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RESTRICTIONS ON THE EXERCISE OF FUNDAMENTAL RIGHTS BY THE OFFENDER IN CRIMINAL AGREEMENTS FROM THE PERSPECTIVE OF LEGAL PATERNALISM

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RESUMO

O artigo aborda o conceito de paternalismo jurídico e adota a concepção de Valdés como uma coerção estatal no comportamento do indivíduo, contra sua vontade, visando evitar-lhe um dano, protegendo-o de um comportamento autorreferente. Analisa a admissibilidade do paternalismo para restringir disposições de garantias processuais pelos infratores nas negociações de acordos penais com o Ministério Público. Para tanto, aborda a autonomia do infrator e as condições nas quais sua decisão é tomada, tendo como parâmetro as lições de Valdés, Maniaci e Sarmento. São examinados os requisitos de uma decisão racional e autônoma, qual seja, a capacidade de discernir, baseada no conhecimento dos fatos relevantes, livre de vícios de discernimento, de pressões coercitivas, de vulnerabilidade, estável no tempo e sem causar danos a terceiros. São pontuados os direitos fundamentais imprescindíveis para garantir a

competência básica do infrator no exercício de sua autonomia e elencadas as garantias processuais passíveis de restrição na negociação.

Palavras-Chave: Paternalismo. Autonomia. Acordo Penal. Disposições de Direitos Fundamentais.

ABSTRACT

The article addresses the concept of legal paternalism and adopts Valdés' conception, as a state coercion on the individual's behavior, against his will, aiming to avoid a harm to him, protecting him from a self-referential behavior. It analyzes the admissibility of paternalism to restrict provisions of procedural guarantees by offenders in negotiating criminal agreements with the Public Prosecutor's Office. To this end, it addresses the offender's autonomy and the conditions under which his or her decision is made, using the lessons of Valdés, Maniaci and Sarmento as a parameter. The requirements of a rational and autonomous decision are examined, namely, the ability to discern, based on knowledge of the relevant facts, free from vices of discernment, coercive pressure, vulnerability, stable over time and without causing damage to third parties. The fundamental rights necessary to guarantee the basic competence of the offender in the exercise of his autonomy are pointed out, and the procedural guarantees that may be restricted in the negotiation are listed.

KEYWORDS: Paternalism. Autonomy. Criminal Agreement. Fundamental Rights. Provisions.

1 INTRODUCTION

Criminal agreements presume reciprocal concessions between the State Prosecution and the offender. Many arguments permeate the discussion about the possibility of the offender agreeing not to exercise procedural guarantees, such as the availability or unavailability of the fundamental rights, the extension of the right to liberty, legal paternalism and human dignity.

This article is interested in addressing legal paternalism as a justification for restricting the power of the offender of disposal in the consensual solution signed with the State Prosecution, either by prohibiting or not recognizing the production of legal effects of that solution.

To this end, the concept of paternalism will be defined, in order to avoid terminological confusions that lead to its unrestricted adoption, with

exaggerated interventions in individual freedom, or its total rejection, with lack of protection of legal goods.

Once the concept is defined, we intend to investigate the admissibility and legality of the paternalistic treatment of offenders in the execution of criminal agreements. To this end, the autonomy and its requirements will be appreciated, to justify the exercise of the general right of freedom of the offender in agreeing to restrictions on procedural guarantees. Next, the hypotheses of vices of discernment, coercive pressure and vulnerability will be investigated, to allow paternalistic interventions, as well as suggested possible measures that can overcome the weakness and admit the negotiated solution, besides explaining the procedural guarantees subject to consensual restrictions.

This is intended to delineate, from a paternalistic approach, the situations in which the State can intervene in the individual liberty of the offender, in order to limit his or her guarantees that may not be exercised.

2 LEGAL PATERNALISM

Among the various concepts of legal paternalism, one can perceive a common denominator as being a restriction, by the State, of the autonomy of the individual, against his will, in self-referential acts, with the purpose of protecting him from himself, from what is considered a better option for him. The examples are countless, such as the obligation of motorcyclists to wear helmets and drivers to wear seatbelts, prohibition of prostitution, drug consumption, sale of some medicines without prescription and gambling.

For Valdés (1988), paternalism can be understood as a coercive intervention in the behavior of a person, against his will, in order to prevent him from harming himself.

For Atienza (1988), a conduct is paternalistic if it is carried out in order to obtain a good for a person or a group of people, without their acceptance.

Feinberg (1980) states that paternalism would be a state coercion to protect an individual from self-inflicted harm or to guide him for his own good, whether he likes it or not.

And Dworkin (1987) relates paternalism to a violation of the autonomy of the individual, preventing people from doing what they have decided or interfering in their decision making.

Sunstein and Thaler (2019) use the term "libertarian paternalism" to refer to the adoption of non-coercive measures aimed at helping the individual make rational decisions (nudges), in which their freedom of choice is not restricted. Martinelli (2010, p.107) covers "persistent advice" as paternalistic practices, even if there is no contrariness of the will, because it modifies them if accepted.

In other words, some authors understand paternalistic practices as interference by means of information or advice, because it is intended to change the behavior of a person. And there is a discussion as to whether the paternalistic intervention aims to prevent harm or to achieve good for the target of the intervention.

This article adopts the central idea of paternalism of Valdés, as a state coercion on the behavior of the individual, against his will, aiming to prevent him from harm, protecting him from a self-referential behavior. State coercion can be direct, such as prohibition; or indirect, such as the non-legal recognition of the effects of certain acts. According to the adopted concept, paternalism is not to be confused with non-coercive state measures of education, stimulus or deterrence.

It has been chosen to adopt a concept that relates the purpose of paternalism to the protection of the individual against himself, to avoid a harm or risk of harm, rather than to obtain a good for the person. In paternalism, behavior is prohibited or required because it negatively affects the interest of the person, the purpose is to avoid harm, that is, to prevent someone from moving from one level of interest satisfaction to a lower level (FEINBERG, 1985, p.50).

The idea, therefore, is not to promote a benefit, to achieve a higher step in the satisfaction of interests, since this purpose tangents with other forms of restrictive interventions, such as moralism and perfectionism. In aiming to achieve a good, they depart from empirical and objective standards; the behavior is forbidden because that is the best way to live, according to the opinion of others.

Most of the doctrine, when addressing the limits of paternalism, initially refers to John Stuart Mill (2000, p.17-18), who refuted paternalistic arguments and argued that only harm or real risk of harm to other people can justify the restriction of freedom. His ideas are based on the differentiation between self-referential acts, which concern only the individual, without involving third parties, and heteroreferential acts, which cause harm or risk of harm to third parties. Only in the latter case could there be a restriction on freedom:

> O único propósito de se exercer legitimamente o poder sobre qualquer membro de uma comunidade civilizada, contra a sua vontade, é evitar dano aos demais. Seu próprio bem, físico ou moral, não é garantia suficiente. Não pode ser legitimamente compelido a fazer ou a deixar de fazer por ser melhor para ele, porque o fará feliz, porque, na opinião dos outros, fazê-lo seria sábio ou mesmo acertado. Essas são boas razoes para o advertir, contestar, persuadir, instar, mas não para o compelir ou castigar quando procede de outra forma.

The practical application of this concept involves difficulties related to the complexity of objectively defining and conceptualizing damage and good, in addition to the existence of nebulous situations in which it is complicated to distinguish whether the act concerns only one's own person whether it affects third parties.

And what is intended is precisely to achieve the greatest degree of objectivity possible, so that one knows to what extent a person can legitimately dispose of his own body and life, and even cause harm to himself. To achieve this, Maniaci warns that it is useless to declare oneself liberal, refer to the doctrine of Mill, and make use of vague and imprecise concepts to justify paternalistic prohibitions, such as human dignity, reasonableness, public interest, or the common good (MANIACI, 2020, p. 9-10).

For the purposes of this article, it is important to break down the arguments and investigate the admissibility of paternalism in the cut-off of criminal agreements, which demands the study of the limits of paternalism and its relation to autonomy, discernment, coercion and vulnerability. In other words, if and when paternalism justifies the prohibition of the consent of the offender not to exercise procedural guarantees. Whether paternalism supplies the argumentative burden necessary to prohibit the individual from availing himself of fundamental rights legal positions, and in what situations.

In fact, approaches to paternalism are always intertwined with the conditions of the citizen and the conditions under which the decision is made.

In addressing the commonly used grounds against paternalism, Valdés (1988) addresses utilitarianism, the autonomy of the person, and the violation of the principle of equality.

Utilitarianism would cover not only the prohibition of harm to third parties, but also the maxim that the individual himself is always in the best position to make decisions. The author recalls that Mill himself made an exception to this reality when he defended state coercion to forbid slavery

contracts, which reveals that the use of utilitarian arguments is insufficient to always reject paternalistic interventions.

The second argument holds that the paternalistic restriction destroys individual autonomy. However, it is only possible to exercise autonomy if there are no impediments to the opportunity of the citizen to exercise his ability to choose. He must be able to choose the best chance (even if he is momentarily prevented from exercising his autonomy). Therefore, certain paternalistic interventions could guarantee individual autonomy.

The third argument is based on a relationship of equality existing in a democratic society, which would be injured by paternalistic interventions, since paternalism presupposes a relationship of subordination. Such argument would also not be sufficient to refute paternalism, because it does not reach the hypotheses of reciprocal paternalism or, even if a subordination exists, there may not be a violation of democratic equality, as, for example, in social security policies.

The fact that the three arguments are not sufficient to disallow paternalistic interventions does not mean that there is always justification for their use.

Accepting that the citizen can even cause harm to himself, from a general right to freedom, presupposes his autonomy to choose that option, that is, to rationally face the challenges or problems he faces, with a probability of success. For Valdés, this would reveal the competence of the citizen to be in a position to understand the scope of his choice, a situation that is always relative to the context.

Valdés then suggests investigating, empirically, whether the citizen is a basic incompetent, which occurs under the following hypotheses (VALDÉS, 1988, p.165):

> a) cuando ignora elementos relevantes de la situación em la que tiene que actuar (tal es el caso de quien desconoce los efectos de ciertos medicamentos o drogas o de quien se dispone a cruzar um puente y no sabe que está roto, para usar el ejemplo de Mill);
>
> b) cuando su fuerza de voluntad es tan reducida o está tan afectada que no puede llevar a cabo sus propias decisiones (es el caso de Ulises, el de los alcohólicos y drogadictos que menciona el § 114 del Código Civil alemán, o el de la fraqueza del que hablaba Hume);
>
> c) cuando sus facultades mentales están temporal o permanentemente reducidas (a estos casos se refieren las disposiciones jurídicas que

> prohiben los duelos, o las relacionadas com la curatela de los débiles mentales);
>
> d) cuando actúa bajo compulsión (por ejemplo, bajo hipnosis o bajo amenazas);
>
> e) cuando alguien que acepta la importancia de um determinado bien y no desea ponerlo em peligro, se niega a utilizar los medios necessarios para salvaguardarlo, pudiendo disponer fácilmente de ellos. La incoherencia que resulta de querer X, saber que Y es condición necesaria para lograr X, disponer de Y, no tener nada que objetar contra Y y no utilizarlo, es um sintoma claro de irracionalidade (Dworkin, 1983, 30). Ello permite incluir a la persona em cuestión em la categoria de quienes carecen de una competencia básica (es el caso de la obligación de los cinturones de seguridad em los automóviles y de los cascos de los motociclistas).

For the author, the list of basic incompetencies should not be expanded because, beyond the situations described, there is a twilight zone that makes it difficult to propose criteria of universal application. The suggested hypotheses have an objective foundation and rely on secure causal relationships.

Once one of these situations is verified, the deficit caused by basic incompetence must be overcome through paternalistic intervention. The purpose of the measure is to overcome the inequality generated by the basic incompetence, for which reason there is a benevolent purpose, that is, to avoid the damage and harm that would come to the citizen from his or her choice.

Maniaci, in turn, emphasizes that the individual is sovereign over his mind and body, autonomy being the central value of the model he defends, called moderate legal anti-paternalism.

For the author, the concept of autonomy understands a set of freedoms, capacities, and opportunities that the State should protect.

An autonomous decision is one that is formed rationally, with capacity to discern, based on knowledge of the relevant facts, free from coercive pressures, and stable over time. Once these conditions are met, the State has no right to use coercion against an adult individual for the purpose of preventing him from causing harm or danger of harm to himself from an autonomous choice (2020, p. 93).

To purify the limits of legal paternalism in the context of criminal agreements, we will therefore adopt the hypotheses of basic incompetencies suggested by Valdés and the conditions proposed by Maniaci as sufficient to achieve a degree of autonomy incompatible with paternalistic interventions by the State.

Despite the objection of Maniaci to the use of the concept of human dignity, given its vagueness, we chose to include the lesson of Daniel Sarmento on the principle of human dignity, due to the objectivity and clarity with which the author treats the citizen, and also because autonomy has a necessary relationship with dignity. For the author, the principle of human dignity has four components, namely, the intrinsic value of the person, autonomy, the existential minimum and subjective recognition (2016, p. 98). We will thus see which autonomy should be pursued by the principle of human dignity.

3 AUTONOMY

The analysis of the legality of the paternalistic treatment of criminal offenders in agreements requires a prior approach to the decision-making autonomy of the individual.

For Maniaci, autonomy is the central value to analyze a paternalistic intervention; for Valdés, it integrates the concept of basic competence; and for Sarmento, it integrates the concept of human dignity.

Autonomy is linked to the idea of negative and positive freedoms. It encompasses both the absence of external constraints and the capacity for self-government, self-determination, being free to conduct your life according to your conscience, values, and moral principles.

For Sarmento, it is the real possibility for the agent to decide and act in accordance with his choice. It presupposes the absence of constraints and also the existence of appropriate material and cultural conditions for each one to be able to self-determine (2016, p. 187).

We will address the requirements for a rational decision in topics, aiming to clarify understanding.

3.1 Ability to discern, based on knowledge of the relevant facts

For Valdés and Maniaci, the first requirement of the basic competence and the autonomy of the citizen, for decision making, is that the decision must be rational, coming from someone who has the capacity to discern.

The ability to discern is the potential that the citizen has to separate the information he or she possesses and use it within its context. It means to be

aware of the actions, to interpret facts, their causes, and their consequences. It is broad and covers even the behavior of the citizen towards himself.

In consent, there is a peculiar discernment, because there is another person involved, the citizen makes an agreement with a third party, accepts his behavior, even if to his own detriment (MARTINELLI, 2010, p.163).

The basic competent person of Valdes is the one who possesses the capacity for discernment, who reaches a cognitive sufficiency, processes the information received, judges it according to his or her values, and communicates his or her desires. It is expressed both when the act is committed and when the citizen is accountable for it.

Only those who have sufficient information can reflect on their actions. Therefore, the condition for the citizen to have the capacity for discernment, to reflect on his conduct, is to receive the necessary information about his action and the consequences.

Therefore, Valdés and Maniaci link autonomy to the ability to discern, based on knowledge of the relevant elements for decision making.

In the case of criminal agreements, it is necessary that the offender knows about the found facts and their legal consequences. Obviously, for him to have knowledge and be able to make a rational decision, the facts must have been previously cleared.

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In the agreements of premature collaboration, depending on the moment in which they are agreed upon, there will not be full investigation of the facts yet, and the knowledge of the relevant elements will involve the set of facts already investigated, without prejudice to the agreement being preceded by an instruction (art.3-B, § 4º, Law nº 12.850, 2013).

The legal repercussions of negotiation in criminal agreements require specific knowledge, so the offender must be assisted by a lawyer, who has the specific competence, and have the ability to consult with a reasonable degree of understanding.

Autonomy, so, presupposes, at first, a real capacity to choose, which comes from the capacity to discern, from the knowledge of the facts and their legal repercussions.

It is important to note that the autonomy referred to here, as the individual's ability to act as a moral agent, making choices, is not limited to the autonomy of the will disciplined by the Civil Code in the category of contractual rights. The autonomy of the will is the result of an outdated historical concept, a civilest view based mainly on patrimonial legal business (SARMENTO, 2016, p. 141).

The Civil Code lists in Chapter IV what it calls "defects of the legal transaction", namely, mistake, malice, coercion, state of danger, injury and fraud against creditors. The latter is known by the doctrine as social vice; the others, as vices of consent. These are hypotheses of defects in legal business, problems related to the formation of the act, which can generate its invalidity, due to the fact that the will has been declared in an imperfect manner, in the sense that if the citizen had known the truth he would not have manifested himself in that manner. Such facts lead to a lack of autonomy, either by preventing his valid discernment, or by making it impossible for him to behave according to his will.

This article adopts a broader approach to autonomy than the civilian conceptualization, because it is not content with the formal understanding of the freedom of the citizen, but with the existence of real, material, empowering conditions for the individual to fully exercise his freedom when negotiating criminal agreements.

That is why the approach of the rational decision of Manici and basic competence of Valdés, in the cut of criminal agreements, will be enriched with the support of the Civil Code rules only in what there is compatibility.

What we argue is that when faced with a rational individual decision, the result of the capacity of the citizen to discern, supported by ample knowledge of the relevant elements, the State should not prevent an autonomous choice, under the pretext of helping the citizen not to harm himself (paternalism).

The paternalistic intervention of the State depends, therefore, on the real possibility of discernment of the citizen. Therefore, it is important to address the vices of discernment; after all they can justify a legitimate State intervention in individual freedom.

3.2 Vices of discernment

Upon becoming aware of the facts, it is possible that the citizen does not weigh them in the best way, due to a false perception of reality, either due to a

personal fault or to a fault in the conditions under which the fact is appreciated (MARTINELLI, 2010, p. 164).

In the mistake, the citizen has a false perception of reality and expresses his will in a way that he would not if he knew it (if he has been induced to the mistake, the Civil Code calls the defect malice).

In the case of criminal agreements, for example, we could consider the hypothesis that the State Prosecution enters into a non-prosecution agreement with an accused person for carrying a restricted use firearm, with an agreement on community service, calculated from the basis of a two-thirds reduction applied to the minimum sentence of three years (art. 16 of Law no. 10.826, 2003, c/c art. 28-A, III, of the Code of Criminal Procedure). After the agreement, the offender learns that the gun seized was not for a restricted use and that his conduct falls under art. 14 of Law No. 10.826, 2003, which minimum sentence is two years. The erroneous projection of the facts caused by the State Prosecution induced the celebrant to the mistake when agreeing on the density of the community service provision clause. This defect, in his judgment, in our view, leads to the renegotiation of the agreement or even, in the face of a possible denial by the State Prosecution, its annulment.

Another example would be the conclusion of a conditional suspension of the proceedings, for the practicing of the crime of swindling, in which no agreement was reached on full reparation of the damage because the offender alleged financial impossibility (art. 89, §1°, I, Law n° 9.099, 1995). After the agreement, the State Prosecution learns that the offender has omitted a fortune, deposited in the name of oranges, derived precisely from the damage caused to the victim, so that this circumstance would also justify the invalidation of the agreement. In this example, the State Prosecution would have made a mistake, leading to its annulment (the offender would have acted with malice).

In its article 156, the Civil Code states that there is a state of danger when someone, pressed by the need to save himself or a third party from serious harm, assumes an excessively onerous obligation. And in the following article, the injury is characterized by the fact that the person, "under the necessity, or because of inexperience", undertakes "an obligation manifestly disproportionate to the value of the opposite obligation". In both, the citizen is in a risky situation, in the state of necessity there is intent to take advantage and in the injury it is not necessary.

The influence of the circumstances under which the agreement was reached (need to save serious harm, “pressing need”), from the perspective of criminal agreements, will be addressed when dealing with coercive pressures and the vulnerability of the offender.

With regard to the proportionality of the benefits, the criminal agreements presume reciprocal concessions, constructed from a dialogical process, conducted with the participation of the offender and his technical defense. The “inexperience” of the offender will be supplied by the actions of his or her defender. It is not possible to categorize in advance a list of “proportional” benefits to be agreed upon in the several types of criminal agreements, because the construction of the clauses requires the analysis of the concrete case and the situation of the offender. But it is possible to start from the idea that, in the agreement, there is no winner or loser. In practice, it is not possible to pact a covenant in which the offender simply accepts the imposition of all sanctions imposed in their maximum densities. Or, on the other hand, in which no burden is imposed on the offender, transforming the agreement into a protocol of future good intentions. Even in the case of premature collaboration, in the hypothesis that the State Prosecution will no longer offer an accusation, there will be proportionality with the agreed collaboration.

It is not enough to have discernment, to know the relevant elements, but not be able to behave according to one's conscience and will. In this case, despite having discernment, autonomy is lacking.

Therefore, it is also important to address coercive pressures, in order to know IF and when they are sufficient to justify a paternalistic treatment that does not recognize effects or annul a criminal agreement even against the will of the individual who entered into it.

3.3 Coercive pressures

The third requirement brought by Valdés and Maniaci for autonomous action concerns the absence of threats and coercive pressures, which include physical and psychological coercion and systemic violence.

For Maniaci, coercion has a subjective and an objective aspect to be configured. From the point of view of the violator, coercion involves the relationship between his or her desires and the options available to him or her (there will be no coercion if the pressure falls on something that is indifferent to

him or her). But the subjective aspect is not enough to define coercion; after all, the same worker who agrees to work an exhausting day in order to pay for the surgery of a sick child could agree to do it in order to buy a luxury property. Therefore, coercion, in its objective aspect, depends on the fundamental rights guaranteed to an individual, based on a conception of liberal equality. It is the guardianship of the fundamental rights of the people that determines whether the coercive pressure that a subject suffers is sufficient to exclude or diminish his will in performing that action. In the example, since the right to health care for the child of the worker was not guaranteed, such circumstance configures coercive pressure capable of removing the autonomy of the worker in agreeing to the strenuous workload.

The concept of autonomy, inspired, for the author, by a liberal egalitarian ideal, is interconnected, therefore, to the concept of coercion, in the sense that it is necessary to guarantee fundamental rights to exclude the hypothesis that the subject is acting under coercive pressure.

Maniaci defends the need to guarantee the individual his fundamental rights in order to evaluate the autonomy of his actions, and does so from the standpoint of liberal equality.

Sarmento, on the other hand, approaches the real capacity for self-determination from a conception of freedom associated with the Welfare State, in the sense of linking it to the presence of material conditions that enable the effective exercise of freedom. In this regard, he highlights the importance of paying attention to the impact of material inequalities and economic needs on the exercise of freedom, preventing freedom from serving as a front for the submission of the will of the individual to the most powerful will.

In the context of criminal settlements, it is necessary to be clear about which fundamental rights guarantee the basic competence of the offender to negotiate a consensual solution and to ensure such rights, in order to provide him with conditions to exercise his autonomy.

In item 4 we will address which fundamental rights of the offender need to be ensured in order to achieve minimum material conditions for a criminal agreement.

The caution that must be taken is not to confuse autonomy, which is an object of human nature, with responsibility, which is a phenomenon of legal nature. Responsibility is the obligation that a person acquires to answer for his acts (MARTINELLI, 2010, p. 177). Nothing prevents the citizen from being held

responsible based on criteria of autonomy, as can occur, for example, in the unenforceability of different conduct, a cause of exclusion of guilt. And yet, some legal systems implement measures that reduce the criminal responsibility of those who commit crimes in a context of absence of minimum conditions for survival, which should have been provided by the State.

The absence of health, education, work, safety, the influence of the social environment in the trivialization of the practice of crimes are situations that contribute to the individual abandoning his ethics and the morals required in social life. In this context, by the theory of Zaffaroni (2019, p. 545) of coculpability, the State would share the responsibility for the commission of the crimes committed by such people, by failing to provide the minimum conditions of dignified life, which would justify the softening of punishment.

Criminal law, however, is based on the fact; responsibility must derive from the conduct committed, and not from the conditions of the person who committed it. Although the Brazilian criminal system takes into account the criminal law of the fact for criminal accountability in the case, article 187, § 1°, of the Code of Criminal Procedure authorizes the Judge to assess the social conditions of the accused, and articles 59 and 66 of the Criminal Code provide normative support for the application of a more lenient penalty, characterizing typical hypotheses of the criminal law of the author.

By parallelism, it will be necessary to apply similar parameters in negotiating the density of the obligations to be agreed upon in the criminal agreements, despite the mistaken treatment of the subject from the perspective of the criminal law of the author.

While coercive pressures act on the autonomy of the individual, in a personal and individualized way, there are several conditions that, despite not covering coercion, can determine the vulnerability of a group of people, because they indicate an imbalance in personal relationships and, therefore, demand external interference to reestablish the balance.

It is important, then, to analyze the vulnerability of some groups of individuals who have committed crimes and the direct impact on the autonomy of its members.

3.4 Vulnerability of the offender in agreements

As said, countless situations can lead to the vulnerability of a group of people. Such conditions may be social, cultural, ethnic, political, economic, educational, health, and there is no exhaustive list. These include minors, people who live in a reality of low socioeconomic status, people with incomplete or retarded mental development, people who are under the influence of alcohol or illicit substances, to the point that their willpower is so affected that they are unable to make decisions.

Some vulnerabilities exclude criminal responsibility, such as minors, others exempt the offender from punishment, such as the imputable.

Of interest in this approach are the vulnerabilities that may impact on the negotiation and acceptance of proposals by the offender against his or her wishes or conscience (in other words, without autonomy). This is because the formation of the opinio delicti on the existence of the crime, its authorship, and the criminal responsibility of the offender precede the moment of agreement (and any impact of vulnerability on the criminal accountability of the offender will receive a different response to the agreement).

An interesting question is to know if it is possible to reach agreements with those who are mentally incapable or semi-imputable. The assessment of imputability, in the incident of mental insanity, is related to the verification of the incapacity of the offender to understand the illicit character of that charged conduct charged, as well as its determination at the time of the committed action. Not necessarily the citizen will also be incapable for acts of civil life or will not be able to manifest his or her will. In many cases, what is observed is a semi-imputability resulting from a specific episode of a certain illness, with a subsequent recovery of rational judgment.

According to the Penal Code, once the unimputability or semi-imputability and criminal responsibility are established, a security measure will be imposed on the offender, a penal sanction of a condemnatory nature, which may result in the suspension of his or her political rights (articles 26 and 96 of the Penal Code, and Resolution no. 22,193 of the Superior Electoral Court, of April 4th, 2006). Criminal agreements, therefore, can be more beneficial to the offender, since through them he can achieve a less rigorous treatment. Prohibiting, in a generic and prior manner, the possibility of criminal agreements for crimes committed by this vulnerable group, seems to constitute differentiated treatment to the mentally ill, not authorized by the International Convention on the Rights of People with Disabilities (approved by Decree No. 6.949, 2009).

For this reason, in principle we see no obstacle to the agreement, observing the appointment of a curator, who may, depending on the psychic conditions of the offender, even act in such a way as to contribute to a supported decision (art. 149, paragraph 2nd, of the Code of Civil Procedure, c/c art. 1.783-A, of the Civil Code). The important is that the offender, even with the aid of a supported decision or in the manner that is most appropriate to the case, reaches some level of understanding about the process, its consequences, and is able to exteriorize his or her reasons about the facts. The security measures were established as a form of protection for those who are incapable and semi-imputable, and it is illogical to use them against them. The object of the agreement, in this case, will cover obligations equivalent to security measures, such as periodic attendance at health clinics, after all, nothing prevents equivalent measures from being agreed upon, as has been recognized for conditional suspension of the process (Theme 930 of the Superior Court of Justice).

In addition to the vulnerability of those who are incapable and semi-imputable, the very position of those who commit a crime is weaker and asymmetric in relation to the position of the State Prosecution, placing them in a situation of vulnerability that justifies the state intervention on their behalf. There is some discussion as to whether these interventions to protect the weaker party in the social relationship constitute paternalism.

For Sarmento, such measures border on paternalism, but are not to be confused with it, and what justifies state intervention in these cases is to neutralize the bargaining power of those in the asymmetric position (2016, p.171).

Maniaci warns that some legal limitations imposed by the State may be indispensable in the face of the asymmetry of positions between the covenants, not characterizing paternalism, since, in that context, it would not be possible to completely neutralize the pressure of one covenant over another, such as, for example, businessmen against consumers or workers (2020, p. 37-51).

In the scope of criminal agreements, regardless of the name that is given, whether or not we will call state interventions paternalistic, it is certain that there are limit for negotiating the clauses, established by the Federal Constitution, ordinary legislation and normalization of the National Council of the State Prosecution. Such limits focus exactly on the unbalance in the relationship between the offender and the State Prosecution. We will deal with them in item 5.

In addition to these limits, in the agreements, the State Prosecution must ensure that the fundamental rights of the offender are present, not as a mere legal formality, but in order to provide the factual assumptions for the exercise of freedom of negotiation by the offender. These fundamental rights will be listed in item 4.

Observing the limits for negotiation and ensuring the fundamental rights of the offender, in the dialogical construction of the clauses, the State Prosecution should verify the eventual vulnerability of the individual, as a concrete person, and, if necessary, soften the density of the agreed obligations, in parallel to the option adopted by the legislator in article 187, § 1º, of the Code of Criminal Procedure, and arts. 59 and 66 of the Penal Code. In the case of the agreement not to prosecute, the legislation expressly authorized that the agreed obligations be shaped according to the condition of the offender. In this sense, art. 28-A of the Code of Penal Procedure authorizes the non-reparation of damage, when it is impossible for the offender to do so (item I) and the agreement of other conditions in addition to those legally provided, as long as they are proportional and compatible with the criminal offense charged (item V). The provision of services to the community and the payment of fines should also be negotiated according to the condition of the offender.

The last item proposed by Maniaci for the formation of an autonomous decision, free from paternalistic interventions, is the stability of the decision over time, which, in this case, must be accompanied by the ability to discern, based on the knowledge of the relevant facts, free from coercive pressure, and observing the eventual vulnerability of the offender.

2 Stability of the decision over time

Maniaci suggests that decisions that have irreversible consequences be stable over time, i.e., not made on impulse, emotional instability, uncertainty, and a period of reflection should be observed beforehand (2020, p. 104).

Adapting the requirement to the hypothesis of criminal agreements, we do not see an obstacle to the absence of a previous reflection period to agree on the penal transaction, conditional suspension of the process and agreement not to prosecute, since the consequences of eventual regret will not be irreversible. Non-compliance with the agreement will cause the State Prosecution to file

criminal proceedings (the same action that would be taken if the agreement had not been entered into).

In the agreement not to prosecute, a period of time has naturally elapsed between the agreement and the hearing for its ratification (art. 28-A, § 4, of the Code of Criminal Procedure). Similarly, in a collaboration agreement, in addition to the time elapsed during the negotiations, a period of time will elapse between the agreement and the confidential hearing of the collaborator by the Judge before the agreement is ratified (art. 4, § 7, Law No. 12.850, 2013).

Once the requirements suggested by Maniaci for reaching an autonomous decision have been outlined, it remains to address one last element mentioned by Valdés as a hypothesis of basic incompetence to justify a paternalistic intervention and confront it with criminal agreements.

3.6 Incoherence of the offender

Valdes links acting in an incoherent manner to a symptom of irrationality, in the hypothesis that the citizen accepts the importance of a good and does not wish to endanger it, but refuses to use the necessary means to safeguard it, even though it is easy to do so. This would constitute basic incompetence and would justify the paternalistic intervention of the State. The author gives as an example the obligation of wearing a helmet by motorcyclists.

Transporting inconsistency as a ground for basic incompetence into the scope of criminal agreements seems to be difficult to implement in practice, because it would require a third party (State) to investigate the moral preferences of the offender to conclude whether or not he or she acted inconsistently.

Even those who argue that there are right and wrong answers to questions about morality and values, and that it is possible to defend moral truths in the context of science, recognize that it is not possible to affirm that there are inherently wrong answers (HARRIS, 2013, p. 36).

Therefore, it seems to us that incoherence is not a sufficient parameter, by itself, to evidence the basic incompetence of the offender and justify a paternalistic intervention in the scope of criminal agreements.

Having dealt with the hypotheses of basic incompetence suggested by Valdés and the conditions proposed by Maniaci as sufficient to achieve the autonomy of a decision (and, consequently, to rule out the legitimacy of paternalistic intervention), it remains to point out what would be the fundamental rights of the

offender that must be guaranteed as a way to achieve the factual assumptions for the exercise of freedom of negotiation.

4 FUNDAMENTAL RIGHTS OF THE OFFENDER

As said, in criminal settlements it is necessary to know which fundamental rights guarantee a basic competence to the offender to exercise his autonomy and negotiate a consensual solution with the Public Prosecutor.

The first fundamental right that must be assured is the presumption of innocence (art. 5, LVII, of the Federal Constitution). It is necessary that the facts have been ascertained and the information elements are evaluated based on rational criteria that make use of epistemology and seek the truth, as a criterion of justice, respecting the prohibition of the use of illicit evidence (art. 5, LVI, of the Federal Constitution).

Once the accusatory hypothesis is outlined, it is necessary to ensure the exercise of the general fundamental right of freedom by the offender (art. 5, caput, items II and VI, of the Federal Constitution). The option of the offender to agree in one way or another integrates his freedom of choice and self-regulation of his will, based on a voluntary, conscious and free of coercion consideration of the best defense strategy to be exercised, in view of the benefit pursued. And all these possibilities coexist with the judicial process and the full exercise of all procedural guarantees.

In other words, the offender may not suffer prejudice by not accepting the agreement if he chooses to exercise all the procedural guarantees before a judicial process. In this aspect, the refusal to enter into a Non-Prosecution Agreement (NPA) does not seem to be a sufficient reason, in itself, for the State Prosecution - once the accusation is made - to stop proposing the conditional suspension of the process (a different situation if the offender enters into this agreement and does not comply with the conditions, which may lead to the refusal of the conditional suspension proposal, according to § 11 of art. 28-A of the Code of Criminal Procedure).

As seen, the understanding and discernment that sustain the exercise of the autonomy of the offender depend on knowledge of the facts, the process, and the consequences that may ensue. It is necessary to assure to the offender, then, the guarantee to the adversary and to the ample defense (art. 5, LV, of the Federal Constitution), in the sense of accessing the due information about the

ascertainment of the facts; to be able to exercise a reaction; to influence and not be surprised. Since criminal settlements involve, besides knowledge of the facts, technical knowledge, it is essential that the offender be assisted by a lawyer.

The knowledge of the relevant elements that support the exercise of autonomy also involves the duty of rational justification and the principle of transparency, on the part of the State Prosecution. The obligations entered into must be preceded by the respective justifications (art. 93, IX, of the Federal Constitution), so that it is known why the obligation equivalent to a certain sanction is being negotiated in that density. The motivation is "the greatest guarantee against human caprice" (BEDÊ JÚNIOR; SENNA, 2009, p. 107).

In this context, it does not constitute a coercive method to impact the autonomy of the offender for the State Prosecution to inform him of the legal consequences of his conduct and the possibility of filing the relevant judicial measures, which, after all, represent the exercise of a right (which is exactly why they do not constitute a means capable of constituting a defect in the consent of the offender).

In the same sense, the imprisonment of the offender at the time of the agreement is not sufficient, in itself, to deprive him of conditions and discernment to act autonomously, besides not representing a coercive pressure, because his decision should reflect a choice "with freedom (psychic freedom)", and not necessarily "in freedom" (physical freedom). In this sense, HC 127.483, Reporting Justice Dias Toffoli, STF Plenary, August 27th 2015.

It is also essential that the agreement be agreed upon with the natural prosecutor, to guarantee his impartiality (art. 5, LIII, of the Federal Constitution). In the formation of its opinio delicti and in the construction of the agreement, in order for the State Prosecution to achieve justice and legitimacy, it must make a correct factual judgment, a correct judgment of law, and observe a valid procedure, respecting the laws and procedural guarantees (TARUFFO, 1997).

O acordo penal representa a expressão do poder estatal na aplicação das consequências jurídicas que se mostraram mais adequadas àquele caso concreto. E o consentimento do infrator é a justificativa procedimental para pactuação daquelas obrigações. Por isso, é preciso que os atos sejam registrados e entabulados em um procedimento. Esse processo consensual será o método de trabalho, o procedimento em contraditório entre o Ministério Público e o infrator, que vai servir para construção de normas jurídicas que regerão aquela relação. O registro das tratativas está previsto no art. 4º, § 13º, da Lei nº 12.950, de 2013

(colaboração premiada) e no art.18, § 2º, da Resolução nº 181do Conselho Nacional do Ministério Público, de 2017, não podendo ser dispensados pelos envolvidos, já esta intervenção paternalística visa evitar um dano ao próprio infrator (o objetivo é assegurar que ele tenha de fato acesso aos elementos relevantes, acompanhado de defesa técnica e garanta sua participação dialógica na construção das cláusulas).

The criminal agreement represents the expression of state power in the application of the legal consequences that have proven to be most appropriate to that specific case. And the consent of the offender is the procedural justification for agreeing to those obligations. Therefore, it is necessary that the acts be registered and agreed upon in a procedure. This consensual process will be the working method, the adversarial procedure between the State Prossecution and the offender, which will serve to build the legal rules that will govern that relationship. The recording of the negotiations is provided for in art. 4, § 13, of Law No. 12,950, 2013 (rewarded collaboration) and in art.18, § 2, of Resolution No. 181 of the National Council of the State Prosecution, 2017, and cannot be renounced by those involved, since this paternalistic intervention aims to avoid a damage to the offender himself (the goal is to ensure that he actually has access to the relevant elements, accompanied by technical defense and ensure his dialogic participation in the construction of the clauses).

The guarantee of these fundamental rights of the offender is not a mere legal formality to be completed, but an indispensable condition for the enjoyment of freedom of choice by the accused.

In dealing with the principle of the dignity of the human person, Sarmento states that the autonomy to be pursued by the principle is a positive freedom, which aims to prevent the imposition of barriers to individual choices and to empower people, so that they can actually exercise the fullness of their freedoms (2016, p. 158).

And what is intended by reinforcing the fundamental rights of the offender that must be respected in the pact of the agreements is exactly that, to provide real conditions of self-determination capacity, for the exercise of an informed decision, within a calculation of advantages and disadvantages to be analyzed, according to his choices as a moral agent, with the support of his technical defense.

Having identified the fundamental rights that guarantee the exercise of the basic competence of the offender in criminal agreements, it remains to verify

which procedural guarantees can be restricted in the negotiation from the exercise of his autonomy.

5 PROCEDURAL GUARANTEES SUBJECT TO CONSENSUAL RESTRICTIONS

On the possibility of restricting the procedural guarantees of offenders, the European Court of Human Rights has ruled that the right to a fair trial is compatible with the offender giving up rights and guarantees in exchange for advantages, provided that there is a forecast for guarantee measures[1]. Still, consensus spaces do not lead to an impropriety by themselves, but must be surrounded by guarantees that are compatible with the right that is no longer exercised, that do not violate a public interest, and that the non-exercise of the right comes from an unequivocal manifestation[2].

Before dealing with the guarantees that may be restricted, it is good to emphasize those that do not admit restriction.

In order to avoid that the unbalanced positions between the State Prosecution and the offender give rise to inequalities and generate damages to the offenders, the Federal Constitution itself imposed a limit to criminal agreements, namely, the agreement of punishment. Its article 5, item LVII, requires a judicial pronouncement on the formation of guilt to impose a penalty. In other words, it is expressly forbidden to agree on penalties in criminal settlements, regardless of the consent of the offender.

Furthermore, those involved in the negotiations cannot agree on the impartiality of the member of the State Prosecution who will make the agreement, on the use of illicit evidence, and on the exemption of the ground of decisions (in a related sense, Enunciation number 37 of Enfam).

In contrast, the procedural guarantees against self-incrimination, guarantee of adversarial proceedings, and guarantee of appeal/double degree of jurisdiction seem to admit some restriction (MENDONÇA, 2018, p. 71-72).

It is not denied that the offender is assured the presumption of innocence and the right to silence (art. 5, LVII and LXIII, of the Federal Constitution). But he is also assured a broad defense (art. 5, LV, of the Federal Constitution), which includes a wide range that goes from silence, to denial, to collaboration. The

[1] COUNCIL OF EUROPE. European Court of Human Rights (CEDH), Caso Scoppola v. Itália (n. 2). Application n. 10249/03, julgado em 17 set. 2009, § 135.

[2] COUNCIL OF EUROPE. European Court of Human Rights (CEDH), Caso Natsvlishvili e Togonidze v. Georgia, Application n. 9043/05, julgado em 8 set. 2014, §§ 88-89-90.

cost-benefit analysis of the defense strategies to be adopted and the option for the agreement is part of the autonomy of the offender, assisted his or her lawyer. The option for the agreement, be it a plea bargain, conditional suspension of the process, agreement not to prosecute or collaboration, is one of the paths to be taken, according to the interests of the offender to reach the benefits of each agreement. The agreement, as said, presumes reciprocal concessions; both the State Prosecution Service and the offender give up something. In the agreement not to prosecute, the prosecution ceases to bring charges and the offender makes a detailed confession of the facts (art. 28-A, caput, of the Code of Criminal Procedure). In the premature collaboration, to achieve certain benefits (ranging from reduced penalties to pardon), the collaborator renounces the right to silence and submits to the right to tell the truth (art. 4, § 14, Law No. 12.850, 2013). Precisely because what is sought is to obtain a benefit that would not be possible without that defense strategy in which the procedural guarantee against self-incrimination may be restricted.

The guarantee of adversary can also be restricted in criminal agreements, and there is no further questioning when it comes to procedural acts (summons by whatsapp, e-mail).

The adversary manifests itself in several ways, and in the decriminalization institutes of the transaction, conditional suspension of the proceedings, and the agreement not to prosecute, the parties renounce to an evidentiary hearing in court, agree on obligations, and thereby implement an alternative way out to repair the legal order.

Even in the agreement of awarded collaboration, followed by evidentiary instruction after its homologation and verification, at the end, of the effectiveness of collaboration, the collaborator commits to collaborate, renounces to silence and provides evidence. By doing so, the collaborator exercises his influence on the development and outcome of the process, the main purpose of the guarantee of adversary proceedings (STF, HC 127.843/PR, Minister Dias Toffoli).

The biggest discussion related to adversary concerns the possibility of renouncing the judicial evidentiary instruction in order to obtain a sentence-generating judicial pronouncement. The "Anti-Crime Package" added art. 395-A to the Code of Criminal Procedure and provided for the agreement of admission of guilt between the offender and the State Prosecution, to be signed between the receiving of the complaint and the beginning of the investigation, dispensing

with the production of judicial evidence and renouncing the right to appeal, promoting the early resolution of the case through the immediate application of penalties. The project required a detailed confession by the offender, reparation for the damage caused to the victim and judicial ratification, on which occasion legality, proportionality and the existence of sufficient evidence for conviction would be analyzed, generating a conviction sentence.

Despite its rejection, the debate is of interest to the analysis of the acceptable limit of the power of the violator of disposal over the adversary.

On this point, it does not seem to us that the provision exceeded the acceptable limit of restriction on the adversarial principle and it was not incompatible with a rational decision. The renounce of evidence instruction in court, linked to the confession, allowed the offender to receive a benefit (a reduction in the penalty) that he would not otherwise have received. It is necessary to note that no constitutional rule has linked the concept of due process of law to the mandatory evidentiary instruction in court (CUNHA, 2019, p. 253). What is required is that the penalty originates from a judicial pronouncement (art. 5, LVII, of the Federal Constitution). The judicial evidentiary confrontation is only indispensable to generate the imposition of the penalty against the will of the offender. If the offender is willing to do so, he/she may have this judicial evidentiary confrontation at his disposal (so much so that, even in the full trial process, the offender may confess and receive a reduced sentence as a result). Furthermore, the agreement would be instituted by law and would require judicial review of guilt (when the Judge pronounces the homologatory sentence, he or she would analyze the evidence, i.e., information gathered during the investigation, linked to the confession).

Precisely because the agreement to admit guilt would present itself as an option (evaluation of the cost-benefit to adopt the behavior stimulated by the Law), there would be no offense to the adversarial process. The offender would be restricting his right to resist the accusation (the right to silence, the right to confront and produce judicial evidence, the right to challenge the merits of the decisions), but maintaining his right as a guarantee of participation (for example, in the assistance by the technical defense and in the possibility of challenging the agreement in court for reasons related to validity, the produced effects, etc.). The option would be within his freedom of choice.

Finally, we also see no obstacle to the restriction of the guarantee to the appeal/double degree of jurisdiction, as long as it concerns the content of what

was agreed upon in the agreement. This is because the appeal is, as a rule, available, a voluntary means of challenging a decision, and it is up to the violator to exercise it or not.

As said, the agreement must be preceded by due investigation of the facts and the authorship, with the defense having ample access to the elements of information and forbidden any negative consequence to the offender who chooses to answer judicially for the accusation. If this is not the case, opting, as a defense strategy, in a rational decision, accompanied by a lawyer, to enter into an agreement, the behavior of the accused, who after the agreement uses impugnation means to confront the density of the obligations agreed upon or even to sustain lack of fair cause for the accusation previously made, violates procedural loyalty.

In this sense, the monocratic decision rendered in HC 619.751 of the Superior Court of Justice, on which occasion Minister Felix Fischer rejected the HC filed by the Public Defender's Office of the State of São Paulo, which pleaded the application of the principle of insignificance in a case in which a Non-Prosecution Agreement was entered into. In the same vein, HC 495.148-DF, in which Minister Antônio Saldanha Palheiro concluded that it was impossible to challenge aspects of the charge after acceptance of the plea bargain.

The requirement of loyalty also applies to the State Prosecution. The prosecutor cannot conclude the agreement and continue the investigation of that fact (unless, of course, it is a collaboration agreement, whose purpose is exactly that).

The renounce of the right to appeal is therefore based on the voluntariness and availability of the appeal, as well as on procedural fairness.

The European Court of Human Rights has already ruled that restrictions on the right to appeal in criminal agreements do not violate the right to a fair trial[3].

This does not mean that the agreement agreed upon is unchangeable, or even that it authorizes the renounce of the appeal or access to the Judiciary fully and unrestrictedly. Situations such as abolitio criminis or even fortuitous of force majeure (illness, loss of job) may justify a request for recognition of the extinction of punishment or even a direct request to the State Prosecution for a review of the terms of the agreement. And access to the Judiciary, whether

[3] COUNCIL OF EUROPE. European Court of Human Rights (CEDH), Caso Natsvlishvili e Togonidze v. Georgia, Application n. 9043/05, julgado em 8 set. 2014, § 93.

through appeals or autonomous opposition action, is always preserved for such cases.

Specifically with regard to cooperation agreements, it is necessary to observe the legal prohibition imposed in § 7-B of art. 4 of Law 12,850 of 2013, which expressly prohibits the agreement to renounce the right to challenge the homologation decision, in line with what the Federal Supreme Court had already decided. This is a legislative option and a limit to the freedom of the parties to agree, which must be respected.

6 CONCLUSION

Among the various concepts of legal paternalism, Valdes' conceptualization was adopted, as being a state coercion in the behavior of the individual, against his will, aiming to avoid damage, protecting him from a self-referential behavior. This is because conceptualizations that relate the purpose of paternalism to the achievement of a good to the individual (and not to avoid harm) tangent with other forms of restrictive interventions in behavior, such as moralism and perfectionism, and depart from empirical and objective standards. And the goal of the article is exactly to know what procedural guarantees the offender may, or may not, have in the negotiation of criminal agreements.

We adhere to the idea of moderate legal paternalism suggested by Maniaci, with some contributions from Valdés and Sarmento, to conclude that the State has no right to limit the freedom of an adult individual who agrees a criminal agreement with the State Prosecution, if his will was formed in a rational manner, free of vices of discernment, free of coercive pressures, of vulnerability, with some stability over time and without causing harm to third parties.

Autonomy derives from the condition of being human, as a moral agent, free to make personal choices and follow them. The freedom of choice of each person to decide what is best for him or herself must be guaranteed, replacing prohibitions and lack of recognition of legal effects by incentives that provide an architecture of decision-making with full autonomy and consent.

The ability to act as a moral agent, making choices, demands a real capacity for discernment, based on the knowledge of the relevant elements about the facts and their legal repercussions, which demands the assistance of technical defense to reach criminal agreements.

It is necessary to empower the individual to fully exercise his freedom when negotiating criminal agreements. And this is done by ensuring that he does not fall into vices of judgment or suffer coercive pressures, which include physical and psychological coercion and systemic violence.

What excludes the hypothesis that the offender is acting under coercive pressure is the guarantee of his fundamental rights, namely, the presumption of innocence, the general fundamental right to liberty, the guarantee of the right to adversarial proceedings and to a full defense, in the sense that he can access due information about the investigation of the facts; be able to react; influence and not be surprised. Still, the grounding of the opinio delicti and the density of the obligations agreed upon by the Public Prosecutor's Office, through its natural prosecutor, must be assured. And provide that the acts are recorded and set out in a procedure.

These fundamental rights guarantee the basic competence of the offender to negotiate a consensual solution with the State Prosecution.

In addition, some conditions determine the vulnerability of a group of people, because they indicate an imbalance in personal relationships and, therefore, demand an external interference to reestablish the balance.

The Federal Constitution and the ordinary legislation imposed limits on criminal agreements, based on the vulnerability of the offender arising from the asymmetry of his or her position in relation to the State Prosecution. Noteworthy are the prohibition of agreeing on a sentence (art. 5, LVII, of the Federal Constitution), negotiation on the impartiality of the member of the State Prosecution that will make the agreement, the use of illicit evidence and the waiver of the need to provide reasons for decisions. And, also, the prohibition to renounce the right to challenge the decision homologating the cooperation agreement.

In addition to the vulnerability intrinsic to the asymmetric relationship between the State Prosecution and the offender, the vulnerability of the non- and semi-imputable should not prevent agreements, since they may represent a more beneficial option by allowing a less rigorous treatment to be achieved. Therefore, it is necessary to find mechanisms to try to neutralize the vulnerability in question. Among them, the possibility of appointing a curator, the use of the supported decision technique (art. 149, § 2º, of the Code of Criminal Procedure, c/c art. 72, I, of the Code of Civil Procedure, c/c art. 1.783-A, of the Civil Code)

and the agreement of clauses compatible with the personal situation of the offender stand out.

In the dialogical construction of the clauses, the State Prosecution should also investigate the vulnerability of the individual, as a specific person, and, if necessary, reduce the density of the obligations agreed upon, in parallel to the option adopted by the legislator in art. 187, § 1, of the Code of Criminal Procedure, and arts. 59 and 66 of the Criminal Code, and by express authorization of art. 28-A, item V, of the Code of Criminal Procedure.

Once the real conditions for making an informed decision have been ensured, by respecting the fundamental rights highlighted above, it is possible to restrict, from the rational decision made in this context, the procedural guarantees against self-incrimination, the guarantee of adversarial proceedings, and the guarantee of appeal/two-degree appeal.

The analysis of the cost-benefit of the defense strategies to be adopted and the option for settlement is inserted in the autonomy of the offender, as a moral agent capable of making choices, assisted by his lawyer. What is sought is to obtain a benefit that would not be possible without that defense strategy and without opting for the agreement.

The European Court of Human Rights itself authorizes consensus spaces in the solution of criminal cases, allowing the offender to give up rights and guarantees in exchange for advantages, provided that there is provision for guarantee measures, that there is no public interest being violated, and that the non-exercise of the right comes from an unequivocal manifestation.

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