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"Plea Agreement" in Foreign and Russian Criminal Procedure Law: Comparative Analysis

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Abstract: The article deals with analysis of plea agreement procedures within the framework of criminal proceedings in Russian and foreign criminal procedure law. The institute of plea agreement, introduced into the Criminal Procedure Code of the Russian Federation in 2009, is one of the ways of differentiating criminal procedure form which improves the efficiency of law enforcement and stimulates favourable post-criminal behaviour of a person charged with offence. The implementation of foreign experience in agreement procedures requires taking into consideration the specific character of an adversarial model of criminal trial in combination with single elements of investigative process taking place in pre-trial investigation when the prosecution and defense enter an assistance agreement.

Key words: Criminal procedure · Plea agreement · Prosecution and defense · Post-criminal behavior · Assistance to law enforcement · Scope of charges · Guilty plea

INTRODUCTION

The globalization process which has become a pivotal trend shaping the modern world order affected the legal systems of leading states in Western Europe and America as well. The standards of international law which are justly believed to be fundamental for integration form a constituent part of national legal systems, including that of the Russian Federation. It can be confirmed by normative concepts, definitions, legal principles, scope of jurisdiction and legal standing, decision-making procedures, methods of citizen rights and freedoms protection, as well as obligations to apply the norms contained in international documents within the framework of criminal proceedings assumed by the law enforcement which exist in national legislations [1]. The analysis of tendencies towards approximation of legal systems at the international level allows claiming that the British, American, German and French criminal procedure influence not only other countries but also each other, which results in adopting criminal procedures most efficient from the point of view of manpower, material and timing constraints by national legislators [2]. In the meantime, the implementation of foreign criminal procedure institutions cannot but take into consideration nationally specific features, legal traditions and modern realities of political and social life in the country. Any changes, involving drastic reforms based on adoption of foreign norms or institutions in the field of criminal procedure law before their actual implementation and application should be theoretically evaluated with reference to the Russian legislation and the law enforcement authorities [3]. This thesis, according to our reckoning, is fully applicable to models of simplifying criminal procedure forms, one of which is a trial procedure outlined in Chapter 40.1 of the Criminal Procedure Code of the Russian Federation.

Body of the Text: Simplifying criminal trial procedure by way of entering into "plea agreement" was mentioned for the first time in the US legislation and dates back to 1804. According to R. Moley as far back as 1839 in the state of New-York each fourth criminal case was settled by a guilty plea [4]. The number of simplified procedures was steadily growing and by the middle of 20th century it made 90% from all criminal trials. Nevertheless, the procedure of plea bargaining was placed on explicit legal footing only in 1997 with adoption of the Federal Rules of criminal procedure in United States district courts [5]. Rule 11 (E) of the said document considers plea bargain as an

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agreement concluded orally or in writing. For both of them there are special record procedures, carried out by a court reporter with a judge, a defendant, an attorney for the defendant and a prosecutor present and in a number of cases with the presence of a victim as well.

Depending on the subject matter, according to the United States legislation plea agreements are subdivided into two types. The most current type of agreement is the one where an attorney for the government moves to dismiss all the charges except those with reference to which a defendant pleads guilty. As a rule, in these cases a defendant is obligated to assist the government authorities, give true testimony, etc. Other type of plea agreement involves changing the scope of charges. If a defendant is charged with several offences, the most typical scenario will be his pleading guilty for the gravest of them and getting a sentence agreed upon between the parties. In some procedures of negotiating the bargain terms the specific language of the terms associates a defendant's plea or sentencing negotiations with "a plea bargain", where the conditions requiring the defendant's assistance in prosecution of other persons by providing testimony, in retrieval of stolen property, etc are annexed to the thing bargained for (more specifically nolo contendere). For example, Article 5 of the Federal Sentencing Guidelines [6] provides that while sentencing such a person the court takes into consideration the significance and usefulness, the nature and extent, the timeliness of the defendant's assistance, completeness and reliability of the information provided by him. Besides, the court takes into account the government attorney's evaluation, who verifies if "the assistance on the part of the defendant is sufficient to conform with mitigated sentencing"[7]. The negotiation process is completed with the agreement between a government attorney, a defendant and a counsel for the defendant. After that the document is presented to the court to take a decision about accepting the plea bargain or rejecting it. The essential conditions to determine the acceptability of the plea agreement made is its voluntary character and awareness. By way of questioning the defendant the judge should ensure that: 1) the defendant is fully aware of the nature of charges brought against him; 2) the defendant understands and gives his consent to all the conditions of a plea agreement; 3) the defendant understands that the court is not obligated to follow any recommendations about sentencing language, which are promised in a plea agreement; 4) the defendant is fully aware of his constitutional rights, the exercise of which he chooses to waiver; 5) the plea did not result from force, threats, or promises other than promises in a plea agreement; 6) the defendant refuses to contest the charges brought against him. Apart from questioning the defendant the judge studies a criminal case file and only after that takes decision about accepting of the agreement entered by the parties. Notwithstanding the fact that the United States Sentencing Guidelines require mitigating a sentence by one third in case of entering "a plea agreement", in fact this mitigation comes up to approximately two thirds, for this purpose an average sentence imposed subsequent to a guilty plea makes 54.7 months of conviction as compared to 153.7 months as a result of a trial [7].

Great Britain is characterized by more cautious attitude towards plea agreement procedures due to the fact that the highest judicial authorities disapprove if judges take part in negotiations between the parties [8]. Although here we find an express tendency towards amplifying the scope of validity for simplified trial procedures as well, which are called summary proceedings. In particular, 95-98% of minor offences cases are examined by magistrate courts which serve as an alternative to trial jury. The form of proceedings is simplified only in cases when a defendant pleads guilty, which avoids the necessity of judicial examination. Total duration of a trial in summary proceedings makes 15 to 30 minutes and comes down to imposition of sentence by the court. In case if an accused pleas guilty the court examination by default applies, as well as a procedure of "criminal penalty on-site", introduced for ten offenses from 2001. A guilty party has to pay a penalty within 21 days after receiving a notice offering voluntary execution of the sentence. Failing to pay a penalty may entail enforced recovery to the amount of 50% higher than the initial one [9].

In the context of integrating the legal systems of Russia and Western Europe the assistance agreement institution applied in Germany appears to be the most promising. Traditionally the criminal proceedings of both countries were similar for the purposes of classical model of trial procedure from the presumption of innocence perspective, adversarial system and equality of parties, liberty of evidence evaluation. Up to the present moment the German criminal procedure law does not include the institute of plea bargaining, though to the extent authorized by the Supreme and Constitutional Courts the law enforcement practice uses a plea agreement. This institute was formed based on the tactics of a so called "primary witness for the prosecution", which was a person collaborating with the prosecution and had a right

to get a mitigated sentence or be released from punishment [10]. At the legislation level the possibility of middle ground between the prosecution and defense is stipulated in the criminal law. In particular, item 10, Art. 261 of the Criminal Code of the Federal Republic of Germany affords ground for the court to mitigate punishment or dismiss it altogether at their discretion, if an offender substantially assists in disclosing the offence committed by another person through his own contribution by way of voluntary disclosure of the information he has. The fundamental prerequisite for plea agreement procedures is providing legislative framework for all possible concessions admissible for the prosecution, more specifically the scope of charges (excluding from a bill of indictment of "concurrent" elements of offense) or mitigation of sentence in the cases if a defendant pleads guilty before the trial. Overrunning the limits established by the criminal law makes an entered plea agreement null and void.

The professional literature names the institute of "sentence agreement" stipulated by Art.444-448 of the Code of Criminal Procedure of Italy as a classic model of continental plea bargain. According to the said norms a sentencing petition ("patterggiamento" or "bargain") allows for mitigating the sentence by one third thought its applicability is limited only to the offenses, for the commission of which the criminal law requires up to three years of imprisonment [11]. The bargain consists in the fact that the parties come to a win-win agreement at the final stage of preliminary investigation or during preliminary hearing of a criminal case as follows: a defendant pleads guilty, which releases a prosecutor from the liability to prove it in court and the prosecution agrees to sentencing in the form of a fine or imprisonment up to two years. Besides, the defendant is excused from paying legal fees and in his case the reduced terms of criminal record cancellation are applied. The agreement is approved by a judge after revising the criminal case confirming that the defendant is guilty, as well as procedural conditions of his imprisonment.

By its legal nature the assistance agreement institute implemented in the Russian criminal procedure law is reckoned among complex ones because it basically involves two constituents, namely a substantive and a procedural one. In the context of criminal law the defendant's perfomance of the obligations undertaken under the agreement incurs relief at imposition of sentence, required by part 2 Article 62 of the Criminal Code of Russian Federation. Among these obligations the legislator considers the assistance in investigation and disclosure of a crime, in incrimination of other accessories, in tracing of property obtained by illegal means (part 1 of Article 317.5 of the Criminal Procedure Code of the Russian Federation). In the context of view of criminal procedure the preferences of the defense consist in: 1) simplifying the form of criminal trial on the merits at first instance court; 2) severance of a criminal case with reference to a suspect or a defendant, who entered a plea agreement; 3) possibility of applying security measures towards this person, his close family members, relatives and connected persons; 4) exemption from the payment of legal fees; 5) according to the accepted law enforcement practice, changing restrictive measures from detention to a more lenient one, not related to personal restraint.

CONCLUSION

The analysis of foreign criminal procedure legislation and the practice of its application allows drawing a conclusion that "a plea agreement" in its various manifestations obtained sufficiently wide circulation. Global practice has shaped several types of agreements which in sublimated form, one way or another, affected the development of the Russian legal model of a plea agreement, stipulated by Chapter 40.1 of the Criminal Procedure Code of the Russian Federation. According to our reckoning, it is an agreement of a defendant with the prosecution with reference to the scope of charges and amount of penalty in exchange for specific actions dealing with pleading guilty and active assistance in investigation fundamental to the vast majority of agreement procedures in the USA and continental Europe which was taken as a basis of a plea bargain.

RESULTS AND DISCUSSION

At present the vector defining the development of national legal systems is their integration which includes implementation of criminal proceedings most efficient from the point of view of material, manpower and timing constraints. The Russian criminal procedure law which undergoes permanent reforms, including those covering simplified procedures of investigation and criminal trial, in particular, the institute of a pre-trial plea agreement, is no exception.

The analysis of criminal procedure legislation of the USA, Great Britain, Italy, Germany allows drawing a conclusion about the extensive use of agrement procedures in settlement of criminal law conflicts, among which "plea bargains" hold a special place. In general

terms this differentiated procedure is about an agreement between the prosecution and defense as for the scope of charges and amount of exchange for specific actions dealing with pleading guilty and active assistance in investigation. The Russian criminal procedure law, while assimilating best practices of the global community with reference to regulating special procedures of judgement in case of entering a pre-trial plea agreement, nevertheless, takes into consideration national specific character, legal traditions and modern realities of political and social life of the country. Thus, the assistance agreement is not eqquivalent to foreign "plea agreements" on two grounds, to name a few. In the first place, the prosecution does not have discretionary authority to define the scope of charges. In the second place, criminal trial on the merits, as required by Chapter 40.1 of the Criminal Procedure Code of the Russian Federation, as well as provision of other material or procedural preferences is not contingent on a defendant's confessing only his guilt in committing an offense, as defined by the legislator.

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