above quotation brings us to the interesting issue of mentality which was also mentioned by a number of participants as an influential factor when it comes to plea bargaining in Montenegro. Judge J5 continues her/his above mentioned comment in the following way: “…it is easier for everybody that way [to go to court], let the court decide about everything and do everything.” Prosecutors agree that mentality is important. As they claim, the accused sometimes prefers conflict rather than settlement, and defending themselves by neglecting rather than pleading guilt; Prosecutor P2 says: “Somehow for the accused it is most important to ‘attack’ somebody; that attorney’s language is close to the accused, so attorneys do act like that. There is very small number of people who admit that they committed a crime even when it is completely obvious and all the evidence exist…” This prosecutor then referred to one such case from her/his own practice. The mentality of injured parties was also discussed in the participants’ comments as important in the whole process. They see injured parties as mostly preferring revenge in comparison to settlement. One prosecutor, P5, metaphorically explained this using the following words: “For the injured party the court proceeding is satisfaction, especially when the public is interested. Newspapers write- the victim said this and that…for the injured party it is
important that everybody knows what he went through, he believes that he lost when there is an agreement, he doesn’t see an accused that is put under torture. He doesn’t see him, as it is said, ‘on the grill in the courtroom’.

When it comes to injured party issues, some participants believe that the injured party always in some way affects the prosecutor, so it is the case with agreements on the acceptance of guilt where the injured party can actually demotivate the prosecutor to offer or conclude an agreement. In order to illustrate this, Judge J1 explains that, informally, prosecutors tell him that even in regular trials, in the end they are quite often satisfied with the sentence but they still do file an appeal because of the injured party: “The prosecutor says to himself, sometime he is satisfied with the sentence, but the injured party is unhappy, and then the prosecutor, under pressure from the injured party, reacts and files an appeal.” Judge J4 used metaphoric questions to illustrate this always present dissatisfaction of the injured party with the sentences ordered; s/he says that they always ask: “Why is this accused not hanged?” or “Why this accused was not fined €300,000?” These sentences may at the same time be seen as a good illustration of the mentality and expectations of the parties. The feeling of the importance of injured party interests for the prosecutor can be sensed in the answers of Prosecutor P3 who insists that the injured party should be more protected by law when it comes to plea agreements, as already briefly mentioned earlier: “With crimes where we have injured parties, I think they should participate in negotiations, so that they can express their opinion.”

Furthermore, this mentality may be, but is not necessarily, linked to the criticism which is directed at prosecutors by many participants in relation to their general resistance to new and modern developments, and the conservatism of society. Attorneys are “loudest” when it comes to this. “When prosecutors say that they have the will [for plea bargaining], they are surely not honest, and that is because of their mental attitude”, Attorney A5 claims. S/he further stresses: “When it comes to rejection, yes, there is rejection, but on the part of
prosecutors… for the plea agreements, prosecutors do not have the courage…inventiveness, wish, intention, they are completely passive for a thousand reasons…they don’t have the intention to change.” In order to illustrate the conservatism of prosecutors, Attorney A2 refers to situations from her/his own practice when the prosecutor informally asked him to propose the agreement instead of s/he her/himself doing it: “Prosecutors should propose agreements, but instead they call the attorney and say ’You propose the agreement!’, I had this situation…prosecutors are passive…this is a new institution and Montenegrin society is conservative, it’s the same with the institutions of protected witness and cooperating witness.” Judge J1 agrees and explains: “The fear of prosecutors of the new institution is the main reason for not having more agreements…fear is the key reason here, fear is present on all sides, but it is mostly reflected in prosecutors.” When talking about plea bargaining, Judge J4 also believes that conservatism has a negative effect on this practice: “Conservatism is present”, s/he says.

It is evident from participants’ comments that in some cases there are certain (dis)trust problems in the relations between prosecutors and attorneys as key actors in the plea bargaining process. Some attorneys claim that prosecutors do not consider them a side in the process with whom they should cooperate in order to reach the joint goal of resolving the case in an efficient way. Attorney A5 is particularly focused on this issue: “It’s a barrier that none of the prosecutors considers the attorney a friend of the truth, but actually a bluffer. Really, it’s literally like that…a prosecutor should be above all this, I know, not every attorney is the same, but the prosecutor should be above all that.” S/she believes that: “In the psychological sense, any kind of agreement with the attorney or the accused is considered corrupting from their [prosecutors’] perspective”. This attorney further explains: “The mentality of the prosecutors cannot stand that we bargain about something. It has certain ‘weight’ for them, this novelty is still a taboo topic for them.” Her/his colleague, Attorney A1, claims the same: “They [prosecutors] look at the attorney as though he is
the enemy.” In relation to this, Judge J1 notices that prosecutors do not like to be seen as equal to attorneys before the court: “Prosecutors are one side, and before the court they are equal to the other side, the judge looks at things this way, and prosecutors don’t like it.” Some prosecutors, like P5, talk about this as well: “Attorneys always expect much lower sentences than what the court would say. It’s demotivating… this kind of haggling…and not real bargaining. Interestingly, it’s always the attorney who asks for the lowest sentence, not that much the accused himself. Due to all this there is a little aversion to this.”

Finally, some participants did discuss the issue of the relationship between the current Montenegrin criminal procedure structure and plea bargaining as a barrier to practical application. They find the structure of the existing procedure problematic, and being split between the two main types of criminal procedure, adversarial and inquisitorial (this issue will be discussed separately in Section e). 112

Apart from talking about the challenges and problems they face in practice, the participants also have positive comments and observations in relation to plea bargaining practical implementation.

Attorney A3 says: “It [plea bargaining] was mostly a positive experience. In practice it all functioned well. It’s surprising how well both judges and prosecutors did this, as they have many years of experience with this.”

The majority of participants see the judges’ attitude and role in the whole process as a very positive one. Attorney A3 says: “Judges would always accept the agreement without any problems. I even think that it’s undisputable that this makes their work much easier. Nobody who wasn’t in the courtroom, can know how exhausting it is to reach an judgment.” Prosecutor P5 confirms this by one simple sentence: “Judges like agreements very much.” Prosecutor P2
also talks positively about the judicial role in the process: “Judges were always very good, everything was fine, every agreement was accepted without any objections. They are generally very much in the mood for this institute, it is easier for them this way.” Attorney A5 agrees: “The court in principle has a fair relationship with this institution, the court has less work when an agreement is used … the court generally has a positive attitude… judges are always ready to accept an agreement if everything that is needed is all right.”

Some participants, mostly defense attorneys, praised the way prosecutors take care of the interests of the injured party. Attorney A5 explains: “A prosecutor is somebody who takes care of the injured party’s interests, I think that they take very good care of this… simply, the prosecutor and the injured party are continuously in touch, they have communication before the conclusion of every agreement, the injured parties are introduced to the agreement…” Her/his colleague, Attorney A4 stresses similar: “All the rights and interests of the injured party are fully protected… prosecutors want the injured parties to agree with everything. In principle, with the agreements they fully relax when the injured party agrees with something…” Judge J5 agrees: “The interests of the injured party are fully protected. The prosecutor represents these interests, the injured parties are informed about the court hearing, and quite often they are present at the hearing…” Prosecutor P1 confirms such practice: “We as prosecutors tend to have the injured party present, to give consent, so far we haven’t had problems with this.”

Participants also discuss different sets of circumstances which from their own experience proved to be stimulating for plea bargaining practice.

Prosecutor P5 describes members of the recidivist category as the most willing to conclude agreements in order to avoid an unpleasant trial. S/he explains this in the following way: “Recidivists are thankful for the agreement, this way they want to avoid ‘pillory’ at the trial… when there is a trial, there they are in the
hallway, photos, video recording, and this way they are ‘hidden’ in my office, the conversation is relaxed; it all comes down to the conversation, attorneys sometimes get involved, and the injured party is there as well. There are no persons who ‘shower’ him [the accused] with questions, for the first time he is in the position that he doesn’t need to defend himself, for the first time he doesn’t need to stand, it’s very good for them. So for recidivists it is pretty certain that they won’t refuse the agreement.” S/he concludes by illustrating this through her/his own case: “When he signed the agreement he was thanking me endlessly. For the first time, he was in position not be ‘attacked’ by everybody.” Prosecutor P2 agrees with this statement: “I think that the people who would be best suited to this institution can be found amongst recidivists.”

Prosecutor P5 further talks about other circumstances which proved motivating for the conclusion of the agreements in her/his cases: “In this case, there was huge media interest. It was in their [accused] interest to conclude an agreement… their motive was to avoid the media, they were followed by the media everywhere, it was their main motive…one year of work ended in just one day, it cannot be better.” Her/his colleague, Prosecutor P1 shared the same experience in relation to public exposure: “They [the accused] have their own reasons…we had cases that they accept the agreement because they don’t want the public, they don’t want to be exposed…”

Prosecutor P5 further stresses that her/his practice showed her/him that people who travel or are in a hurry are quite motivated for the conclusion of the agreement: “I have an example of a seaman who was not able to receive the invitation from the court and come to trial because of his job, so he suggested that we conclude an agreement. He elaborated it all well, that he wants to respect the institution of the state and shorten the procedure.”
Furthermore, their colleague, Prosecutor P3 believes that even a small reduction in the prison sentence in negotiations, even by a few months, in comparison to the common court sentence for the crime in question can mean a lot to the accused: “The key is to go below common practice with the sentence, with negotiations we would go lower, a month or two, and even that meant a lot to them [the accused].”

Finally, Prosecutor P1 thinks that plea bargaining is generally more suitable for more serious than less serious crimes, where the accused has an option of deferred prosecution as well. In this context, P1 says: “Less serious crimes are more suitable for deferred prosecution, and plea agreements are maybe more suitable for more serious crimes; plea bargaining exists when you have more serious crimes...as the crime is more serious, it is harder to foresee what will happen..”

e) The position and importance of agreements on the acceptance of guilt in the context of the whole criminal procedure

In their answers, the participants referred not just to the relationship between plea bargaining and deferred prosecution that they were specifically asked about by the interviewer. Inspired by their practical experiences, they also talked about the concept of the Montenegrin criminal procedure as such, and other possibilities that exist in the criminal procedure that are generally potentially “more attractive” and may represent a certain limiting factor for the agreements’ implementation.

As mentioned earlier, Attorney A1 strongly emphasized that the existing concept of the Montenegrin criminal procedure as such represents a key barrier to plea bargaining. S/he explains that the Montenegrin criminal procedure represents a mixture of an inquisitorial and adversarial procedure which causes problems in practice, primarily by creating a generally unequal position of the prosecutor, and the accused and her/his defense attorney. According to her/him, the Montenegrin criminal procedure which, on the one hand, has a prosecutor led investigation
characterized by greater rights and authorities for the prosecutor than was the case earlier, and on the other hand, kept a classical inquisitorial trial characterized by the exclusion of cross-examination and by the leadership of a judge, deprives the accused and her/his attorney of enough good opportunities to present their own evidence and defend their position. S/he believes that this inequality can be applied to plea bargaining as well, for example, through the inability of the attorney to have timely access to case files in some cases or prosecutors simply not wanting to enter negotiations because their acts related to evidence are not always proper. S/he claims: “The prosecutorial investigation and that part is one thing, that was changed, but everything else remains the same. The position of the accused under this law, including the human rights aspect as well, is based on an inequality principle…our Criminal Procedure Code is a bad basis for the application of this institution. In practice, the key problem is how the law is set up.” S/he concludes: “…the law should be changed, to bring into the law all that is needed or to give up such a procedure…every system in any case is based on rules which refer to the equality of arms. If something like that doesn’t exists and it’s missing, than it’s not what it needs to be.”

This opinion is indisputably linked to the general principle of truth in the Montenegrin criminal procedure and fact that the presence of this principle may be a barrier to plea bargaining (this issue was elaborated in Chapter III). In this context, Judge J4 claims the following: “The condition for this institution [plea bargaining] to live is to deviate from the principle of truth in the criminal procedure. We should introduce…cross-examination. Plea agreements and the principle of material truth, it is a combination which is problematic…I don’t know why we don’t immediately transfer to something completely new, but we do it slowly and gradually.” It can be said that in some way Prosecutor P3 follows up on this with the following conclusion: “What is important is that in our criminal procedure we do take care of fairness, so this defines everything somewhere down the line.” This complex issue can obviously be
subject of separate research; in this research it contributes to “getting the whole picture” and a better understanding of the issues linked to plea bargaining application in Montenegro.

Furthermore, a number of participants discussed the relationship between a regular confession and a confession in the framework of plea bargaining. A regular confession is seen by some as a simpler and more attractive solution than an agreement on the acceptance of guilt. Judge J1 explains that there is an informal practice for the prosecutor and the accused to agree about regular confessions, and generally agree and present the agreed sentence to the judge. S/he says that in these situations, after the confession is checked by the court and it is determined that all the elements and evidence are in line with the confession and the law, the judge orders the agreed sentence in a shortened procedure without a full presentation of evidence at the trial. As Judge J1 says, this is much simpler then an agreement on the acceptance of guilt and lots of formalities and paperwork are avoided this way: “We have something that we apply in practice, because this informal approach was born out of practice…what is its main disadvantage? [of the plea bargaining procedure], it’s complicated due to documents, ‘million’ of statements are written, the proposal, the agreement, as with the indictment all evidence must be submitted…what happens informally, a prosecutor comes with the proposal and says ‘If you are willing to confess, confess, and I’m ready to propose this sentence’…the court, if this is all ok, literally doesn’t have to do anything after that, so it is a confession, and he immediately goes to issuing a judgment, the decision on sentence, checks the circumstances, and adopts the decision without presenting evidence. With the agreements, this is not possible.” Attorney A4 also talks about cases from her/his practice when the accused had confessed the crime, but then informal steps were taken in order to avoid a plea agreement. In these cases, the prosecutor agreed with the accused about the confession and generally about the sentence, then it was all presented to a judge who after that conducted a shortened version of the trial based on the given clear confession of
the accused and the existing evidence, and then s/he adopted a judgment with the agreed sentence involved. As this attorney says: “So….this is how it was informally agreed, and in fact there was no plea agreement as the law defines it.” S/he concludes: “They [prosecutors] are becoming more relaxed in that sense.” According to this attorney this simple confession is a much better option for all the sides involved, since it is shorter and simpler in comparison to the very formal procedure of concluding plea agreements. Judge J2 shares the opinion of the above mentioned judge and attorney: “When it comes to the confession of a crime, it is very easy to finish the procedure without a plea bargaining agreement.”

Judge J3 mentions, even though s/he does not fully agree with it, the interesting issue of the possible existence of a difference between those accused who make a regular confession and those who make a confession in the framework of plea bargaining, with the first group being discriminated against in comparison to the second group, who are much better treated because of the agreement: “My general opinion is that it is a good institution [plea bargaining], it’s a shorter way of completing the criminal procedure. There were many who thought that this is not all right, that this way certain categories of accused are being favored, actually those who confess in the framework of a plea agreement in comparison to those who confess in the regular procedure, not through an agreement. But confession is a mitigating circumstance in any case. It’s good and I’m happy that this institution has now been introduced for all crimes.”

Finally, when it comes to the relationship and comparison between deferred prosecution and plea bargaining, most participants stress the usefulness of both institutions, but in their own way, since the former is used for less serious crimes only, and the latter is now used for almost all crimes. Judge J5 says: “Both of these institutions are excellent because they shorten the procedure…There are similarities but there are differences as well. Deferred prosecution is used for less serious crimes. With deferred prosecution the accent is on
personality, so the prosecutor takes into account what kind of person is in question, whether the person has been convicted before, somehow the person himself is important. Only some personalities are suitable for deferred prosecution, while the plea agreement can be used by everybody, every accused person.” Judge J2 agrees that both institutions are useful: “Both are useful, but in different aspects.”

In this context, some prosecutors stress that deferred prosecution is much better for those accused who commit a crime for the first time, while agreements are better for those who are “returning” criminals or recidivists. Prosecutor P2 says: “We did use deferred prosecution. It’s primarily and more useful for those accused who did not show up before as perpetrators of crimes. They were mostly stimulated by not being given a criminal records.” Her/his colleague, Prosecutor P5 agrees with this: “Well, deferred prosecution can be applied with people who have not been convicted before, recidivists are not a category of people who are suitable for deferred prosecution.”

Many claim that the main advantage of deferred prosecution which motivates the accused is her/his absence from the official criminal records in cases when s/he fulfils the agreed obligation: Judge J1 says: “Both institutions have the same purpose, but deferred prosecution is better because the crime is not added to the criminal records, everybody ‘runs after this’, even when there are no elements of criminal offense, people want to have deferred prosecution.” Prosecutor P1 claims that deferred prosecution is used more and it is much better for the accused for the same reasons described above: “Deferred prosecution is used much more. They opt for this first of all because there’s no evidence of a criminal offense. It’s much more present in practice than agreements…for example for less serious traffic crimes, the injured party gets damage compensation much faster this way…quite often here we have the consent of the injured party which includes compensation for damage.” Prosecutor P4 agrees and explains it in the following way: “Deferred prosecution is a much
more useful institution and suspects are more open to this institution. Why?
Because in the process of deferred prosecution, after one of these obligations
defined by law is fulfilled, the crime report against the suspect is rejected. He
doesn’t have a single consequence, no conviction, like nothing happened.”

Attorney A1 thinks similarly and just like Prosecutor P1 stresses the good position
of the injured party when it comes to deferred prosecution: “It’s a much larger
role for the injured party with deferred prosecution… and it is not logical for
the injured party to have deciding role with the agreement since the law
doesn’t give him such a role in the regular trial either…Deferred prosecution
is different, I think that the key reasons why it is easier to implement and
more attractive are easier cooperation between the parties and mentality.”
Attorneys A2 agrees when it comes to the injured party position and says:
“Deferred prosecution is of a really great usefulness, I had … deferred
prosecution in my practice. The attitude of the injured party is very
important here.”

Furthermore, Attorney A3 stresses one more advantage of the deferred
prosecution: “Both institutions are useful, I have experience with deferred
prosecution as well. Maybe it should be applied much more than the
agreement because its advantage is that it affects a person’s thinking, a
person thinks that next time it will be worst for him. The task of the state is
to act not just in a repressive way, but also to be preventive.”

On the other hand, some participants stress the advantages that they think plea
agreements have in comparison to deferred prosecution, primarily the existence of
judicial control of the whole process. They also express worry about the possible
misuse of the deferred prosecution institution. Judge J4 claims: “Both
institutions are good, with the agreement there is more control from the
court. With deferred prosecution we don’t know whether the person
committed a crime. He entered the procedure, fulfilled the obligation, and
paid. There may be misuse there. Much more than with the institution of the agreement where everything is protected by judicial control. But both are good in relation to the rights of parties”. Attorney A1 shares this opinion related to possible misuse, and explains it in the following way: “But this [deferred prosecution] can be misused as well, and here again we come to professionalism, professionals should work on the prosecution, and bad things should be resolved by being held accountable.” Judge J3 is also cautious when the application of both institutions is concerned: “Both institutions are good, but both require special attention. With deferred prosecution, as it is the case with plea agreements, they should be approached carefully.”

Finally, Prosecutor P1 notices that the accused quite often mix up the two institutions in practice until it is explained to them: “Suspects very often mix up these two institutions, in principle it must be explained to them every time. The defense attorney is, of course, involved in this.”

As can be seen from the participants’ answers, for both of these institutions they consider them useful in their own ways, having similarities but also differences. It is obvious that deferred prosecution is limited to a certain number of less serious crimes while plea bargaining was extended to almost all crimes not long ago. As Attorney A5 says: “…these institutions ‘touch’ each other but there is a difference in the sentence, both institutions are affirmative and may be of use to all sides.” Some participants believe that the extension of plea bargaining to almost all crimes will influence practice primarily in terms of the increased number of plea agreements concluded. Judge J2 says: “It [the changed legislation] should stimulate the greater implementation [of plea agreements].”

f) Suggestions for the future
When it comes to finding solutions to the identified problems, the participants suggest either very specific actions, primarily legislative changes that they would like to happen, or talk about more general proposals or desired tendencies in relation to what steps should be taken, where the effort should be put in, and where the “keys for resolving problems are hidden”.

Regarding proposed legislative changes, the participants are very specific. Some participants suggest allowing agreement conclusion until the end of the trial, as well as the introduction of the possibility of bargaining about the facts and the legal qualification of crime. Prosecutor P4 says the following in relation to this proposal: “What my legal dilemma or thinking is, whether it would be more efficient if it is possible to apply this legal institution until the end of the main hearing, and not practically until the beginning of the main hearing. So that you have a better opportunity to see what you have and don’t have, both the prosecutor and the accused. This would reduce the workload of the court, and everybody else.” S/he continues: “Furthermore, … now we negotiate about the conditions of the admission of guilt, I think they [prosecutors] should have the option to negotiate the crime itself. Let’s negotiate the crime!” Attorney A1 fully agrees with this: “The prosecutor, when adopting the order to open an investigation, indicates the facts and the legal qualification of crime therein. No prosecutor agreed about it, nor do any of these 60 to 70 agreements include an agreement on the legal qualification of the crime, where you can have negotiations on giving up some charges, on mitigating the legal qualification; maybe to negotiate the factual description of the crime, because in this description there are facts which I don’t want to admit but the crime still stands and then some less serious form of crime can be agreed. It may happen, if the prosecutor doesn’t have evidence for one part, I don’t want to admit that part, but I will admit another. In practice, the negotiations are narrowed down to negotiations about the criminal sanction.”
However, there are those who are not sure about this option, like Judge J3 who says: “It’s questionable to negotiate about the legal qualification of the crime. You have a factual description from which a certain qualification derives and that’s it…there are a very small number of crimes in practice where it could be some other qualification [rather than the original one which the prosecutor defined].”

Other participants’ proposals concern the injured party’s level of influence in the whole process. Specifically, Prosecutor P3 calls for the greater involvement of the injured party in negotiations and suggests the law be amended in this sense: “In my opinion, all the Criminal Procedure Code provisions are good except that the participation of the injured party in negotiations should be defined…I think the law should regulate for the injured party to be introduced to everything…at least for us to have that party’s opinion…”

Unlike Judge J4, who thinks that the introduction of the prosecutor’s duty to provide the indictment together with the plea agreement to the court (in cases when the agreement is concluded before the formal bringing up of the indictment) is a good solution\textsuperscript{113}, Prosecutor P5 criticizes it and suggests the opposite: “When it comes to legal provisions [changes]…this duty…that the indictment should be submitted with the agreement in cases when the indictment hasn’t been brought up yet, I don’t see the purpose of that, I think we can do well without that.”

Clear proposals for the adoption of some kind of prosecutorial standards for negotiating sentences in the plea bargaining process can also be heard from some participants, particularly from the already quoted\textsuperscript{114} Prosecutor P1 and Judge J1.

Additionally, Judge J1 suggests the introduction into the law of informal, more simple, negotiation practices that s/he describes\textsuperscript{115}, and by that giving these practices a formal obligatory character: “...and this thing that exists informally
should be copied into the plea agreement provisions and the law should be changed in that sense.”

In order to encourage attorneys to suggest plea bargaining to their clients when appropriate, Attorney A5 proposes the introduction of a special rate for attorneys’ plea bargaining services. S/he says: “As I said, the provisions are not a problem. I have suggestion to start a campaign, that all the actors are involved, and to amend certain provisions within the Bar Chamber Tariff where plea agreement services would be charged at 50% more than it is the case with other, regular things.”

Other participants’ proposals are of a more general character. Some of them are directed towards making the whole plea bargaining process simpler and less formal, as can be seen from the already quoted statements of Judge J1, Prosecutor P1 or Attorney A4.

Many participants propose more educational or promotional activities in this area, so that all the potential actors in this process are much more aware of it. In this context, Prosecutor P2 suggests the following: “It would be useful that in prison libraries, in addition to the Criminal Procedure Code and the Criminal Code, they [convicted recidivists] also get some kind of brochure that would explain what this institution means, to explain to them that if the agreement is not reached their confession cannot be further used as evidence against them, and that all the documents are then destroyed.” Attorney A2 believes that media exposure of the agreements may be useful: “I think it is good to announce information about the agreements in the media, so that people are being educated about this issue.” Her/his colleague, Attorney A4 shares the same opinion: “In this sense it would be needed to have some media presentation of this institution, through the words of judges, experts, academics…” On the other hand, Attorney A3 thinks that the education of all actors is important and says: “Education is important. We should organize a
round table discussion with the participation of all the professionals and by using our own practices, but also those of other counties.” Judge J5 thinks similarly: “Maybe to do some kind of promotion of this institution, I don’t know how, but something needs to be done. Maybe some training sessions. For example, when I heard about this topic at the seminar, it was actually one of the best I attended…everything looked so positive to me, and that there was a great potential for this in practice.” The earlier quotations of Attorney A5 imply the same opinion.

Additionally, proposals concerning the desired tendency of prosecutors to offer plea agreements to the category of recidivist as the ones most open to this institution are also given by Prosecutors P2 and P5, as already quoted.

The firm general proposal of making the sentencing policy more severe comes from Prosecutor P4 who says: “The key condition for everything is a more severe sentencing policy in the courts. As long as we don’t have that, we won’t have many agreements…the cure for better implementation is making the courts’ sentencing policy more severe.”

Furthermore, many earlier quotations clearly illustrate the participants’ general proposal directed towards increasing the motivation of prosecutors and attorneys to conclude agreements. However, the participants do not offer that many answers on how to do this.

The earlier quotations, specifically of Judge J4 and Attorney A1 demonstrate their strong message to the legislator inviting him to opt for either a fully adversarial or fully inquisitorial criminal procedure, and not to have a mixture of both, which they find to be very problematic in practice.

Finally, as can also be seen from some earlier quotations, the authority of prosecutors is directly or indirectly commented on by some participants. In line
with this, there are some general proposals related to strengthening prosecutorial authority for the sake of the more successful implementation of the plea bargaining institution. Attorney A3 says: “I think they [prosecutors] are not independent enough, they stick only and very strictly to the court practice...they are afraid how their supervisors will react, they are not free...it should be initiated that prosecutors are given the autonomy to adopt decisions...if somebody selected you to be a prosecutor, then you should be given autonomy including ...to conclude agreements with the attorney.”

Her/his colleague, Attorney A5 has a similar opinion: “The Heads of the Prosecutorial Offices must tell their prosecutors to conclude agreements, they should say ‘Conclude them, there’s no need to hide behind the courts’ decisions’. There’s nothing like this, if they started with this then everybody would be able to see that it works, there would be more cases where agreements would be concluded.”

4.3. Conclusion

The results presented above demonstrate the complexity of plea bargaining practice in Montenegro, and particularly of reasons for the non-implementation of this practice in the country. The analysis of interviews was a manageable, but still challenging task, bearing in mind the quite large amount of information received from participants. The discussion of the presented results in the following chapter, and final recommendations that are part of Chapter VI, are based on the complete interview information, as well as the direct impressions and observations of the researcher. The sophisticated research elements that influence the researcher’s final conclusions are quite often not possible to express in written form, but can hopefully be anticipated and “felt” by the readers of this work.
CHAPTER V
DISCUSSION OF KEY FINDINGS

5.1. A Few General Comments

Some of the goals of my research have already been partly answered in Chapter III through the relevant document analysis; those are analyzing plea bargaining legal regulations in Montenegro, and comparing plea bargaining legislation and practice in Montenegro with that of neighboring countries. However, these, as well as the remaining research goals, would hardly be fully reached without using the interviews as a research method. The interviews “put some light” on the reality when it comes to this practice in Montenegro. The interview results presented in the previous chapter, the discussion of the research results that follows in this chapter, and the relevant conclusions which will be part of Chapter VI, will provide answers in relation to the remaining research goals: the investigation of the level of use, usefulness and productiveness of plea bargaining practice in the Criminal Justice system of Montenegro; identification of the problems and successes and their causes in the application of plea bargaining in this country; and based on that, the provision of adequate conclusions and recommendations which can be useful in the further development of the practice and study of this issue in Montenegro. In general, the research represents a solid contribution to the overall literature in the plea bargaining field, particularly as no other authors have so far dealt with this issue while being specifically focused on Montenegro.

5.2. Limiting Factors

Before going into the discussion of the interview results, there are two limiting factors related to the influence and scope of this research that must be stressed. One obvious aggravating factor is the complete absence of previous research of this type and on this topic in Montenegro, and the very limited literature related to
the same or similar issues in the regional countries which are most adequate when it comes to comparative analysis. Another barrier to a larger research scope and influence is the very small number of plea agreements concluded in Montenegro. However, the identification of the reasons for this situation forms a large part of this research. In this context, the research will provide relevant conclusions and recommendations to both practitioners and future researchers in this area.

5.3. Key Issues Discovered

The legislative, statistical and comparative analysis and discussions from Chapter III clearly lead to three major conclusions. They speak for themselves, serve as a starting point and provide a framework for the key findings that come out of the interviews:

a) *The practice of plea bargaining is obviously not widespread in Montenegro, nor is this the case in neighboring Serbia and Croatia.* On the contrary, a very small number of criminal cases are being resolved this way in all three countries. Even though such a situation is quite obvious this finding represents a comparative contribution to universal plea bargaining research, as well as a starting point for all further findings and possible future actions in Montenegro when it comes to the relevant legal norms. It supports the mentioned research approach of the *Law-in-Action* and Davis’s (2017, p.3) discussion about the opposite direction of that research - from a recognized problem in reality towards specific findings, and consequently towards possible appropriate interventions in the “*law-in-books*”.

b) *The main motives of the legislator for introducing this legal instrument into the legal system of Montenegro were improving the efficiency and reducing the costs of criminal proceedings.* The legislator was clear about her/his motives in a number of relevant discussed documents which were
adopted by the government. When it comes to this finding, it indisputably goes in favor of supporters of plea bargaining who praise it for its efficiency and practicality, such as Easterbrook (1992, p.1975) whose discussions were mentioned in Chapter I. It is evident that both Montenegrin legislators, as well as actors in the plea bargaining process, believe in its practicality. Therefore, when it comes to this particular aspect of the practice they definitely take the side of plea bargaining supporters.

c) The plea bargaining legal solutions of Montenegro and Croatia are quite similar, and these systems seem more “closed” to plea bargaining in comparison to Serbia. When it comes to these three countries, as discussed, the openness to plea bargaining seem to be larger where there is a more adversarial set up of the criminal procedure. The Serbian criminal procedure is somewhat closer to the adversarial system in comparison to other two, having not just prosecutor led investigations like Montenegro and Croatia, but also cross-examination at the trial. In general, the results of examining the plea bargaining practices of Serbia and Croatia represent a contribution to overall universal comparative knowledge about plea bargaining, whose specific segments were discussed in Chapter I, through the elaboration of the experiences of different countries in this area.

These starting conclusions are followed up and significantly enriched by those findings that arise from the interviews conducted. The interviews and the data they provide in some cases demonstrate the presence of completely contrary opinions, even of members of the same professional groups, as well as the influence of personal experiences and surroundings on the participants’ attitudes about plea agreements. On the other hand, they clearly demonstrate the joint position of the participants in relation to a number of key issues. One factor important for the validity of the data gathered through interviews is the obvious honesty of the participants when they talk about their own negative characteristics
or practices which limit the use of plea bargaining in Montenegro. Keeping these general impressions in mind, the interview results undisputedly recognize the following:

\[ \text{d)} \quad \text{The existence of a generally positive opinion of all actors in relation to plea bargaining as such} \]

None of the interviewees is explicitly against plea bargaining and this practice being part of the Montenegrin legal system. It is completely clear from their answers, their thinking and reasoning as a whole. However, some concerns were expressed in relation to the fairness of the practice i.e. the question of truth and “natural justice” discussed in Chapter I. One of the judges (J4) who generally favors the institution and its practicality, clearly says: “What is the thing that is questionable to me? That is the existence of plea agreement and the principle of truth and justice… I would be for truth and justice.” Such concerns can be “felt” in the answers of some other interviewees as well. One of the prosecutors (P3), stressed that: “…what is important is that in our criminal procedure we do take care of fairness.” Those attitudes indirectly support the retributive justice theory requirements of being punished for a committed crime by a sentence adequate to the seriousness of the crime, elaborated in Chapter I through Kant (1999, p.138) and Hegel’s (1897, cited by Materni, 2013, p.276) discussions on the issue, but also through the observations of modern authors like Materni (2013, p 276) and Primoratz (1989, cited by Materni, 2013, p.278). Such positions obviously still retain their non-dominant place in the Montenegrin legal system and within its actors. This is the case with many other legal systems of the present time as well. When it comes to Montenegro this is to be expected, taking into account the current set-up of the criminal procedure which will be discussed further in Section d, and also the existence of the previously mentioned formal requirement for respecting the principle of truth and fairness defined in Article 16 of the Montenegrin Criminal Procedure Code.\[117\]
e) The existence of the negative influence of procedural formalism on plea bargaining practice

It is clear from the very explicit answers of all the participants that the legally defined procedure of plea bargaining in Montenegro is too formal. This is the joint observation of all the participants, even though this formalism represents the smallest burden for defense attorneys. These opinions are supported by the discovered existence of informal negotiation practices which represent shortcuts to the final judgment, and essentially the avoidance of plea agreement and the established formal procedure (elaborated in Chapter IV). The more widespread usage of deferred prosecution and the existence of the prevailing favorable opinion of prosecutors and even some defense attorneys about this practice is to some extent also linked to its formalism. With deferred prosecution, the procedure is less formal, considering that the criminal procedure in this situation formally does not even start. In addition to this, with deferred prosecution, the prosecutors do have guidelines on how to act (the Rules on Deferred Prosecution mentioned in Chapter III), which makes the whole situation much easier to handle for all the sides involved.

This finding definitely contributes to comparative analyses of the formalism of the plea bargaining process discussed in Chapter I through presenting the experiences of the U.S. and a number of other countries mentioned in Appendix A, as well as through presenting a historical overview of this practice. A formal statutory regulation of plea bargaining practice is generally speaking a final requirement in countries using civil law, while it is not a predominant concern for the adversarial legal systems. However, this finding proves that strict formal regulation may be a barrier to the application of any practice including plea bargaining, and that quite often any legal institution finds its way towards its further development through the establishment of informal practices. Additionally, this finding also takes us back to the discussions of the concepts of the “Law-in-Books” and the “Law-in-Action”, and how important it is to observe
social reality, as well as practices and needs, in order to shape, adapt, understand, and interpret legal norms better.

\[ \text{f) } \text{The existence of the negative influence of the lenient sentencing policy of the courts on plea bargaining practice} \]

It can be concluded that the sentencing policy of the courts plays some role in the whole process i.e. it demotivates prosecutors to conclude plea agreements. This was stressed by all the participants. However, it is evident from the interviews that there is an open call from judges to try with the lower sentences than the expected court ones are. Judges explicitly stress the passive role of prosecutors in this context. Some say that prosecutors “love” their charges and that they are “sentimentally attached” to them, as quoted earlier (J4); some even stress that the agreed sentences in some cases were the same as the ones the court and they themselves would probably order after the trial. In this context, as was already stressed, one judge (J3) claims: “I would, for example, order the same [sentence]”. On the other hand, defense attorneys claim that the sentencing policy is, as one attorney says, just “an alibi” for prosecutors (A5). In general, it seems that it does have an effect, but also that prosecutors in many cases stick to their positions in terms of sentence and are not willing to try to go just a little bit “under” the typical sentence in a specific case. However, some maneuvering space seems to exist; as one prosecutor says based on her/his own experience: “The key is to go below some practice when it comes to sentence, with negotiation we would go lower, by a month or two, and even that meant something to them [accused].” (P3) Furthermore, the expectation that sentencing policy will become more severe is not something to fully rely on in the future. When talking about sentencing policy becoming more severe, however, there are some signs of this happening as well, according to the results of the interviews. Specifically, as one defense attorney recognizes: “lately there has been a slightly more severe sentencing policy present” (A4). In order to illustrate this s/he used a specific case from her/his practice. One prosecutor (P5) also recognized sentencing policy becoming more severe lately: “…sentencing policy, it was
really lenient, now it’s a little bit more severe”. This relatively lenient sentencing policy does have an influence, but it obviously cannot be a complete excuse for not trying to find some “maneuvering space” when it comes to sentencing in the plea bargaining process.

This finding can be linked and it contributes to the general discussions on the role of sentencing policy in the application of plea bargaining. In particular, the coerciveness of the U.S. legal system in this context was discussed in Chapter I with reference to the positions of Alschuler (1981, p.705), Lynch (2003, p.24), Scott and Stuntz (1992, p.1919-1921), and others on this issue. This finding illustrates the possibility that in Montenegro there is exactly the opposite situation in comparison to the U.S. where, as some authors believe, the severe threatened sentences cause a greater use of plea agreements which are seen as a “safer way” for the accused in that country. As can be concluded from the experiences of the Montenegrin participants, there is a possibility that a certain level of non-coerciveness of the system in this sense might exist, or even better to say – that discouragement exists where the use of plea agreements is concerned through the system’s lenient sentencing policy. In any case, it is evident that discussions about the influence of sentencing on application of plea bargaining are universal and have their own strong reasoning.

8) The existence of the general negative influence of the set-up of the criminal procedure in Montenegro on plea bargaining practice

An issue which has been mentioned many times in this work, particularly in Chapter III, is the current set-up of the Montenegrin criminal procedure, and the role of the principle of determining the truth in this system. This issue emerged from the answers of the interviewed participants, including judges and prosecutors. The main observation of some of them in relation to the current criminal procedure in Montenegro is that it is actually Canivet’s (2003, p.941) “hybridized” form of criminal procedure discussed in Chapter I. One judge (J4) explicitly said that combining plea bargaining and the principle of determining the
truth, still the leading one in the Montenegrin criminal procedure, is not functional, and that the solution would be to cancel this principle, introduce cross-examination and, through that, simply to transfer to a different type of criminal procedure, the adversarial one. S/he concludes: “I don’t know why we don’t immediately transfer to something new, instead of doing it gradually and slowly.” In such a procedure, in her/his opinion, plea bargaining would function much better. One attorney noted this mixture of inquisitorial and adversarial elements in the Montenegrin criminal procedure as a huge problem and main “culprit” for the non-application of plea bargaining and the existence of many other practical problems. S/he says: “Our Criminal Procedure Code is a real deception. Prosecutorial investigation and that part is one thing, and everything else remained the same. The position of the accused under this law ... is based on the principle of inequality.” (A1) S/he obviously believes that the criminal procedure set-up gives a more powerful role to prosecutors and produces an inequality between the sides in this process, just as a number of U.S. authors argue, including Burke (2007, p.183-211) whose views were discussed in Chapter I. As already mentioned, one prosecutor, it seems somewhat unconsciously, at one moment said: “What is important is that in our criminal procedure we take care of fairness, so it actually determines everything somewhere down the line.” (P3) That is actually the truth and the overall impression. Prosecutors in Montenegro seem to be reluctant to bargain because it never fully satisfies the requirements of justice and fairness linked to the principle of determining the truth in the Montenegrin criminal procedure.

Another question is: Whether there is enough “maneuvering space” for plea bargaining in the existing situation, without leaving the principle of determining the truth as the leading one in the criminal procedure? Probably yes, particularly with the recent extension of the practice to almost all crimes, but only time will show that. This could be the topic of a separate future research.
One more question is: Whether these same “worries” would still exist in a
criminal procedure “released” from the principle of determining the truth? The
U.S. experiences and academic discussions prove that issues of justice and
fairness are eternal and that they would probably still remain present even in this
“changed” system. It must be taken into account, though, that the sentencing
policy of the U.S. is quite severe, so it is huge incentive for the accused to
bargain.

Furthermore, in this context, it would be interesting to observe and research the
implementation of plea bargaining in the coming years in Serbia, which has
recently significantly backed away from the typical civil law inquisitorial system.
Probably, the general approach when it comes to Montenegro should be to try to
“find” and further develop its own type of plea bargaining, one that is adequate to
the existing, still predominantly civil law system.

Nevertheless, this finding clearly contributes to the previously mentioned general
academic and theoretical discussions about the issues of innocence and truth and
justice, and discussions specifically focused on innocence and truth in the context
of plea bargaining. It is yet another demonstration that those issues are popular
nowadays and in different legal systems, as they have always been in the past.
This finding is also fully in line with Givati’s (2011, p.21) conclusion in relation
to the perception of innocence discussed in Chapter I. Specifically, from the
answers of the Montenegrin judges and prosecutors it is obvious that they are very
much concerned about seeking the truth i.e. primarily that guilty people are not
left unpunished, and such concerns definitely arise from the set-up of the criminal
process. Such a concern for the truth and for justice seems to be eternal, and are
seen by many as incompatible with plea bargaining.

h) The existence of problematic relationships between prosecutors and
defense attorneys when it comes to plea bargaining
Another aspect which emerged in the analysis of plea bargaining practice in Montenegro is the relationship between prosecutors and defense attorneys in relation to this practice. During the interviews, quite often the very first thing which the majority of members of both groups would do is blame other side for the failure of plea bargaining. Both sides were not “shy” when it came to criticizing the other side. In this sense, the most creative relevant illustrative terminological constructions came from some “theatrical” attorneys; for example they claim that prosecutors perceive attorneys as “a crowd of semi-criminals” and “bluffers”, and that prosecutors are “conservative… non-creative”, and so on (A5). This attorney’s observation was also that prosecutors “cannot accept bargaining with us [defense attorneys].” On the other hand, prosecutors were more sophisticated in this sense so, for example, they say “…attorneys want to put responsibility on the courts” (P2) or “Attorneys obviously like to earn money, and they don’t propose agreements” (P3). It is not common for these two sides to work in the spirit of cooperation, it is expected that they are confronted sides which argumentatively and in line with the rules “fight” in the arena called “the court”. However, plea bargaining represents an alternative to classical criminal proceedings and implies a certain level of cooperation between prosecutors and attorneys.

Regardless of the obvious lack of this cooperation, the totality of the participants’ answers gives hope that there is space for that kind of cooperation in the practice of Montenegro. Amongst other things, both sides agree that the focus of future activities should be on bringing this concept closer to everybody, and explaining that plea bargaining does mean “jumping out” of regular roles and cooperation with other side in the interest of this efficient way of reaching justice. As one defense attorney suggests: “It’s necessary to seriously get plea agreements closer to defense attorneys…that they understand…that the institution gives the chance for a faster ending to the case.” (A5)

It can be said that this finding is somewhat specific to Montenegro. In all the literature discussed in Chapter I, no other consulted author refers to the issue of a
lack of trust between the prosecutors and defense attorneys in this context. Many authors do discuss the role of prosecutors in this process, and some of them see it as a dominant one shaping the whole process. (Burke, 2007, p.183-211).

Alschuler (1968, p.68) is also one of those authors who believes that prosecutors have a key role in plea bargaining. As he says: “Defense attorneys…are not equal competitors in the game of deception.” He justifies his position by explaining that, unlike attorneys, prosecutors have a whole state-supported system for investigation standing behind them, and that, as he believes, attorneys need to have good personal relationships with prosecutors in order to be successful with plea bargaining.

However, in order to further research this aspect, a deeper examination of the relevant experiences of primarily civil law countries is needed, which this research does not allow due to its limited scope. Regardless of that, this finding definitely represent an interesting contribution to the literature discussions on factors which influence the application of plea bargaining. It will be briefly touched upon again below in Section J in the context of the obvious need for further education in this area in Montenegro.

i) The potential existence of the limited negative influence of the public and mentality on plea bargaining practice

When it comes to the existence of the influence of the public and mentality on plea bargaining in Montenegro, it cannot be called a firm finding of this research since it’s based more on participants’ impressions and observations, and less on their own personal experiences. However, these impressions are quite strong, sometimes they do rely on personal experiences, and are present for the majority of participants, so they do deserve some elaboration. They are also the result of the demonstrated openness of the participants during the interviews.

Very creative terminological illustrations can be seen from all the participants when it to comes to “people”, the media and the public in general. Some of them
are on verge of being humorous like, for example, those already stressed, that the injured party likes to see the accused “on the grill” at the trial (P5), to those that “here everybody wants to go to court” (J5) or “journalists are not professional, they need sensational titles only to create benefit for themselves” (J1). However, there are some conclusions arising from the answers that are quite significant. Apart from both judges and defense attorneys’ estimation that, when deciding about plea bargaining, prosecutors are influenced by the public, in terms of demotivation, it was also confirmed by some prosecutors themselves. One prosecutor said: “There is no direct pressure from the public, but for every case we do take care of the fact of how it will be interpreted by the public.” (P1) What goes in favor of such conclusion is also the mentioned observation of attorneys that prosecutors are afraid of the public reaction to some agreements i.e. that they might be suspected of some improper activities that involve the accused and her/his attorney.

Another interesting estimation of both judges and attorneys is related to the existence of the fear of prosecutors of their own supervisors and in line with that for their own position/job in situations when they take certain steps, including those related to plea bargaining in some cases. It is a pretty strong “accusation” and is still just the impression of judges and attorneys; there are no other issues or sources provided through this research that would support these impressions. In some way, such impressions may be a result of the hierarchical functioning of the prosecutorial system in Montenegro, where each prosecutor is directly responsible to her/his immediate supervisor, with this line of responsibility going all the way up to the Supreme State Prosecutor in the end. In this sense, one of the very good suggestions of defense attorneys was for supervisors to encourage prosecutors underneath them to use this practice more, which according to them never happens. As one defense attorney suggests: “... Heads of Prosecution Offices... should say......’Conclude the agreement, there’s no need to hide behind the courts’ decisions.’” (A5).
Additionally, the issue of Montenegrin mentality in a wider sense is also an interesting one, which indirectly “peeped out” from the totality of the answers and impressions of the participants. Many participants claim that people love to go to trial in Montenegro; that they prefer to “attack”, as one prosecutor says, and favor conflict over settlement (P2); and that it is a really obvious thing in Montenegro that a great number of people go to court. “Everybody wants to go to court” as one judge says (J5). Some attorneys explicitly say that the prosecutors’ mindset is definitely based on some mental elements, like fear of their supervisor, and in line with that there is this always present question on the prosecutor’s side: Will somebody think that this sentence I negotiated is too large a concession?

Apart from that, some other issues mentioned during the interviews may be linked to mentality. For example, one prosecutor stresses that there is a commonly present unpreparedness of the accused to confess crimes and s/he would always rather deflect guilt even in cases where the evidence is strong; as this prosecutor says: “He [accused] doesn’t want to confess even in cases when he is obviously guilty”(P2).

The very interesting observation of some prosecutors that comes out of their own plea bargaining cases is that the accused accepts agreement in order not to be publicly exposed, and the injured party also favors it, but in order to be publically exposed as a victim. (P5) As this prosecutor says: “Avoiding the media was the main motive to them [the accused].”, or “The court proceeding is satisfaction for the injured party, especially when the public is interested. Newspapers write….the victim said this and that….it is important to the injured party that other people know what he went through, he thinks that through the agreement he lost…”. This might be linked to the fact that Montenegro is a very small country and to some extent a traditional society in which “shame” is still an important and influential factor in people’s behavior, while “the role of the brave victim” causes social attention in that it is a sort of measure of endurance, pride and dignity. The “opinion” of people is very important in small societies which function in a very
specific way defined by the existence of a small number of people in a relatively small space. As could be seen from the interviews even some prosecutors think about “what people will say”.

Conservatism is the word heard during the interviews, used primarily by judges and defense attorneys. Participants “attached” this characteristic to all the actors in the process, but unfortunately in the majority of cases mostly to prosecutors only. This impression of prosecutors being conservative and not ready to accept new things was naturally strongly refuted by prosecutors themselves. However, this characteristic may be linked to the fact that, in general, by nature, structures like the judiciary and prosecution offices are least able to change remembering that they are large and complex state structures with powerful roles.

The existence of the above described influence of the media, public and mentality on plea bargaining practice in Montenegro is obviously not a firm conclusion based on clear and strong research evidence. The interviews and comments of the participants refer to a large potential for the existence of such influence in reality, which is worth mentioning when discussing this practice in Montenegro. It can be said that this finding does contribute to the literature discussions on the concepts of the “Law-in-Books” and the “Law-in-Action”, including those of Halperin (2004, p.76), Silbey (2003, p.860), and other previously mentioned authors. It generally refers to the importance of social factors in creating and applying the law. It can be seen that some social factors, in this case in Montenegro, may discourage the application of the existing legal provisions. Furthermore, this finding potentially opens up another questions suitable for further research, and that is how and whether the social context was actually analyzed well enough before creating the “law-in-books” in this case i.e. the introduction of plea bargaining provisions in the legal system of the country.

\[ j \] \textit{The existence of a passive approach from prosecutors and defense attorneys when it comes to plea bargaining practice}
One of the quite generally defined reasons for the non-application of plea bargaining practice in Montenegro which the majority of participants clearly identified is the passiveness of both prosecutors and defense attorneys in this regard. This conclusion inevitably emerges from the above elaborated findings. The causes of this passiveness have been directly or indirectly recognized and expressed by the actors in the process themselves, and they include: the subjective concern for reaching justice and truth as the purpose of the criminal proceeding; the formalism of the procedure; conflicting relations between the plea bargaining legal institution and the set-up of the Montenegrin criminal procedure; the relatively lenient sentencing policy of the courts, and the uncooperative relationship between prosecutors and defense attorneys when it comes to plea agreements.

The focus of the passiveness critique is logically on prosecutors and defense attorneys (and their defendants) as those who initiate and conclude agreements, while the judges’ position in the whole process is by nature the most comfortable one. Even though there are judges who did express concerns about justice and fairness issues in relation to plea bargaining, as noted on a few occasions earlier, in principle what can be concluded from the interviews is that judges do have a positive attitude towards the agreements. As they stress, this is primarily due to the fact that it brings significantly less work to them. Some of their statements illustrate this: “The biggest advantage for the court is the shorter procedure and writing of judgments, which are much smaller in scope.” (J2), or “In the case of the agreement, for the court, the procedure is definitely easier…the number of court sessions is lower, the presence of the parties is less…” (J4). It is expected that judges will always act based on the law and reject agreements only when they are contrary to the legally defined requirements. This was confirmed by all participants in their answers, but also by the fact that there is a negligible number of proposed agreements which were rejected or dismissed in practice (elaborated in Chapter III). This recognized position of judges supports Canivet’s (2003, p.940-941) discussions about the reasons for the worldwide spread of the plea
bargaining practice mentioned in Chapter I - that is, that judges are being
universally burdened with the huge number of cases which makes them primarily
focus on how to deal with their situation quickly, rather than having time to deal
with the essential issues of justice in each case. The biggest problem in
Montenegro obviously lies within the individual, subjective relationship of
prosecutors and defense attorneys towards plea agreements, as well as within the
somewhat complicated relationship between members of these two groups.

When it comes to the subjective relations of prosecutors and defense attorneys
towards plea agreements, in addition to all the earlier information presented in
this chapter, both groups did express an introspective, general criticism of the
professional groups they belong to in relation to some segments of the plea
bargaining process. Even though those are general statements not directly linked
to the interviewees, it is worth mentioning them since they might reflect reality
and contribute to a better understanding of the practice.

In this regard, as could be read earlier, some attorneys openly claim that financial
motives are predominantly leading a number of attorneys when it comes to plea
bargaining, and that going to trials simply pays off better for attorneys. This may
refer to the potential existence of truly unethical and unprofessional practices.
One attorney summarizes the problems related to defense attorneys and plea
bargaining in one sentence: “They [defense attorneys] are simply led by inertia,
subjectivism and opportunism.”(A5) There are also some attorneys’ claims about
the lack of knowledge of their colleagues in this area.

On the other hand, when it comes to prosecutors, they never explicitly talk about
their own professional group’s negative characteristic in relation to plea
bargaining. Apart from noticing the general passiveness of both sides of the
process, they mostly look for reasons for the practice’s unsuccessfulness in factors
“outside themselves” and outside of their professional group. In some of
prosecutors’ answers, a certain level of reluctance to accept some aspects of the
process can be sensed. One prosecutor, for example, said that s/he does not like
bargaining with attorneys “like at the market, but negotiations” (P5). It also looks like some prosecutors opt for plea bargaining only when everything is “clear” in terms of the evidence and confession, and when they practically do not need to negotiate at all and consequently reduce the sentence to larger degree. One prosecutor actually stresses that it was like that with all her/his cases when concluding agreements: “…with all the agreements, it’s not just that the accused accepted the agreement but we had all the evidence and the confession, and then we opted for an agreement” (P3). Another prosecutor says: “It is not the purpose of this institution to get a much lower sentence” (P5). All this ties in with the observation of some attorneys who claim that prosecutors cannot accept bargaining with them, as well as the observation of one judge who says: “Prosecutors are one party, and in front of the court they are equal with the other side; judges see it that way and prosecutors don’t like it.” (J1)

The general passiveness of prosecutors when it comes to plea bargaining may be explained by the set-up of the criminal procedure in the past, where prosecutors did not have an active role, but on the contrary quite a passive one. They were not responsible for the investigation, the investigative judges were; their role was to go to trial with the evidence gathered by investigative judges, and as prosecutors represent the state during the trial which was led by a judge. Based on my personal experience of the courts, in practice, in most cases, it would mainly be reduced to making opening and closing remarks with a “few” questions asked in between, and all this keeping in mind that the crimes of those times were much simpler than today.

The passiveness of prosecutors and defense attorneys when it comes to plea bargaining and the key causes of this passiveness have obviously been expressed by the interviewees and identified, but there is always the risk of some being unexpressed by the actors themselves, and therefore they may remain unrevealed.

This discovered problem of the passiveness of both sides involved in the plea bargaining process in Montenegro, and to some extent the above-mentioned
problematic relationship between prosecutors and defense attorneys, potentially points to Canivet’s (2003, p.941) “hybridized” criminal procedure discussed in Chapter I, and the consequent resistance to unfamiliar or non-inherited legal practices. The unfamiliarity is further linked to education and training. To be specific, all the interviewed candidates did not show any wider knowledge about the practice apart from what the legal norms tell them about it. For example, none of them referred to the practice of the ECoHR discussed in Chapter I in her/his answers as an argument for their opinion. This again indirectly leads to the issues of the “Law-in-Books” and the “Law-in-Action”, and the lack of relevant systematic contextual examination and analysis prior to the introduction of a completely new legal institution in the system. Many of the interviewees themselves directly or indirectly referred to this problem in their answers when, for example, they talked about the need for future training in this field. This finally leads to a conclusion which is relevant to future practice – that there is a recognized need for further public and professional education in this field in order to bring the legally available practice closer to those who are supposed to implement it.

5.4. Conclusion

The research results are obviously interesting and are “filled out” by the “energetic” and “confronting” opinions and experiences of participants. Indeed, the goals of the research have been mostly reached, and some useful specific answers have been provided. There were no illusions on my part that this research would reveal the totality of the issues in question or fully identify solutions to the recognized problems, but in principle, it has enabled me to formulate some specific conclusions, presented in the next chapter. They will hopefully be found beneficial when it comes to the future application of plea bargaining in Montenegro, as well as for potential future research in this field.
Finally, the research contributes to the overall knowledge about plea bargaining primarily bearing in mind that it reveals for the first time how this practice is applied in Montenegro, but to some extent it also adds to the existing knowledge about this practice in the neighboring countries of Serbia and Croatia. It also clearly expands the universal discussions and debates about some of the specific issues mentioned above related to plea bargaining, which obviously exist in Montenegro as well.
CHAPTER VI

CONCLUSION

In this concluding chapter, elaborated recommendations in relation to future steps that may be taken in the area of plea bargaining in Montenegro will be presented. Based on the determined research goals and the research findings reached, a set of actions in the plea bargaining field that might be taken by practitioners and legislators, as well as the academic community of Montenegro will be presented in this chapter. The leading goal in formulating the final recommendations is to improve the application of this practice in the country. As can be concluded from the previous chapters, improving this practice is the indisputable wish of all the interviewed participants and Montenegrin legislators, but also hopefully of those Montenegrin academics whose voices are yet to be heard.

6.1. Research Goals - How have they been reached?

Before providing the final recommendations, it is useful to recall the initially determined research goals and the ways they have been reached in my research.

The first two research goals, analyzing the quality of the legal regulation of plea bargaining in Montenegro, and comparing plea bargaining practice in Montenegro with the practice in neighboring countries, Serbia and Croatia were crucial initial steps which together with the plea bargaining literature review in Chapter I and the methodology review in Chapter II provided context for the interviews that followed. Through the method of document analysis and relevant discussion in Chapter III, the reader was introduced to the reasons for the introduction of plea bargaining in Montenegro, the ways in which this practice is regulated in the country, and what the differences are in comparison to Serbia and Croatia, which have similar legal systems. The reader was able to learn that plea agreements are not a widespread practice in Montenegro, that a very small number of criminal cases is completed this way, and that the legal regulation of
the practice in the country is strongly affected by the general concept of the existing criminal procedure, being based on civil law with some adversarial elements in the investigation phase. The relevant experiences of Serbia and Croatia were also presented to the reader who was able to conclude that plea bargaining is not used to a larger extent in both of these countries either. Additionally, in Chapter III it could be seen that the legal solutions of Montenegro and Croatia in this area are quite similar, while the Serbian procedure is somewhat different, since it is closer to the adversarial system having not just prosecutor led investigations, like Montenegro and Croatia, but also cross-examination at the trial.

The third research goal of investigating the level of use, usefulness and productiveness of the plea bargaining institution in the criminal justice system of Montenegro was partly reached through the mentioned document analysis and discussion in Chapter III, which clearly showed that the level of usage of this legal instrument is quite low in Montenegro. However, the usefulness and productiveness of the plea bargaining institution could only be examined through the experiences of actors in this process i.e. the interviews conducted with them. The interviews, being the key part of this research, led to fulfillment of the third, but also the remaining research goals: identifying problems in the application of plea bargaining in Montenegro, as well as successful schemes in the implementation of this practice; discovering the causes of challenges in the application of plea bargaining in Montenegro, as well as factors of success in the implementation of this practice; and in line with these two goals, providing adequate conclusions and recommendations which can be useful in the further development of the practice and study of this issue in Montenegro. The interviews with judges, prosecutors and defense attorneys who have practical experience with plea agreements managed to reveal the real practices, positions, thinking and attitudes hidden behind the legal norms and documents.

Through relevant presentations, analysis, elaborations and discussions in all the chapters, the key research findings were shaped and elaborated in Chapter V:
a) The plea bargaining practice is not widespread in Montenegro, nor is this the case in neighboring Serbia and Croatia;
b) The main motives of the legislator for the introduction of this legal instrument into the legal system of Montenegro were improving efficiency and reducing the costs of the criminal proceedings;
c) The plea bargaining legal solutions of Montenegro and Croatia are quite similar, and these systems seem more “closed” to plea bargaining in comparison to Serbia;
d) The existence of a generally positive opinion of all actors in relation to plea bargaining as such;
e) The existence of the negative influence of procedural formalism on plea bargaining practice;
f) The existence of the negative influence of the lenient sentencing policy of courts on plea bargaining practice;
g) The existence of the general negative influence of the set-up of the criminal procedure in Montenegro on plea bargaining practice;
h) The existence of problematic relationships between prosecutors and defense attorneys when it comes to plea bargaining;
i) The potential existence of the limited negative influence of the public and mentality on plea bargaining practice; and
j) The existence of a passive approach from prosecutors and defense attorneys when it comes to plea bargaining practice.

Based on the above summarized research goals and findings, the relevant recommendations which will be presented further in this chapter have been formulated.

6.2. Implications for Practice

In considering the key implications for practice when it comes to this research, it was first necessary to take into account the recommendations which were given by the interviewed participants themselves. Their voice is the major one in this
process since it is expected that they best know what challenges they face in practice, and what needs to be done in order to overcome them. The prevailing suggestions of the most important actors in the process i.e. prosecutors and defense attorneys have primarily been taken into account when discussing implications for the future, but judicial suggestions have not been excluded. A few of the participants’ proposals are neglected in this part for various justified reasons (they are presented in more detail in Appendix S). All of these recommendations reflect the totality of the participants’ answers and comments, the existing Montenegrin legislative framework, as well as the comparison of relevant Montenegrin legal solutions with those in neighboring countries.

It is important to emphasize that the following recommendations are based on the existing set-up of the Montenegrin criminal procedure discussed earlier. The question of whether the Montenegrin Criminal Justice system should or will transfer to a fully adversarial criminal procedure is one which is hard to answer. Due to the complexity and potentially far reaching effects of such a transfer, it is not easy to suggest this big systematic change even though it looks attractive in some of its aspects. Additionally, the fact that the existing CPC was adopted and amended relatively recently leads to the conclusion that the Montenegrin criminal procedure will keep its current shape for many years. Therefore, identifying practical suggestions which are realistic and potentially useful in the existing set-up of the criminal procedure in Montenegro was the guiding idea.

Furthermore, all the identified practical suggestions are directed towards the promotion and further development of plea bargaining practice in Montenegro. The intention and wish to keep this legal instrument as part of the Montenegrin criminal procedure are reflected in the participants’ interviews, as well as in the general direction chosen by the Montenegrin legislator (this was discussed in Chapter III). This is a legal instrument which is obviously part of not just reality but also the future of the Montenegrin Criminal Justice system.

Apart from the above presented issues, the obvious lack of previous research in this area in Montenegro adds an additional burden when it comes to shaping
conclusions and suggestions in this research. Some of the recommendations and research segments presented in this work may be able to generate ideas for future research in this field.

Finally, many factors and elements on which the following proposals are based have already been largely elaborated and discussed in the earlier chapters. Bearing this in mind, all the recommendations that will be presented further are the logical outcome of these earlier discussions, and therefore their justification will not be extensive.

Based on their goal, the research recommendations can be grouped in the following categories:

   a) Legislative and other similar recommendations;
   b) Educational;
   c) Promotional;
   d) Academic.

Legislative and Other Similar Recommendations

- To allow plea bargaining to be applied until the end of the main hearing i.e. the trial
- To allow negotiation on the circumstances of the case and consequently on the legal qualification of the crime

These two recommendations related to amendments to the current plea bargaining provisions have the purpose of enlarging the potential scope of the application of plea bargaining.

It is currently allowed to conclude agreement only until the first session of the main hearing i.e. the beginning of the trial, and it is limited to negotiation about criminal sanctions, meaning that the accused can only confess the crime which is initially legally qualified by the prosecutor. The proposed widening of this
application should not bring any harm to the practice, but can only potentially contribute to its development. In relation to the possibility of plea bargaining being applied until the end of the trial, this has already been discussed in the previous chapters, and was proposed by the prosecutors and defense attorneys themselves. We should recall that the proposed change might be a more practical solution since quite often the trial i.e. the presentation and elaboration of evidence, convincingly demonstrates reasons for simplifying the process and concluding the agreement. The trials, particularly those that involve large number of accused, witnesses and experts, may last a long time and become complicated.

As for another proposed change to allow negotiation on the circumstances of the case and the legal qualification of the crime, it was also earlier discussed and suggested by prosecutors and defense attorneys, but also by some judges. Some might criticize this proposal. However, this solution may primarily be useful in terms of opting for a less severe rather than more severe form of the single crime in question. It can often happen that the accused is, for example, willing to confess one act but not another, in which case s/he can still be accused of the same crime i.e. a less severe form of the obvious crime in question. In some situations where the evidence is weak, negotiating case circumstances and the legal qualification of the crime might be a more practical solution for prosecutor that sticking to more severe charges and potentially losing the case.

- To reduce the formalism of the procedure

The formalism of the procedure was clearly marked as a problem by many research participants. It was also demonstrated through the spontaneous creation of earlier mentioned informal practices in the courts which essentially represent plea bargaining; they basically represent the avoidance of procedural formalism. In line with this and the analysis of the relevant provisions in the earlier chapters, it can be concluded that there is space for a reduction in formalism. For example, it may be through canceling the acceptance of the plea agreement at two levels (first through the court ruling, and then the court judgment), or through a reduction in the number of documents and forms that are written and adopted
during the process itself. A reduction of formalism in the plea bargaining process is one of the proposals that has the potential to be implemented in practice relatively easily.

- **To adopt official guidelines by the Office of Supreme State Prosecutor related to plea bargaining application**

Through the interviews with participants in this research, it was easy to notice that Montenegrin prosecutors feel a certain type of worry and uncertainty when it comes to using plea bargaining in practice. Amongst other things, as some of them suggested, this can significantly be reduced by providing them with some major guidelines on how to act and how to handle this process. This could be done through the issuance of some kind of guiding document by the Supreme State Prosecutor of Montenegro. For example, as was earlier noted, precisely this was done in Croatia by their Chief State Prosecutor. Such guidelines would not just contribute to uniformity in the prosecutorial application of this legal institution throughout the country, but what is maybe more important, it would be a sort of encouragement for prosecutors to start using the agreements more. The lack of such encouragement was clearly recognized by almost all the participants, including prosecutors themselves. The existing Montenegrin guidelines about deferred prosecution practice are seen as a potentially encouraging factor, particularly bearing in mind that deferred prosecution is much more widely applied in practice in comparison to plea bargaining. Even though the existence of guidelines would obviously not be a deciding factor when it comes to larger plea bargaining application, it would surely be an influential one, since prosecutors clearly expressed complains about the lack of any kind of guidance in this area.

- **To (perhaps) amend the Defense Attorneys’ Tariff**

The amendments that are proposed here are those suggested by some attorneys, and that is the introduction of higher attorneys’ rates for plea bargaining related legal services in order to encourage the conclusion of plea agreements. When it comes to this recommendation, it can be interpreted as indirect verification of the
potentially unethical behavior of some Montenegrin attorneys who, according to the impressions of research participants, led by financial interest, opt rather for a trial than an agreement. Consequently, it can also mean favoring one side or profession in this process i.e. the attorneys’ one. However, this practice can be justified, keeping in mind that more or less the same amount of money would ultimately be paid to the attorney for her/his services. In other words, defense attorney would earn a similar amount of money from an average length trial as from the plea agreement (in the case of the existence of higher attorneys’ rates for plea bargaining legal services). This is maybe a questionable recommendation in some of its aspects, but it can contribute to the significantly larger application of plea bargaining in practice, and consequently to releasing the Criminal Justice system from very long and expensive criminal trials.

Educational recommendations

- To continuously organize plea bargaining related training for prosecutors and defense attorneys, as well as judges when deemed appropriate

Almost all the interviewees stress training as an important element that can affect the future application of plea bargaining. In their comments, most of the participants call for educational activities in this area. Many of them stress that in the initial period when plea bargaining was introduced into the Montenegrin legal system, there were many relevant training events for prosecutors, defense attorneys and judges. However, as they claim, such activities do not exist to the needed extent at present. In line with this, the general recommendation for the Judicial Training Center of Montenegro as the key national judicial training institution is to continue to include this topic in its yearly Criminal Law Curriculum, but with more attention being paid to it in practical curriculum implementation. Furthermore, in line with the research findings, the special focus of the training programs in this area should be on: a) understanding and developing cooperative relationships between prosecutors and defense attorneys
in the process of plea bargaining; b) learning about the practices of other relevant countries; c) recognizing situations in which plea bargaining is the most practical solution like, for example, the earlier discussed recidivists category of accused, and d) the influence of the sentencing policy of courts on plea bargaining.

Educational activities cannot be expected to cause a revolution when it comes to plea bargaining application, but they have a specific type of importance. They have the potential to “deliver” specific results like, for example, legislative proposals, but also to cause certain thinking and develop certain subjective reactions of participants in relation to the topic discussed. In this context, one of the interviewed judges says: “When, for example, I heard about this topic at the seminars…it all looked so positive and that there was a potential for that in practice.” (J5).

Promotional Recommendations

- To organize promotional activities related to plea bargaining

Even though this proposal is nominated by many interviewed participants, at first glance it may provoke the question of whether it is appropriate to promote something that exists in the law, especially in the criminal law. However, if plea bargaining is understood as an alternative to the classical criminal trail (which is usually exhausting for all of its actors), then the promotion of this legal institution is acceptable. One of the interviewed attorneys says: “Anybody who hasn’t been in a courtroom cannot know how exhausting it is to actually reach the judgment.” (A3) Similarly, mediation is strongly promoted as an alternative way of resolving civil, but also criminal cases in many countries including Montenegro. In this context, it would be useful for the Ministry of Justice of Montenegro, as the “neutral party” in the whole process and the key criminal law legislator which supports this institution, to start a kind of promotional campaign. This could potentially include the delivery and distribution of more informative brochures to the courts and prosecution offices (a limited number have already been
distributed), organizing public debates and discussions on this topic including TV and radio debates, promotion through the newspapers, and so on. These activities, just like the educational ones, cannot be expected to bring tremendous changes, but may still motivate a number of prosecutors and the accused and their defense attorneys to try plea bargaining. It would be a positive result which could lead to fewer long and expensive trials.

**Academic Recommendations**

- **Encouraging future research on this topic**

The final recommendation is related to the need for future research of plea bargaining in Montenegro. This is primarily bearing in mind the already mentioned key limiting factors of this research: the complete absence of previous research of this type and on this topic in Montenegro; the very limited literature related to the same or similar issues in the countries of the region which are the most useful when it comes to comparative analysis; and the very small number of plea agreements concluded in Montenegro so far. This research obviously represents just a starting point. It does provide key information about one phase of plea bargaining application in Montenegro, since its introduction for a limited number of crimes in 2009 to its significant extension to almost all crimes in 2015. However, as can be seen from the research results, this period of six years is characterized by a very small number of concluded plea agreements and practically just modest attempts at using this legal instrument. It can be logically expected that by the recent amendments of the CPC, by which plea bargaining has been extended to almost all crimes, the number of plea agreements will increase in the future. In line with this, the suggestion is to repeat the same kind of research, but covering the period of five years from the present time. This future research would be a follow up to the present study. It should again be focused on examining essentially the same issues i.e. generally the regulation and practical usage of plea agreements in Montenegro, and it should use the same research
methods, primarily interviews. Examining the Serbian experience with this institution in the years to come would be interesting as well, bearing in mind their recent transfer to a largely adversarial criminal procedure. Obviously, the timeframe, relevant legal provisions and total number of plea agreements that would be in the focus of this future research would be different. Consequently, this follow up research would potentially include not just a larger number of plea agreements to be analyzed, but also a larger number of interviews to be conducted. It would logically produce different results, but ones which would be fully comparable with the results of this research. Altogether, it would cover a very long period of the development and practical implementation of this legal institution in the country. It would be very useful for learning about the development of the legal institution, as well as for the final identification and determination of the most adequate plea bargaining legal and practical framework in Montenegro.

Additionally, this research has tackled and opened up one separate interesting topic that should be a focus of separate future research; this is particularly keeping in mind the wish for the further development of plea bargaining institution and practice clearly expressed by the Montenegrin legislators, but also practitioners. That is the public perception of plea bargaining in Montenegro. It is a segment which is important for the successful implementation of this practice. Through targeted focus groups and questionnaires, public perceptions about plea agreements should be examined in the future. The findings of this research would be useful primarily in the context of the successful promotion of this legal institution and general encouragement for its use. These findings would definitely be an additional helpful tool that could contribute to the process of the further examining and development of this practice in the country.
6.3. Conclusion

At the very end, I hereby express the hope that the conclusions reached through this research will be beneficial to the legal community of Montenegro, as well as interesting to the reader. I will conclude this work with the wish that plea bargaining, in whatever form it is present in the Montenegrin legal system in the future, fulfills its main purpose, and that is to assist all the actors in the criminal procedure to go through this challenging process in an easier and more efficient way, while at the same time, satisfying the inexorable requirements of justice.
APPENDIX A

Brief Overview
The plea bargaining practice in the United Kingdom, Germany, Italy, Russia and India

The United Kingdom – England and Wales

In England and Wales, there is no strictly formal and institutionalized plea bargaining. As Raphael says (2008, p.2): “Opportunities for the prosecution to engage formally in discussions with the defense over possible pleas are more limited in England and Wales than in many other jurisdictions.” He further explains that historically the criminal justice system in England and Wales has been reluctant to formalize any sort of plea bargaining, primarily because of the need to retain judicial independence and ensure that no undue pressure was put on the defendant to plead guilty. However, plea bargaining is and has been very much part of the English Criminal Justice System in an informal way. Based on statistical analysis, Horne writes that (2013, p.2): “The vast majority of defendants in criminal cases in England and Wales plead guilty… The overwhelming majority of these guilty pleas will have been influenced by plea bargaining in one of its forms.” He explains that some of the guilty pleas are a result of “express bargaining between the parties” which ends either with an agreement of a lesser charge or a “less serious version of the facts” i.e. charge bargaining and fact bargaining. However, as he writes, most commonly there is no express negotiation taking place, and plea agreements are reached “through the operation of the sentencing discount.” “This entitles a defendant who pleads guilty to a reduced sentence (which, depending on the stage at which he pleads guilty, will be up to one third less than would have followed conviction at trial)... Thus, the sentencing discount amounts to a third form of plea bargaining.” In relation to the formalization of the practice, Horne further enumerates (2013, n.p.) laws and other documents which do regulate certain aspects of guilty plea issues in England and Wales i.e. the sentencing discount and the role of prosecutors and judges. Those documents are: the 2003 Criminal Justice Act, the 2007 Sentencing Guidelines Council - Reduction in Sentence for a Guilty Plea, the 2013 Code for Crown Prosecutors, the 2011 Ministry of Justice’s Consolidated Criminal Practice Direction and the 2012 Criminal Procedure Rules. She further writes: “In the Crown Court, the judge must consider whether the plea is ‘a proper plea on the basis of the facts set out by the papers’ and sentencing can only take place if the judge is ‘satisfied that the plea is properly grounded’. In the magistrates’ court, the court must be satisfied that the plea ‘represents a clear acknowledgement of guilt’”. Something that is typical of the legal system of England and Wales when it comes to plea bargaining is how a plea of guilty as such is understood by the courts. Baldwin and McConville, known for criticizing the coercive nature of guilty pleas in England and Wales, claim that (1979, p.288): “…the courts themselves have been reluctant to
acknowledge that a plea of guilty can be anything other than a full, free, and voluntary decision by the defendant.” In this context, Horne explains (2013, n.p) that courts have traditionally presented a guilty plea as a ‘confession’ and as “a gesture of remorse”, and commonly relied on that as a mitigating factor in sentencing. In relation to this, she refers to the well-known *Regina v. Turner case*124. When talking about the stronger formalization of plea bargaining and leaving behind such an understanding of the guilty plea, it is obvious that in recent years there are number of steps that the Government and even the Courts of England and Wales have taken in this direction. Horne particularly emphasizes the effects of the 1993 Royal Commission on Criminal Justice Report125 which recommended better regulation of the sentencing discount for guilty plea. She notes that after this report was issued several important things happened in this regard, such as, for example, the introduction of plea discussions in serious fraud cases126. It is obvious that there is a factual plea bargaining in England and Wales including sentence, charge and, to a lesser extent, fact bargaining, with a significant role for the court, but the road towards its complete formalization still seems to be long.

*Germany*

In the past Germany, as a typical civil law country, did not have formal plea bargaining agreements. However, there were so-called “informal agreements” of this type that were quite widely used. They largely involved judges in the process of negotiations, and led to much confusion in practice. Finally, in 2009, the Law on Agreements in Criminal Proceedings127 was adopted by the German Parliament. This was result of a wish to formalize the above-mentioned exiting practices and was also motivated by clear instructions given in the German Supreme Court Decision from 2005128. As Frommann writes (2009, p. 201-202): “…the German Supreme Court…called on the legislature to assume its responsibility to draft a law regulating agreements in order to put an end to legal uncertainty.” Frommann further describes how the German Law on Agreements in Criminal Proceedings regulates this area (2009, p.202-203): “The Law on Agreements inserts section 257c StPO into the German Code of Criminal Procedure, as the main provision dealing with agreements. Section 257c I StPO stipulates that the court can, in suitable cases, agree with the participants about the further course and outcome of the proceedings. The same paragraph states that the obligation of the court to elucidate the merits of the case pursuant to section 244 II StPO remains unrestricted.” He further explains that the subject-matter of the agreement may be related to the sentences. The added section clearly says that the subject-matter of the agreement is the defendant’s confession, and that “neither a conviction nor the defendant’s announcement to waive remedies may be part of the agreement”. It is clear that the role of the judge in the German plea negotiations and agreements is large, and that it is in general limited to sentence bargaining.

*Italy*
In 1988, Italy adopted a new Code of Criminal Procedure\(^2\). This marked the beginning of the application of special form of plea bargaining practice in Italy. At that time, it was quite a revolutionary law in terms of the introduction of adversarial elements into a typical civil law system, primarily elements close to plea bargaining and cross-examination. In relation to these novelties, the Italian author Iovene writes that (2013, p.3): “…in 1988, the Italian legislature …introduced so-called special proceedings which, generally speaking, can be numbered among negotiated justice: the sentencing by parties’ request … and the abbreviated trial.” An abbreviated trial represents more an alternative to a complete trial in the form of shortened trial rather than plea negotiations, therefore, I will not elaborate on that. When it comes to the first mentioned procedure, the so-called patteggiamento which can be considered a form of Italian plea bargaining i.e. sentence bargaining, Iovene further writes (2103, p.4): “In the Italian plea bargaining there is actually no guilty plea, but just a request that a particular sentence be applied; furthermore, due to the mandatory prosecution, no charge bargaining is possible.” This procedure enables the prosecutor and the defendant to agree on a sentence with a judge’s scrutiny. The judge is not bound by their agreement, but can approve it or reject it. It can be concluded that in Italy, as in Germany, the role of the court in plea bargaining process is quite important, and it is also focused on sentence bargaining.

Russia

In 2001, Russia adopted a new Criminal Procedure Code\(^3\); this was the first new law of this type, which replaced the old Soviet Union Criminal Procedure Code dating from 1961. The new Code introduced a form of resolving criminal cases that can be linked to plea bargaining. As Semukhina and Reynolds write (2009, p.401): “In Russian jurisprudence, this plea bargaining is termed as ‘special court order proceeding.’” These authors refer to Orland (2002) and say that within this procedure: “…a defendant has the right to file a petition to request the ‘special order of court proceeding’ if the accused agrees the charges specified in the indictment are true. In such a case, the judge can order the trial stage omitted and sentence the defendant to no more than two-thirds of the maximum sentence allowed for the crime by the Criminal Code.” They further write that (2009, p.405):”…the defendant can either completely agree with the charges of the indictment or go to trial…” and conclude that “the special court procedure in Russia can only be viewed as a sentencing plea but cannot include any type of charge or count negotiations.” The authors discuss the scope of judicial discretion in this process in Russia as well (2009, p.406) by referring to Geintze (2007), and explain that a Russian trial judge can reject or accept the plea, decide to change the criminal charges, “remand the case to the prosecutor, or drop the criminal charges.” The similarities of the Russian legal solutions in this area with the German and Italian ones are obvious when it comes to the described forms of plea bargaining i.e. sentence negotiations.
India

After many years of harsh judicial resistance towards classic forms of plea bargaining, primarily when it comes to Indian Supreme Court, in 2005 a small but significant change in the judiciary’s attitude happened. As Santhy writes (2013, p.91): “...it was Gujarat High Court that recognized the utility of this method in the case *State of Gujarat v. Natwar Harchandji Thakor*, as an alternative measure of redressal to deal with huge arrears in criminal cases.” In exactly the same year 2005 and regardless of the serious debate and confrontations to the practice, the Indian Criminal Procedure Code was amended and provisions related to plea bargaining were introduced into the Indian criminal justice system. Kathuria describes how this process functions in India (2007, p.57). To be clear, the initiative to start negotiations is from the accused. Kathuria says: “A person accused of an offence for which the maximum punishment does not exceed seven years may file an application for plea bargaining in the court in which such offence is pending for trial.” After the application is received by the court, the court examines the accused in order to check whether the application was filed voluntarily. After it is determined as voluntarily the accused together with the prosecutor, the victim and the investigator, is given some time to mutually agree about the form of case disposition. Kathuria stresses that (2007, p.58): “The judge is not envisaged to be a silent spectator, but has a significant role to play in the process. The court is responsible for ensuring that the whole process is carried out with the full and voluntary consent of the accused.” After the disposition of the case is agreed, in line with what was agreed the court decides on compensation to the victim, as well as on the sentence. When it comes to this type of bargaining, since it is vaguely left to the accused, the prosecutor, the investigator and the victim to decide on case disposition, in practice this includes not just sentence but also charge bargaining. The Indian advocate Pradeep discusses this in his article (2010, n.p.), and he stresses that even though the Criminal Procedure Code: “…does not state about the nature of bargaining, it is a consolidation of Charge, Sentence and Fact plea-bargaining.” As can be concluded, the Indian Criminal Justice System implies quite a big influence of the court in the plea bargaining process, and it allows sentence, charge, as well as fact bargaining. Additionally, a particularity of this system especially comparing to the U.S., as well as to most other countries, is that it gives significant attention to the rights of victims, who can literally veto the reaching of the plea agreement.
DRAFT - INTERVIEW QUESTIONS FOR JUDGES

Semi-structured interview

**Interviewer:** Ana Grgurevic  
**Interviewees:** Judges

**Date and time:** xxx

*Introduction, general overview of the topics that will be discussed, stressing the importance of informality and relaxed atmosphere, general encouragement to speak as much as they want.*

<table>
<thead>
<tr>
<th>Main questions</th>
<th>Additional questions</th>
<th>Eventual clarifying questions</th>
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<tbody>
<tr>
<td>Q 1. As you have been informed, the overall purpose of this interview is to</td>
<td>Why do you think they are good/not good? What are advantages and disadvantaged of this</td>
<td>Can you please tell me how many agreements have you approved and how many agreements have you rejected during last year?</td>
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<tr>
<td>find out your opinion about plea bargaining agreements, potential for their</td>
<td>legal instrument?</td>
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<td>application in the Montenegrin legal system, challenges and successes with</td>
<td>Does your opinion come from your practical experience with plea bargaining agreements?</td>
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<td>implementing this practice. In line with this, firstly what is your general</td>
<td>Can you please describe your personal practical experience with these agreements?</td>
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<td>opinion about such agreements?</td>
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<td>Q 2. From your</td>
<td>In your opinion what are</td>
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<td>perspective how Montenegrin judges generally perceive such agreements?</td>
<td>the reasons for these perceptions? What might explain a judge’s reluctance to plea bargaining? To what extent might this reluctance be linked to all the novelties of the criminal justice system. Do you think it could be typical for the plea bargaining institution only?</td>
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<tr>
<td>Q 3. In relation to my next question, it’s obvious from the courts’ statistics that there are not that many cases in which plea bargaining was applied. In your opinion, are these agreements realistically applicable in the Montenegrin legal system to a larger extent?</td>
<td>To what extent do you think that the barriers for the application of plea bargaining are within the provisions of the Criminal Procedure Code itself? Do you think that they could relate more to the approach and motives of prosecutors and advocates? Are there any other reasons that could be put forward for this? Can you please explain what do you think: whether this type of reluctance of the criminal justice system can be linked to all the novelties of the criminal justice system which are in a way alien to traditional continental legal system of Montenegro, or it is typical for plea bargaining?</td>
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<td>What do you think, does sentencing policy of the courts plays role in application of plea bargaining, and if it does how?</td>
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<td>Answer</td>
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<tr>
<td>Q 4. In your experience, how prosecutors and advocates generally act when it comes to plea bargaining agreements?</td>
<td>Are there any particular problems in practice that you can identify? What in your opinion could be done to improve the situation? Can you please share with me some examples from your practice which were problematic when it comes to plea bargaining practice, primarily in relation to cases in which you rejected the agreements proposed? And opposite, good examples?</td>
<td></td>
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<tr>
<td>Q 5. Do you have any comments regarding application of plea bargaining agreements in the context of the protection of human rights?</td>
<td>What specific European Convention of Human Rights standards you have in mind?</td>
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</tr>
<tr>
<td>Q 6. Can you please comment on the position of the damaged party when it comes to plea bargaining agreements and Montenegrin legislation in this context? How do you see this?</td>
<td>In your opinion, how well are the interests of the injured party protected? Is this satisfactory? From your experience does this issue of the injured party interests ever comes as problematic in practice? Can you please share with me some experiences of this kind?</td>
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<tr>
<td>Q 7. The law, practice and literature suggest that both plea bargaining and deferred prosecution have a purpose of enlarging work efficiency and reducing case backlog. In the light of this how do you see the relationship between these two legal institutions?</td>
<td>In your opinion, which of these two legal institutions is more useful in practice, and why?</td>
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<td>Q 8. Defendant’s understanding of the</td>
<td>In your opinion, how important openness of the</td>
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<tr>
<td>Purpose and consequences of the plea agreement that he/she is signing, is a precondition for its approval. What are you experiences with this element of the plea bargaining?</td>
<td>Defendants’ for plea bargaining is in the whole process of plea bargaining application? Do you or would you worry about public perception when approving the plea bargaining agreement?</td>
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<tr>
<td>Q 9. What you think could be done by legislators and all the actors of plea bargaining (prosecutors, lawyers, judges) in order to make it an efficient alternative tool in resolving criminal cases?</td>
<td>Who has the most important role in promoting this institution (having in mind that it has been part of the Montenegrin criminal legislation for quite some time, and that by its nature it is expected to contribute to the efficiency of the criminal justice system)? Do you have any concrete legislative changes in mind that could be useful when it comes to plea bargaining?</td>
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<tr>
<td>Q 10. Finally, is there anything you would like to add on this topic, anything we missed and you see it as important? Any comments, suggestions and similar?</td>
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*Ending the interview. Thanking. Reminding on the researcher’s availability for further communication.*
DRAFT - INTERVIEW QUESTIONS FOR PROSECUTORS

Semi-structured interview

Interviewer: Ana Grgurevic

Interviewees: Prosecutors

Date and time: xxx

Introduction, general overview of the topics that will be discussed, stressing the importance of informality and relaxed atmosphere, general encouragement to speak as much as they want.

<table>
<thead>
<tr>
<th>Main questions</th>
<th>Additional questions</th>
<th>Eventual clarifying questions</th>
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<tbody>
<tr>
<td>Q 1. As you have been informed, the overall purpose of this interview is to find out your opinion about plea bargaining agreements, potential for their application in the Montenegrin legal system, challenges and successes with implementing this practice. In line with this, firstly what is your general opinion about such agreements?</td>
<td>Why do you think they are good/not good? What are advantages and disadvantaged of this legal instrument? Does your opinion come from your practical experience with plea bargaining agreements? Can you please describe your personal practical experience with these agreements?</td>
<td>Can you please tell me how many agreements have you concluded during last year i.e. how many cases have you finished that way?</td>
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<td>Q 2. From your</td>
<td>In your opinion what are</td>
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<tr>
<th>perspective how Montenegrin prosecutors generally perceive such agreements?</th>
<th>the reasons for these perceptions? What do you think motivates prosecutors when considering whether or not to engage with plea bargaining? What might explain a prosecutor’s reluctance to engage with plea bargaining? To what extent might this reluctance be linked to all the novelties of the criminal justice system. Do you think it could be typical for the plea bargaining institution only?</th>
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<tr>
<td>Q 3. In relation to my next question, it’s obvious from the courts’ statistics that there are not that many cases in which plea bargaining was applied. In your opinion, are these agreements realistically applicable in the Montenegrin legal system to a larger extent?</td>
<td>To what extent do you think that the barriers for the application of plea bargaining are within the provisions of the Criminal Procedure Code itself? Do you think that they could relate more to the approach and motives of prosecutors and advocates? Are there any other reasons that could be put forward for this? Can you please explain what do you think: whether this type of reluctance of the criminal justice system can be linked to all the novelties of the criminal justice system which are in a way alien to traditional continental legal system of Montenegro, or it is typical for plea</td>
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<td>Q 4. In your experience, how advocates generally act when it comes to plea bargaining agreements?</td>
<td>bargaining institution only? Are there any particular problems in practice that you can identify? What in your opinion could be done to improve the situation? Can you please share with me some examples from your practice of the advocates who did not want to enter into plea bargaining, and you believed that there were good grounds for plea bargaining, and/or opposite?</td>
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<tr>
<td>Q 5. How do judges react when plea bargaining agreement is offered to them?</td>
<td>Are there any particular problems in practice that you can identify, and can you please describe them? What in your opinion could be done to improve the situation? Can you please share with me some examples from your practice, when a judge rejected the agreement, and you thought that it was completely justified and well grounded?</td>
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<td>do you see the relationship between these two legal institutions?</td>
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<td>Q 9. In your experience, how much the defendants know about plea bargaining?</td>
<td>How would you describe the defendants’ opinion about such agreements? Are they generally open for plea bargaining or not? How important this factor is in the whole process of plea bargaining application? Do you or would you worry about public perception when entering into plea bargaining?</td>
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<td>Q 10. What you think could be done by legislators and all the actors of plea bargaining (prosecutors, lawyers, judges) in order to make it an efficient alternative tool in resolving criminal cases?</td>
<td>Who has the most important role in promoting this institution (having in mind that it has been part of the Montenegrin criminal legislation for quite some time, and that by its nature it is expected to contribute to the efficiency of the criminal justice system)? Do you have any concrete legislative changes in mind that could be useful when it comes to plea bargaining?</td>
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<td>Q 11. Finally, is there anything you would like to add on this topic, anything we missed and you see it as important? Any comments, suggestions and similar?</td>
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Ending the interview. Thanking. Reminding on the researcher’s availability for further communication.
DRAFT - INTERVIEW QUESTIONS FOR ADVOCATES

Semi-structured interview

**Interviewer:** Ana Grgurevic

**Interviewees:** Advocates

**Date and time:** xxx

*Introduction, general overview of the topics that will be discussed, stressing the importance of informality and relaxed atmosphere, general encouragement to speak as much as they want.*

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<td>In your opinion what are the reasons for these perceptions? What do you think motivates advocates when considering whether or not to engage with plea bargaining? What might explain an advocate’s reluctance to engage with plea bargaining? To what extent might this reluctance be linked to all the novelties of the criminal justice system. Do you think it could be typical for the plea bargaining institution only?</td>
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<td>Q 7. Can you please comment on the position of the damaged party when it comes to plea bargaining agreements and Montenegrin legislation in this context? How do you see this?</td>
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<td>Q 8. The law, practice and literature suggest that both plea bargaining and deferred prosecution have a purpose of enlarging work efficiency and</td>
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suggestions and similar?

Ending the interview. Thanking. Reminding on the researcher’s availability for further communication.
APPENDIX E

Brief overview of the Montenegrin legal system and a diagram of the Montenegrin courts with jurisdictions in criminal procedure

The Montenegrin legal system is a civil law system based on Roman law. The Government forms the executive branch of power, the Parliament is the legislative branch of power, and the courts form the judicial power. The Ministry of Justice is part of the Government and is responsible for legislation and policy development in the criminal justice area. When it comes to criminal law issues the Ministry is also responsible for international legal assistance in criminal matters, and it has oversight over the system of enforcement of criminal sanctions. The State Prosecution does not belong to any branch of power in Montenegro, but rather represents an institution of its own, a so-called sui generis institution that is responsible for the investigation and prosecution of crimes.

There are 15 Basic or Municipal Courts responsible for crimes where a prison sentence of up to ten years is envisaged by the law. There are two High Courts, one for the central and southern part of the country, and one for the northern part of the country. They act as appellate courts for criminal cases in the Basic Courts, and as first instance courts for crimes where a prison sentence of more than ten years is envisaged by the law. The High Court in the capital city of Podgorica has the Specialized Department for Organized Crime, Corruption, War Crimes and Terrorism Cases. There is also the Appellate Court of Montenegro, which acts as the court of appeal for first instance criminal cases from the High Courts for the whole country, while the Administrative Court is responsible for administrative disputes in the whole country, and the Commercial Court is specialized in commercial cases across the whole country. Misdemeanor cases are under the jurisdiction of the three first instance Misdemeanor Courts and one second level, High Misdemeanor Court, a court of appeal that covers the whole country. Finally, there is the Supreme Court of Montenegro which acts as a third instance court in all the cases. Separately, there is also an individual Constitutional Court of Montenegro which is responsible for deciding on the constitutionality of legal acts and violations of human rights. Both the Supreme Court and the Constitutional Court cover the whole country.

The State Prosecution Offices are organized in accordance with the court network and organization. In line with that, there are: 13 Basic or Municipal State Prosecution Offices (they act before the Municipal Courts; some of them act before the two Municipal Courts), two Offices of the High State Prosecutor (acting before the High Courts), and an Office of the Special State Prosecutor.
responsible for organized crime, serious corruption cases, war crimes, terrorism and money laundering cases (which acts before the Special Department of the Podgorica High Court). Finally, there is the Office of the Supreme State Prosecutor that is generally responsible for all prosecutions (and which acts before the Appellate Court, the Administrative Court and the Supreme Court, as well as other courts when appropriate).

Defense attorneys are organized by the Bar Chamber of Montenegro responsible for the whole country. It deals with all matters related to this profession.

There is a Judicial Council and a Prosecutorial Council whose main tasks are the election and dismissal of judges and prosecutors, statistical and other reporting, and budgetary tasks.

The Center for Training the Judiciary and the Prosecution is an individual institution that provides initial and continuous training to all the judges and prosecutors in the country, but also when necessary and appropriate to members of other legal professions like defense attorneys, court experts and members of other state institutions.

The Center for Mediation is an individual institution responsible for matters related to this form of alternative dispute resolution that is applied in both civil and criminal cases in the country.

Montenegro has a Representative before the European Court of Human Rights in Strasbourg who represents the country in all cases before this court.

There are separate systems of bailiffs and notaries with their own managing bodies and associations that deal with matters related to these professions.

Court experts are organized by their own professional organization responsible for matters related to this profession.

When it comes to plea bargaining, in accordance with the Amendments to the CPC from 2015, this practice can be applied in the Basic Courts, High Courts and Misdemeanor Courts. A diagram which shows the organization and jurisdiction of the Montenegrin courts is given below.
SUPREME COURT
(Third instance for all; no plea bargaining)

APPELLATE COURT
(Second instance for High Courts; no plea bargaining)

2 HIGH COURTS
(First instance for crimes with a prison sentence of more than 10 years and some types of serious crimes; second instance for Basic Courts; plea bargaining is possible)

15 BASIC COURTS
(First instance for crimes with a prison sentence of up to 10 years; plea bargaining is possible)

SUPREME COURT
(Third instance for all; no plea bargaining)

HIGH MISDEMEANOR COURT
(Second instance for all misdemeanor cases; no plea bargaining)

3 BASIC MISDEMEANOR COURTS
(First instance misdemeanor courts; plea bargaining is possible)
APPENDIX F
Favorable ethical opinion of the Research Ethics Committee of the Faculty of Humanities and Social Sciences

Ana Grjevec
Professional Doctorate Student
Institute of Criminal Justice Studies
University of Portsmouth

REC reference number: 09/10:10
Please quote this number on all correspondence.

12th June 2015

Dear Ana,

Full Title of Study: PLEA BARGAINING IN MONTENEGRO

Documents reviewed:
Consent Form
Ethics self-assessment
Interview questions
Invitation Letter
Participant Information Sheet
Protocol

Further to our recent correspondence, this proposal was reviewed by The Research Ethics Committee of The Faculty of Humanities and Social Sciences.

I am pleased to tell you that the proposal was awarded a favourable ethical opinion by the committee.

Kind regards,

FHSS FREC Chair
Dr Jane Winstone

Members participating in the review:

- David Carpenter
- Richard Hitchcock
- Jane Winstone
# APPENDIX G

UPR16 form

## FORM UPR16

Research Ethics Review Checklist

Please include this completed form as an appendix to your thesis. See the Postgraduate Research Student Handbook for more information.

<table>
<thead>
<tr>
<th>Postgraduate Research Student (PGRS) Information</th>
<th>Student ID: 442418</th>
</tr>
</thead>
<tbody>
<tr>
<td>PGRS Name: Ana Grgurinovic</td>
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<tr>
<td>Department: ICIS</td>
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<td>Start Date: 1 Oct 2013</td>
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<tr>
<td>Study Mode and Route:</td>
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<tr>
<td>Title of Thesis: Please Bargaining in Mentenogro and a Regional Comparative Overview</td>
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<tr>
<td>Thesis Word Count: 51512 (excluding abstract)</td>
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</table>

If you are unsure about any of the following, please contact the local representative on your Faculty Ethics Committee for advice. Please note that it is your responsibility to follow the University's Ethics Policy and any relevant University, academic or professional guidelines in the conduct of your study.

Although the Ethics Committee may have given your study a favourable opinion, the final responsibility for the ethical conduct of this work lies with the researcher(s).

### UKRIO Finished Research Checklist:

(If you would like to know more about the checklist, please see your Faculty or Departmental Ethics Committee page or see the online version of the full checklist at: [http://www.ukrio.org/faculties-ethics-checklist](http://www.ukrio.org/faculties-ethics-checklist))

- a) Have all of your research findings been reported accurately, honestly and within a reasonable time frame? [YES][NO]  
- b) Have all contributions to knowledge been acknowledged? [YES][NO]  
- c) Have you complied with all agreements relating to intellectual property, publication and authorship? [YES][NO]  
- d) Has your research data been retained in a secure and accessible form and will it remain so for the required duration? [YES][NO]  
- e) Does your research comply with all legal, ethical, and contractual requirements? [YES][NO]

### Candidate Statement:

I have considered the ethical dimensions of the above named research project and have successfully obtained the necessary ethical approval.

Ethical review number(s) from Faculty Ethics Committee (or from NRES/SCREC): 00/10:10

If you have not submitted your work for ethical review, and/or you have answered 'No' to one or more of questions a) to e), please explain below why this is so:

Signed (PGRS): Ana Grgurinovic  
Date: 22 Feb 2017

UPR16 – August 2015
Consent Form

Study Title: Plea Bargaining in Montenegro

REC Ref No: 09/10:10

Name of Researcher: Ana Grgurevic

Please initial box

1. I confirm that I have read and understand the information sheet dated 20 May 2015 (Version No 1) for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason up to the point when the data are analyzed.

3. I understand that data collected during the study, may be looked at by individuals from the University of Portsmouth, or from regulatory authorities.
   I give permission for these individuals to have access to my data.

4. I agree to my interview being recorded and to being quoted verbatim (without being named and quoted by name).

Institute of Criminal Justice Studies
Researcher: Ana Grgurevic
E-mail: ana.grgurevic@myport.ac.uk
Supervisor: Dr Diana Bretherick
E-mail: diana.bretherick@port.ac.uk
x. I agree to take part in the above study.

Name of Participant:  
Signature: 

Date: 

Name of Person taking consent: Ana Grgurevic  
Signature: 

Date: 

When completed: 1 for participant; 1 for researcher's file.
APPENDIX I

INSTITUTE OF CRIMINAL JUSTICE STUDIES

Researcher: Ana Grgurevic
E-mail: ana.grgurevic@myport.ac.uk
Supervisor: Dr Diana Bretherick
E-mail: diana.bretherick@port.ac.uk

Study Title: Plea Bargaining in Montenegro

REC Ref No: 09/10:10

Dear xxx,

I hereby invite you to participate in the research on application of plea bargaining in Montenegro. I conduct this research as a doctoral student at the University of Portsmouth, Institute of Criminal Justice Studies in the UK. The research deals with various aspects of application of plea bargaining in Montenegro with special focus on recognizing challenges, as well as identifying success formulas in practical implementation of this legal institution. Among other, in the framework of this research the relevant views of direct participants of this process, judges, prosecutors and lawyers, will be taken into account and analyzed. Having this in mind, I would be thankful if you could consider being interviewed for this purpose.

This letter is sent to you because I have identified that you might be a suitable participant of my research primarily taking into account your profession and active role in the plea bargaining process.

Please have in mind that participation in this research is completely voluntary and you can withdraw any time up to the moment of data analyses. Attached is more detailed information sheet about the research, as well as consent form which you are expected to sign in case you accept to participate in this project. In order to either confirm or deny participation in the research, or eventually if you need any additional information, please feel free to contact me at the e-mail address provided in the header of this letter.

Thank you very much for taking time to read this letter regardless of your final decision on participation.
Sincerely,

Ana Grgurevic
APPENDIX J

INSTITUTE OF CRIMINAL JUSTICE STUDIES

Researcher: Ana Grgurevic
E-mail: ana.grgurevic@myport.ac.uk
Supervisor: Dr Diana Bretherick
E-mail: diana.bretherick@port.ac.uk

Participant Information Sheet

Study Title: Plea Bargaining in Montenegro
REC Ref No: 09/10:10

We would like to invite you to take part in our research study. Before you decide we would like you to understand why the research is being done and what it would involve for you. Please ask us if there is anything that is not clear.

What is the purpose of the study?
A main purpose of this study is to research how legal institution of plea bargaining is regulated and how it functions in Montenegro; the extent to which it is applied in practice; in what way it is applied; what are the reasons for challenges in application and what are successful formulas for the application of plea bargaining in this country. All the available statistical data and other information related to plea bargaining in Montenegro will be gathered and analyzed through this study. Additionally, a comparative elaboration in relation to plea bargaining will also be conducted when it comes to Montenegro and countries of the region which have all relatively recently introduced this legal instrument into their legal systems, and which have the same legal tradition as Montenegro.

This study is part of researcher’s post-graduate doctoral studies, and is required element in the process of gaining the doctoral award at the University of Portsmouth.

Why have I been invited?
You were recognized as adequate participant in this study by researcher herself. It is primarily due to your professional engagement as one of active participants of the plea bargaining process, as well as due to your obvious interest in this area. Apart from you, fourteen other persons will be interviewed in the framework of this research, making it all together fifteen interviews with five judges, five prosecutors and five advocates.

**Do I have to take part?**
Taking part in the research is entirely voluntary. It is up to you to decide to join the study. We will describe the study in this information sheet. If you agree to take part, we will then ask you to sign a consent form.

**What will happen to me if I take part?**
If you decide to take part in this study, you will firstly be asked to give formal consent for participation in the study i.e. to sign the consent form. In a period of 15 days after signing the consent form, the researcher will schedule and conduct an interview with you. The interview will be composed of a series of main and possibly some additional, explanatory questions; and only if you agree it will be audio recorded (otherwise the notes will be taken by researcher). You will not need to discover your identity. All that you say during the interview will be confidential and will be used exclusively for research purposes. By giving the interview, your participation in this research is considered completed. The research itself will last longer (according to internal University of Portsmouth rules it must end by May 2016) since it includes not just conducting of interviews, but also reviewing of relevant literature, above mentioned comparative analyses, analyses of documents, and other.

**Expenses and payments**
There are no expenses or payment related to participation in this study.

**What will I have to do?**
If you decide to take part in this study and after giving a formal consent for participation, you will be expected to give interview to the researcher. You will first agree about date, time and place of the interview with the researcher, whenever and wherever it suits you the best. The interview itself will be semi-structured and will be composed of a series of main questions. These main questions will most probably be followed by additional questions whose purpose is for you to better explain your positions and statements to the researcher concerning the research topic, in the cases when a researcher or you believe it is needed. The interview will not be strict and formal, it will be set up in a way to encourage you to fully express yourself and answer the main questions in a free and relaxed way. The interview will be audio recorded only if you agree (otherwise the notes will be taken by researcher).
By signing the consent form you will allow the researcher to quote you verbatim. Purpose of the recording is for researcher to have all the materials needed for analyses fully and accurately noted. Purpose of quoting you verbatim is to illustrate well your expressed positions and opinions. Your identity and participation in a study is confidential.

**What are the possible disadvantages and risks of taking part?**
There are no possible risks or disadvantages of taking part in the study.

**What are the possible benefits of taking part?**
There are no direct benefits for taking part in the study. However, the study results can serve as a main source of information related to existing practice in this area in Montenegro. Additionally, it can potentially serve as an assistance tool in further development and regulation of this practice in Montenegro since it will contain concrete conclusions and recommendations in relation to overcoming eventual organizational, normative and other problems in application of this legal instrument. Generally, the research can potentially be useful and beneficial for legal community of Montenegro.

**Will my taking part in the study be kept confidential?**
Your identity and participation in the study is confidential. If you join the study, it is possible that some of the data collected will be looked at by authorised persons from the University of Portsmouth i.e. the data may be looked at by authorised people to check that the study is being carried out correctly (for example, by researcher’s supervisors). All will have a duty of confidentiality to you as a research participant and we will do our best to meet this duty. The data collected will be stored securely by the researcher and protected by unique password.

**What will happen if I don’t want to carry on with the study?**
After signing the consent form you may withdraw from the study in the course of the interview, and up to the point when the interview data are analysed. If you decide to withdraw from the study in the given timeframe, all the data that have been collected until then will be destroyed by researcher and yourself.

**What if there is a problem?**
If you have a concern about any aspect of this study, you should ask to speak to the researcher (Ana Grgurevic, tel + 382 69 502 477) or her supervisor (Dr Diana Bretherick, tel +44 23 9284 3792) who will do their best to answer your questions. If you remain unhappy and wish to complain formally, you can do this through the Head of the Department-Institute of Criminal Justice Studies (Dr Phil Clements, tel + 44 23 9284 5069).

**What will happen to the results of the research study?**
As for the results of the study, there is a general intention of the researcher to publish the study results in Montenegro, after they are translated into Montenegrin language. You will not be identified in any report/publication. The researcher will inform you about publishing of the research results.

**Who is organising and funding the research?**
This research is supported by the University of Portsmouth. Nor the researcher, nor the University of Portsmouth will financially benefit from this study.

**Who has reviewed the study?**
Research in the University of Portsmouth is looked at by independent group of people, called a Research Ethics Committee, to protect your interests. This study has been reviewed and given a favourable opinion by the Research Ethics Committee.

**Concluding statement**
Thank you for taking time to read the information sheet regardless of your decision on participation in the research. If you decide to participate you will be given a copy of this information sheet to keep and your formal consent to participate in the research will be asked.
APPENDIX K

INSTITUTE OF CRIMINAL JUSTICE STUDIES

Researcher: Ana Grgurevic
E-mail: ana.grgurevic@myport.ac.uk
Supervisor: Dr Diana Bretherick
E-mail: diana.bretherick@port.ac.uk

Study Title: Plea Bargaining in Montenegro

REC Ref No: 09/10:10

Dear Ms. Medenica,

I hereby request your approval to conduct a number of interviews with judges of different Montenegrin courts. The interviews are related to the research on application of plea bargaining in Montenegro. I conduct this research as a doctoral student at the University of Portsmouth, the Institute of Criminal Justice Studies in the UK.

The research deals with various aspects of application of plea bargaining in Montenegro with special focus on recognizing challenges, as well as identifying success formulas in practical implementation of this legal institution. Among other, in the framework of this research it is planned that relevant views of direct participants of this process, judges, prosecutors and lawyers, are taken into account and analyzed. This is considered extremely important when it comes to quality of the research. Having this in mind, I would be thankful if you could consider giving a general approval for conducting the above described interviews with Montenegrin judges. The final number and choice of judges will depend on their experience with this practice, and willingness and availability for the interviews.

Thank you very much in advance for taking time to read this letter regardless of your final decision on this matter.

Sincerely,

Ana Grgurevic
Dear Mr. Stankovic,

I hereby request your approval to conduct interviews with a number of prosecutors in your prosecutorial office. The interviews are related to research on application of plea bargaining in Montenegro. I conduct this research as a doctoral student at the University of Portsmouth, the Institute of Criminal Justice Studies in the UK.

The research deals with various aspects of application of plea bargaining in Montenegro with special focus on recognizing challenges, as well as identifying success formulas in practical implementation of this legal institution. Among other, in the framework of this research it is planned that relevant views of direct participants of this process, judges, prosecutors and lawyers, are taken into account and analyzed. This is considered extremely important when it comes to quality of the research. Having this in mind, I would be thankful if you could consider giving a general approval for conducting the above described interviews with a number of prosecutors from your office. The final number and choice of prosecutors will depend on their experience with this practice, and willingness and availability for the interviews.

Thank you very much in advance for taking time to read this letter regardless of your final decision on this matter.

Sincerely,

Ana Grgurevic
Dear Mr. Begovic,

I hereby request your approval to conduct a number of interviews with advocates from different Montenegrin towns. The interviews are related to the research on application of plea bargaining in Montenegro. I conduct this research as a doctoral student at the University of Portsmouth, the Institute of Criminal Justice Studies in the UK.

The research deals with various aspects of application of plea bargaining in Montenegro with special focus on recognizing challenges, as well as identifying success formulas in practical implementation of this legal institution. Among other, in the framework of this research it is planned that relevant views of direct participants of this process, judges, prosecutors and lawyers, are taken into account and analyzed. This is considered extremely important when it comes to quality of the research. Having this in mind, I would be thankful if you could consider giving a general approval for conducting the above described interviews with Montenegrin advocates. The final number and choice of advocates will depend on their experience with this practice, and willingness and availability for the interviews.

Thank you very much in advance for taking time to read this letter regardless of your final decision on this matter.

Sincerely,

Ana Grgurevic
APPENDIX N

The research methods chosen by other plea bargaining researchers

The authors I here refer to are not any plea bargaining authors, or exclusively the most well-known authors, but primarily those whose research goals were very similar to mine. They were all interested in finding out what is actually happening between the participants of plea bargaining process, to “investigate” their motives, opinions, and behaviors; and they all used interviews as their research method.

When the previously mentioned Alschuler was doing research with the goal of examining plea bargaining as a sentencing device, as well as a form of dispute resolution, he wanted to find out the defendants’ positions about plea bargaining offers. He questioned defense attorneys about this by using interviews as a method. Alschuler says (1981, p. 663.): “In interviews that I conducted on the plea bargaining process…I asked defense attorneys why some defendants accepted favorable offers while others in the same circumstances refused them.”

Heumann was an author who also used interviews, as well as document analysis in his research on the relationship between case pressure and plea bargaining. “The data that I shall employ were gathered from published State of Connecticut reports, as well as from interviews I conducted with 71 individuals (judges, prosecutors, public defenders and private criminal attorneys) …” (Heumann, 1975, p. 517).

Furthermore, with the more recent author, Emmelman, who was researching resolving criminal cases through guilty pleas with a focus on the negotiation aspect of the process, interviews were also used together with the method of the observation of participants i.e. defense attorneys. As Emmelman says (1996, p. 337): “Throughout the observation period, I recorded field notes, which I later analyzed …To clarify and refine these preliminary research findings, I conducted in-depth interviews toward the end of the study.”

The interesting research about the use of plea bargaining in defensive homicide cases of Flynn and Fitz Gibbon (2011, p. 909) was also conducted mainly by using semi-structured interviews. As they explain: “…the interviews offered a mechanism to understand how plea bargaining operates from the perspectives of those directly involved in the process.”
APPENDIX O

2009 Criminal Procedure Code of Montenegro
Plea bargaining provisions

Article 300
(1) In the case of criminal proceedings for a criminal offence or concurrence of criminal offences for which a prison sentence of up to 10 years is envisaged, the State Prosecutor or the accused person and her/his defense attorney may propose that an agreement on the admission of guilt be concluded.
(2) When the proposal referred to in paragraph 1 of this Article has been made, the parties and the defense attorney may negotiate the conditions of admitting guilt for the criminal offence or criminal offences with which the accused person is charged.
(3) The agreement on the admission of guilt shall be made in writing and must be signed by the parties and the defense attorney, and can be submitted not later than the first hearing for the main hearing before the first instance court.
(4) If an indictment has not been brought yet, the agreement on the admission of guilt shall be submitted to the Chair of the Panel referred to in Article 24 paragraph 7 of the present Code and after the indictment has been brought, it shall be submitted to the Chair of the Panel.

Article 301
(1) By way of an agreement on the admission of guilt, the accused person fully confesses to the criminal offence or concurrence of criminal offences s/he is charged with, whereas the accused person and the State Prosecutor agree on the following:
   1) on the penalty and other criminal sanctions which will be imposed on the accused person in accordance with the provisions of the Criminal Code;
   2) on the costs of the criminal proceedings and claims under property law;
   3) on denouncing the right of appeal by the parties and defense attorney against the decision of the court made on the basis of the agreement on the admission of guilt when the court has fully accepted the agreement.
(2) Agreement on the admission of guilt shall also contain an obligation of the accused person to return the property gain acquired by the commission of the criminal offense as well as objects that have to be forfeited under the Criminal Code within a certain time limit.
(3) The accused person may undertake by means of the agreement on the admission of guilt to perform the obligations referred to in Article 272 paragraph 1 of the present Code, provided that the nature of the obligations is such that it allows the accused person to perform or start performing them before the submission of an agreement on the admission of guilt.

Article 302
(1) The court shall decide by a ruling whether an agreement on the admission of guilt should be dismissed, rejected or accepted.
(2) If an agreement on the admission of guilt has been submitted before an indictment has been brought, the Chair of the Panel referred to in Article 24 paragraph 7 of the present Code shall decide on it. In such a case, a special clause of the agreement shall contain all the information listed in Article 292 of the present Code.
(3) If an agreement has been submitted after the indictment has been brought, the Chair of the first instance panel shall decide on it.
(4) The Chair of the Panel shall dismiss an agreement on the admission of guilt submitted after the expiry of the term specified in Article 300 paragraph 3 of the present Code. The decision on rejection shall not be appealable.
(5) The court shall decide on the agreement on the admission of guilt without delay at a hearing attended by the State Prosecutor, accused person and her/his defense attorney, while the injured party and her/his proxy shall be informed of the hearing.
(6) Provisions of Art. 313 to 316 of the present Code shall apply on the holding of a hearing referred to in paragraph 5 of this Article.
(7) The court shall dismiss an agreement on the admission of guilt by way of ruling if the duly summoned accused person does not appear at the hearing. The ruling dismissing the agreement on the admission of guilt cannot be appealed.
(8) The court shall accept an agreement on the admission of guilt and render a decision which is in line with the contents of the agreement, if it establishes the following:
   1) that the accused person confessed to the criminal offence or offences s/he is charged with voluntarily and consciously, that the confession is in line with the evidence contained in the case files and that there is no possibility that the confession was made as a consequence of an error;
   2) that the agreement was concluded in accordance with Article 300 paragraph 1 item 1 of the present Code;
   3) that the accused person understands the consequences of the agreement, and particularly that s/he waives the right to a trial and that s/he may not file an appeal against the decision of the court rendered on the basis of the agreement;
   4) that the agreement does not violate the rights of the injured party;
   5) that the agreement is in line with the interests of fairness and the sanction serves the purpose for which criminal sanctions are imposed.
(9) If one or more conditions referred to in paragraph 8 of this Article have not been met, the court shall reject the agreement on the admission of guilt by a ruling, and the admission of guilt contained in the agreement cannot be used as evidence in criminal proceedings. The agreement and all supporting files shall be destroyed by the Chair of the Panel, of which records shall be made.
(10) The court shall enter into the record the decision accepting, rejecting or dismissing the agreement on the admission of guilt. The decision accepting the agreement on the admission of guilt may be appealed by the injured party,
whereas the decision rejecting the agreement may be appealed by the State Prosecutor and by the accused person.

(11) The Panel referred to in Article 24 paragraph 7 of the present Code shall decide on the appeal referred to in paragraph 10 of the present Article, not including the judge who rendered the decision referred to in paragraph 10 of this Article.

Art 303

(1) When a ruling on accepting an agreement on the admission of guilt becomes final, the Chair of the Panel shall, without delay, and not later than within three days, render a decision to the effect that the defendant is found guilty in accordance with the accepted agreement.

(2) The decision referred to in paragraph 1 of this Article shall be appealable insofar as it is not in accordance with the concluded agreement.
APPENDIX P

2015 Amendments to the Criminal Procedure Code of Montenegro

Plea bargaining provisions

Article 300

(1) For criminal offences which are prosecuted ex officio, except for criminal offences of terrorism and war crimes, the suspect, the accused person and the defence attorney may be made a proposal for the conclusion of an agreement on the admission of guilt, i.e. the suspect, the accused person and defence attorney may propose the conclusion of such an agreement to the State Prosecutor.

(2) When the proposal referred to in paragraph 1 of this Article has been made, the parties and the defence attorney may negotiate the conditions of admitting guilt for the criminal offence or criminal offences with which the suspect or the accused person is charged.

(3) The agreement on the admission of guilt shall be made in writing and shall be signed by the parties and the defence attorney, and may not be submitted later than the first hearing for the main hearing before the first instance court.

(4) The agreement on admission of guilt shall be submitted, if the indictment has not been brought, or if the bill of indictment or private action have not been submitted to the President of the Panel referred to in Article 24, paragraph 7 of the present Code, and after the indictment has been brought or after the filing of the bill of indictment or private action, to the President of the Panel.

(5) If the agreement on admission of guilt was concluded prior to indictment or the filing of the bill of indictment or private action, the State Prosecutor shall, together with the agreement, submit the court with the indictment or the bill of indictment which forms an integral part of the agreement.

(6) The indictment or the bill of indictment referred to in paragraph 5 of this Article shall not be subject to provisions on the control of indictment, or the provisions on a preliminary examination of the bill of indictment.

Article 301

(1) By way of an agreement on the admission of guilt, the accused person fully confesses to the criminal offence or concurrence of criminal offences s/he is charged with, whereas the accused person and the State Prosecutor agree on the following:

1) on the penalty and other criminal sanctions which will be imposed on the accused person in accordance with the provisions of the Criminal Code;

2) on the costs of the criminal proceedings and claims under property law;

3) on denouncing the right of appeal by the parties and defense attorney against the decision of the court made on the basis of the agreement on the admission of guilt when the court has fully accepted the agreement.

(2) Agreement on the admission of guilt shall also contain an obligation of the accused person to return the property gain acquired by the commission of the
criminal offense as well as objects that have to be forfeited under the Criminal Code within a certain time limit.

(3) The accused person may undertake by means of the agreement on the admission of guilt to perform the obligations referred to in Article 272 paragraph 1 of the present Code, provided that the nature of the obligations is such that it allows the accused person to perform or start performing them before the submission of an agreement on the admission of guilt.

**Article 302**

(1) The court shall decide by a ruling whether an agreement on the admission of guilt should be rejected, dismissed or accepted.

(2) When an agreement on the admission of guilt has been submitted before an indictment has been brought, or before the filing of the bill of indictment or the private action, it shall be decided upon by the President of the Panel referred to in Article 24, paragraph 7 of the present Code.

(3) If an agreement has been submitted after the indictment or the submission of the bill of indictment or the private action has been brought, the Chair of the first instance panel shall decide on it.

(4) The Chair of the Panel shall reject an agreement on the admission of guilt submitted after the expiry of the term specified in Article 300 paragraph 3 of the present Code. The decision on rejection shall not be appealable.

(5) The court shall decide on the agreement on the admission of guilt without delay at a hearing attended by the State Prosecutor, accused person and her/his defense attorney, while the injured party and her/his proxy shall be informed of the hearing.

(6) Provisions of Art. 313 to 316 of the present Code shall apply on the holding of a hearing referred to in paragraph 5 of this Article.

(7) The court shall dismiss an agreement on the admission of guilt by way of ruling if the duly summoned accused person does not appear at the hearing. The ruling dismissing the agreement on the admission of guilt cannot be appealed.

(8) The court shall accept an agreement on the admission of guilt and render a decision which is in line with the contents of the agreement, if it establishes the following:

1) that the accused person confessed to the criminal offence or offences s/he is charged with voluntarily and consciously, that the confession is in line with the evidence contained in the case files and that there is no possibility that the confession was made as a consequence of an error;

2) that the agreement was concluded in accordance with Article 300 paragraph 1 item 1 of the present Code;

3) that the accused person understands the consequences of the agreement, and particularly that s/he waives the right to a trial and that s/he may not file an appeal against the decision of the court rendered on the basis of the agreement;

4) that the agreement does not violate the rights of the injured party;

5) that the agreement is in line with the interests of fairness and the sanction serves the purpose for which criminal sanctions are imposed.
(9) If one or more conditions referred to in paragraph 8 of this Article have not been met, the court shall dismiss the agreement on the admission of guilt by a ruling, and the admission of guilt contained in the agreement cannot be used as evidence in criminal proceedings. The agreement and all the case files forming an integral part of the agreement shall be destroyed by the President of the Panel, with records being made thereon.

(10) The court shall enter into the record the decision accepting, rejecting or dismissing the agreement on the admission of guilt. The decision accepting the agreement on the admission of guilt may be appealed by the injured party, whereas the decision dismissing the agreement may be appealed by the State Prosecutor and by the accused person.

(11) The Panel referred to in Article 24 paragraph 7 of the present Code shall decide on the appeal referred to in paragraph 10 of the present Article, not including the judge who rendered the decision referred to in paragraph 10 of this Article.

Article 303

(1) When a ruling on accepting an agreement on the admission of guilt becomes final, the Court shall, without delay, and not later than within three days, render a decision to the effect that the defendant is found guilty in accordance with the accepted agreement.

(2) The decision referred to in paragraph 1 of this Article shall be appealable insofar as it is not in accordance with the concluded agreement.
APPENDIX Q

Overview of crimes that were the subject of plea agreements in Montenegro for the period 2010-2015

Criminal Code of Montenegro:

Article 151: Grievous Bodily Injury
Article 152: Minor Bodily Injury
Article 153: Participation in an Affray
Article 168: Endangering Safety
Article 210: Pandering
Article 220: Family and Domestic Violence
Article 239: Theft
Article 242: Assault and Robbery
Article 265: Smuggling
Article 272: Abuse of Position in Business Operations
Article 284: Illicit Trade
Article 300: Unauthorized Production, Keeping and Distribution of Narcotic Drugs
Article 301: Enabling the Enjoying of Narcotic Drugs
Article 326a: Building a Facility without a Building Permit
Article 327: Causing General Danger
Article 329: Causing Danger by Failure to Ensure Protection Measures at Work
Article 338: Grave Offenses against General Safety
Article 339: Endangering Public Traffic
Article 347: Failure to Provide Assistance to a Person Injured in a Traffic Accident
Article 348: Grave Offences against the Safety of Public Traffic
Article 376: Attack on a Person in Official Capacity during Performance of an Official Duty
Article 399: Acts of Violence
Article 401: Criminal Association
Article 403: Unlawful Keeping of Weapons and Explosive Substances
Article 412: Falsifying a Document
Article 415: Instigation to Authenticate False Content
Article 424: Active Bribery
APPENDIX R

Brief overview
Other CPC institutions and opportunities available to the accused that resemble plea bargaining

The institutions available to the accused under the CPC which are more or less similar to plea bargaining are the so-called “cooperating witness” and “postponing of the criminal prosecution”. These institutions represent additional options which the accused has when it comes to making arrangements with the prosecution. The essence of the institution of the cooperating witness is to release the accused, a member of a criminal organization, from criminal prosecution if s/he testifies and by that testimony assists the prosecution in proving the committed/planned future crimes of the organization the accused belongs to. In such cases, the importance of her/his testimony in proving the crimes must be larger than the damage caused by the crimes s/he is accused of. The leader of a criminal organization cannot be a cooperating witness. As for the institution of postponing the criminal prosecution, or as it is commonly called “deferred prosecution”, it is limited to crimes where a fine or prison sentence of up to five years is envisaged by law. Upon the prosecutor’s estimation on the non-purposefulness of having a criminal process, s/he can offer the accused to fulfill one of the duties enumerated in the law in the period of six months at the longest; in case that accused accepts this offer and fulfills the given duty s/he will be released from criminal prosecution. These duties may include, for example, compensation for the damage caused by the commission of the crime; payment of a certain amount of money to a humanitarian organization; and so on. If the duty is fulfilled in time by the accused, the prosecutor will reject the criminal report. Even though these institutions are limited to certain types of crime, they do imply the release from criminal prosecution. Therefore, there is no negotiation on the criminal sentence. However, they both can still be seen as a form of bargaining where the “goods” of bargaining are a bit different than is the case with agreements on the admission of guilt.

Another two options that the CPC offers to the accused are worth mentioning as well. One is the procedure of issuing a criminal sanction without holding a trial. This shortened procedure is possible for crimes where a fine or prison sentence of up to three years is defined by law. With the consent of the accused, the prosecutor may propose to the court that the court decision on the criminal sanction is adopted without holding a trial. The consent of the accused is checked by the court in this situation, as is the case with plea bargaining. However, the law here limits this possibility to only certain types of sanctions that can be ordered this way, excluding prison sentences, and those are: a fine, community service, probation, and judicial admonition. Therefore, this option merely has the purpose of shortening the criminal procedure in less serious cases where the accused, for the sake of avoiding a trial, accepts the sentence offered without any kind of
bargaining. Furthermore, a standard confession is yet another option for the accused. After the accused confesses a crime i.e. all the indictment charges, and after the prosecutor and defense attorney provide their confirming statements about this, the court may decide not to present evidence related to the crime further in the procedure, but only the evidence related to the criminal sanction. This is, of course conditioned on the clear and full confession of the accused, given willingly and consciously, with the full understanding of all the relevant consequences of such an act, in accordance with the available evidence and without the existence of any evidence that supports a possible false confession. If the confession fulfils all these conditions, no other evidence will be gathered further, and the court will decide. The confession is here actually treated as an extenuating circumstance for the accused.

This is obviously the case with deferred prosecution, which is much more common in practice of the Montenegrin prosecution and courts. This is, however, understandable since in these cases the accused fulfills a duty, and by that completely avoids a criminal record. For the reasons of comparison with plea bargaining statistics, in 2014, the number of cases in Montenegro resolved by deferred prosecution was 549. Another potentially better option for the accused can even be a regular confession in many situations. The issue of a regular confession in the criminal procedure v. a confession in the framework of plea bargaining is discussed in Chapters III, IV and V. Some of the interviewed participants discuss the relationship between the two, and find a regular confession to be a simpler way to go for all the actors in the criminal process in some cases.
APPENDIX S

Major research participants’ recommendations related to plea bargaining practice which are excluded from the final recommendations presented in Chapter VI

a) To make the court’s sentencing policy more severe, and to opt for the introduction of either a fully inquisitorial or fully adversarial criminal procedure. These recommendations are quite general and require systematic changes. Consequently, they require the long term, versatile and complex engagement and effort of the complete legal community of the country and the top management structures of the national Criminal Justice system.

b) To re-adopt the provisions that existed before the 2015 CC amendments. To exclude the requirement that the indictment is a constituent part of plea agreement in cases when the agreement is concluded before the formal bringing up of the indictment. In my opinion, this change would not affect plea bargaining practice to a significant extent. To cancel the mandatory defense requirement in the plea bargaining process (further elaborated in Chapter IV). In my opinion, the rights of the accused are better protected when s/he has a professional legal defense provided.

c) To amend the provisions in a way that the injured party participates in the plea negotiation process and is able to express her/his relevant opinion at this stage. In my opinion, these changes could reduce the number of plea agreements, which is not in line with the intentions and wished of both legislators and practitioners in Montenegro. On the other hand, there were proposals to amend the legislation in order to remove the opportunity of the injured party to complaint against the court ruling on the acceptance of the agreement. In my opinion, this change would not affect plea bargaining practice to a significant extent. It was, however, briefly discussed within the recommendation for the reduction of procedural formalism.

d) To try to find a mechanism through the Bar Chamber, likely through its Court of Honor, to sentence those attorneys who are unethical in relation to plea agreements and their clients. In my opinion, is not possible to successfully and easily investigate and determine this type of attorney behavior.

e) To make a technical correction to Article 300 of the CPC which says that plea bargaining is allowed for criminal offences which are prosecuted ex officio, except for criminal offences of terrorism and war crimes. Here “criminal offenses prosecuted by private complaint” should be added, since in other relevant CPC plea bargaining articles private complaint is mentioned together with the indictment and indictment proposal that are
used by the state/public prosecutor (an indictment proposal is a type of indictment used by the state prosecutor in cases of less serious crimes). Specifically, according to the CC, some crimes are prosecuted only by private complaint/private individuals not the state prosecutor, and the CPC actually allows plea bargaining in this situations as well. Crimes prosecuted by private complaint should, therefore, be added to Article 300 to reflect this option which is allowed by other CPC plea bargaining articles. This was probably omitted by accident from Article 300. Bearing in mind that this is more of a technical suggestion (made by Prosecutor P2), it was left out of the research recommendations. As stressed earlier, one of the interviewed prosecutors, P3, actually discusses the issues of the private prosecutor and whether it fully suits the plea bargaining institution.
APPENDIX T
Suggested form for the plea agreement / agreement on the admission of guilt

OFFICE OF THE BASIC STATE PROSECUTOR
Kt.br. 110/10
Podgorica, 10.09.2010.

Based on Article 301, Par. 1, Points 1, 2 and 3 of the Criminal Procedure Code, the Deputy Basic State Prosecutor in Podgorica, P.R. and the accused M.M. and his defense attorney D.Dj. from Podgorica, on 10. 09. 2010. concluded the following

AGREEMENT ON ADMISSION OF GUILT
By which basis the State Prosecutor and the Accused agreed about the following:

Article 1
The Accused M.M. admits that he:
- On the day 15. 06. 2010, in Podgorica, close to Stadium of the Football Club Buducnost, around 10 am, with the intention caused a severe bodily injury to the Victim V.M. from Podgorica, hit the victim in his face with his fist. This caused the victim to fall down to the ground. The Accused then continued to kick him with his legs in the victim’s body, and by this he caused Grievous Bodily Harm i.e. a fracture to the upper jaw-bone and a fracture to the seventh rib on the left side, as well as several blood hematomas and abrasions on the chest and back of the Victim,
- By which he committed the crime of Grievous Bodily Harm from Article 151, Par. 1 of the Criminal Code.

Article 2
The Deputy Basic Prosecutor and the Accused agree for the Basic Court in Podgorica, as the one having subject-matter and territorial jurisdiction in the case, to order the Accused M.M. to serve a prison sentence of three months, for committing the crime of Grievous Bodily Harm from Article 151, Par. 1 of the Criminal Code.

Article 3
The Deputy Basic Prosecutor and the Accused agree that the Accused pay €100 to the Basic State Prosecution in Podgorica for criminal procedure expenses and a €30 lump sum within 15 days from the moment when the judgment based on the Agreement on the Admission of Guilt becomes final.
Article 4
The Deputy Basic Prosecutor and the Accused agree that the Victim V.M is to be instructed to claim his property law request in a civil procedure.

Article 5
The Accused confirms that he gave his statement about the Admission of Guilt voluntarily and consciously, that he was not forced to do this by anybody, and that he is fully aware that by this Agreement on the Admission of Guilt he recants his right to a fair trial if the judgment based on the Agreement on the Admission of Guilt is adopted.

Article 6
The Deputy Basic Prosecutor and the Accused jointly recant a right to file an appeal against the decision of the court based on this agreement.

Article 7
This agreement on the Admission of Guilt was concluded in the premises of the Basic State Prosecution in Podgorica, on 10.09.2010., in five identical copies, out of which the Accused retains one, while other copies stay in the State Prosecution Office for the needs of the criminal procedure.

The Accused The Accused’s Defense Attorney The Deputy Basic Prosecutor
M.M. D.Dj. P.R.

Note: The content and form of the Agreement on the Admission of Guilt are the same in the phase after filing the indictment.
References


2 Even though the countries involved are close and have a joint legal history and tradition, quite often the post-Yugoslav individual legal reforms in each country led to taking slightly different positions and approaches when it comes to criminal law and the regulation of the criminal procedure. Consequently, this led to the development of slightly different case law and experiences.  
3 Out of 35 acquie policy fields or chapters, as they are called, that concern the free movement of goods, competition policy, fisheries, energy, transport and others, a special focus of the EU when it comes to Montenegro is on “the rule of law” Chapter 23: Judiciary and Fundamental Rights and Chapter 24: Justice, Freedom and Security. Due to the importance of establishing the rule of law and legal stability in the country these Chapters are a special focus of the EU. Through the adopted Action Plans for Chapters 23 and 24, Montenegro has overtaken a set of timely limited obligations which must be fulfilled in order to reach European and international standards in these areas. The Action Plans are predominantly focused on the fight against corruption and
organized crime, and strengthening the independence of Criminal Justice institutions. Only by fulfilling these duties will the country become eligible for EU membership. Every year the country’s progress is marked, and further guidance is given in the European Commission Progress Report. During this challenging and dynamic process a whole series of reports, strategies and other documents are drafted and adopted. Such a focused EU approach in the negotiations of the important Chapters 23 and 24 tells about the importance of the issues covered by these chapters from the EU’s point of view. It also demonstrates the importance of Montenegro’s efforts that are being put into the improvement of these areas for the pace of Montenegrin integration into the EU, and most importantly, for the democratization of society.

4 These key elements of the plea bargaining process that characterize it today have been equally recognized by the authors of different historical periods. It was like that at the end of the 1970s, when the practice was explained as “a defendant’s agreements to plead guilty…with the reasonable expectation of receiving some consideration from the state” (Miller et al., 1978, cited by McDonald, 1979, p.388); later in the 1980s the authors write about the accused who gets “lenient treatment” and “inducements” for waiving a right to trial (Feely, 1982, p.338); in the 1990s they write about “defendant’s entry of a guilty plea in anticipation of concessions from the prosecutor or judge” (Mary E. Vogel, 1999, p.162); or finally in 2013 Levenson (2013) defines plea bargaining as “a process of compromise” in which “Both sides act out of necessity.” (p. 464).


6 This will be discussed in Section 1.5. of this chapter.

7 Perceiving plea bargaining as an “unjust” practice can lead us even further to a discussion about the morality of laws and the well-known natural law theory maxima lex injusta non est lex (an unjust law is not a law) which promotes the legal non-validity of immoral or unjust law. It was largely discussed and to a great extent endorsed by St. Thomas Aquinas (Kretzmann, 1988, cited by Vieru, 2012, p. 120). Contemporary natural law theorists do claim that there is a legal obligation to follow an unjust law i.e. they approve of the authority which creates laws, but there may not be a moral obligation to respect it. (Finnis,1980, cited by Rice, 1981, p. 279). Those who see bargaining with guilt as one of those immoral or unjust laws, at the present time obviously need to accept the legal regulation of this issue in its existing form. On the other hand, this of course does not prevent them from considering it immoral, and even questioning it through the available defined legal procedures.


9 The issue and consequences of the public exposure of plea bargaining will be discussed in Chapter IV where analysis of the interviews results is provided.

10 When it comes to the theoretical underpinnings, the restorative justice approach by natural logic seem to be in conflict with the retributive approach which is focused on the harm done and which favors a strongly repressive mechanism of sentencing the perpetrator for what s/he did, because s/he deserves it. However, a number of authors believe that restorative justice is not completely contrary to the retributivist theory since both approaches are “concerned with making the wrong right or restoring the justice of the situation”; it is simply the means of reaching justice that makes them different (Brunk, 2001, p. 39). Some even think that restorative practices “consist of fundamental principles from both a retributive and a utilitarian perspective.” (Gabbay, 2005, p. 397). Gabbay concludes that “if we are going to punish because
offenders ‘deserve’ to be punished … we might as well impose sanctions that aspire to achieve other noble goals, namely reducing crime and increasing public welfare” (2015, p. 382).

11 Plea bargaining in the United Kingdom - England and Wales will be briefly discussed in Section 1.5. of this chapter.


13 Donald J. Newman, the author of a leading study on plea bargaining from 1966 entitled Conviction: Determination of Guilt or Innocence without Trial also claims that “plea agreements are not new”. He even goes further claiming that such bargaining has always been part of the criminal courts practice, that has existed ever since they began (Newman, 1974, cited by Alschuler, 1979, p.2).

14 In my later discussions, it can be seen that both Montenegrin legislators and practitioners i.e. those that I interviewed, amongst others identify these reasons as the main justification for the introduction and application of plea bargaining. It is similar in other countries which are familiar with this practice.

15 In its analysis, Fisher linked this pressure to the specific social reality of that time i.e. growing number of alcohol (due to prohibition) and driving related crimes.

16 When it comes to the issue of trial complexity, in civil law systems like the Montenegrin one, being largely inquisitorial with the key role of the judge during the trial, procedural complexity and formalism can definitely be a barrier to efficiency. Exactly because of these reasons, as will be discussed later, the Montenegrin system called for the necessary reform of the criminal process by the introduction of adversarial elements. In this context, plea bargaining was recognized by the Montenegrin legislators as a good way to avoid complex and long trials. Such reformatory processes are not limited to Montenegro only but have been happening in different forms in a number of European and other civil law countries over the last two decades. This will be briefly discussed in Section 1.5. of this chapter.

17 Known as an author very critically oriented towards plea bargaining which he even interestingly compares with the medieval European Law on Torture.

18 See Section 1.1. of this chapter. As a reminder, by this case nolo contendere pleas were introduced in the U.S., where the accused can plead guilty but at same time protest her/his innocence.

19 Fisher claims that he himself followed the suggestions of the “third wave” authors in his own detailed study of plea bargaining where he literally analyzed thousands of cases of the Middlesex County in the State of Massachusetts from the 1800s to the present time. He emphasizes that his focus was not on the larger social setting, but on the courtroom setting which he deems the most important for such research.

20 Over time, plea bargaining has naturally become an essential part of the most relevant U.S. criminal legislation and other documents that regulate this area. One of such documents is the Federal Rules of Criminal Procedure (file:///C:/Users/BluePerl/Downloads/rules-of-criminal-procedure%20(2).pdf) and it’s Rule 11 which was first time adopted in 1944 and has been amended many times since then. All the changes over this long period of time have been in the direction of further strengthening this practice through defining more exact and detailed procedures and the roles of all sides involved in the process, as well as having the purpose of reflecting the passage of time and modern trends. These rules represent the main source of plea bargaining law in the U.S. Federal Criminal Justice system, and are proof of the continuously stable position of this legal institution in the system. Furthermore, another such document is the Federal Sentencing Guidelines (http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf) first adopted in 1987. Even though it was decided by the Supreme Court in the Brooker v. Unites States case (543 U.S. 220 (2005)) that these Guidelines are of an advisory and not obligatory character, they are still very relevant in judicial decisions on sentences. Part of the Guidelines refers to the plea bargaining process and the role of the court in the process, with a focus on sentencing issues. Today, plea bargaining is part of numerous
Department of Justice (DOJ) policy documents as well. For example, “the Ashcroft Memorandum ... sets out specific guidance for both charge bargaining and plea bargaining.” (Taylor Shannon, 2007, p. 9). Memorandums are documents announced by U.S. Attorney Generals or their deputies. Plea bargaining is also an important part of the U.S. Attorney Manual (https://www.justice.gov/usam/united-states-attorneys-manual). Additionally, it was not just Government that formalized the significance and usage of plea bargaining, but it was also done by other participants in this process. Specifically, in 1969, the American Bar Association (ABA) for a first time issued a set of so-called Standards for Criminal Justice (http://www.americanbar.org/groups/criminal_justice/standards.html) that amongst other elements include an elaboration of plea bargaining issues. Finally, it is worth to mention that plea bargaining was also strongly incorporated into the Uniform Rules of Criminal Procedure http://www.uniformlaws.org/shared/docs/rules%20of%20criminal%20procedure/urcp_final_87.pdf which were initially promulgated in 1954, and then amended a few times. These rules are adopted by the Uniform Law Commission, whose main role is to provide legislation and take other steps which contribute to the uniformity of state laws.


When it comes to Montenegro, two additional observations are worth mentioning. Specifically, a cost of Montenegrin court proceedings is generally not high for the parties involved, and also the threatened criminal sentences seem to be much lower than it is the case in the U.S. These factors that may potentially have a significant influence on the application of practice in any legal system will be discussed later in my work from the Montenegrin perspective.

30 See Section 1.1. of this chapter.
31 See Section 1.4. of this chapter, sub-section: The U.S. Supreme Court’s Affirmation of and Support for Plea Bargaining.

32 This was clearly stated in their Report on the Courts (I did not have direct access to this report). Davis and Griffiths mention this report in their work and cite its most relevant part in this sense (1979-1980, p.319): “Its condemnation of plea bargaining was as unequivocal as it was explicit: ‘[The Commission] condemns plea bargaining as an institution and recommends that within 5 years no such bargaining take place. The only concession the Commission is willing to make is that total elimination of the practice will take appreciable time.’”

33 The research is concluded with the statement that “Plea bargaining is an inherent part of the criminal justice system. An official ban on plea bargaining is therefore impractical.” However, some reformatory actions in this area are proposed for future consideration: “Limiting plea bargaining to certain types of charges, such as less serious crimes; limiting prosecutorial discretion by creating policy and legislation that calls for firmer guidelines when choosing sanctions for specific crimes; and” with referral to Bibas (2004) “Involving both judges and
defense attorneys in the charge bargaining process so that there is more of a balance of power among all legal participants.”


37 Natsvlishvili and Togonidze v. Georgia, Application no. 9043/05, Judgment of 29 April 2014. Before discussing the position of ECoHR in this case it is important to stress that Georgia introduced plea bargaining practice in 2004. Since then, plea bargaining has been used more and more each year in this country. However, many controversies follow the application of plea bargaining in this country; many human rights defenders claim that the process is non-transparent, and that legislation and legal institution are being misused in practice. Thomas Hammarberg, Commissioner for Human Rights of the CoE, visited Georgia in April 2011, and the visit resulted in a report which amongst other things includes a section on plea bargaining (CommDH[2011]22. The report can be downloaded from the web-site: https://wcd.coe.int/ViewDoc.jsp?id=1809789). According to the report: “The Chairman of the Supreme Court informed the Commissioner that in 2010 plea agreements were applied in around 80% of all criminal cases.” Commissioner Hammarberg stresses one peculiarity of the Georgian plea bargaining system which: “...relates to Article 42 of the Criminal Code, which provides that fines can be imposed in the context of plea agreements even for violations of the Criminal Code for which this form of punishment is not foreseen.” He further notices that safeguards of proper application of the institution may be provided in the legislation itself, but the practice is strongly criticized. He stresses the importance of free and voluntarily pleas, insists that judges should have stronger control over the process, and calls for a larger role of the defense in negotiations, as well as greater process transparency. In line with the above mentioned, the Natsvlishvili and Togonidze v. Georgia case involves two Georgian citizens, a husband and a wife, Mr. Natsvlishvili and Ms. Togonidze. Natsvlishvili was the director of one of the largest public companies in Georgia. He and his wife together owned 15.55% of shares in the factory, and were the largest shareholders after the state. Natsvlishvili was arrested in 2004 and charged with: “making fictitious sales, transfers and write-offs, and spending the proceeds without regard for the company’s interests.” (ECoHR Press Release on the Judgment issued by the Registrar of the Court on 29 April, 2014). In the same year, after negotiations with a prosecutor he accepted a plea bargain and was fined € 14,700 in exchange for a reduced sentence. Before the ECoHR, amongst other things, Natsvlishvili claimed that plea bargaining as applied in his case was an abuse of the process by the prosecution, that there was no possibility of appeal, and that it breached Article 6 of the ECHR. In addition, both applicants claimed that the financial penalties imposed upon them as part of plea bargaining violated their property rights under Article 1 of Protocol 1 to the ECHR. In short, the ECoHR position in this case was that there were no violations of the named articles by the Georgian institutions, since, according to the court, Natsvlishvili voluntarily pleaded guilty and was fully aware of the consequences and content.

Plea bargaining was not originally foreseen in the Rules of Procedure and Evidence of this ad-hoc tribunal which date from February 1994 (all versions starting from 1994 can be read at the web-site: http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence). Only in November 1997 was a plea of guilty as such regulated through Rule no 62bis, and in December 2001 a real plea bargaining procedure including agreement between the prosecutor and accused was regulated through Rule no. 63ter. In 1996 Drazen Erdemovic (Prosecutor v. Erdemović, TC, Case No. IT-96-22-T, 7 October 1997) was the first accused to plead guilty before this Court. He was a low level soldier charged with committing killings at one of the execution sites near the village of Srebrenica, and he was convicted for murder after he pleaded guilty. Even though it led to the adoption of the above-mentioned Rule 62bis and the definition of the conditions which must be fulfilled for a valid guilty plea, this guilty plea was not the result of negotiations. The first case of real plea bargaining before this international tribunal was the case of Stevan Todorovic from 2000 (Prosecutor v. Todorović, TC, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001. Todorovic was Chief of Police in the town of Bosanski Samac charged with crimes against humanity consisting of persecution on political, racial and religious grounds in the form of beating, ordering torture, humiliating, discrimination against non-Serb civilians and so on.. He was convicted of persecution after negotiating a guilty plea. Ferioli writes that (2013, p.6):
‘...between 2001 and 2003, thirteen more defendants did the same”, meaning pleaded guilty. ICTY generally allows for sentence and charge bargaining. Ferioli further refers (2013, p.9-10) to Turner J.I. and Weigend (2013) and says: “’a prosecutor’s decision to drop charges at the ICTY and ICTR must typically entail the dropping of factual allegations as well, because the withdrawal of charges might not have any effect on the ultimate sentence, unless the parties also negotiate to exclude certain facts from the indictment”. As can be concluded, a type of fact bargaining is allowed before the ICTY as well. One of the best known and most illustrative cases when it comes to the ICTY and plea bargaining which caused lots of controversy and criticism by the victims’ families is the case of Biljana Plavsic (Prosecutor v. Plavšić, TC, Case No. IT-00-398&40/1, Sentencing Judgment, 27 February 2003. Plavsic was President of the Republic of Srpska, which is one the two entities of Bosnia and Herzegovina. She succeeded the accused Bosnian war criminal currently on trial, Radovan Karadzic, in this position. Plavsic was charged with crimes against humanity and genocide by being involved in planning and enforcing the ethnic cleansing of Muslims during the Bosnian war.) She pleaded guilty to crimes against humanity, and because of this plea the genocide charge was dropped by the prosecution.

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, Sentencing Judgment, 2 December 2003.

University of Wisconsin Law School web-site: http://law.wisc.edu/law-in-action/

Another division between research methodologies that is well explained and useful is provided by Gray (2014). He recognizes the following research methodologies: experimental and quasi-experimental research, phenomenological research, analytical surveys, action research and heuristic inquiry. In his work Gray (2014) also provides readers with advice which additionally helped me to choose the direction of my research. Specifically, after stressing the importance of connecting all the research elements and taking the epistemological standpoint into account at the very beginning of research he says: “What is important, is that whatever philosophy, approach and methodology you adopt for your research, you should be able to justify your mix in relation to your research philosophy and research question(s).” In line with all the above, my final general choice was a qualitative research approach. The goals of my research especially those related to identifying the problems and success formulas within plea bargaining application in Montenegro, as well as those related to the usefulness of this practice, cannot be fulfilled without the deeper involvement of the actors in this process themselves. Any other road that would imply excluding the actors in the process would lead to repetitive results that are neither reliable nor credible, and which are not based on the authentic experiences and realistic circumstances in which this practice takes place.


All statistical data is gathered from the official web-site of the Courts of Montenegro: www.sudovi.me

The reason for not having a precise percentage for these two groups is because their names in the judgments are not always provided in full, but only their initials. I did not consider further research in relation to this necessary since by the total number of agreements concluded and analogy with judges, it can be concluded that the percentages of prosecutors and defense attorneys who possess some experience in this area are small as well.

Plea bargaining possibilities were like that at the time of research; the most recent legislative changes in this regard which do not have any effect on the previous practice will be discussed later.

More about ethical considerations later in this chapter.

For quoting the Criminal Procedure Code articles in my work, I used the unofficial translation of this law from the Montenegrin into English provided by the Ministry of Justice of Montenegro. In some places, I did make small corrections to the text in order for it to be of a better quality and more precise. I did this in the capacity of the Official Court Interpreter for the English Language appointed by the Minister of Justice of Montenegro (Decision number 03-11039/14).
After the adoption of the CPC on 18 August 2009, not all the provisions came into force eight days after the law was published in Official Gazette of Montenegro, as is the common practice in the Montenegrin legal system. Specifically, the law itself defined a so-called *vacatio legis* of one year for most of the law provisions, meaning that the majority of provisions were to become applicable one year after the law came into force. As for plea bargaining provisions, their application deadline was six months. *Vacatio legis*, as the legislator explained “...was defined with the purpose of more efficient application of law, by which possibility was given to all the actors of criminal procedure to prepare themselves for implementation of the new legal solutions, as well as to create conditions for their better acceptance in a psychological sense.”(Ministry of Justice. (2013). *Report on the Needs for Modifications and Additions to the Criminal Procedure Code*. Podgorica)

Limiting plea bargaining to these crimes was explained by the legislator as an optimal solution at that particular moment, bearing in mind that it was a completely new legal institution. “Such limiting of the agreement enables that a large number of crimes are its subject, but that it is still not possible for the most serious crimes; this is justified, on the one hand, by the fact that this is a completely new legal mechanism which requires certain necessary caution, while on the other hand, such a solution is generally acceptable”. This is written in the Government of Montenegro-Ministry of Justice and Human Rights *Information on the Implementation of the Institution of Agreements on Admission of Guilt* from 2012. It is obvious that the legislator was careful when deciding about the scope of application of these agreements, and opted for limited application and a potential “trial period” for this legal practice.

The “accused” implies a higher level of certainty that a person did commit a crime, and by that the prosecutor’s success at trial is more likely. This may affect both the prosecutor’s and the accused’s motivation to enter the agreement in one way or another.

This article also allows for agreement on the costs of the criminal proceeding, as well as on waiving the right to appeal after the court fully approves the agreement. Furthermore, the article defines the obligation of the accused to return a property gain acquired by crime, and objects that have to be forfeited under the CC. The article also provides the possibility for the accused to agree about the fulfillment of a certain obligation in the framework of the plea agreement. This can include, for example, eliminating the consequences of a crime or compensating damage caused by a crime, paying a certain amount of money to a humanitarian organization, carrying out some community service or humanitarian work, and so on.

When it comes to the acceptance of the agreement, the article enumerates the specific conditions which all cumulatively must be fulfilled in order for the court to accept the agreement. The confession of the crime by the accused must be given “voluntarily and consciously” in line with the available evidence and without the possibility that it was made “as a consequence of an error”. The crime for which the confession is given must be one of the crimes for which plea agreements are allowed. The accused must be aware of all the consequences of signing the agreement, particularly waiving the right to trial and the right to appeal. The agreement cannot “violate the rights of the injured party”, it must be in line with “the interests of fairness”, and the sanction should serve “the purpose for which criminal sanctions are imposed.” If only one of these conditions is not met, the court will reject the agreement, and the admission of guilt cannot be used as evidence in any further criminal proceeding. There are two situations in which the court will dismiss the agreement, and that is if the accused does not come to the hearing scheduled for the purpose of deciding on the agreement, even though s/he was regularly summoned to the court, and if the agreement is not submitted to the court in a timely way i.e. not later than the first session of the main hearing. The legislator did explicitly take care of the injured party’s interests. Specifically, apart from the violation of injured party interests being one of the particular reasons for the rejection of an agreement, the article defines that the injured party and her/his proxy will be informed by the court about the plea bargaining hearing.
Additionally, the injured party is given the possibility to appeal against the court’s ruling on the acceptance of the agreement.

63 The article says that there is just one situation in which the court’s judgment on accepting the plea agreement can be appealed and that is when the judgment itself does not correspond to the agreement reached. This is, however, expected to happen extremely rarely or probably never in the court’s practice.


69 It seems that the legislator believed that the “test” period for this legal instrument was over, and that it should be possible to apply it to all crimes with the exception of the most serious ones. The justification for such an approach may be found in the potential position of the legislator that resolving complex cases, like organized crime and high level corruption cases, by using this institution releases the prosecutor from hard and long lasting work which quite often does not have a certain and positive outcome at the trial. The question that can be asked is: why was this approach not taken at the very beginning? It may be that the “fear” of such novelty prevailed at that starting moment. As for terrorism related and war crimes cases, it can be presumed that the high sensitivity of these cases led to the legislator’s determination to disable “bargaining about guilt” in such situations.

70 Extending the possibility to the suspect to conclude an agreement can be seen as a step forward that might open the doors to greater implementation of the practice. Depending on the type of charges, the strength of evidence, the prosecutor’s position in relation to the sentence, as well as the forecasted judicial decision in each particular case, it may be motivating both for the prosecutor and the suspect.

71 The novelty related to the submission of the indictment together with the plea agreement can be potentially explained by the position of the legislator that the criminal procedure must formally start with the indicting act. However, by eliminating indictment control in plea bargaining cases, the court is less burdened and the prosecutor is released from this obligation which slows down the process.

Articles 293 to 297 of the Criminal Procedure Code of Montenegro regulate issues of the control of the indictment. This is a standard obligation that arises from the CPC. It represents a form of initial judicial control and serves as a tool for initial corrections to the key indictment act with the purpose of preventing improper indictments from initiating a trial, or their poor quality affecting the quality of the trial. Additionally, it serves as a checking mechanism in the context of the rights and freedoms of the accused.


73 There is a general terminological change present in the new plea bargaining articles that should be mentioned for the sake of clarity. The “indictment proposal” and “private complaint” were added to the articles after the word “indictment”. This is a reflection of the new reality that agreements are now allowed for all crimes except the previously mentioned ones. Specifically, in the cases of more serious crimes, the prosecution brings up a classical indictment. With the less serious crimes a simpler type of indictment called an “indictment proposal” is brought up.
Moreover, the CPC defines that certain types of crimes may be prosecuted by a private complaint which is submitted by a private individual. This means that a “private prosecutor” can negotiate a plea agreement with the suspect/accused. It is an interesting new solution which will be discussed later in Chapter IV. With the extended application of plea bargaining to almost all crimes, these two other types of indicting acts had to be inserted into the relevant articles accordingly.

74 In the earlier 2009 CPC, these issues were not clearly and explicitly regulated which provided space for confusion. Both of these issues were actually discussed as problematic by some of participants in my research. The legislator obviously “felt” the need to clarify these issues, probably based on input from practitioners.

75 All the statistical data is gathered from the official web-site of the Courts of Montenegro: www.sudovi.me

76 This and all the other percentages below for each given year are the percentages of the cases completed by plea agreements out of the total number of completed criminal cases for that year.


84 For example, in 2014, the number of indictments at the Podgorica Basic Prosecution Office were 992, while the largest number of indictments in the North of Montenegro was at the Basic Prosecution Office in Berane, 259, and in the South at the Basic Prosecution Office in Kotor, 435 (Office of the Supreme State Prosecutor. (2015). Report on Work of the State Prosecution for 2014. Podgorica). Furthermore, as an illustration of the differences between the courts of different regions, the influx of all types of cases at the Basic Court in Podgorica for 2014 was 18,601, while the influx of cases at the largest courts in the North and South of Montenegro was much lower, at the Basic Court of the northern town of Bijelo Polje 6,336, and at the Basic Court of the southern town of Kotor 5,414 (Judicial Council of Montenegro. (2015). Annual Report on Work the Judicial Council and Courts for 2014. Podgorica).


86 The information is a result of the analyses of the content of all the plea bargaining agreements retrieved from the official web-site of the Courts of Montenegro: www.sudovi.me

87 It is worth noting that even though agreements on the admission of guilt have been part of the Montenegrin legal system for almost six years now, not that many practitioners or academics have written about this institution. I identified only two articles on this topic in Montenegro, interestingly both written by judges (both authors are included in the References). The authors write about the agreements on the admission of guilt, but both have entirely opposite standpoints. While Vujanovic (2012), even though referring to some practical problems, favors the institution, Bogicevic (2010) is completely against it and believes that it should not be part of the Montenegrin legal system. Vujanovic does express criticism in relation to the different segments of the plea bargaining process in Montenegro that include: prosecutors being inactive
when it comes to proposing negotiations; judges not being good at estimating the quality of confessions; and the low level of involvement of defense attorneys when it comes to the confession of their clients (2012, p. 120-136). Another interesting critical comment by this author concerns the previously mentioned forms for CPC application published by the Judicial Training Center of Montenegro. Specifically, in the author’s opinion: “The manual of forms for the practical application of the CPC hindered more than assisted in the practical application of agreements on the admission of guilt. Prosecutors and judges stuck to the published forms without thoroughly studying the institution of the agreements on the admission of guilt and their role in it, which in most cases led to standard minutes and rulings based on a system of copy-paste” (Vujanovic, 2012, p. 15.). However, regardless of these observations, Vujanovic encourages further application and even suggests the introduction of the possibility to negotiate about the legal qualification of a crime: “…I believe that it would be purposeful to enable … to negotiate about the key characteristics of the essence of the crime as well, and in connection with that about the legal qualification too.” (Vujanovic, 2012, p. 15). Additionally, one more legislative change was proposed by this author, and that is to introduce an obligation of the prosecutor to submit the indictment together with the agreement (in cases when the agreement is concluded before formal bringing up of the indictment). Otherwise, as she explains, it means that there is a conviction without an accusation i.e. formal indictment. On the other hand, Bogicevic has an extremely negative opinion about plea agreements which is strongly expressed in his work: “This is a new institution in our criminal procedural system…taken over from the Anglo-Saxon tradition. It is attack on the Montenegrin moral codex and legal tradition, and jeopardizes moral axiology as rational self-consciences in the essence of Kant’s categorical imperative, the foundations of justice and truth; and that is because it is based on benefits and privileges which the accused gets in the procedure which favors him in comparison to the confession of crime by the accused which is not included in the agreement.” (Bogicevic, 2010, p. 19). It seems that the everlasting discussion of U.S. authors about this issue that I wrote about in Chapter I can equally be applied even in a small country like Montenegro.

For contextual purposes, I will briefly refer here to the issue of public interest in plea bargaining. This institution is always an attractive one in Montenegro, bearing in mind that country is historically known for worshipping the cult of the so-called “blood revenge”, the concept of “an eye for an eye” justice. There are many examples of murders in Montenegrin court practice that are result of this traditional phenomenon. In this sense, the attitude of the public towards plea agreements can be subject of separate research. When it comes to specific media articles devoted to plea bargaining, there have been some published in Montenegro. In 2014, the main daily newspaper published a series of articles about plea bargaining and deferred prosecution for the first time which served to introduce the public to the legal provisions, and explain the nature and purpose of these practices. (Prosecutors Unwilling to Negotiate because of Fear of the Public. [2014, July 13]. Vijesti, p. 2; Guilty the Most Common Plea by the Accused in Traffic Accidents. [2014, July 14]. Vijesti, p. 10; Alibi for the Prosecutor with Weak Evidence. [2014, July 21]. Vijesti, p. 15; Agreement on Admission of Guilt Rare-A Million Euros Spent Dally. [2014, July 26]. Vijesti, p. 11; Accused Don't Want to Make a Deal with the Prosecutors. [2014, July 29]. Vijesti, p. 9; Who Paid not to go to Prison?. [2014, July 30]. Vijesti, p. 14; Unusual Deal of the Prosecution-Why Didn't the Country React Differently?. [2014, July 31]. Vijesti, p. 9; Pleading Guilty Because of a More Lenient Sentence. [2014, August 1]. Vijesti, p. 11.) From the political perspective the articles also questioned some of existing deferred prosecution agreements in terms of the individuals with whom they were signed. The titles of some of the articles were quite bombastic like: Who paid not to go to prison? In 2015, on two occasions, the media introduced the public to the CPC 2015 amendments by which the agreements’ application was extended to all crimes, except terrorism related ones and war crimes (in May and September of 2015 two articles were published in two different daily newspapers: Bargaining with the Prosecutor for All Crimes. [2015, May 11]. Dnevne novine, pp 12, 13; No Bargaining only for
Crime of Terrorism and War Crimes. [2015, September 7]. *Pobjeda*, p. 7. It is noticeable that from the beginning of 2016 the media have regularly started to follow a few specific cases where plea agreements have been concluded. The reason is that those are high level corruption cases involving state officials. Due to the quite large number of such articles I am not able to track them all. The general observation is that they are primarily of an informative character, occasionally questioning the sentences as being too small and the return of illegally gained assets. Most of the agreements that have been in the focus of media attention in 2016, however, have still not been finally confirmed by the court. They can be considered the result of the 2015 CPC amendments – the extension of plea bargaining to almost all crimes. These processes are discussed in Chapter VI, in the framework of the recommendations for future research.


93 The standpoint of the Montenegrin legislator was possibly related to efficiency i.e. the accused missed using the institution at the very beginning, and entered the phase of trial where all the evidence has practically been gathered and the chances of the prosecution winning are much larger. However, sometimes the trial, presentation and elaboration of evidence convincingly demonstrates the reasons for the conclusion of the agreement. This is especially so, bearing in mind that some cases involve a large number of accused and witnesses which might be not just time consuming and long lasting, but can also provide a new perception of the whole situation. The existence of trial related psychological pressure as a motivating factor for the accused to conclude an agreement cannot be neglected in this context either.

94 In practice, the prosecutor will likely be willing to give up the prosecution of less serious crimes that are not included in the agreement which can serve as an incentive for the accused to accept the sentence offered. Montenegrin legislation does allow the giving up of criminal prosecution under certain conditions, like for example, cooperating witness and deferred prosecution situations.

95 The Serbian Special Prosecutor for Organized Crime, Miljko Radisavljevic, and the Senior Advisor in the Serbian Prosecution for Organized Crime, Predrag Cetkovic, refer to this in their article entitled *Experiences of the Prosecution for Organized Crime in Application of the Institution of Agreement on Admission of Crime* published in 2013 in the book *Simplified Forms of Acting in the Criminal Matters*. For more details see References, under Radisavljevic.

96 When it comes to the first agreement, apart from the testimony of the accused about relevant individuals and crimes, it includes her/his confession of the crime and the negotiation of the sentence. The Montenegrin provisions on cooperating witnesses leave the prosecutor with only one option in giving up a criminal prosecution against the accused if s/he decides to become a cooperating witness and by her/his testimony helps the prosecutor in prosecuting other organized crime individuals. The Serbian prosecutor obviously has more options, not just to give up the criminal prosecution, but also to release the accused from sanction, to negotiate the type, measure and range of sanction, and to negotiate about the confiscation of all the accused’s assets. The Montenegrin CPC does not require a confession from the accused, just relevant testimony about the organized crime(s) in question, it does not anticipate the signing of any kind of agreement between the prosecutor and the accused, nor do the Montenegrin provisions allow any kind of negotiations with cooperating witness. The principle of witness cooperation that exists in Montenegro in these cases is ‘give and take’.
As for the agreement on the testimony of the convicted envisaged by the Serbian CPC, which does not exist in Montenegrin law, it is limited to convicted individuals in cases of organized crime and war crimes. The “goods for trade” in this situation is the testimony of the convicted in relation to relevant individuals and crime(s) which assists the prosecutor in further criminal prosecutions. For providing such testimony, the prosecutor mitigates the sentence, or even releases the convicted party of the sentence through a special procedure defined in the CPC as well. Sentence negotiation is also a key element of this agreement.

97 In this context, it is important to stress that both the Montenegrin and Serbian legislation do not allow for the leader of a criminal organization to enter such arrangements with the prosecutor. Additionally, unlike in Serbian law, according to Montenegrin law, the court is also explicitly forbidden from proclaiming somebody guilty solely based on the statement of a cooperating witness.

98 It exists in Montenegro as well, and it is different from the earlier practice of both countries when the investigation was led by an investigative judge.


101 Special Prosecution Office for Organized Crime and Corruption acts before the Zagreb Country Court.


104 This solution seems to be the most appropriate one since both the Montenegrin and Serbian experience proved that this solution was also the final choice of the legislators in these countries after having test periods with the institution of plea bargaining.

105 It is obvious that the Croatian legislator wanted to keep regular judicial control of the indictment in the process of plea bargaining as well. The court i.e. the indictment panel in the Croatian system, must first check whether the parties agree with the statement on the agreement, then it conducts a check of the indictment, and then based on that it adopts a judgment on the acceptance of the agreement. The Croatian Judge Cambj explained the motives of the legislator behind this decision (2013, p. 672): “...criminal procedure...starts by confirming of indictment, and judgment can be adopted only by the authorized court, in the court proceeding defined by law, so it is completely logical that indictment must be confirmed before adoption of judgment, because if opposite, the judgment would be adopted while court proceeding hasn’t started yet.” It is the same justification that the Montenegrin legislator and some authors used for making the indictment part of the plea agreement in the earlier described cases. In both Montenegro and Serbia, control of the indictment is excluded in cases when the indictment is submitted together with the agreement. The solution in the Croatian system is not a huge obstacle in the whole process, but it can take time especially when serious and complex crimes are in question.

When it comes to the injured party, Croatian law is the most protective of the injured party’s interests. The consent of the injured party is required for concluding the agreement. Additionally, in the framework of the regular appellate procedure, the injured party, for a certain number of reasons, has the right to file an appeal against the court’s decision based on the plea agreement. This solution can realistically be an obstacle for concluding the agreement in quite a significant number of cases.

In terms of the accused’s waiver of the right to appeal against the judgment based on the plea agreement, unlike in Croatia, in both Montenegro and Serbia this right to appeal practically does not exist. In Montenegro, there is just one exception when this right will exist regardless of
accused's waiver, and that is when the judgment is not in accordance with the concluded agreement; this is a situation that can occur almost only at a theoretical level. In Serbia, the situation is essentially the same. The Croatian solution of allowing the right to appeal can legitimately be questioned, taking into account the purpose of plea bargaining, and that is to reach a just final judgment in a fast and efficient way. Just like the court in Serbia, the Croatian court decides on the acceptance of the plea agreement in the form of a judgment only, without the adoption of any previous ruling. The probable wish of the Montenegrin legislator to provide the injured party with the right to appeal against the acceptance of the plea agreement, resulted in the court’s two-level decision process (first by a ruling and then a judgment). The injured party in the Croatian system is, however, even more strongly protected through the possibility to act in the regular appellate procedure. The Montenegrin solution seems more adequate, bearing in mind nature and purpose of plea bargaining.


108 To remind the reader, deferred prosecution is possible for crimes where the envisaged prison sentence is up to five years, and it represents the postponing of the criminal prosecution with the possibility of cancelling it under the condition that the accused fulfils certain obligation in a given period of time.

109 Interestingly, the possibility of concluding an agreement between a so-called “private prosecutor” and the accused is found confusing by the same prosecutor, P3, but s/he did not have any particular suggestions in this regard. S/he was simply questioning this solution: “I’m not quite clear about this. How will the agreement be concluded here? We have the injured party as a private prosecutor. If they want to agree about anything, the accused and the injured party, then they will agree out of court. I don’t think that there will be cases of this type. But I guess they wanted to make the position of the private prosecutor and the state prosecutor equal.”

110 This is even though the CC/CPC allows a much higher sentence for this crime, particularly if the accused is a recidivist.

111 This is for the least serious form of this crime, where no juveniles are involved and where everything was done voluntarily.

112 A few other interesting participant’ comments about barriers or worries when it comes to plea bargaining practice are worth mentioning. Some of the participants’ answers revealed specific, more technical reasons why they were not able to conclude agreements. Based on her/his own cases, Attorney A4 emphasizes that the non-functionality of the prisoners’ electronic surveillance system in the country was a clear barrier to concluding the agreement: “I had this case, I represented a man in Serbia, in Cacak, and it was for misuse of official position in commercial business. The sentence we agreed on was home detention, for him to wear an electronic bracelet. Unfortunately, this agreement could not have been realized because there are no conditions for this in Montenegro. Really, it’s a pity.” On the other hand, Attorney A2 talks about another type of barrier to concluding the agreement. S/he stresses that from her/his own experience, those accused who are members of organized criminal groups sometimes do not want to conclude plea agreements because they would then need to reveal the leader of the group which they do not want: “What I noticed as a problem is that the accused don’t want to confess or conclude agreements, actually they don’t want to ‘spy’ on the leader of an organized criminal group, and this is when they are together in the same indictment. They have a dilemma when we have these big organized criminal groups because if they want to describe their role [in the group] they would reveal the leader of the group. This is where problem lies.”
Some participants express the worry that plea bargaining may be misused. As Judge J4 believes, sometimes it can be misused: “The question of fairness may be asked here, a person and his statement may be used as somebody’s arms and based on that somebody innocent may be proclaimed guilty.” The Judge calls for more detailed regulation of using plea bargaining confessions as evidence in other cases. In line with this, s/he talks about one of her/his cases and shares her/his thinking about that case: “I’m thinking why they [the prosecutor and the accused] actually agreed [in this particular case], whether the prosecutor did this so that through one person he reaches another group of criminals. I accepted this agreement. And then...later I see this person reported himself to be a witness in another case against this group. The prosecutor won’t say anything and the accused says’ I did it for my own reasons’, so the accused won’t say anything either. So the accused may possibly be the arms of the prosecutor. The sentence [in this case] is of course within the legally defined framework and ... the judgment is adopted.”

113 This was discussed and quoted earlier. And in addition, as a reminder, the same judge, J4, suggests the detailed legal regulation of how the prosecutor can use the confession of the accused given in the framework of plea bargaining in her/his [prosecutor’s] other, separate cases (see endnote 112 for this).

114 In relation to this issue.

115 This was presented earlier as well.

116 In connection with the already discussed unprofessionalism of attorneys in the context of plea bargaining, Attorney A3 has the very general and quite unrealistic proposal of sentencing her/his unethical colleagues: “I think that with attorneys it would not be bad to form ‘something’ to control their practice when it comes to agreements, maybe within the Court of Honor of the Bar Chamber or somewhere; however, it is very hard in practice, to prove that the prosecutor offered and this one rejected, and so on…”


Article 16 - Principle of Truth and Fairness

(1) The court, State Prosecutor and other public authorities participating in the criminal proceedings shall truthfully and completely establish all the facts relevant to render a lawful and fair decision, as well as examine and establish with equal attention the facts that incriminate the accused person and the ones in her/his favour.

(2) The court shall ensure equal terms to the parties and to the defence attorney as regards the offering, accessing and presenting of evidence.

118 As s/he said, in the past the typical sentence ordered for the crime of grievous bodily harm was probation i.e. releasing the accused after conviction under condition that s/he does not commit any crime in a certain given period of time, while now it is predominantly a prison sentence. Exactly for this crime, s/he managed to conclude a plea agreement for her/his client with the probation agreed.

119 Criminal Justice Act, 2003, can be read at the web-site: http://www.legislation.gov.uk/ukpga/2003/44/contents

Possible relevant legislative updates can be found at the web-site: http://www.legislation.gov.uk/


122 Ministry of Justice’s Consolidated Criminal Practice Direction, Horne referred to the 2011 edition, the 2013 edition can be downloaded from the web-site:
Possible relevant updates can be found at the web-site: https://www.judiciary.gov.uk/

123 Criminal Procedure Rules, 2012, can be read at the web-site: http://www.legislation.gov.uk/uksi/2012/1726/contents/made

Possible relevant legislative updates can be found at the web-site: http://www.legislation.gov.uk/

124 Regina v. Turner [1970] 2 QB 321. In this case, the Court of Appeal said that the council must be completely free to give the accused the best advice; and this can potentially include advice that a plea of guilty, which shows an element of remorse, is a mitigating factor which may make the court give a lesser sentence than would otherwise be the case.


126 Daniele Alge, Lecturer at University of Surrey, elaborates on the negotiated plea agreements introduced for serious fraud cases by the Attorney General in 2009. Specifically, power was granted to the Serious Fraud Office to negotiate plea agreements in cases of serious fraud. Alge writes that these are the first formalized plea bargaining agreements in England and Wales. The article dates from 2013, and is entitled Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualization of Plea bargaining?. It can be found on the web-site of the Web Journal of Current Legal Issues: http://webjcli.org/article/view/203/272


128 BGH (GS) [2005] 58.4 Neue Juristische Wochenschrift, 1440.


130 Criminal Procedure Code of the Russian Federation, 2001, can be downloaded from the web-site: http://legislationline.org/documents/section/criminal-codes/country/7
