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SOME ASPECTS OF PLEA AGREEMENT IN CROATIAN MISDEMEANOUR PROCEEDINGS IN DOMESTIC VIOLENCE CASES*

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ABSTRACT

This paper is dedicated to the issue of violence against women and domestic violence in the context of the plea agreement of the parties and the procedural position of the victim in these proceedings. Therefore, this paper first analyses the European legal standards that weave the positive legal basis for the limitation of alternative ways of solving cases in the domain of domestic violence. The two pillars of the Convention's supervisory mechanism are then considered, which ensure the effective implementation of the proclaimed standards, with special reference to the results of the evaluation of the legal systems of the member states of the Convention from the perspective of the victim's right to effective investigation and the prohibition of alternative dispute resolution processes in the context of entering into plea agreements in cases of violence against women and domestic violence. Finally, the current normative framework of the Misdemeanour Act on the procedure for entering into a plea agreement and sanction is critically analysed, shortcomings and inconsistencies of the current procedural solutions are pointed out, and proposals are made for the future aimed at reviving international legal standards in the Croatian Misdemeanour Act.

Keywords: *domestic violence, GREVIO, Istanbul convention, misdemeanour proceedings, plea agreement, violence against women*

1. INTRODUCTION

One of the characteristics of modern criminal justice is the generally accepted trend of implementing various procedural institutes that emphasise the initiative

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of the parties with an impact on the course and outcome of criminal proceedings.[1] This trend of the re-privatisation of criminal justice is particularly evident in the institution of plea agreements as the European counterpart of the American plea bargaining.[2] By accepting this consensual form, many European countries tried to overcome the problem of excessively long criminal proceedings.[3]

The Croatian legislator did not resist this idea either, so in 2008, the Croatian Criminal Procedure Act introduced the institution of judgement based on agreement of the parties,[4] and a few years later, in 2013, an almost identical normative model of negotiation was implemented in the Croatian Misdemeanour Act.[5] By amending and supplementing the Misdemeanour Act, the Croatian legislator clearly disclosed his intention to relieve the misdemeanour branch of trials from a large number of cases to speed up and simplify daily procedures, thus further contributing to the efficiency of misdemeanour proceedings.[6]

Misdemeanours, generally speaking, are minor violations of public order, social discipline and social values that sanction those behaviours that do not meet the characteristics of criminal offence.[7] Therefore, in principle, the legislator's idea that by implementing various consensual forms, and especially the plea agreement of the parties, it is possible to speed up misdemeanour proceedings for a wide range of misdemeanours, regardless of the extent to which individual misdemeanours actually harm the interests of the social community.

However, in the Croatian legal system, there is one specific group of offences that, in a very complex way, violate not only public order as such, but at the same time strongly affect the private sphere of the victim, and these are offences in the domain of domestic violence. Today, these offences are prescribed by a special law on protection against domestic violence.[8] By prescribing this group of misdemean-

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1 Thaman, Stephen C., *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Trial*, 2010, Chapter 11, World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial, Carolina Academic Press, 2010, pp. 297-396.

2 Alkon, C., *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, Transnational Law & Contemporary Problems, Vol.19, No. 2, 2010, pp. 355-418.

3 Vitiello, M., *Bargained-for-Justice: Lessons from the Italians?,* The University of the Pacific Law Review, Vol. 48, No. 2, 2017, pp. 247-263

4 Criminal Procedure Act, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24.

5 Misdemeanour Act, Official Gazette 107/07, 39/13, 157/13, 110/15, 70/17, 118/18, 114/22.

6 Rašo, M.; Korotaj G., *Novosti u postupovnim odredbama Prekršajnog zakona*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 20, No. 2, 2013, pp. 779-793.

7 Veić, P.; Gluščić, S., *Prekršajno pravo*, Narodne novine, Zagreb, 2013, pp. 3-4.

8 Law on Protection from Domestic Violence, Official Gazette 70/17, 126/19, 84/21, 114/22, 36/24.

ours, the legislator tried to effectively offer a preventive and repressive response to the growing occurrence of domestic violence in everyday life, while at the same time preserving a stricter reaction in the domain of criminal law.[9]

Nevertheless, the repressive character of that special law seems questionable because the legislator, with an uncritical and comfortable approach to the matter of negotiation in the Misdemeanours Act, made it possible to enter into agreements on admission of guilt and sanctions for all misdemeanours, including misdemeanours in the domain of domestic violence.[10] The significant social harmfulness of precisely these offences, as well as the fact that their commission breaks the cohesion of the family community and infringes on the individual's rights,[11] was reason enough to highlight at the international level not only the zero tolerance rate for domestic violence but also the clear position that in cases of domestic violence, there is no room for entering into a plea agreement.[12]

By signing the Council of Europe Convention on preventing and combating violence against women and domestic violence on January 22, 2013 and ratifying it on May 16, 2018,[13] Croatia accepted the obligations prescribed by the Convention, including the provision from Art. 48, which obligates the parties to undertake "the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention."[14] Despite this, even six years after the ratification of the Convention, the Croatian Misdemeanour Act still leaves open the possibility of entering into an agreement on admission of guilt and sanction when it comes to offences of domestic violence.

Therefore, this paper first analyses the European legal standards that weave the positive legal basis for the limitation of alternative ways of solving cases in the domain of domestic violence. The two pillars of the Convention's supervisory

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9 Dragičević Prtenjača, M.. *Dihotomija pristupa u rješavanju nasilja u obitelji putem prekršajnopravne i kaznenopravne regulative*, Hrvatski ljetopis za kaznene znanosti i praksu Vol. 24, No. 1, 2017, pp. 141-175.

10 Rašo, M., Korotaj, G., *op. cit.* note 6, p. 788.

11 Bo L, Yating P. *Long-Term Impact of Domestic Violence on Individuals-An Empirical Study Based on Education, Health and Life Satisfaction*. Behav Sci, 13, 137, pp 1-17.

12 Suntag D., *Pleas, Plea Bargaining, and Domestic Violence: Procedural Fairness as an Answer to a Failing Process*, Court Review: The Journal of the American Judges Association, Vol. 57, No. 1, 2021, pp. 58-62.

13 Law on the ratification of the Council of Europe Convention on preventing and combating violence against women and family violence, Official Gazette – International agreements, 3/18.

14 Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011, CETS No.210, [https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence], Accessed 10 February 2024.

mechanism are then considered, which ensure the effective implementation of the proclaimed standards, with special reference to the results of the evaluation of the legal systems of the member states of the Convention from the perspective of the victim's right to effective investigation and the prohibition of alternative dispute resolution processes in the context of entering into plea agreements in cases of violence in the family and violence against women. Finally, the current normative framework of the misdemeanour law on the procedure for entering into a plea agreement and sanction is critically analysed, shortcomings and inconsistencies of the current procedural solutions are pointed out, and proposals are made for the future aimed at reviving international legal standards in the Croatian Misdemeanour Act.

2. CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE AS A EUROPEAN LEGAL STANDARD

2.1. Procedural Duty to Carry Out Effective Investigation

The Convention of the Council of Europe on preventing and combating violence against women and domestic violence is the first supranational instrument by which the Council of Europe seeks to establish minimum European rules aimed at preventive and proactive action to suppress domestic violence.[15] These rules are primarily focused on preventing violence against women and domestic violence, the prevention and protection of the victim from secondary victimisation, and the prosecution of the perpetrators of these acts.[16]

Special emphasis is placed on the investigation and prosecution of perpetrators of criminal acts and misdemeanours. Namely, states have an obligation to ensure that an investigation is carried out without unnecessary delay and that court proceedings are initiated to determine the guilt of the perpetrator.[17] Such a strict attitude was expressed because it was noticed that cases of violence against women and domestic violence are given a low priority in investigations and court proceed-

[15] For the European experiences see: Melnyk, Mariia B., Stasiuk, Nadiia, Medvedska, Victoria V., Rufanova, Viktoriia M. Pletenets, Viktor M., *European experience of prevention and combating domestic violence*, Estudios constitucionales, Vol. 21, No. 2, 2023, pp. 195-220, [https://dx.doi.org/10.4067/S0718-52002023000200195], Accessed 10 February 2024.

[16] See: Grans L., *The Istanbul Convention and the Positive Obligation to Prevent Violence*, Human Rights Law Review, Vol. 18, No. 1, 2018, pp. 133-155.

[17] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011, Council of Europe Treaty Series - No. 210, § 252.

ings, which significantly contributes to the feeling of impunity among perpetrators and, in the long term, contributes to maintaining a high level of acceptability of such violence.[18] Such an approach expresses a clear demand that the state must carry out an effective investigation of domestic violence and violence against women, which will ultimately affect the collection of all key evidence, increase the conviction rate and remove the impression of impunity.[19] The procedural obligation to conduct an effective investigation implies, in this case, the establishment of relevant facts, interviewing all available witnesses, conducting forensic expert examinations based on a multidisciplinary approach and using the latest criminal research methodology to ensure a comprehensive analysis of the case.[20]

2.2. Prohibition of Implementing Alternative Procedures in Cases of Domestic Violence and Violence Against Women

The obligation to conduct an effective investigation requires the member states to arrange their domestic legal order such that a detailed, circumstantial and careful investigation of all the circumstances of the committed criminal offence and misdemeanour will be ensured.[21] Therefore, it is completely understandable to expect that the determination of guilt or innocence for an alleged violation of the legal order in the form of domestic violence should be carried out in a procedure before an independent and impartial court that will impose an appropriate sanction that will have a deterrent effect and send a message about the danger and social harm of domestic violence. This attitude corresponds to the idea of placing a strong emphasis on the prohibition of mandatory alternative dispute resolution procedures, including mediation and conciliation in relation to all forms of violence.[22]

Although it is clear that the modern judiciary, in the era of excessively long court proceedings and the daily influx of new cases, is looking for a way to relieve the heavy congestion, it is still necessary to note that not all cases are the same. Namely, the upper limit of the prescribed sentence for a specific criminal offence or misdemeanour is not the only factor that determines the severity of the offence

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18 Ibid., § 255.

19 Grans L., *loc. cit.*, note 16.

20 Explanatory Report, *op. cit.* note 17, § 256.

21 For the first ECtHR landmark judgement on violence against women see: Abdel-Monem, T., *Opuz v. Turkey: Europe's Landmark Judgment on Violence Against Women.* Human Rights Brief, Vol.17, no. 1, 2009, pp. 29-33.

22 See: Pichard Marc J., *Article 48 Prohibition of mandatory alternative dispute resolution processes or sentencing,* in: De Vido, S.; Frulli M., (eds.), Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention, Edward Elgar Publishing, 2023, pp. 568-577.

committed. That is why it is necessary to take into account some other factors, such as the harmful consequences that arise for the victim of the crime and society as a whole, in the case of certain criminal acts and misdemeanours. In addition, the sanction prescribed by law and pronounced in court proceedings must achieve not only a special preventive effect in the form of correction of the offender but also a general preventive effect that is achieved through the favourable educational action of the judiciary on mature personalities.

Therefore, when choosing between different forms of alternative ways of solving individual cases, it is necessary to consider some other interests, not only the economy of the procedure and the speed of solving the case. Namely, alternative ways of resolving cases, including different forms of plea agreements, can have significant negative effects in cases related to domestic violence and violence against women.[23] That is why the Explanatory report particularly highlights the negative effects of alternative procedures in cases of various forms of violence, especially if such practice regularly avoids adversarial court proceedings:[24] "Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator.[25] It is in the nature of such offenses that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance.[26] To avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force."[27]

2.3. Plea Agreements in Cases of Violence Against Women and Domestic Violence – Stumbling Block

From the perspective of the plea agreement, the aforementioned request to limit alternative ways of ending criminal and misdemeanour proceedings comes to the fore even more. Prosecution of perpetrators in criminal and misdemeanour proceedings is an expression of the sovereign power of the state and its monopoly to carry out the activity of public punishment of perpetrators in the interest of the

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23 Keenan M.; Zinsstag, E., *Sexual Violence and Restorative Justice*, Oxford University Press, 2023, pp. 95-97.

24 Explanatory Report, *op. cit.* note 17, § 252.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

state and its citizens.[28] However, in the case when the prosecutor and the defendant enter into negotiations regarding the possible end of the proceedings in an alternative way, such as a plea agreement, it is clear that the public interest of prosecuting and punishing the perpetrator gives priority to the private initiative of the parties.[29] In such a situation, the prosecutor and the defendant become masters of the course and outcome of the proceedings, and the role of the court is often limited to confirming the will of the parties without a prior assessment of whether the purpose of punishment is achieved with the proposed sanction. The victim of a criminal offence is often neglected and does not have the opportunity to exercise the right to seek justice in the true sense of the word.[30]

Although the process of agreeing on guilt and sanction has its place in modern criminal justice as a faster, simpler, and cheaper way to reach a conviction, such a relativised approach to punishment and the punishing of the perpetrator is unacceptable in light of the emerging forms of domestic violence and violence against women. Although the conclusion of the plea agreement achieves the goal and purpose of the criminal procedure from the perspective of the prosecutor and the defendant, this certainly cannot be said for the sense of justice and fair punishment of the perpetrator expected by the victim and the deterrent effect of the punishment for society as a whole.[31]

The external impression of an insufficiently clear and concrete global response of national legislation and the judiciary to the ubiquitous problem of domestic violence and violence against women requires a more serious and concrete approach to eradicating this social problem. Precisely because of this, the plea agreement is not an acceptable institution that could be used to build society's awareness of the need for zero tolerance for the occurrence of these socially undesirable behaviours. Even more, in many judicial systems, the prior consent of the victim is not prescribed at all as a mandatory checkpoint that the prosecutor must reach before deciding to enter into a plea agreement, which opens the door to wide negotiation discretion between the parties, regardless of the will and interests of the victim.[32]

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28 Daw, R. K., *The "Public Interest" Criterion in the Decision to Prosecute*, The Journal of Criminal Law, Vol. 53, No. 4, 1989, pp. 485-501.

29 Turner, J.I., *Transparency in Plea Bargaining*, Notre Dame Law Review, Vol. 96, No. 3, 2021, pp. 994-997.

30 See: Beloof, D.E., *Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains: a Response to Professor Michael O'Hear*, Marquette Law Review, Vol. 91, No. 1, 2007, pp. 353-354.

31 See: Alm, D. *Crime Victims and the Right to Punishment*, Criminal Law and Philosophy, Vol. 13, No. 1, 2019, pp. 63-81.

32 Pugach, D.; Tamir, M., *Victims' Rights in Plea Agreements Across Different Legal Systems*, *Oxford Research Encyclopedia of Criminology.* 28 Sep. 2020; Accessed 28 Apr. 2024. [https://oxfordre.com/criminolo-

Although no social problem can be eliminated by repressive actions alone, it is necessary to apply preventive educational action, and at the current level of awareness of the problem of domestic violence and violence against women, ending these cases by agreement is absolutely contraindicated. Therefore, it is necessary to insist on the implementation of criminal proceedings that will give a clear and concrete answer to the public about the social harm and danger of such behaviour and ensure that the victim of a criminal offence has access to the court and just satisfaction, not only by imposing a sentence on the perpetrator but also by satisfying her real needs for protection and the prevention of further victimisation.

3. MECHANISMS FOR MONITORING THE IMPLEMENTATION OF THE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

3.1. GREVIO and Committee of the Parties – Two Pillars of Supervision

The Istanbul Convention is the first legally binding instrument in Europe that establishes the obligation of state parties aimed at preventing gender-based violence, protecting victims and punishing perpetrators of violence against women and domestic violence.[33] However, the written legal act itself is not a sufficient means to ensure that the member states actually implement these requirements in their domestic legislative acts. For this reason, a monitoring mechanism has already been established in the Convention itself, which monitors its implementation and provides recommendations and guidelines for its effective implementation in domestic legal systems.

The convention explicitly established GREVIO, a group of experts on action against violence against women and domestic violence.[34] Its main task is to monitor the implementation of the Convention by the member states.[35] This task is primarily accomplished through the preparation and publication of reports in

gy/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-686], Accessed 20 February 2024.

33 Riccardi, A., *Article 18 General obligations*, in: De Vido S.; Frulli M., (eds.), Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention, Edward Elgar Publishing, 2023, pp. 285-286.

34 Gasimov, I., *Monitoring Mechanism of the Istanbul Convention: Individual Application and Criminal Justice*, 2022, pp. 1-12, [https://ssrn.com/abstract=4254304G, Accessed: 20 February 2024.

35 Petrić N.; Husić S.; Šiljak I., *Toolkit for Monitoring Implementation of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention),* Banja Luka, 2018, p. 10.

which the assessment of legislative and other measures undertaken to implement the fundamental ideas proclaimed in the Convention is given in domestic law. On the basis of the evaluation carried out in this way, GREVIO compiles its report with recommendations to the member states on the direction and method of implementation of individual provisions of the Convention.[36] Furthermore, if GREVIO receives credible information that leads to the conclusion that it is necessary to establish immediate supervision in order to prevent or limit the extent or number of serious violations of the Convention, it may request the urgent submission of a special report on the measures taken to prevent a severe, extensive or persistent pattern of violence against women.[37] Based on the information obtained in this way, GREVIO can appoint one or more of its members to carry out the investigation and urgent reporting to GREVIO, and on the basis of all the information gathered and in consideration of the findings from the investigation, it transmits these findings to the relevant party and, when appropriate, to the Committee of Parties and the Committee of Ministers of the Council of Europe, together with possible remarks and recommendations.[38]

In addition, GREVIO can adopt general recommendations that are not related to individual countries but have meaning for all member states.[39] Although they do not have a binding effect, they serve as a starting point for the state parties, contributing to a better understanding of certain areas covered by the Convention and serving as a guideline that helps the more effective implementation of certain provisions of the Convention.

The second pillar of the monitoring mechanism is the Committee of the Parties, which consists of representatives of the member states to the Convention.[40] It ensures the equal participation of all parties to the Convention in the decision-making process and the monitoring of its implementation in domestic legal systems. In this sense, the Committee of the Parties can adopt recommendations that refer to the measures that the respective Party must take to implement the conclusions of GREVIO if necessary, determine the date for submitting information on their implementation, and promote cooperation to ensure the correct implementation of the Convention.[41]

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36 Explanatory Report, *op. cit.* note 17, § 350.

37 *Ibid.,* § 358.

38 *Ibid*.

39 *Ibid*., § 359.

40 *Ibid.,* § 345-347.

41 *Ibid*., § 357.

3.2. Supervision over the Implementation of the Convention

Shortly after its establishment, the GREVIO group of experts started the Baseline evaluation procedure 2016–2028.[42] This evaluation procedure is carried out country by country, in which the level of implementation of the Convention is determined, as well as the weaknesses and shortcomings of the domestic legal system in strengthening and protecting Convention rights. The country evaluation procedure has several rounds of evaluation. In this context, GREVIO considers the information submitted by the parties in response to their questionnaires or any other requests for information, taking into account the information received from the relevant bodies of the Council of Europe, institutions established under other international instruments such as non-governmental organisations and national institutions for human rights. If the collected information is not sufficient, GREVIO can organise country visits.[43] Based on the evaluation carried out in this way, GREVIO prepares its final report and conclusion for each country separately and sends them to interested parties.[44] Particularly valuable are the so-called comparative analyses in which GREVIO shows a collective horizontal review for all evaluated countries and identifies key problems and weaknesses of the current legislation.

3.3. Prohibition of Mandatory Alternative Dispute Resolution Processes or Sentencing – Practical Anomalies and Challenges

During 2022, GREVIO published its first Mid-term Horizontal Review of GREVIO baseline evaluation reports,[45] which is significant because it provided the first overview of the level of implementation of the Convention in the member states and observed shortcomings in the implementation of prescribed standards and certain areas that require improvements and a better and more concrete response from national legislators.

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42 Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), [https://rm.coe.int/grevio-inf-2016-1-eng-first-baseline-questionnaire/1680a60a4bG, Accessed 15 February 2024.

43 Country-monitoring work, [https://www.coe.int/en/web/istanbul-convention/about-monitoring1], Accessed 15 February 2024.

44 Country-monitoring work, [https://www.coe.int/en/web/istanbul-convention/country-monitoring-work], Accessed: 16. February 2024.

45 Mid-term Horizontal Review of GREVIO baseline evaluation reports, Council of Europe, 2022. [https://rm.coe.int/prems-010522-gbr-grevio-mid-term-horizontal-review-rev-february-2022/1680a58499], Accessed: 22 February 2024.

When it comes to the issue of implementing requirements from Article 48 of the Convention, and in particular the prohibition of mandatory alternative dispute resolution process (ADR), GREVIO has established, based on the collected data, that no country has explicitly prescribed the obligation to implement an alternative dispute resolution process.[46] Nevertheless, it is symptomatic to note that the majority of states did not even explicitly prohibit the implementation of such procedures. For this reason, GREVIO observed various practices in which alternative dispute resolution processes come to the fore, deviating from the basic principles set by the Convention.

Thus, it has been observed that in some countries where conciliation is in principle allowed in proceedings related to violence against women and domestic violence, although it is not mandatory, victims often perceive conciliation as a mandatory phase of proceedings due to the lack of initial information about their rights in the proceedings.[47] Equally, it has been observed that many countries know the broad possibilities of proceeding through deferral of prosecution, so in cases characterised by violence against women and domestic violence, decisions are made on the waiver of criminal prosecution only based on the consent of the defendant and without the prior consent of the victim.[48] Cases were also recorded where the court proposed mediation, although the domestic procedure explicitly prohibits such treatment as cases of violence against women and domestic violence are exceptionally excluded from mediation.[49] For this reason, GREVIO expressed concern that such practices send the wrong message: that domestic violence is not a "crime fit for criminal conviction".[50] This particularly stems from the fact that GREVIO has identified as a common challenge the lack of understanding by legal professionals of the dynamics of violence and the dangers of alternative dispute resolution processes in cases of violence against women and domestic violence.[51] On such a basis, in its recommendations, GREVIO strongly encouraged the local authorities to take into account the weaker position of the victim, and especially the noticeable power imbalances, as well as the need to ensure the victim's full respect for her rights and to make additional efforts so that victims receive adequate information about their rights and especially about the non-mandatory nature of mediation. As an isolated case, observed in only one country, GREVIO also noticed the practice of the perpetrator's lawyers trying to make an agreement with

46 *Ibid*. § 408.

47 *Ibid*.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid*., § 408-409.

the victim not to testify in the criminal proceedings, offering them in return a good settlement in the civil proceedings for damages.[52]

In particular, it should be noted that GREVIO observed the practice of concluding plea bargaining agreements in certain countries. In such cases, perpetrators are quickly sanctioned by the pronouncement of a guilty verdict by skipping the trial and without examination of evidence. In doing so, it was noticed that sanctions are often imposed below the legal minimum, while the victims do not have the opportunity to express themselves before the prosecutor and the defendant conclude an agreement.[53] In addition, by conducting such a procedure in which no evidence is presented, the victim cannot exercise the right to be heard before the court before the final decision is made.[54] Such practices directly affect the policy of punishing offences of violence against women and domestic violence, so the sanctions are not commensurate with the gravity of the offence committed, nor do they have a long-term deterrent effect, which is why Article 45 of the Convention is violated.[55] In some countries, GREVIO has also observed the practice of concluding agreements in cases of criminal offences of rape and sexual abuse, which ultimately lead to the imposition of extremely lenient sanctions, even to the extent that fines are imposed instead of imprisonment,[56] which is why GREVIO concluded that such a method does not achieve the deterrent effect of punishment and does not appear proportionate and dissuasive. In some countries, the practice of concluding out-of-court settlements, so-called "transactions", has been observed, in which cases, due to an agreement reached between the plaintiff and the defendant, in the end, proceedings before the court do not take place.[57]

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52 *Ibid*., § 409.

53 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Bosnia and Herzegovina, 2022, § 244.

54 *Ibid.*

55 *Ibid.*

56 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Georgia, 2022, § 288.

57 GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Netherlands, 2022, § 242-243.

4. PLEA AGREEMENT OF THE PARTIES IN CROATIAN MISDEMEANOUR PROCEEDINGS – A CRITICAL REVIEW FROM THE PERSPECTIVE OF DOMESTIC VIOLENCE

4.1. Plea Agreement of the Parties in the Croatian Misdemeanour Act

Plea agreements of the parties were implemented in the Croatian Misdemeanour Act in 2013. With this act, the Croatian legislator took an additional step aimed at relieving the misdemeanour courts and increasing the number of resolved cases. Thus, the plea agreement of the parties became just one more of several different procedural instruments aimed at speeding up misdemeanour proceedings.[58] Among them today, the misdemeanour warrant, mandatory misdemeanour warrant, urgent procedure, insignificant offence, and procedural instruments based on the principle of opportunity, such as unconditional and conditional waiver, stand out.[59]

By analysing the normative structure of the plea agreement of the parties in Art. 109.e of the Misdemeanour Act, it can be seen that the role model for prescribing this institute was the institute of the judgement based on agreement of the parties previously known in the Criminal Procedure Act,[60] with minimal differences due to the specificity of the misdemeanour procedure itself.

In this context, the basic determinants of the plea agreement of the parties can be considered from three aspects: the moment of starting the negotiations, the conclusion of the agreement, the statement for passing a decision based on the plea agreement of the parties and the procedure of judicial review of the concluded agreement.

The parties can negotiate in terms of admission of guilt and sanctions after the prosecutor has served the perpetrator of the offence with the notice of rights from Article 109a paragraph 1 of the Misdemeanour Act. It should be noted that the

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58 Bonačić, M.; Rašo M., *Obilježja prekršajnog prava i sudovanja, aktualna pitanja i prioriteti de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 19, No. 2, 2012, pp. 439-472.

59 For detailed overview see: Mršić, Ž.; Posilović D.; Šantek M., *Procesuiranje prekršaja primjenom načela oportuniteta i sklapanjem sporazuma između policije i počinitelja prekršaja o sankciji i mjerama*, Policija i sigurnost Vol. 27, No. 2, 2018, pp. 213-235; Filipović, H., *Primjena oportuniteta od strane policije kao ovlaštenog tužitelja te pregovaranje i sporazumijevanje prije pokretanja prekršajnog progona*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 28, No. 2, 2021, pp. 629-658.

60 Ivičević Karas, E.; Novokmet, A.; Martinović, I., *Judgment based on agreement of the parties in Croatian law: a critical analysis from the comparative legal perspective*, Pravni vjesnik, Vol. 37, No. 1, 2021, pp. 11-34; Ivičević Karas, E.; Novokmet, A.; Martinović, I., *Judgment Based on Agreement of the Parties: Analysis from the Perspective of Practitioners' Experience in Croatia*, Utrecht Law Review, Vol. 19. No. 1, 2023, pp. 31-52; Novokmet, A.; Tripalo D., *Opseg sudske kontrole sporazuma stranaka*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 28, No. 2, 2021, pp. 211-239; Tomičić, Z., Novokmet, A., *Nagodbe stranaka u kaznenom postupku – dostignuća i perspektive*, Pravni vjesnik, Vol. 28., No, 3-4, 2012, pp. 149-190.

law does not specify the latest moment by which a plea agreement could be concluded. In fact, only the law leaves the possibility for the parties to negotiate an agreement during the proceedings before the court, practically until the decision on the offence is made. Interestingly, the parties can negotiate the conclusion of an agreement even at the initiative of the body before which the proceedings are conducted, i.e. the court (Article 109a paragraph 2 MA).

If the prosecutor and the defendant reach an agreement on the terms of admission of guilt and the sanction, they draw up a so-called written statement for making a decision on a misdemeanour based on the agreement of the parties, which contains: 1) a description of the misdemeanour; 2) a statement by the defendant admitting guilt for that misdemeanour; 3) an agreement on the type and measure of punishment or other sanctions or measures; 4) an agreement on the costs of the authorisation of the prosecutor in connection with the determination of the violation and the costs of the body of the procedure when the agreement was reached during the conduct of the procedure; 5) the signatures of the parties (Article 109.e. paragraph 3. MA). The statement prepared in this way is submitted to the court, which will finally decide on the acceptance of the agreement.

After receiving a statement for rendering a verdict based on the agreement of the parties, the court carries out mandatory, *ex officio*, judicial review of the concluded agreement. The court is not obliged to accept the agreement of the parties, that is, it will not accept it if the agreement was concluded taking into account the rules on the choice of the type and amount of the sanction to the detriment of the defendant, if the purpose of punishment will not be achieved, or if the agreement is otherwise illegal. If the court does not accept the agreement, it will conduct a regular procedure, present evidence at the hearing and make a decision. If, on the other hand, the court accepts the agreement, it will make a decision on the offence that must fully correspond to the agreement reached by the parties (Article 109.e. paragraphs 5-8. MA).

4.2. Plea Agreement of the Parties from the Perspective of a Victim of Violence Against Women and Domestic Violence

The presented normative structure of the provisions that regulate the process of agreeing on guilt and sanction shows that the parties can, in this way, end each misdemeanour procedure that was initiated by issuing an indictment.[61] The victim is not at all recognised as a relevant factor that the prosecutor in misdemeanour pro-

[61] Kikić, Suzana. *(Ne)primjena skraćenog postupka, sporazumijevanja i oportuniteta u slučajevima prekršaja obiteljskog nasilja*, Policija i sigurnost Vol. 32, No. 4, 2023, p. 372.

ceedings should take care of when concluding an agreement, so the prosecutor is left with a wide possibility to negotiate on guilt and sanction even in those offences where the victim of that offence is clearly identified. Unlike the Misdemeanours Act, the Criminal Procedure Act somewhat restricts the ability of the prosecutor to make a completely autonomous decision on entering into an agreement, since the law expressly states the circumstances that limit his freedom of agreement, especially if it regards crimes against life and limb and against sexual freedom for which a prison sentence of more than five years is prescribed (Article 360, paragraph 6 of the CPC). It is obvious, namely, that the legislator was aware that there are certain criminal acts that encroach so strongly on the victim's private sphere that without her prior consent, the prosecutor cannot enter into a plea agreement.

This state of affairs is particularly problematic from the perspective of victims of violence against women and domestic violence. Entering into a plea agreement for these offences is not only prohibited by the Convention, but GREVIO, having conducted a comparative analysis of the practice of the countries that signed the Convention in several cases, clearly emphasised that settlements in cases of violence against women and domestic violence should be avoided.[62] The reason for this is the multiple harmful consequences for the victim herself, who not only remains devalued because she is not given the opportunity to have her voice heard before making the decision to conclude an agreement, but the final sanction imposed on the basis of the concluded agreement, which is always milder in comparison to the sanction that would have been imposed in the regular procedure, further traumatises and victimises the victim, due to which there is no confidence that the system has justly punished the perpetrator.[63]

Such conduct, among other things, violates the general provision of Article 5 of the Act on Protection from Domestic Violence, which establishes the duty of all bodies that act on the occasion of domestic violence to act with special consideration towards the victim of domestic violence and, when taking actions, to take appropriate care of the rights of the victim.[64] This provision not only results from the duty of competent authorities to behave in the prescribed manner; but also the victim also has the right to a legitimate request that these authorities really provide her with such protection and care for her interests. This becomes even more evident if we take into account that the Convention establishes the victim's fundamental right to have competent authorities conduct an effective investiga-

62 See supra 3.3.

63 Kikić, S. *loc. cit.,* note 61.

64 See specifically: Radić, I., Radina, A., *Zaštita od nasilja u obitelji: obiteljskopravni, prekršajnopravni i kaznenopravni aspekt,* Zbornik radova Pravnog fakulteta u Splitu Vol. 51, No. 3, 2014, pp. 727-754.

tion of any allegation of violence.[65] In doing so, it should be taken into account that the concept of the right to effective investigation does not refer only to the pre-trial phase of the procedure, since the ECtHR extended the concept of effective investigation to all stages of the procedure, including the trial phase of the procedure before the court, so it concluded in its practice that the investigation was not effective when the defendant was given a relatively mild sanction, which is normally characteristic of procedures that end in a plea agreement.[66]

A further important problem is manifested in the fact that the Misdemeanour Act does not at all recognise the victim of violence against women and domestic violence who needs help, support and protection. Although the Misdemeanour Act stipulates an interesting provision that "if this Act does not contain provisions on certain issues of the procedure, the provisions of the Criminal Procedure Act and the Juvenile Courts Act shall be applied in an appropriate manner, when it is appropriate for the purpose of the misdemeanour procedure" (Article 82, paragraph 3. MA) in practice, the interests of the victim are not taken into account, nor are the rights of the victims guaranteed in the CPA meaningfully applied. This is even more symptomatic when it is taken into account that the Law on Protection from Domestic Violence expressly stipulates that Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime has been transposed into that law, but it is obvious that even if it was transferred, it was not really brought to life in practice.[67]

4.3. A Critical Overview of Practice of Plea Agreement in the Misdemeanour Act and *De Lege Ferenda* Propositions

The analysis of the verdict based on the agreement of the parties in the Croatian Misdemeanour Act and the actual position of victims of violence against women and domestic violence points to serious deficiencies in the existing provisions of the Misdemeanour Act in the context of plea agreements and sanctions.

This is first noticeable in the very provision of Article 109a of the Misdemeanour Act, which represents the backbone of notifying the accused about the fundamental rights of defence. Among the enumerated rights, the defendant is expressly guaranteed, among other things, the right to enter into a plea agreement and sanc-

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65 Explanatory Report, *op. cit.* note 17, § 256.

66 Novokmet, A.; Sršen, Z., *Neučinkoviti kazneni postupak pred sudovima – implementacija presuda Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 24, No. 2, 2017, p. 297.

67 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, L 315 57.

tion as a fundamental right of defence (Art. 109.a paragraph 1. point 9. MA). On the other hand, the very provision of Article 109.e of the MA, which regulates the way of entering into a plea agreement, speaks of plea agreement of the parties as a possibility and not as a mandatory way of proceeding. In other words, it is obvious that there is no obligation on the part of the prosecutor to enter into a plea agreement with the defendant, which leads to the conclusion that the defendant has no right to a plea agreement, because his right does not correspond to the duty of the prosecutor to negotiate and conclude an agreement. In recent literature, it is even emphasised that certain protocols on the manner of handling cases of domestic violence issued by the Ministry of Internal Affairs expressly stipulate that persons accused of a misdemeanour of domestic violence should not be informed of this right of defence at all when given instructions on rights, no matter what is expressly prescribed by law.[68] Such reasoning of the practice confirms the thesis that the existing legal solution is incoherent and unsustainable, since by-laws try to limit its application.[69] The stated state of affairs is of course not good, because the unity of the legal order is violated, legal certainty is called into question and the equality of all citizens before the law is brought into question, since the right that is expressly derived from the law is derogated based on lower legal regulations. In addition, it clearly follows from all of the above that the Croatian legislator was not careful enough when prescribing the rights of the defendant's defence and broad possibilities for negotiation without taking into account the European legal standards that impose the obligation to prevent alternative ways of solving cases from the domain of violence against women and domestic violence.

The next important shortcoming and consequence of the excessively broadly provided plea agreement is manifested in the complete neglect of the victim and her specific position and needs when it comes to violence against women and domestic violence. This is visible first of all in the absence of the general duty of the prosecutor to take care of the interests of the victim when entering into a plea agreement in the process of deciding whether and under what conditions to enter into an agreement. On the other hand, this is also visible in the fact that the law leaves a wide possibility of negotiation for any misdemeanour, regardless of the severity of the sanction, which is equally valid for misdemeanours in the domain of domestic violence and violence against women.

Taking into account the European standards for the protection of victims of domestic violence prescribed by the Convention as well as the recommendations of GREVIO, it is clear that the Croatian legislator must intervene in the relevant

[68] Kikić, Suzana, *op. cit.* note 61, p. 373.

[69] Ibid.

provisions of the Misdemeanour Act and explicitly stipulate that in all offences related to violence against women and domestic violence, the possibility of negotiation for entering into a plea agreement is absolutely excluded. In addition, no half-solution is acceptable in which the possibility of the victim's prior consent would be introduced as a condition for entering into an agreement for those offences, because that would also be against the convention standards on the general prohibition of alternative ways of solving those cases, and it would still be a problematic issue of additional traumatisation and victimisation of the victim.

Based on all of the above, it is necessary for the legislator to intervene in a targeted manner in the provisions of the Misdemeanour Act, which regulate the procedure for negotiating a plea agreement, in order to clearly and unequivocally exclude any possibility of entering into an agreement for offences related to violence against women and domestic violence. Only with such concrete and focused legislative activity can European standards be implemented in the domestic legal order and establish certainty of action in all future cases. This will of course send a strong message to the general public about zero tolerance for violence as such, but also the willingness of the state to use stricter sanctions aimed at the perpetrators of these offences to achieve a beneficial educational effect on the general civil public and send a clear message about the social harm and danger of misdemeanour violence against women and of domestic violence.

5. CONCLUSION

In this paper, a targeted analysis of the implementation of the standards established by the Istanbul Convention was carried out in relation to Article 48 of the Convention, which obliges the parties to undertake the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention in correlation with Article 49 and positive procedural obligation to conduct effective investigation and prosecution in cases of violence against women and domestic violence.

In this sense, the domestic legal framework established by the Misdemeanours Act, which regulates the procedure for entering into agreements on admission of guilt and sanctions, was analysed. It has been noted that the provisions of the Misdemeanour Act are very broad, which is why there is currently no ban on entering into agreements in cases related to violence against women and domestic violence. For this reason, in practice, through various protocols and implementing regulations of the Ministry of Interior, it is emphasised that plea agreements should not be made in these cases.

However, since the law itself clearly prescribes such a possibility, and even constitutes it as a fundamental right of the defence, it is doubtful whether the norm of a higher regulation, i.e. the law, can be derogated from by a by-law. Therefore, in order to protect legal security, the unity of the legal order and the equality of all citizens before the law, it is necessary to make the necessary changes to the Misdemeanours Act in order to expressly limit the possibility of concluding plea agreements in cases of domestic violence and violence against women.

Only such a concrete and specific legislative response can send a clear message to society that the public interest in prosecuting the perpetrators of those categories of offences prevails over the private interest of the individual to be punished more leniently. This will, among other things, give solid support to all preventive and educational efforts on the importance of understanding and eradicating gender-based violence.

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