TRENDS IN THE SLOVENIAN CRIMINAL PROCEDURE

The Slovenian criminal procedure is a mixed, adversarial-inquisitorial type in which the principal of pursuit of the material truth applies - a strong element of the inquisitorial procedure - however, adversarial content is also strongly emphasized.

The first criminal procedure act (hereinafter referred to as: CPA) adopted in Slovenia after it gained independence came into force on 1 January 1995, therefore 21 years ago. All the main solutions of the old Yugoslavian regulation (CPA from 1976) remained in force i.e. a mixed (inquisitorial-adversarial) model. The presumption of separate police and judicial proceedings was specific. There was an assumption that criminal proceedings, as judicial criminal proceedings, commence with the first act of the Court (i.e. with a decision on the initiation of an investigation).[1] The key novelty in the first Slovenian CPA was that a suspect attained the right to receive legal caution before the commencement of judicial proceedings (under the Yugoslavian CPA, such right was not granted before the investigative phase).[2]

Since its entry into force 21 years ago, the Slovenian CPA had been amended 15 times. The legislator gives two groups of reasons for such numerous amendments: On the one hand, the law had to comply with the decisions of the Constitutional Court of the Republic of Slovenia; on the other hand, amendments were made in order to achieve a more efficient and economically viable implementation of criminal proceedings, in order to achieve a more adversarial nature of criminal proceedings, and to eliminate deficiencies in practice.
The theory and the practice often criticise such (too) frequent rate of amending the CPA. The critics often emphasise the legislator's desire to make proceedings faster and more economical; they also claim that accurate analyses of the current state of affairs and expected effects of amendments are needed prior to amending the criminal legislation, as well as in-depth broad professional debates .

However, in spite of frequent amendments, a completely new model of criminal procedure (CPA-1) is being prepared since 2000, which would assign a different role and authorisations to persons involved in criminal proceedings, and would represent a huge step towards an adversarial model. However, no concrete decision exists regarding the exact date of entry into force of the new law.

[1] Šugman Stubbs K.: »Strukturne spremembe slovenskega kazenskega procesnega prava v zadnjih dvajsetih letih« (Structural changes in Slovenian criminal procedure over the last twenty years), Zbornik znanstvenih razprav, Univerza v Ljubljani, Pravna fakulteta, 2015, p. 130.
[2] Ibidem, p. 131.

In Slovenian history, there is a trend of systemic shift from the inquisitorial to the adversarial type of procedure. Three main solutions must be emphasised, which are adversarial by nature:[3]
1) The introduction of a legal caution (Miranda Rights) in the early phases of proceedings;
2) The Authorisations of the State Prosecutor's Office, which allow them to more efficiently affect the course of criminal proceedings (selective mechanisms). For specific criminal offences (subject to a prison sentence of up to three years), the State Prosecutor may decide whether to prosecute and initiate proceedings before a Court, or try to resolve the matter before the judicial branch becomes involved – using the legal institute of settlement and postponement of criminal prosecution; the State Prosecutor's Office also attained the authorisation to initiate investigative and restrictive measures and with it an active role, because without the incentive of the State Prosecutor's Office investigative or restrictive measures cannot even commence,
and
3) The possibility to conclude a plea agreement with the accused.

The latter of the aforementioned solutions (which is not a novelty in most civil law legal orders) was introduced in the amendment CPA-K, in 2012. By introducing the possibility to conclude a plea agreement (probably the most characteristic legal institute of the adversarial procedure), the procedure was even more decisively pushed towards the adversarial model.
The adversarial element of this novelty is that the accused has power over some of their procedural safeguards; they may even waive such safeguards. It is characteristic of an adversarial procedure that the dispute may be resolved by negotiations between the prosecutor and the accused or their defending counsel. The accused is recognised as an equal, autonomous interlocutor, who is able to contribute to a swift resolution of the dispute.

However, the introduction of the possibility to plea bargain did not encroach on the fundamental principle of the CPA – the principle of the pursuit of truth. Due to a strong judicial oversight (substantiated on the instructional maxim), the institute of confession is of a very different nature than in the *common law* system from where it derives.[4] Therefore, adversarial solutions provide a very different outcome in the Slovenian system than in systems where such a basic premise does not exist: the inquisitorial element, which still exists in the Slovenian version of a plea bargaining is that the Court maintains a strong judicial oversight over the plea agreement between the accused and the State Prosecutor.[5] The accused's confession in and of itself

[3] Ibidem, p. 146.
[4] Ibidem, p. 150.
[5] The Court must verify whether the accused understood the nature and consequences of the given confession, whether the confession was given voluntarily and whether the confession is clear and complete and substantiated with the other evidence on file (Article 285.c of the CPA).

does not suffice for a conviction, it must be substantiated with additional evidence. The inquisitorial element is apparent also in the fact that the plea agreement may not include legal qualification of the criminal offence.

Below, we will present the practical perspective of the role of the defence counsel during plea bargaining before the main hearing.

In our experience, this new adversarial element results in a more active as well as a more responsible role of the defence counsel in proceedings before the main hearing.
The defence counsel has an obligation to caution the accused regarding the new form of defence – the conclusion of a plea agreement – before proposing plea bargaining to the prosecutor. In order to make a neutral assessment of the case and predict its outcome as soon as possible, the defence counsel must assess the collected evidence and then ascertain the realistic possibilities for success of the defence, or whether there is a significantly higher probability that criminal proceedings against the accused would result in a verdict of conviction rather than pardon, or that proceedings would be terminated, or that a verdict of dismissal would be passed due to any other reason. Only then may they weigh their options in plea bargaining and properly approach the prosecutor.

The defence counsel must inform the accused of the possibilities they have in proceedings and suggest the best one; they must also inform them of the nature and consequences of confession. The defence counsel is in charge of plea bargaining with the prosecutor, which is an important and responsible task, because the position of the defence counsel in plea bargaining is ambivalent:[6] On the one hand they must defend the interests of the accused, and on the other hand they must cooperate with the prosecutor to achieve the most favourable sentence for their client. Moreover, they must often subjugate their professional knowledge and experience to the wishes of the accused. If they reach an agreement with the prosecutor, the defence counsel also concludes a plea agreement with the prosecutor.

It is, therefore, apparent that in the light of the adversarial nature of such procedure, this new legal institute does not only grant the defence counsel the right to respond to the statements of the counterparty, but requires their more active participation.

[6] Tratnik A.: »Kako se pogajati v kazenskem postopku?« (*How to bargain in criminal procedure*?), Pravna praksa, N. 12/2013 , p.24.