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Plea bargaining in the American criminal justice system – between economics and justice

The subject of my dissertation is the institution of a plea bargaining in the American criminal procedure. First of all, we should realize that a plea bargaining is not an additional part of American criminal procedure, a plea bargaining is the American criminal procedure. The usage of that institution is universal (almost permanent) and affects the whole procedure, which eliminates its main part – the trial. This is why it is claimed that American criminal process has a negotiating character. That is why plea bargaining is a key figure to understand the American criminal justice system. Plea bargaining is a lens in which substantial elements of criminal procedure and their characteristics are shown, likewise its main, systemic problems. I assume also that focusing on a plea bargaining allows to learn more about the American state in general.

Therefore, in my paper I work in the two fields of inquiry: plea bargaining and the American criminal justice system. I want to take a look at how the domain of negotiation is combined with criminal process and what the conclusions of jurisprudence are. "Between economics" – because, first of all, I want to know what happens when we deal with the efficiency of the criminal procedure, and secondly, I want to confront with the Law & Economics doctrine. "And justice" – because I deal with justice system and criminal law, which cannot be deprived of justice. I assume I will recognize causes of using the consensus modes and what the outcomes for the justice system are. In this dissertation I describe the basics of the American justice system and criminal procedure law structure, and the institutional environment of plea bargaining and its main regulations resulting from the American Constitution, Supreme Court case law and federal rules. It is important to know that on the level of states and even of each district attorney's office there can be more detailed rules connected to plea bargaining but none of them are contradictory with rules deriving from the Constitution,

neither do they change the general outlook of plea bargaining. Also, they do not indicate any new factor in confrontation with legal theories. Therefore, that perspective seems to be sufficient to achieve expected objectives.

In the Opening Chapter I present briefly my views on the jurisprudence and based on the American scholarship and legal culture I introduce the initial assumptions about the institution of law and state which create framework for my thesis. Finally, I present my theses which are proven in this dissertation. In the 2nd Chapter I describe key elements of the American criminal justice system, presenting the model of the American process and the respective conclusions. The 3rd Chapter pertains the institution of a plea bargaining, showing its regulations in federal and constitutional law, its historical development and the practice of its usage. The final point in this chapter is comparison with the similar Polish solutions of consensual resolution of criminal cases, that is Articles 335 and 387 of Polish Code of Criminal Procedure. In the 4th Chapter, based on the outcomes from previous parts of the dissertation, I confront plea bargaining with the Law & Economics doctrine, showing its views on the consensual resolutions of criminal cases and critically analyzing this theory. In this chapter I also present cybernetic (or in other words, "systemized") approach to issues of law and state, which helps identify differences between Polish and American justice systems. At the end of Chapter 4 I present some suggestions on the aim of criminal law based on the thought of O.W. Holmes.

The goal of this dissertation was to show the main features of the American criminal justice system and in how many points it is vulnerable to uncertainty, impreciseness and, in a way, spontaneity. The most important elements affecting the shape of the American criminal procedure are: methods of selection of the officials, their discretional power, lack of principle of legalism, lack of principle of objective truth, consequent adversary system in court proceeding which imposes responsibility for the outcomes of the trial on the parties, significant use of social lay participants with their ability to follow their own evaluation – jury nullification, reliance of the procedural law on general constitutional provisions interpreted by judicature, expanded system of rules of evidence which limits the government's actions. Those elements are closely related to the institution of plea bargaining. Its existence derives directly from those foundations of the American process, which also indicates that it is impossible to abolish conducting of plea bargaining, and furthermore that official implementation of this institution was preceded by using its mechanisms in unofficial, spontaneous and impliedly way.

According to my assumptions, the set of features of the American criminal justice system can be named as "Freedom". This dissertation shows that this set of features connected

with the key elements of criminal procedure is the reason of permanent using of plea bargaining. Plea bargaining derives from the shape of American process and in the same time balances disadvantages of the unprecise system of Freedom (non-system). The Polish system is organized in a different way, based on detailed norms of procedure from the statute level, principle of objective truth, principle of legalism and the leading role of a judge in a trial, shows the set of the features which we called Security. Here the usage of similar consensus modes in criminal dispute resolution has an opposite objective – to overcome disadvantages arising from its Security, which is mostly protraction, inefficiency, bureaucracy.

Even though in this paper I demonstrated the limits of using Law & Economics doctrine, the economic analysis of law shows that in the current American criminal justice system both parties, the defendant and the justice system, gain benefit thanks to the use of plea bargaining, which derives from mutual limitation of risk, eliminating the disadvantages of the system. Game theory shows that decisions of both parties are strictly combined and result from the assessment of the opposite side. The presented analyses clearly show that defendants who are deprived of the ability to take a plea bargaining would be more helpless or they would end with harsher sentences, which are often inadequate because of mistaken anti-drug policy ("3 strikes out" rule, Anti-Drug Abuse Act of 1986). On the other hand, plea bargaining enables justice system to function, because according to the contemporary crime rate it is impossible to handle all cases through a criminal trial. The limitation of using Law & Economics doctrine arrives from the lack of rationality of the actors – negotiating parties, caused by their non-incidental roles and group identities and by lack of possibility to strictly compare available alternatives, which results from unpredictability of trial course, judge's decisions in the matter of rules of evidence and also jury's decision on credibility of evidence.

Using basic cybernetic terms, which are used to model systems, we can notice that Americans did not create proficient, consistent system. Instead, from the level of structure building, they created a system in which many links have an enormous impact on the course of a criminal case. It causes that the system is more flexible and opened to a discussion about values and that it can be more easily adjusted to a specific case. On the other hand, it enhances unpredictability, which, as I mentioned, is the main incentive to the use of a plea bargaining, next to overload of cases and limitation of sources.

The essential disadvantage of a plea bargaining may be that correct functioning of the social system and the mutual trust cannot be ensured only by means of punishment, but also by the procedure of imposing them. Therefore, it is important what that procedure is and what its criteria are. Implementing justice in a state must be public to strengthen its stability. It seems

that in the design of the plea bargaining this value is secured by public acceptance of an agreement and sentencing by a judge. Currently, in the United States we deal with the biggest index of incarceration in the world. The majority of criminal cases is directly or indirectly connected with the national drug abuse problem – especially low-level drug offences. We face the focal point in which the American establishment has to reconsider the issue of criminal policy in that types of cases. The first sign of a change in that direction is the Fair Sentencing Act of 2010, which decreases minimum mandatory sentences and the disproportion in treating crack in regard to cocaine.

In the United States a criminal trial is an institution which indeed engages society, encourages it to ask moral questions and to set discussion about values. It is not necessary and even required to become universal solution in "everyday" criminal cases. And that is what happens, by which Americans discovered efficiency in the functioning of the criminal justice system. The Supreme Court takes only 1% of cases worth hearing its voice, likewise the institution of criminal trial is used only in a small fraction of cases worth its attention. Adversary trials are conducted when it is reasonable for a jury trial to resolve unclear issues or cases that draw public attention. Whatever we may say about the presumption of innocence and constitutional guarantees, it is clear that with the structure of criminal law and criminal procedure law there are cases which are not adequate to a full statement of jury trial. According to the shape of the institution of plea bargaining, the court's voice to some extent is guaranteed, but without full legal reasoning. It constitutes an intermediate formula to the expression stating that law does not care about trivial things. A practice was created based on a new maxim which stated that trial is for serious matters.

As Dean Strang, former defense attorney for Avery and an adjunct professor at the University of Wisconsin Law School, said, "most of what ails the American criminal justice system lies in unwarranted certitude on the part of police officers and prosecutors and defense lawyers and judges and jurors that they are getting it right, that they simply are right". It can be perceived as lack of cohesion and humility that lead to lack of precision. On the other hand, it proves that this system consists of vital citizens in a democratic society.