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Reevaluating Confession as Evidence in Terminated Non-Prosecution Agreements in Brazilian Criminal Procedure

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ABSTRACT

This article examines the legal and constitutional implications of using confessions obtained during the negotiation of a Non-Prosecution Agreement (NPA) in Brazilian criminal procedure, particularly when such agreements are terminated due to non-compliance by the investigated individual. The analysis begins by tracing the evolution of negotiated justice within criminal law, highlighting the growing importance of consensual resolution mechanisms as alternatives to traditional punitive models. A key focus is the requirement of a detailed confession as a condition for entering into an NPA, raising questions about the balance between efficiency in criminal proceedings and the protection of fundamental rights, including the right against self-incrimination. The constitutionality of this confession requirement is evaluated in light of Brazilian jurisprudence and constitutional principles. Further, the article explores the evidentiary weight of such confessions if the agreement is later terminated, especially regarding their admissibility and legitimacy in subsequent prosecutions. Through a review of case law and doctrinal interpretations, the paper assesses the potential risks of coercion and procedural unfairness when confessions intended for negotiation are later repurposed as incriminating evidence. The methodology employed is primarily deductive, supported by doctrinal, jurisprudential, and legislative analysis. Ultimately, the article argues for clearer legal safeguards to ensure confessions made during NPA negotiations are not misused, reinforcing the legitimacy and fairness of negotiated criminal justice in Brazil.

Keywords: Non-prosecution Agreement, Confession, Criminal procedure, Negotiated Justice, Constitutional Rights.

INTRODUCTION

In this article, we intend to verify the constitutionality of the related confession formal and circumstantial requirement dthe criminal practice by the investigated, to enter into the non-criminal prosecution agreement, and, also, in the event of termination of this agreement, the possibility of using this confession as a means of evidence against the person under investigation.

Therefore, the article is divided into four parts: initially, it addresses the history of consensus mechanisms in the criminal sphere, ; subsequently, consider the constitutionality of the non-prosecution agreement and the confession requirement, subsequently, it is the assessment of confession in the event of termination; finally, a case law analysis relevant to this topic is presented.

The development of the article was based on valuable doctrinal lessons and, above all, judgments from the Superior Courts brasileiras, as well as from the state Courts of Justice, always confronting doctrine and jurisprudence.

From the conclusion of this article, it is possible to infer important aspects relating to non-prosecution agreements, especially as regards the Brazilian jurisprudential trend.

Negotiated Justice, Efficiency and the Brazilian Criminal Process

When trata daNegotiated Justice in criminal proceedings, ou seja, da Justiça plasmada no consenso, the idea that immediately arises is linked to the binomial has p-efficiency , o que and entails some recurring mistakes or, at least, Manichaean exaggerations that deserve analysis.

On one side, the defenders of the so-called results process, seeking maximum procedural efficiency and economy; on the other side, the detractors of the expression efficiency, who see in this system a form of limitation of individual rights and guarantees and, portanto, uma affront to the guarantor axioms.

The Role of Negotiated Justice in Criminal Proceedings

This prejudice may originate from the use of the concept eficiênciain other branches of science, such as economics and a administration.

In Dlaw, however, the concepts of efficiency and effectiveness are easily identifiable according to the intended purpose of the process (instrumental ,guarantee against state arbitrariness eor set of instruments and procedures to ensure the rights and guarantees of the parties within a fair process). Effectiveness, however, which is the achievement of the true result itself, appears ,in the area of Dlaw, especially the legal Pprocess P, as something quite fluid: social peace, ,validity of the Estate of Dlaw or public security, preservation of human dignity.

In other words, in terms of Dprocedural Plaw P, the concepts of efficiency, efficacy and effectiveness – according to the different ideological perspectives they may deserve – must be combined to seek an adequate concept and results.

It does not seem possible, in a Democratic State of Law, to conceive of a process that seeks, at all costs and with maximum procedural economy, punishment, just as it is not reasonable that ,in the name of the supposed preservation of the guarantee premises, the abuse in the use of a false system of rights and guarantees, in order to sacrifice public safety and social peace (Barros, 2021).

In short, it is not through a mathematical and economic formula that social peace will be achieved, ,nor ,through utopian and philosophical digressions that a fair result can be ensured in the process, free from state arbitrariness.

Therefore, an efficient criminal process has a clear instrumental, concrete, empirical character, within a system of rights and guarantees of the parties, assured in a procedure that develops within a reasonable period of time, in order to achieve a fair result.

NFrom this perspective, it is perfectly possible to reconcile the consensual criminal process, abbreviated procedures and typical rules of the oral process, with a process inspired by guarantees and not rhetorically paternalistic.

There are those who categorically deny ,the instrumental nature of the process, with an argument that borders on eristic syllogism, that is, that consensus ,in criminal matters ,will represent the termination of individual rights and guarantees, which are not compatible with the dispositive power of the parties (Brasileiro De Lima, 2018).

Reconciling Efficiency, Efficacy, and Effectiveness in Legal Systems

The mistake din this understanding seems to be centered, firstly, on the Manichean idea ,that contrasts the state's punitive power eand the individual guarantees that emanate from due process of law , sem admitir a conjugação de ambos; secondly, on the false premise that a consensual criminal process is irreconcilable with the preservation of individual rights and guarantees and due process of law, this is because, in the first case, the right at stake is of a patrimonial, private and disposable nature; and the second hypothesis deals with the public and unavailable interest.

For radical advocates of this point of view, the defendant is not the object of the process., as if considerava at the origin of the process ,and not even a subject of rights , as it is seen in contemporary law , but an authentic object of academic study and the process is nothing more than a phenomenon to be dissected and studied, without more (Costa Tourinho Filho, 1997).

In other words, the accused in this criminal proceeding is deprived of his self-determination. He is an entity devoid of will and who does not have the capacity to evaluate, for himself, what would be the best and most convenient way to face the estate option in the face of the reactive route adopted, that is, consensus or conflict.

Com efeito, ofalse concept that consensus and guarantees are institutes that ,necessarily ,oppose and exclude each other, perhaps it is based on a model of Negotiated Justice originating from DNorth American -alaw , whose vices will find consistent protection in the Brazilian system, in which, among other techniques, the so-called

ninquisitorial system is adopted , which does not remove the judge's investigative power and does not place him as a mere inert spectator, even allowing him, when necessary, to declare the defendant defenseless (Demercian, 1999).

It is important to note, on the other hand, that the final part of art. igo129, I, of the Federal Constitution, when using the expression “in the form of the law ”, makes it clear that the obligation does not arise directly and expressly from a constitutional rule, and it is up to the law to determine the limits and hypotheses for the exercise of the right of action.

In this last aspect, it is possible to identify at least three major schools of thought: (a) there are those who defend the adoption of a system based strictly on mandatory nature; (b) in a diametrically opposite direction, there are those who idealize a supposed new era in procedural law, advocating the imperative need to adopt a more flexible and agile method for resolving disputes, which would be based, precisely, on the adoption of the principle of opportunity; (c) finally, there are those who defend the coexistence and conciliation of the two previous methods (Demercian & Ponte, 2020).

In Brazil, this principle, arising from articles 24 and 28 of the Code of Criminal Procedure, is also linked to the principle of unavailability of public criminal action, establishing that the Public Prosecutor's Office cannot dispose of or withdraw from ongoing proceedings.

The Debate: Mandatory vs. Opportunistic Models of Action

It cannot be denied that the canon of obligation is one of the essential supports of the so-called Rule Democrático of Law, vez queits purpose is to protect Criminal Justice from suspicions and temptations of partiality and arbitrariness. na medida em que submits the actions of public bodies to the Destablished law; evidenciando queit is unreasonable é to exercise criminal action based on fluid political criteria and social utility (Demercian Rocha Almeida De Moraes, 2017).

Despite this, for a long time ,these principles were placed as constraints on the actions of the criminal prosecution body. However, the principle of mandatory action cannot be considered as a blind imposition to initiate criminal proceedings, even when it proves to be completely useless and counterproductive. , especialmente, considerando queThere is a real trend ,worldwide ,towards the so-called “criminal proceedings of results”, marked by consensus and not by conflict (Ferreira Mendes, 2012).

EssaThe trend aims, in short: (a) to resolve disputes quickly and efficiently; (b) to reduce bureaucracy in the justice system and bring it closer to consumers; (c) to allow judges and public prosecutors, more than just solvers of problems and illnesses, to adopt a preventive stance and, when this is not possible, to mediate conflicts.

Nthis context, estáinsert idaConsensual Justice , in which it is possible to identify the models of negotiated Jjustice N(criminal transaction, conditional suspension of the process, award-winning collaboration ,, etc. .). Therefore, a clear antinomy and opposition between consensus and imposed or conflictual justice is evident 12.

Nesse sentido, aConstitution of the Republic of 1988, in art. igo98, caput and Section I, paved the way for the beginning of negotiated Jjustice N, in the criminal sphere, and, consequently, for the mitigation of the mandatory nature of criminal action, by encouraging the infra-constitutional legislator to create courts for cases of low offensive potential, promoting conciliation and rapid procedures.

The law in question also innovated by providing for the benefit of conditional suspension of the process, according to which, once subjective and penalty requirements have been met, the perpetrator of the act, already reported ,and, after the start of the criminal action, may benefit from the extinction of the punishability, through compensation for the damage and compliance with other conditions, for a period of two to four years.

However, Law nº 9.099/ 95 was not the only one to provide for negotiated 19justice Ninstruments Jin the criminal sphere.

In 1990, that is, just two years after the enactment of the 1988 Constitution of the Republic, the Heinous Crimes Act, Law nº 8.072/ 1990, in Article igo7, acrescentou o parágrafo 4º ao artigo 159 do Código Penal, relativo ao establishes ndothe possibility of an agreement between the Public Prosecutor's Office and the person under investigation, to reduce the sentence by one to two thirds, in cases where the crime was committed by a gang or group, and the co-author filed a complaint with the authorities, facilitating the release of the kidnapped person. Six years later, prioritizing the rescue of the victim, Law nº 9.269/ 1996 was enacted, to allow the reduction of the sentence for the collaborating agent, including in the case of simple co-authorship.

Also in 1990, Law nº 8,137/ 1990 was enacted, which dealt with crimes committed against the tax and economic order and against consumer relations. The aforementioned legal diploma also provided for a reduction in the sentence, from one to two thirds, in order to benefit the agent who confessed the crime voluntarily to the

police or judicial authority, revealing the criminal plot, in cases of gang or co-authorship (Gomes De Vasconcellos, 2023).

In response to global concerns about the expansion of criminal organizations, Law nº 9,034 was enacted in 1995, the first legal instrument focused on combating organized crime , atualmente revogado. The aforementioned law was responsible for the provision, still broad, of a new consensus mechanism: the reduction of the sentence, from one to two thirds, mediante the spontaneous collaboration of the agent who facilitated the clarification of crimes committed by criminal organizations and their authorship.

Posteriormente, aLaw nº 9.613/ 1998 regulated the crime of money laundering in the Brazilian legal system. In addition, this legal instrument introduced a negotiated Jjustice mechanism N, by regulating that the sentence may be reduced by one to two thirds and served in an open or semi-open regime, with the judge having the right to refrain from applying it or replace it, at any time, with a penalty restricting rights, if the author, co-author or participant ,voluntarily collaborates ,with the authorities, providing clarifications that lead to the investigation of the criminal offenses, the identification of the authors, co-authors and participants, or the location of the assets, rights or values that were the object of the crime. This is an important legal provision, since, for the first time, it was allowed to change the regime of serving a custodial sentence, replacing it with a restriction of rights and exempting the application of a penalty as a reward to the collaborating agent, in addition to the reduction of the sentence itself.

In 2013, through Law nº 12,850, which deals with the fight against organized crime, plea bargaining was duly regulated in the Brazilian legal system, establishing even more relevant benefits to the collaborating agent: 1) judicial pardon; 2) reduction of the custodial sentence by up to two thirds; 3) replacement of the custodial sentence with a restrictive right. In addition, in 2019, through an amendment made by Law nº 13,964, it was foreseen that the Public Prosecutor's Office may not file the complaint, in cases where the proposal for a collaboration agreement refers to a criminal offense of the existence of which it had no prior knowledge, as long as the collaborator is not the leader of the criminal organization and was the first to provide effective collaboration.

As can be seen, the Brazilian legal system has come a long way until the advent of Law da Lei nº 13,964/2019, which considerably expanded Negotiated Justice in criminal matters, by establishing the non-criminal prosecution agreement.

NON-PROSECUTION AGREEMENT

Law nº 13,964/2019 innovated the Brazilian legal system by introducing incluir Article igo28-A nof the Code of Criminal Procedure, a fim dewhich allows tar athe conclusion of a non-prosecution agreement, when it is not a case of archiving and the person under investigation has formally and circumstantially confessed to committing a criminal offense without violence or serious threat and with a minimum sentence of less than four years.

This is the provision of an important extra-procedural legal instrument, which seeks to establish bilateral agreements between the Public Prosecutor's Office and the offender of criminal legislation, so that the latter complies with previously agreed measures, which must be sufficient and necessary for the reprobation and prevention of crime (Lauria Tucci, 1986).

Although this is an agreement, there is no doubt that there is a conflict of interests between the parties involved. However, as Francisco Dirceu Barros teaches, "... in order to avoid judicialization and all procedural procedures, both interested parties make mutual concessions within parameters established by law to consensually stipulate the application of alternative measures to imprisonment".

Among the mutual concessions, it is worth noting that the Law established as a requirement, for the conclusion of the non-prosecution agreement, the formal and detailed confession of the crime. At this point, it is important to emphasize that it is not enough for the person being investigated to confirm the facts described in the investigation. For Rodrigo Leite Ferreira Cabral, "it must be something detailed, accompanied by a sufficiently coherent and convincing narrative about the criminal practice, to the point of conveying consistency and veracity".

The confession of the crime is a consideration by the person under investigation, which is added to the evidentiary framework existing in the investigation, and, therefore, must occur at the time of the conclusion of the agreement, in order to allow the person under investigation, duly assisted by his/her defense attorney, to assess the proposal presented by the Public Prosecutor's Office and decide on its relevance (Leite Ferreira Cabral, 2023).

This is because, with the intention of signing the non-prosecution agreement, the person under investigation fails to exercise the right to remain silent, enshrined in Article igo5, LXIII ,of the Federal Constitution, and confesses to the criminal practice, producing evidence against himself (Lopes Junior & Josina, 2020).

This legal provision was soon challenged by the Brazilian Association of Criminal Lawyers (ABRACRIM), through Direct Action of Unconstitutionality No. 6,304., on the grounds that it would violate the presumption of innocence, guaranteed in art. igo5, LVII ,of the Constitution of the Republic.

Although the above-mentioned Direct Action of Unconstitutionality is pending judgment, it is certain that the Supreme Federal Court has already decided that the approval of the non-prosecution agreement presupposes the existence of a formal and detailed confession of the crime (Moreira Filho, 2021; Queijo, 2003).

Constitutionality of Article igo28-A of the ódigo de Criminal Procedure rocesso Codeenal

In order for a non-prosecution agreement to be signed, a primary requirement must be met: the case must not be shelved. This means that there se is no strong evidence of authorship, inexistirreal proof of materiality, or evidence of the presence of any exclusion of unlawfulness, guilt, cause for the extinction of punishability, material or formal atypicality, não é possível a homologação do acordo de não persecução penal.

Portanto, athe representative of the Public Prosecutor's Office, before raising the possibility of concluding a non-prosecution agreement, is responsible for carrying out an analysis of the case, paraonly in iciar as negotiations of the agreement if it is understood that there are sufficient elements to offer the complaint. Thus, the non-prosecution agreement is not based solely on the confession of the person under investigation.

The truth is that the person under investigation, duly assisted by his defense attorney, aware of the evidence against him, makes an assessment of the convenience of signing a non-prosecution agreement, with the aim of not being subjected to the problems inherent in traditional criminal proceedings. If the agent decides to agree to the conditions offered by the Public Prosecutor's Office, he decides to confess to having committed the crime and, as such, ceases to exercise the constitutional guarantees concernentes of direito ao silence and the presumption of innocence.

The right to remain silent, enshrined in Article igo5, LXIII ,of the Federal Constitution, derives from the principle of nemo tenetur se detegere , which enshrines the privilege against self-incrimination. For Maria Elizabeth Queijo, this is a principle that "aims to protect the individual against excesses committed by the State, in criminal prosecution, including protection against physical and moral violence, used to compel the individual to cooperate in the investigation and investigation of crimes, as well as against prohibitive methods of interrogation, suggestions and dissimulation".

It turns out that no legal system protects fundamental rights in an unlimited manner, which means that every right has a scope of protection that, at least in principle, is subject to interventions.

Nesse sentido, Ingo Sarlet teaches that limits to fundamental rights can "be defined as actions or omissions by public authorities (Legislative, Executive and Judiciary) or private individuals that hinder, reduce or eliminate access to the protected legal asset, affecting its exercise (subjective aspect) and/or reducing state duties of guarantee and promotion (objective aspect) that result from fundamental rights".

Therefore, possible restrictions on fundamental rights are permitted, as long as they are in line with the Federal Constitution, both from a formal and material perspective, which deals with respect for the essential core of fundamental rights (Sanches Cunha, 2020).

In relation to the right enshrined in art. igo5, LXIII ,of the Federal Constitution, as Luís Gustavo Grandinetti Castanho de Carvalho rightly points out, "what is prohibited is coercion for the accused to provide evidence against himself, not collaboration or legitimate bodily interventions".

Therefore, it is unquestionable that the need for confession, in order to enter into a non-prosecution agreement, maintains the essential core of the fundamental right to silence intact. This is because the person under investigation decides to produce evidence against himself, voluntarily, duly assisted by a lawyer, driven solely by his own convenience (Silva Andrade, 2018).

Likewise, there is no violation of the principle of the presumption of innocence.Nesse aspecto, aThe American Convention on Human Rights states, in Article igo8, § 2, that "everyone accused of a crime has the right to be presumed innocent until proven guilty according to law". Two rules arise from this right, one regarding evidence and the other regarding treatment.

The evidentiary rule is linked to the principle in dubio pro reo , referring to the fact that the burden of proof falls on the prosecution and, in case of doubt, the accused must be acquitted. Regarding the treatment rule, Gilmar Ferreira Mendes explains that the guarantee of presumption of non-culpability in DBrazilian law has been understood "as a principle that prevents the granting of legal consequences to the person under investigation or denounced before the final judgment of the criminal sentence"。

It happens that, when a non-prosecution agreement is signed, the confession of the person under

investigation is added to the evidence already produced during the investigation, removing any doubt about the commission of the crime. Furthermore, it is important to highlight that the legal consequences that fall on the person under investigation are accepted by him/her voluntarily. This is because, together with his defender, he made a judgment of convenience, concluding that accepting the proposal would represent a special advantage.

Furthermore, compliance with the measures agreed between the Public Prosecutor's Office and the person under investigation only ocorreráafter judicial approval, that is, after a Judge has analyzed the legality of the agreement, especially with regard to the person under investigation's consent to the celebration.

Therefore, it cannot be said that the non-prosecution agreement affects the essential core of fundamental rights. On the contrary, , athe restrictions are shown to be proportional, necessary and appropriate, in addition to arising from the expressed will of the person under investigation. Therefore, the claim that the confession requirement for entering into a non-prosecution agreement is unconstitutional must be dismissed.

ON THE VALUE OF CONFESSION

Since Article igo28-A of the Code of Criminal Procedure came into effect, non-prosecution agreements have been signed throughout Brazil, always requiring a formal and detailed confession of the crime.

In view of this situation, evidenciou-se umadiscussion about the value of the confession obtained as part of the non-prosecution agreement: in the event of non-compliance with the agreement by the person under investigation, could the confession be used as evidence for conviction?

Initially, it is important to highlight that Article igo197 of the Code of Criminal Procedure provides that the value of the confession must be assessed by the criteria adopted for other evidence, so that the judge must compare it with the other evidence in the case, verifying whether there is compatibility or agreement between them. In other words, under no circumstances may the agent's confession, –whether realizada before the Public Prosecutor's Office or before the Judicial Authority, be the sole basis for a conviction.

Despite this, due to the provisions of art. igo155 of the Code of Criminal Procedure, which establishes that the judge must form his conviction by freely assessing the evidence produced under the judicial adversarial system, and cannot base his decision exclusively on information obtained in the pre-trial phase, there is a strong doctrinal current defending that the confession – made to establish a non-prosecution agreement – cannot be used as evidence against the person under investigation during the course of the proceedings (Silva Brandalise, 2016).

In this sense, Aury Lopes Junior and Higyna Josita stand out a posição de , when dealing with the confession made within the scope of a non-criminal prosecution agreement, ndoemphatically stating that “the confession cannot be used as evidence against the person under investigation during the course of the proceedings”. To support this understanding, they cite the reasoning of Rogério Sanches da Cunha, for whom, although the non-prosecution agreement presupposes confession, there is no express recognition of guilt by the person under investigation; what there would be would be an implicit admission of guilt, “of a purely moral nature, without legal repercussions. Guilt, in order to be effectively recognized, demands due legal process”.

Guilherme de Souza Nucci argues that, if the agreement is terminated, initiating criminal proceedings, it is unlawful to use the confession as evidence. This is because the defendant would only have admitted guilt in order to enter into the agreement. The aauthor presents two alternatives regarding the confession made to establish a non-prosecution agreement: “a) art. 3º -C, § 3º, of the CPP, comes into effect, canceling the injunction that holds it in effect; with that, the entire investigation, including the defendant's confession, would be outside the process; b) if art. 3º -C, § 3º, of the CPP, remains without effect for an indefinite period (or if it is considered unconstitutional by the STF), it seems to us that the way forward is to consider the extrajudicial confession term as illicit evidence to be used in the process against the defendant”.

However, this understanding is not in line with the Brazilian legal system, nor with the modern jurisprudence of the Superior Court of Justice and the Supreme Federal Court.

Art. 65, III, d , of the Penal Code establishes that the sentence should always be mitigated if the agent has spontaneously confessed, before the authority, the authorship of the crime. Therefore, according to Alberto Silva Franco, “in order for the mitigating circumstance to be recognized, it is now sufficient for the agent to have confessed before the authority (police or judicial) the authorship of the crime, and that such confession be spontaneous”.

In this sense, the case law of the Superior Court of Justice was established that “the mitigating circumstance of confession "Spontaneous confession must be recognized, even if it was partial or qualified, whether judicial or extrajudicial, and even if the defendant retracts it, when such manifestation is used to justify his conviction". In

other words, it is accepted that the confession, made even during interrogation at the Police Station, can be used as a basis for the conviction of the agent, a situation in which the sentence should be reduced (Silva Franco, 1997).

As can be seen, there is no obstacle to the recognition of the confession, even if extrajudicial. Much less so in cases of non-prosecution agreements, which is an instrument of Nnegotiated justice, in which both parties – the Public Prosecutor's Office and the person under investigation – make mutual concessions in order to avoid the initiation of criminal proceedings.

Although the Supreme Federal Court has not specifically ruled on the use of confession as a means of evidence in cases where the agreement is breached by the person under investigation, the fact is that the issue has already been addressed, albeit indirectly, in the various actions that question the retroactivity of the non-prosecution agreement (Silva Jardim, 1994).

This is because, although there is great doctrinal insurgency regarding the constitutionality of the non-prosecution agreement, the most present discussion, in the Supreme Court, concerns the possibility of application to cases that were in progress, when Law No. 13,964/2019 was created. According to a survey carried out by Vinicius Gomes de Vasconcellos, in 2020 and 2021, "of the 25 published judgments, 20 addressed this issue and all were issued by the First Chamber".

In this scenario, it is important to highlight the decision of the distinguished Justice Cármen Lúcia, in the proceedings of the Procedural Appeal in Habeas Corpus 204.796, in which the execution of a non-prosecution agreement was discussed, after the sentencing of a conviction. According to the understanding presented by the Justice, the legal provision of the non-prosecution agreement aims to relieve the criminal justice system, in addition dto serving as an alternative to mass incarceration. However, she emphasizes that: "This purpose is fully compatible with the negotiation of the non-prosecution agreement until the sentencing. Until this procedural phase, the confession of the accused is useful to the prosecution, in addition to being possible to mitigate the mandatory public criminal action before this time frame ".

Based on the vote cast by Minister Cármen Lúcia, the signing of a non-prosecution agreement, after a conviction, distorts the nature of the institute, as there will be no benefit to be extracted by the Public Prosecutor's Office (Souza Nucci, 2021).

Rodrigo Leite Ferreira Cabral highlights that "confession has at least two very important reasons, one for constituting (i) a guarantee function and the other for enabling (ii) a procedural function for confession".

The guarantee function is linked to the fact that the confession, detailed and credible, gives the Public Prosecutor's Office security that he is not acting unfairly, that is, that he is not entering into a non-prosecution agreement with an innocent person.

The procedural function is related to the use of confession in the event of non-compliance with the agreement entered into. That is, if the agreement is terminated without justification by the agent, the Public Prosecutor's Office will have an element of procedural advantage, and the confession may be used to corroborate the evidence produced in court, under the scrutiny of the adversarial system.

A contrary understanding regarding the use of extrajudicial confession would mean that there would be practically no consequences for the person under investigation who failed to comply with the agreement. In this scenario, signing an agreement – without any intention of fulfilling it –– is even interesting for the person under investigation, as it would be capable of prolonging and hindering the criminal prosecution, without any harm to him/her.

Therefore, it is important to keep in mind that this is an agreement in which each party concedes on a certain point: on the one hand, the Public Prosecutor's Office stops pursuing criminal action, while the person under investigation formally and circumstantially confesses to the crime. All of this is intended to make the criminal justice system more efficient and faster, and not to create a defense mechanism for the person under investigation that tends to delay the application of criminal law.

TERMINATION OF THE NON-PROSECUTION AGREEMENT IN CASE LAW

Initially, it is important to highlight that the termination of the non-prosecution agreement can only be ocorrerdue to the unjustified failure to comply with the conditions agreed between the Public Prosecutor's Office and the person under investigation. In other words, under no circumstances can the termination be based on a fact prior to the agreement.

In a recent ruling, the Court of Justice of the State of São Paulo analyzed a case in which the Public

Prosecutor's Office offered a non-criminal prosecution agreement, stating that the person under investigation met all legal requirements. Given the conditions presented, the defendant accepted the proposal and confessed to the crime in detail, and the agreement was approved by the court.

It so happens that, subsequently, the Public Prosecutor's Office requested the termination of the agreement, on the grounds that the person under investigation had already benefited in another criminal case with procedural sursis , which was accepted by the Court, which revoked the agreement. Unresigned, the defense appealed the decision, which was reformed by the Justices, with the following argument: “The formulation of a proposal for a non-prosecution agreement presupposes the analysis of its convenience and its suitability at the time in which it was proposed, so that the subsequent request for revocation of the agreement, due to a fact PRIOR to its proposal, after the crime has been circumstantially and formally confessed by the accused, constitutes contradictory and unexpected behavior, violating objective good faith and causing surprise and, furthermore, manifest harm to the accused person”.

Furthermore, considering the consequences arising from the termination of the non-prosecution agreement, the Court of Justice of the State of São Paulo has already ruled that the defendant's defense must be summoned to comment on the request for termination made by the Public Prosecutor's Office, when there is news of non-compliance with the agreed conditions. In this way, the adversarial system and full defense are ensured (Wolfgang Sarlet, 2018).

Não obstante, rOnce the non-prosecution agreement is terminated, criminal prosecution begins, with the existence of an extrajudicial confession in the records.

At this point, it is important to highlight that, although the value of this confession has not been directly addressed by the Supreme Federal Court, in practice, it has been used as a basis for convictions.

As an example, we can cite a case from the district of Presidente Bernardes, in the State of São Paulo, in which a non-prosecution agreement was signed between the Public Prosecutor's Office and the person under investigation, who confessed, in detail, to having committed the crime, comprometendo-se a pagar prestação pecuniária e reparar o dano causado à vítima. Nesse caso, dAfter the agreement was duly approved, it was reported that the agreed conditions had not been met. Even though he had been summoned to prove that the agreement had been fulfilled, the person under investigation remained inactive, which led to the termination of the agreement and the beginning of the criminal prosecution. During the judicial phase, the person under investigation did not appear in court to be questioned, so his absence was declared. However, even without the judicial questioning, the defendant was convicted and, in the sentencing, the mitigating factor of a spontaneous confession was recognized, evidenciandosince the admission of the criminal offense, even in the extrajudicial phase, was used as grounds for the conviction.

As can be seen, in the situation above, the confession made to enter into a non-prosecution agreement was analyzed together with the other evidence produced in court.

It is worth noting that this was also the understanding of the Court of Justice of Paraná, when analyzing the defense's appeal, in which it was argued that it was impossible to use the confession made to enter into a non-prosecution agreement, after the termination of the agreement: “Initially, the appellant claimed that the confession made at the time of the proposal to formulate the Non-Prosecution Agreement could not be used as a basis in the sentence for conviction, but, strangely, he did not appeal the use of the confession as an extenuating factor, in the 2nd phase of the sentencing. In the event of termination of the non-prosecution agreement, the judge must use the confession made at the time of the formulation of the proposal, there being no legal impediment, especially because at the time he was warned that that confession could be used in the event of non-compliance with the agreement, a condition that was accepted by him and his defense attorney in a hearing (mov. 154). Furthermore, the confession was not the only evidence that supported the conviction of the accused.”

certainly ,still be widely debated in case law, but, at this time, the decisions of the Courts of Justice tend to understand that the extrajudicial confession, realizada for the execution of a non-prosecution agreement, pode ser utilizada como fundamento em sentenças condenatórias, no caso de descumprimento da avença,as long as o teor darticles 155 and 197 of the Code of Criminal Procedure are observed. In other words, the extrajudicial confession cannot be the sole basis for the conviction, and it is essential that it be in line with the other evidence produced in court, under the scrutiny of the adversarial system and full defense.

CONCLUSION

It is necessary pontuar that the debate surrounding the arrival of the non-prosecution agreement in 2019, in

the so-called Anti-Crime Package , in the midst of a Criminal Justice system that has historically spent decades and decades focused on the mandatory filing of public criminal proceedings and the prohibition of agreements of any nature, provoked a true revolution in the positioning of doctrine and jurisprudence on the subject.

At this point, it is important to note that, until the advent of the new article 28-A of the ódigo de Criminal Procedure rocesso Code enal, there were few possible exceptions to the archaic obligation, namely: a) the conciliation hearing, specific to private criminal actions, , prevista noart. igo520 of the ódigo de Criminal enalProcedure Code rocesso , in a matter where the plaintiff's availability prevailed ;, and b) the civil composition of damages, the penal transaction and the conditional suspension of the process, previstas naLaw nº 9,099/ 1995, the latter as the first effectively consensual mechanisms, in force almost fifty-five years later than the Code of Criminal Procedure itself, applicable only in offenses of minor offensive potential .

The breakdown of the old procedural structure and the leap to consensus as a way of resolving previously endless disputes generated continued and heated debates. There was almost immediately a conservative reaction to the arrival of the legal mechanism, which was viewed with suspicion by many. As críticas nIt was not ramonly lawyers and legal scholars , hwho raised objections to aspects of the non-prosecution agreement within the Brazilian Public Prosecutor's Office itself .

However, it is necessary to agree that the non-prosecution agreement was a necessary institute and currently appears to be a practical and useful revolution, quite interesting to those under investigation, lawyers, members of the Public Prosecutor's Office, members of the Judiciary, and, naturally, to society itself, tired of seeing endless processes, incomprehensible solutions, surrounded by appeals that drag on in time, until the final judgment.

In this context, considering the reaction to the legal provision of the non-prosecution agreement as natural, one would also expect – as it did – the reaction to some of its conditions. In particular, for the purposes of this study, the reaction exigência to a detailed confession by the interested party que poderia ser utilizada as evidence against himself, should the agreement be terminated.

The same conservatism supramencionado has operated forcefully nesse ponto, due to the confession ser realizada in the presence and under the command of the Public Prosecutor's Office. However, contrary to what has been said, it does not violate any constitutional guarantee. It does not offend due process and its correlative adversarial and full defense.

Com efeito, aconfession, when collected, occurs in the mandatory presence of – a lawyer or a public defender, who guarantees all the guarantees of the persons under investigation . Without this, it is not even possible to hold the hearing.

Thus, the requirement, very wise in its creation, sought to demonstrate, as a condition of the advantages of not being prosecuted – in particular that of not being criminally convicted – a minimum of recognition from the interested party.

Não obstante, oAn agreement is not concluded unless it is guided by the most absolute voluntariness on the part of the interested party. It is up to him, at any time, to deny its implementation, not to confess, if it seems interesting to him ,and to choose, if the case may be, to try the process and its possibilities.

Entretanto, It makes no sense to guarantee the interested party the right not to be prosecuted without imposing any burden of any kind. The detailed confession to the member of the Public Prosecutor's Office can only be seen from this perspective and not from any other. It is valid and needs to be respected, studied and understood, considering the transitional moment that the Brazilian criminal process is going through.

Therefore, if the interested party gives reason to breach the conditions agreed with the Public Prosecutor's Office, it is clear that he will need to be prosecuted. And if this is the case, it is equally clear that the detailed confession, collected under the guidance of the technical defense, will be valid in the criminal proceedings as extrajudicial evidence , provided by the person under investigation, including in the details, since it must be, as stated, detailed .

Nesse contexto, aThe confession will have the same probative value as any other evidence, and it is up to the Magistrate ,who is going to sentence the case to give it the value appropriate adoto the sum of the other evidence collected in the process after the termination, given the adversarial system and full defense. It will also be up to the judge to measure any contradiction that may arise between a denial in court, after the detailed confession made by the Public Prosecutor's Office.

Finally, it is important to highlight novamente the interested party's right possui not to confess, not to enter into an agreement and to opt for the trial. This assessment, which seems obvious, concludes the conclusion of this article, with a necessary emphasis : it is necessary to agree that the non-prosecution agreement and its

requirements, including the detailed confession, came to definitively mark the transformation of the Brazilian criminal process, freeing it from its colonial ties ,that only discredited the Criminal Justice System over the decades.

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