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PLEA BARGAINING AS A MEANS OF OBTAINING EVIDENCE AND THE PRINCIPLE OF NEMO TENETUR SE DETEGERE: LIMITS AND GUARANTEES IN THE BRAZILIAN LEGAL SYSTEM

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ABSTRACT

The approach to the subject in question has the scope of analyzing plea bargaining as a means of obtaining evidence in the legal system, highlighting its compatibility with the principle of nemo tenetur se detegere, in which it safeguards the right of the accused not to produce evidence against himself. In summary, the approach highlighted the premises of the brevity of the historical evolution of plea bargaining as well as its insertion in the Brazilian penal system, especially after the enactment of Law No. 12,850/2013. The study sought to outline the limits and guarantees established for its application. The general objective was defined in analyzing plea bargaining as a means of obtaining evidence in the Brazilian legal system, highlighting the limits and guarantees in the light of the principle of nemo tenetur se detegere. The methodology addressed was defined by a literature review, followed by the qualitative form and the type of exploratory research, considering publications carried out in the time period from 2012 to 2024. Among the initial findings, the legal nature of the institute was verified, differentiating it from analogous institutes, such as plea bargaining, and analyzes the requirements for its validity, including the voluntariness of the agreement, the need for judicial approval and the observance of the fundamental rights of the collaborator. In addition, the research considers the challenges and criticisms that involve the use of plea bargaining as a means of obtaining evidence, especially with regard to the possibility of indirect coercion of the accused, the production of illicit evidence and the legal certainty of the agreements entered into. Therefore, despite being a relevant instrument in the fight against organized crime, its implication must be guided by respect

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for fundamental rights and guarantees, avoiding violations of the principle of nemo tenetur se detegere.

Keywords: Award-winning collaboration. Nemo tenetur se detegere. Taking of evidence.

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INTRODUCTION

The theme addressed highlights plea bargaining, as a means of obtaining evidence in the legal system, constituting an important tool in the fight against crime, specifically in crimes involved in criminal complexity, such as white-collar crimes and crimes related to criminal organizations (Santos, 2016).

In this sense, plea bargaining was regulated by Law No. 12,850/2013, where this institute enabled the investigated or defendant to mitigate or extinguish his sentence, through the provision of relevant information that could contribute to the elucidation of criminal offenses, identification of co-perpetrators and recovery of illicit assets, among other enabling contexts in the elucidation of crimes (Silva, 2014).

As exposed, the research and development problem of this article was guided by the following question: To what extent can plea bargaining be used without violating fundamental rights and guarantees, especially with regard to the voluntariness of the agreement and the placement of coercion or embarrassment on the employee?

The application of plea bargaining raises relevant legal discussions, especially with regard to its compatibility with the principle of *nemo tenetur se detegere*, which guarantees the individual the right not to produce evidence against himself. This principle, enshrined in the Magna Carta and in international treaties, to which the Democratic Rule of Law is a signatory, aims to ensure full defense and due process, preventing confessions obtained under coercion or inducement from violating the fundamental rights of the accused (Salvador, 2019).

In this context, the scope of this approach is to analyze the limits and guarantees inherent to plea bargaining in the Brazilian legal system, considering its practical applicability and the challenges imposed by the need to safeguard fundamental rights, associating its use as a guiding instrument and facilitator of the total or partial elucidation of criminal cases, without its usefulness violating the rights and guarantees of the accused (Santos, 2019).

To this end, the normative framework that regulates the institute was examined, as well as the interpretation given by the higher courts to its use, weighing its effectiveness as an investigative instrument and the risks of affront to the collaborator's procedural guarantees (Rios, Farias, 2018).

Among other factors, the research is also justified by the growing use of plea bargaining as a means of evidence and the legal debates that involve its application,

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especially in the face of emblematic cases that have raised questions about its legitimacy and compliance with constitutional principles (Wunderlich, 2017).

In this way, it seeks to contribute to the legal understanding of the contours and implications of this mechanism, evaluating its impact on criminal prosecution and the protection of the rights of the investigated or defendant (Pereira, 2013).

To achieve this objective, the methodology adopted will consist of bibliographic research in a qualitative exploratory way, considering publications carried out between 2012 and 2024, focusing on national and international legal doctrine, in addition to the examination of paradigmatic decisions of the Federal Supreme Court and the Superior Court of Justice.

Based on this approach, a critical overview of plea bargaining was outlined in the light of the principle of *nemo tenetur se detegere*, highlighting the challenges and perspectives that permeate the use of this instrument in the Brazilian legal scenario (Mendroni, 2016).

ANALYSIS OF PLEA BARGAINING AND THE NEMO TENETUR SE DETEGERE PRINCIPLE: LEGAL AND CONCEPTUAL PERCEPTIONS

The analysis of plea bargaining is one of the most debated criminal procedural institutes in society, specifically in the context of the fight against organized crime.

Initially, it should be noted that all the formulation related to plea bargaining, as well as to the other institutes that aim to negotiate with the accused, in favor of means of elucidating the crime, voluntariness must precede its entire approach, as demonstrated in the teachings of Badaró (2016, p.89) highlighted below:

> Voluntary comes from the Latin *voluntarius*, a, one, meaning "who acts of his own will". A voluntary act is, therefore, an act that one can choose to practice or not. It is an attribute of those who act only according to their will. Or, to define it negatively: voluntary is the action that is not forced. On the other hand, that imprisonment is coercion, is what the Constitution itself says, ensuring habeas corpus for those who suffer "coercion in their freedom of movement", illegally.

It should be noted that voluntariness is, above all, a decisive factor in the validity of plea bargaining.

However, considering the analysis of the nemo *tenetur se detegere principle,* in which it guarantees the individual the right not to produce evidence against himself, it

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emerges as a primary counterpoint in the analysis of the legitimacy and limits of plea bargaining (Almeida, 2021).

In this context, according to the teachings of Capez (2012), plea bargaining consists of the statement made by the person of the accused, who in the act of interrogation in court or when questioned by the police authority. Thus, when confessing to the authorship or participation of the crime, he equally attributes the authorship and materiality to other criminals.

According to the teachings, Nucci (2016, p. 326) highlights the concept and context of legal employability of plea bargaining, allowing a better understanding of its institute, as highlighted below:

> To collaborate means to provide assistance, to cooperate, to contribute; associating itself with the term awarded, which represents advantage or reward, extracts the meaning of criminal procedure for the investigated or accused who uses it: admitting the criminal practice, as author or participant, reveals the competition of other(s), allowing the State to expand the knowledge about the criminal offense, with regard to materiality or authorship. Although the law uses the expression plea bargaining, it actually deals with plea bargaining. The institute, as provided for by law, is not intended for any kind of cooperation of the investigated or accused, but for that in which unknown data are discovered as to the authorship or materiality of the criminal offense. Therefore, it is an authentic denunciation, in the perfect sense of accusing or denouncing someone - vulgarly, debauchery.

As highlighted in the aforementioned excerpt, the use of the institute consists of the statement made by an accused, when being questioned in court or heard by the police. In addition to confessing to the authorship of a criminal fact, he also attributes to a third party the participation as an accomplice.

In addition, plea bargaining consists of a legal mechanism through which an investigated or defendant cooperates with the authorities by providing information relevant to the elucidation of crimes, with the aim of obtaining legal benefits, such as reduction of sentence or even extinction of punishability (Melo, 2019).

This institute is provided for in Law No. 12,850/2013, which regulates criminal organizations in Brazil, in addition to being provided for in specific legislation, such as Law No. 9,807/1999, which establishes witness protection standards, highlighting in article 3, item I, the use of collaboration at any time of criminal prosecution (Brasil, 2013).

In relation to the legal premises of Law No. 9,807/99, that the legislator guarantees protection to defendants who voluntarily collaborate in the elucidation of crimes, at the

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same pace as that determined in the protection of victims, as explained in the following form (Brasil, 1999):

> Article 13. The judge, ex officio or at the request of the parties, may grant judicial pardon and the consequent extinction of punishability to the accused who, being a primary offender, has effectively and voluntarily collaborated with the investigation and criminal process, provided that such collaboration has resulted: I - the identification of the other co-perpetrators or participants in the criminal action; II - the location of the victim with his physical integrity preserved; III - the total or partial recovery of the proceeds of the crime. Sole Paragraph. The granting of judicial pardon will take into account the personality of the beneficiary and the nature, circumstances, seriousness and social repercussion of the criminal act.

As noted, the legal nature of plea bargaining is the subject of doctrinal discussion, being considered sometimes as a means of obtaining evidence, sometimes as a modality of procedural legal transaction. The acceptance of the plea bargain is conditional on compliance with the legal requirements, highlighting the voluntariness and effectiveness of the information provided.

In the context of using the institute under study, it is of paramount importance to highlight the applicability of the principle *nemo tenetur se detegere*, originated in Roman law and widely recognized in modern legal systems, assures the individual the right not to incriminate himself. This principle is closely related to the right to silence, enshrined in article 5, item LXIII, of the Federal Constitution, and is essential to guarantee a fair criminal process (Brasil, 1988).

The protection conferred by this principle prevents any individual from being compelled to confess his or her guilt, and it is inadmissible to obtain evidence by coercive or abusive means. Thus, plea bargaining must respect the limits imposed by this principle, avoiding any form of coercion or undue inducement.

In this way, it is important to highlight the teachings of Lopes (2020, p.50) highlights that the right to silence does not allude to guilt to the accused, just as the adoption of plea bargaining also does not have repercussions on indirect confession, as highlighted in the excerpt quoted below:

> The right to silence is only a manifestation of a much greater guarantee, enshrined in the principle Nemo tenetur se detegere, according to which the taxpayer cannot suffer any legal prejudice for omitting to collaborate in an evidentiary activity of the prosecution or for exercising his right of silence during the interrogation. It should be emphasized: the exercise of the right of silence cannot give rise to any presumption of guilt or any type of legal prejudice for the accused. Thus, through the principle of Nemo tenetur se detegere, the taxpayer cannot be compelled to declare or even participate in any activity that may incriminate him or harm his defense.

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The interaction between plea bargaining and the principle nemo tenetur se detegere generates intense debates in doctrine and jurisprudence.

The main concern lies in the possibility that plea bargaining will become an instrument of pressure to obtain evidence, compromising the employee's voluntariness and violating his right to silence (Vasconcelos, 2017).

Considering the above-mentioned approach, it is necessary to highlight the analysis of the following table, in which it compares the premises of plea bargaining and the principle under study, as detailed below.

Table 01: Legal comparisons between definitions addressed by the national legislator

Criteria	Plea bargain	Princípio Nemo Tenetur Se Detegere
Concept	Legal mechanism where the accused or investigated person collaborates with justice, providing information on criminal offenses in exchange for previously defined legal benefits.	Legal principle according to which no one is obliged to produce evidence against himself, or in self-incrimination.
Legal basis	Law No. 12,850/2013	Article 5, item LXIII, of the Federal Constitution, Pact of San José de Costa Rica.
Legal nature	Agreement of a business nature between the investigated/defendant and the State, ratified by the Judiciary, the Public Prosecutor's Office.	Fundamental right of the accused, of an absolute nature in criminal proceedings.
Requirements	The investigated/defendant must voluntarily provide information that is relevant and practical for criminal prosecution.	Applicable to any individual investigated or charged in criminal proceedings.
Obligation	The investigated/defendant is not obliged to provide plea bargaining. Their participation must be spontaneous and voluntary, without coercion.	The accused cannot be compelled to confess, testify against himself or produce evidence against himself.
Benefits	Reduction of sentence, replacement of the custodial sentence with a sentence that restricts rights, even judicial pardon, according to the relevance of the collaboration.	It is not defined by a benefit, but by protection against abusive state coercion.
Waiver of the right to silence	The employee expressly waives the right to silence when signing the agreement, a factor that does	It must be guaranteed at all stages of the process, as the right to silence cannot be compulsorily renounced.

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	not compromise the violation of the right not to self-incriminate.	
Possibility of cancellation	It can be annulled if obtained through cooperation, fraud or illegality, or if the employee does not fulfill his obligations.	It is not annulled, as it is an inalienable right of the defendant, however, it can lead to the nullity of evidence obtained when it is illegal.
Context to the test	The information provided by the employee cannot be the only basis for communication, and must be corroborated by other evidence (article 4, paragraph 16, of Law 12,850/2013).	Any evidence obtained in violation of this principle can be considered illegal and null, as provided for in article 5, LVI, of the Constitution.
Jurisprudence	Operation Car Wash in the plea bargains of businessmen and politicians.	Requested in HC 93.050/STF, where the right of the accused not to produce evidence against himself was recognized.

Source: Author, 2025

Brazilian jurisprudence has sought to equate this tension by requiring that collaboration be carried out spontaneously and without any type of threat or constraint. In addition, the negotiation of benefits must take place under the supervision of the Public Prosecutor's Office and the Judiciary, ensuring the legality and morality of the agreement.

PLEA BARGAINING: LIMITS BETWEEN EFFECTIVENESS AND PROTECTION OF FUNDAMENTAL RIGHTS FROM THE PERSPECTIVE OF THE LAW, DOCTRINE AND JURISPRUDENTIAL DECISIONS

As verified, the plea bargain in no way correlates with the formulation of evidence against the whistleblower himself, given that its nature is defined in a negotiated way, where the state entity delivers benefits in exchange for clarifications from the whistleblower. Such action allows for a more assertive investigation by the Judiciary, in the midst of elucidating the facts (Lopes, 2020).

Thus, the limits between the effectiveness of plea bargaining and the protection of fundamental rights must be analyzed from three main perspectives: legislation, doctrine and controversy. Regarding the doctrinal definitions adopted as a source and legal basis among the legislator, it is verified that the doctrine diverges on the validity and limits of plea bargaining (Távora, Alencar, 2020).

Some scholars, such as Nucci (2020), argue that the institute is an advance in criminal prosecution, as it enables the dismantling of criminal organizations efficiently.

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On the other hand, Pacelli (2022) points to the risks of abuses by the Public Prosecutor's Office and the police, which can compromise constitutional guarantees, such as the right to a full defense and the right to be heard.

In short, it is verified that the recurrent criticisms consist of pointing out the possibility of manipulation of the truth by the collaborator, who can provide untrue information to obtain benefits. The alleged violation of the nemo *tenetur se detegere principle*, which prevents someone from being compelled to produce evidence against him (Capez, 2012).

In addition, another point among the criticisms made by the doctrinaires consists of the high risk and fragility in the midst of the political use of plea bargaining, as pointed out in several episodes of Operation Car Wash (Diniz, 2019).

Regarding the jurisprudential position, the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) have consolidated their understanding of the limits of plea bargaining. In the judgment of the Direct Action of Unconstitutionality - ADI 5526, the STF recognized the validity of the plea bargain agreement, but reinforced that it cannot be used in isolation as a means of evidence for conviction, and must be corroborated by other evidence (Dallas, Wunder, 2018).

In addition, in HC 127.483, the STF decided that plea bargaining cannot be compulsorily imposed on the investigated, reinforcing the need for collaboration to be voluntary and conscious (Lima, 2020).

The investigation plays a fundamental role in the application of plea bargaining, as it interprets and complements the legislation, ensuring legal certainty and uniformity in decisions. As Law No. 12,850/2013 establishes general guidelines, the supervision of the higher courts, especially the STF and the STJ, define parameters for the validity of the agreements, the limits of judicial action and the rights of employees (Brito, 2016).

In order for plea bargaining to be an effective instrument and at the same time respect fundamental rights, some principles must be observed in a subsidiary way to the principle of prohibition of self-incrimination, such as voluntariness, where collaboration must be provided spontaneously, without restraint or abusive promises, corroboration, where no conviction should be based exclusively on plea bargaining, there must be independent evidence that confirms the facts reported and the jurisprudential control defining that the judicial control must supervise the legality of the agreements, preventing them from becoming instruments of excessive pressure on the investigated (Bitencourt, Bisato, 2014).

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The following table highlights the steps to be followed in the midst of the formalization and ratification of the plea bargain, from the perspective of limits and legal efficiency, as demonstrated:

Table 02: Formalization and ratification of plea bargaining

Stage	Definition	Legal basis	Stakeholders and attribution
1st - Expression of interest	The investigated or defendant expresses interest in collaborating with the Justice, providing useful information to the investigation.	Article 4 of Law 12,850/2013	Public Prosecutor's Office, Police, Judge
2nd - Negotiation of the agreement	Definition of the conditions of collaboration, including benefits and obligations. It must be voluntary and involve the presence of a lawyer.	Article 4, paragraph 6 of Law 12,850/2013	Public Prosecutor's Office, Defense, police authority, if there is no investigation
3rd - Formalization of the agreement	The agreement must be in writing, containing specific terms, including confession, indication of evidence and commitment to veracity.	Article 6 of Law 12,850/2013	Public Prosecutor's Office, Defense, Judge (homologation) .
4th - Judicial approval	The judge analyzes the legality, voluntariness and adequacy of the agreement, and may deny or provide.	Art. 4, §7, 8 and art. 7 of Law 12.850/2013	Public Prosecutor's Office, Police Chief, Judge, Lawyer or Public Defender

Source: Author, 2025

In addition, judicial approval is essential for the benefits agreed upon in the agreement to have legal validity, ensuring security for both the whistleblower and the Justice.

Based on the above, considering the teachings of Cavali (2017, p 261) points out the importance of the contribution of the whistleblowing institute, in the midst of crimes of great complexity, of elucidative responsibility of police entities in Brazil.

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> Its relevance is indisputable: through plea bargaining, the Federal Police and the Federal Public Prosecutor's Office have been able to understand, demonstrate and prove the operation of complex criminal corruption schemes that would probably never be unveiled through traditional means of investigation.

In general, article 4, paragraph 6, of Law No. 12,850/2013 establishes that the statements of the whistleblower, in order to be accepted, must be accompanied by evidence or other elements that corroborate the information provided. In other words, a simple word from the whistleblower is not enough to substantiate an accusation against him or other individuals. The information provided must be proven in conjunction with the evidence that can be confirmed (Bottino, 2016).

Regarding the self-incrimination of the whistleblower, the STF settled that the plea bargain cannot be used as a means to produce evidence against him. The statements ensure that their destination is used in a valid manner, they must be accompanied by independent evidence that confirms the facts narrated. This ensures that the whistleblower is not harmed or incriminated solely for his collaboration, protecting his right to a full defense and adversarial proceedings (Aires, Fernandes, 2017).

FINAL CONSIDERATIONS

Therefore, plea bargaining and the principle nemo tenetur se detegere are fundamental institutes in criminal procedural law, whose balance is essential to guarantee a fair trial.

Respect for the voluntariness of the collaborator and the requirement of control mechanisms are essential to avoid abuses and preserve the fundamental rights of the investigated.

Jurisprudence has played a fundamental role in delimiting the contours of plea bargaining, ensuring that its application occurs within constitutional parameters.

Thus, the challenge lies in ensuring that the institute is used in a balanced manner, in order to contribute to the efficiency of criminal prosecution without compromising individual rights and guarantees.

It should be noted that other legal sources attribute benefits similar to those contemplated in plea bargaining, such as Laws No. 9,807/1999, which regulates the witness protection program, and Law No. 8,072/1990, on which the law of heinous crimes is based.

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In addition, it is important to highlight that the improvement of the institute requires a constant doctrinal and jurisprudential debate, ensuring a balance between effectiveness in criminal investigation and the protection of individual guarantees.

In this way, plea bargaining can continue to be a valid and effective instrument within the Democratic Rule of Law, without compromising the pillars of justice and legal certainty.

In practice, this means that, although the information provided by the whistleblower can be fundamental to dismantle criminal organizations or complex clear crimes, it cannot be used in a way that the skills of the whistleblower himself without proper external proof.

If the plea bargain is used as an incriminating element without corroborating the allegations with additional evidence, the collaboration agreement may be undone, and the agreed benefits may be revoked.

In short, plea bargaining is an effective investigative tool, but its use is regulated in order to preserve the rights of the whistleblower. The principle of non-self-incrimination ensures that collaboration is not used as a mechanism of revenge, avoiding injustices and ensuring that the whistleblower is treated appropriately, based on evidence and not just on his statements.

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