



The regulations of agreement  
between defense and  
prosecution in criminal  
procedure: State and  
development perspectives

## THE REGULATIONS OF AGREEMENT BETWEEN DEFENSE AND PROSECUTION IN CRIMINAL PROCEDURE: STATE AND DEVELOPMENT PERSPECTIVES

### LOS REGLAMENTOS DE ACUERDO ENTRE LA DEFENSA Y EL PROCESAMIENTO EN EL PROCEDIMIENTO PENAL: PERSPECTIVAS DE ESTADO Y DESARROLLO

#### ABSTRACT

The problem of current criminal procedural legislation improvement still retains a high degree of urgency. And one of the promising trends of such a development is the clarification of contractual regulation place and content in the field of criminal justice and, accordingly, the optimization of its parameters, which acquires a special significance in the context of a number of negative criminal trends development in Russian Federation, forming the prerequisites for their localization and overcoming. The specificity of a current criminal situation and the alarming forecasts of its development predetermine the activity of society and the state in search of optimal ways to increase the efficiency of criminal proceedings, also by improving the norms that support the existence and the actual content of contractual relations in criminal proceedings. Negative trends in crime and the declining of clear-up rate reveal that traditional, established legal institutions aimed at the elimination of the criminal-legal conflict between the state and the person who committed the crime, as well as its causes, can not always be applied effectively and require qualitatively different approaches to solve this problem, the introduction of new procedures to stop the expansion of crime.

**KEYWORDS:** criminal justice, contractual regulation, criminal process party, prosecution, defense simplified procedure.

Copyright © Revista San Gregorio 2018. eISSN: 2528-7907 ©

#### RESUMEN

El problema de la mejora de la legislación procesal penal actual aún conserva un alto grado de urgencia. Y una de las tendencias prometedoras de tal desarrollo es la aclaración del lugar y el contenido de la regulación contractual en el campo de la justicia penal y, en consecuencia, la optimización de sus parámetros, que adquiere un significado especial en el contexto de una serie de tendencias criminales negativas. desarrollo en la Federación de Rusia, formando los requisitos previos para su localización y superación. La especificidad de una situación criminal actual y los pronósticos alarmantes de su desarrollo predeterminan la actividad de la sociedad y el estado en busca de formas óptimas de aumentar la eficiencia de los procedimientos penales, también al mejorar las normas que respaldan la existencia y el contenido real de los contratos. Relaciones en el proceso penal. Las tendencias negativas en el delito y la disminución de la tasa de compensación revelan que las instituciones legales tradicionales establecidas para eliminar el conflicto criminal-legal entre el estado y la persona que cometió el delito, así como sus causas, no siempre pueden ser aplicados de manera efectiva y requieren enfoques cualitativamente diferentes para resolver este problema, la introducción de nuevos procedimientos para detener la expansión del crimen.

**PALABRAS CLAVE:** justicia penal, regulación contractual, proceso penal, procesamiento, procedimiento simplificado de defensa.

Copyright © Revista San Gregorio 2018. eISSN: 2528-7907 ©

	<b>IGOR O. ANTONOV</b>		<b>LILIYA T. BAKULINA</b>		<b>ANDREY YU. VERIN</b>
	Kazan Federal University, Russian Federation		Kazan Federal University, Russian Federation		Kazan Federal University, Russian Federation
	<a href="mailto:igolant@yandex.ru">igolant@yandex.ru</a>		<a href="mailto:bltkfu@mail.ru">bltkfu@mail.ru</a>		<a href="mailto:verinkfu@mail.ru">verinkfu@mail.ru</a>
			<b>MARINA E. KLYUKOVA</b>		
			Kazan Federal University, Russian Federation		
			<a href="mailto:dkme@mail.ru">dkme@mail.ru</a>		

ARTÍCULO RECIBIDO: 20 DE NOVIEMBRE DE 2018

ARTÍCULO ACEPTADO PARA PUBLICACIÓN: 12 DE DICIEMBRE DE 2018

ARTÍCULO PUBLICADO: 28 DE DICIEMBRE DE 2018

## INTRODUCTION

One of the promising trends in the development of the criminal process in modern Russia is that the so-called punitive nature of justice is gradually giving way to restorative justice, which presupposes the use of such methods for criminal proceeding appointment implementation, which are based on the results of the procedures coordinating the positions of the prosecution and defense parties in the framework of mutually beneficial contractual relations, the expediency of the use of which in the doctrine of the criminal process are actively disputed still (Matkina, 2010).

One can not but agree with the opinion that the state also uses known methods of contract freedom restriction for a certain type of legal regulation - permissive or generally permissive in the sphere of criminal proceedings. And in this regard, their establishment (restrictions) depends on the specifics of regulated social relations, including the prevalence of private or public interests in them (Bakulina, 2017).

A variety of options for contractual regulation in the field of this type of proceedings makes its contribution to the achievement of criminal justice objectives, as provided by the legislator, starting with those that may be concluded prior to the initiation of criminal proceedings in the context of operational-search legal relations (for example, Part 3, Article 15 of the Federal Law "On operational-search activity"), ending with those that are already in the stages of a criminal case preliminary investigation and a trial (in particular, see Chapters 40, 40.1 of Criminal Procedure Code). A special place among the contracts in the sphere of criminal justice is occupied by those that the prosecution and the defense parties conclude with each other.

According to the data of the Judicial Department under the Supreme Court of Rus-

sian Federation, a special order of the trial at the consent of the accused with the charge brought against him was used in 594,243 criminal cases (2017), during the conclusion of the pre-trial cooperation agreement it was used in 4,391 criminal cases.

A wide application of these procedures in the Republic of Tatarstan is confirmed by the following statistical data. In 2017, a special trial procedure was applied in 7,260 criminal cases at the consent of the accused one with the charges brought against him and in 26 criminal cases at the conclusion of a pre-trial cooperation agreement.

The analysis of contractual regulation experience in RF criminal procedure allows us to formulate a rather ambiguous assessment: on the one hand, the need and the possibility of its most active application at the pre-trial and judicial stage of criminal proceedings in the cases provided by law, on the other, they are concerned that some positions in the contractual relations between the parties of the criminal proceedings are not regulated in a precise, detailed and sequential manner that may carry the risk of goal achievement failure in full stipulated by the legislator in the sphere of participant legitimate rights and interests protection in criminal proceedings.

All mentioned above directly causes the need to intensify the search for solutions adequate to the present-day challenges in the field of contractual regulation improvement in criminal proceedings, based on an analysis of existing domestic practice, as well as on the use of positive foreign experience in this area.

## METHODS

The methodological basis of our research was, first of all, represented by the basic dialectical method of social and legal phenomenon cognition in the field under consideration, the methods of analysis, questioning, and the comparative legal method. Also, the statistical method was widely used during the research, which allowed to reveal the dynamics and the prevalence of contractual regulation application in the criminal process.

One of the important means of legal phenomenon study is the comparative legal method. In particular, our study of contractual regulation in criminal proceedings showed that, despite the recently published very interesting

monographic studies of domestic authors (Abshilava, 2012; Matkina, 2012; Baev, 2013), the need to analyze foreign experience in this area remains relevant for its use in Russian Federation, which predetermined our interest to a wide range of foreign studies in this field. Among them are the works of such scientists as Albert W. Alschuler, Stephanos Bibas, Andrew Manuel Crespo, Tarika Daftary-Kapur, Brandon L. Garrett, Richard L. Lippke, Boaz Sangero and others (Alschuler, 2018; Bibas, 2016; Crespo, 2018; Daftary-Kapur and Zottoli, 2014; Garrett, 2016; Lippke, 2018; Sangero, 2018).

The key method in our study was the method of judicial-investigative and prosecutorial-supervisory practice analysis on issues of contractual regulation in criminal proceedings (the statistical data of the Supreme Court and the Prosecutor's Office of RT

## RESULTS AND DISCUSSION

A. The contractual regulation between the prosecution and the defense is recognized in Russia as an acceptable instrument to resolve a criminal-legal conflict between a state and a person who has committed a criminal act, the application success of which depends largely on consistent and detailed level of its regulation by a legislator.

In this regard, it seems logical to supplement Article 5 of RF CPC with the paragraph containing a clear definition of the agreement between the prosecution and the defense party.

The contract in criminal proceedings presupposes the existence of a certain agreement, its record in the form and the procedure established by a legislator between the participants of criminal proceedings. Accordingly, the thing is about an agreement between the prosecution and the defense in the case we consider. In this version of the contract, there is a combination of public and provisional origins of criminal proceedings as the reflection of the mandatory nature of criminal prosecution for each case of its initiation on legal grounds, as well as the record of the party possibility agreeing on the process of certain parameters of criminal prosecution support within the limits and the procedures established by law.

RF CPC provides for the following types of domestic criminal proceedings contractual regulation between the prosecution and the defense: 1) a special procedure for taking a court decision at the consent of an accused one with the charge against him; 2) a pre-trial cooperation agreement; 3) the reconciliation of the parties.

In our opinion, the most demanded and relatively regulated among the abovementioned variants of contractual regulation in criminal proceedings is a special procedure of a trial at the consent of an accused one with the charges brought against him, the introduction of which represented a fundamentally new, previously not typical trend of criminal procedural legislation of Russia development in the direction of dispositive principles and conciliation procedures expansion in the form of mutually beneficial contractual relations.

A special order of a trial is an agreement between the accused one and the prosecution on the establishment, modification and termination of the criminal procedural rights and obligations set out in the Ch. 40 of CPC. The agreement on a special trial procedure is considered as concluded if a criminal procedural agreement has been reached between the parties in the form prescribed by law on all the essential conditions of the contract, as set forth in Ch. 40 of CPC.

In other words, the special order of the trial is one of the forms of contractual regulation per se in the framework of criminal proceedings, which is based on the contract that consolidates the procedural positions of prosecution and defense parties, who have made mutually acceptable concessions in the framework of mutually acceptable conditions.

Another option of contractual regulation in domestic criminal proceedings is a pre-trial cooperation agreement, the content of which is the performance of voluntary obligations by a suspect (an accused one), on the one hand, and the actions of a prosecutor recorded in the criminal procedure law, as well as their rights and obligations, on the other. Such a contract is a mutual agreement between the prosecution and the defense party, which presupposes the possibility of coordinating the terms of the accused (the suspect) criminal responsibility, depending on his actions after the initiation of a criminal case or a charge.

The cooperation of the suspect, the accused one, based on the pre-trial agreement, is of a continuing nature and is also being implemented at the judicial stages of the criminal process.

Thus, the contractual nature of the pre-judicial cooperation agreement is expressed in the fact that the parties enter into an agreement on certain conditions with the aim to generate legal mutually beneficial consequences, providing a reasonable balance of public and private principles in the sphere of criminal procedural relations.

The resulting relations of cooperation between the state on behalf of the bodies conducting criminal proceedings and the accused one (the suspect), which are mutually beneficial for them per se, must have clearly defined boundaries, the violation of which is unacceptable from the point of view of observance of rights and freedoms of the process participants, the provision of a qualitative investigation of a crime and a fair judicial decision (Verin et al, 2016).

The contractual regulation in criminal proceedings presupposes the regulation of not only the content of the contract between the prosecution and the defense, but also a special procedure to achieve an acceptable consistency of the prosecution and the defense party, which is usually called a conciliation procedure. This procedure allows the parties to achieve the permitted and desirable compromise for them within the limits established by law.

B. Given that there are several options for contracts between the defense and the prosecution in domestic criminal proceedings and it is likely that its new varieties will appear in the foreseeable future, it is advisable to introduce an independent chapter "General provisions of contractual regulation in criminal proceedings between the defense and the prosecution party" for RF CPC, in which it is reasonable to reflect the most basic characteristics of such contracts.

One of the most important parts of the chapter should be the general conditions for the conclusion, suspension, renewal and termination of the contract between the defense and the prosecution party in criminal proceedings. The general conditions of such a

contract should include all those procedural rules that should help to maintain an acceptable balance of interests for prosecution and defense party within the limits established by the criminal procedure law. In particular, one should include the following to such ones: 1) the grounds for the conclusion, suspension, renewal and termination of a contract; 2) the form of a contract; 3) the responsibility of the parties for contract violation; 4) the duration of the contract.

C. An important place among the general conditions should be occupied by the determination of the grounds for a contract conclusion, suspension, renewal and termination between prosecution and defense parties. In fact, the grounds for a contract conclusion fix the permissible limits of the contract mechanism implementation in Russian criminal justice system. The public danger of a criminal act should be attributed to such grounds first of all. In our opinion, the category of a committed crime should stipulate the form of the contract concluded between prosecution and defense party, as well as its specific conditions that make up its content. It is necessary to refer the situations fixed at the legislative level, under which one or another party of the process can initiate conclusion, suspension, renewal and termination of the cooperation agreement, to equally significant grounds.

D. An important general condition should be the mandatory written form of the agreement, which, from the point of view of participant right and legitimate interest provision for the process participants, is preferable than the set of procedural actions and decisions on certain varieties of the contract under consideration fixed in the criminal procedural law (see chapter 40 of RF CPC). It seems that the set of rights and duties of each party, fixed in an independent procedural document, will reduce the risks of misunderstanding or the abuse of procedural rights in the framework of contractual procedures, both on the part of prosecution and on the part of defense. The written form of the contract must also contain the information on the date, the place of its drawing up, the official concluding the procedural agreement, the personal data of the accused one (the suspect), the criminal offense committed by him, other circumstances that are to be proved by a criminal case, the actions that the accused (the suspect) is obliged to commit after the contract conclu-

sion, the consequences of the contract conclusion provided by RF CPC, etc.

E. A special place among the general conditions for the conclusion, suspension, renewal and termination of an agreement between the defense and the prosecution in criminal proceedings should be the position on the responsibility of the parties for the failure to comply with its terms. The responsibility for a contract breach must be clearly defined for both the prosecution and the defense. It is necessary to remember the specifics of such contracts in criminal proceedings, which is expressed in the fact that the logic of the adversarial process is not always maintained during their conclusion, since the prosecution has more power than the defense, which makes the position of the latter more vulnerable in the cases of controversial situations. In this regard, it seems that RF CPC should state more clearly the obligations of the authorities - the prosecution participants, who can and should become the subject of the concluded contract, and in case of their non-fulfillment - the basis for their legal responsibility. The procedural order of bringing the prosecution - defense agreement violators to responsibility deserves a more detailed regulation by the legislator.

F. In general terms, in our opinion, it is expedient to determine the procedural terms for position coordination by the parties to the criminal process (conciliation proceedings) and the procedural terms of the agreement itself between the prosecution and the defense. At the conclusion of the contract, each of the parties must have a perfectly accurate idea of such an agreement operation duration, as well as of a liability for such term violation. In our opinion, this rule, having created the certainty concerning the stages of the criminal process to which are covered by the contract between prosecution and defense parties, will also allow to protect more the rights and the legitimate interests of participants in criminal proceedings.

## CONCLUSIONS

A. The success of the further application of contractual regulation between the prosecution and the defense in Russia depends to a large extent on the consistently and detailed level of its regulation in current legislation. In this regard, it is advisable to supplement the

Article 5 of RF CPC with the definition of a contract (an agreement) between the prosecution and the defense.

B. It makes sense to introduce an independent chapter "General provisions of contractual regulation in criminal proceedings between the defense and the prosecution" in RF CPC, which will reflect the basic characteristics of all varieties of such contracts. A key component of the said chapter should be the general conditions for the conclusion, suspension, renewal and termination of an agreement between the defense party and the prosecution in criminal proceedings, among which it is appropriate to include procedural rules conducive to maintain an acceptable charge for the party and protect the balance of their interests in established criminal-procedural law (the grounds for contract conclusion, suspension, resume and termination, the form of the contract, the responsibility of the parties for the contract violation, the contract duration).

C. The basis for an agreement conclusion between the prosecution and the defense determines the permissible limits of the of the contract mechanism introduction in Russian criminal justice system. Among these, the following should be mentioned, first of all: 1) the public danger of a committed criminal act that predetermines the contract form between prosecution and defense, as well as its specific conditions that make up its content; 2) the determination of procedural situations in which one or another party of the process may initiate the conclusion, the suspension, the renewal and the termination of the cooperation agreement.

D. An important general condition should be the mandatory written form of the contract, designed to protect the rights and legitimate interests of participants in criminal proceedings. The set of rights and obligations of each party, fixed in an independent procedural document, significantly reduces the risks of misunderstanding or abuse with procedural rights within the framework of contractual procedures.

E. The general condition for the conclusion, suspension, renewal and termination of an agreement between the parties of defense and prosecution is the record of the position on

the responsibility of the parties for non-compliance with its terms.

F. One of the general conditions should be the procedural terms for the position coordination by the parties to the criminal process (conciliation proceedings) and the procedural terms of the agreement between the prosecution and the defense.

### SUMMARY

Thus, the imperfection of the current legal norms in modern Russia, which fix the mechanism of contractual regulation in crimi-

nal proceedings, undoubtedly implies their rethinking, update and systematization on a new basis in accordance with the real and potential needs of law enforcement practice.

### ACKNOWLEDGEMENTS

The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University. ■



### BIBLIOGRAPHY

Matkina, D. V. (2010). Conventional form of legal proceedings: history, current situation and development prospects: monograph. Moscow: Yurлитinform, p. 216.

Bakulina, L. T. (2017). The means of contractual legal regulation. Actual problems of Russian law. No. 5 (78). pp. 158-166.

Abshilava, G. V. (2012). Conciliation proceedings in the criminal proceedings of Russian Federation: monograph. Ed. by O.A. Zaitsev. Moscow: Yurлитinform, p. 456.

Baev, O. Ya. (2013). Pre-judicial cooperation agreement: legal and forensic problems, possible trends for their resolution: monograph. M.: Norma, Infra-M, p. 208.

Albert, W. (2018). Alschuler. Plea Bargaining and Its History. Columbia Law Review. URL: [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2005&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2005&context=journal_articles) (Дата обращения: 15.06.2018); Albert W. Alschuler. PLEA BARGAINING AND THE DEATH PENALTY // DePaul Law Review. URL: <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1227&context=law-review> (Дата обращения: 15.06.2018).

Bibas, S. (2016). Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops. William & Mary Law Review. Volume 57. Issue 4. pp. 1055-1081.

Crespo, A. M. (2018). The Hidden Law of Plea Bargaining. Columbia Law Review. Volume 118. No. 5. pp. 1303-1424.

Daftary-Kapur, T., Zottoli, T. M. (2014). A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court. International Journal of Forensic Mental Health. Volume 13. Issue 4. pp. 323-336.

Brandon, L. (2016). Garrett. Why Plea Bargains are Not Confessions. William & Mary Law Review. Volume 57. Issue 4. pp. 1415-1444.

Richard, L. (2018). Lippke. Plea Bargaining in the Shadow of the Constitution. Duquesne University Law Review. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2319058](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319058) (Дата обращения: 16.06.2018).

Sangero, B. (2018). Safety from Plea-Bargains' Hazards. Pace law review. Volume 38. Issue 2. pp. 301-337.

Verin, A. Y., Antonov, I. O., Klyukova, M. E., Rahmatullin, R. R. (2016). Some problems in application of certain forms of summary procedure based on criminal procedure code of the Russian Federation. Journal of Legal, Ethical and Regulatory Issues. Volume 19. Special Issue. pp. 25-30.

