

Approach to a Negotiated Criminal Justice System

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ABSTRACT

This article discusses the system of compliance judgments in the United States and its influence of its application in Spanish law. Moreover, the article includes positive and negative arguments in relation to such application. As to positive arguments we can consider, for example, the reduction in the number of criminal proceedings and the speed of obtaining a final judgment (procedural simplification). As to negative arguments uncertain and sometimes unfair outcome can be included. The performance of prosecutors, lawyers and judges in these criminal proceedings, and the possible advantages and loss of rights of the accused, are studied here. Also, the article deals with application in famous cases in Spain, such as the tax fraud committed by professional footballers.

Keywords: *justice System, negotiated criminal, Spain law*

1. THE ORIGIN

In the very space of the American criminal justice system we find among its basic pillars the principle of opportunity, which materializes in a broad criterion of discretion in the hands of the prosecution. This solution, built around the use of incentives, is rooted in a centuries-old American legal tradition, dating back at least to the Civil War, or even to the preceding centuries. In this way, the parties, and more specifically the Public Prosecutor's Office, are given the possibility of deciding with quite a margin of freedom the initiation or continuation of the criminal proceedings, and even to negotiate with the defense an exemption or reduction of sentence. Practicality prevails, since a negotiated solution avoids long and costly procedures, the randomness of the outcome of the trial and the optimal use of the resources of the subjects involved in the defense of the interests of the Public Prosecutor's Office and in the exercise of the jurisdictional power. This principle can be manifested as a free opportunity, that is, without limitations in the negotiation and its legal consequences, since it allows the prosecutor to even renounce the exercise of criminal proceedings. This would, for example, allow exemption from punishment in exchange for a delation. It must be borne in mind that in the American system the judge is usually in a passive situation, since the control of the proceedings rests with the parties and, therefore, the negotiation of conformity becomes of greatest relevance. Plea bargaining, which began as an exceptional solution for quickly resolving a limited number of cases, is now, in fact, the main or only procedural path, as "the exception has swallowed the rule".

Traditionally, judges and academics have paid little attention to the negotiation process, as the mere possibility of subsequent arrive to a trial would ensure the impartiality of the agreement previously reached. The parties reach a

fact, while the state merely offers the possibility of a fair trial. If prior agreement exists between the parties, this right and state protection would be waived. As we will see, this criterion has been changing – albeit very lukewarmly – in some recent rulings of the United States Supreme Court. Today, American doctrine unanimously recognizes that the system of oral trials has been supplanted, as a system based almost exclusively on conformities today governs, which requires building around this way of doing justice a renewed framework of procedural safeguards. In other words, a new design must be reached that surpasses the idea of the freely accepted contract, the result of an agreement of wills.

This is a system that is in frank international expansion, but it has not evenly crossed American borders, because in the rest of the world there are serious reluctance to have such extensive criminal action. On the contrary, a system of regulated opportunity has gradually been opened up, i.e. the admission of the negotiating power for certain crimes, imposing limits or, in general, seeking alternatives to respect the principles of legality criminal and procedural. In this context, the conformity judgment is placed in the Spanish criminal proceedings, as a specific manifestation of the principle of regulated opportunity that, as we will see, brings some positive results, but in turn not a few interpretative and Application.

As we have been saying, in the United States, cradle of the negotiated verdict, the voluntary, induced or negotiated confession of guilt or guilty plea has led to most criminal proceedings being resolved by the plea bargaining route, being exceptional recourse to the trial in the strict sense and the jury. While public opinion believes that trials prevail before juries with full guarantees, the reality indicates that these trials are almost non-existent, as conformities are reached voluntarily or even through

actions with a high coercive degree emanating from the prosecution . Moreover, it is claimed that the prosecutor has become the most powerful figure in the View Room . Since the Judgment of the Supreme Court "Lafler v. Cooper" (2012) it is confirmed that the American criminal system is a system of conformities, not a system of judgments. From the point of view of the legislation, the American plea bargaining is essentially deregulated, as it lacks a specific legal foresight .

The negotiation is based on a reduction of charges by the Public Prosecutor's Office (charge bargaining), the obtaining of a less judicial conviction than it would correspond, previously agreed by indictment and defense (sentencing), or the option to support mixed solutions, which should always provide some advantage to the accused . The doctrine considers that it is negotiated in the shadow of judgment, considering the influence that the evidence will have on that trial and a diminished penalty from that which could possibly result from the judicial-based process. However, another point of view is also defended that does not see this simple approach, because it does not consider the complex essence of any negotiating process, with its distortions, an eventual bad result of the wrong advice, the taking of decisions that are not always as rational as intended, etc. .

The main difference between the trial in the strict sense and the plea bargaining is the lack of connection with the evidence to establish the guilt or innocence of the accused. In a system such as the American, which purports to rely on the presumption of innocence and the presentation of evidence before the court, both disappear with plea bargaining, in such a way that punitive objectives are achieved, but at the same time the trust placed in the entire judicial system is diluted . The starting point is the free recognition of guilt, which in the Anglo-Saxon world is known as plea guilty, that is, a prior guilty plea that is considered a confession that would serve as an evidentiary basis for the court to assess the guilt of the subject without imposing on the prosecution the burden of proof . In this context, negotiation or haggling occurs between the indictment and the accused (bargaining). This is, in short, the model originally prevalent in many of the jurisdictions existing in the United States although it is also in force, with many nuances, in other legal systems such as Spanish Since the 1980s Europe and in general everyone has become influenced with this phenomenon , and so have the International Courts of Justice . As Del Moral rightly points out, Spain could not be sidelined from these trends, exemplifying that Circular 1/1989 of the State Attorney General's Office externalizes a true " Exaltation of the conformity system" . We must remember, however, that while plea bargaining is being imposed around the world, the rules governing its application in the United States do not .

"The Continental European criminal procedure has entered into a deep and incomparable crisis precisely because of the adoption of plea bargaining, a crisis vital to the structure of a liberal rule of law and a crisis of survival, which is not can be picked up, or does not want to be, by the professionals who act in the process" (Schünemann) .

We consider, however, that these concepts should be nuanced. There are positive and negative aspects to the conformity judgment, which require the adoption of a conciliatory point of view and not based solely on antagonisms. A doctrinal sector chooses to talk about "conflict and consensus", and of "principle of opportunity versus principle of legality" . However, this struggle does not appear to be beneficial. I believe that the compliance judgment will always be positive, framed in the alternative settlement of disputes, if it is provided with enough procedural mechanisms that do not neglect the effective protection of socially relevant legal assets and, in turn, ensure respect for the fundamental rights of a fully informed accused and avoid the conviction of innocents..

2. POSITIVE ARGUMENTS

There can be no denying the existence of important positive aspects in the institute of conformity. From a practical perspective, the reduction in the number of criminal proceedings and the speed of obtaining a final judgment (procedural simplification) should be welcomed. It is a question of favoring the judicial economy and, ultimately, improving the functioning of the Administration of Justice, without ignoring the monumental saving of economic resources for the State . It reduces the work of prosecution, defense and judges, all simultaneously benefiting, thus taking precedence over a utilitarian approach. From this perspective, the defendant who does not trust his acquittal will obtain a reduction of the expected sentence . It also sometimes produces practical benefits for the work of the investigation, as it helps to uncover critical information about the functioning of criminal networks, especially when conformity predicts a delation or the provision of evidence .

As we have already stated, these positive arguments have popularized plea bargaining in the United States to bring most criminal proceedings to a conformity without the need to go to trial, with the jurors increasingly being Exceptional. The same trend is seen in Germany and seems to prevail in Spain . In a first synthesis, as Brown points out, leaving aside the negative aspects of malpractice in this matter, in most cases the advantages of a procedure that avoids judgment in the strict sense are many and easy to understand: agreements are adequate and quick, especially in most procedures, which are usually simple, and it really is beneficial for a defendant willing to plead guilty and for the prosecution who avoids trying to burden himself with the whole evidence framework .

From this optimistic positioning is a win-win solution: the defendant who resigns the trial receives a lesser sentence than the deserved one (although he also renounces a possible acquittal), while the prosecution guarantees a conviction without the need to fully generate the mandatory test . As a global idea it is advocated that "compromise is better than conflict" and that, under ideal conditions, plea bargaining offers advantages for all. The problem is that these ideal conditions do not occur in most cases, so a major reform of the American system is

proposed, which avoids the judicial errors that there regularly produces a justice negotiated through the judgment of Accordance.

3. NEGATIVE ARGUMENTS. AN UNCERTAIN AND SOMETIMES UNFAIR OUTCOME

In the United States, many voices currently regard conformity as inefficient and unfair . Conformity suffers from relevant criminal and procedural principles, such as legality and equality. In terms of legality, the duty to prosecute crimes is observed. Citizens who suffer from the commission of crimes (victims) are depressed from the criminal action that the Administration takes over through the Public Prosecutor's Office, regardless of possible prosecutions of the particular indictment. This dispossession requires that criminal proceedings be effectively brought on behalf of all, giving rise to one of the main grounds of the principle of procedural legality . We are aware, however, that this duty to prosecute all crimes does not exist in the American judicial system, and even, graphically states, "The idea that the prosecutor may be forced to initiate criminal prosecution in general terms it is unimaginable to an American jurist."

The principle of equality will also be affected, in so far as only one of those responsible for two identical offences – the one who accepts the conformity sentence – will be subject to less punishment for the simple fact that they have not been put to trial and lighten the burden probative of those responsible for the accusations and diminish the tasks of the judges. Even solutions close to full exoneration of punishment (very light sentences or immediate release from prison) for providing incriminating testimony, giving a third party, may even be reached in the American system, if such evidence is considered essential for the Public Prosecution Service. The use of these informants or snitches often materializes based on false testimonies that allow police and prosecutors to improve their statistics of resolved cases, although with this evidentiary mechanic no objective truth is externalized and, even, an innocent is convicted . Interestingly, the most conservative sectors – the defenders of "law and order" policies – rely on the lack of equality to attack the plea bargaining for not imposing all the threatened punishment, as the interests of the victims would not be defended and would be favored criminals themselves and the increase in crime rates .

Here appears the enormous problem of the asymmetrie in terms of incentives in plea bargaining, since the prosecution can offer an exoneration or reduction of sentence in exchange for a testimony, and the defense has no capacity to offer practically anything, simply should wait for the generosity of the prosecution through a good offer of penalty reduction . There is also asymmetrie of information: the prosecution knows how far it can go in the evidence sphere with the accumulated background, while the defense does not have even similar means at that

time, nor can it use them from the same way . The asymmetrie can also be manifested in legal advice, as sometimes the human team of the prosecution with which a defendant with little financial resources can pay is not comparable . By continuing to influence inequalities and asymmetries, there is an obvious distortion of justice, since one who has no information is worth nothing, and his custodial sentence is much longer than other criminally more responsible subjects, but who they have information and collaborate, in what is known as substantial collaboration favored in plea bargaining .

But they are not the only principles that can be affected. Schünemann lists a good arsenal of procedural principles that can be damaged: advertising, immediacy, orality, presumption of innocence, etc. In short, it is understood that criminal justice is degraded, since its purposes are not fulfilled either in relation to society (the penalty may be insufficient) or the author (it is condemned without going through a fair trial). A space of para-procedural (clandestine) negotiations is created between prosecutor and defense, usually devoid of the transparency that must be governed if it is intended to provide a full picture of Justice . For this reason, in recent rulings, the United States Supreme Court has expressed concern about achieving "market" regulation of conformities, requiring effective legal assistance to make the result achieved reliable and in short, a trustworthy conformity is reached . In general, it can be understood that non-conformity is criminalized. This undermines the procedural principles and the role of the parties to the process . More severe charges are often filed in the American system or the penalties requested are increased if the subject, instead of accepting the offer of conformity posed by the Public Prosecutor's Office, chooses to go to trial. Note that this is the exercise of the right to have a jury trial covered by the Sixth Amendment of the Constitution, a topic currently hotly debated in the United States . That is why the doctrine has suggested that prosecutors could be executing an act of pure vengeance for not reaching the pact. Then appears the so-called doctrine of "Vindicating Vindictiveness" which allows these aggressive tactics to reach agreements. This would be a widespread attitude within the prosecution, covered by the law, although strongly criticized by public opinion . Also in Spain, in very recent times, when a change of heart was found of a tax defendant whose lawyers had reached an agreement in accordance with the prosecutor's office and particular indictment which was not ratified by the person concerned before the Court, it was considered that "the foreseeable thing now is that they raise their request for penalties in the face of the enormous malaise that has caused the case." The proponents themselves of plea bargaining recognize that one of the main problems posed by this resource is that its structural dynamics harm defendants who are innocent, who, in the event of a risk of a higher penalty, which could be imposed at trial, prefer the lower penalty agreed in the negotiation . This is not an example of laboratory but of the stark reality , as clamorous judicial errors are documented, resulting from false confessions – many of them achieved under pressure and in police

headquarters – and sentences in accordance with them, which over time have managed to be reversed by the emergence of new technologies, such as DNA testing . Another important factor also comes into play, such as the economic cost of judgment that many people cannot bear – threatened, for example, with the complete loss of their assets – which leads them to accept a lesser penalty, even if they are innocent . This decision by an innocent to plead guilty in exchange for a reduction in punishment significantly undermines citizens' confidence in justice . But many authors find this situation tolerable, to the extent that they understand "that most defendants are not innocent" , which would ultimately pose something of a risk that "they" (all who are criminally charged) must take for the simple there is a suspicion at the police headquarters or the prosecution.

4. THE JUDGMENT OF CONFORMITY IN SPANISH LAW: GENERAL LINES

Gradually, conformity has been imposed as an instrument of procedural simplification in the Spanish penal system. However, we cannot forget that our criminal procedural system is dealt with from what has been rightly described as "procedural chaos" , in which at least six different procedures coexist, from which there are also different possibilities to face the phenomenon of conformity, its characteristics and consequences. Gómez Colomer proposes to simplify this system in a sharp way, structuring an ordinary criminal process for the most serious crimes and another rapid or abbreviated process for the other crimes, which would have important consequences for conformity.

At first, the conformity provided for the ordinary summary was reduced to accession to the punitive pretensions of the accusations. Since the introduction of the abbreviated procedure by Organic Law 7/1988 of 28 December (provided for offences that have designated by

5. CONCLUSION

American criminal justice has gone from being a theater of social education (the jury trial) to an impersonal and impenetrable machinery, run by prosecutors and lawyers (plea bargaining). In this context, neither the judges nor the community play an active role . Conformity has become a kind of "accession contract", in an institution that more resembles a supermarket with pre-labeled prices that the subject accepts or rejects, in which there is no negotiation . "Justice chain production" has been born, which has already been very graphicly dubbed "McDonaldization of the criminal process", that is, there is a time when the principles of the fast food restaurant are moving into the process itself . The American system frequently and through plea bargaining leads to unfair convictions without possible judicial control .

law a custodial sentence not exceeding nine years), completely changed the perspective by apportioning the legal framework to the conformity resulting from a negotiation between the accusing party and the defense . Thus, expressly, Circular 1/1989 of the State Attorney General's Office repeatedly invites the Public Prosecutor's Office to reach conformity agreements.

One of the most relevant aspects of conformity judgments in Spain is presented in the context of economic criminal law. In particular, such agreements have become widespread in criminal proceedings initiated by tax fraud committed by professional footballers belonging to the main football teams. These athletes collect multimillion-dollar salaries, which are supplemented by other advertising revenue from an endless series of products. The taxation of all these extraordinary incomes focuses on the criminal problem, since important technical-tax advice seeks apparently evasive forms of taxes.

The real problem is very particular, because the admission to prison of these athletes would entail the early termination of their professional career, which cannot be restarted years later. Whether this or another is the specific reason, there is a tendency to offer generous sentences of conformity while threatening them with harsh prison sentences. In short, paying million-dollar fines can evade jail and thus make it in accordance with the state's tax representatives.

However, not all footballers have accepted these agreements. The most famous and recent case is that of the Spanish player Xavier Alonso, who has achieved an absolute sentence for acts like those that have led to a conviction according to other players of his team at that time (Cristiano Ronaldo). It is therefore cautioned that the negative aspects of conformities emerge when it is the administration that intervenes for exclusively collecting purposes.

In Spain and in general in Europe we do not want this to be reached, but the danger is latent. We are facing a very complex institution, which shows signs of great bipolarity: so, questioned by some, so defended by others. There is a clear tension between the political class and some practical justice – which tend to support conformity – and those that underpin academic and theoretical positions, which often highlight many of the negative aspects of this procedural solution . It is necessary and basic, in order to be able to accept conformity, that there is a trilateral negotiated agreement (fiscal, defense and control judge) with full guarantees, and not a bilateral solution with purely contractual profiles such as that currently prevailing in the American system, in which the judge has lost all prominence.

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