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NEWS AND DEVELOPMENTS

PLEA BARGAINING AGREEMENTS IN THE BRAZILIAN LEGAL SYSTEM AND THE IMPACT OF NEW TECHNOLOGICAL TOOLS: AN ANALYSIS IN LIGHT OF THE CASE LAW OF THE STF AND ADPF 919

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ABSTRACT (PORTUGUESE)

case law of the Supremo Tribunal Federal (STF), integrating this analysis with the context of modern technological tools for criminal investigation. Through the scrutiny of the claims raised in ADPF 919 (filed by the Partido dos Trabalhadores) and ADI 5508, as well as the submissions of the Advocacia-Geral da União (AGU) and the Procuradoria-Geral da República (PGR), the inadequacy of abstract judicial review as a means to reshape boundaries already established by the Supreme Court is demonstrated. The legal nature of the plea bargaining agreement, the limits of corroborative evidence, and the complementarity of cooperation with cyber intelligence solutions such as Maltego and Social Links are discussed.

Keywords (Portuguese): Colaboração premiada; Supremo Tribunal Federal; ADPF 919; Criminal investigation; OSINT.

ABSTRACT

This article examines the institute of plea bargaining (colaboração premiada) under the framework of Law No. 12,850/2013 and the case law of the Brazilian Supreme Court (STF), integrating this analysis with the context of modern technological tools for criminal investigation. Through the scrutiny of the claims raised in ADPF 919 (filed by the Workers' Party) and ADI 5508, as well as the positions of the Attorney General's Office (AGU) and the Prosecutor General's Office (PGR), the article demonstrates the inadequacy of abstract judicial review to reshape boundaries already established by the Supreme Court. The study discusses the legal nature of plea bargaining agreements, the limits of corroborative evidence, and the complementarity of cooperation with cyber intelligence solutions such as Maltego and Social Links.

Keywords: Plea bargaining; Brazilian Supreme Court; ADPF 919; Criminal investigation; OSINT; Corroborative evidence; Organized crime; Administrative sanctions law.

INTRODUCTION

- The complexity of contemporary organised crime has imposed upon the Brazilian State the need to modernise its prosecutorial arsenal. In this context,

Crime Act (Lei nº 12.850/2013), has established itself as an important and strategic tool for the dismantling of structured criminal networks.

- Far from operating in isolation, the plea bargaining agreement forms part of an ecosystem of extraordinary means of obtaining evidence, aligning itself with instruments such as the infiltration of agents and the use of Open Source Intelligence (OSINT) cyber tools, such as the Maltego platform[1] and Social Links[2]. Maltego, with its advanced capacity for *link analysis*, enables the massive cross-referencing of data for asset tracking and identification of front persons within a matter of hours[3], whilst Social Links enables the in-depth mapping of digital identities, activity on the *dark web* and cross-referencing of metadata from messaging applications such as WhatsApp and Telegram[4]. These mechanisms are further complemented by sophisticated remote access and signal interception tools (such as the Pegasus system and *IMSI catchers*), whose use by state agencies, although challenging from the standpoint of constitutional limits, was validated by the absence of an injunctive prohibition within the scope of ADPF 114, under the rapporteurship of Justice Alexandre de Moraes, at the STF[5].
- In light of the imminent judgement of the Arguição de Descumprimento de Preceito Fundamental (ADPF) No. 919, filed by the Partido dos Trabalhadores (PT)[6], it becomes essential to detail the legal and operational contours of the plea bargaining agreement. The said action challenges the interpretive limits of the institute, which demands caution, given that the hermeneutic consolidation of Lei nº 12.850/2013 has already been the subject of extensive prior deliberations by the Supremo Tribunal Federal, notably in the judgement of ADI 5508[7], which endorsed the capacity of the Judicial Police to negotiate the agreement, in addition to a vast body of case law focused on the preservation of legal certainty.

LEGAL NATURE OF THE PLEA BARGAINING AGREEMENT

- In Brazilian law, the plea bargaining agreement possesses a dual legal nature, expressly recognised by the STF: it constitutes, simultaneously, a **procedural legal transaction** and a **means of obtaining evidence**[8].

of using plea bargaining agreements to support convictions without external corroborative elements, whether in criminal law or in administrative sanctions law.^[9]

- Within this contractual context, the case law of the STF has also consolidated the attributions of state agencies. In the landmark judgement of ADI 5508^[10], with the masterful vote of Justice Celso de Mello^[11], the Supreme Court declared the constitutionality of §§ 2 and 6 of art. 4 of Lei nº 12.850/2013, ensuring that the Federal Police and the Civil Police forces, presiding over police inquiries, possess full legitimacy to negotiate and conclude plea bargaining agreements, the Public Prosecution Service not holding a monopoly over this instrument. The participation of the Public Prosecution Service (MP), in this scenario, occurs through the issuance of a prior opinion (albeit non-binding upon the judge) during the course of the police inquiry, preserving the investigative balance.
- When analysing the institute as a **means of obtaining evidence** (*mezzi di ricerca della prova*), it is distinguished from evidence itself (*mezzi di prova*). The Supremo Tribunal Federal established the premise that the statements of the cooperating witness ontologically possess a reduced evidentiary value (*quid minus*) arising from their impure source^[12]. Therefore, the word of the informant, in order to be vested with evidentiary aptitude and reliability, incontestably requires the duty of truthfulness of the cooperating witness coupled with the existence of **external corroborative elements**^[13].
- Sob a perspectiva da jurisprudência do STF, os external corroborative elements devem emanar de fontes autônomas e diversas da própria delação (documentos, laudos periciais, escutas telefônicas)^[14]. In this regard, the rejection of the so-called exclusive “cross-informing” (delação cruzada) (*mutual corroboration*), a situation in which the sole element corroborating one plea bargaining agreement is another plea bargaining agreement^[15].
- In this same context, the elements brought by the cooperating witness, such as recordings, e-mails, copies of documents, and even bank statements, are considered internal elements of the cooperation, such that they must equally be corroborated by external elements. Indeed, one of the greatest errors in

to the annulment of many plea bargaining agreements.

- Proceeding further, it is worth recalling that the current system, including as supported by the case law of the STF, safeguards the duty of truthfulness of the informant and the guarantee of voluntariness, which must be preserved in combating the industry of plea bargaining agreements that arose due to the absence of control over conflicts of interest of lawyers who act simultaneously for informants and those informed upon, or of individuals who inform upon one another.
- Notwithstanding, there is no legal lacuna to be filled by a new ADPF, there being merely the need for greater rigour on the part of the authorities in complying with the existing law.
- Similarly, ADPF 919 is well-intentioned in seeking to prohibit the remuneration of informants by another informant, as was recently witnessed in Brazil: informants of a company, at a lower echelon than the owner – who was also an informant –, all represented by the same legal structure, received bonuses for informing.
- It is not necessary to adjudicate this ADPF to curb this practice. It is plainly evident that Lei nº 12.850/2013 prohibits coordinated and pre-arranged plea bargaining agreements. This collective architecture of informing, a veritable collusion amongst informants, is a reprehensible practice and antithetical to the essence of the said legislation.
- Nevertheless, this may well have been one of the grounds for the explosion of so many distorted plea bargaining agreements in the recent Brazilian context. It is by no means a matter of suggesting the absence of the need for the Supremo Tribunal Federal itself to refine its case law in due course, but merely of demanding greater rigour from the constituted authorities regarding compliance with the current provisions of Lei nº 12.850/2013.
- This is a requirement that imposes respect for the duty of truthfulness of the cooperating witness and the prevention of conflicts of interest amongst lawyers.

- ADPF 919, brought by the PI, seeks to establish "constitutional parameters for the interpretation and application" of the plea bargaining agreement, by means of the technique of *interpretation in conformity with the Constitution*[16]. The initial petition raises seven hypotheses of unconstitutionality based on alleged abusive practices:
- **Cross-informing (Delação cruzada):** Impossibility of grounding precautionary measures or sentences solely on the basis of reciprocal cooperation agreements.
- **Order of submissions:** Requirement, under penalty of absolute nullity, that the accused who has been informed upon always speaks after the informant.
- **Limitation of clauses:** Allegation that the advantages offered to the cooperating witness are restricted to an exhaustive statutory list, it not being within the competence of the MP to establish atypical benefits.
- **Venal informing (Delação venal):** Illegality in the conclusion of plea bargaining agreements mediated by payment from third parties.
- **Challenge by third parties:** Argument that would extend to the accused who has been informed upon (third party) the right to challenge the ratified agreement.
- **Unlawful pre-trial detention:** Presumption of lack of voluntariness when the cooperation is carried out by a defendant unlawfully detained.
- **Belated cooperating witness:** Violation of the principle of equal treatment by conferring greater benefits upon those who cooperate after sentencing.

Arguments of the Advocacia-Geral da União (AGU):

- The AGU argued for the non-cognisance of the action on the basis of non-compliance with the **principle of subsidiarity** (art. 4, § 1, of Lei 9.882/99), noting that the ADPF purports to act as a veritable "appellate surrogate"[17]. On the merits, the AGU refutes the arguments by demonstrating that the Anti-Crime Act (Lei nº 13.964/2019) itself already enshrined that no measure shall be decreed on the basis "solely" of the statements of the cooperating witness

procedural principle of *pas de nullité sans grief* (art. 563, CPP)[19]. Furthermore, the AGU defended the contractual flexibility of the clauses subject to judicial ratification and rejected the intervention of third parties[20].

Arguments of the Procuradoria-Geral da República (PGR):

- The submission of the PGR fully corroborated the applicability of the lack of subsidiarity, asserting that there are suitable procedural means to remedy any individual grievances[21]. The PGR argued that the conforming interpretation cannot serve to create "new norms" (the STF acting as a positive legislator) [22]. It refuted the restrictions on the validity of the agreement, underlining that abuses or defects of consent inevitably depend on the subjective and factual analysis inherent to each case. Additionally, the PGR highlighted the efficient internal system of checks and balances, whereby the agreements are submitted for review by the Câmaras de Coordenação e Revisão of the MPF[23].

CONCLUSION

- The thorough dogmatic analysis of the case law of the Supremo Tribunal Federal amply demonstrates the inefficacy and futility of the claim raised in ADPF 919. The author of the said action seeks to establish interpretive rules regarding guarantees that are already exhausted and supported by the current statutory text and the overwhelming hermeneutics of the Supreme Court.
- As aptly noted by Judge Rodrigo Capez, when analysing the case law of the STF in the context of the Colaboração Premiada[24], a rejeição à famigerada delação cruzada exclusiva já constitui axioma lógico do sistema probatório: “O § 16 do art. 4º da Lei 12.850/13, ao não admitir a condenação baseada exclusivamente nas declarações do delator, implica uma limitação ao livre convencimento. É insuficiente para o fim de corroboração exigido pelo § 16, que o elemento de confirmação de uma delação premiada seja outra delação premiada”.
- With regard to the claim to allow third parties who have been informed upon to challenge the judicial decision ratifying the agreement, this contention comes

STF in the aforementioned **HC 127.483/PR**[25]: "Por se tratar de um procedural legal transaction personalíssimo, o acordo de colaboração premiada não pode ser impugnado por coautores ou partícipes do colaborador na organização criminosa e nas infrações penais por ela praticadas"[26]. And this understanding remains settled in the Court, having been replicated in judgements such as **HC 142.205/PR**[27].

- Finally, the intended standardisation of automatic invalidities by ADPF 919 disregards the complex evidentiary mechanism and the utility of phenomena such as the fortuitous discovery of evidence (serendipity validated in **Inq. 4.130-QO** and in **Pet 7.074-QO/DF**)[28].
- The advancement in the elucidation of criminal networks demands the rational and strategic use of predictive and cyber technologies articulated with police and prosecutorial investigations, without the exceptional procedural architecture delineated by the plea bargaining agreement suffering setbacks disguised as abstract guaranteeism. The national legal system, refined by the collegiate decisions of the STF, possesses concrete ratification filters capable of remedying any defects (*in concreto*), which entirely empties the diffuse and generalist object claimed in ADPF 919.

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[8]CAPEZ, Rodrigo. The plea bargaining agreement in the view of the Supremo Tribunal Federal. Cadernos Jurídicos da Escola Paulista da Magistratura, São Paulo.

[9]Vale lembrar, a esse respeito, o precedente estampado no Inquérito n. 3.998/DF (Rel. Min. Edson Fachin, Red. do acórdão Min. Dias Toffoli, Segunda Turma, j. 18 dez. 2017), no qual se firmou o entendimento de que a colaboração premiada, como meio de obtenção de prova, pode deflagrar a investigação criminal, mas não fundamenta, isoladamente, o oferecimento da denúncia ou eventual condenação, quando ausentes elementos externos de corroboração. Consta do julgado que “os depoimentos do colaborador premiado, desacompanhados de outras provas idôneas de corroboração, não possuem densidade suficiente para lastrear um juízo positivo de admissibilidade da acusação, o qual exige a presença do *fumus commissi delicti*”. Confira-se, a propósito, o Mandado de Segurança n. 37.810/DF (Rel. Min. Nunes Marques, decisão monocrática de 28 jun. 2021), no qual se assentou a necessidade de elementos externos de corroboração para a validade de colaborações

Min. Gilmar Mendes, decisão monocrática de 20 dez. 2023), na qual se concedeu habeas corpus de ofício para trancar a ação penal, em razão da inadmissibilidade da denominada “delação cruzada”. Em matéria de Direito Administrativo Sancionador, especificamente na área da improbidade administrativa, o Supremo Tribunal Federal editou o Tema 1043, com repercussão geral, para proibir o uso de colaborações premiadas sem elementos de corroboração.

[10]BRAZIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade No. 5.508/DF. Rapporteur: Justice Marco Aurélio. Adjudicating Body: Tribunal Pleno. Decided on 20/06/2018.

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[12]BRAZIL. Supremo Tribunal Federal. Habeas Corpus No. 127.483/PR. Rapporteur: Justice Dias Toffoli. Adjudicating Body: Tribunal Pleno. Decided on 27/08/2015.

[13]It must not be forgotten that the Supremo Tribunal Federal itself has already consolidated the understanding that plea bargaining agreements apply to the field of Administrative Sanctions Law, which governs Lei nº 8.429/92 and Lei nº 12.846/2013. In this regard, it is worth noting the precedent set in Mandado de Segurança No. 37.810/DF (Rapporteur: Justice Nunes Marques, monocratic decision of 28 June 2021), in which the need for external corroborative elements for the validity of plea bargaining agreements was established, including within the sphere of Administrative Sanctions Law.

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[18]Idem.

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[20]Idem.

[21]BRAZIL. Procuradoria-Geral da República (PGR). Opinion AJCONST/PGR No. 256707/2022 in the Arguição de Descumprimento de Preceito Fundamental No. 919/DF. Brasília: Supremo Tribunal Federal, June 2022.

[22]Idem.

[23]Idem.

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[25]BRAZIL. Supremo Tribunal Federal. Habeas Corpus No. 127.483/PR. Rapporteur: Justice Dias Toffoli. Adjudicating Body: Tribunal Pleno. Decided on 27/08/2015.

[26]Idem.

[27]BRAZIL. Supremo Tribunal Federal. Habeas Corpus No. 142.205/PR. Rapporteur: Justice Gilmar Mendes. Adjudicating Body: Segunda Turma. Decided on 25/08/2020.

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