

The Conformity: Negotiating, Compromising, Reducing, and... Wavering Rights to Facilitate the Process?

La conformidad: Negociar, pactar, rebajar y... ¿Renunciar a derechos para agilizar el proceso?

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Abstract

This work aims to analyze the conformity in the Spanish procedural system. But not exclusively. It pretends that the reader gets an idea that even though the conformity (as well as other forms of negotiated justice) is an advantageous and agile solution, also has a more uncertain side since it implies wavering guarantees and fundamental rights. Without disregarding the negotiations that take place (mainly, in the USA) that can be constraining to extremes that are hardly ethical or not at all. Not everything is acceptable for facilitating the process. This study will allow us to verify the problems of the justice system (slowness and congestion), as well as to analyze an instrument of procedural facilitation such as the conformity, to review its functioning, and for understanding what happens in the USA and in Chile, countries that have been chosen because the former is a conformity-based system, and the latter has an important Criminal Procedure Code and aims at distancing from the plea bargaining.

Key words: *Conformity; Negotiated Justice; Principle of Opportunity; Principle of Legality; Prosecution Service; Procedural Facilitation.*

Resumen

Este trabajo tiene como objeto la conformidad en el ordenamiento procesal español. Pero no exclusivamente. Pretende que el lector se haga una idea de que si bien la conformidad (y otras figuras de justicia negociada) son una solución premiada y de agilidad, también presentan su lado más incierto porque implica renunciar a garantías y derechos fundamentales. Sin olvidarnos de las negociaciones que se llevan a cabo (principalmente, en EUA) que pueden ser condicionantes hasta extremos poco o nada éticos. No todo vale para agilizar el proceso. Este estudio nos servirá para constatar los problemas de la justicia (lentitud y congestión), para analizar

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un instrumento de agilidad procesal como es la conformidad, para ver su funcionamiento y para saber qué sucede en EUA y Chile, escogidos el primero por ser un sistema de conformidades y el segundo por la importancia de su Código Procesal Penal e intentar huir del *plea bargaining*.

Palabras clave: *Conformidad; Justicia Negociada; Principio de Oportunidad; Principio de Legalidad; Ministerio Fiscal; Agilidad Procesal.*

I. GENERAL CONSIDERATIONS: THE SO OFTEN REPEATED -AND MORE NOW WITH COVID-19, SLOWNESS AND SATURATION OF THE JUSTICE SYSTEM

One of the main concerns of Spanish citizens is linked to the slow functioning of the justice system. According to judicial data obtained from the Web Page of the Spanish Judicial Branch, concretely, from the documents “*justicia dato a dato*”¹ from different years, the main reason for complaint is the one regarding the activity of courts and tribunals, and, if further disaggregate, the dissatisfaction is centered on a justice system lacking in attentiveness and agility, and that is not technologically advanced.

This defective functioning of the Spanish courts and tribunals is not recent, for since the year 2003 (first year in which it appeared included in the data of the Web of the Spanish Judicial Branch) it becomes the main reason for complaint on part of the population. Over time, the unease generated by the organization of the judicial organs remains the main concern, representing over 60% of the annual complaints that have taken place in the last ten years. Moreover, if we examine the results in more detail, we perceive that the perseverance of the legislation in remodeling judicial procedures in order to diminish their slowness through reforms to the *Ley de Enjuiciamiento Criminal* (Criminal Procedural Act, in what follows, LECrim²) and the introduction of new procedural practices has not obtained the expected success, since over 40% of the complaints received by the *Unidad de Atención al Ciudadano del Consejo General del Poder Judicial* (General Council of the Judicial Branch’s Unit of Attention to the Citizen), revolve around the need for a speedy and technologically advanced justice system. These data show that the dissatisfaction with regard to the functioning of tribunals and the slowness of judicial procedures is not only consolidated, but it is increasing year by year.

And in case this is not illustration enough of the problem that exists regarding the lack of speediness of judicial procedures, in March of 2020 the WHO declared the *Covid-19* virus as a global pandemic. This virus, that first propagated in Wuhan, China, in a few months has crossed all borders, leaving evident signs of its virulence in most countries around the world.

¹ <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estudios-e-Informes/Justicia-Dato-a-Dato/> (last date of inquiry: August 14th, 2020).

² Spain: Royal Decree from 14th September 1882, which approved the Act of Criminal Procedure (Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal).

This situation brought about a *sanitary emergency* and, in turn, the courts have also been affected by the increased saturation of their affairs, thus causing a *judicial emergency as well*.

The so often repeated slowness and collapse of the justice system, as well as the desires for facilitation and to provide a solution to the problem have been discussed for many years. Already in 1987 the Recommendation R (87) 18 concerning the Simplification of The Criminal Justice by the Committee of Ministers of the Council of Europe was published, which endorsed the principles of opportunity, non-criminalization, minimal intervention, as well as forms such as mediation and reparation, in order to avoid the criminal process. Likewise, other mechanisms aimed at providing celerity to the criminal process, such as conformity, have been established for some time.

Moreover, in Spain facilitation laws have been enacted as well as those that are aimed at accelerating criminal procedures³ such as the Act 38/2002, from October the 24th, which partially reformed the LECrim, regulating the procedure for the speedy and immediate trial of certain criminal conducts *-flagrante delicta*, or crimes that even though are not flagrant, are in principle, easy to investigate, or conducts that have a special incidence on public safety-, or the Act 41/2015, from October the 5th, which modified the LECrim in order to facilitate criminal justice and to strengthen procedural guarantees,⁴ which introduced the procedure by acceptance of decree, aimed at the decongestion of judicial organs and at offering a speedy punitive response to crimes of lesser severity, whose sanction can be a fine or community service. Or the very recent Act 2/2020, from June the 27th, by which article 324 LECrim (investigation time periods) is modified and, just like it provides in its preamble, the criminal process is to be developed with all its guarantees and within a maximum time period of twelve months since the beginning of the process, whenever possible.

And now, once the so called “new normality”⁵ starts, and with the saturation problem of the judicial organs rising after the compulsory confinement caused by the coronavirus, the Spanish Government wants to potentiate mediation in order to reduce the levels of litigiousness. Without overlooking the described developments, the Minister of Justice, Juan Carlos Campo, declared during his intervention in the closing of the presentation of the *Centro Español de Mediación* (Spanish Centre for Mediation, CEM), on July 15th, 2020, the importance of promoting the “culture of mediation, of arbitration or settlement” in order to

³ The enactment of laws aiming at facilitation is not exclusive of criminal matters, the legislator also contemplates the need of reducing delays in procedures in all jurisdictional matters. In civil matters, for instance, a reform of the Act of Civil Procedure took place in virtue of the Act 37/2011, from October 10th, on measures of procedural facilitation. Likewise, the Spanish government has the intention of starting a facilitation plan for the social jurisdiction, contentious and mercantile after *Covid-19*. Thus, in the additional 19th provision of the Real Decree-Law 11/2020 from March 31st, by which urgent complementary measures in the social and economic in order to face Covid-19. Published in: «BOE» num. 91, from 01/04/2020.

⁴ The strengthening of procedural guarantees refers to the right to information; right to legal counsel; right to free translation and interpretation; right to remain silent; right not to declare against self, to not admit guilt, besides, of a reinforcement of guarantees in cases of detention and provisional imprisonment.

⁵ With the expression “new normality”, in the times of *Covid*, the different governments have referred to the period of gradual return to social and economic activities, which is characterized by the use of masks and social distancing.

provide mechanisms that procure “temporal speediness” in the solution of conflicts after the health crisis.⁶

And not only the promotion of the use of the so-called *Alternative Dispute Resolution* (ADR) is intended. Holding telematic trials, using *apps* for carrying out electronic judicial acts or, ultimately, the irruption of the *iproceso*, point towards an authentic digital transformation of the justice system.⁷ But since it is still too soon for knowing whether with these new and revolutionary measures the desire of facilitation is fulfilled, I consider more appropriate to analyze other already regulated instruments about which it is possible to make an assessment, such as the previously mentioned institution of conformity in the Spanish criminal process and that, precisely, according to the Supreme Tribunal decision 188/2015, from April 9th, ensures procedural celerity. And, moreover, considering that a commission has been formed in order to elaborate a preliminary draft of a new Act of Criminal Procedure, intended to replace the LECrim from 1882, and noticing that in the two previous attempts (from 2011 and 2013⁸) of new Code of Criminal Procedure, the institution of conformity performed quite a relevant role, is very possible that in this new legal text, under discussion within the entire legal community at the time of this work, conformity will again play a specially important role.⁹

As a first conceptual approximation, it may be said that conformity is a traditional form of negotiated justice by which the defendant (with his counselor) accepts the penalty proposed in the accusation, or the highest of the requested penalties if several accusations exist, without the need of providing evidence during the trial, thus finalizing the proceedings

⁶ News taken from Diario del Derecho from *Iustel. Newsletter* from July 17th, 2020: iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1200671&utm_source=DD&utm_medium=email&nl=1&utm_campaign=17/7/2020 (last date of inquiry: August 14th, 2020).

⁷ JIMENO BULNES (2020) “Emergencia judicial y COVID-19: hacia el iProceso” in www.legaltoday.com, July 29th, 2020 (last date of inquiry: October 3rd, 2020).

⁸ In the preliminary draft of LECrim from 2011, the legislator, such as established in its exposition of motives, aimed at providing more celerity to the process through increasing the use of the principle of opportunity. A greater margin in the reduction of sentences is attributed to the Prosecution Service with the purpose of finding a consensual solution. In time, the five-year limit for the conformity of the sentence is eliminated, because in practice this happens anyway through the application of mitigating circumstances. The elimination of this limit entails a greater control on part of the tribunal for guaranteeing that, besides conforming with the sentence, there are sufficient indications of criminality. Moreover, the preliminary draft of Criminal Procedure Code from 2013 goes one step further and establishes an only form of conformity for every procedure, for all offenses, in any moment of the process, regardless of how many defendants are, without being necessary that all of them give their conformity (it is convenient to precise that the proposal from 2013 is the first time in which the legislator allows the conformity agreement at any time during the process. Both in the preliminary draft from 2011 and the LECrim from 1882, with its respective revisions, the pact was only possible before evidence was presented)

In the preliminary draft from 2020, the prosecutor has an ample margin for reducing the sentence in the conformity agreement. The prosecutor may request the imposition of a penalty inferior by one degree to the one legally established.

⁹ In the same vein, LASCURAÍN SÁNCHEZ and GASCÓN INCHAUSTI (2018), pp. 3-4.

early.¹⁰ As added by Gascón & Lascuráin “the conformity tends to be seen as an institution that offers reduction of sentences in exchange for procedural agility”.¹¹ Negotiated justice, through the institution of conformity or similar ones, allows the prosecutors and the defendants to reach, in the context of a criminal procedure, an agreement entailing a result which is alternative to a conviction or absolution.

After these introductory lines and in order to continue tracing the starting point of this work, it may be asserted that conformity usually takes place regarding tax offenses,¹² as well as concerning offenses against traffic safety.¹³ And conformity agreements are not excluded when it comes to other kinds of offenses, even more serious and socially impactful ones. So, for example, a man who has been accused of murder by stabbing, in Ciudad Real (in July 2017), accepted a four-year prison sentence after a conformity agreement between the prosecution and the defense attorney. Or another man in Pamplona who sexually abused a woman who was evidently inebriated (as well as robbing money from her) and that was convicted by a conformity sentence (decision pronounced by the same tribunal that sentenced the members of the *Manada*) to five years imprisonment.

And it cannot be overlooked that at times the defendant does not accept the conformity agreement. The story of the President of Bankinter, Jaime Botín, who rejected at the last minute the conformity agreement obtained with the *Fiscalía y Abogacía del Estado*¹⁴ (State Prosecution and Attorney), caused controversy in Spain. Mr. Botín’s defense attorney had accepted the perpetration of a tax evasion offense in the amount of a million euro in exchange for a prison sentence of under a year and a fine penalty of 50%. This is an unusual fact, since regarding tax offenses it is usual to obtain conformity. That said, it seems that the President of Bankinter got upset with the media due to their assertion that he accepted the committed offense. He would consider himself innocent, and for that reason rejected the

¹⁰ The conformity would be what in other systems is the *plea bargaining*, *guilty plea*, *Absprache* (agreements), *patteggiamento* (covenants), etc. GÓMEZ COLOMER (2012), pp.15 a 41.

¹¹ LASCURAÍN SÁNCHEZ & GASCÓN INCHAUSTI (2018), p. 2.

¹² There are several cases of tax offenses in which conformity agreement have taken place, that have caused great commotion in the media: *caso Neymar*, *caso matrimonio Godia-Torreblanca*, *caso Palma Arena*, etc.

¹³ According to data from the *Dirección General de Tráfico* (General Traffic Authority) relative to the period 2019-2018, 89.264 condemnatory sentences for traffic offenses of danger, figure that represents a 34% of the totality of criminal sentences. And there have been close to 7000 condemnatory sentences more that those pronounced during the previous period. 56.173 sentences from a total of 89.264 are for offenses of driving under the influence of alcohol and other substances. And almost 90% of the total of 89.264 sentences are preceded by conformity, which has allowed the immediate execution of over 60.000 sentences of deprivation of the right to drive and the almost 2000 losses of driving licenses imposed during this period from 2018. Likewise, the 60.000 fine sentences have been speedily executed as well as over 24.000 community service sentences in the same time period. This data are extracted from the following link to the Revista de la DGT (DGT Magazine): <http://revista.dgt.es/es/noticias/nacional/2019/07JULIO/0730-Estadisticas-Fiscalia.shtml#.X0i49CXtYIQ> (last date of inquiry: August 28th, 2020).

¹⁴ https://www.elconfidencial.com/espana/2017-12-18/jaime-botin-rectifica-y-ya-no-acepta-un-delito-fiscal-por-evadir-impuestos-de-su-jet-privado_1494663/ (last date of inquiry: August 18th, 2020).

agreement. This interesting case allows us to later discuss the causes that might motivate an innocent person to accept conformity.

Regardless of situations like the Bankinter case, if we focus on statistical data from the memory of the *Fiscalía General del Estado* (General State Prosecution) from the year 2019,¹⁵ in Spain, from the total of condemnatory sentences pronounced by criminal tribunals (113.234), 71.909 sentences were based on the conformity of the defendant with the request of the *Ministerio Fiscal* (Prosecution Service) (which represent 63%). In the Audiencias Provinciales (Provincial High Courts) a total of 7.814 sentences were pronounced, from which 4.282 (el 55%) were also based on the conformity of the defendant and his defense with the claim of the prosecutor. Through these figures we can see a more than remarkable tendency to use the mechanism of conformity as an alternative to convictions and absolutions. The reason behind it? At first sight it seems evident that resorting to conformity entails the facilitation of justice, as well as the improving the functioning of the judicial administration, the reduction of costs regarding the investigation of facts constituting an offense and, at the same time, in most cases offers a rewarded solution to the defendant through a significant sentence reduction.¹⁶ Nevertheless, other data (namely the ones verified at the beginning with the assistance of the “Justicia dato a dato” [Justice Figure by Figure] documents) show that even though many conformity-based sentences are passed, the impression of procedural facilitation is not created. And, moreover, that not everything regarding conformity is advantageous. In the following pages we shall see that this practice generates a considerable waiver of rights.

Once the starting point is delineated, we shall analyze in more detail the nature of conformity, its requisites and dynamics, distinguishing among the different criminal procedures that exist in the Spanish legal system (*ordinario por delitos graves*, [ordinary for serious offenses] *abreviado* [abbreviated], *enjuiciamiento rápido* [fast-track procedure], *proceso ante el Tribunal del Jurado* [procedure before the Jury Court], etc.) and comparative law references shall be offered, highlighting the plea bargaining used in the United States which constitutes the origin of our conformity and of other similar legal institutions in other countries, and that has become a key instrument of effective negotiation after the guilty plea, aimed at solving the American criminal process.

Likewise, I shall pay attention to the forms of negotiation existing in Chile, thus referring to another relevant country and whose Criminal Procedure Code has experienced recent and important reforms. The three forms I shall refer to are: 1) the *procedimiento monitorio penal* (payment criminal procedure); 2) the *juicio simplificado con reconocimiento de culpabilidad* (simplified trial with acknowledgement of culpability) and 3) the *procedimiento abreviado*¹⁷ (abbreviated procedure). The regulation of a payment criminal procedure has also taken place in Spain with the introduction (from 2015 onwards) of the so-called *proceso por aceptación*

¹⁵ <https://www.fiscal.es/documents/20142/ebc7f294-b4d8-6ca4-c7c0-3a95c371e94f> (last access: October 3rd, 2020).

¹⁶ In the same vein, FERRÉ OLIVÉ (2018), p. 6.

¹⁷ A first reference to important Chilean literature is: CORREA ROBLES & REYES LÓPEZ (2012); CORREA ROBLES (2018), pp. 185-212, and DUCE JULIO (2019).

de decreto (procedure by acceptance of decree) which intends to be a formula (as many others) for accelerating criminal justice and provide a response to less relevant offenses. And there is the question of whether this procedure, regulated in articles 803 bis a) to 803 bis j) of the LECrim is yet another manifestation of the institution of conformity. We are interested, due to the matters discussed in this work, to provide an answer to this question, what we shall do in the following sections.

Last but not least, the present study shall conclude with some reflections on the use that has been given to negotiated justice, noticing its strengths and perplexities, thus concluding whether even wavering rights, or giving conformity even if the person is innocent for overcoming the excessive duration of proceedings is acceptable and, ultimately, the lack of agility of the justice system. Some issues may remain open, such as the balancing act between the principles of legality and opportunity and how conformity comes into line with the principle of legality. Likewise, the regulation of conformity, of the *plea bargaining* or of the negotiation-related institutions in Chile covers many key aspects that will allow me to continue my current line of research.

II. CONFORMITY IN THE SPANISH LEGAL SYSTEM: DIFFERENT FORMS.

As previously stated, the institution of conformity, as a form of negotiated justice, supposes the early termination of the criminal procedure through an agreement between the parties (prosecutor or prosecutors and defendant), being the acquiescence of the defense attorney always necessary, as well as the supervision of the tribunal so that said agreement can produce effects. The defendant shall enjoy the possibility of giving his conformity once the accusation has been stated, accepting a penalty that usually will be reduced in comparison to the one that the accusation would have requested if the proceedings had moved forward with all of its acts.

Regarding the nature of conformity, this is an act of disposition which, as correctly stated by Gómez Colomer, “is a consequence of the principle of opportunity, since it establishes the maximum limit of the sentence to be imposed”. According to the same author, conformity is also a special procedure “which accelerates the acts of the proceeding, since once it is given, the procedure goes directly to the phase of sentencing”.¹⁸

With the enactment of the LECrim, in 1882, just one procedure was contemplated to trial any of the offenses contemplated in the Penal Code. The original drafting of this procedural normative body already regulated conformity (arts. 655 and 688 ff.). The LECrim has not experienced any total reform, however, in the course of its almost 140 years of existence, it has experienced partial reforms with the aim of adapting to the continuing needs and requirements of the judicial system.

This partial reforms have introduced, among other aspects, an ample scope of different forms of procedure and, in turn, conformity has been set not in a unitary form, but differentiating among forms of procedure or, in other words, according to the different

¹⁸ GÓMEZ COLOMER, *et al.* (2019), p. 362.

existing procedures. We can speak of *different forms of conformity*. Moreover, even though new formulations of the institution of conformity have taken place, the legislator has wanted to keep the originally established form for the *procedimiento ordinario por delitos graves* (ordinary procedure for serious offenses).

In order to better understand the institution of conformity and before analyzing the different procedures, it is necessary to delineate the structural outline of the Spanish criminal process. The first phase of a Spanish criminal process is the phase of investigation, also called *sumario*, preliminary proceedings or urgent proceedings¹⁹ (in charge of it is the *Juez de Instrucción* [Investigating Judge] and it is aimed at inquiring the facts and their possible perpetrator). Once the investigative activity is finished, the next phase is the intermediate phase, whose function is to establish whether there are sufficient elements for continuing the process or, on the contrary, this must finish or be temporarily paralyzed until new evidence appears. The most important phase is the oral trial with the production of evidence, the documents of accusation (by the Prosecution Service, private accusation, or popular accusation), the document of defense and the passing of sentence.

2.1. The conformity in the *procedimiento ordinario por delitos graves* (ordinary procedure for serious offenses)²⁰

In the *procedimiento ordinario por delitos graves* (ordinary procedure for serious offenses) there are two appropriate procedural moments for the conformity to take place: a) at the time in which the defense responds to the provisional qualification made by the prosecution (art. 655 LECrim) or b) at the beginning of the oral trial, before the evidence is produced (arts. 688 ff. LECrim). Regardless of the moment in which it takes place, conformity is conceived as an act of a party in which the defendant has to acknowledge the content of the provisional accusation document (or the one contained in the most serious accusation, if several are requested).²¹ In this ordinary procedure it must not be overlooked that the conformity was conceived without the need of a previous negotiation. It is simply a voluntary acknowledgement of responsibility in pursuit of procedural economy.

Moreover, for the defendant to provide conformity it is essential that the prison sentence requested by the prosecution does not exceed a term of six years. Traditionally, these were the so called “*penas de carácter correccional*”²² (“correctional penalties”). In this procedure,

¹⁹ In the ordinary procedure for serious offenses, it is called “*sumario*”; in the abbreviated procedure “preliminary proceedings”, and in the fast-track procedure “urgent proceedings”.

²⁰ A very detailed work on the conformity in the procedure for serious offenses (and also in the abbreviated procedure) is BARONA VILAR (1994). Other BUTRÓN BALIÑA (1998)

²¹ When different defendants are tried in the same trial, it is essential that all of them give their conformity. If one of them does not, the process shall continue (even regarding the one that did conform) due to the indivisible character of the criminal procedure. Even though in the hypotheses on which the procedure can be divided, existing several defendants being tried on several charges, the conformity agreement shall be valid, and the process shall carry on only for those that did not want to give their conformity (art. 655 LECrim).

²² Nevertheless, the “*Fiscalía General del Estado-Circular 2/1996*” (“General State Prosecution-Memorandum 2/1996”), from May 22nd on the incidence of the Penal Code from 1995 on the transitory regime of the new Penal Code: incidence on the prosecution of previous facts- regards that the term “*pena correccional*” (“correctional

conformity “can only take place in exceptional cases in which, even though conducts punishable by superior penalties are on trial, the most serious request on part of the accusers does not exceed six years (as a consequence, for instance, of the application of mitigating circumstances or incomplete excuses)”.²³

On the other hand, the judge may declare the reached conformity agreement null and void, according to art. 238 of the *Ley Orgánica del Poder Judicial* (Organization Act of the Judicial Branch), if she deems that the facts constituting an offense which are included in the qualification made by the prosecution have not been adequately delimited and should entail a more severe sentence than the one requested (STS from July 8th, 1987).

Finally, according to art. 787.7 LECrim, the conformity sentence can only be challenged if its requisites or terms have not been respected, but the defendant cannot challenge them on substantive grounds if the conformity has been given freely. The latter is not applicable solely to the ordinary procedure for serious offenses, but to other procedures as well.²⁴ As asserted by Armenta Deu, the agreement cannot be challenged on substantive grounds due to several reasons: 1) nobody can go against their own acts; 2) the principles of legal security and *pacta sunt servanda*, and 3) the possibility of fraud if a more favorable sentence is negotiated and then challenged, thus renouncing to the given conformity (SSTS 483/2013, from June 12th; 752/2014, from November 11th, among others).²⁵

penalty”), referred to penalties not higher than “*prisión menor*” (“minor imprisonment”) as obsolete, and prefers the offenses punishable with up to six years imprisonment as scope of application for the institution of conformity.

²³ TOMÉ GARCÍA, J. A., *et al.* (2004), p. 458. In a similar vein, NIEVA FENOLL, J. (2019), p. 332.

²⁴ On the institution of conformity and the duty of correlation of the sentence, there is an exhaustive work (dissertation) from DEL RÍO FERRETTI, C. (2007).

²⁵ ARMENTA DEU, T. (2019), p. 288.

The general rule is that if the cassation appeal is considered inadmissible against conformity-based sentences, even though there are cases in which a cassation appeal would be appropriate: if the motive for the cassation appeal is that the sentence has been pronounced in a non-legally admitted hypothesis (penalty above the limit established by art. 787.1), if the defense alleges that the established procedural requirements have not been respected, if a vitiated consent that makes conformity ineffective, or if, exceptionally, the imposed sentence is not appropriate according to the qualification of the facts, thus infringing the principle of legality. Likewise, it is admissible to challenge sentences that do not respect the terms of conformity that have been set by the parties, regarding either the account of the facts, the legal qualification, or the imposed sentence (STS 422/2017, from June 13th). The cassation appeal is lodged before the Tribunal Supremo (*Supreme Tribunal*), and its proceedings are regulated in arts. 847 ff. of the LECrim.

2.2. Conformity in the *procedimiento abreviado*²⁶ (abbreviated procedure)

The *Ley Orgánica* (The Organization Act) 7/1988, from December the 28th brings about a genuine metamorphosis of the Spanish procedural system by establishing the *procedimiento abreviado*. (abbreviated procedure) The purpose of this, as reflected by the explanatory statement of the Organization Act is to relieve the criminal process from inane proceedings in order to achieve a greater efficacy in the judicial procedure.

In the same spirit, conformity is reconfigured, thus introducing into our procedural system *the negotiation* or *the principle of "consensus"*. The purpose is no longer to put an end to the proceedings with the acceptance of the requested sentence and the acknowledgement of the facts on part of the defendant, but to establish an agreement between the prosecutor and the defendant that solves the controversy after the commission of criminal offenses that are not especially serious.

The 1988 Act regulated some ambiguous and unconnected provisions. Their wording which was improved by the Act 38/2002, from October 24th on the *procedimiento para el enjuiciamiento rápido* (fast-track procedure).

As it was the case with regard to the ordinary procedure, conformity requires that the sentence requested by the accusation does not exceed the term of six years. And the conformity agreement may take place in different stages of the process. Let us examine them:

Conformidad en diligencias previas (Conformity during the preliminary proceedings): Art. 784.3 LECrim establishes two time limits for the defendant to give his conformity: a) in the *escrito de defensa* (defense document) and b) once the defense document has been lodged, the accusers and the defense can, with the consent of the defendant, jointly lodge the act of conformity in a new document of qualification.

Conformity in the oral trial (Conformidad en juicio oral): before evidence is submitted, during the oral trial is possible for the defendant to give its conformity with the accusation document requiring the most severe sentence. This can take place in two different ways: a) on the proposal of the defense, provided the acceptance of the defendant; or b) defense and prosecution may jointly draft a new accusation document which shall be lodged before the evidence is submitted (art. 787.1 LECrim). This second possibility accords the defendant a good opportunity for benefiting from the ultimately imposed sentence and that will be the result of the negotiation.

Once the conformity is presented, regardless of the procedural moment, the judge shall evaluate if the legal qualification and the proposed sentence (according to said qualification) are appropriate in light of the described facts that have been accepted by all parties, and if that the defendant freely accepted the conformity. If the judge determines that the qualification of either the conformity or the proposed sentence do not adjust to the law, she shall request the modification of the document of qualification and, if this is not done, the proceedings shall continue. If the judge considers that the facts should receive a qualification leading to a more severe sentence or to a less severe one, the proceedings shall continue.

²⁶ An exhaustive study of the institution of conformity in the abbreviated procedure in DÍAZ PITA (2006).

Moreover, if the judge doubts regarding either of these matters, the proceedings shall equally continue in order to be properly delimited. The LECrim grants these powers to the judge as a protective measure for the defendant since no evidence will be presented and this control guarantees that the agreed upon sentence fits the facts committed by their perpetrator.

At the same time, there is a specialty regarding the abbreviated procedure, namely the *reconocimiento de hechos* (acknowledgment of the factual bases of the accusation). According to art. 779.1.5° LECrim, in the preliminary proceedings (before the pronouncement of a decree of dismissal [*auto de sobreseimiento*], a decree to transmit the proceedings to the competent judge [*auto trasladando lo actuado al juez competente*] or a decree closing the preliminary proceedings and opening the opportunity for the prosecution to request the commencement of an oral trial [*auto finalizando las diligencias previas y abriendo el plazo a la acusación para que solicite la apertura del juicio oral*]) if the defendant acknowledges the facts in the presence of the judge and these constitute criminal offenses punishable by up to three years imprisonment, as long as the reduced sentence does not exceed two years, or up to ten years if the penalty is of a different nature (requisites established for the conformity in the fast-track procedure) the Ministerio Fiscal (Prosecution Service) and the other parties (not only the defense, but also if there are other accusing parties²⁷) may formulate an accusation document containing the conformity of the defendant. This document, as pointed out by Armenta Deu, shall lead to a conformity sentence when the judge deems that the conformity was given freely, and the requested sentence and the legal qualification are correct.²⁸

With respect to the challengeable character of the conformity sentence in the abbreviated procedure, we can refer to what was said regarding the ordinary procedure and that is not possible to challenge it except if the requisites for the conformity have not been

²⁷ With respect to the parties in the Spanish criminal process, it is necessary to mention the accusing parties: a) *Ministerio Fiscal* (Prosecution Service); b) The *acusador particular* (private accuser) is the person offended by the crime, who establishes herself as active part in the process by requesting the offender to be punished; c) The *acusador popular* (popular accuser) is established in art. 125 of the Spanish Constitution, according to which any Spanish citizen may exercise criminal action, even if she was not offended by the crime, and d) the *acusador privado* (private accuser) concerning private offenses regarding to which the offended person holds the monopoly of the penal action because these are offenses that can only be prosecuted at the request of a party. And if the offended person decides to exercise the criminal action within the criminal process, she is known as private accuser.

The victim of the offense, as we can see, can be part of the process through the mechanisms of the *acusación particular* (accusation by a private individual) in public and semi-public offenses, or the *acusadora privada* (private accuser) regarding private offenses. We shall also add that the victim, whether she acts like a party in the process or not, has a number of rights that are contemplated in an *Estatuto de la Víctima* (Statute of the Victim) (Act 4/2015, from April 27th).

Concerning the defendants, we have the investigated person, who is the passive party within the criminal process. As the different phases/stages of the process go forward, its denomination changes to *procesado* (prosecuted person), *encausado* (tried person), *acusado* (accused person), *denunciado* (denounced person), *querellado* (person subjected to a complaint or *querrela*).

Furthermore, every offense results in a criminal action, and can also result in a civil action aimed at restitution or compensation of damages. As civil parties we have the civil complainant who is the person that brings a civil action within the criminal process and is the one offended by the crime, whereas the liable party is the individual against whom the civil action is directed.

²⁸ ARMENTA DEU (2019), p. 291.

fulfilled, being the defendant unable to challenge his freely given conformity based on substantive grounds (art. 787.7 LECrim).

2.3. The conformity in special criminal procedures.

2.3.1. The conformity in the proceso especial para el enjuiciamiento rápido (special fast-track procedure)

The Act 38/2002 contains the regulation of the *enjuiciamiento rápido* (fast-track procedure) for certain offenses and misdemeanors (now misdemeanors have been replaced by less serious offenses²⁹). Alongside this new procedure a new mode of conformity appears, doubtless more agile and beneficial for the defendant.

The conformity in a fast-track procedure includes the possibility of finishing the process before the *juzgado de guardia*³⁰ (duty court). Moreover, as argued by Chozas Alonso, this conformity functions as a qualified mitigating circumstance thus reducing the sentence requested in the accusation by one third³¹. Nevertheless, this privilege is not absolute, since, as stated in the previous section, it establishes as a limit to the conformity before the duty court, namely that it only applies if the offense is punishable with up to three years imprisonment, provided the reduced sentence does not exceed two years, or up to ten years if the penalty is of a different nature (arts. 801.1.2° and 3° LECrim).

For the purposes of conformity, in this fast-track procedure it must be taken into account whether only the Prosecution Service is submitting an accusation or there is also a private accusation. If the only accusation is the one submitted by the Prosecution Service, the defendant may give his conformity regarding the facts and the legal qualification before the duty judge, thus being necessary for the Prosecution Service to have lodged in that very act the accusation document as the request for the commencement of an oral trial (art. 801.1.1° LECrim). If there is also a private accusation besides the one submitted by the Prosecution Service, the defendant may give his conformity in the defense document, adhering to the more severe of the submitted accusations (art. 801.5 LECrim).

²⁹ The application of fast-track procedures requires the the following circumstances take place: a) that this are offenses punishable by imprisonment up to five years and/or any penalties which duration does not exceed 10 years; b) that the procedure had initiated by police statement; c) that the police had stopped one or certain persons as possible author/s of the offense or that, even without arrest, there is a denounced person in the statement; d) that the committed offense is one of the following: 1) robbery or theft; 2) offense against traffic security; 3) damages; 4) offenses against public health established by art. 368 of the Penal Code; 5) flagrant offenses against industrial or intellectual property; 6) the ones established in art. 173.2 of the Penal Code (domestic violence), and 7) any other punishable offense whose investigation would presumably be easy; e) that there is no connection between of the mentioned offenses and another one not contemplated on the list; f) that the judge does not decree the secret of the proceedings.

³⁰ The duty court provides on-call services, so it is always possible to resort to it. All the instruction courts from a certain place provide this service in successive turn. The urgent proceedings of the fast-track procedures are requested to the duty court in order to facilitate the proceedings of this procedure that, as its name indicates, is a quick procedure.

³¹ CHOZAS ALONSO (2013), p. 106.

It is interesting to refer to the art. 801.2 of the LECrim which provides that the conformity sentence shall be pronounced orally and, if the prosecutor and the represented parties manifest their decision not to challenge it, the judge, in that very act, shall orally declare the executory character of said sentence, and if the imposed penalty is of imprisonment, the judge shall decide on its suspension or substitution.³²

2.3.2. *The conformity in the juicio especial ante el Tribunal del Jurado (special procedure before the Jury Court)*

The *Jurado popular* (popular Jury) is created for fulfilling the constitutional imperative established on art. 125 of the Spanish Constitution, which contemplates the participation of citizens in the administration of justice. The Jury is constituted for judging the offenses for which it has competence (homicide, threats, burglary, bribery, among others). It is integrated by nine lay jurors randomly chosen for an only trial and a Magistrate-President. In order to analyze the conformity in the procedure before the Jury Court, we shall focus on the *Ley Orgánica 5/1995, de 22 de Mayo, del Tribunal del Jurado (Organization Act 5/1995 from May 22nd, of the Jury Court)* which regulates all things regarding this both discussed and acclaimed institution.

We are particularly interested in art. 50 of the LOTJ which establishes that, if a conformity agreement exists, the Jury Court shall be dissolved if the parties agree to the pronouncement of a sentence according to the qualification document requesting the most severe penalty, or with the one they submit in the act, subscribed by all parties, without including other facts than those been tried, or a more serious qualification than the one included in the provisional conclusions. Conformity is absolute regarding the facts, the sentence, and the legal qualification. However, there is a pre-requisite to this will of the parties towards the pronouncement of a conformity sentence: that the fact constituting an offense does not lead to an imprisonment sentence of more than six years (which follows the sentence duration limit established for both the ordinary and the abbreviated procedures).

Moreover, a doctrinal sector elaborates an interpretation of another provision of the LOTJ, the art. 24.2 (the application of the LECrim is supplementary, provided its provisions do not contradict those contained in the LOTJ), according to which the conformity could also be given prior to the establishment of the popular Jury (as it is the case regarding both the ordinary and the abbreviated procedures) thus avoiding the constitution of this Jury, as well as the difficulties it entails.³³

2.3.3. *The conformity in the procedimiento especial de menores (special procedure for minors)*

The *Ley Orgánica 5/2000, de 12 de enero, Reguladora de la Responsabilidad Penal de los Menores (Organization Act 5/2000, from January 12th, Regulating the Criminal Liability of Minors)*

³² For the suspension or substitution of sentence of imprisonment, see arts. 80 of the Spanish Penal Code.

³³ CHOZAS ALONSO (2013), p. 106.

(in what follows, LORRPM) contemplates a special procedure for minors above the age of 14 aimed at enforcing the criminal liability derived from the commission of facts typified in the Penal Code or in special criminal legislation as offenses or minor offenses. As established by the exposition of motives of said act, the superior interest of the minor is an essential criterion for the interpretation and application of this procedure and the adopted measures.

In the procedure for minors also appear manifestations of the principle of opportunity³⁴ and it is possible to obtain a conformity agreement. The conformity in the LORRPM operates in two different moments, according to the nature of the measure to be imposed, but always in the phase of hearing. The first moment for the *Juez de Menores* (Judge of Minors) to pronounce a sentence of conformity is regulated by art. 32 and is when, in the pleading document of the prosecution one of the measures contemplated in art 7.1 sections e) to ñ) of the LORRPM³⁵ is requested, the conformity not being possible if said measure is internment in any of its forms and, therefore, we shall refer to an hypothesis of *limitada* conformity. Moreover, art. 36 establishes the second moment for the conformity to be given, and it is when the hearing's sessions begin, and in that case the required measure can be of any kind. Here we are dealing with *absolute of unlimited* conformity. It is required that the minor conforms with the facts and with the measure/civil liability, with the agreement of his counselor. It entails, as always, an acceleration of the procedure, and the judge must verify that the qualification and the requested measure are correct (art. 787.2 LECrim). If the conformity is absolute, the judge may pronounce sentence without further due, and if the conformity is limited, the debate shall focus on the measure to be imposed.

2.4. A controversial hypothesis of conformity: in the *juicio por delitos leves* (procedure for minor offenses)

The misdemeanor procedure presented a structure similar to that of is heir, the *juicio por delitos leves* (procedure for minor offenses). As to the regulation of this procedure for minor offenses, there are no explicit references to conformity, although, in virtue of the supplementary application of the provisions regulating the abbreviated procedure or the fast-track procedure, conformity should be possible. In this sense argues the proceduralist jurist Gómez Colomer, who admits that conformity may be given in this procedure due to both

³⁴ A very recent and complete work on the principle of opportunity and the “*proceso de menores*” (“procedure for minors”) is BUENO DE MATA (2020), pp. 285-331.

³⁵ Article 7.1 sections e) to ñ) of the LORRPM: said sections contemplate the cases in which the minor can conform, which are: “*asistencia a un centro de día*” (assistance to a day center); “*permanencia de fin de semana*” (weekend detention); “*libertad vigilada*” (probation); “*prohibición de aproximarse o comunicarse con la víctima o con aquellos de sus familiares u otras personas que determine el juez*” (prohibition of approaching or communicating with the victim or with family members or other persons determined by the judge); “*convivencia con otra persona, familia o grupo educativo*” (residence with another person, family or educational group); “*prestaciones en beneficio de la comunidad*” (community service); “*realización de tareas socio-educativas*” (performance of socio-educational tasks); “*amonestación*” (reprimand); “*privación del permiso de conducir ciclomotores y vehículos a motor, o del derecho a obtenerlo, o de las licencias administrativas para caza o para uso de cualquier tipo de armas*” (forfeiture of licence for driving ciclomotives and motor vehicles, or of the right to obtain them, or of the administrative licences for hunting or for the use of arms of any kind); “*inhabilitación absoluta*” (absolute inhabilitation).

formal (the already mentions supplementary application of rules regulating other procedures) and substantial reasons, since conformity would contribute to the objective of procedural facilitation by avoiding the celebration of the trial for minor offenses.³⁶ Arguing in the opposite direction, there are other authors who consider that the fact that the procedure for minor offenses does not require the intervention of a defense lawyer makes conformity difficult, since the defendant will neither have enough counsel nor the knowledge required for evaluating the consequences of his conduct.³⁷

2.5. The *procedimiento por aceptación de decreto* (procedure by acceptance of decree): one more way for the conformity on criminal matters?³⁸

As we have been pointing out so far in this study, the will of the Spanish legislator regarding the different partial reforms of the LECrim has been no other than procedural facilitation. One of the last reforms that goes in that direction is the one enacted by the *Ley 41/2015, de 5 de octubre, de modificación de la LECrim para la agilización de la justicia penal y el fortalecimiento de las garantías procesales* (Act 41/2014, from October 5th, of Modification to the LECrim for the Facilitation of Criminal Justice and the Strengthening of Procedural Guarantees), which introduces an important novelty: *the procedimiento por aceptación de decreto* (procedure by acceptance of decree). This is a payment criminal procedure³⁹ whose scope of application are the offenses punishable by fine, community service or up to one year imprisonment, provided the latter can be suspended in accordance to the criteria established in arts. 80 ff of the Penal Code.

With regard to the proceedings of this singular procedure, firstly, the special role played by the Prosecution Service, which has the power of issuing a decree that, if accepted by the defendant, shall become an executory sentence that is to put an anticipated end to the criminal procedure (this feature is remarkably similar to the conformity). This punitive proposal of the Prosecution Service can only be possible when no popular or private accusation has been presented (the existence of such accusations may slower the process and we shall remember that the justification of the judicial policy for adopting this procedure is the decongestion of the judicial organisms and providing a fast punitive response). For this procedural channel to be used, the process shall be in the phase of the initial investigating proceedings and before the end of the investigation phase. And if we want to further describe the proceedings of the procedure by acceptance of decree, we shall say that the decision of the Prosecution Service must be referred to the *Juzgado de Instrucción* (Investigating Court), since it requires judicial authorization. Once this has been obtained, the parties are summoned to a hearing in order to ensure the adversarial principle. A relevant aspect is that

³⁶ GÓMEZ COLOMER *et al.* (2019), pp. 369-370.

³⁷ AGUILERA MORALES (1998), p. 72; CHOZAS ALONSO (2013), p. 105.

³⁸ A detailed study on this process can be found in LÓPEZ SIMÓ and CAMPANER MUÑOZ (2017).

³⁹ The peculiarity of payment procedures, frequently used in the context of the Spanish civil process (payment procedure regulated by the Act of Civil Procedure) and in the criminal procedures from legal systems other than the Spanish one (for example, the Italian model of procedure by decree or the Portuguese extremely summary trial) is the rapid resolution of conflicts when there is no controversy between the parties.

the defendant (who must appear accompanied by his counselor) must understand the content of the Prosecution Service's decree, especially the imposition of the proposed sentence and the effects of its acceptance.⁴⁰

And now let us focus on the appearance (or not) of the defendant. There are several possibilities: if he appears and understands and accepts the proposal contained in the decree, a condemnatory sentence that cannot be challenged shall be pronounced. If he does not appear, the proposal of the Prosecution Service shall have no effect and the procedure shall carry on through the appropriate channel. It might also happen that the defendant appears but does not accept the decree of sentence imposition, hypothesis in which the process shall also continue through the appropriate channel.

The procedure for acceptance of decree is similar to a channel parallel to conformity, or we could even assert that is one more channel for the conformity on criminal matters, thus answering the question stated at the beginning of this section. Nevertheless, as argued by Nieva Fenoll (in a somewhat ironic tone) "this procedure fell into disuse before coming into effect, because, in reality, it overlaps with the fast-track procedure, being quicker than the defense counselor and the prosecutor reach a conformity agreement on the spot before the Duty Court, with the exact same result".⁴¹ Or, as correctly pointed out by Sánchez Melgarejo, this peculiar procedure would have more sense if the Prosecution Service directed the investigation, "as a quick mechanism for obtaining conformity without the need to unnecessarily prolong the investigation; but not, however, when its initiation derives from an open judicial procedure, without penological incentive whatsoever, which, by the way, can be obtained resorting to other procedural mechanisms".⁴² If the draft of a new LECrim comes through, the investigation of offenses is going to be in charge of the Prosecution Service and then the procedure by acceptance of decree could get its chance.

⁴⁰ The content of the decree of proposing of imposition of sentence is the following: a) identification of the defendant; b) punishable act; c) committed offense and existing evidence; d) reasons why is understood that the prison sentence is to be substituted; e) sentence proposal (fine, community service, or license to drive), reduced by a third relative to the legally predefined penalty; f) restitution and compensation, if appropriate.

⁴¹ NIEVA FENOLL, J. (2019), p. 501.

⁴² Interesting here is SÁNCHEZ MELGAREJO, F. R. (2016) "El proceso por aceptación de decreto: ¿una verdadera vía para la conformidad penal?" in <https://www.abogacia.es/actualidad/noticias/el-proceso-por-aceptacion-de-decreto-una-verdadera-via-para-la-conformidad-penal-i/> (last date of inquiry: October 4th, 2020).

III. THE UNITED STATES AND CHILE: OTHER FORMS OF NEGOTIATED JUSTICE AND OTHER PROCEDURAL SYSTEMS.

3.1. The plea bargaining: The practice of negotiating and agreeing with which the American procedure usually finishes.

To begin with, I shall destine a few words to explain why I have chosen the USA. The Anglo-American Law presents remarkable differences with the continental European tradition and, besides, the USA is the country per excellence in which negotiated agreements take place. So much so, that it is asserted that the American system is not a system of trials, but one of *conformities*.⁴³ An adversarial system as the American is mainly characterized by the direction of the investigation being in charge of the Prosecution Service, establishing the facts, presenting evidence and, ultimately, delimitating the object of the process. Opening a parenthesis on the latter, the current trend in Spain is to move from a model of mixed criminal process or of “formal accusation”⁴⁴ to a purely adversarial system (as the American one) with new roles for the prosecutor through the attribution of discretionary powers in the exercise of the criminal action.

At this point we must address the institution that provides the title to this section: the *plea bargaining*. At first, this was a mechanism exceptional in nature aimed at rapidly resolving certain cases, afterwards becoming an almost essential procedural instrument.⁴⁵ The statistical data attest to this: 95% of the criminal procedures in America are resolved by an early recognition of guilt (*guilty plea*⁴⁶) which entails a waiver of the right to a trial, which conditions the sentence to be imposed upon the defendant and that is the outcome of a negotiation carried out between the prosecutor and the defense counselor (*plea bargaining*).⁴⁷ It is quite clear, in view of this highly elevated 95%, that the American process is apparently prepared for the sole purpose of negotiating, which takes the essence away from certain governing principles of the process, such as the principles of equality, contradiction, or the presumption of innocence. Taking as a reference a classical essay such as the one by Langbein, this author dared comparing the *plea bargaining* with the medieval law on torture.⁴⁸

Even then, the *plea bargaining* is the mirror through which the Spanish conformity and other procedural institutions in other countries are viewed,⁴⁹ but it is the case that in the USA the principle of opportunity is a basic and fundamental principle within their legal system,

⁴³ FERRÉ OLIVÉ (2018), p. 3, which also quotes the Supreme Court Sentence *Lafler v. Cooper*, from 2012 which confirms that the American system is a system of conformities.

⁴⁴ It is the system that became prevalent in Europe after the enactment of the Napoleonic *Code of Criminal Procedure* from 1808.

⁴⁵ ALSCHULER (1979), pp. 1 ff. And BIBAS (2016), pp. 1058 ff.

⁴⁶ TARUFFO (1979), pp. 238 y ss.

⁴⁷ LASCURAÍN SÁNCHEZ & GASCÓN INCHAUSTI (2018), p. 3. More statistical data in GALANTER (2004), pp. 459-570.

⁴⁸ LANGBEIN (1978).

⁴⁹ In this venue, see AAVV. (2010).

and it worries that in our country there is such a disproportionate application of this principle of opportunity and its difficult fit with the principle of legality.

As previously pointed out, it starts with an early admission of guilt (*guilty plea*) which is regarded as a confession that shall constitute the evidentiary base for the tribunal to establish the culpability of the defendant without the need of imposing the burden of proof upon the prosecution. In this scenario a negotiation between the prosecution and the defendant takes place (bargaining).⁵⁰

It is important to take a few instants to discuss this negotiation adequately. In general, this is a negotiation in which two or more individuals try to find common ground with the purpose of obtaining an outcome that satisfies the interests of both parties. Nevertheless, does this happen when the liberty of a person hangs from a thread? Clearly the answer is no. The defendant, who already starts the negotiation at a disadvantage, can often fall into the temptation of accepting the proposed sentence (in this supposed negotiation) due to fear, or because he lacks exculpatory evidence or has been ill advised by his legal counselor. These considerations allow me to pose the question as to what really the intention of the negotiation is through all these forms of *bargaining*. Should we speak of negotiation or rather of bargaining or conditioning? The legal doctrine considers that these forms *bargaining* are developed under the shadow of the trial, since the evidence and the possibility of obtaining a reduced sentence make the defendant well disposed toward the negotiation. The defendant and his defense counselor on many occasions prefer practicality, accepting a reduced sentence, thus not having to face a long and costly procedure in which chance sometimes plays a determining role in the result of the trial. Nevertheless, caution is advised regarding this sort of negotiations that take place within the criminal process, since in situations filled with tension, pressure, inadequate or insufficient counsel, the defendant can yield to the possibility of an advantageous solution which sometimes does not seem to be either advantageous or beneficial.

Such as these negotiations are developed and, ultimately, the *plea bargaining*, there is a strong belief that the procedure thus becomes more *administrative* or *privatized*. And it is the case that these negotiated forms (but not only in the context of the American process) entail a wavering to the fundamental rights to a public process, to the presumption of innocence, to not incriminate oneself and to provide relevant discharge evidence.⁵¹

Without losing sight of this wavering of fundamental rights, according to the Supreme Court of the USA, very much in the same vain with doctrine established by the European Court of Human Rights, the *plea agreement* is to fulfill the following requirements (which are similar to those established for the conformity in our Spanish legal system): 1) that the plea is given with complete knowledge and information regarding the circumstances of the case; 2) that the consequences are freely accepted; 3) that the recognition of guilt is voluntary and free, and 4) that the agreement and the formerly stated requirements can be subjected to

⁵⁰ FERRÉ OLIVÉ (2018), p. 4.

⁵¹ An expert on *plea bargaining* and *administratization* is Prof. Máximo Langer: LANGER (2020).

judicial review.⁵² It is true that after the defendant provides his preliminary admission of guilt, the tribunal is bound to accept it. Nevertheless, the control to which this admission of guilt (guilty plea) is subjected is usually superficial.⁵³

Justice can very well be more agile due to the practice of the *plea bargaining*. Besides, it is a highly used procedural instrument for dismantling criminal network. But the negotiation that takes place has more shadows than lights. We referred above to the technique of negotiation and to the different positions of the parties in the procedure. And the fact of the matter is that the defendant has a lot at stake and the Prosecution Service nothing,⁵⁴ which implies that the prosecutor can go to the extreme of pressuring the defendant with more severe sentences or with formulating more charges if the offered agreement is not accepted and the defendant decides to go to trial. This includes exerting pressure against the defendant's closest relatives.

3.2. The *procedimiento abreviado* (abbreviated procedure), the *procedimiento simplificado con reconocimiento de culpabilidad* (simplified procedure with recognition of guilt) and the *procedimiento monitorio* (criminal payment procedure): The forms of negotiation in Chile.⁵⁵

The presidential message which initiated in the year 2000 the parliamentary process that led to the of the Act N° 19.696, which enacted the Chilean Criminal Procedure Code, stated that one of the greater obstacles for the success of the criminal justice system was the management of a very large number of cases as well as the slowness that entails solving them. In order to facilitate them, some simplified procedures were proposed, in which some stages of the ordinary course of the process were suppressed via *agreements between the parties*, with the aim of achieving a quick solution for the different processes. So, with these three procedures the legislator commits itself to celerity as well as the application of the principle of opportunity with the purpose of decongesting the judicial organisms and also transforming a pure inquisitive criminal procedure into an adversarial one.

The *procedimiento abreviado* (*abbreviated procedure*) and the *procedimiento simplificado con admisión de responsabilidad* (*simplified procedure with recognition of liability*) fulfill the same purpose: to finalize the procedure in a quicker and more economical way through a negotiation between the prosecutor and the defendant. With regard to their scope of application, this includes offenses punishable by 540 days to five years imprisonment (*abbreviated procedure*) and offenses sanctioned with less than 540 days imprisonment (*simplified procedure with recognition of guilt*). Thus, the Chilean criminal procedural system intended to adapt to

⁵² *Natsvlishvili and Togomidze v. Georgia*, Appl. No. 9043/05, April 29th, 2014.

⁵³ LANGER (2006), pp. 223-299.

⁵⁴ This matter has been addressed, in Spain, by ARMENTA DEU (2012), pp. 135-137. In the United States of American, for instance, DAMASKA (2004), p. 1028.

⁵⁵ A recent study that reflects on the negotiated justice in Chile is OLIVER CALDERÓN (2019), pp. 451-475.

modern procedural legislations,⁵⁶ but distancing itself from the negotiation method used in the United States, which, even though is in vogue, has received and receives numerous critiques.

The intent of the legislator underlying the establishment of these procedures was, on one hand, that the negotiation would not be used for more serious offenses and, on the other hand, that the use of these procedures would favor the imposition of measures alternative to and that substitute penalties that involved imprisonment (in the Chilean system of criminal law, sentences up to five years imprisonment may be replaced by substitutive penalties, provided that the defendant has no previous criminal record). Both with regard to the abbreviated procedure and the simplified procedure, and in contrast with other forms of negotiated justice, even though the defendant recognizes or accepts the facts (object of the accusation and the factual background upon which is based, but not their legal qualification), is necessary that the judge accepts the voluntary character of the recognition, besides evaluating the evidence and pronouncing sentence. The Chilean legislator has been reluctant to the negotiated or consensual criminal justice and intends that there is a judicial control of the voluntariness of the recognition of acceptance of the sentence, apart from the evaluation of the evidence.⁵⁷ It is convenient to ask whether this judicial control should be more or less strict. Correa and Reyes argue that if the admission of the facts and the investigative background upon which they are based could be enough for basing a condemnatory sentence, this would deprive the judge of jurisdictional power and the possibility of condemning base on the sole confession would be admitted.⁵⁸ Other authors such as Mera Figueroa highlight that it would be contradictory with the high degree of discretion accorded to the prosecutor to admit a hard judicial control that leads to a substantive pronouncement on the matter, since the requests that show a disconformity between the legal qualification made by the prosecutor and the defendant should be rejected.⁵⁹

If we focus on the abbreviated procedure, a first reform of this procedure was enacted by Act N° 20.074, from November 14th, 2005. This act modifies the moment in which this abbreviated procedure may be started. Before the reform from 2005, this could be initiated in the *audiencia de preparación del juicio oral* (hearing of preparation of the oral trial), whereas after the reform is possible to resort to this procedure from the *formalización de la investigación* (formalization of the investigation). Due to this reform, its used began to consolidate, but did not show its complete effectiveness until the enactment of the Act N° 20.931, from July 5th, 2016. This latest act facilitates the effective application of the penalties established for robbery, theft, and the handling of stolen goods (which are the most common offenses, we suppose) thus improving their criminal prosecution.

⁵⁶ Countries such as Germany, Argentina, Croatia, Denmark, Scotland, the United States of America, France, The Netherlands, Italy, Norway, Poland, had already developed in their criminal procedural systems special negotiation-based procedures.

⁵⁷ See DEL RÍO FERRETTI (2009). Others: CORREA ROBLES & REYES LÓPEZ (2012); CORREA ROBLES (2018), pp. 185-212; DUCE JULIO (2019); FALCONE SALAS (2005), pp. 363-378, and PECCI (2005).

⁵⁸ CORREA ROBLES & REYES LÓPEZ (2012), p. 129.

⁵⁹ MERA FIGUEROA (2002), p. 253.

And why did a substantial modification of the prosecution of these offenses entail increasing the processing and efficacy of the abbreviated procedure? Well, in virtue of this act (and only for offenses against patrimonial interests or the socio-economic order) a general rule was enacted according to which mitigating and aggravating circumstances only proceed for establishing an inferior or superior penal framework (translator's note: *marco de pena*) within the Penal Code's legal framework.

To further illustrate this, before the entry into effect of the Act N° 20.931, the penal framework (translator's note: *marco de la pena*) established by law for robbery with intimidation was of five years and one day to 15 years and, by applying mitigating or aggravating circumstances, the penal framework could be inferior or superior to the one predefined by law. With the entry into force of this act from 2016, mitigating and aggravating circumstances can only operate for establishing an aggravated or mitigated penal framework (translator's note: *marco de la pena*) within the legally defined framework, that is, a robbery with intimidation can lead to a sentence of five years and a day to ten years. Moreover, the act establishes an exception to this general rule, relative to which the abbreviated procedure comes into play. The only way of applying a penal framework (translator's note: *marco de pena*) inferior to the one defined by law, when it comes to these patrimonial offenses, is to renounce to the oral trial and resort to the abbreviated procedure. This way, through this exception to the application of mitigating and aggravating circumstances, several defendants charged for theft, robbery, that opt to recognize the facts and resort to the abbreviated procedure in order to negotiate a sentence inferior to the established frameworks, or even for according a substitution of the imprisonment sentence for an alternative or substitutive measure (note that in the Chilean criminal law-system, the penalties of imprisonment can only be substituted if the sentence does not exceed five years). For this type of offenses (the most usual ones) and from the entry into effect of this act from 2016 onwards, the possibility of applying measures that are alternative to imprisonment is only possible resorting to the abbreviated procedure.⁶⁰

The Criminal Procedure Code from 2000 also included another procedure, besides the ones we have referred to. This is the *procedimiento monitorio penal* (payment criminal procedure). This procedure is of great importance in Chile due to the benefits it entails for the defendant if he accepts the offered sentence. The payment criminal procedure does not answer to the classical formulation of *solemnis ordo iudicarius*,⁶¹ since it escapes from formalisms and is simple, agile, and concentrated.

The payment criminal procedure allows the *Juez de Garantía* (Judge of Guarantees) to hear and decide cases that do not entail great complexity and without the need for carrying out an oral trial it is possible to trial criminal conducts (misdemeanors) for which the prosecutor requires only a fine. The judge is to review the case and the requested fine sentence and, if she deems it sufficiently based, she shall issue a decision declaring that the sentence is executory. Nevertheless, if the judge estimates that either the facts or the amount of the fine are not well based enough, the process shall continue its ordinary course by the appropriate

⁶⁰ RIEGO (2017), pp. 1092 ff.

⁶¹ DELGADO CASTRO (2015), pp. 1-24, which quotes TOMÁS Y VALIENTE (1960), p. 2.

channel. In case the judge declares that the sentence is executory, if the defendant accepts and pays the amount of the fine within fifteen days after the notification of the sentence, this will be reduced by 25%. In contrast, if the defendant manifests his disconformity with the imposed fine within fifteen days after the notification of the sentence, the process shall continue.

It cannot be overlooked that this procedure starts with the condemnatory sentence (without the defendant's appearance) and allows the opposition to it. It is necessary to point out that in the Chilean judicial system no formal opportunity is accorded to the defendant to declare his guilt or innocence, but consequences are derived from his attitude.⁶² This circumstance is not incompatible with the requirements of due process or the tenants of the right to the presumption of innocence.⁶³ Armenta Deu warns regarding an undeniable risk of justice privatization due to two clear reasons, which are: the increase of negotiation-based instruments, as well as the demands for an immediate justice and the escape from the process which the current situation shows, thus leading to a return to forms of self-tutelage.⁶⁴

In this Chilean procedure, just as in the Spanish procedure by acceptance of decree, there is not really a negotiation between the parties. Moreover, as it is also the case regarding the procedure by acceptance of decree, this is yet another indication of the principle of opportunity and its justification lies in facilitation and reduction of procedural costs.

IV. AS A FINAL REFLECTION

The present work combines several considerations and objectives beginning by examining a central aspect of the current legal situation and of the criminal-law reforms that characterize it, such as *facilitating-increasing the effectiveness of justice*. The tendency to accelerate processes takes place within the framework of both the civil and the criminal process, as well as in the different legislations belonging to our geographical and cultural surroundings (EU and Ibero-America) as well as in systems that belong to other legal traditions (USA). In the context of the criminal process the scope of application of the principle of opportunity has increased exorbitantly (the procedure by acceptance of decree, the payment criminal procedure, the procedure for minor offenses with the power of the Prosecution Service of ending this procedure early, mediation and, of course, conformity) and it is increasingly difficult making it compatible with the principle of legality. Besides, the search for a legitimate solution of the problems of justice (slowness, overload, lack of digitalization) makes us reflect upon the risks of a more effective justice based on the acceleration of the procedures.

If we discuss the effectiveness of the justice system and, in particular, the effectiveness in the criminal process, we have to discuss the *plea bargaining*, the conformity and other forms of negotiated criminal justice. The *plea bargaining* has vigorously extended to several countries (although adapting to the singularities of either *civil law* or *common law* system) and the statistical data are very favorable to the practice of negotiating within a criminal process. In

⁶² DELGADO CASTRO (2015), pp. 1-24, which quotes TOMÁS Y VALIENTE, F. (1960), p. 5.

⁶³ LAUDAN (2013), p. 142.

⁶⁴ ARMENTA DEU (2015), pp. 121-139.

the American case there is an absolute surrender to this system, with over a 90% of the processes ending through a negotiation (*guilty plea, plea bargaining*). Moreover, in Spain the numbers regarding conformity show a more than remarkable tendency towards using this mechanism as alternative to the condemnatory and absolutory sentences (as attested in the *Memorias de la Fiscalía General del Estado* [Memoirs of the General State Prosecution]).

The figures concerning negotiated justice are unquestionable, but we can question the following: why there are so many people willing to waive their rights? An, even, why do innocent people give their conformity? Two of the reasons can be the excessive duration of the process and the costs associated to it, as well as the fear of a wrong decision as the outcome of the process.

Through conformity the criminal process is concluded with the acceptance of the requested sentence on part of the defendant, with the previous validation of the judge. Usually, before proposing a sentence, the prosecution and the defense carry out a negotiation ending with the recognition of the facts and the acceptance of the sentence. In exchange for this recognition or acceptance, the defendant obtains certain benefits.

In most consensus-based procedures there is neither oral trial nor production of evidence. We face the suppression of the most important act of the process, which can lead to the infringement of the different guarantees of principles of the process. Without the production of evidence, we must presume that the confession of the defendant or the recognition of the facts constitute the material truth, therefore, with the conformity the main function of the judge is eluded, namely that of finding that material truth (to verify the facts through the allegations of the parties and the production of evidence) and passing sentence. As previously argued concerning the American plea bargaining, the prosecutor can resort to intimidation, fear, or threat to the relatives in order to reach an agreement, and the judicial review of the early admission of guilt (*guilty plea*) is sometimes superficial. If we focus on other countries, Chile, for instance, aims at escaping the American model by regulating a judicial review of the voluntary character of the recognition or acceptance of the facts, as well as contemplating the evaluation of evidence, which seems to be a correct approximation.

With these negotiation formulas there is a waiver of fundamental rights, among them, of the right to the presumption of innocence. So, when a sentence of conformity is dictated, neither an oral trial has taken place nor evidence has been produced, so the material truth has not been obtained and, moreover, in case the facts are dubious, the simple acceptance of the sentence by the defendant shall be sufficient for a conviction, thus neglecting the *in dubio pro reo* principle as well as the right to the presumption of innocence.

We are putting aside guarantees, principles and fundamental rights with the purpose of circumventing the excessive duration of processes. Not everything should be acceptable for achieving procedural facilitation. Besides, the image of the justice system (at least in Spain) is still one of slowness. Conformity and other expressions of the principle of opportunity in the Spanish system will remain on the rise, above all, if we consider the global pandemic situation through which we are living and that has caused the eleventh collapse of the tribunals and, if the preliminary draft of a new LECrim carries on with the prosecution leading the investigation under judicial control. But the sensation is that so much negotiation, so much

facilitation and so many waivers will lead to losing the judicial procedure. Let us hope this is not the case.

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