P L E A   B A R G A I N I N G – B O G E Y   O F   J U S T I C E?

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Changes in the early nineties restored the discussions about the necessity of the criminal law reform in the former Czechoslovakia and in Europe, too. There was much debate about the implementation of new concepts in criminal proceedings resulting from the experience acquired by Slovak lawyers in foreign countries, and vice versa from the experience acquired by foreign lawyers in Slovakia. Being familiar with the new institutes and concepts we vaguely considered their incorporation into our system, or more specifically- into the traditional European systems.

I suppose, the train of thought and the American or English ideas about law and justice had an effect on current conditions of our criminal codes, and this is one reason why we have such criminal codes. It is relatively easy to answer the question why the impact became so evident within several years, at least in Slovakia and the Czech Republic.

Only young law graduates could respond to student exchange and internship offers from foreign countries, mostly USA and Canada, as they did meet one of fundamental requirements – ability to speak English. I do not know how many of them were interested in criminal law but it is possible to count them on the fingers of both hands as implied by later publications. They were leaving without adequate knowledge of continental law theory or the theory of classical criminal law, and mostly without experience acquired through the work of judges, public prosecutors or attorneys at law. Therefore they found the American institutes and concepts new, formidable and modern when compared to our continental principles reeking of mothballs smell.

Only later, also official delegations of professionals and experts participated in exchange programs looking for experience in their fields, however, mostly limited to discussions on legal topics at short-term conferences and other official meetings. Quite naturally, there is a big difference between talks on the strong points (less frequently the weak points) of the legal system and the everyday operation of criminal justice system, e.g. in the USA.

Some young lawyers returning home from their exchange programs abroad got engaged in politics and sided with political leaders (many of whom did not possess professional qualification in criminal law) pushing

various innovations into the legal system. This may be a simplistic view requiring a discussion on several points, but I will try to use one of possible answers as a starting point of my presentation.

As for my own experience, I have to say it took me quite a lot of time to realize that certain doubts and reservations started to prevail over the advantages of what I became acquainted with during my visits abroad. This also applies to the issue of plea bargaining, which seemed to be very simple at first sight, maybe also beneficial, cost-effective or otherwise positive. But hadn´t there been the impact of classical European procedures or the impact of the Czechoslovak school of legal thoughts (e.g. Solnař, Kallab, Miřička, Hatala, Ružek, Husár, and some of those who are still alive) I surely would, even today, support these new institutes.

In the early nineties, during discussions concerning changes and reform of criminal law, some of more senior and more experienced experts mentioned various risks related to some of the alterations. I will not deal with all of them, my focus is on plea bargaining, but some comments may also apply to other institutes.

One of the main issues was the development of criminal law *per se,* or its philosophy and the development of criminal policy in general. Or putting it simply, the answer to the question - what are we looking for? However, it seems that this question has not been seriously answered yet. And putting aside all of the declarations, what I mean is to get a brief and clear answer as to what criminal policy we need.

Simplification of criminal proceedings is one and not always unproblematic reason for plea bargaining. In fact, the law enforcement agencies have not been relieved of many of burdens, anyway. There has been no justification for this significant change in relation to the pre-trial which will (possibly) result in plea bargaining. An investigating officer is still required to conduct proper investigation and the public prosecutor is still required to study the case file to be able to prepare for plea bargaining. In this situation it may be equally demanding to prepare the agreement by the prosecutor and defence, or the official accusation. The judge, too, must review and study materials on the file to have a clear idea of and insight into the case, in which he will make judgment based on 10 questions.[1] Or should he just believe answers to questions given by the prosecutor and

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[1] Čentéš, J.et al.: Trestný poriadok – komentár. Poradca podnikateľa, (Code of Criminal Procedure – Comments. Entrepreneurs' Guide Journal) Žilina, 2006, s. 471 ff.

the accused? This is a stumbling block of justice and one of the main issues. Is the court obliged to examine the truth of presented facts, or to base its decision on what the parties have stated? Is the court obliged to establish facts on the material truth, or to determine facts on the evidence presented by the parties? The Code of Criminal Procedure does not provide for such obligation, and the court will not accept the agreement if the judge finds any apparent conflict. But let's be perfectly honest, is that really always the case?

"Bargaining" concerning the guilty plea and the related punishment has been generally accepted by the Slovak experts positively, but the general public is not so positive about such deals occurring in the system of justice. And this is mainly the result of how plea bargaining was presented in the media tending to equate plea bargaining just with less strict (also perceived as lenient) punishment.

Another frequent reference is made to the advantage of less workload for the law enforcement agencies (the police and public prosecutors). It is quite clear today, that the reality is quite different: despite simplified procedures the courts still face some problems. As for the accused, there is less stress, lesser punishment, the accused pleading guilty gets a kind of reward from the State that is relieved of some burdens. Guilty plea by the offender is undoubtedly an important mitigating circumstance, which, similarly as in case of standard criminal proceedings, significantly affects the severity of the imposed punishment. Needless to say, an analysis of this topic would considerably exceed the extent of this presentation. Making an agreement between the prosecutor and the accused is also beneficial to the defence counsel, for at least two reasons. The lawyer's fee will be charged at a higher rate and the case is over relatively fast compared to the general standard length of the proceedings.

The primary enthusiasm in favour of the introduction of plea bargaining in our jurisdiction cooled off quite soon. After my return from the USA and Canada, I supported these innovations, although I had an unpleasant feeling of doubts about the conciliation of the accused and the victim who may shake hands (quite naturally only allegorically) after they agreed on compensation, or become reconciled after the accused has accepted restrictions, made the payment with the matter being thus all over. In practice, my doubts were confirmed as for the conciliation under Sec. 220 of the Code of Criminal Procedure and also as for conditional discontinuation of prosecution under Sec. 216 of the Code of Criminal

Procedure. These concepts proved to be positive, but they must be properly administered.[2] More expressive doubts were demonstrated as early as in 1994 in the discussions at the criminal law conference in Slovakia, at which one of well-known experts Professor Schüler-Springorum said: "Plea bargaining, yes, (absprachen), aber vorsichtig – Strafprozess ist kein Kuhhandel."[3]

These words gradually appeared also in other forms (making deals with justice – Handel mit Gerechtigkeit, or quite expressively "sludge – Stumpf)" in the publications of Central European, and especially German lawyers. The essentially positive impressions and enthusiasm by a large part of legal professionals over the institute of plea bargaining, particularly in Slovakia, became substantially affected by Professor Musil speaking at the conference "Criminal Law Reform - Present Wisdom and Experience" in his presentation "Plea bargaining – Yes or No?" and giving an outstanding answer to this question by concluding finally: "I consider plea bargaining a wrong solution, its disadvantages and weaknesses prevail over anticipated benefits; therefore I do believe that this solution should be refused by Czech legislators."[4]

In the course of applying this institute, various problems arose as a result of genuine deals made in the field of justice. It may be quite difficult to make some generalizations with its history of less than three years, but, on various occasions, one of fundamental principles of the presumption of innocence[5] has been left behind. It has been a long established practice that the guilt of the accused, or in this case of the person charged with an offense, must be proved "beyond any reasonable doubt". But this has been replaced by the accused pleading guilty, as he may have a good reason to prefer plea bargaining. And, to some extent, also the law

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[2] In my view, the activities of mediation officer, their number and qualification are inconsistent with the real needs. For the time being, however, I leave this matter open

[3] Professor of criminal law Horst Schüler-Springorum is still active at the Ludwig Maximilians Universität Faculty of Law inv Munich: His ideas expressed in numerous of his articles are accessible through the web sites of this institution.

[4] Musil, J.: Dohody o vině a trestu – ano či ne (Plea bargaining – Yes or No). In: Rekodifikácia trestného práva – doterajšie poznatky a skúsenosti (Re-Codification of Criminal Law – Present Wisdom and Experience"). A Collection of papers from the national conference with international participants , Bratislavská vysoká škola práva 2008. p 179 – 201. I refer to this, in my opinion highly significant article, the ideas of which I fully support and quote also in this presentation. In my knowledge, this is the first article not only drawing attention to the weak points of this institute, but also expresses the doubts often encountered by the Slovak practitioners, the attorneys-at law/advocates in Slovakia in the period after this institute was introduced in the criminal justice system.

[5] For details seei: Gazareková, L.: Prezumpcia neviny, jej neodškriepiteľná súvislosť s ľudskými právami, historické pozadie jej vzniku.(Presumpsution of Innocence, its indisputable relation with human rights, historicall background) In: Ochrana ľudských práv a slobôd prostriedkami trestného práva : (Collection of Papers of International Conference. Bratislava: Európske združenie študentov práva - Elsa, 2001, s. 107-113.

enforcement agencies and courts are quite willing to accept the plea and the agreement, rather than engage in lengthy collection of evidence to find out what and how happened, and to prove the case "beyond reasonable doubt". Statements of facts in which expressions such as "at the time not precisely established", "at the place not precisely identified", "with an accomplice who has not been identified yet" are inadmissible and intolerable. Usually unambiguous are the statements concerning legal qualification of cases – because the parties have agreed on it, and also the amount of compensation, because it was sought by the victim.

I believe that this issue still requires some answers also to other questions. One purpose of plea bargaining was to shorten and simplify the entire criminal process. However, where are the ideas, several decades old, of de-criminalization a de-penalization?[6] I consider the ideas about repression being the best prevention to be completely erroneous. Serious research on causes of crimes, once presented by reputable research institutions that should be as a must an integral part of any justice system, only begins to develop in Slovakia. We had to wait more than 15 years.

I would welcome some considerations to be discussed at this forum of whether plea bargaining, as it became applied in the Slovak Republic, is the proper solution. My answer, together with Professor Musil is – better no today and in this form. I can support it by the following:

1. Justice is not to make deals. Justice needs a systematic method of how to proceed from a commission of a crime (provided that it is established the crime was really committed) to answers to the questions: has it really been committed by that particular person (the accused, the convict), as established by the facts presented during the collection of evidence? A guilty plea must not be the crown evidence.

2. Examination of circumstances under which a crime was committed must be conclusive also for the elimination of causes of criminal conduct:

   - Objective circumstances – poor protection of premises, negligent accounting, and also loopholes in the law contributing to such criminal conduct, see for example imperfect economic

[6] C.f. for example: Čič, M. a kol.: Funkcie a význam trestného zákonodarstva (Functions and Significance of Criminal Legislation), Univerzita Komenského, 1987.

regulations (VAT, excise tax, vague regulations, which apply to the handling of toxic substances, etc.). Let me remind you that the purpose of public prosecution is not only to punish, but also to assist in creating the environment in which the rate of crime would be eliminated.

- Subjective circumstances – offenders repeatedly committing crimes, post-penitentiary support, system of probationary supervision, monitoring groups of the population at risks, etc.

We could also consider insufficient material and moral rewards provided for the police, for example (in Slovakia), typically the authority of the first contact from which further criminal prosecution develops. In the initial findings, the conditions are being prepared for the possible plea bargaining to follow. Or we could consider how the tax payers' money is being spent on vague aims. Was it necessary to establish a new system of toll police, if we have a well-operating customs and duties administration? Now we have a "state" police under the Ministry of Interior; toll and railway police as two independent entities under the Ministry of Transport, Post-Offices and Telecommunications; customs police under the Ministry of Finance, etc. But the Criminology Research Institute was opened practically only yesterday.

3. Imperfect Slovak rules of evidence collection. How often do the law enforcement agencies and the courts believe the evidence presented by the so called "credible person" to be true, but paying little attention to the credibility of a witness? Or simply said – the proof tending to be more suitable represents stronger evidence. Examination of credibility of witnesses in the Anglo-American systems is well known, but I myself cannot recall this applied in the criminal proceedings in Slovakia. And here I will rather not mention the tasks of confidential witnesses or undercover agents other than the police officers.

The most fundamental in the plea bargaining procedure are the rules of evidence. The rules of evidence in the Anglo-American systems are very strict. We have adopted the principle of adversarial proceedings, but only in the proceedings conducted before the court. We stopped somewhere halfway. If adversarial, the entire proceedings should be adversarial in nature. That is also at the pre-trial stage. Otherwise, plea bargaining will remain where it is today - approximately halfway through.

Please, note that plea bargaining - undoubtedly an interesting and maybe useful institute - may become, as I said in the heading – a bogey of justice. Law and justice at the beginning of the 21st century should be the same, there should not be any difference between these two concepts: they should be to the benefit of citizens who abide by the laws, and at the same time, they should punish those who contravene the rules and who thus deserver the punishment. Any decision on the punishment must be made "beyond any doubt". Otherwise, in the event of any doubts the principle "*in dubio pro reo*" has to prevail, which some prosecutors and judges do not like.