

TRACING THE INSTANCES OF PLEA BARGAINING IN THE LITHUANIAN CRIMINAL JUSTICE SYSTEM

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This Article aims to overview procedural grounds in the Lithuanian criminal justice system that relate to the concepts of simplified and negotiated justice, in particular to the concept of plea bargaining. Specifically, the research seeks to examine the procedures of simplified examination of evidence in court, accelerated proceedings and the procedure of penal order as foreseen in the Code of Criminal Procedure of the Republic of Lithuania (hereinafter referred to as the CCP). This research aims to highlight similarities between the aforementioned procedures and the concept of plea bargaining.

Šio straipsnio tikslas yra apžvelgti Lietuvos baudžiamosios teisės sistemoje esančius procesinius pagrindus, kurie stipriai priartėja prie supaprastintų ir derybinių baudžiamojo proceso formų, būtent prie susitarimo dėl kaltės instituto (angl. plea bargaining). Šiame moksliniame tyrime bus siekiama išnagrinėti supaprastinto įrodymų tyrimo, pagreitinto proceso ir baudžiamojo įsakymo institutus, numatytus Lietuvos Respublikos baudžiamojo proceso kodekso (toliau – BPK) nuostatose. Straipsnyje yra siekiama atskleisti ir pabrėžti susitarimo dėl kaltės instituto ir paminėtų procesinių institutų panašumus.

Introduction

Due to the fact that plea bargaining makes prosecution easier and significantly shortens the length of procedures, thus reducing the workload for criminal justice authorities, plea bargaining has been a rapidly proliferating procedure in the context of European criminal law. For example, in Germany the practice of plea bargaining was officially accepted in the 1980s; in Italy – in the late 1980s; in France – in the late 1990s; in Poland – in 1998; in Estonia – in 2011, etc.¹ Over fifteen European criminal procedures have already adopted this legal mechanism. The Lithuanian criminal justice system, despite constantly searching for efficiency of the criminal procedure and as well as possible ways to optimize it, does not have analogues to a pure model of plea bargaining².

¹ LASCU, L. A. Is the Plea Agreement Practice of the International Criminal Tribunals a Pathway to Negotiated Justice within National Jurisdictions? *Law Review*, Vol. 3, Issue 2, 2013, p. 78–83.

² Some efforts have been put to incorporate plea bargaining in Lithuanian legal system. In 2010, the Prosecutor General's Office of the Republic of Lithuania presented the project of plea bargaining. According to the Lithuanian scholars, this draft honored some but not all principles of non-adversarial criminal justice system prevailing in Lithuanian criminal legal system. The project was also strongly influenced by the Anglo-American plea bargaining model and carried many features of it, e. g. settlement would be done regarding what charges would be brought against the defendant, the amount of damage and sentence. This draft law has not been enacted, as well as the concept of plea bargaining has not yet been entrenched into Lithuanian criminal justice system. See, e.g.: JANUŠAITYTĖ, G. Derybų dėl kaltės instituto egzistavimo prielaidos Lietuvos Respublikos baudžiamajame procese. *Teisės apžvalga*, nr. 1(13), 2016; Aiškinamasis raštas dėl Lietuvos Respublikos baudžiamojo proceso kodekso 3, 9, 18, 22, 28, 51, 62, 63, 64, 110, 147, 151, 154, 155, 158,

In this article the greatest concern will be devoted to the concepts of simplified examination of evidence in court, accelerated proceedings and penal order in the Lithuanian criminal justice system. Arguably, the values supported by regulations of these procedures are ones that are for the most part aligned with the values of plea bargaining. Therefore, the main tasks of this article are to present the core features of plea bargaining mechanism and provide a structured analysis of the above mentioned procedures. The purpose of this article is to define and emphasize any possible similarities between these simplified forms and the concept of plea bargaining. It will be argued that even in the absence of a pure form of plea bargaining, the Lithuanian criminal justice system can be – and is – characterized by strict characteristics of negotiated justice, and plea bargaining in particular.

I will employ a qualitative research approach, with several dominant methods, i. e. inductive and analytic methods of reasoning, and criminological comparative method.

This legal field has been partially examined by Gintaras Goda, Gintarė Janušaitytė, Ramūnas Jurgaitis, and Rima Ažubalytė, however, the particular topic this article will focus on has not been thoroughly discussed. Hopefully, the article will stimulate further discussions about whether Lithuania is indeed a country without a plea bargaining institute, simply because plea bargaining law has never been enacted and has never become a legal tool of the Lithuanian criminal procedure.

1. Up-to-date perception of *plea bargaining*

Due to the spread of the concept of plea bargaining outside the common law tradition, this concept has been exposed to different sets of non-adversarial principles, legal cultural backgrounds, and creativeness of legislators³. The market for plea bargaining is highly adaptive. There can be and there are many innovations in plea agreements⁴. Because of the globalisation process across the world we can no longer regard the criminal procedure code as we did before and claim that a certain criminal justice system does not have a plea bargaining concept simply because there is no chapter or article named after this concept.

There is considerable variation in languages used to define the non-trial adjudication of criminal charges against defendants.

In the narrowest sense of plea bargaining a definition of this concept is strongly transfused with the spirit of Anglo-American legal tradition. Plea bargaining, in its traditional sense, takes the form of an agreement between the prosecution and defense upon which the defendant admits their guilt in return for a reduction in their charge or sentence⁵. Hence, for some plea bargaining occurs only if there is considerable give and take between prosecutors and defense lawyers over what charges are appropriate or the sentences defendants should be assigned if they are willing to admit their guilt. Accordingly, no court involvement, or inactive and only formal role of the court defines the procedure of plea bargaining in most cases by this understanding⁶.

159, 160, 161, 162, 163, 168, 170, 172, 177, 178, 181, 214, 215, 217, 218, 220, 237, 254, 276, 422, 425, 426, 429, 432, 440 straipsnių pakeitimo ir papildymo XXXI skyriaus trečiuoju skirsniu įstatymo projekto (2010 02 09, Nr. 10-441-01).

³ ALKON, C.; DION, E. Introducing Plea Bargaining into Post-Conflict Legal Systems. *International Network to Promote the Rule of Law, Research Memorandum*, 2014, p. 5.

⁴ BLANK, D. P. Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation. *68 Fordham L. Rev.* 2011, 2000, p. 2095.

⁵ CHEESMAN, S. J. *A Comparative Analysis of Plea Bargaining and the Subsequent Tensions with an Effective and Fair Legal Defence*, 2014, p. 158. Retrieved from: <http://doktori.bibl.u-szeged.hu/2488/2/Samantha_Joy_Cheesman_tezisek_en.pdf>.

⁶ LIPPKE, R. L. *The Ethics of Plea Bargaining*. Oxford University Press, 2011, p. 5.

In the broad sense of plea bargaining, anything short of full trial adjudication is seen as plea bargaining, even if there are little actual negotiations between the interested parties⁷. Despite the flexibility of the concept, even the latter approach to this concept rests on core and indispensable characteristics of the contemporary notion of plea bargaining. Proceedings of plea bargaining have several features in common.

The main goal that negotiated justice and plea bargaining serves is, first and foremost, efficiency in solving criminal cases⁸. However, this does not come without a cost. Where plea bargaining occurs, the doctrine of criminal waiver is present. This means that by pleading guilty the defendant must usually abandon a series of fundamental rights in return for a more lenient sentence, such as the right to a full trial, the right to have case evidence examined in a trial, the right to appeal, etc.⁹

To be perceived as an active participant in waiving rights and making decisions that will affect the defendant's criminal liability, a voluntary and informed consent of the defendant is necessary for participation in the procedure of plea bargaining¹⁰. Since this type of case-ending decision is based on a sort of agreement between the parties, usually no examination of evidence takes place¹¹. As a reward for that, the defendant is entitled to sentence or charge discounts¹².

Additionally, no court or judge is involved in this form of negotiated justice. The prosecutor is the one who is authorized to offer sentence discounts to the accused person, as well as being the legal official responsible for the process of adjudication¹³.

It follows that plea bargaining is a special type of mechanism of negotiated justice that serves the purpose of simplifying criminal proceedings, i. e. save time and resources of state officials. Arguably, procedures that possess the above discussed features (in one way or another) could be or are entitled to be considered as derivatives of plea bargaining, if plea bargaining is understood in the broad sense.

2. Forms of simplified procedures in the Lithuanian criminal justice system

Because of the necessity to cope with an overload of cases, one of the more important characteristics of the modern criminal procedure legislation is the simultaneous existence of a single general, ordinary form of criminal proceedings prescribed as a rule, and the increasingly used simplified (less complex) forms of proceedings in criminal matters¹⁴. As it will be discussed, the Lithuanian criminal justice system is not an exception either.

Article 2 of the CCP provides for the prosecutor's and pre-trial investigation officer's responsibility to conduct the investigation and disclose criminal offences within the shortest terms possible¹⁵. Taking this further, the Constitutional Court of the Republic of Lithuania (hereinafter referred to as

⁷ Ten pat.

⁸ JANUŠAITYTĖ, G. Derybų dėl kaltės instituto egzistavimo prielaidos Lietuvos Respublikos baudžiamajame procese. *Teisės apžvalga*, 2016, nr. 1(13), p. 88.

⁹ BLANK, D. P. Plea Bargain Waivers Reconsidered <...> p. 2011.

¹⁰ Opposite opinion exists as well on this matter since some authors argue that the essential feature of plea bargaining is a pressure put on the defendant to make him choose a simpler system of adjudication. See, e.g.: WEIGEND, T. Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform. *Crime and Justice*, 1980, Volume 2.

¹¹ WEIGEND, T. Is the Criminal Process about Truth: A German Perspective. *26 Harvard Journal of Law and Public Policy*, 1973, p. 170.

¹² ALKON, C.; DION, E. Introducing Plea Bargaining <...> p. 23–25.

¹³ BALISACAN, R. H. C. Towards an Accountability Framework for the Exercise of Prosecutorial Discretion in Plea Bargaining. *Ateneo Law Journal*, Volume 59, No. 2, 2014, p. 379–380.

¹⁴ JOVANOVIĆ, I.; STANISAVLJEVIĆ, M. (Eds.). *Simplified forms of procedure in criminal matters. Regional criminal procedure legislation and experiences in application*. OSCE Mission to Serbia, 2013, p. 5.

¹⁵ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

the Court) has noticed the need to guarantee efficiency in the Lithuanian criminal procedure as well. It argued that the general model of criminal procedure prevailing in the Lithuanian legal system might have exceptions, because it is being optimized¹⁶.

Based on an analysis of Lithuanian criminal procedure law, it can be argued that at least several currently applicable alternative legal mechanisms serve the purpose of efficiency in criminal procedure. Partially, this is one of the reasons why Lithuanian scholars almost unanimously agree that plea bargaining is a redundant option in the context of Lithuanian criminal justice¹⁷. Moreover, due to the existence of several simplified procedures, adoption of plea bargaining carries a risk of provoking competition between several potentially similar legal norms¹⁸.

In agreement with Gintaras Goda (2012), forms of simplified procedures in the Lithuanian criminal justice system that are alternatives to the traditional criminal procedure, are as follows: accelerated proceedings, penal order, termination of the process due to release from criminal liability, and simplified examination of the evidence in the court¹⁹. Similarly as Gintaras Goda (2012), Rima Ažubalytė (2014) claims that existing criminal legal norms already partially legalize negotiation among the defendant and the state. The author, however, focuses mostly on such grounds as termination of criminal case due to important testimony given by defendant, as well as different grounds for a release from criminal liability, for example in cases when a person reports a crime which has been committed, when a person confesses, etc.²⁰

Arguably, the termination of the process due to release from criminal liability plays an important role in contributing to the efficiency of criminal procedure, however, it occurs on completely different grounds than plea bargaining²¹. The defendant unconditionally gains benefit from the termination of the process due to release from criminal liability since he is brought to *status quo*. Since in this sce-

¹⁶ The ruling of the Constitutional Court of the Republic of Lithuania of 16 January 2006. On the compliance of paragraph 4 (wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the compliance of paragraph 5 (wordings of 10 April 2003 and 16 September 2003) of article 234, paragraph 2 (wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (wording of 19 June 2003), paragraph 1 (wording of 14 March 2002) of Article 408, paragraphs 2 and 3 (wording of 14 March 2002) of Article 412, paragraph 5 (wording of 14 March 2002) of Article 413 and paragraph 2 (wording of 14 March 2002) of Article 414 of the code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the petitions of the Šiauliai District Court, the petitioner requesting to investigate whether Article 410 (wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania is not in conflict with the Constitution of the Republic of Lithuania. *Official Gazette*. 2006, No. 7-254, and the ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2008. On the compliance of paragraph 2 (wording of 14 March 2002) of Article 425 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania. *Official Gazette*. 2008, No. 11-388.

¹⁷ AŽUBALYTĖ, R. Baudžiamojo proceso raidos tendencijos: formų diferenciacija. Iš *Globalizacijos iššūkiai baudžiamajai justicijai*. Vilnius: VĮ Registrų centras, 2014, p. 239.

¹⁸ GODA, G. Galimybė įgyvendinti baudžiamojo proceso uždavinius baudžiamąją bylą užbaigiant sandorū. Iš *Neprisklausomos Lietuvos teisė: praeitis, dabartis ir ateitis*. Vilnius: Vilniaus universiteto Teisės fakulteto Alumni draugija, 2012, p. 448.

¹⁹ Ten pat, p. 448–449.

²⁰ AŽUBALYTĖ, R. Baudžiamojo proceso raidos tendencijos <...> p. 238–239.

²¹ The grounds for the release from criminal liability are foreseen in Section VI of the Criminal Code of the Republic of Lithuania. Articles 36–40 foresee grounds for release from criminal liability such as: Release from Criminal Liability when a Person or Criminal Act Loses Its Dangerousness, Release from Criminal Liability due to Minor Relevance of a Crime, Release from Criminal Liability upon Reconciliation between the Offender and the Victim, Release from Criminal Liability on the Basis of Mitigating Circumstances, Release from Criminal Liability When a Person Actively Assisted in Detecting the Criminal Acts Committed by Members of an Organized Group or a Criminal Association, Release from Criminal Liability on Bail.

nario the defendant is not convicted at all, no waivers of rights can be discussed here. Nonetheless, this procedural option – not unlike the mechanism of plea bargaining – may raise the question of fairness of criminal procedure, since the goal of finding material truth is hardly accomplished.

However, because of the scope limitations of this article, further analysis will mainly focus on simplified examination of evidence in the court, accelerated proceedings, and penal order procedures.

2.1. Simplified examination of evidence in court

The simplified examination of evidence in court is regulated by Articles 273, 290, 291 of the CCP. Arguably, the application of this procedural tool is very broad in the Lithuanian legal system. According to Article 273 of the CCP, this procedure is allowed in all criminal cases except where the charges against the defendant are brought for committing a grave crime. When the prosecutor completes a pre-trial investigation, he prepares the case dossier, i. e. a Bill of Indictment that concludes the first stage of the criminal procedure, and the case is then referred to the judge²².

Several conditions need to be met in order to exploit this procedural option.

Similarly to the cases where plea bargaining occurs, the defendant must confess to committing the crime he has been charged with. After the judge reads the Bill of Indictment in the court hearing, the defendant must be willing to testify immediately, as well as to express his wish that the rest of the evidence should not be examined in the court. In this case and accordingly with the provisions of Articles 290 and 291 of the CCP, the judge names and announces the evidence without thorough examination and later on imposes the punishment. The prosecutor's consent is necessary to pursue this procedure as well²³. Hence, similarly to the plea bargaining procedure, the cooperation between the main parties to the proceedings is a necessary step in order to shorten the court proceedings. Hence, the dispositive element of agreement and understanding replaces the imperative one.

In both simplified examination of evidence and plea bargaining, the material truth finding doctrine is challenged severely. Determination of material truth in a criminal case inevitably requires judge examining the evidence and finding out the facts and not simply announcing them²⁴. Only facts presented and examined at the time of the trial can contribute to the efforts of determining the "truth"²⁵. For the court to passively accept the parties' proposition as to the outcome of the criminal process means to abdicate the inquisitorial court's prime mission to independently establish the factual grounds of the verdict. As plea bargaining becomes an accepted means of resolving criminal cases, the party-determined version of "procedural truth" prevails²⁶.

It is interesting to note that all this criticism regarding the disclosure of truth - usually pointed towards plea bargaining - is equally relevant where the simplified examination of evidence occurs. The aim to determine the truth in a criminal case is very often replaced with a prompt criminal procedure where simplified examination of evidence is applied. Arguably, the right to challenge evidence in the court and the right to have them fully examined is waived in the case of the latter.

As an additional safeguard that must be present in the simplified examination of evidence, as well as in accelerated proceedings and penal order which will be discussed in the following paragraphs, is the requirement of "undisputable circumstances of the committed crime"²⁷. Usually, this requirement

²² Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

²³ Ten pat.

²⁴ WEIGEND, T. Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform. *Crime and Justice*, 1980, Vol. 2, p. 427.

²⁵ WEIGEND, T. Is the Criminal Process about Truth <...> p. 160.

²⁶ Ten pat, p. 170.

²⁷ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

is not present in plea bargaining. Arguably, this criterion is not defined or at least not defined enough, since the term “undisputable circumstances” is a value-based and subjective concept, rather than an objective requirement. Usually this criterion refers to undisputable and evident crime scene, timing, modus operandi, and also cases where there are no doubts about who committed the crime, etc.²⁸ However, in cases where clarification of the circumstances of the offense is necessary, the court will always proceed in a traditional way. Arguably, only cursory review of charges and evidence in cases with undisputable circumstances, wherein defendants confess and express their wish not to challenge the evidence in public trial, is perceived as satisfactory according to the Lithuanian criminal legal system.

However, those are not the only features that prompt an examination of similarities between simplified examination of evidence in the Lithuanian criminal justice system and the concept of plea bargaining. The regulation regarding the severity and size of punishment is an element that mostly mirrors the similarity between this legal procedure and plea bargaining.

The Lithuanian criminal justice system, as any other system with plea bargaining, allows the state to make legal (well-grounded or otherwise) sentence discounts for defendants who agree to have simplified examination of evidence in the court. Hence, the court’s judgement must comply with the regulations foreseen by Article 64¹ of the Criminal Code of the Republic of Lithuania (hereinafter referred to as the CC)²⁹.

Article 64¹ of the CC is applicable to all three alternatives to traditional criminal procedure in Lithuanian criminal justice system, i. e. the simplified examination of evidence as well as accelerated proceedings and the procedure of penal order, both of which will be discussed in the following paragraphs. Article 64¹ has been included in the CC in 2013³⁰. It is one of the brand new legal tools that directly encourages defendants to avoid the full criminal trial in exchange for a reduced sentence. According to the law, the punishment is reduced by one third and this rule is applicable only when the defendant acknowledges his guilt. The judge is also the main subject who imposes the punishment³¹.

In the case of plea bargaining, there are various possibilities regarding sentence and charge discounts. The magnitude of sentence and charge discounts depends on the legislator and legal culture. Prosecutors can be permitted to make very minor discounts or have almost complete discretion in eliminating charges, including serious ones, as well as reducing sentences³².

Article 64¹ of the CC contains the same idea with an implied possibility to reduce the punishment. Moreover, similarly to the concept of plea bargaining, which is inextricably related to the perception of entering a guilty plea or at least confessing, the defendant’s acknowledgement of his guilt is the core condition to reduce the sentence in all three procedural options³³. Hence, according to this legal provision, confession is the main justification to reduce the punishment - in contrast to reduction of punishment on the grounds of mitigating circumstances, which would be the case in regular trial proceedings. For example, some states perceive a guilty plea as a necessary condition for plea bargaining (e. g. United States of America, Australia), whereas other jurisdictions are not even familiar with the concept of entering a guilty plea and rely on confession only (e. g. Germany, France)³⁴. Despite that,

²⁸ Rekomendacijos dėl proceso baigimo pagreitinto proceso tvarka. *TAR*, 2015-06-01, nr. 8538.

²⁹ Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios*, 2000-10-25, nr. 89-2741.

³⁰ Lietuvos Respublikos baudžiamojo kodekso papildymo 64¹ straipsniu įstatymas. *Valstybės žinios*, 2013-07-02, nr. 89-2741).

³¹ Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios*, 2000-10-25, nr. 89-2741.

³² ALKON, C.; DION, E. Introducing Plea Bargaining <...> p. 23–25.

³³ RAUXLOH, R. E. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? *Fordham International Law Journal*, 2011, Volume 34, Issue 2. Article 5, p. 310.

³⁴ LANGER, M. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. *Harvard International Law Journal*, Vol. 45, No. 1, 2004, p. 39–62.

plea bargaining proceedings end with a real conviction of the offender followed by a real criminal sentence, even if this sanction is milder compared to the one which would normally be imposed after a full trial³⁵.

The departure from fair punishment in all these alternatives is justified because it enables prosecutors and other state officials to deploy their limited resources in ways that would expand the deserved punishment. Already before this norm, as a rule, more lenient punishment used to be imposed by penal order in comparison to the one that would be imposed at the end of a traditional criminal procedure³⁶. Ažubalytė (2014) also suggests that the purpose of these alternatives is not merely efficiency, but also the individualization of criminal responsibility for the criminal³⁷. Arguably, integration of this norm suggests that abbreviated alternatives to traditional criminal procedure are strongly encouraged by legislation.

Despite the aforementioned common resemblances, the procedure of simplified examination of evidence differs from the core mechanism of plea bargaining. In cases where simplified examination of evidence is applicable, both stages of traditional criminal procedure are preserved, i. e. a pre-trial investigation is concluded with the Bill of Indictment and the case is referred to the judge – as in regular proceedings. This produces the exterior of traditional trial proceedings and does not garner as much attention in the public as the concept of plea bargaining would.

Other than avoiding the full examination of evidence in the court, the trial stage proceeds in a regular way and preserves all the characteristics of a traditional non-adversarial criminal procedure.

2.2. Accelerated proceedings

Accelerated criminal proceedings are foreseen in Articles 426-432 of the CCP. The procedure of accelerated proceedings is admissible in cases when the offence concerns mainly minor and less serious crimes, not serious or grave crimes.

This expeditious procedural option grants broad discretionary rights for the prosecutor to determine whether it is legitimate to choose accelerated proceedings in a given criminal case. First of all, the defendant's consent is not necessary to proceed with this alternative. This alienates the procedure of accelerated proceedings from plea bargaining which is based on the idea of collaboration between the prosecutor and the defendant³⁸. The procedure of plea bargaining can by no means be commenced without the defendant expressing consent to start negotiations³⁹. Secondly, if the gravity of the crime complies with the law, the prosecutor is limited only by the requirement of “undisputable circumstances of criminal offense” that must be met in accelerated proceedings and that has already been discussed in the previous paragraph⁴⁰.

It is worth emphasizing that – differently from the plea bargaining mechanism – in cases of accelerated proceedings the law does not explicitly require a confession from the defendant. Moreover, according to the Recommendations regarding the completion of criminal procedure by accelerated proceedings issued by the Prosecutor General's Office of Republic of Lithuania, denial of guilt or

³⁵ PETERS, J.; CAVARLAY, B. A.; LEWIS, C.; SOBOTA, P. Negotiated Case-ending Settlements: Ways of Speeding up the (Court) Process. *European Journal on Criminal Policy and Research*, 2008, September, Volume 14, Issue 2, p. 147.

³⁶ JURGAITIS, R. Baudžiamojo įsakymo procesas: proceso be įprastojo nagrinėjimo teisme ypatumai ir įtariamąjį (kaltinamąjį) procesinės garantijos. *Jurisprudencija*, 2008, 6(108), p. 70.

³⁷ AŽUBALYTĖ, R. Baudžiamojo proceso raidos tendencijos <...> p. 232–233.

³⁸ LANGER, M. From Legal Transplants to Legal Translations <...> p. 23.

³⁹ As it was mentioned before, consent must be voluntary and informed, and cannot be based on coercion, i. e. legal officers cannot persuade defendant to enter guilty plea by using force or threats.

⁴⁰ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

partial acceptance of guilt does not mean by default that the circumstances of a criminal case are disputable⁴¹. However, it is difficult to imagine accelerated proceedings with the defendant strictly denying his guilt. Hence, confession should be perceived as a necessary condition in order to accelerate criminal procedure.

As it is foreseen in Article 426 of the CCP, when accelerated proceedings are an option, the prosecutor is granted a period of maximum 14 days from the beginning of the pre-trial investigation to refer the case to the court and submit a statement regarding accelerated proceedings. No indictment is necessary in this procedure. The statement to initiate accelerated proceedings with the obtained evidence (if any has been obtained) is considered to be equivalent to regular indictment. In this case, the court holds a hearing not later than within the term of 14 days. It is mandatory that the defendant is assisted by a defence lawyer during this hearing⁴². In accelerated proceedings, court proceedings take place regularly except for the fact that all charges are presented in the form of a statement and not in the form of the Bill of Indictment. This also means that punishment is imposed by the judge as in the traditional court proceedings.

Bearing in mind these points, it is obvious that accelerated proceedings, same as plea bargaining, contribute greatly to the promptness of criminal procedure. Even though, contrary to plea bargaining, both stages of criminal procedure are preserved and the judge plays the main role in the adjudication procedure, the pre-trial investigation stage in the accelerated proceedings departs heavily from its main goal to gather all necessary incriminating and exculpatory evidence. According to the provisions foreseen in Article 426, the prosecutor can submit a statement to the court on the same day as he launches a criminal investigation. It might create situations where the prosecutor miscalculates and hurries up to convict a defendant in this particular manner. As in many models of plea bargaining, the law here also provides some safeguards and allows the judge to decline the prosecutor's request to proceed with the option of accelerated proceedings, however, if the presentation of the criminal matter is right and convincing, the judge will most probably initiate the accelerated proceedings⁴³.

As opposed to plea bargaining, the procedure of accelerated proceedings and its initiation depends mainly on the prosecutor, and the law does not provide for or require negotiation between the prosecutor and the defense regarding either the charge or the sentence. In accelerated proceedings, same as in cases where simplified examination of evidence is applicable, the court's judgement must comply with the requirements foreseen in Article 64¹ of the CC. The punishment is reduced by one third if the defendant acknowledges his guilt⁴⁴. This means that in cases where the defendant does not admit his guilt but the prosecutor still submits the statement disregarding this fact (because he believes he is complying with the standard of "undisputable circumstances"), accelerated proceedings would benefit the state only, and not the defendant.

As far as waivers of rights are concerned, it would be hard to argue that the defendant waives any of them, since, as it has been discussed recently, the law does not require the consent of the defendant. Unfortunately, in comparison to the plea bargaining procedure, in accelerated proceedings the defendant finds himself in an even more unfavorable situation, mainly because he is deprived of the right to choose or decline this procedural option. Hence, this procedural option lacks flexibility and should be perceived more as a variation of official criminal procedure rather than a contract similar to plea bargaining.

⁴¹ Rekomendacijos dėl proceso baigimo pagreitinto proceso tvarka. *TAR*, 2015-06-01, nr. 8538.

⁴² Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁴³ Ten pat.

⁴⁴ Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios*, 2000-10-25, nr. 89-2741.

2.3. Penal order

Similarly to the options discussed above, the procedure of penal order is a special type of fast-tracked case-ending procedure. The procedure of penal order is based on a kind of agreement between the parties and is foreseen in Articles 418-425 of the CCP⁴⁵. There is no doubt that the procedure of penal order perfectly serves the purpose of efficiency and is perceived as a potential equivalent to the traditional criminal procedure. Similarly to plea bargaining, penal order is aimed at minimizing the extreme overload that legal institutions are experiencing⁴⁶.

The main outstanding similarity with the plea bargaining procedure is avoidance of a public trial. Because of this feature, plea bargaining cannot be simply reconciled with the inquisitorial (non-adversarial) version of truth-seeking that prevails in continental Europe, including Lithuania. Hence, it raises the question of where the procedure of Lithuanian penal order stands with respect to the concept of plea bargaining and how does it comply with non-adversarial values.

As Jurgaitis (2008) notes, the procedure of penal order is based on the notion that the goals of criminal procedure can be achieved without traditional trial proceedings⁴⁷. The Court likewise ascertained and upheld its view that relationships between a criminal and the state can be regulated by a model where justice is implemented by a single judge who rules in accordance with a procedural document presented by a prosecutor⁴⁸.

In a penal order procedure, instead of filing an indictment, the prosecutor has the power to request and order the imposition of a sentence from the judge. To do so, the defendant's acceptance of guilt is necessary as well as compliance with the standard of "undisputable circumstances of a criminal case"⁴⁹. The prosecutor's request is filed together with the pre-trial investigation material. Based on this request, the judge issues a penal order individually without conducting a public trial⁵⁰. Once again, the judge's ruling (that is, a penal order and not a judgement) must comply with the requirements foreseen in Article 64¹ of the CC⁵¹.

The Lithuanian criminal justice system, despite supporting the abbreviated alternatives, strongly safeguards the defendant's right to a public trial⁵². Hence, whilst cooperating with the prosecutor on the matter of penal order, the defendant waives his right to a public trial, same as the defendant who accepts a plea bargain deal⁵³. In a penal order the waiver of appeal is preserved. After the penal order is issued, the defendant can still appeal the decision, i. e. the defendant has a right to disagree with the penal order. In any case in which the penal order is rejected by either the judge or the accused, the procedure of trial continues on as if no penal order has ever been issued. If there is no appeal, the penal order becomes valid and it replaces any further proceedings; the offender is immediately punished

⁴⁵ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁴⁶ RAUXLOH, R. E. Formalization of Plea Bargaining <...> p. 301.

⁴⁷ JURGAITIS, R. Baudžiamojo įsakymo procesas <...> p. 68.

⁴⁸ The ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2008. On the compliance of paragraph 2 (wording of 14 March 2002) of Article 425 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania. *Official Gazette*. 2008, No. 11-388.

⁴⁹ In contrast to previously discussed procedures, the standard of "undisputable circumstances" is emphasized by the Court and the Recommendations regarding the completion of criminal procedure with a penal order only and is not foreseen by the law explicitly.

⁵⁰ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁵¹ Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios*, 2000-10-25, nr. 89-2741.

⁵² Article 30 of The Constitution of the Republic of Lithuania guarantees that "a person whose constitutional rights or freedoms are violated shall have the right to apply to a court".

⁵³ BLANK, D. P. Plea Bargain Waivers Reconsidered <...> p. 2016.

with the agreed sentence⁵⁴. Thus a full trial is avoided, coming very close to a guilty plea. Arguably, the state gives leverage to the efficiency of the criminal justice system instead of guarantees of a fair outcome. However, being aware of that that, legislature has embedded several more safeguards to generate outcome which would be as fair as possible.

As Article 418 of the CCP foresees, penal order can be applicable when the defendant is charged with a crime for which any kind of punishment has been provided by the law, except for the cases when the only possible punishment is imprisonment for a fixed term or life imprisonment. This procedure can be applied only if the defendant has already paid for the reparation of damages his actions had caused or eliminated them or has committed to do so⁵⁵.

Similarly to plea bargaining, penal order requires the defendant's consent to proceed with this alternative procedure⁵⁶. Plea bargaining is often understood as a contract and plea bargaining settlement has all the features of a civil contract – offer, acceptance, consideration, and mutual intent to be bound by this agreement⁵⁷. In penal order, the mutual agreement with the prosecutor is also the only way this procedure can be applied in the Lithuanian criminal justice system. In case the defendant declines the prosecutor's offer to proceed this way, the traditional criminal procedure takes place⁵⁸.

The law also foresees that the prosecutor's decisions to submit a statement regarding the penal order can be appealed by the victim. If the pre-trial judge satisfies the victim's appeal, a case must be tried before the court of law in a "regular" way⁵⁹. Arguably, the victim's consent should be perceived as one of the indirect safeguards that must be in place in order to proceed with the penal order. Some models of plea bargaining include similar safeguards. For example, according to Russian Criminal Procedure Code, if the victim makes an objection, abbreviated procedure will not take place⁶⁰.

All the features examined above reflect similarities between penal order and plea bargaining. However, there is one more equally important analogy between these two legal tools. As Article 419 of the CCP foresees, in case of penal order, the opinion of the defendant regarding the punishment must be indicated in the statement that is referred to the judge. In other words, the prosecutor must specify the type and the size of the sentence and to clarify the defendant's opinion on this issue⁶¹. Moreover, the Recommendations regarding the completion of criminal procedure with a penal order encourages the defendant to indicate which conditions of the penal order he agrees with and which he refuses to agree with. In plea bargaining, as well as in penal order procedures, the hierarchic interrelation in criminal law between the dominant state and the offenders is replaced by a co-relation between more equal parties. Where penal order is applicable, the state is in discussion with the defendant to find a solution to the problem rather than simply expose him to sanctions⁶². Even though both plea bargaining and penal order are subject to court approval, usually the judge goes along with the proposed sentence and simply checks if all other procedural safeguards are in place⁶³. Hence, in both plea bargaining and penal

⁵⁴ The ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2008. On the compliance of paragraph 2 (wording of 14 March 2002) of Article 425 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania. *Official Gazette*. 2008, No. 11-388.

⁵⁵ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁵⁶ Ten pat.

⁵⁷ LANGER, M. From Legal Transplants to Legal Translations <...> p. 36.

⁵⁸ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁵⁹ Ten pat.

⁶⁰ ALKON, C. & DION, E. Introducing Plea Bargaining <...> p. 25.

⁶¹ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁶² RAUXLOH, R. E. Formalization of Plea Bargaining <...> p. 302.

⁶³ OPPEL, R. A. Sentencing Shift Gives New Leverage to Prosecutors. *The New York Times*, 2011. Retrieved from: <<http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>>.

order procedures, the traditional stages of criminal procedure are affected significantly. In the pre-trial stage, the goal of investigation is having the defendant entering a guilty plea or confessing. The second stage, i. e. trial proceedings do not play nearly any role where these forms of negotiated justice occur.

To sum up, the requirement of the defendant's agreement with the proposed punishment spectacularly mirrors the values of plea bargaining since it makes penal order more similar to the contract of plea bargaining rather than to an official indictment, where only the position of the prosecutor is reflected.

It goes without saying that this approach creates a domain or at least a gap for negotiations and informal agreements between the prosecutor and the defendant. As can be seen, the defendant is given a more active and more dominant role in the penal order procedure than in any other proceedings. Seemingly, both parties are allowed and even encouraged to discuss the conditions of penal order. As Rauxloh (2011) argues, the penal order is a welcoming starting point for informal negotiations. The defense lawyer and prosecutor might agree that the prosecution will not bring further charges and request only for a penal order, if the accused is willing to accept the punishment suggested by the order⁶⁴. It is worth mentioning that the penal order procedure brings the same concerns as plea bargaining, since the prosecutor has all the necessary tools to coerce the defendant to go along with the penal order procedure.

Despite mutuality and negotiation regarding the punishment in the penal order procedure, the principle of compulsory prosecution seems to stay intact. Charges cannot be the topic of agreement⁶⁵; however, this option is not unthinkable. The prosecutor who is interested in completing the criminal case as fast as possible might show extreme benevolence towards the penal order procedure; he may fine-tune the charges if the accused is willing to accept the punishment suggested by the order.

It is interesting to note that whilst discussing plea bargaining derivatives in Europe, different scholars often have a precise focus on the German legal system, where the procedure of penal order is being discussed in terms of allowing informal negotiation in the German criminal process. Additionally, the French penal procedure (appearance before a court after prior admission of guilt) has also been discussed as parallel to plea bargaining⁶⁶. On the other hand, penal order in the Lithuanian criminal procedure has never been directly discussed, as if were an introduction of the guilty plea or plea bargaining into the Lithuanian system. Nevertheless, the analysis of penal order reveals a number of characteristics that resemble the core features of the plea bargaining mechanism, mainly the avoidance of a public hearing and agreed punishment.

Conclusions

1. Despite the fact that Lithuanian criminal justice system has never adopted the pure mechanism of plea bargaining, the analysis in this Article shows that the features of plea bargaining can still be traced in several simplified and abbreviated procedural alternatives to traditional criminal procedure. The examination of procedural options such as the simplified examination of evidence in the court, the accelerated proceedings and the penal order reveals that the procedure of penal order is mostly aligned with the values of plea bargaining. In case of simplified examination of evidence and accelerated proceedings, both stages of criminal procedure are preserved, however, they carry many peculiarities and restrictions that challenge the material truth-finding doctrine - similarly as in plea bargaining case.

⁶⁴ RAUXLOH, R. E. Formalization of Plea Bargaining <...> p. 304.

⁶⁵ Lietuvos Respublikos baudžiamojo proceso kodeksas. *Valstybės žinios*, 2002-04-09, nr. 37-1341.

⁶⁶ LANGER, M. From Legal Transplants to Legal Translations <...> p. 39.

2. Lithuanian penal order is the procedure which strongly mirrors the features of plea bargaining and has similar operating mechanism. In cases where the procedure of penal order occurs, no public hearing is held and adjudication process strongly depends on the agreement reached between the defendant and the prosecutor in the form of penal order. Both plea bargaining and the use of the penal order have a common objective, i. e. the interest of convenience to both the accused and the court system, expeditious disposal of cases, which might lead to an informal determination of guilt. While final acceptance of both the plea bargain and the penal order rests with a judge, in both procedural options the prosecutor decides which cases he wishes to try before the court and in which cases it is more purposeful to bargain or to issue a penal order. Additionally, the prosecutor plays a major role in the determination of the sentence. Moreover, in both situations, the prosecutors ask the defendants to waive some of their defense rights and to consent to the punishment prescribed by the prosecution. The similarities between the penal order and plea bargaining examined in this Article in particular could be a great starting point for further discussions whether Lithuania is indeed a country without plea bargaining.

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SUSITARIMO DĖL KALTĖS INSTITUTO UŽUOMINŲ PAIEŠKA LIETUVOS BAUDŽIAMOJOJE JUSTICIJOJE

Simona Garbatavičiūtė

S a n t r a u k a

Šio straipsnio tikslas yra apžvelgti Lietuvos baudžiamosios teisės sistemoje esančius procesinius pagrindus, kurie stipriai priartėja prie supaprastintų ir derybinių baudžiamojo proceso formų, būtent prie susitarimo dėl kaltės instituto (angl. *plea bargaining*). Šiame moksliniame straipsnyje siekiama išnagrinėti supaprastinto įrodymų tyrimo, įtvirtinto Lietuvos Respublikos baudžiamojo proceso kodekso (toliau – BPK) 273, 290, 291 straipsniuose, pagreitinto proceso, įtvirtinto BPK 426–432 straipsniuose, ir baudžiamojo įsakymo, numatyto BPK 418–425 straipsniuose, institutus.

Nepaisant to, kad Lietuvos baudžiamosios justicijos sistema nėra nustačiusi susitarimo dėl kaltės instituto, šio instituto užuominų yra matoma visose trijose ką tik paminėtose alternatyvose. Vienas iš pagrindinių bendrų šių supaprastintų baudžiamojo proceso formų ir susitarimo dėl kaltės instituto bruožų yra teisinis reguliavimas dėl bausmės sunkumo ir dydžio. Lietuvos Respublikos baudžiamojo kodekso 64¹ straipsnio nuostatos yra taikomos visais supaprastinto baudžiamojo proceso atvejais. Nuostatos tiesiogiai skatina kaltinamuosius atsisakyti tradicinio baudžiamojo proceso mainais į švelnesnę bausmę. Taip pat, taikant bet kurią iš aptariamų supaprastinto baudžiamojo proceso formų, pavojus yra sukliamas reikalavimui dėl materialiosios tiesos teisme nustatymo įgyvendinti, lygiai taip pat kaip ir susitarimo dėl kaltės atveju.

Baudžiamajame procese, kuriame yra taikomas baudžiamojo įsakymo institutas, išvengiama viešo teismo posėdžio ir nuteisimas daugiausia priklauso nuo kaltinamojo ir prokuroro susitarimo, kuris įtvirtinamas baudžiamuoju įsakymu. Apibendrinant galima teigti, kad teisinės vertybės, puoselėjamos Lietuvos baudžiamojo įsakymo instituto, yra labai artimos susitarimo dėl kaltės instituto vertybėms.

Įteikta 2017 m. gruodžio 16 d.

Priimta publikuoti 2018 m. sausio 30 d.