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NEWS AND DEVELOPMENTS

Defense Independence and Narrative Non-Communication in Plea Bargaining Agreements

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The autonomy of counsel is essential to truthfulness, with a proposal to prevent cross-influence between the accounts of investigated parties.

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Introduction

Plea bargaining agreements, as set forth in Law 12.850/13, have become one of the primary instruments for combating organized crime in Brazil. This is a means of obtaining evidence grounded in the utility, effectiveness, and truthfulness of the information provided by the cooperating witness. Within this framework, the role of technical legal counsel assumes a central position – not merely as a safeguard of fundamental rights, but as a structural element of the very reliability of the institution.

This article proposes a reinterpretation of plea bargaining agreements in light of the principle of defense independence, arguing that such independence

precedents of the Brazilian Supreme Court (STF) that prohibit communication between investigated parties, and an implicit principle of narrative non-communication among cooperating witnesses with conflicting interests is proposed.

Development

Law 12.850/13 establishes, in its Article 3-C, the mandatory presence of an attorney in all plea bargaining negotiations, and, in Article 4, conditions the granting of benefits upon the effectiveness of the cooperation. It further provides for the replacement of defense counsel in cases of conflict of interest. A systematic reading of these provisions reveals that the legislature assigned to technical legal counsel a functional role in shaping the evidence – and not merely a formal assistance function.

A plea bargaining agreement is not a mere spontaneous account. It is a legally oriented narrative, constructed through strategic decisions, selection of facts, chronological reconstruction, and evidentiary contextualization. In this environment, the narrative autonomy of the cooperating witness is a precondition for the validity of the evidence produced. The duty of truthfulness, although legally imposed upon the cooperating witness, depends on an institutional context that allows for its full realization.

It is at this point that the conflict of interest assumes structural significance. The simultaneous representation by a single attorney of cooperating witnesses whose positions intersect – particularly in cases of reciprocal denunciations – introduces an objective limitation upon the independence of the defense. The attorney comes to hold confidential information belonging to multiple clients and to operate under cross-cutting duties of loyalty and confidentiality, which compromises their capacity for free counsel.

The direct consequence is the potential contamination of the cooperative narrative. Accounts may be filtered, adjusted, or calibrated in accordance with parallel interests, even if not deliberately so. In such a scenario, the cooperation ceases to be an autonomous expression of truth and begins to take on the contours of a shared strategic construction.

measures prohibiting communication between investigated parties, with the objective of preventing the coordination of accounts and preserving the integrity of the evidence. The STF, in numerous precedents, has upheld such restrictions as legitimate instruments for the protection of investigations.

If the legal system acknowledges that direct communication between investigated parties can compromise the production of evidence, then it must be recognized, with even greater reason, that indirect communication mediated by shared defense counsel produces an equivalent effect. What the precautionary measure prevents at the external level – the coordination of accounts – cannot be tolerated at the internal level of the formation of the cooperative narrative.

From this observation emerges an interpretive proposal: Law 12.850/13 contains, implicitly, a principle of narrative non-communication among cooperating witnesses with mutually affected interests. This principle derives from the combination of the evidentiary nature of cooperation, the duty of truthfulness, the requirement of technical legal counsel, and the prohibition of conflicts of interest.

Conclusion

Plea bargaining agreements, as a means of obtaining evidence, require an institutional environment that guarantees the narrative autonomy of the cooperating witness. The independence of the defense, in this context, does not constitute a mere ethical requirement, but rather a structural condition for the realization of the duty of truthfulness and for the reliability of the evidence produced.

The parallel with the precautionary measures that prohibit communication between investigated parties deepens this understanding, demonstrating that the legal system already recognizes the need to prevent the contamination of evidence through the alignment of accounts. The extension of this logic to the field of plea bargaining agreements leads to the recognition of an implicit principle of narrative non-communication.

the institution. The concern is not merely to protect individual rights, but to preserve the integrity of the evidence, the quality of the investigation, and the legitimacy of criminal prosecution within the Rule of Law.

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