

Plea-bargaining in the criminal procedure of the Republic of Kazakhstan

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Abstract. The reform of criminal procedure legislation of the Republic of Kazakhstan that provides for gentle breakaway from non-democratic forms of the criminal procedure applied in the times of the USSR assumes extensive use of the positive experience of foreign countries, which have been developing as democracies for a long time. The authors of this research believe existence of the institution of pretrial agreement in the criminal procedure legislation to be one of the attributes of democratic nature of the criminal procedure. The article conceptualizes the subject matter of this institution and studies its correlation with allied institutions. It provides generalization of the tendencies of foreign legislation with regard to approaches to the introductory investigation procedure, imposition of punishment in case the person is found guilty, and entering into a pretrial agreement. In the article, the authors provide arguments that can serve as the basis for scientific discussion about the essence, the legal nature, and the subject matter of plea-bargaining agreements and pretrial agreements being a variety of the former.

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During the development of the new Concept of the draft Criminal Procedure Code of the Republic of Kazakhstan [1], the Kazakhstan's law-makers suggested a well-elaborated and mature in many respects draft of the criminal procedure reform, one of targets of which was to provide more flexibility to the criminal procedure by means of introduction of the pretrial agreement, which is sometimes referred to in the industry-specific jargon as a "plea bargain".

This institution currently existing in Kazakhstan as a draft has caused unprecedented interest of Kazakhstani and foreign researchers.

We find it necessary on the one hand to evaluate these procedural ideas as such and on the other hand to find out how well they can be implemented in practice.

Currently, there are two types of pretrial agreements between the suspects and the prosecution the international practice. The most popular is a bargain with the prosecutor's office, the concept of which resides in partial withdrawing of charges or qualify the offense as one of lesser severity.

A pretrial agreement of a suspect or a defendant with prosecution was initially determined and is practiced on a wide scale in foreign criminal procedure systems. The "plea bargain" legal institution has been most extensively developed in the USA, where it is called "plea bargaining" and has been acknowledged by the Supreme Court of the USA as a material and reasonable part of the criminal justice system [2].

B. Stefanos believes that the main cause of appearance of plea bargains is the focus on such

important procedural values as "speed, cost, free will, accuracy, and definiteness" [3]. In view of this, F. Easterbrook, R. Scott, and V. Stuntz called plea-bargaining the purchase of rights. According to them, it ensures independence and efficiency, decreases ambiguousness, and saves money and time [4].

There are also foes to plea bargains among western researchers. T. Linch, while expressing criticism of this institution, noticed: "It is true that plea bargaining speeds caseload disposition, but it does so in "an unconstitutional manner"" [5]. M. Kinsley in his article *Why Innocent People Confess* focused on the fact that having created this option, the American system forced innocent people to confess in what they had not committed [6].

The other side of plea bargaining is the pretrial agreement, which is called in the USA the transformation of a defendant into a witness of prosecution [7].

In exchange of witnessing against accomplices, the suspect obtains "prosecutor's immunity" – total or partial relief from punishment. Any abusive practice is prevented by the essential approval of the bargain by the judge.

After that, abidance by the approved conditions becomes mandatory for all of its sides. At the same time, whenever the prosecutor finds evidences, based on which he can reach a guilty verdict, the already concluded bargain can be terminated [8].

The main deficiency of pretrial agreements, in the opinion of lawyers in many countries, is that the defendant can slander anyone in order to avoid

fair punishment. At the same time, they acknowledge that by concluding such bargains, the prosecutor saves his time and budget expenses for court trials and achieves the required result: the offender undergoes just punishment, though relatively lenient [9].

When a pretrial agreement is concluded, no proofs of guilt are studied during the court sessions, but the personal data and mitigating and aggravating circumstances are examined and taken into account. At that, unlike hearing of a case under a special procedure, the complainants' consent for hearing of the case is not required.

Following the results of hearing of a criminal case, the judge brings a verdict of guilty, and at that, the defendant can be imposed more lenient punishment than prescribed for the offence (below the lower margin), or conditional sentence, or even be relieved from punishment at all.

T. Sarsenbaev, while criticizing such an approach, reasonably noticed that false confession at conclusion of the bargain not only incurs conviction of an innocent person, but also lets the guilty person avoid punishment. Besides, other deficiencies are noticed, such as bringing charges for offenses, which have not been committed by the defendant, reputational damage to the official investigation, etc. [10].

The intention of Kazakhstani law-makers to implement in the legal system of Kazakhstan another variety of the legendary plea bargains is not unexpected, as during the recent years many countries, which are mainly far from reaching final solution of the most complex tasks of building a rule-of-law state, creation of an independent court system, ensuring stable non-corrupt law-enforcement practice, etc., have been indicating aspiration for implementation of the plea bargains particularly. Calling for prudence required at adoption of the mentioned institution, L.V. Golovko denotes that, for example, in Russia, the institution of the plea bargains has not yet come to the expected results in the field of fighting organized crime, terrorism, or corruption (there are virtually no somewhat serious hearings won by prosecution due to these bargains), but has already caused certain very negative consequences [11].

In general, the author is convicted that the institution of plea bargains can be efficient and at the same time safe in terms of the rights of individuals only in the circumstances of institutionally formed procedural systems, which do not include the majority of post-Soviet legal systems [12]. He appeals for listening to recommendations expressed in the course of the III Expert Forum of the SCE/ODIHR for Central Asia (2010), according to

which "plea bargains cannot be used in those criminal procedure systems, in which the pretrial proceedings is contaminated with cases of illegal influence and enforcement to guilt admission and in which the access to legal assistance is insufficiently ensured" [12]. L.V. Golovko believes that the other criterion is the presence or absence of independent judicial power, which assumes total absence of any slightest allusion of the accusatory deviation in its activity. He is also sure that the criminal procedure system of the Russian Federation does not conform to these criteria, which sometimes results in catastrophic consequences, like, for example, in the renowned case of S. Magnitsky. L.V. Golovko also doubts that the criminal procedure system of the Republic of Kazakhstan completely corresponds to it, which again does not exclude emergence of any similar consequences, which are of course not embraced by the "intent of law-makers" [11].

Sharing the expressed worries to some extent, the authors of this research nevertheless notice that the analysis of the practical application by Russian law-enforcement agencies of the procedures of pretrial agreements evidences the growth of importance of the role of this institution in the crime fighting. There can be seen no factors that would allow slowing down growth of the number of cases of its application [13].

In their turn, the authors of this article also believe that the pretrial agreement is a special construct of the institution of special order of trial at conclusion of such an agreement. As a result of conclusion of a pretrial agreement, the mechanism of mitigation of punishment is initialized. Thus, the legal nature of pretrial agreement can be determined as the procedural ground for applying mitigation of punishment and provisions of the institution of special (simplified or reduced) order at conclusion of a pretrial agreement.

The authors of this research also find it necessary to emphasize that the pretrial agreement is a means necessary for investigation and solution of criminal cases of grievous and extremely grievous offenses committed in a group of persons, an organized group, a criminal community, a constant armed group (a gang). Thus, the principal condition of admitting the guilt in the case of joint offences is the conclusion of a pretrial (procedural) cooperation.

Describing the institution of pretrial agreements in the criminal procedure, which is being developed by lawmakers of the Republic of Kazakhstan, it is necessary to note that:

- it is conditioned by the intention of the developers of the criminal procedure legislation of Kazakhstan to distance from the outdated and non-democratic model of the Soviet criminal procedure;

- it corresponds to the principle of humanism of the criminal policy as well as the principle of procedural economy;

- it extends the set of rights of suspects and defendants providing them with the right of cooperation with the investigators;

- it helps to uncover other persons accessory to commitment of a group offense and to form the necessary body of evidence.

Without denying the fact that currently not all of the above-mentioned problems related to the institution of pretrial agreement have been solved by lawmakers, the authors of this article do not doubt the practicability of implementation of this institution in the criminal procedure system of Kazakhstan.

Thus, there is no reason to deny the necessity and positive effect of the new Criminal Procedure Code of the Republic of Kazakhstan suggested by the Concept, the Code being able to finally provide the existing relations with legal shape. The task of specialists in the sphere of criminal law and procedure is not to deny the necessity of the pretrial agreement institution, but to seek and suggest possible ways of its improvement.

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