Agreements in criminal process: Towards the reduction of its coercive nature*

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Summary: After a quick examination of the main defects and virtues of the negotiated criminal justice mechanisms, this paper analyzes the reasons why such mechanisms are considered as systems of coercive nature and some measures are proposed to mitigate this character.

Key words: Agreements in criminal process, negotiated criminal justice, consensual criminal justice, plea bargaining.

I. Introduction

In his book "En busca del derecho penal. Esbozos de una teoría realista del delito y de la pena", Professor Silva Sánchez remembers the cover of the international edition of *The Times* on August 24th, 2010, whose headline read: "*Time off for early guilty plea*"[1]. It was the claim of the British government to convince the accused to make, in exchange for considerable reductions in penalties, confessions before the police, advancing the moment from which the conformities could take place, to allow them in phases prior to judicial intervention, with the consequent saving of resources that could have been produced if a significant number of court hearings were avoided.

After confirming Silva Sánchez that in the Spanish legal landscape "*favorable winds to the agreements blow in the criminal process*"[2], he highlights the main criticism that has traditionally been raised against them, namely their submission to a perverse dynamic of coercion and fear, in which it is "*the fear of an accusation*

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[1] Silva Sánchez, Jesús-María, "Acuerdos: ¿Proceso sin derecho?", in The Same, *En busca del derecho penal. Esbozos de una teoría realista del delito y de la pena* (Buenos Aires-Montevideo, 2015), p. 283.

[2] Silva Sánchez, Jesús-María, ob. cit., p. 283 (free translation).

with request for excessive penalties that determines confessions whose truthfulness can never be proven"[3].

However, the Spanish professor believes that it is possible to subtract the agreements in criminal process from that perverse dynamic, insofar as they are understood as "*stages for discussion on the applicable law in frames of factual uncertainty*"[4]. Thus understood the conformities, instead of the procedural truth obtained from the judicial evaluation of the evidence, in his opinion, several more or less probable alternative narratives would arise, with which the discussion would increase its rationality and would focus on the greater or lower probability of the narratives faced, rather than in a pure dynamic of power[5].

In this brief work, I intend to present some general ideas about the negotiated criminal justice mechanisms and their coercive nature, and suggest some measures to reduce this character, which I think can serve as an attempt to "continue development" of Professor Silva Sánchez's approach and, at the same time, as an affectionate testimony of thanks and admiration for my dear teacher.

II. About the concept of agreements in the criminal process, its origin, its virtues and its defects

When talking about *agreements in the criminal process* or, in apparently more widespread terminology, *negotiated criminal justice mechanisms*, reference may be made to more than one object of study. Using the expression in a broad sense, it is possible to understand any agreement that the accused can conclude in the process, even if it does not imply a waiver of the oral trial or immediately leads to a conviction or acquittal. For example, when the expression is understood in this way, it would be a demonstration of negotiated criminal justice a probationary convention, that is to say, an agreement destined to take certain facts as accredited, which cannot be discussed in the oral trial[6]. In a strict sense, however, it is only used to refer to agreements that import a waiver of the oral trial and immediately lead to a final sentence of conviction or acquittal[7]. As can be inferred from reading its introduction, in this work this expression is used in a strict sense.

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[3] Silva Sánchez, Jesús-María, ob. cit., p. 284 (free translation).

[4] Silva Sánchez, Jesús-María, ob. cit., pp. 284-285 (free translation).

[5] Silva Sánchez, Jesús-María, ob. cit., p. 285.

[6] In this sense, see Ugaz Zegarra, Fernando, "Las convenciones probatorias: aspectos esenciales y prácticos de una novísima institución", in Herrera Guerrero, Mercedes/Villegas Paiva, Elky (coords.), *La prueba en el proceso penal* (Lima, 2015), p. 97.

[7] In relation to the two possible senses of the expression, it can be seen Herrera Guerrero, Mercedes, *La negociación en el nuevo proceso penal. Un análisis comparado* (Lima, 2014), pp. 57-69.

On the other hand, even using the expression in its strict sense, it could also be included more than one object of study. This is so, because among the agreements that in a criminal process the accused could conclude and that entail a waiver of the oral trial and immediately lead to a conviction or acquittal, theoretically, there may be some that fall only on the procedural rite, with the purpose of simplifying its processing, and there may be others that fall both on procedural ritualism, and on the factual or legal merit of the punitive claim[8]. Although this last distinction is relevant for the purposes of this work, from now on, unless explicit reference is made to any of the specific modalities of agreements in the strict sense, both possibilities will be understood.

Even when is usual to place the origin of the negotiated criminal justice mechanisms in the North American system[9], there are those who deny their Anglo-Saxon origin and affirm that they come from the confession of the inquisitive model[10]. In any case, the relevant thing is that after several reforms of the second half of the last century[11] and of the beginning of the present century, those mechanisms have been permeating the criminal proceedings of many countries in continental Europe and Latin America, being today very easy to find demonstrations of negotiated criminal justice in comparative law. For example, in the United States of America, the *plea bargaining*; in Germany, the *Absprache*; in Italy, the *giudizio abbreviato* and the *patteggiamento* or *applicazione della pena su richiesta delle parti*; in Spain, the *conformidad del acusado*; in Portugal, the *processo sumaríssimo*; in France, *the comparution sur reconnaissance préalable de culpabilité*; in Colombia, the *preacuerdos y negociaciones*; in Peru, the *terminación anticipada*; in Argentina, the *procedimiento abreviado*; in Chile, both the *procedimiento abreviado*, and the admission of responsability in the *procedimiento simplificado*, and even the non-claim of the accused in the *procedimiento monitorio*, etc.

The main virtue that is attributed to the negotiated criminal justice mechanisms, not to doubt it, consists of utilitarian considerations. It is affirmed that no criminal procedural system has the capacity to submit all cases to an oral trial, so it would be essential to implement such mechanisms[12]. As can be seen, it is an

[8] Distinguishes between consensus on the procedural rite and consensus on the merit of the process, Del Río Ferretti, Carlos, *Proceso penal, consenso de las partes y enjuiciamiento jurisdiccional* (Santiago, 2009), pp. 21-25.

[9] Del Corral, Diego, *Juicio abreviado* (Buenos Aires, 2010), p. 41.

[10] In this sense, Nieva Fenoll, Jordi, *Fundamentos de derecho procesal penal* (Montevideo, 2012), p. 220.

[11] Barona Vilar, Silvia, *Seguridad, celeridad y justicia penal* (Valencia, 2004), pp. 189-195.

[12] Among several others, it can be seen: Horvitz Lennon, María Inés, in Horvitz Lennon, María Inés/López Masle, Julián, *Derecho procesal penal chileno* (Santiago, 2004), volume II, p. 504.

argument of efficiency in the use of system resources. However, there are those who extend the scope of the argument, highlighting also the time and resource savings that the adoption of negotiated criminal justice models can mean for the accused, and even for the victim[13].

Another advantage that has been attributed to the negotiated criminal justice mechanisms, although with less vehemence than the previous one, is that its use would contribute to respecting the right of the accused to be tried within a reasonable time or without undue delay[14].

However, a superficial examination of the copious existing literature on negotiated criminal justice is enough to confirm that there are many more disadvantages than merits attributed to these mechanisms. One of the criticisms made against them points to the decrease they would produce in the preventive effectiveness of sentences and, therefore, in the protective function of legal interests. The idea behind the criticism is that if a criminal sanction of a certain intensity is required to produce its preventive effect, this effect inevitably suffers a loss when, as a consequence of the application of one of these mechanisms, a smaller entity sentence is applied[15].

The negotiated criminal justice mechanisms have also been criticized based on the principle of equality. The idea on which the criticism is based is that the prosecutor could negotiate with a defendant and not with another who is in exactly the same situation, despite there being no reasons that justify a different treatment[16].

An additional criticism that has been formulated against these mechanisms is directed to the poor quality of the procedural truth that is reached when they are promoted. Unlike what happens when the oral trial takes place, the one that due to the contradictority and the immediacy that characterize it allows to reach a high-quality procedural truth[17], when negotiating mechanisms are applied, an evident relaxation occurs (and sometimes, an abandonment) in the purpose of

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[13] In this sense, Riego Ramírez, Cristián, "El procedimiento abreviado", in AA.VV., *Nuevo proceso penal* (Santiago, 2000), p. 208.

[14] Durán Sanhueza, Rafael, *Procedimiento simplificado y monitorio en el Código Procesal Penal chileno* (Santiago, 2009), pp. 55-57.

[15] Herrera Guerrero, Mercedes, "La negociación en el proceso penal desde la dogmática del derecho penal. Especial referencia a los ordenamientos español y peruano", in *Política Criminal*, Vol. 11, Nº 21 (2016), pp. 229-263. Similar, Núñez Ojeda, Raúl, *Código Procesal Penal* (Santiago, 2016), pp. 442-443.

[16] Rodríguez García, Nicolás, *La justicia penal negociada. Experiencias de derecho comparado* (Salamanca, 1997), pp. 96-97.

[17] Among others, Andrés Ibáñez, Perfecto, "Sobre el valor de la inmediación (una aproximación crítica)", in *Jueces para la democracia*, Nº 46 (2003), p. 57.

the criminal procedure consisting in finding out the truth[18], which, in turn, can result in a *minus* of legitimacy of the sentence.

In any case, it is evident that the main criticism that has been formulated against the negotiated criminal justice mechanisms is that of their coercive nature[19]. The basis of this criticism lies in the idea that the defendants renounce the oral trial and agree to submit to any of these mechanisms, only because of the threat that they would receive a much more serious sentence in the trial. In the US system, this greater severity of the sentences imposed at trial has been calculated, according to some, between thirty and forty percent[20], and according to others, between forty and fifty percent[21], even though some studies have detected much greater differences[22].

There are several factors that have an impact on the reported coercive nature of the criminal negotiation mechanisms. On the one hand, a practice has been detected in different legal systems, which in the Anglo-Saxon system has been called *overcharging* and that consists in the artificial increase of charges against the accused only to compel them to renounce the trial and submit to negotiation[23]. On the other hand, there has been a certain predisposition of defense lawyers to try to persuade the accused to renounce the oral trial, in order to collect their pay in the shortest possible time[24]. In addition, the fact that many times the defendants

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[18] Schünemann, Bernd, "¿Crisis del procedimiento penal? (¿Marcha triunfal del procedimiento penal americano en el mundo?)", in The Same, *Temas actuales y permanentes del derecho penal después del milenio* (Madrid, 2002), p. 299; Cociña Cholaky, Martina, *La verdad como finalidad del proceso penal* (Santiago, 2012), pp. 69-72.

[19] Nieva Fenoll, Jordi, ob. cit., p. 217. This criticism has been raised with special intensity for the American *plea bargaining* by Langbein, John H., "Torture and Plea Bargaining", in *The University of Chicago Law Review*, Vol. 46, Nº 1 (1978), pp. 3-22. For the continental European system, in general, and for the Italian, in particular, see Ferrajoli, Luigi, *Derecho y razón. Teoría del garantismo penal*, translation by Perfecto Andrés Ibáñez, Alfonso Ruiz Miguel, Juan Carlos Bayón Mohino, Juan Terradillos Basoco and Rocío Cantarero Bandrés (Madrid, 2000), pp. 746-752.

[20] In this sense, Wilkins, William W. Jr., "Plea negotiations, acceptance of responsability, role of the offender, and departures: Policy decisions in the promulgation of Federal Sentencing Guidelines", in *Wake Forest Law Review*, Vol. 23, Nº 2 (1988), p. 191.

[21] García Torres, María José, *El proceso penal abreviado y el acuerdo del imputado. Legislación comparada y análisis constitucional* (Buenos Aires, 2004), pp. 84-85.

[22] For example, in the district of Massachusetts, the sentences imposed on trial have been, on average, 500% more severe than those applicable in the context of a negotiation. Mallord, Joel, "Putting plea bargaining on the record", in *University of Pennsylvania Law Review*, Nº 162 (2014), p. 699.

[23] See Lippke, Richard L., *The ethics of plea bargaining* (New York, 2011), pp. 31-34.

[24] In this sense, De Diego Díez, Luis Alfredo, *Justicia criminal consensuada (Algunos modelos del derecho comparado en los EE.UU., Italia y Portugal)* (Valencia, 1999), pp. 59-60.

are in pretrial detention, and sometimes in prisons with deplorable conditions of overcrowding, operates as a powerful stimulus to accept the terms offered by the prosecutor, as they represent the most quick and easy way to leave the confinement[25]. As it can be easily understood, in these circumstances, in a considerable number of cases it will be highly probable that those who admit guilt and renounce the trial, are in fact innocent[26].

As a counterpart to the increased risk of the conviction of innocents, the imposition of more rigorous sentences for those who do not accept the terms offered by the prosecutor ends up being considered a real punishment against those who decide to exercise their right to an oral trial[27].

III. Some measures to mitigate the coercive nature of negotiated criminal justice mechanisms

Assuming as a premise that it is unrealistic to propose the suppression of negotiated criminal justice mechanisms, because if they disappear there could be a nuisance in the functioning of the criminal procedural system, given the great proliferation they have experienced in the laws of the different countries, perhaps, instead, it would be better to think of different ways to minimize the risks attributed to them. On this occasion, as I have advanced, I will concentrate on the coercive nature that is reproached to them.

1. In relation to agreements on the merit of the punitive claim

Above I indicated that with the terms "agreements in the criminal process" or "negotiated criminal justice mechanisms", strictly understood, we can refer both to agreements that fall only on the procedural rite, in order to simplify their processing, as to agreements that fall on procedural rituality and, at the same time, on the factual or legal merit of the punitive claim. It is useful to remember this distinction now, because when, according to the terms of the respective criminal procedural regulation, the agreement extends to the merit of the punitive claim, because it is required that the accused "accept the facts of the accusation", "confess his participation", "admit his responsibility" or self-incriminate in any other way that the corresponding legislation establishes, it is increased the risk of being coerced to testify against him, especially if the conditions identified above

[25] Riego Ramírez, Cristián, "El procedimiento abreviado en Chile", in Maier, Julio / Bovino, Alberto (comps.), *El procedimiento abreviado* (Buenos Aires, 2001), pp. 474-475.

[26] Recognizes it Rodríguez García, Nicolás, ob. cit., pp. 104-106.

[27] Pizzi, William T., *Trials without truth. Why our system of criminal trials has become an expensive failure and what we need to do to rebuild it* (New York, 1999), pp. 189-192.

are maintained as contributing factors to enhance the coercive nature of the negotiation mechanisms. Keep in mind that, in accordance with the provisions of international human rights treaties, everyone charged in a criminal proceeding has the right not to be forced to testify against himself or confess guilty[28].

For what has just been explained, it is reproachable that the criminal procedural legislation in question requires, so that the accused accesses the punitive benefit that leads him to renounce the oral trial, that he incriminates himself. There are several regulations in which this self-incrimination is required for negotiated criminal justice mechanisms to take place. For example, in Chilean regulation, for the *procedimiento abreviado* to take place, it is necessary, among other things, that the accused expressly accept the facts that are the subject of the accusation (art. 406 Criminal Procedure Code), and in the *procedimiento simplificado*, to that the conviction cannot impose a sentence greater than that requested by the prosecutor, it is necessary that the accused admit responsibility for the facts contained in the requirement (art. 395 Criminal Procedure Code). Something similar is observed in Criminal Procedure Codes of some Argentine provinces, such as Córdoba, which has deserved objections by a sector of the doctrine of that country[29]. The same applies to the German Criminal Procedure Ordinance, after it was amended in 2009 to expressly consecrate the so-called *Absprache* (§ 257 C).

It would be desirable that all legal requirements of self-incrimination in the regulatory statutes of the various negotiated criminal justice mechanisms be abolished. In this sense, from this reduced point of view, perhaps the North American can be considered a good model, since, in this one, so that the defendant renounces the trial and receives the penological benefit offered by the prosecutor, he does not need to plead guilty, but can also simply declare that he will not discuss the accusation (*nolo contendere*).

2. About the magnitude of the punitive benefit

In another order of ideas, in order to reduce the coercive nature of these mechanisms, it would be desirable that there was not a large difference between the applicable sentences when promoting the negotiating mechanism in question and the sanctions that could be applied if the oral trial took place. This is so, not only

[28] See article 14.3 letter g) of the International Pact on Civil and Political Rights, and article 8.2 letter g) of the American Convention on Human Rights.

[29] Del Corral, Diego, ob. cit., p. 128: "*the mere existence of the legal norm in the procedural codes, demanding the admission of guilt for those who want to take advantage of the abbreviated procedure, impregnates that prohibited coactivity with the entire system of prosecution*" (free translation). In the same sense, Villar, Ariel H., *El juicio abreviado* (Quilmes, 1997), pp. 205-206.

to avoid the understanding of the greater severity of the applicable sentences in court as a punishment for those who defend themselves and exercise their right to an oral trial, but also to ensure the voluntariness and freedom of the accused in their decision to give up the trial. Apparently, the greater the distance that exists between the afflictivity of the sentences imposed after the criminal negotiation and that of the sanctions that can be applied in the oral trial, the lower the degree of voluntariness and freedom of the accused to renounce the trial. In the words of Schünemann, the punitive benefit for the defendant who decides to renounce the trial cannot be very great, among other reasons, because "*in case of an oral trial, the enormous increase in punishment that would threaten as a sword of Damocles, would destroy all willfulness in the decision*"[30].

Therefore, those legal systems that do not set a limit to the punitive benefits to which the accused can access in exchange for his resignation from the trial must be observed with suspicion. In this sense and from this other point of view, the American model does not seem especially recommended.

However, those criminal procedural systems that set a limit to the punitive benefit for the accused who submits to the negotiation mechanism and waives the trial, but establishing a considerable difference between the sanction requested by the prosecutor and the sentence finally imposed, with sales that, in general, fluctuate between 30 and 50%, must be carefully examined. For example, according to the Spanish *conformidad del acusado*, when it takes place in the *procedimiento para el enjuiciamiento rápido de ciertos delitos*, at the Court of Guard, the deprivation of liberty requested is reduced by a third (art. 801 Criminal Procedure Law).

On the other hand, in the Italian *giudizio abbreviato*, the reduction of half of the sentence is contemplated when it comes to contraventions, and of a third of the sanction in the case of crimes, in the latter case providing for the replacement of life imprisonment for imprisonment for thirty years (art. 442.2 *Codice di Procedura Penale*). In the case of the *applicazione della pena su richiesta delle parti* (*patteggiamento*), the reduction of the sanction is established in a third (art. 444.1 *Codice di Procedura Penale*). And in the case of the *procedimento per decreto*, a

[30] Schünemann, Bernd, *La reforma del proceso penal* (Madrid, 2005), pp. 107-108 (free translation). In a similar sense, Del Río Ferretti, Carlos, ob. cit., pp. 196-197. See, however, Langer, Máximo, "Rethinking plea bargaining: the practice and reform of prosecutorial adjudication in American criminal procedure", in *American Journal of Criminal Law*, Vol. 33, Nº 3 (2006), pp. 231-243, who states that to consider coercive the offer of the prosecutor is not enough to have a large difference between the applicable sanction after the negotiation and the applicable sentence in the trial, but it is also necessary that the prosecutor alter the normal course of the process, for example, threatening to bring a weak case to trial, to invoke more serious criminal charges than those appropriate to the facts, or to request higher sanctions than those legally applicable.

reduction of up to 50% of the applicable monetary sanction is expected (art. 459 *Codice di Procedura Penale*).

In turn, in the Costa Rican *procedimiento abreviado*, the possibility of reducing the sanction provided in the corresponding crime is foreseen by up to one third (art. 374 Criminal Procedure Code).

Some regulations establish stricter limits on the amount of the punitive benefit, making it "less attractive" for the accused, which, however, has not prevented the negotiation mechanisms from being widely used. For example, in the Peruvian regulation of the *terminación anticipada*, the reduction of one sixth of the sentence is contemplated (art. 471 Criminal Procedure Code), which despite somewhat departing from the usual amount of rebates in the Comparative legislation, has not prevented its massive application[31].

It is my opinion that, in this matter, special care must be taken. Apparently, it is true that the greater the punitive rebate offered to the accused, the less will be his degree of voluntariness and freedom to decide to renounce the oral trial. But it also seems to be true that if such a reduction is too tenuous, the defendant will hardly be willing to accept such a waiver, so he will usually prefer the trial. In other words, the fact that the regulation of negotiated criminal justice mechanisms contemplates punitive benefits of a very small entity can conspire against their widespread application and, therefore, introduce inconvenient doses of inefficiency in the general functioning of the system; or, to avoid such inconveniences, it can lead to infringe the principle of legality, forcing the literalness of the law to offer the accused more intense penological benefits than those expressly contemplated by law[32].

An example of what has just been explained can be seen in Chile. In this country, perhaps as a result of the absence in the regime of negotiated criminal justice, in general, of especially intense penological benefits[33] –except in the case

[31] See Herrera Guerrero, Mercedes, *La negociación en el nuevo proceso penal. Un análisis comparado*, ob. cit., p. 156, who, however, attributes the successful application of this figure to the possibility of accumulating the punitive benefit that it entails, with the reduction of one third of the sanction that may take place in the hypotheses of sincere confession (art. 161 Criminal Procedure Code).

[32] Recognize it, for the Chilean case, Rodríguez Vega, Manuel/Pino Reyes, Octavio, "El principio de obligatoriedad en el ejercicio de la acción penal en los procedimientos jurisdiccionales basados en la autoincriminación", in *Revista Chilena de Derecho*, Vol. 42, Nº 3 (2015), p. 1011.

[33] The benefit has been described only as a "*paltry reward for the defendant who waives the oral trial*". Rodríguez Vega, Manuel, "Discrecionalidad del Ministerio Público y objeto del juicio abreviado", in *Revista de Derecho,* Pontificia Universidad Católica de Valparaíso, Vol. XXXVI, Nº 1 (2011), p. 502 (free translation).

of certain crimes against property[34], an automatic reduction of the imprisonment is not contemplated, considering only a mitigating circumstance and the prohibition that the sentence may impose a sanction greater than that requested by the prosecutor–, on several occasions, to allow the application of negotiation mechanisms, the public prosecutor has artificially modified the imputed facts, has degraded their legal qualification, has invoked unreal mitigating circumstances or has omitted to invoke effectively concurrent aggravating circumstances. This has meant not only the violation of the principle of legality, but also the infringement of some procedural guarantees, without the courts, in general, having done much to prevent such proceeding[35].

Consequently, it seems possible to be drawn to the conclusion that a good regime of negotiated criminal justice mechanisms should favor the establishment of punitive benefits that are of an entity sufficient to make attractive to the accused the decision to accept the terms offered by the prosecutor and renounce the oral trial, but that, at the same time, are not so advantageous that they decrease to unacceptable levels his voluntariness and freedom in the adoption of said decision.

In any case, I do not consider that in modulating the amount of such benefits, the criminal procedure regulation in question establishes distinctions according to the moment in which the waiver of the oral trial takes place, offering the accused a greater reduction of penalty if he waives the trial immediately after he has knowledge of the fact with criminal appearance attributed to him, than if he does it later in the process. Some criminal procedural laws have adhered to this model, such as the Colombian one. In this country, if the defendant accepts the charges at the imputation hearing, a reduction of up to half of the applicable sanction takes place (art. 351 Criminal Procedure Code). If the acceptance of charges is verified after the accusation has been filed and until the moment the defendant is interrogated at the beginning of the oral trial on the acceptance of his responsibility, the reduction of the sentence reaches up to its third part (art. 352 Code Criminal Procedure). And if the acceptance is made at a later

[34] These crimes, in any case, numerically speaking, occupy a very important place (more than 40%) in the total causes that enter the Chilean criminal procedure system, so in many cases there is an automatic reduction of the sentence for those who undergo these mechanisms. In relation to this topic, see Riego Ramírez, Cristián, "El procedimiento abreviado en la Ley Nº 20.931", in *Política Criminal*, Vol. 12, Nº 24 (2017), pp. 1085-1105.

[35] See Rodríguez Vega, Manuel / Pino Reyes, Octavio, ob. cit., pp. 1012-1018. In the same sense, Del Río Ferretti, Carlos, ob. cit., pp. 77-138; Del Río Ferretti, Carlos, "El principio del consenso de las partes en el proceso penal y enjuiciamiento jurisdiccional: aclaraciones conceptuales necesarias", in *Revista Chilena de Derecho*, Vol. 35, Nº 1 (2008), pp. 167-169.

stage of the trial, a reduction of the amount takes place in a sixth part (art. 367 Criminal Procedure Code).

The reason why I find this way of setting the amount of the punitive benefit inconvenient lies in the not very subtle extortion that the defendant would suffer to refrain from producing proof of discharge, since if he did he would lose the possibility of obtaining the greatest penological advantage[36].

3. The impact of the purpose of the intermediate stage

In another order of considerations, if it is the fear of an accusation with request for excessive sanctions that often explains the confession of the accused, then the physiognomy of the intermediate stage of the criminal process of the country in question becomes very relevant, in the sense of whether or not she has the function of controlling the merit of the prosecutor's accusation.

From the point of view of the possibility of controlling the merit of the accusation, in comparative law, it is possible to recognize at least three different systems. In the first system, there is a direct opening of the trial, without the defense being able to express itself on the merit of the investigation, being able to only invoke facts that exceptionally give rise to temporary or definitive dismissal. It is the case of legislations, in general, of strong inquisitive character. In the second system, there is control of the merit of the accusation, but it is only activated if the defense opposes the opening of the trial; if she does not object, she goes directly to the trial. This is the case, for example, of Austrian legislation and of the Codes of some Argentine provinces. And in the third system, control of the merit of the accusation is mandatory, even if the defense does not request it, and the judge can always reject the accusation. It is a negative control that points to the legality of the formulation of the accusation. This is the case of criminal procedural laws of several countries in continental Europe, such as Germany, Italy and Portugal[37].

A systematization a little bit different from the physiognomy of the intermediate stage of the criminal process in comparative law, offers those who distinguish between intermediate phase of preparatory nature and intermediate phase of decisional character. In the first one, the central objective is the purification of the evidence that will be brought to trial, without it being up to the court to rule on the merit of the accusation. This model is present in England and the United States of America. On the other hand, in the second, the main objective is to control the accusation, so that the court verifies the existence of formal and material grounds

[36] In this sense, Del Corral, Diego, ob. cit., p. 8.

[37] See Horvitz Lennon, María Inés, ob. cit., pp. 9-10.

that justify making a judgment against the accused. This model is recognized in some countries of the continental European system[38].

As will be understood, the purpose of the intermediate stage in the criminal process directly affects one of the elements that are at the base of the criticism that is formulated against the negotiated criminal justice mechanisms and which gives them a coercive character. This is so, because if the acceptance of the offer made by the prosecutor and the resignation of the oral trial are solely due to the fear of the accused to the artificial increase of the charges against him and, therefore, to the request of excessive sentences (*overcharging*), the existence of an eventual control of the accusation that can be done in the intermediate phase could serve to dispel that fear. If, at the intermediate stage of the criminal process in question, it is possible to review the merit of the accusation, in other words, if it were an intermediate phase of a decisional nature, the unjustified bulges of charges filed and increases in sanctions requested could be controlled and corrected there. On the other hand, if the intermediate stage were of a preparatory nature and was only intended to purify the evidence that will be brought to trial, such control and correction could not take place, so the fear of suffering the practice of *overcharging* could hardly be conjured.

From what has just been explained, it does not seem that, from this isolated point of view, Chilean criminal procedural legislation can be taken as a model to be imitated in the design of a negotiated criminal justice system that seeks to avoid coercive physiognomy. In fact, in the ordinance of this country, judicial control of the accusation is limited to the correction of its formal defects and to the possibility of decreeing the dismissal based on grounds enumerated in the law, and provided that it is not necessary an evidence hearing. This is a "*limited form of control of the accusation, which moves away from most foreign models*"[39], which although seeks to prevent the trial with anticipation on the merits of the matter under discussion and reaffirm the idea that the promotion of criminal prosecution corresponds only to the prosecutor[40], as a result of the absence of a genuine negative judicial control of the accusation and the attribution to the exclusive discretion of the prosecutor of the decision to bring the accused to trial, produces an obvious risk of arbitrariness. In such a system, that "*corresponds better with the English criminal prosecution model, and also with the United States*

[38] Vera Sánchez, Juan Sebastián, "Naturaleza jurídica de la fase intermedia en el proceso penal chileno. Un breve estudio a partir de elementos comparados", in *Revista de Derecho*, Pontificia Universidad Católica de Valparaíso, Vol. XLIX (2017), pp. 141-184.

[39] This was stated by the Message of the Executive that began the parliamentary process of what became the new Chilean Criminal Procedure Code (free translation).

[40] *Idem*.

criminal prosecution model"[41] rather than with the European continental model, the danger of incurring in *overcharging* is latent. It is not an accident that these practices have been detected and studied more in the context of the Anglo-Saxon legal system and of the laws that have been influenced by it on this issue, than in the scope of the continental European legal system.

4. Regarding the use of pretrial detention and prison reality

Finally, it seems clear that in the more or less coercive nature of the system of negotiated criminal justice mechanisms of the country in question, strong incidence has the greater or lesser application of preventive detention and the conditions observed inside of the prisons in which said precautionary measure is complied with. This is so, because the easier the imposition of pretrial detention is and the longer its duration, the less freedom the accused will have to negotiate the terms offered by the prosecutor. The threat of applying or maintaining such a precautionary measure will directly affect the degree of voluntariness and freedom that the accused has to adopt the decision to renounce the trial, given the possibility of entering or remaining in prison. Assuming that preventive detention, in practice, is often perceived as an early punishment, especially if it is fulfilled in conditions of overcrowding and overpopulation, the offer made by the prosecutor "*could result with the accused being faced with the need to renounce their rights in order to obtain a decision that ends the informal punishment that the process represents*"[42].

For this reason –in addition to others, such as the possible involvement of the presumption of innocence, understood as a treatment rule[43]–, special attention should be paid to the effective duration of pretrial detention in the criminal procedure system in question[44]. In this regard, and considering that it is not easy to determine precisely when the defendant''s right to not remain under pre-trial detention beyond a reasonable time[45] is affected, it may be a good measure to establish a maximum term for the duration of said precautionary measure. An

[41] Vera Sánchez, Juan Sebastián, ob. cit., p. 181 (free translation).

[42] Riego Ramírez, Cristián, *El procedimiento abreviado en Chile*, ob. cit., p. 475 (free translation).

[43] In relation to this topic, see Magalhães Gomes Filho, Antonio, *Presunción de inocencia y prisión preventiva*, translation by Claudia Chaimovich Guralnik (Santiago, 1995), *passim*.

[44] Van Kempen, Piet Hein (ed.), *Pre-trial detention. Human rights, criminal procedural law and penitentiary law, comparative law* (Cambridge-Antwerp-Portland, 2012), pp. 23-25, with a summary of the results of an extensive comparative study about the length of pretrial detention in several countries.

[45] See Article 9.3 of the International Pact on Civil and Political Rights, Article 5.3 of the European Convention on Human Rights and Article 7.5 of the American Convention on Human Rights.

example of this is observed in Spain, whose Constitution obliges the legislator to set a maximum term for the provisional detention (art. 17.4), an obligation that is fulfilled in the Criminal Procedure Law (art. 504).

For the same reason –in addition to others, such as the need to respect the dignity of people–, the conditions of confinement of those who are serving preventive detention must be examined. It is clear that such conditions can operate as a powerful stimulus to accept the terms offered by the prosecutor and renounce the trial. This explains that in a report on the Chilean prison reality of June 27th, 2016, the *Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments* denounces overcrowding and overpopulation conditions in some prisons in that country, and qualifies such conditions as unjustified stimuli to self-incriminate and renounce the right to a trial (paragraphs 29 to 31).

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