Analysis of the Plea Bargain under the Law against Criminal Organizations in Brazil (Law N° 12.850/2013)

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Abstract: The plea bargain institute, although used at various points in history, is an action that became widely known after the trials against the Italian mafia in the 1970s. It is characterized by a negotiation between judicial authorities and the accused, so that the accused himself can help the justice in the elucidation of crimes, in return for some benefits. The aim of this article is to analyze the institute of the plea bargain of the new Criminal Organization Law in Brazil (Law n°. 12.850/2013), addressing its conceptualization, historical origin, legal nature, among other legal and hermeneutical aspects.

Keywords: Plea, Bargain, Bargaining, Criminal

1. Introduction

The plea bargain is a means of “bargaining” between the accused and the authorities responsible for elucidating a criminal offense. Although it has been used at various moments throughout history, the deed as it is known today is a relatively new mechanism, having been used for the first time, in the current molds, in Italy during the 70s, in some judgements about the Italian mafia.

Even though it is based on several legal provisions in Brazil, the plea bargain is still subject to doctrinal divergences regarding its (in) constitutionality and classification as for its legal nature.

The aim of this article is to analyze the institute of the plea bargain of the new Criminal Organization Law (Law n°. 12.850/2013), addressing its conceptualization, historical origin, legal nature, among other legal and hermeneutical aspects.

2 Concept and Historical Origin

According to Nucci (2014)², to bargain in the jurisprudential sphere means dealing in the sense of denouncing or revealing, and it only makes sense to talk about deportation when an individual commits a crime and points other participants of the same offense.

However, the term "plea bargaining", which qualifies the accusation, is justified by the benefit, provided to the judge, of applying a reduction of sentence or even judicial pardon when the agent collaborates with the indication of other participants in the criminal offense. Yarochewsky (2012)¹. According to them, the plea bargaining, as we know it today, was originated in Italy in the mid-1970s during some judgments of dangerous individuals related to the Italian mafia.

In the Brazilian law, it can be mentioned that the plea bargain took place in two moments: the first was during the Brazilian Empire, in the Philippine Ordinances (1603-1830), where it could be granted even the judicial pardon if an individual pointed out other agents involved in conspiracies. The second moment came with the advent of Law number 8.072/1990, the well known Brazilian Law of Hediond Crimes, art. 8, sole paragraph: "the participant and the associate who denounce to the authority a gang or other criminal associations, allowing their dismantling, shall have their penalty reduced by one or two-thirds”. Bittar (2011)³.
Currently the institute of the plea bargain is present in several devices:

a) Decree-Law n °. 2848/1940 - Brazilian Penal Code (article 159, §4 and article 288);

b) Law n ° 8.072/1990 - Law of Heinous Crimes (article 8, sole paragraph);

c) Law n ° 12.850/2013 - Law of Criminal Organizations (articles 3, I, 4, 5, 6 and 7);

d) Law n ° 7.492/1986 - Law of Crimes Against the National Financial System (article 25, § 2);

e) Law n °. 9.613/1988 - Law of Crimes of Money Laundering (Article 1, § 5);

f) Law n ° 8.137/1990 - Law of Crimes Against the Tax, Economic and Consumer Law Order (article 16, sole paragraph);

g) Law n ° 9.807/1999 - Law of Protection of Victims and Witnesses (articles 13 and 14);

h) Law n ° 11.343/2006 - Drug Law (article 41); and


3 Legal Nature

Up to now there is still no consensus on the legal nature of the plea bargain demarcation in the Brazilian doctrine. For Nucci (2014)², the accusation can be admitted as a means of proof, however, it only acquires probative value when the accuser, in addition to attributing to someone the practice of a crime, also confesses his participation, otherwise it would be a mere testimony. Nucci (2014)².

Mirabete (1999)³ describes that plea bargain has an anomalous juridical nature, since it does not fit into any other type of nominated proof, but that there is no doubt that it has a great probative value, and, in this way, can serve as a support for the condemnation, mainly if it is coherent and finds support in other circumstantial evidence.

Mendroni (2002)⁴, however, claims that the juridical nature of the plea bargain is derived from a consensus, that is, a variation of the principle of legality in which the parties can decide on the fate of the accused, and the latter accepts what will be determined, since he/she reveals essential information to the authorities.

4 Factors that Lead the Agent to Choose Plea Bargain

From the subjective point of view, it is necessary to analyze the general reasons that lead an individual to opt for denunciation of the delusional acts practiced by him/her, with important information available for the elucidation of such crimes.

Through the psychoanalytic point of view, delation can be characterized as a result of a process of repentance in which the individual suffers a psychic disorder caused by guilt for transgressing elementary foundations of ethics and morality. For Freud (1894)⁶ (Neuropsychos of Defense 1894, Article II), the individual keeps in his psychic environment the element of guilt from the beginning of his existence. This feeling, although late, can be stimulated by individuals belonging to the primary attachment circle (family), as well as the secondary circle (intimate persons and their peers), who tend to strongly influence the social return option, being able to cause a fundamental profound transformation of thought or character, inducing the agent to seek redemption, assuming responsibility for his own errors as a form of penance, and thereby decides and agrees to express repentance through such disclosure. Freud (1894)⁶.

On the other hand, one can simply admit that, by exposing their crimes and the possibility of losses, such as their freedom, physical and moral integrity, or even their insertion into the prison system, the individual may decide to opt for the plea bargain as a form self-preservation. In one way or another, as an element of bargaining or a transformation undergone, it is certain that the delator craves the enjoyment of such benefit.

One can still consider the possibility of the agent choosing the agreement of leniency only with the desire of revenge, a normal behavior that, according to Freud in an interview given to the journalist Viereck, states: "Evil is the revenge of man against society, by the restrictions that it imposes. The most unpleasant characteristics of men are generated by this precarious adjustment to a complicated civilization. It is the result of the conflict between our instincts and our culture". Viereck (1930)⁷.

In spite of the plea bargaining, such situation would not be sustained for a long time, since Law n° 12850/2013, in article 4° § 1 and 16, stipulates in its framework, that the disclosure must be effective and also that, in addition, the information given needs to be backed up or confirmed, thus creating a mechanism capable of preventing such a choice
from being considered, without penalizing that conduct in other crimes provided for by law.

5 Plea Bargain: Means of Obtaining Proof or Proof in Criminal Proceedings?

"Proof" is a word that originates from the PROBARE entry, which in Latin means "to test, to demonstrate that something is worthy". In short, all the elements presented by the parties to the judge in a case, in order to delimit the truth or falsity of the fact, as well as the existence or non-existence of delusional acts. Lopes Jr. (2008).

The purpose of the evidence, then, lies in assisting the formation of the magistrate's opinion on the elements necessary for clarifying the cause. For this reason, without licit and valid evidence, the whole process would be compromised because it would not be possible to create a certainty concerning the fact, only to generate a fragile theory of what had indeed happened, not always sufficiently capable of shaping the judge's conclusions about a typical fact Capez (1998).

In view of this, it can be concluded that the means of evidence are sufficient elements for the conviction of the judge, while means of research and obtaining evidence have the purpose of acquiring the evidence itself. In this sense:

"While the means of proof are capable of directly serving the conviction of the judge as to the truth or not of a factual statement (eg. testimony of a witness, or the content of a public deed), the means of obtaining it (eg, search and seizure) are instruments for collecting elements or evidence sources, which are in fact able to convince the judge (eg. a bank statement found in a search and home seizure). That is, while the means of proof lends itself to the direct conviction of the judge, the means of obtaining evidence only indirectly, and depending on the outcome of its realization, may serve to reconstruct the history of the facts." (Minister Dias Toffoli; 2015 apud BADARÔ; 2012).

In view of what was mentioned above, art. 3°, item I of Law 12.850/13 expressly claims, that the plea bargain is a way to obtain evidence and therefore it is intended to acquire evidence with the ability to elucidate facts. BRASIL, Law n° 12.850/2013.

It is necessary to observe that the agreement of demarcation is a way to obtain evidence. However, the testimony provided by the agent can be a proof for the conviction of the judge if, and only if, it is confirmed by other types ff evidence. In this sense, art. 4, paragraph 16, of Law 12.850/13 states that "no conviction shall be handed down based only on the statements of a collaborating agent". BRAZIL, Law n° 12.850/ 2013.

6 Relationship Between the Principle of Contradictory and the Plea Bargain

In the words of Vicente Greco Filho (2013), there are some examples of how the contradictory principle can be characterized:

The contradictory can be defined as the means or technical instrument for the accomplishment of the broad defense and consists almost in being able to counteract the accusation; require the production of evidence that must, if pertinent, be produced; to overview the production of the evidence, making, in the case of witnesses, the pertinent questions that they consider adequate; always to speak after the accusation; manifest itself in all the acts and procedural terms to which it must be present; and also to appeal when necessary. Greco Filho (2013).

It is clear that the contradictory principle is present in several devices in the Brazilian legal system, as art. 5°, item LV of the Federal Constitution (1988), which states: "The litigants, in judicial or administrative proceedings, and the accused in general, are guaranteed the contradictory and ample defense, with the resources inherent therein" Brasil, Federal Constitution (1988).

In the same sense, art. 155 of the Brazilian Criminal Procedure Code states that "the judge shall form his/her free assessment of evidence produced in a judicial contradictory, not being able to base his/her decision exclusively on the information elements collected in the investigation". BRASIL, Decree-Law n°. 3.689 (1941).

However, when it comes to the principle of the contradictory in relation to the plea bargain, there is an intense jurisprudential battle being waged in the courts, questioning whether it violates this constitutional principle. Some writers justify the inadmissibility of the plea bargain simply because it does not allow the defense to be possible since, with the approval of the agreement, the allegations made in the statement are presumed to be true.

Still in this sense, Professor Doctor Leonardo Isaac Yarochewsky (2012) apud Tasse claims that:

"The process in which the instrumentality of the plea bargain is made in the present makes it appear merely a defensive formality, without any possibility that it is really effective. The need for the agent, in order to obtain favors from the judge, effectively
collaborates, revealing his involvement, third parties, details of the criminal action, etc., establishes the ample defense as a mere vain promise of the political text. Yarochewsky (2012).11

On the other hand, some judges demonstrate that the plea bargain would not affect the contradictory principle, as explained by the former Supreme Tribunal of Justice Minister Teori Zavascki:

“The scope of judicial cognition in the decision approving the plea bargain collaboration agreement is limited to the judgment as to the legal rigidity of that original act. It is not for the Judiciary, at that moment, to examine aspects related to the convenience or timeliness of the agreement concluded or the conditions established therein, much less to investigate or attest to the truthfulness or otherwise of the facts contained in the statements made by the collaborator, or information about crimes revealed by him/her. It is clear, therefore, that the judicial approval of the agreement does not presuppose and does not contain and can not contain any judgment on the truth of the confessed or delayed facts or even on the degree of reliability attributable to the statements of the collaborator, considered in isolation, the law itself attributed little confidence and limited probative value. (Minister Dias Toffoli, 2015, HC 127483 / PR, pp. 26-27 by Minister TeoriZavaski)10.

Therefore, it is not possible to talk about an offense to the contradictory principle since no conviction can be pronounced based only on the statements of the collaborating agent. BRASIL, article 4, § 16 of Law 12.850/201311.

7 Plea Bargain Received Facing the Criminal Organization Law (Law n° 12.850/2013)

The new Criminal Organization Law (Law No. 12.850/2013)11 is a standard created to define Criminal Organization and clarify how the criminal investigation should be conducted, the means of obtaining evidence, related criminal offenses and the criminal procedure. The mentioned legislation changed the art. 288 of the Brazilian Penal Code (Decree-Law No. 2848/1940) and also repealed the old Criminal Organization Law. BRAZIL, Law n° 9.034; 1995.

However, despite trying to elucidate the expression “Criminal Organization”, Busato (2013)15 states that the law was not exactly innovative about the mechanisms of evidence production. In the plea bargain, an institution known to be responsible for "bargaining" with one of the criminal wrongdoers for information about other participants or for the prosecution in exchange for benefits, shows the agent's interest in acquiring this benefit ranging from penalty reduction to absolute forgiveness. Busato (2013)15.

Thus, even though the plea bargain has recently gained a new appearance with the advent of Law n° 12.850/201311, previous legislation has already included in its content the possibility of using this means of obtaining evidence. Busato (2013)15. It therefore shows a clear State breakdown as far as the need to associate with those investigated in the crime to try to solve the crime itself, as if the State had failed in its attempt to prosecute the crime and was obliged to resort to the aid of accused delinquents.

Busato (2013)15 also affirms that there is an obvious unconstitutionality regarding art. 4°, paragraph 6° of Law n° 12.850/2013. The mentioned institute allows the Delegate to replace the judge in the granting of the benefit to the participant of the criminal organization and the holder of the criminal action: the Public Prosecution Service, which would only be "heard", thereby removing the characteristic of "procedural evidence".

It demonstrates the above device that:

"The judge will not participate in the negotiations between the parties for the formalization of the collaboration agreement, which will take place between the police officer, the investigated and the defender, with the manifestation of the Public Prosecutor's Office or, as the case may be, between the Public Prosecution Service and the investigated or accused and its defender.” BRAZIL, Law n° 12.850/201311.

It is inferred from the above-mentioned device that the new Criminal Organization Law brought about two significant innovations about the plea bargain: the possibility of replacing the custodial sentence with a restrictive penalty of rights and not requiring cumulation of the results obtained for the granting of benefits guaranteed by law.

Therefore, Law n° 12.850/201311 brought expressly in its art. 4° the non-requirement of cumulation of results:

Article 4 of Law n° 12.850/201311 states that:

"The judge may, at the request of the parties, grant judicial pardon, reduce by two thirds (2/3) the deprivation of liberty or substitute it by restricting the rights of those who have collaborated effectively..."
and voluntarily with the investigation and with the criminal prosecution, provided that one or more of the following results from this collaboration: I - identification of the other coauthors and participants in the criminal organization and of the criminal offenses committed by them; II - the revelation of the hierarchical structure and division of tasks of the criminal organization; III - the prevention of criminal offenses arising from the activities of the criminal organization; IV - the total or partial recovery of the proceeds of criminal offenses committed by the criminal organization; V - the location of any victim with their physical integrity preserved.” BRASIL, Law n°. 12.850/2013. Emphasis added.

The most obvious difference between the Criminal Organization Law and the other provisions that also contemplate the plea bargain is precisely the substitution of the sentence of deprivation of liberty by the restrictive penalty of right, a substitution that does not occur in other legal institutes in Brazil.

8 Conclusions

Ex positis, it is possible to find out that there is an evident lack of capacity of the State in the elucidation of crimes, and sometimes it is necessary to resort to the assistance of the accused/collaborator himself, in an attempt to find a resolution for what had really taken place to generate the wrongful act. Thus, plea bargain still finds a certain doctrinal and jurisprudential resistance regarding its acceptance and application in the legal world, although there are several devices that support this institute.

On the one hand, it is understandable the reasons that influence the decision of an informer to “betray” his comrades, since the regret or the fear of living in the Brazilian penitentiary system alone is already an important factor in trying to bargain a penalty reduction or a possible freedom.

The new Criminal Organization Law (Law n° 12.850/2013) came in an attempt to conceptualize the term “Criminal Organization” and to modify the criminal procedure concerning the plea bargain. But caution is needed in the use of this complex means of obtaining evidence, since it itself does not have the capacity to determine the truth of the facts.

It is not always clear whether this new mechanism is effective enough to be adopted by the Brazilian legal system. However, even though it is the subject of constant unconstitutionality claims, according to some, it is opposed to fundamental principles such as the contradictory, ample defense and legal process. For the time being, even in spite of the rejection of part of the doctrine and jurisprudence, the plea bargain has been increasingly used in the Brazilian legal system.

9. References


