PLEA BARGAINING IN RUSSIA: SEARCHING FOR THE DUE PROCESS OF LAW IN CRIMINAL CASES

DOI: https://doi.org/10.24115/S2446-622020217Extra-A925p.538-545

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ABSTRACT

The article considers the concept of due legal processes, its development and the current state – the institute of plea bargaining. Historical and comparative methods of legal research allowed the author to analyze elements of the above-mentioned concept and its initial consolidation in the Magna Carta of 1215. The author of the article has traced the evolution of the socio-legal institute, its new essence in the Anglo-Saxon and continental law, and the international recognition after World War II in the fundamental UN documents. They have also analyzed the meaning of this concept in the modern era when, for the sake of economic feasibility and efficiency, it is often necessary to refuse due processes and replace them with abridged procedures. As a result, the author has proved that the institute of plea bargaining is an integral part of the current due process.

Keywords: Due legal processes. The Magna Carta. Criminal proceedings. The principles of a fair trial. Plea bargaining institute.

INSTITUTO DE DECLARAÇÕES DE NEGOCIAÇÃO NA RÚSSIA: BUSCA DO PROCESSO JURÍDICO DEVIDO EM CASOS PENAIS

RESUMO

O artigo considera o conceito de devido processo legal, sua evolução e o estado atual – o instituto de negociação judicial. Os métodos históricos e comparativos de pesquisa jurídica permitiram ao autor analisar elementos do referido conceito e sua consolidação inicial na Carta Magna de 1215. O autor do artigo traça a evolução do instituto sociolegítimo, sua nova essência na direito anglo-saxão e continental, e o reconhecimento internacional após a Segunda Guerra Mundial nos documentos fundamentais da ONU. Eles também analisaram o significado desse conceito na era moderna, quando, por uma questão de viabilidade econômica e eficiência, muitas vezes é necessário recusar os devidos processos e substituí-los por procedimentos abreviados. Como resultado, o autor provou que o instituto de negociação de pena é parte integrante do devido processo legal em vigor.

Palavras-chave: Processos legais devidos. A Magna Carta. Procedimentos criminais. Os princípios de um julgamento justo. Instituto de negociação de culpa.

RELACIÓN: Procesos legales devidos. A Magna Carta. Procedimientos criminales. Los principios de un juicio justo. Instituto de negociación de culpa.

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In the Soviet period (1917-1991), the need to study such a socio-legal phenomenon as a “due process of law in criminal cases”, including in the form of a mutually beneficial plea agreement with a person who committed an offense (crime), was completely rejected as an independent method (mechanism) for resolving social conflicts for ideological reasons. This approach to analyzing socio-legal realities almost deprived the Russian science of the opportunity to determine the nature of this trans-sectoral institute and comprehend its role in criminal policy. Moreover, such foreign terms as “plea bargaining” and “plea and cooperation agreement” used to denote a “mutually beneficial confession of judgment” but were translated into Russian as “an immunity agreement” (a commercial deal condemned in the Soviet period).

The above-mentioned circumstances had a decisive impact on the choice of the research topic, its object (subject), structure, methods, goals and objectives. This study aims at developing a new theoretically grounded and empirically tested doctrine of the institute of plea bargaining, other forms of mutually beneficial cooperation between the state and the offender as a multifaceted type of activity in the system of court, law enforcement and human rights, as well as a special and effective means of resolving social, political and economic conflicts based on the rule of law. Additional objectives are as follows: to substantiate the need to adjust the conceptual and categorical framework in the theory of judicial, prosecutorial, law enforcement and human rights activities of the state concerned with the institute of plea bargaining; to prepare scientifically grounded proposals for improving the current legislation; to increase the efficiency of law enforcement and judicial authorities.

The methodological basis was formed by a wide array of scientific methods. Considering the research object and subject, we used the historical method. Describing and studying the development of criminal proceedings, their conceptual and categorical framework, and their features in a chronological sequence, we managed to trace their evolution from origin to the current state in many countries, including Russia, which ensured a deep understanding of their nature and contributed to the correct assessment of their development prospects. While working on this article, we also applied the comparative-legal method. It helped determine the main trends in the development of criminal proceedings and their components on a global scale, and evaluate their state in a particular country, i.e. Russia.

The sociological and psychological approaches to cognizing the basic institutions of criminal justice and its proceedings allowed us to reveal the mechanism of social formation and better understand its legal foundations predetermined by various socio-political phenomena.

To comprehend the true essence of criminal proceedings, including the institute of plea bargaining, we used the method of dialectical cognition to consider the research subject, i.e. a plea agreement itself in its development. In addition, we have studied all the relevant legal phenomena in their interdependence and connection with social life. They were analyzed not only in statics but also in dynamics.

Additional methods comprised abstraction, analysis, synthesis, induction and deduction. Statistical methods played a special role as they allowed to obtain, process and analyze data, and reflect the quantitative characteristics of the plea bargaining institute.

In the process of cognition, we also used other methods. In particular, the institute of plea bargaining was considered through the cross-sectoral integration and differentiation of provisions of the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation, as well as several other regulations (including departmental orders of the Ministry of Internal Affairs of the Russian Federation and the Prosecutor's Office of the Russian Federation, resolutions of the Plenum of the Supreme Court of the Russian Federation). They contribute to the inner unity, reliability, representativeness, completeness and consistency of the study.

In medieval Western Europe, justice was administered by feudal lords and sovereigns. The procedure had a religious nature since God was regarded as the supreme judge. In this regard, judicial proceedings were represented by a "trial by ordeal" or "ordeal" with the use of fire and water. Some elements of this procedure have survived to this day. In English-speaking countries, the consideration of a case by the court of the first instance is still called a "trial". The religious aspect of justice led to the formation of another form of dispute resolution — a "trial by combat". The accused of committing a crime could demand to resolve a conflict in the form of a contest with the accuser. The victor of the battle also became the prevailing party since God cannot allow evil (the person...
who lost the fight) to win. Subsequently, parties could involve third parties in the combat. In this connection, several foreign scholars believe that this method of conflict resolution laid foundations for the Anglo-Saxon adversarial system (MILLER, 2012).

A significant transformation of criminal proceedings occurred in 1215, with the adoption of the Magna Carta by the English king John Lackland. This document established a new order of relations among the English monarchy, church and feudal barons. The charter aimed at resolving many economic and political contradictions between barons and the monarch, as well as consolidating the "liberties" of barons, the church and the free population of England. One provision of the Magna Carta reads, "No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land" (PETRUSHEVS,II, 1918).

It is believed that the very concept of "the due process of law" goes back to the reference to "the law of the land" ("terrae legem") in the Magna Carta. Later, the English Parliament enshrined this guarantee in several legislative acts (the following versions of the charter). One of these acts (1354) replaced the phrase "according to the law of the land" with "according to the due process of law". The Chief Justice of England (1642) Sir Edward Coke (COKE, 1653) and other authoritative jurists of that period declared these two concepts equivalent, which was subsequently adopted by US courts and legal scholars in the late 19th and early 20th centuries (WILLIAMS, 2012). According to the provision under consideration, the "law of the land" was understood in such a way that the deprivation of individual rights could be carried out only in accordance with the law.

The Magna Carta turned a "trial by ordeal" into a procedure for establishing facts of the crime which were assessed and resolved by the "court of peers". It also consolidated other progressive principles, including proportionality in sentencing, conviction only in court proceedings, the inviolability of property, etc. Later the statute of 1354 expanded the concept of "the due process of law" with the need to initiate a trial based on a court order or jury decision (STEPANOV, 2017). Lord Coke interpreted this concept as "presentment and indictment", i.e. he emphasized the need to observe a special procedure for bringing a person to criminal responsibility.

At the same time, judicial proceedings in English courts retained their main features, in particular, the law of evidence had not been adopted until the middle of the 19th century. The process of accusation was supported by the victim (CHOONGH, 2002) who, like the defendant, most often did not have legal representation (ZANDER, 1998). As a result, the judge played the key role in a trial, as was the case in the English magistrate courts (SPENCER, 2000). In 1884, the US Supreme Court noted that the due process of law in Great Britain "was not an integral part of prosecution and punishment but was used as an example of procedural principles arising from case-law in cases where the specified concept is traditionally applied".

In 1868, the 14th Amendment to the US Constitution was adopted, providing for the possibility of applying due processes to protect the rights of citizens from the arbitrariness of state bodies at the level of state and local self-government (the 5th Amendment is believed to be applicable only at the federal level). The US Supreme Court stated that due processes included four types of guarantees: due processes (for criminal and civil proceedings), substantive due processes, protection from obscure laws, and the incorporation of the Bill of Rights. The 5th Amendment also comprised such important guarantees of the defendant's rights in criminal proceedings as the right against self-incrimination, re-prosecution, and the possibility of prosecution only if charges are brought in accordance with the procedure established by law.

The continental European law developed under the influence of Roman law. In the Middle Ages, the accusatory and adversarial model was replaced by the inquisitorial procedure characterized by the formation of special state bodies responsible for identifying and investigating crimes, acting on their own initiative and in public interests. After the French Revolution, the Napoleonic Code d'instruction criminelle of 1808 reflected the desire of reformers to borrow several legal provisions from the Anglo-Saxon adversarial system. Preserving inquisitorial preliminary investigation, the judicial stage of proceedings became more open and adversarial.

The Russian legislators also tried to establish a certain legal procedure for the consideration of cases. The judicial statutes of November 20, 1864 consolidated the modern adversarial form of legal proceedings, introduced such principles of justice as competition, equal rights of the parties, electivity, irremovability of judges, non-estatism and publicity of a trial. Along with the jury, the prosecutor's office and the public defender's office, the magistrates' court became an important component of justice aimed at relieving general courts.
THE CURRENT STATE OF DUE PROCESS

Currently, the due process of law is enshrined in such fundamental international documents as the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Rome Statute of the International Criminal Court, regional conventions on human rights, including the European, African, Inter-American and Cairo Declaration on Human Rights in Islam. Some foreign scholars interpret the concept of a “due process” as a set of procedural rules used by courts in conformity with established and sanctioned legal principles and compliance with the guarantees of individual rights (RAMRAJ, 2004).

The principles relating to due processes in the administration of justice include, inter alia, the right to a fair trial, the presumption of innocence, the independence and impartiality of the judiciary. Various rules governing the due process of law are enshrined in several articles of the above-mentioned conventions. All of these provisions can be classified into four groups: a) the quality of justice administration; b) the effective protection of the parties’ rights; c) productivity; d) efficiency. The effectiveness of judicial proceedings depends on whether the state guarantees the right to pardon, amnesty and commutation of a death penalty; the right to review the decisions taken during the preliminary investigation and the application of preventive measures related to the deprivation of liberty; the right to review the conviction and the amount of punishment (THE RIGHT TO DUE PROCESS).

In recent decades, the due process of law has been losing its ground to economic expediency, with the plea bargaining institute coming to the fore. This is how Richard Posner wrote about the economic expediency of plea bargaining: “The counterpart in criminal procedure to settlement negotiations in civil procedure, plea bargaining is criticized both as denying the defendant’s right to the procedural safeguards of a trial and as leading to reduced sentences. Neither criticism is persuasive to an economist. If a settlement did not make both parties to a criminal case better off than if they went to trial, one or the other would invoke his right to a trial; hence the criminal defendant is compensated for giving up the procedural safeguards to which he would be entitled in a trial” (POSNER, 2004).

At the other end of the spectrum is the “due process model” that is characterized by procedural fairness and presumed fairness to the accused, acting as constraints on effectiveness. “In this model, criminal justice is viewed as an obstacle course, where prosecution is required to overcome barriers”. Originated in ancient times and formed during the Middle Ages, the concept of a due process went through difficult development in both the Anglo-Saxon and continental legal systems. As a result, it was consolidated in several international documents aimed at the protection of human rights. If the relevant international bodies control the observance of due processes by member states of international and regional treaties, it does not let withdraw from such a process for the sake of economic expediency.

RESULTS

The search for a proper legal procedure in criminal cases led to the fact that the Council of judges of Russia approved the institute of accelerated and simplified proceedings on April 3, 1998. In November 2000, the 5th All-Russian Congress of judges supported its introduction into judicial activity. In recent years, the Supreme Court of the Russian Federation has intensified the development of draft laws aimed at the optimization of judicial activity by simplifying and accelerating it and promptly seeking an agreement between the parties to a conflict. This type of judicial activity was positively assessed by President of the Russian Federation V.V. Putin. On January 23, 2018, the president attended an inaugural meeting dedicated to the 95th anniversary of the Supreme Court of the Russian Federation and noted that “the law-making activities of the Supreme Court of the Russian Federation are of great importance, which allows to fill gaps in the legislation and relieve courts from senseless routine”. In our opinion, we have managed to achieve the following scientific results:

1. The history and development of plea agreements were studied and considered in the context of modern Russia. They represent criminal policy in special forms of law enforcement, human rights, prosecutorial and judicial activities conducted both within the framework of adversarial criminal proceedings and beyond their limits.

2. The genesis of the plea bargaining institute in a certain state is a natural stage in the development of law enforcement, human rights, prosecutorial and judicial activities. We have proved that its formation is predetermined by the following necessities: 1) to establish civil peace in society; 2) to save the state resources allocated to expose perpetrators.
3. The formation of the plea bargaining institute was preceded by the social awareness of the importance of admitting guilt by the defendant in the system of criminal evidence. This is predetermined by the following circumstances: 1) parties to legal relations (prosecution and defense) are equal and free; 2) the tolerance of the prosecution (state) to the rights and fundamental freedoms of a person and citizen in collecting evidence; 3) the quality of legal assistance provided to the accused by professional lawyers.

4. The conclusion of a plea agreement is a complex, systemic and historical reality, as well as unique and naturally arising social relations, whose essence is the potential ability of a particular society to reach a mutually beneficial agreement between the state and the accused based on law. Within the framework of this agreement, criminals admit their guilt in committing a crime and the state represented by preliminary investigation bodies, prosecutors and courts takes this admission of guilt into account when determining the type and amount of punishment to be imposed on such a perpetrator.

5. The conclusion of a plea agreement is a means common to the social nature of a person and the necessary condition for the functioning of a highly developed social community, as well as a type of communication that arises among highly organized parties to criminal proceedings aimed at resolving certain categories of social conflicts.

6. The conclusion of a plea agreement represents a public expectation that the social conflict caused by a criminal offense will receive adequate attention.

7. The conclusion of a plea agreement is a behavioral pattern adopted by a certain human community in resolving social conflicts caused by the commission of a crime.

8. The institute of plea bargaining, i.e. the corresponding relations in the sphere of law enforcement, human rights, prosecutorial and judicial activities in the power mechanism of a particular state (state-power legal relations), the intensity of these legal relations and their variety are conditioned by many different factors, including historical, socio-economic and political.

9. The effectiveness of the plea bargaining institute is conditioned by such a social value as a developed system of law and a) the legal and technical quality of legislation; b) the training of parties to legal proceedings, their desire and objective capabilities to resolve conflicts through the conclusion of a plea agreement.

10. For the first time, we have determined and formulated the main problems of plea bargaining. Being the existing practices, the institutes of plea bargaining and early guilty plea hearing should be enshrined in the Criminal Procedure Code of the Russian Federation.

11. The institute of plea bargaining existed earlier (including in the USSR). Currently, it is represented by the following forms: a short-form inquest (Chapter 32.1 of the Criminal Procedure Code of the Russian Federation); a pre-trial cooperation agreement (Chapter 40.1 of the Criminal Procedure Code of the Russian Federation); the mass consideration of criminal cases in a special order (Chapter 40 of the Criminal Procedure Code of the Russian Federation); the termination of criminal cases of a minor or of an ordinary gravity in connection with the parties' reconciliation (Article 25 of the Criminal Procedure Code of the Russian Federation); the termination of a criminal case or criminal prosecution in connection with the appointment of a criminal law measure in the form of a fine (Article 25.1 of the Criminal Procedure Code of the Russian Federation); the termination of criminal prosecution in connection with an active repentance (Article 28 of the Criminal Procedure Code of the Russian Federation); the termination of criminal prosecution in economic crimes (Article 28.1 of the Criminal Procedure Code of the Russian Federation).

12. For the first time, we have proposed to amend and supplement the laws governing law enforcement, human rights, prosecutorial and judicial activities with a direct indication that parties to criminal proceedings should conclude a plea agreement with the persons accused of committing the crime to optimize criminal proceedings. It is also necessary to update the Criminal Procedure Code of the Russian Federation.

13. Most legal relations typical of the plea bargaining institute are outside the criminal process since they are elements of law enforcement, prosecutorial, human rights and judicial activities. Due to this circumstance, these legal relations need to be settled within the framework of laws regulating such activities.
14. Within the regular bodies carrying out a preliminary investigation, the prosecutor's office should establish special units aimed at negotiating with offenders (persons who committed a crime) and concluding a plea agreement with them. These staff structures should focus on the earliest possible conclusion of a cooperation agreement. This type of procedural activity can be automated as much as possible. It is permissible to conclude an implied contract on cooperation.

15. It is advisable to establish special councils in the structure of the Russian judicial system that would consider criminal cases, in which a plea agreement has already been concluded.

**DISCUSSION**

There has been a large number of people striving to comprehend the essence of the plea bargaining institute, starting from the moment of its formation. However, relatively little progress has been made in this direction, both in Russia and in foreign countries. There are few scientific works concerned with plea agreements written by the most renowned representatives of the Russian legal science, namely, the fathers, children and grandchildren of those standing behind the Judicial Reform of 1864. At the same time, the leading Russian processualists E.V. Vaskovskii and I.Ya. Foinitskii always highlighted such basic principles of criminal proceedings as their promptness and cheapness.

During the Soviet period (1917-1991), the plea bargaining institute was only briefly mentioned in foreign books (A.M. Wilshere, E. Jenkens, P. Archer) translated into Russian in the 1940-1950s. As a rule, the institute under consideration was harshly criticized (for example, the scientific works of N.N. Polyanskii of 1937 and 1969). The main ideologists of the Soviet criminal proceedings M.S. Strogovich and M.A. Cheltsov (textbooks on criminal proceedings written by other authors had not been published for decades) were ardent opponents of: 1) any agreements concluded between state and persons held liable for committing offenses; 2) any reduction or simplification of criminal proceedings. The authors substantiated their position by the consequences of introducing abridged procedures in cases of terrorist organizations and terrorist acts against workers of the Soviet government (Section 7 of the Criminal Procedure Code of the Russian Federation, 1923).

**CONCLUSION**

The scientific novelty of this article lies in the fact that it addresses one of the latest phenomena, both in the world and in the Russian practice, i.e. mutually beneficial relations between the state and the offender (including the criminal). Based on the study of numerous regulatory and doctrinal sources, as well as real law enforcement practice, we have drawn the following conclusion: the genesis and development of state-offender agreements in different countries is a universal positive trend that has already been implemented in law enforcement, human rights, prosecutorial and judicial activities. This approach is typical of all state activities in the Russian Federation. The thesis defined the polyfunctional institute of plea bargaining, studied and classified its main types, as well as determined the boundaries of its application. We have revealed the main activity-based prerequisites for its use and indicated the objectives that can be achieved through the application of the plea bargaining institute. We have also examined an amorphous danger of its overdevelopment and proved the positive nature of plea bargaining if it does not go beyond the limits of its reasonable use. At the same time, we proceeded from the fact that the principles of legality, expediency and mutually beneficial cooperation do not exclude but rather complement each other since they form a systemic unity. In particular, the scientific novelty of this study is evidenced by the following judgments:

1. For the first time, the history and development of plea agreements were studied and considered in the context of modern Russia. They represent criminal policy in special forms of law enforcement, human rights (advocacy), prosecutorial and judicial activities conducted both within the framework of adversarial criminal proceedings and beyond their limits.

2. The genesis of the plea bargaining institute in a certain state is a natural stage in the development of law enforcement, human rights, prosecutorial and judicial activities. Its formation is predetermined by the following necessities: 1) to establish civil peace in society; 2) to save the state resources allocated to expose perpetrators; 3) to ensure the internal stability of society through a mutually beneficial agreement between the state and the offender, which reduces the level of antagonism and diversifies mechanisms for the fair resolution of conflicts.
3. The formation of the plea bargaining institute was preceded by the social awareness of the importance of admitting guilt by the defendant. This is predetermined by the following circumstances: 1) parties to legal relations (prosecution and defense) are equal and free; 2) the tolerance of the prosecution (state) to the rights and fundamental freedoms of a person and citizen in collecting evidence; 3) the quality of legal assistance provided to the accused by professional lawyers.

4. The conclusion of a plea agreement is a complex, systemic and historical reality, as well as unique and naturally arising social relations, whose essence is the potential ability of a particular society to reach a mutually beneficial agreement between the state and the accused based on law. Within the framework of this agreement, criminals admit their guilt in committing a crime and the state represented by preliminary investigation bodies, prosecutors and courts takes this admission of guilt into account when determining the type and amount of punishment to be imposed on such a perpetrator. The above-mentioned institute is based on contractual and compulsory norms that are interdisciplinary.

5. The effectiveness of the plea bargaining institute is conditioned by such a social value as a developed system of law and a) the legal and technical quality of legislation; b) the training of parties to legal proceedings, their desire and objective capabilities to resolve conflicts through the conclusion of a plea agreement.

6. The institute of plea bargaining existed in all countries and at all times (including in the USSR). Currently, it is represented by the following forms: a short-form inquest (Chapter 32.1 of the Criminal Procedure Code of the Russian Federation); a pre-trial cooperation agreement (Chapter 40.1 of the Criminal Procedure Code of the Russian Federation); the mass consideration of criminal cases in a special order (Chapter 40 of the Criminal Procedure Code of the Russian Federation); the termination of criminal cases of a minor or of an ordinary gravity in connection with the parties’ reconciliation (Article 25 of the Criminal Procedure Code of the Russian Federation); the termination of a criminal case or criminal prosecution in connection with the appointment of a criminal law measure in the form of a fine (Article 25.1 of the Criminal Procedure Code of the Russian Federation); the termination of criminal prosecution in connection with an active repentance (Article 28 of the Criminal Procedure Code of the Russian Federation); the termination of criminal prosecution in economic crimes (Article 28.1 of the Criminal Procedure Code of the Russian Federation) and other forms, in particular, within the framework of imposing punishment according to the Code of Administrative Offenses of the Russian Federation.

7. Most legal relations typical of the plea bargaining institute are outside the criminal process since they are elements of law enforcement, prosecutorial, human rights and judicial activities. Due to this circumstance, these legal relations need to be settled within the framework of laws regulating such activities outside the framework of criminal proceedings.

8. It is advisable to create structures that would timely form mutually beneficial relations between the state and the criminal in the structure of law enforcement agencies that identify and incriminate offenders.

9. It is recommended to establish special courts (councils) that would consider criminal cases, in which preliminary investigation bodies have already reached an agreement on the admission of guilt, in the structure of the Russian judicial system.

10. To supplement the system of principles for organizing law enforcement, human rights and judicial activities with a new principle of mutually beneficial cooperation. The latter will contribute to the creation of mutual trust and interaction between parties to a conflict, such parties and state bodies, including courts. The main message of such activities is the earliest clarification of all the circumstances of a particular case, and the adoption of a lawful and well-grounded decision that resolves the conflict in question by preliminary investigation bodies, prosecutors and courts. The interaction of parties to the conflict with law enforcement agencies, prosecutors and, finally, courts help all the parties to such proceedings to develop a mechanism for resolving the conflict at the earliest stages. On the one hand, this will guarantee the highest possible level of protection of legal rights and interests. On the other hand, this approach will optimize both time and financial costs of the parties due to the principle of procedural economy.
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