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# Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases\*

STEPHEN C. THAMAN

## 1. Introduction

The “full-blown” trial with “all the guarantees”<sup>1</sup> is no longer affordable. With the rise in crime and the more cost-, and labor-intensive procedures required by modern notions of due process, legislatures and courts are gradually giving priority to the principle of “procedural economy” and introducing forms of consensual and abbreviated criminal procedures to deal with overloaded dockets. After decades of biting criticism of American plea bargaining as a form of “bargaining with justice,”<sup>2</sup> one cannot help but recognize a “triumphal march of consensual [and other less costly] procedural forms.”<sup>3</sup>

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\* Session VB.

National Reports received from: Brazil (BR), A. P. Zomer; Bulgaria (BU), J. Iontcheva Turner; Croatia (CR), D. Krapac; Denmark (DE), R. Wandall; Germany (GE), K. Altenhain; Italy (IT), M. Ferraioli; Norway (NO), A. Strandbakken; Netherlands (NE), C. H. Brants-Langeraar; Poland (PO), M. Rogacka-Rzewnicka; South Africa (SA), A. Skeen; Scotland (SC), F. Leverick & P. Duff; Spain (SP), C. Samanes Ara; US, J. Ross.

<sup>1</sup> Art. 24 of the 1978 Spanish Constitution guarantees to those accused of crimes the right to a defense, to the assistance of counsel, as well as “a public trial without undue delays and with all the guarantees ...” Constitución Espanola de 17 de Diciembre de 1978 (BOE no. 311, Dec. 29, 1978 [RCL 1978, 2836]), text reprinted in J. Muerza Esparza (Ed.), *Ley de Enjuiciamiento Criminal y otras Normas Procesales* (1998).

<sup>2</sup> Cf. K. F. Schumann, *Der Handel mit der Gerechtigkeit* (1977).

<sup>3</sup> Th. Weigend, *Die Reform des Strafverfahrens. Europäische und deutsche Tendenzen und Probleme*, 104 *Zeitschrift für die Gesamte Strafrechtswissenschaft* 486, 493 (1992).

K. BOELE WOELKI & S. VAN ERP (EDS.), *General Reports of the XVII<sup>th</sup> Congress of the International Academy of Comparative Law – Rapports généraux du XVII<sup>e</sup> Congrès de l’Académie Internationale de Droit Comparé*, 951-1011.

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“Consensual” procedural forms are part and parcel of criminal procedure reforms worldwide and are driven by the desire for procedural economy: to either avoid the formal preliminary investigation by investigating magistrate or prosecutor and the preparation of an exhaustive investigative dossier, typical of inquisitorial systems patterned after the continental European “civil law” model of criminal procedure, or the formal, oral, increasingly adversarial trial which has been complicated by the increase in procedural guarantees given to criminal defendants and rendered more unpredictable to the extent that lay judges are given control over the issue of guilt.<sup>4</sup> As these reforms are instituted, one hears the complaints of legal scholars who bemoan a compromise of important principles of criminal procedure, most important among them being the compromise of the search for truth and the legality principle, requiring mandatory prosecution as a guarantee of equal protection before the law.<sup>5</sup> The dispute over the advisability of guilty pleas and plea-bargaining is probably at its most heated in relation to the introduction of plea-bargaining in the international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), where one is dealing with crimes against humanity, genocide and mass murders which require a delicate balancing of: (1) the economic interests of the international community which funds the court; (2) the interests of victims and the international community in having the perpetrator accept responsibility for their acts and express remorse; and (3) the interest of the international community, the parties to the conflict and the victims in having a full and accurate historical record of the events during the conflict.<sup>6</sup>

This report will explore the various types of consensual procedures which make up the procedural arsenals of modern criminal justice systems and try to flesh out how and if they have contributed to procedural economy in the respective country and whether or not important procedural principles have been compromised which undermine the legitimacy of the criminal justice system. I sent an elaborate questionnaire<sup>7</sup> to the country reporters<sup>8</sup> which,

<sup>4</sup> See M. Damaska, *Negotiated Justice in International Criminal Courts*, 2 J. Int'l Crim. Just. 1018, 1022-23 (2004)

<sup>5</sup> A. Eser, *Funktionswandel von Prozeßmaximen*, 104 Zeitschrift für die Gesamte Strafrechtswissenschaft 361, 373 (1992).

<sup>6</sup> G.-J. A. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* 264 (2005). Cf. Damaska, *supra* note 4, at 1031, who feels that admissions in exchange for a reduced sentence will not necessarily have a salutary impact, but “if his self-incrimination appears to be motivated by a change of heart rather than by personal risk calculations, then his self-condemnation can exert a strong effect on his followers, making them more likely to confront the reprehensible nature of their own conduct.”

<sup>7</sup> See Appendix 1.

<sup>8</sup> This report will refer to the country reports provided by the respective rapporteurs and to other materials gathered by the general rapporteur. For citation purposes, I will use a two-letter abbreviation for the country (usually the first two letters), and the page number of the report. The contribution from Prof. Geert-Jan Alexander Knoops, University of Utrecht, on

besides addressing the forms of consensual resolution of criminal cases such as diversion, penal orders, stipulations to the correctness of the charges, plea bargains or confession bargaining, also sought certain basic information about the relative complexity and formality of both the mode of pretrial investigation and the mode of trial used in the respective countries. This is important, for the more complicated and formal the pretrial stage, the more necessities of procedural economy will favor simplifying or leaping this stage of the proceedings. The same holds true for the relative complexity, and, in the case of jury trials, the relative unpredictability of the mode of trial,<sup>9</sup> which will lead to increased use of plea-bargaining or other mechanisms to simplify or avoid the full-blown criminal trial.

The country rapporteurs were also asked about the amount of discretion prosecutors have in charging cases, or in dismissing charges (during negotiations for instance) for countries with complete prosecutorial discretion (*opportunity principle*) such as the US might tend to have less theoretical aversion to plea-bargaining<sup>10</sup> whereas those which deny prosecutorial discretion (*legality principle*)<sup>11</sup> are usually antipathetical to “bargaining with justice.” As can be seen in the country reports, most countries following the “legality principle” have allowed a certain level of discretion in charging, based on assessments of the prospect of a conviction,<sup>12</sup> and have also introduced the “opportunity principle” for less serious crimes,<sup>13</sup> thus opening the door for diversion, penal orders and consensual resolution of the less serious cases. In Denmark and the Netherlands, prosecutorial guidelines determine what kinds of crimes are subject to discretionary prosecution.<sup>14</sup> In the Netherlands, negotiations

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International Criminal Tribunals, is from his book, *supra* note 6. I have consulted a number of other codes of criminal procedure of countries for which no country report was available. These codes are listed in Appendix 2 and use a similar abbreviated format. For instance, cites to the Moldovan Code of Criminal Procedure will be in the following format: MO (§425 CCP).

<sup>9</sup> Damaska, *supra* note 4, at 1022-23, emphasizing the function of unpredictability in this sense.

<sup>10</sup> US (p. 1), where plea bargaining is wide-open. But Norway, while recognizing the opportunity principle if there are “weighty reasons” for not charging, NO (pp. 1-2), is a country that generally frowns on plea-bargaining. SC (pp. 1-2) clearly recognizes the opportunity principle but prosecutorial guidelines tend to map out the areas where discretion should normally be exercised; SA (pp. 1-3) also recognizes the opportunity principle across the board, but frowns on plea bargaining. France, which also recognizes the opportunity principle, was a great enemy of plea-bargaining as well, until 2004.

<sup>11</sup> For countries generally accepting the legality principle: GE (p. 1); DE (pp. 2-3, 13-14); NE (p. 2); CR (p. 2); BU (p. 3); PO (p. 1); BR (p. 1); *see also* IT (p. 1), where the principle is enshrined in Art. 112 of the Constitution.

<sup>12</sup> For instance: IT (p. 1); DE (pp. 3-6, 14-15); NE (p. 2).

<sup>13</sup> *See* BR (p. 1); PO (p. 1); CR (p. 2); GE (p. 10). Langer sees a softening of the legality principle in Guatemala (1994), Costa Rica (1998) and Chile (2000-2003) as well. M. Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L. J. 1, 28 (2004).

<sup>14</sup> DE (pp. 5-6); NE (pp. 4-5).

between prosecution and defense before charging probably only happens, and then secretly, when the prosecutor is facing a more powerful adversary, such as a defense lawyer representing a powerful enterprise charged with a white collar offense or an organized crime syndicate.<sup>15</sup>

Prosecutorial discretion not to charge is also limited in many countries by procedures which allow the aggrieved party (whether victim or relatives of deceased victims) to seek to compel the prosecutor to charge,<sup>16</sup> or even to bring charges themselves independently through private prosecution.<sup>17</sup> In many jurisdictions a judge will perform a screening function to weed out groundless charges presented by the public prosecutor or even victims acting as private prosecutors.<sup>18</sup> This was traditionally the function of the investigating magistrate in inquisitorial systems,<sup>19</sup> is carried out by a pretrial judge in other systems,<sup>20</sup> and even by the trial judge in a pretrial hearing on occasion.<sup>21</sup> Once a case has been charged, the prosecutor will often require the consent of a judge, usually the trial judge,<sup>22</sup> to dismiss the charges, and here too the victim

<sup>15</sup> NE (pp. 2-3).

<sup>16</sup> Classically the German Klageerzwingungsverfahren allows the victim to appeal to a judge to compel prosecution, GE (p. 13); NE (p. 9, "Article 12 Procedure"). Similarly: BU (p. 3); IT (p. 5). In Poland, the judge can compel the prosecutor to twice review the case and if he or she refuses to charge, the victim may proceed through private prosecution, PO (pp. 8-11). In the US (p. 1) there is no right to private prosecution, nor to ask a judge to compel prosecution. In SC (p. 6) the victim has a theoretical right to compel prosecution in serious "solemn" cases, but this remedy has only been granted two times in Scottish history. In other countries there is only a right to appeal to a hierarchically higher prosecutor, DE (p. 15); NO (p. 3); BR (p. 2). In SC (p. 5) the prosecutor, since 2005, is required to give the victim a written explanation why charges were not preferred, but there is no way to get a judge to compel charging.

<sup>17</sup> A complaint of the victim is required for public prosecution of certain minor offenses, and even rape in some countries: PO (p. 2). It is required for statutory rape in NE (p. 8). Private prosecution without obligatory participation of the public prosecutor is allowed for minor offenses in GE (pp. 14-15); DE (p. 15); CR (pp. 6-7); NO (p. 4, only for defamation); BU (p. 5); BR (p. 2); IT (p. 5). The victim may participate as an auxiliary prosecutor with full procedural rights sitting alongside the public prosecutor in PO (p. 7), Spain, and Germany, a provision mainly for sexual assault cases.

<sup>18</sup> No such judicial screening exists in NE (p. 7) or SC (pp. 3-4).

<sup>19</sup> For the French procedure as related to victim's complaints, see S. C. Thaman, *Comparative Criminal Procedure: A Casebook Approach* 21-23 (2002). See also CR (p. 5-6), where the investigating magistrate's rejection may be reviewed by a panel of three judges if the prosecutor refuses to dismiss, a procedure similar to that in France.

<sup>20</sup> See SA (p. 1); the giudice dell'udienza preliminare in IT (p. 4). In SA (p. 1) and US, in the case of preliminary hearings, the procedure is public and adversarial. W. R. La Fave *et al.*, *Criminal Procedure* 714-39 (4<sup>th</sup> ed. 2004). But the US also is the only country still using the highly secret, inquisitorial grand jury, a group of anywhere from 6 to 23 lay persons which screens prosecutorial charges without any defense participation. *Id.* at 740-796.

<sup>21</sup> GE (p. 9); PO (p. 10); BR (p. 2).

<sup>22</sup> NE (pp. 9-10); BU (p. 6); PO (p. 12); BR (p. 3); IT (p. 5). Minor exceptions are allowed in some countries: in GE (p. 12, 18) for individual charges in multi-count accusatory pleadings, and cases subject to victim-offender conciliation and other narrow categories of offenses; in DE

may have a role in seeing that the case continues on to trial and judgment according to the normal procedures.<sup>23</sup>

It is also important to know whether the pretrial investigation yields a comprehensive file or *dossier* from which trial judges (and parties) can evaluate whether the evidence is sufficient to prove guilt in cases of consensual resolution. The investigative file of classic inquisitorial systems which was supposed to be the repository of all admissible evidence and whose contents, whether in the form of witness statements, reports of investigative acts, or expert reports, were all presumptively admissible,<sup>24</sup> would naturally provide an excellent documentary basis for the finding of guilt in a case which did not go to trial.<sup>25</sup> The informal police investigation,<sup>26</sup> which, as in the U.S., only produces isolated police reports and witness statements which are not always subject to full disclosure to the defense, would tend to be the least reliable basis for assessing the factual basis for a guilty plea.<sup>27</sup>

Reforms in formerly inquisitorial countries are, however, gradually changing the methodology and the aims of the formal preliminary investigation. First, the preliminary investigation has been opened up to more defense participation in the form of the ability to make evidentiary motions before the chief investigator, whether it be investigating magistrate,<sup>28</sup> public

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(pp. 16-17) for cases punishable by fines, juvenile cases, etc. In SC (pp. 6-7), no decision of the public prosecutor to dismiss has ever been judicially reviewed, despite a theoretical possibility to do so. If the public prosecutor moves to dismiss in a case where victim is acting as auxiliary or private prosecutor, in some countries the victim may continue prosecuting the case, DE (p. 17); CR (p. 7).

<sup>23</sup> In BU (pp. 6-7) the victim may assume responsibility for the prosecution in such cases. The public prosecutor has unlimited power to dismiss charges without judicial approval in SA (p. 3); CR (p. 7); NO (p. 4). In Spain, the aggrieved party may act as private prosecutor and any member of the public as "popular prosecutor" in any criminal case independently of whether the public prosecutor intends to continue with the prosecution. See Thaman, *supra* note 19, at 23-28.

<sup>24</sup> This holds true in Russia and many of the former Soviet republics. It presumably holds true in France, NE (pp. 3-4), CR (p. 1) and other countries that have maintained the investigating magistrate and the formal preliminary investigation. In Brazil, the entire investigative file is given to the jury when they retire to deliberate. §476 Código de Processo Penal, in D. E. De Jesus (Ed.), Código de Processo Penal Anotado (7<sup>th</sup> ed. 1989).

<sup>25</sup> It also allows the judge to take an active role in assessing whether there is a factual basis for the guilty plea. Langer, *supra* note 13, at 15.

<sup>26</sup> DE (p. 5); SA (p. 1); NO (p. 1); SC (p. 1).

<sup>27</sup> Langer notes that reforms have reduced the importance of the written dossier in Italy (1989), Argentina (federal) 1992, Guatemala (1994), Buenos Aires (1998), Paraguay (1999), Venezuela (1999), Chile (2000-03). Langer, *supra* note 13, at 28.

<sup>28</sup> CR (p. 3); this is also true in France and Spain in the jury trial cases and perhaps in abbreviated procedure cases.

prosecutor<sup>29</sup> or other official.<sup>30</sup> The theory behind the prohibition of defense investigations was typically the notion that pretrial contact with a witness by a party contaminated the witness, undermining his or her credibility.<sup>31</sup> In some countries there is a theoretical right of the defense, in cases where a suspect has been arrested and preliminarily charged, to be present during all investigative acts and to actively solicit evidence in an adversarial type setting.<sup>32</sup> Finally, Italy took the radical step, which has been followed in other countries, to declare the *prima facie* inadmissibility of all evidence collected in the preliminary investigation dossier, unless it cannot be repeated at trial, thus requiring the parties to conduct depositions of witnesses with full confrontation rights of their adversaries when there is a danger the witness will not be available for trial due to death, illness, or illegal threats.<sup>33</sup> In addition, Italy has not only accorded the defense the right to conduct its own pretrial investigations,<sup>34</sup> as occurs in the United States and other common law countries,<sup>35</sup> but has set out codified guidelines for the defense collection of evidence and its preservation in a defense file, which is then consolidated with the file of the prosecutor at the end of the pretrial phase.<sup>36</sup>

The more comprehensive and two-sided the pretrial investigation and the more adversarial the taking of evidence in the pretrial stages, the more the consensual modes of trial, whether in the form of guilty pleas, stipulations or abbreviated trials, will be able to make claims of truth-approximation. This theoretical approach has its adherents in Germany, where several voices in the literature have called for again making the preliminary investigation the most important stage in the criminal process to the extent it performs the function of comprehensively collecting the evidence while protecting the defense right to put it to an adversarial test. Thus, consensual resolution will be on firm footing and, if consensus is not achieved, the trial itself can be streamlined due

<sup>29</sup> The Netherlands, perhaps the most inquisitorial country in Europe, allows no independent defense investigation, compelling the defense to funnel any evidence through the prosecutor and/or investigating magistrate, NE (pp. 1-2, 5). In GE (p. 2), the prosecutor must question witnesses suggested by the defense, but they can also be subpoenaed directly to testify at trial.

<sup>30</sup> In Russia, an investigator attached to the Ministry of the Interior heads the investigation, under supervision of the public prosecutor, and can hear motions of the defense. RU (§§46, 47, 86 CCP). The defense must ask the police to question a witness in NO (p. 2).

<sup>31</sup> NE (p. 5). BR (p. 1) also prohibits independent defense collection of evidence.

<sup>32</sup> For instance in Spain. See Thaman, *supra* note 19, at 34-39.

<sup>33</sup> In relation to Italy, and the procedure before the Spanish jury courts, see S. C. Thaman, *Spain Returns to Trial by Jury*, 22 *Hastings Int'l & Comp. L. Rev.* 241, 281-82 (1998).

<sup>34</sup> Many countries allow defense investigations, either in an informal uncodified manner, GE (p. 2), DE (p. 6), CR (p. 2), or while codified, without procedural clarification of the rules to be followed or the admissibility of the fruits thereof, NO (p. 2).

<sup>35</sup> SC (p. 2).

<sup>36</sup> IT (p. 2, §§391 bis *et seq.* CPP-Italy); N. Triggiani, *La L. 7 dicembre 2000 N. 397 (Disposizioni in materia di indagini difensive): Prime riflessioni*, *Cassazione Penale* (2001), Nos. 7-8, #1120, at 2272-91.

to the pretrial preservation of crucial sources of evidence.<sup>37</sup> There is, however, a real danger if consensual (or other alternative) procedures lead to a skipping of both a formal preliminary investigation and a formal trial, for it will then be difficult for the sentencing judge to ascertain whether there is a factual basis for a finding of guilt.<sup>38</sup>

Certain procedural mechanisms not necessarily related to the giving of consent by the defendant can, however, achieve the same end of skipping the formal preliminary investigation, or avoiding a full trial (by jury) with all the guarantees. Typical among these are expedited trials, usually where the defendant is arrested *in flagrante* or the evidence is otherwise clear due to an unequivocal confession or other manifest proof, where the prosecutor, without consent of the defendant, can immediately send the case to the trial court.<sup>39</sup> In cases where the evidence is actually overwhelming, of course, many of these cases will not end up in full-blown formal trials, but in consensual resolution of one kind or the other. Finally, many countries provide for a more expeditious police or prosecution investigation of the case, in lieu of the full-blown preliminary investigation, or a complete skipping of the preliminary investigation or preliminary hearing<sup>40</sup> for less-serious crimes, which could be an incentive for a prosecutor to undercharge a case to gain the obvious saving of time and investigative resources.

<sup>37</sup> Weigend, *supra* note 3, at 506 ff; J. Wolter, Aspekte einer Strafprozessreform bis 2007 79-91 (1991).

<sup>38</sup> Some voices in countries in transition from an inquisitorial to an adversarial form of procedure, feel it is more important to leap over or simplify the cumbersome, pedantic preliminary investigation with its long periods of pretrial detention, and maintain a full adversarial trial. After all, the state's incapacity to bring defendants to trial in a reasonable time is the reason for long periods of pretrial detention, and yet the state uses this reason for "compelling" defendants to accept judgment without trial through its "consensual" procedures." G. E. Córdoba, *El juicio abreviado en el Código Procesal Penal de la Nación*, in J. B. J. Maier & A. Bovino (Eds.), *El Procedimiento Abreviado* 241-245 (2001), citing Bovino.

<sup>39</sup> BU (p. 11); in IT (p. 19), the public prosecutor may skip the preliminary investigation and the preliminary hearing in flagrant cases by choosing *giudizio direttissimo* or in cases involving otherwise clear evidence by choosing a *giudizio immediato*, which can result in the setting of trial within 15 days. See S. C. Thaman, *Gerechtigkeit und Verfahrensvielfalt: Logik der beschleunigten, konsensuellen und vereinfachten Strafprozessmodelle*, in S. Machura & S. Ulbrich (Eds.), *Recht – Gesellschaft – Kommunikation: Festschrift für Klaus F. Röhl* 307-09 (2003). Venezuela has introduced a similar provision which applies to flagrant crimes, but also to crimes punishable by less than four years deprivation of liberty or fine only. VE (§§372-73 CPP). See also the procedure for "clear crimes, uncovered in the moment of their commission," MO (§513(1) CCP), which requires the police to submit a report of the crime to the prosecutor within 12 hours and for the prosecutor, if she believes a crime has been committed, to refer the case to the court, which must hear it within five days, with one five-day extension. MO (§§515-18 CCP); cf. BE (§§452-59 CCP), which provides in clear cases where the suspect does not deny responsibility, for submission of the case to the prosecutor within 10 days, whereupon the case must be submitted to the judge who must set trial within five days.

<sup>40</sup> *Id.* IT (pp. 8-9).



Practices like *correctionnalisation* in France and Belgium,<sup>41</sup> allow prosecutors to manipulate the charges so as to avoid the jurisdiction of mixed<sup>42</sup> or jury courts<sup>43</sup> with lay participation, or the discretionary charging of “either-way” offenses in England and Wales which would lead to less complicated and more predictable trials before professional panels or, in the latter case, by lay magistrates.<sup>44</sup> While such procedures do not necessarily require the

<sup>41</sup> Thaman, *supra* note 19, at 141. On Belgium, see Ch. Van den Wyngaert, *Belgium*, in Ch. Van den Wyngaert (Ed.), *Criminal Procedure Systems in the European Community* 11 (1993).

<sup>42</sup> Thus it is important to know which countries have mixed courts for the trial of more serious offenses and trials before a professional judge or judges for less serious cases. GE (pp. 19-20), has panels of 3 professional and two lay assessors for more serious felonies, like murder, panels of one professional judge and two lay assessors for crimes punishable by from 2-4 years and single judge trials for lesser offenses; CR (pp. 8-9) has a court composed of one professional judge and two lay assessors for crimes punishable by 5-10 years, and of 2 professional judges and 3 lay assessors if punishable in excess of 10 years; single judges try cases punishable by less than five years; BU (p. 6) provides a mixed court of one professional and two lay judges for crimes punishable by from 5-15 years and a mixed court of two professional and three lay judges for those punishable in excess of 15 years, with single judges trying cases punishable by less than 5 years; in IT (pp. 7-8), a mixed court of six lay judges sitting with two professional judges hears all homicides and other cases punishable by imprisonment from 10 to 24 years, single judges try cases punishable by up to 4 years, and 3 judge panels the rest; in SA (p. 4) lay assessors must be appointed in murder trials and may be used to assess appropriateness of sentence in regional courts. Only two Latin American countries have mixed courts: in BO (§50 CCP) trial courts are staffed with two professional judges and three lay assessors and in the Argentine province of Córdoba, with three professional judges and two lay assessors. R. J. Cavallero, *La Constitución Argentina. La Realidad Jurídica y un Reciente Ensayo de Tribunal Mixto*, in J. B. J. Maier et al. (Eds.), *Juicio por Jurados en el Proceso Penal* 52 (2000).

<sup>43</sup> For countries with jury trials for more serious crimes and professional panels for the others: BR (p. 3, jury of seven, with one professional judge, for crimes against life only); for countries with jury trials for more serious crimes, mixed courts for mid-range crimes and professional panels for less serious crimes: DE (p. 20, jury of 12 with three professional judges for crime punishable in excess of four years, and a mixed court consisting of one professional judge and two lay assessors for lesser crimes; if a defendant gives a full confession, however, all cases will be tried by a professional judge sitting alone); NO (p. 5, cases punishable by up to six years tried by mixed court of one professional judge and two lay assessors, cases punishable by in excess of six years, and appeals of the smaller mixed court, tried by mixed court of 3 professional judges and four lay assessors and appeals from court of 3 professional judges and 4 lay assessors tried by a jury of 10 sitting with three professional judges); SC (p. 8, jury of 15 and one professional judge for “solemn” offenses tried in the High Court and punishable by life imprisonment); NI (§297 CCP), has a jury of five presided by one professional judge; PA (§2332 Judicial Code) has a jury of seven presided by one professional judge. On the relatively new Russian jury system, with a jury of 12, and Spanish system, with a jury of nine, both presided over by a single judge for the trial of murders and some other offenses, see S. Thaman, *Europe's New Jury Systems: the Cases of Spain and Russia*, in N. Vidmar (Ed.), *World Jury Systems* 326 (2000).

<sup>44</sup> The Netherlands has been historically skeptical of lay participation and has neither a jury nor a mixed court and uses three-judge panels for the more serious cases, and single judges for less serious cases. NE (pp. 11-12). On ‘either-way’ offenses, see Thaman, *supra* note 19, at 141-3.

consent of the defendant,<sup>45</sup> they may be preceded by informal discussions or negotiations between defense and prosecution and thus, in a sense, be akin to plea-bargaining.<sup>46</sup> In countries with jury systems, in which the right to trial by jury is the right of the accused,<sup>47</sup> and not exclusively the right of the people to participate in the administration of justice,<sup>48</sup> the waiver of the right to jury trial could be the subject of negotiations, or could be subtly or not too subtly coerced either by manipulative investigators, prosecutors or even court-appointed defense lawyers,<sup>49</sup> or by, for instance, a system of punishing more leniently following a court trial than a jury trial.<sup>50</sup>

Finally, I believe it is important to recognize, that recognitions of guilt in the form of confessions have been the great simplifier of criminal procedure throughout its often ignominious history. Even where defendants were not allowed to jurisdictionally will the end of criminal proceedings by entering a plea of guilty, they were regularly either tortured or otherwise compelled, threatened, induced, or inveigled to confess to the crime, which served traditionally as the “queen of evidence” upon which professional judges, juries or mixed courts would determine the guilt of the accused.<sup>51</sup> It was the great simplifier even of the formal, exhaustive preliminary investigation of classic inquisitorial stamp,<sup>52</sup> thus justifying the cessation of the gathering of

<sup>45</sup> In SC (pp. 8-10), the public prosecutor has almost complete freedom to choose whether trial will be by jury in the High Court, by “solemn” (full-blown) procedure in the Sheriff’s Court (one professional judges, with maximum punishment of 5 years) or by summary procedure in the Sheriff’s (3 month maximum) or peace courts (the latter with lay justices and maximum punishment of 60 days). This situation would be “unthinkable” in England, Wales or the US where the defendant controls whether the trial be by jury or judge (or lay magistrate). *Id.* p. 10.

<sup>46</sup> Manipulative charging to influence the composition of the trial court is forbidden and may be nullified by the court in several countries: CR (pp. 9-10); NO (p. 6); BU (p. 9); PO (p. 13); BR (p. 4); IT (p. 8). It is possible that it occurs in DE (pp. 22-23) and could avoid judicial control.

<sup>47</sup> Such as in the US and Russia. Thaman, *supra* note 43.

<sup>48</sup> Such is the case in Spain, where the right to jury trial may not be waived. *Id.* Jury trial may also not be waived in Denmark, P. Garde, *The Danish Jury*, 72 *Rev. Int. de Droit Pénal* (Lay Participation in the Criminal Trial in the XXI<sup>st</sup> Century), 87, 89 (2001).

<sup>49</sup> Thaman, *supra* note 43, at 326.

<sup>50</sup> See a discussion of the court trial system in the city of Philadelphia, in S. J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 *Harv. L. Rev.* 1037, 1062-67 (1984).

<sup>51</sup> Thaman, *supra* note 39, at 309. Damaska notes that the authorized use of coercion made it unnecessary for continental European officials to have to make concessions to defendants to get them to admit guilt, Damaska, *supra* note 4, at 1022. For the classic argument that plea bargaining replaced torture as the vehicle for coercing confessions of guilt, J. H. Langbein, *Torture and Plea Bargaining*, 46 *U. Chi. L. Rev.* 3-22 (1978).

<sup>52</sup> The 1877 Code of Criminal Procedure of Germany was introduced to put an end to inquisitorial procedure with its introduction of a public and oral trial before a jury, GE (p. 74). Inquisitorial procedure yielded in Denmark to adversarial procedure finally with reforms in 1919, DE (p. 2).

circumstantial evidence of guilt, whether it be through independent witness testimony, physical evidence, expert testimony, or even the simplifying of the oral trial.

Systems in which a confessing defendant would achieve earlier release from pretrial detention<sup>53</sup> or is promised or expects mitigation in charging<sup>54</sup> or punishment<sup>55</sup> upon confessing, can actually be viewed as systems of “plea-bargaining,” even though those systems proclaim to be based on the legality principle, the search for material truth, and are openly hostile to American-style plea-bargaining.<sup>56</sup> Nowadays, the guilty plea and the confession should be treated in a procedurally similar fashion and there are some indications of a move in this direction. Although nearly all systems allow police to interrogate suspects even before the preliminary investigation has been initiated, some even allotting them a certain number of hours or days for this purpose,<sup>57</sup> most now recognize that a suspect should not be interrogated unless he or she has been advised of the right to counsel<sup>58</sup> and the right to remain silent<sup>59</sup>

<sup>53</sup> In GE (p. 8), a detained suspect will be offered prospect of release from pretrial detention due to absence of detention ground of obstruction of justice due to a confession; NE (p. 7) notes that police do make promises of early release to induce confessions, but that this is technically illegal.

<sup>54</sup> GE (p. 8), admits that confessions are bargained for in exchange for instituting diversion procedures, proceeding by way of penal order, requesting a mitigated punishment, etc.; DE (pp. 11-13) recognizes that pretrial confession bargaining exists in exchange for limiting the charges, asking for less punishment, etc., but it is very controversial, with support among some voices in the literature, and opposition among others who find it violates the principles of legality and material truth as well as the prohibition of coerced confessions.

<sup>55</sup> In NO (p. 3), police may tell a suspect that the penal code permits a 1/3 reduction in sentence if a defendant has confessed; in BU (p. 4), while no bargaining is allowed for confessions, the police often induce them by indicating the possibility of a mitigated sentence. Any promise to release from detention or to mitigate the charges or punishment is illegal in: PO (p. 10); BR (p. 2); IT (p. 4); CR (p. 5).

<sup>56</sup> In Japan, penal orders exist for minor criminality, a simple non-adversary trial for defendants who confess (92% of all cases between 1987 and 1992) and an adversarial trial with more severe punishment when one is convicted. D. T. Johnson, *Plea Bargaining in Japan*, in M. M. Feeley & S. Miyazawa (Eds.), *The Japanese Adversary System in Context* 142-45 (2002).

<sup>57</sup> Three to six days in NE (p. 6). In some countries police create an interrogation space illegally by pretextually arresting a suspect for an administrative violation and then questioning about a suspected crime: BU (p. 3); see FR (§63 CCP).

<sup>58</sup> *Miranda v. Arizona*, 384 US 436 (1966); GE (p. 4); SA (p. 2); DE (p. 7); NE (p. 6); CR (p. 4); BU (p. 4); NO (p. 2); PO (p. 10); BR (p. 1); IT (p. 2); SC (p. 3). In most countries, this of course includes the right to court-appointed counsel in the case of indigence or the fact a person is under pretrial arrest or detention. *Miranda*, supra; GE (p. 7); CR (p. 4); DE (p. 9); NO (p. 2); BU (p. 5); IT (p. 3). In NE (pp. 6-7), the admonitions of the right to appointed counsel are only given after the first interrogation.

<sup>59</sup> *Miranda*, supra note 58; GE (p. 7); DE (p. 8); NE (pp. 6-7); CR (p. 4); NO (p. 2); BU (p. 3); PO (p. 10); BR (p. 1); IT (p. 2); SC (p. 2).

and waives those rights.<sup>60</sup> Violations of these rules, called Miranda-rights in the US, will lead in some countries to inadmissibility of the statements subsequently obtained,<sup>61</sup> in other countries not.<sup>62</sup> The prohibition may be extended to evidence indirectly discovered through the interrogation as well,<sup>63</sup> such as evidence of crime, witnesses, or subsequent legal statements that come on the heels of inadmissible statements.<sup>64</sup> The doctrine of “fruits of the poisonous tree,” however, is not recognized in some countries.<sup>65</sup> Some systems allow waiver of the right before one has seen counsel,<sup>66</sup> and others insist that the defendant consult with counsel before commencing the interrogation. Some systems will allow counsel to be present during the interrogation, but the defendant may waive this right.<sup>67</sup> Others allow the defendant to waive counsel before having spoken with one or to waive the right of counsel to be present during questioning.<sup>68</sup> Others do not allow counsel to be present unless the investigating official grants permission<sup>69</sup> or allow questioning if defense counsel does not appear after having been notified.<sup>70</sup> Finally, a few countries disallow use of any statement made by a defendant in the absence of counsel.<sup>71</sup> An argument can be made for requiring counsel to be present during interrogation, just as counsel is required for all consensual procedures designed to elicit procedure-ending or procedure-simplifying admissions or stipulations.

<sup>60</sup> See in general, S. C. Thaman, *Miranda in Comparative Law*, 45 Saint Louis U. L. Rev. 581-624 (2001).

<sup>61</sup> DE (p. 8, where not advised of right to remain silent); NE (p. 7, as long as the suspicion in relation to the person questioned had crystallized enough for him to be a suspect rather than a “witness”); CR (p. 5); BU (p. 4); BR (p. 1); IT (p. 2, extending inadmissibility to even spontaneous statements made in absence of counsel).

<sup>62</sup> NO (p. 3); in Germany the statement is prima facie inadmissible, GE (p. 5), but if the seriousness of the crime outweighs the seriousness of the Miranda-violation, the evidence may be usable. Cf. Thaman, *supra* note 19, at 104-08; Thaman, *supra* note 60, at 606-08. In Scotland, a strict exclusionary rule has given way to a more flexible “case-by-case” approach based in the discretion of the trial judge, SC (p. 3).

<sup>63</sup> So-called “fruits of the poisonous tree” PO (p. 10); CR (p. 5).

<sup>64</sup> GE (p. 6), will suppress a subsequent legal statement if suspect not advised that earlier statement was improperly obtained.

<sup>65</sup> GE (p. 6), unless the violation is particularly egregious; DE (p. 9), allows use of contents of illegal interrogations to continue the investigation; NE (p. 7); NO (p. 3); BR (p. 2), within discretion of judge to admit. In Italy the doctrine of fruits of the poisonous tree is not recognized in relation to statements taken in violation of the admonition requirement. R. VanCleave, *Italy*, in C. M. Bradley (Ed.) *Criminal Procedure. A Worldwide Study* 264 (1999).

<sup>66</sup> *Miranda v. Arizona*; BU (p. 5).

<sup>67</sup> DE (p. 7); PO (p. 10); BR (p. 2).

<sup>68</sup> DE (p. 7).

<sup>69</sup> NO (p. 2); GE (p. 4); NE (p. 6); SC (p. 3).

<sup>70</sup> PO (p. 10).

<sup>71</sup> IT (pp. 2-3); CR (p. 5); SA (pp. 2-3); RU (§75(2)(1) CCP).

This report will discuss procedures for skipping the preliminary investigation and a full-trial by use of pretrial diversion, victim-offender conciliation, penal orders, and consensual modes of stipulations of guilt, such as plea-bargaining. It will also discuss consensual means of simplifying trials through negotiations of confessions or trial-simplifying evidentiary concessions, up to the option of having a “trial on the file” with, if any, a minimum of oral testimony to complement it.

I believe that the use of different procedures for different types of cases – whether based on the seriousness of the threatened punishment, flagrancy, the lack of controversy, etc. – should not necessarily mean that there will be more “truth” or more “justice” for those who are tried “with all the guarantees” than those who proceed to procedural resolution in swifter, less complicated ways.<sup>72</sup>

In ancient times there was a diversity of procedures, ranging from compositions, to duels, ordeals, use of compurgators or juries or *Schöffen* depending on the particularities of the case.<sup>73</sup> In the Middle Ages the old Germanic *Schöffengericht* continued to exist alongside the new inquisitorial procedures in the 16<sup>th</sup> Century German code, the *Carolina*.<sup>74</sup> Written witness statements could be used in French correctional courts, staffed by professional judges, but not in its jury courts.<sup>75</sup>

Expedited, consensual and simplified forms also existed in the ancient and pre-modern world. The precursor for expedited trials were the procedures for suspects caught “red-handed”<sup>76</sup> or “hand-having”.<sup>77</sup> In one Anglo-Saxon version of this procedure, the suspect gets “short shrift,” is not allowed to make a statement and is promptly “hanged, beheaded or precipitated from a cliff” perhaps even by the victim acting as executioner.<sup>78</sup> Quite likely all systems of resolving conflicts that we would today characterize as “criminal” involved procedures which are analogous to the three main modes of criminal procedure today: accusatorial-adversarial procedures, inquisitorial-

<sup>72</sup> Thaman, *supra* note 39, at 317.

<sup>73</sup> J. H. Dawson, *A History of Lay Judges* 121 (1960).

<sup>74</sup> G. Radbruch, *Zur Einführung in die Carolina*, in G. Radbruch (Ed.) *Die Peinliche Gerichtsordnung Kaiser Karls V. Von 1532* (1975), at 21.

<sup>75</sup> See No. 242, Crim. 404, 405 (1884), a decision of the French Court of Cassation, with an English translation in Thaman, *supra* note 19, at 119-20. In fact, the French practice of correctionnalisation and English trial of either-way offenses in the magistrates’ courts are designed, often through anti-judicial manipulation of charging, to avoid trials in the jury (or assizes) courts. *Id.* at 141-44. See J. Pradel, *Procédure Pénale* 97-99 (9<sup>th</sup> ed. 1997), who emphasizes the “consensual” nature of this “illegal” but everyday practice.

<sup>76</sup> On summary procedures for those caught “red-handed” in ancient England, see Th. A. Green, *Verdict According to Conscience. Perspectives on the English Criminal Trial Jury, 1200-1800* (1985), at 8.

<sup>77</sup> On the German Handhaftverfahren, see Th. Weigend, *Deliktsoffer und Strafverfahren* 36 (1989).

<sup>78</sup> Thaman, *supra* note 19, at 4.

investigative procedures, and accusatorial-consensual procedures. Trials by battle, by lining up platoons of oath-helpers to swear at each other, by squaring off and heaping ridicule one on the other,<sup>79</sup> were all precursors of the Anglo-American adversary trial with attorneys squaring off against each other and an independent trier of fact deciding the case. Trial by ordeal was a kind of Divine inquisition, much like as if the judges would have inquired the truth from oracles or from medicine men or soothsayers, and like the torture-laden Medieval *Inquisitionsprozess* it involved inflicting severe pain on the suspect regardless of whether he or she were guilty or innocent. In Germanic and Anglo-Saxon traditions there were the self-informing grand juries and in Carolingian France the *enquête du pais* or the *jury de dénonciation* or the *inquisitio generalis* of the Canon law;<sup>80</sup> finally, most early customary legal orders allowed for mediation and negotiation among accuser and accused (and their clans or families) and the payment of a composition or *wergeld*. If the family refused compensation or the culprit could not pay, then one of the other modes of trial would proceed with the possibility of severe, even capital punishment.<sup>81</sup>

In this regard it is important to realize that no country has only an adversarial, inquisitorial or communitarian system of criminal justice. All systems have existed, and continue to exist in all countries in varying degrees as lateral or subsidiary traditions. Plea-bargaining *à l'Américain* is thus not only a result of the accusatorial-adversarial nature of the American trial ethic which allows the *disponibilité* of the charge, but also of more communitarian notions of compromise and restoring the judicial peace. More importantly it must be emphasized that plea-bargaining is just as much an offshoot of the *Inquisitionsprozess* with its stress on inducing admissions of guilt by using pressure, inducements, promises of leniency, if not outright torture. This will become increasingly evident when we discuss the inherent coercive nature of modern day American plea-bargaining.

It also should be kept in mind that the official paradigms of a system of criminal justice unceasingly trumpeted by its ideologues, the university

<sup>79</sup> It has been noted that such procedures existed, as well, in Croatia in the 10<sup>th</sup> through 12<sup>th</sup> Centuries, CR (p. 23). On the custom in Greenland of having the two sides compete by seeing who can sing the most ridiculous songs about the other, see U. Wesel, *Frühformen des Rechts in Vorstaatlichen Gesellschaften* 133-34 (1985).

<sup>80</sup> A. Esmein, *A History of Continental Criminal Procedure with Special Reference to France* 65-66 (1913).

<sup>81</sup> For an example from 10<sup>th</sup> Century England, see Thaman, *supra* note 19, at 8. Cf. Montesquieu, *De L'Esprit des Lois*, Vol. 1. (1748) 221 (GF-Flammarion 1979). On the rich buying their way out of corporal punishment with the consent of the victim, see Weigend, *supra* note 77 at 67-69, and SC (p. 18). On the existence of "consensual" forms of resolving criminal-type disputes among the Nuer in Africa, where the wergeld took the form of payment in cows, in lieu of blood revenge, see Wesel, *supra* note 79, at 256-58 (1985). See also NO (p. 10), for a description of the transition from a family-based law based on revenge, to one based on compensation.

professors, are not always the paradigms that dominate in the workaday world of the courts in the interactions of police, prosecutors, judges and defense lawyers. I have thus tried to get the country rapporteurs to assess the extent to which informal bargaining for confessions or for the application of certain alternative procedures exists in the corridors of courthouses if not in the official codes. After all, American plea bargaining and the German practice of *Absprachen*, which is now used in a rising percentage of cases, were originally developed informally and only after many years were accepted by the courts if not actually codified. I have also asked the country reporters to try to delve into their country's past to see if there were early versions of consensual procedures that could be seen as the precursors of the modern variants.

## 2. Consensual Procedure Resulting in Dismissal with Conditions

### 2.1. Diversion

To lessen the burden on the criminal courts, many countries have instituted procedures similar to what is called "diversion" in the US,<sup>82</sup> where a case, usually involving less serious crimes,<sup>83</sup> is suspended for a period of time<sup>84</sup>

<sup>82</sup> Diversion was introduced in NO (p. 8) already in 1887 with the passage of its first code of criminal procedure; in DE (p. 25) in 1932; in GE (p. 31), in 1974, with its scope being expanded in 1987 and 1993; in IT (p. 13) in 1988, with expansion to the peace courts in 2000; and in BR (p. 5) with its scope expanded in 2001. The composition pénale, a type of diversion, was introduced in France in 1999. Langer, *supra* note 13, at 59, *see also*, C. Saas, *De la composition pénale au plaider-coupable: le pouvoir de sanction du procureur*, *Revue de Science Criminelle et de Droit Pénal Comparé* 827-42 (2004). Both diversion and the use of "fiscal fines" were introduced in SC (pp. 10, 14) in 1988. Diversion applies to negligent or less serious crimes in NI (§63 CCP). Cf. LA (§70(1)(4) CCP).

<sup>83</sup> GE (pp. 11, 29, misdemeanors, *see* §153a(1) CCP-Germany); in DE (pp. 17, 25) diversion is technically available in all crimes, but is usually applied to juvenile crimes punishable by fine only; NE (pp. 14-15, transactie applies to misdemeanors and minor felonies punishable by up to six years imprisonment); CR (pp. 2-3, applicable to crimes punishable by up to three years for adults and up to five years for juveniles); in NO (p. 8) it is technically applicable to all crimes and has been twice used in homicide cases (euthanasia, father killing mentally ill child); BU (p. 9, intentional crimes punishable by 3 years or less and reckless crimes punishable by 5 years or less); in France, the composition pénale may be applied in any case punishable by less than 5 years, Saas, *supra* note 82, at 832; PO (p. 15, crimes punishable by up to 3 years); BR (p. 5, crimes with minimum punishment of one year deprivation of liberty); IT (p. 11, juvenile cases and cases before the justice of the peace, since the year 2000); SC (p. 11, "fiscal fines" apply to all cases tried in the district courts, thus punishable by less than 60 days deprivation of liberty). Diversion applies to negligent or less serious crimes in NI (§63 CCP) and LA (§415(3)(1) CCP) and to slight or midlevel crimes which are not of significant danger to the community in MO (§510 CCP).

and certain conditions are imposed on the defendant, which, if fulfilled will result in a dismissal of the case and the absence of any conviction. Typical conditions are restitution,<sup>85</sup> payment of money to a public institution<sup>86</sup> or a fine,<sup>87</sup> community service work,<sup>88</sup> drug or alcohol treatment,<sup>89</sup> making support payments,<sup>90</sup> etc.<sup>91</sup> Abstention from further criminal conduct is of course always a condition.<sup>92</sup> Naturally, the defendant must agree to fulfil the conditions and this opens a space for bargaining between prosecution and defense both as to the appropriateness of the diversion and the time and conditions it will be subject to.<sup>93</sup> In some countries, limitations are placed on which cases shall be subject to diversion, such as the lack of public interest in pursuing the crime<sup>94</sup> or the borderline question of guilt,<sup>95</sup> or even, on the contrary, that the defendant confess his guilt.<sup>96</sup>

Diversion and the resulting dismissal has been criticized because in some countries the alleged victim has no control over the decision not to pursue a conviction.<sup>97</sup> Furthermore, the institution has been considered to amount

<sup>84</sup> Case suspended for: no more than 3 years in IT (p. 12); two years in BR (p. 5); one year in MO (§511(1) CCP); six months in France, Saas, *supra* note 82, at 829. In NI (§64 (para.2) CCP), suspension is for no less than two months and no more than three years.

<sup>85</sup> NE (pp. 14-15); NO (p. 8); BU (p. 9); BR (p. 5); GE (p. 29); DE (p. 25); CR (pp. 2, 14); PO (p. 18); IT (p. 12); NI (§63(para.2) CCP); MO (§510(2)(5) CCP); ES (§202(1) CCP); France, Saas, *supra* note 82, at 829.

<sup>86</sup> GE (p. 29); CR (pp. 2, 14).

<sup>87</sup> NE (pp. 14-15, of up to 350 Euros); BU (p. 9, of from 250 to 500 US dollars); DE (p. 25); France, Saas, *supra* note 82, at 830; in SC (pp. 11-12, the “fiscal fines,” were originally limited to 25 pounds, though may now reach 100 pounds and reform proposals would raise them even further).

<sup>88</sup> NE (pp. 14-15); GE (p. 29); CR (pp. 2,14); NI (§65(4) CCP). In France, no more than 60 hours of community service work to be completed within 6 months (830) Saas, *supra* note 82, at 830.

<sup>89</sup> NE (pp. 14-15); DE (p. 25); CR (pp. 2,14); NI (§65(9) CCP).

<sup>90</sup> CR (pp. 2, 14).

<sup>91</sup> Under the Soviet era Russian CCP, cases involving minor misdemeanors were dismissed and referred to “comrade’s courts” for informal administrative resolution. RSFSR (§51 CCP).

<sup>92</sup> Such as in Danish “youth contracts,” DE (pp. 26-27); BR (p. 5); MO (§511(1)(3) CCP).

<sup>93</sup> GE (p. 30); PO (p. 15); in BR (p. 5) there is sometimes informal bargaining about the amount of restitution; although bargaining is not allowed or done in, NE (p. 14); CR (p. 15); BU (p. 10); IT (p. 12); SC (p. 14); in the Netherlands prosecutors sometimes have to bargain with white collar defendants who have powerful lawyers representing them, NE (p. 15). On the “room for bargaining” in relation to French compositions pénales, *see* Langer, *supra* note 13, at 59.

<sup>94</sup> CR (pp. 2, 13); expressed in PO (p. 15) as minor dangerousness of the act.

<sup>95</sup> GE (p. 29).

<sup>96</sup> In Denmark, defendant must confess unconditionally and confession must be corroborated, DE (pp. 17, 25-26); PO (p. 15), requires that guilt be clear and that the defendant will not recidivate; confessions of guilt are required in NI (§63 CCP), PAR (§21 CCP), MO (§510(1) CCP) and in France, Langer, *supra* note 13, at 59.

<sup>97</sup> GE (p. 31); DE (p. 27); NE (p. 14); NO (p. 8); BU (p. 9); IT (p. 12), France, Saas, *supra* note 82, at 840. The victim does have a veto right in CR (p. 14).



to a kind of *Verdachtsstrafe* in that sanctions are imposed without a finding of guilt<sup>98</sup> and by a prosecutor and not a judge.<sup>99</sup> Undue pressure is put on the defendant to accept the conditions, thus tending to violate the prohibition against coercing admissions of guilt.<sup>100</sup> It has been contended that the procedure violates the principle of a public trial, allowing rich defendants to secretly buy their way out of criminal liability and avoid prejudicial limelight,<sup>101</sup> or that the bureaucratic-administrative procedure results in a *de facto* decriminalization eliminating blameworthiness in favor of payment of a “tax” on erstwhile illegal activity.<sup>102</sup> Nonetheless, a relatively large amount of cases are resolved using diversion procedures in some countries which has helped to unburden the courts.<sup>103</sup>

## 2.2. Victim-Offender Conciliation

The movement for restorative justice has been instrumental in the increasing popularity of expanding procedures of victim-offender conciliation as an alternative to criminal prosecution.<sup>104</sup> The roots of this procedure can be found

<sup>98</sup> In GE (p. 11), a dismissal per §153 StPO leads to a “hypothetical evaluation of guilt” whereas §153a StPO requires determination of slight to middle-level guilt due to the imposition of sanctions. It has been criticized as the imposition of punishment, in the form of “conditions” based on mere suspicion, and because there is no judicial involvement, thus hearkening back to inquisitorial procedures where the investigative official also decided the case and sentenced, GE (p. 31). The ECHR has also made this criticism in *Oztürk v. Germany* (2.21.84), NE (pp. 14-15). The French *injonction pénale* was introduced by a law of December 22, 1994 but was declared unconstitutional by the Conseil constitutionnel on February 2, 1995, on the basis that the prosecution was essentially issuing a judgment, confusing the roles of prosecution and judgment. Pradel, *supra* note 75, at 204.

<sup>99</sup> As to France, see Saas, *supra* note 82, at 827. Even police suspend proceedings in minor traffic cases and impose sanctions. *Id.*, at 829.

<sup>100</sup> GE (p. 31).

<sup>101</sup> GE (p. 31); NE (pp. 16-17, for this reason NE is moving towards replacing diversion with penal orders).

<sup>102</sup> SC (p. 22).

<sup>103</sup> 15-20% of all cases in the last 20 years, GE (p. 30); 7-11% of all dismissals from 1995-2002 in DE (p. 25); used 219 times in 2001 in NO (p. 8); in CR (p. 15), the procedure was seldom used in relation to adults, but resulted in anywhere from 59% (young adults from 18-21 years of age) to 87% (juveniles from 15-18 years of age) of all dismissals. In Scotland, informal diversion was used in 3.1% of cases in 2002-03, 3.9% in 2004-2005, and “fiscal fines,” another type of diversion, were used in 7.9% of cases in 2002-03, 9.3% in 2003-04, SC (p. 4). On the other hand, the procedure is seldom used in CR (p. 16) or France, where only .17% of cases were resolved by diversion in 2001. Langer, *supra* note 13, at 61.

<sup>104</sup> The procedure exists since 1930 in IT (p. 14), but only in 1999 were provisions made to assess the costs of the procedure to the defendant. It was introduced in NO (p. 9), in 1991, in 1994 in GE (p. 32), but procedural mechanisms to implement it were not introduced until 1999 which seek to encourage victim-offender mediation in as many cases as possible, GE (p. 35); in DE (p. 27) in 1995 experimentally in three jurisdictions; in BR (pp. 1, 4-6) in 1995. In SC (p.

in ancient customary law where the families or clans of victims and victimizers would arrange for a *composition*, *wergeld* or some kind of compensation, often accompanied by feasts or other rituals of conciliation.<sup>105</sup>

Today the procedure is often obligatory as a first step in cases brought by private complaint and private prosecution, usually misdemeanor offenses such as battery, infliction of minor injuries, defamation, vandalism, etc.<sup>106</sup> The procedure is popular in many of the former Soviet republics,<sup>107</sup> where some codes even articulate the “right” of the defendant to conciliate with the victim.<sup>108</sup> Only if the case cannot be settled through conciliation will the criminal procedure continue along the normal path. The result is a dismissal once conciliation has been achieved.<sup>109</sup> Since many of these minor crimes may be subject to diversion proceedings there may be an intertwining of these procedures.<sup>110</sup> It has been limited to minor offenses,<sup>111</sup> generally, due to the possibility that influential or perhaps dangerous defendants could coerce conciliation for robberies or rapes, etc., and thus avoid criminal responsibility.<sup>112</sup> Some voices in the literature, a distinct minority, maintain that the procedure might violate equal protection if not applied to crimes where society is the victim.<sup>113</sup>

14), charity-administered conciliation programs were introduced on an experimental basis in Aberdeen, Edinburgh and Lanarkshire in 1988.

<sup>105</sup>Damaska, *supra* note 4, at 1020, believes the early medieval legal process constituted “the common stem of Western procedural culture” and a “vehicle for the settlement of disputes and the prevention of endemic violence.”

<sup>106</sup>GE (p. 15); NE (p. 27); CR (p. 16); NO (p. 8); BU (pp. 5-6, 10); PO (pp. 3-4, 19); IT (p. 13, entire system of peace courts is aimed at promoting conciliation). In Nicaragua, “mediation” towards the end of conciliation and restitution is possible in cases of misdemeanors, negligent or unintentional crimes, property crimes among family members involving violence or intimidation, and crimes punishable with minor punishments, NI (§56 CCP). In Paraguay, conciliation is obligatory in cases subject to private prosecution, and discretionary in others. PAR (§§311, 424 CCP). In UZ (§84(para.5)(2)), the procedure is limited to first-offenders who do not represent “great social danger” or perpetrators of less serious crimes who have made restitution, showed active remorse, or helped solve the crime.

<sup>107</sup>It was included in the Soviet era Russian RSFSR (§5(6) CCP) relating to cases initiated by complaint of the victim and was further included in the MPCCIS (§36(1)(6)) and in AR (§36 CCP); BE (§§26(2), 29(1)(5), 30(1)(2) CCP); LA (§§536-38 CCP); LI (§§207, 420 CCP); TA (§§5(para.1)(3), 5.3 CCP); UZ (§§582-86 CCP).

<sup>108</sup>LA (§66(1)(17) CCP).

<sup>109</sup>UZ (§84(para.4) CCP); TU (§31(1)(6) CCP-Draft).

<sup>110</sup>GE (pp. 17, 36-38); in Nicaragua, “mediation” leads to a suspension of the case pending restitution and other conditions, much as is the case with diversion, NI (§57(4) CCP).

<sup>111</sup>In Russia it may be applied to crimes of slight or mid-level gravity. RU (§25 CCP) in the MPCCIS (§37(1)) to misdemeanors.

<sup>112</sup>This has been a problem in Venezuela, but not recognized as a problem in CR (p. 17), NO (p. 9), BR (p. 6), SC (p. 14), or IT (p. 13), though in the latter it could not be excluded.

<sup>113</sup>GE (pp. 32-33, such as the offenses of complete intoxication, tax fraud, etc.).

Victim-Offender conciliation requires active participation of both parties and should not be confused with procedures which, upon the payment of restitution, may result in dismissal, without there necessarily being a face-to-face interaction.<sup>114</sup> Thus, a type of bargaining is compelled at times in these cases,<sup>115</sup> in fact is part and parcel of the conciliation process, in determining the plausibility of conciliation and the terms which will ensure its success.<sup>116</sup> Bargaining as to restitution even in cases without a private victim, such as tax cases, is a commonplace as well.<sup>117</sup> In some countries, neutral mediators are used<sup>118</sup> and the public prosecutor is not involved.<sup>119</sup> In others the public prosecutor<sup>120</sup> or the court are involved.<sup>121</sup> In Russia, it has been held that the court must entertain a motion to dismiss on the part of the aggrieved party where complete restitution has been made and the defendant has little or no criminal record and has expressed remorse.<sup>122</sup>

As with diversion and penal orders, some voices find that victim-offender conciliation provisions, when they are conditioned on the defendant admitting guilt,<sup>123</sup> violate the privilege against self-incrimination by compelling this admission.<sup>124</sup> The frequency of use of victim-offender mediation varies from country to country.<sup>125</sup>

<sup>114</sup>BR (p. 5); GE (p. 32). Provisions allowing dismissal or mitigation to be triggered by restitution may be applicable to more serious offenses, like sexual offenses, whereas victim-offender conciliation would not, GE (p. 34).

<sup>115</sup>GE (p. 36).

<sup>116</sup>In CR (p. 16), where conciliation not regulated, bargaining is well possible; in BR (p. 6), IT (p. 13), there is bargaining as to the amount of restitution.

<sup>117</sup>In GE (pp. 35-37), it has been questioned whether restitution should suffice to trigger a dismissal in cases involving the rich because no "considerable personal efforts" or "personal sacrifice" is involved. Some voices claim that such defendants should also make a large symbolic payment to the state coffers.

<sup>118</sup>PO (pp. 4, 18, requires parties select a person or institution in whom they have confidence); DE (p. 28); in Nicaragua, "mediation" may be conducted before a lawyer, notary, public defender or a rural "facilitator of justice," NI (§57 (para.1) CCP). The Paraguayan code mentions the use of an amigable componedor ("friendly compromiser"), PAR (§424 CCP). For the use of mediators in the probation office, see LA (§381 CCP).

<sup>119</sup>DE (p. 28).

<sup>120</sup>In NE (p. 19), while there is no official victim-offender conciliation, a procedure was experimentally introduced in 1995 allowing the victim to approach the public prosecutor before joining trial as an aggrieved party with a claim to compensation and to attempt, with help of the prosecutorial staff, to come to an agreement with the offender about compensation. Principle of opportunity then allows prosecutor to base decision on whether or not to prosecute on the outcome.

<sup>121</sup>BU (p. 10).

<sup>122</sup>Opređenje Sudebnoy kolegii po ugovornym delam Verkhovnogo Suda RF, May 24, 2005, No. 57-D05-9 [http://www.supcourt.ru/vscourt\\_detale.php?id=4365](http://www.supcourt.ru/vscourt_detale.php?id=4365).

<sup>123</sup>GE (p. 35, requires a confession in cases involving violence and sexual assault); DE (p. 28); PO (p. 18); NO (p. 8, guilt must have been proved for the procedure to be used).

<sup>124</sup>GE (pp. 34-35).

<sup>125</sup>It was little used in the early years in GE, but this is beginning to change GE (p. 37), and has

### 3. Consensual Procedures Resulting in a Skipping of the Preliminary Investigation and the Trial

#### 3.1. Penal Orders

The penal order, which appears to have originated in Germany,<sup>126</sup> consists in the public prosecutor, in cases in which only a fine<sup>127</sup> or lesser periods of deprivation of liberty<sup>128</sup> is contemplated, submitting in writing a suggested charge and punishment to the defendant, who is given a short period of time to accept or reject the proposal.<sup>129</sup> If the defendant rejects the proposal, the case will be tried according to the normal procedures.<sup>130</sup> In many countries, the defendant's silence or failure to respond will constitute acceptance of the

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also been used only 8,000 times in PO (p. 19) in the first eight years of its existence, 60% of cases actually resulting in conciliation; in DE (p. 27), conciliation was requested in 1432 cases, 357 were referred to a mediator, and 150 were successfully mediated; in NO (p. 9) it was used only 20 times in 2004. In BR (p. 9) victim-offender conciliation has unburdened the courts to a certain extent, but has been seen as being relatively ineffective. In 2004-05 in SC (p. 14), victim-offender conciliation was undertaken in 1,232 cases and was successful in 91% of cases in which both victim and defendant.

<sup>126</sup>The institution goes back to 1877 and is based on a previous Prussian model, GE (p. 28).

<sup>127</sup>GE (pp. 22-23, cases punishable by fines or suspended periods of imprisonment of up to one year); DE (pp. 19, 24, fines only); LI (§425(1) CCP) (fine only); NE (p. 17, if the fine exceeds 2000 Euros, the prosecutor must hear the defendant, but fines not surpassing 225 Euros, and suspensions of a driver's license for up to six months may be ordered without a hearing); IT (p. 10, crimes punishable by a fine or up to 6 months suspended imprisonment); the offense itself may be punishable by deprivation of liberty, NE (p. 17, of up to six years); CR (p. 11, of up to five years) as long as only a fine is sought in relation to the defendant in question (NO, p. 7, applicable to burglary and theft in such circumstances); BR (pp. 4-5), misdemeanors or offenses punishable by less than two years); SC (pp. 12-13, "fixed penalties" of up to 60 pounds for normal traffic offenses, and 200 pounds for driving without insurance may be issued by the public prosecutor or the police). *See also* ES (§251(1) CCP); LI (§425(1) CCP); CH (§392 CCP) (procedimiento monitorio), C. Riego, *El procedimiento abreviado en Chile*, in Maier & Bovino, *supra* note 38, at 472. The French "simplified procedure," which results in a penal order (ordonnance pénale) is applicable to minor crimes (délits) and infractions (contraventions) where no imprisonment is possible, FR (§§495, 459-1, 524 CCP).

<sup>128</sup>In PO (p. 16), "conviction without trial" may apply to offenses punishable by up to 10 years.

<sup>129</sup>Seven days in LI (§§427, 429 CCP); Eight days in CR (p. 11); three to ten days in NO (p. 7); 10 days in ES (§254(6) CCP); two weeks in GE (p. 24), NE (p. 17), 15 days in IT (p. 10) and immediately upon oral offer at the preliminary hearing in BR (p. 5); up to 28 days, however, with regard to Scottish "fixed penalties." SC (p. 12); 15 days per CH (§392(c) CCP), Riego, *supra* note 127, at 472. The defendant in cases of French "simplified procedure," however, has 45 days to accept the penal order, in cases of délits, FR (495-3 CCP), and 30 days in cases of contraventions, FR (§527 CCP).

<sup>130</sup>DE (pp. 12, 24).

penal order.<sup>131</sup> The judge in most countries, however, maintains the power to reject the penal order if he/she believes it is unsupported by the evidence.<sup>132</sup> Sometimes the victim also may block a penal order.<sup>133</sup> Sometimes, the penal order is restricted to cases where the defendant has confessed or where the state of the evidence clearly shows guilt, as would be the case with flagrant offenses.<sup>134</sup> Penal orders result, at times, in a statutorily discounted punishment.<sup>135</sup> Although not provided for in the code, it has been recognized that bargaining between defense and prosecution at the early stages of the procedure exists,<sup>136</sup> or cannot be excluded as a possibility<sup>137</sup> so that a penal order will be satisfactory to the defense. While the court pronounces judgment tantamount to a guilt-finding in many countries,<sup>138</sup> it is of a skeletal variety due to the lack of a formal investigation of the evidence.<sup>139</sup> In some countries, however, the finding is less one of guilt, than a kind of *Verdachtsstrafe*, i.e., a mere finding of probable cause.<sup>140</sup>

Penal orders have greatly reduced the caseload of the courts in some countries,<sup>141</sup> yet continue to arouse criticism due to the fact that the defendant usually has no right to be heard<sup>142</sup> and that it is essentially the prosecutor

<sup>131</sup>FR (§527(para.4) CCP).

<sup>132</sup>GE (pp. 23-24, if no "probable cause" or disagrees with the punishment proposed, in which cases proceeds by the expedited procedure); CR (p. 11); ES (§253(3) CCP); the judge has no power to reject the penal order, however, in: NO (p. 7); LI (§427 CCP).

<sup>133</sup>IT (p. 10); FR (§§524(para.3), 528-2(para.3) CCP, if victim has filed a complaint against the defendant).

<sup>134</sup>GE (p. 23); DE (pp. 19, 24, often applicable to petty thefts, minor drug offenses, traffic cases). See also the CCP-Neuquen (Argentina) where the preliminary investigation may be eliminated in flagrant cases. G. Vitale, *El proceso penal abreviado con especial referencia a Neuquén*, in Maier & Bovino, *supra* note 38, at 366.

<sup>135</sup>Up to 1/2 of what would have been the appropriate fine, IT (p. 10).

<sup>136</sup>GE (p. 26). For instance, the prosecutor may suggest a particular level of fine to the defendant if the defendant agrees not to object to the penal order. M. D. Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 *Stanford L. Rev.* 547, 560 (1997).

<sup>137</sup>DE (p. 24); NE (p. 19, no reason to believe prosecutor won't bargain with powerful defendants); NO (p. 7); IT (pp. 10-11).

<sup>138</sup>In IT (p. 11); GE (p. 26); SC (pp. 12-13), the decree is equal to a judgment and may not be appealed.

<sup>139</sup>In CR (pp. 11, 21), it is based on the police report and the court's satisfaction that the fine or measure is correctly imposed.

<sup>140</sup>Some voices in Germany believe the finding is really only one of probable cause, GE (p. 26); BR (p. 5), treats the result as a mere imposition of punishment without a guilt-finding.

<sup>141</sup>Penal orders constitute 2/3 of all convictions in GE (p. 26). In the mid 1990's, around 22% of penal orders were rejected by defendants. Dubber, *supra* note 136, at 562. 28% of all cases in Croatia are resolved by penal orders, CR (p. 12); in 2001 NO (p. 7) decided 215,276 cases by penal order. On the other hand, "fixed penalty" cases amount to only 2-3% of all cases in SC (p. 13). Few defendants reject the penal order in France. Pradel, *supra* note 75, at 683.

<sup>142</sup>Thus violating right of due process of Arts. 14(1)(1) IPCPR, 6(1)(1) ECHR and 103 Const. Ger. GE (p. 27).

that imposes judgment<sup>143</sup> without trial<sup>144</sup> and with minimal or no judicial control and no express finding of guilt.<sup>145</sup> Fears have been expressed that a defendant, who might not be represented by counsel, will agree without sufficient knowledge of the circumstances.<sup>146</sup> Concerns of equal protection due to differences in the treatment of like offenses in different judicial districts have also been voiced.<sup>147</sup> Concerns of procedural economy, however, have also led to praise of the penal order due to its unburdening of the courts and the fact the defendant has a right to reject the offer.<sup>148</sup> Despite its 100 year plus vintage, many countries are only recently turning to the penal order in pursuit of procedural economy.<sup>149</sup>

### 3.2. Guilty Pleas and Stipulations to the Charges as Substitutes for the Criminal Trial

#### 3.2.1. Introduction: the Common Law Guilty Plea and its Development in the US

It is unclear when in the Anglo-American Common Law a guilty plea by a defendant led inexorably to the waiver of the right to have a jury decide the issue of guilt or innocence.<sup>150</sup> The procedure likely had its roots in the 19<sup>th</sup> Century but, once it was accepted that a guilty plea could lead directly to sentence, the procedure gradually began to replace the full-blown trial by jury.<sup>151</sup> By the beginning of the 20<sup>th</sup> Century, 50% of all cases were settled by guilty pleas in the US, the percentage rising to 80% in the 1960's and reaching 93-95% today.<sup>152</sup> While guilty pleas were accepted in the 19<sup>th</sup> Century as a trial-ending procedural figure, it was only in the mid-20<sup>th</sup> Century that it began to

<sup>143</sup>Thus violating the separation of powers, DE (p. 24); NE (pp. 18-19); PO (p. 16).

<sup>144</sup>GE (p. 27).

<sup>145</sup>GE (pp. 27-28, due to overburdening of courts).

<sup>146</sup>NE (p. 19).

<sup>147</sup>DE (p. 25).

<sup>148</sup>DE (p. 24); CR (pp. 12, 22); NO (p. 7); IT (p. 11).

<sup>149</sup>NE (p. 17), has only introduced it in 2006 in order to be able to more expeditiously exact fines where terms of diversion have been violated; IT (p. 22) introduced the penal order with its 1988 Code of Criminal Procedure and CR (p. 12) in 1998.

<sup>150</sup>When trials in England were fast and one jury could handle several in one day, trial judges discouraged defendants from pleading guilty and encouraged them to take their chance with the jury. J. H. Langbein, *The Origins of Adversary Criminal Trial* 19 (2003). Guilty pleas were also discouraged in late 18<sup>th</sup> Century America, and one trial court, as late as the 1890's could still handle as many as six trials a day. A. W. Alschuler & A. G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 922-25 (1994).

<sup>151</sup>In SC (p. 15) there is no further taking of evidence after a guilty plea and the proceedings immediately move to the sentencing stage.

<sup>152</sup>Alschuler & Deiss, *supra* note 150, at 922-24.

be recognized that guilty pleas were often preceded by full-fledged bargaining by prosecutor, defendant, and sometimes the judge over the type of charge the defendant would admit to and the parameters of the resultant punishment. The US Supreme Court finally recognized the fact of such bargaining and even put its stamp of approval on it, claiming it did not violate any of the important principles of criminal procedure as long as the defendant made a knowing and voluntary plea and properly waived his right to remain silent, to confront and cross-examine the witnesses, and his right to a trial by jury. The “knowledge” requirement was held to mean that he must know the character of the charges and that he must know the consequences of his plea as well, i.e., the range of possible punishment, and sometimes even collateral measures that might be applied upon the finding of guilt.<sup>153</sup>

Eventually, plea-bargaining and guilty pleas were regulated by sometimes detailed statutes<sup>154</sup> which cover the procedure for obtaining pleas, the rights of the defendant, such as the right to counsel, which must be abided by, as well as the types of rights a defendant can be induced to waive upon entering into a “plea agreement,” as the resulting contract has been named in the US federal system. All terms must be put on the record now in most US jurisdictions.<sup>155</sup>

What is common in all US jurisdictions, is that plea-bargaining applies to any and all kinds of cases, from minor infractions, up to capital murder cases. This differentiates American plea-bargaining from most other systems which have been adopted in other countries. Another important factor, is that the large differences between minimum and maximum punishments in most US jurisdictions means that the “offer” of the public prosecutor may appear to some to be inherently coercive.<sup>156</sup> The US Supreme Court has ruled that it does not, for instance, violate due process for a prosecutor to offer a defendant to either admit guilt and suffer a five year sentence, or insist on a jury trial, where, if he is convicted, the public prosecutor will ask for life imprisonment.<sup>157</sup> Critics have claimed that only with a reduction in the Draconian length of prison sentences will plea-bargaining’s hold on criminal procedure be loosened.<sup>158</sup>

<sup>153</sup>Boykin v. Alabama, 395 US 238, 242-44 (1969); United States v. Brady, 397 US 742, 751-52 (1970); Santobello v. New York, 404 US 257, 261 (1971).

<sup>154</sup>Informal guilty plea practice became codified in SA (p. 6), only in 2001.

<sup>155</sup>US (p. 2). The same holds true in SA (p. 7). The main federal statute is Fed. R. Crim. P. 11.

<sup>156</sup>Many critics point to the huge differences between punishments in America and Europe to stress this aspect of American plea bargaining. Damaska, *supra* note 4, at 1027. Hans Zeisel once surmised that each month of a European sentence would translate into a year’s deprivation of liberty in the US. Langbein, *supra* note 51, at 16. Dubber, *supra* note 136, at 596-97, has noted that, while all defendants convicted of felonies in the US federal courts receive prison sentences (40% of which were suspended as a condition of probation), no federal felon received a fine as the primary sentence, whereas in Germany 80% of all punishments are fines, and only 5% are sentenced to deprivation of liberty.

<sup>157</sup>Bordenkircher v. Hayes, 434 US 357 (1978).

<sup>158</sup>Dubber, *supra* note 136, at 553, 597.

### 3.2.2. The Gradual but Reluctant Acceptance of Guilty-Plea Mechanisms in Civil Law Jurisdictions

Historically in the countries of the civil law, a defendant could not herself dispose of the charges by admitting guilt, thus preventing further taking of evidence and the conduct of a trial, whether it be before jury, mixed court or a panel of judges or a single magistrate. This violated the right to due process, the requirement that justice could only be meted out by a judge, and many important principles of continental European criminal procedure. This view still holds in many countries.<sup>159</sup>

Nevertheless, already in 19<sup>th</sup> Century Spain, a defendant was allowed to terminate the taking of evidence and cause the trial to move to the imposition of punishment by expressing his conformity, or *conformidad* to the pleadings of the prosecution parties.<sup>160</sup> This tradition has continued in an uninterrupted fashion up to this day and has served as a model for some Latin American countries in the development of guilty-plea mechanisms.<sup>161</sup>

Otherwise, the first apparent break in the complete rejection of guilty plea mechanisms came with the Italian Code of Criminal Procedure of 1988 with the introduction of the “application for punishment upon request of the parties,” commonly called the *patteggiamento*, or “deal” which originally provided for up to a 1/3 discount on punishment and was limited to crimes punishable by no more than three years deprivation of liberty. The *patteggiamento* has become one of the main models for guilty plea mechanisms which have been introduced in Europe,<sup>162</sup> the former Soviet Republics<sup>163</sup> and some Latin American countries.

<sup>159</sup>GE (p. 38); DE (p. 17); NO (p. 9).

<sup>160</sup>Since the enactment of the CCP of 1882, SP (p. 2). See N. Rodríguez García, *El Consenso en el Proceso Penal Español* 78 (1997), who claims the procedure was already introduced as early as 1848.

<sup>161</sup>The Spanish *conformidad* was the model for the *juicio abreviado* provided for in §431 bis of the Argentine Federal CPP, A. Bovino, *Procedimiento abreviado y juicio por jurados*, in Maier & Bovino, *supra* note 38, at 65-66. It was introduced in 1997 in the Federal Argentine CCP, Córdoba, *supra* note 38, at 229. It was introduced in 1994 in the CCP of the Province of Tierra del Fuego and called the *omisión del debate* (omission of the trial). E. C. Sarrabayrouse, *La omisión del debate en el Código Procesal Penal de Tierra del Fuego. Su régimen legal y aplicación práctica*, in Maier & Bovino, *supra* note 38, at 300-02. It is also clearly the model for many of the “abbreviated procedures” introduced in other parts of Latin America: the *procedimientos abreviados* in the 1999 CCP of Bolivia, BO (§373 CCP); the 2000 CCP of Chile, CH (§406 CCP). Among the successor states of the Soviet Union, the possibility of entering a “guilty plea” was broached in §35 of the Model Code of Criminal Procedure for the Commonwealth of Independent States (MCCIS).

<sup>162</sup>Consensual procedures similar to the Italian model have been introduced in: SA (p. 8) in 2000; in BU (p. 12) in 2000, with significant changes made in 2005; in CR (p. 22) in 2002.

<sup>163</sup>This rapporteur drafted a chapter on consensual procedures for the authors of the 2001 Russian Code of Criminal Procedure and the legislator adopted a procedure I suggested which



Finally, a more wide-open negotiation of guilty pleas has been adopted in some countries based on the classic American model and often as the result of American influence in the legislative process in those countries.<sup>164</sup>

### 3.2.3. Theories for Accepting “Bargaining” With Justice

In the US, plea-bargaining has been justified on the theory that it is a “contract” between two equal bargaining entities that must be upheld. If the prosecutor reneges on the offer, the defendant can withdraw his plea or plead for specific enforcement of the terms.<sup>165</sup> If the defendant breaches, he may be prosecuted on the dismissed charges, held to his guilty plea, and be sentenced to a more aggravated punishment.<sup>166</sup> Easterbrook invokes models of contract law, and characterizes plea bargaining as a “voluntary transaction which maximizes the welfare of both parties.” The defendant is spared of anxiety and the costs of litigation and the prosecutor frees up resources to pursue other criminals. He argues against judicial oversight for “if a third party must approve the settlement, settlements and their savings become less frequent.”<sup>167</sup>

It is seen to be an outgrowth of the adversarial system of justice<sup>168</sup> where the search for truth is not an explicit goal of the proceedings<sup>169</sup> and trial judges have no prior knowledge of the facts of the case to guide any search for truth due to the absence of an investigative file.<sup>170</sup>

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was very similar to the Italian patteggiamento. See Rekomendatsii parlamentskikh slushaniy “O khode podgotovki proekta Ugolovno-protsessual’nogo kodeksa Rossiyskoy Federatsii” (po problemam, kasaiushchikhsia sokrashchennykh predvaritel’nykh slushaniy i form sudoproizvodstva). 16 January 2001 (copy on file with author).

<sup>164</sup>See the procedures for Nicaragua and Venezuela, Estonia, Latvia, Lithuania, Moldova and Georgia, addressed *infra*.

<sup>165</sup>*Santobello v. New York*, 404 US 257, 261 (1971). The government may be in breach of the contract if it breaks its promise not to oppose the defendant’s request for a certain punishment by attempting to prove aggravating circumstances, *United States v. Taylor*, 77 F.3d 368 (11<sup>th</sup> Cir. 1996), or, for instance, by submitting a victim impact statement, *United States v. Johnson*, 187 F.3d 1129 (9<sup>th</sup> Cir. 1999), US (p. 5). For a position in support of the contract theory, see F. H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L. J. 1969, 1975 (1992).

<sup>166</sup>*United States v. Holbrook*, 368 F.3d 415 (4<sup>th</sup> Cir. 2004); *United States v. Cimino*, 381 F.3d 124 (2<sup>d</sup> Cir. 2004), US (p. 5).

<sup>167</sup>US (p. 7).

<sup>168</sup>Langer, *supra* note 13, at 6, sees plea bargaining as a ‘text’ that has been translated from one ‘language’ – the adversarial system of the United States, into another, that of the inquisitorial systems of Germany, Italy, Argentina, and France.

<sup>169</sup>“The adversarial conception of truth is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred.” Langer, *supra* note 13, at 10.

<sup>170</sup>US (p. 1).

### 3.2.4. The Scope of the Application of Guilty Plea Mechanisms

A guilty plea may be accepted in relation to any charge, even the most serious, in the US and will serve to terminate evidence-taking and move the case immediately to the sentencing stage and the imposition of punishment.<sup>171</sup> This model has been followed in some countries.<sup>172</sup>

The consensual procedures in the civil law realm have typically not been applicable to prosecutions for serious or especially grave offenses.<sup>173</sup> The Spanish *conformidad* is applicable, in its usual form, to crimes punishable by no more than six years deprivation of liberty.<sup>174</sup> In some Latin American

<sup>171</sup>This should be distinguished from countries where the defendant may admit guilt, thus shortening the trial, or even providing for a trial before a professional bench, rather than a bench with lay participation, NO (pp. 4, 9).

<sup>172</sup>In SC (p. 15) and apparently in SA (p. 6). It also appears there is no restriction in the BO (§373 CCP). In Costa Rica, a *conformidad*-type acceptance of the charge with a substantial reduction in punishment potentially applies to all charges. J. Llobet Rodríguez, *Procedimiento abreviado en Costa Rica, presunción de inocencia y derecho de abstención de declarar*, in Maier & Bovino, *supra* note 38, at 446. In Honduras, the “abbreviated procedure” applies to all crimes, as long as the accused has no prior criminal record. HO (§403 CCP). The Nicaraguan acuerdo (agreement) appears to be very close to the US plea bargain, as it allows free negotiation of the charges in all types of cases, NI (§61(para.1) CCP). In Venezuela, the “procedure for admitting the facts” is applicable to all cases, though the discount one receives differs depending on the seriousness of the offense, *see infra*, VE (§376 CCP). There appear to be no limits to the plea-bargaining introduced in 2004 in Georgia and in the Latvian “agreements” in §§539-43 of the 2005 CCP.

<sup>173</sup>Only misdemeanors in PO (p. 16); they may not apply to first degree offenses punishable by a minimum of 4 years or maximum of life imprisonment in Estonia. §239 CCP-Estonia. The Moldovan guilty plea may be accepted in relation to crimes of slight, mid-level or serious character. MO (§504(2) CCP). This appears to exclude “especially serious” crimes.

<sup>174</sup>SP (p. 1). The same six year limit exists in the *juicio abreviado* in Argentina’s federal CCP, Bovino, *supra*, note 161, at 65. In a 2002 Spanish law which introduced “expedited trials,” however, a defendant may express his/her *conformidad* in any case where the public prosecutor is requesting a sentence of ten years or less, although the amount of actual prison time is limited to two years in such cases, SP (p. 8); *conformidad* is also applicable in juvenile cases, where usually only measures short of deprivation of liberty are imposed, SP (p. 12). Despite these statutory limitations, it seems as if Spanish courts will accept “guilty pleas” to more serious crimes and move directly to sentence, as was recently done in the case of the “rapist of Pozuelo” in the Madrid Provincial Court where a Brazilian “pled guilty” and accepted a 300 year sentence (he will only serve 20 years thereof). El ‘violador de Pozuelo’ acepta una pena de más de 300 años de prisión por atacar a 19 mujeres, *El País*, June 6, 2006, at 40. Similar procedures in Cuba are applicable to crimes punishable by up to seven years, C. Loarca & M. Bertelotti, *El procedimiento abreviado en Guatemala*, in Maier & Bovino, *supra* note 38, at 413. The *conformidad*-type procedures in the CCP of Buenos Aires, however, applies to crimes punishable by up to eight years, and that of the CCP of the Province of Córdoba in Argentina applies to all crimes. Córdoba, *supra* note 38, at 249. The Model CCP for Ibero-America originally called for limiting such procedures to crimes punishable by no more than two years, *Id.*, and the CCP-Tierra del Fuego permits them for crimes punishable by a maximum of three years. Sarabayrouse, *supra* note 161, at 302.

jurisdictions, the parties may agree to a disposition as to the facts and the sentence in minor cases and the judge may not sentence in excess of the agreed-upon limit.<sup>175</sup>

Although the Italian *patteggiamento* was originally limited to crimes punishable by no more than three years, the legislator extended its scope in 2003 to crimes punishable by up to five years.<sup>176</sup> This tendency to expand the applicability of the consensual procedures in civil law jurisdictions is notable also in Russia, where the provision, modeled on the Italian *patteggiamento*, was applicable to crimes punishable by no more than three years upon first reading in the State Duma, but was raised to five years upon passage of the new Code of Criminal Procedure in 2001, and up to ten years<sup>177</sup> in a 2003 amendment to the code.<sup>178</sup>

### 3.2.5. Statutory Discounts or Free Bargaining Between Prosecution & Defense

Statutory discounts for defendants who admit guilt are virtually unknown in the US.<sup>179</sup> and other common law countries. Naturally there must be some incentive to plead guilty and waive the right to a jury trial or trial by professional or lay magistrates and a guilty plea is usually considered to be a mitigating factor which will lead to a lesser sentence than if one were to be convicted at a jury trial. It is generally accepted that English magistrates and crown courts will grant around a 1/3 discount to anyone who enters a timely guilty plea,

<sup>175</sup>In §§503-04 CCP-Neuquen (Argentina), the limit is two years and the judge in his or her judgment must accept the facts as agreed upon by the parties. Vitale, *supra* note 134, at 367. The Chilean “abbreviated procedure” applies, conformidad-like, if the public and private prosecutors in their accusatory pleadings request a punishment of deprivation of liberty which does not exceed five years, even though the maximum punishment for the crime could be higher. Riego, *supra* note 127, at 457-58.

<sup>176</sup>IT (p. 15). The French reconnaissance préalable de culpabilité (preliminary recognition of guilt) is also applicable to crimes punishable by no more than five years deprivation of liberty, FR (§495-7 CCP). The Paraguayan “abbreviated procedure” also apparently only applies to crimes punishable by up to five years imprisonment. Loarca & Bertelotti, *supra* note 174, at 413; *cf.* PAR (§420(1) CCP).

<sup>177</sup>10 years is the maximum also in CR (pp. 17, 19).

<sup>178</sup>RU (§314 CCP). The Guatemalan “abbreviated procedure” was originally applicable to crimes punishable by a maximum of two years, but has now been extended to those punishable by no more than five years. §464 CCP-Guatemala, as amended in 1997, Loarca & Bertelotti, *supra* note 174, at 413-414.

<sup>179</sup>Often in the US there is a huge differential between the likely sentence after a jury verdict, and that offered by the public prosecutor. For instance, in the case of *Bordenkircher v. Hayes*, 434 US 357 (1978), five years in the event of a plea and life imprisonment after jury verdict, US (pp. 2-3). In earlier days, a guilty plea could statutorily spare a defendant of the death penalty, which could only be imposed by a jury. Such provisions were held to be coercive of guilty pleas in *United States v. Jackson*, 390 US 570 (1968).

though this is nowhere codified and is not binding.<sup>180</sup> Although there is no codified discount in Scotland, the High Court has ruled that the discount must be at least 1/3 upon a timely entry of a guilty plea.<sup>181</sup> Nonetheless, the codes seldom provide for mandatory mitigation in the event of a guilty plea in the sentencing statutes like is often the case in civil law countries.<sup>182</sup>

There were no statutory discounts applicable in the traditional Spanish *conformidad*,<sup>183</sup> but, with the introduction of the Italian *patteggiamento*, many civil law countries have enacted statutory minimal discounts which the sentencing judge must grant if the defendant chooses to terminate the proceedings with a guilty plea, “request for punishment,” or expression of conformity to the charges.<sup>184</sup> The typical discount is one-third of the punishment which the judge would have otherwise imposed, taking into consideration gravity of offense, and personal characteristics of the offender.<sup>185</sup> In Croatia, however, the sentence to be imposed may not exceed one-third of the maximum sentence, resulting in a 2/3 discount.<sup>186</sup> In Costa Rica, when the defendant accepts the maximum charges presented by the prosecuting parties (including the aggrieved party) in a *conformidad*-like procedure, he or she

<sup>180</sup>For an estimate that the discount is from 25-30%, see Viscount Runciman of Doxford (Ed.), The Royal Commission on Criminal Justice, Report §41 (1993).

<sup>181</sup>*De Plooy v. HM Advocate*, 2005 1 JC 1, SC (p. 15); an investigations of the authors has shown, however, that some judges started from a higher maximum so as to avoid the necessity of a real 1/3 discount. Due to the vast judicial sentencing discretion in Scotland it is impossible to know whether the defendant actually gets a 1/3 discount. *Id.* p. 16.

<sup>182</sup>A confession or admission of guilt will substantially mitigate in DE (p. 30), and usually to the extent of 1/3 in NO (pp. 3, 9). In SC (p. 15), a statute requires mitigation for a timely entered guilty plea.

<sup>183</sup>The defendant would accept the correctness of the highest qualification of the charges and the highest requested sentence of the public prosecutor and private and popular prosecutors if they exist as long as the latter was six years or less and the judge had to sentence below the requested punishment. There are also no statutory discounts in SA (p. 6), in Latvia and in BU (p. 15), where this absence has been criticized.

<sup>184</sup>The name of the Russian procedure is “agreement with the filed charges.” RU (§314 CCP).

<sup>185</sup>IT (p. 15); the 1/3 discount has been introduced in SP (pp. 6-7), in the “expedited trial” legislation of 2002, though the sentence of deprivation of liberty may not exceed two years; the French *reconnaissance de la culpabilité*, introduced in 2003, also grants a 1/3 statutory discount. In Colombia, §37 CCP allows a defendant to get a 1/3 discount on an “anticipated judgment” (*sentencia anticipada*) if she agrees to the charges before the preliminary investigation is complete; the discount falls to 1/6 if she makes this decision after the case is charged and before trial. O. J. Guerrero Perralta, *Colombia*, in J. B. J. Maier *et al.* (Eds.), *Las Reformas Procesales Penales en América Latina* 234 (2000). In Lithuania, if a defendant subject to expedited proceedings agrees to admit guilt, the court may not sentence to more than 2/3 of the maximum punishment and may sentence 1/3 less than the minimum required sentence. LI (§440(1) CCP).

<sup>186</sup>CR (p. 19). In Venezuela, the general discount in cases of *admisión de los hechos* is from 1/3 to 1/2 of the sentence which would otherwise be imposed. However, by crimes of violence with a maximum punishment which exceeds 8 years, the discount is limited to 1/3, VE (§376 CCP).

may not be sentenced to more than 1/3 of the statutory minimum required for the offense.<sup>187</sup> The “abbreviated procedure” introduced in El Salvador in 1998 reforms applies to cases punishable by no more than three years deprivation of liberty, and the criminal code in such cases requires a sentence not including deprivation of liberty in cases where the punishment would have been from six months to one year, and allows the judge to suspend jail sentences in cases punishable from one to three years.<sup>188</sup> A one-fourth discount is given according to the Honduran “abbreviated procedure.”<sup>189</sup> Although the French “recognition of guilt” applies only to cases punishable by five or less years of imprisonment, if a prison sentence is imposed it may not exceed six months and fines may not exceed half of what they would normally have been.<sup>190</sup>

In the Estonian “settlement proceedings” the prosecutor, defendant and victim enter into a settlement agreement after free negotiations which then must be accepted by the judge in its entirety, or rejected, whereupon the case must be tried according to the normal procedures.<sup>191</sup> In Colombia, an *audiencia especial* (special hearing) may be convoked at which prosecution and defense may negotiate the elements of the charged crime and the level of defendant’s participation, thus constituting explicit plea, if not sentence bargaining.<sup>192</sup>

In some of the recently enacted consensual procedures, specific language links plea or sentence bargaining to what in the US are called “cooperation agreements,” i.e., conditions attached to the “deal” that require the defendant to aid in the prosecution of others by testifying, giving information, etc.<sup>193</sup> Such provisions have been introduced in some Latin American<sup>194</sup> and of the

<sup>187</sup> §§373-375 CCP-Costa Rica, Llobet Rodríguez, *supra* note 172, at 434.

<sup>188</sup> §§379-389, CCP-El Salvador, E. Amaya Cobar, El procedimiento abreviade en el proceso penal de El Salvador, *in* Maier & Bovino, *supra* note 38, at 402-403. Similarly, the “abbreviated procedure” in Guatemala also allows for suspension of imposition of prison sentences up to three years and commutation of sentences up to five years. Loarca & Bertelotti, *supra* note 174, at 413.

<sup>189</sup> HO (§404(para.4) CCP).

<sup>190</sup> FR (§495-8 CCP).

<sup>191</sup> ES (§248 CCP). The settlement includes agreement as to the charges, the punishment and the amount, if any, of compensation or damages awarded to the aggrieved party or civil complainant. ES (§245 CCP). The Nicaraguan “acuerdo” is also subject to unrestricted bargaining between the parties, NI (§61(para.1) CCP).

<sup>192</sup> As of 2000, however, the procedure was seldom used. Guerrero Peralta, *supra* note 185, at 235-36.

<sup>193</sup> §5K1.1 US. Sentencing Guidelines provides for so-called “downward departures” for cooperation with the federal authorities, which can implicate a sentence below the statutory minimum per 18 U.S.C. §3553(e). The prosecutor has virtually complete control over whether the “cooperation” of the defendant is sufficient. *Wade v. United States*, 504 US 181 (1992).

<sup>194</sup> For instance, in NI (§62 CCP), where the testimony of a defendant must be truthful, or “the agreement is broken in relation to the punishment imposed and the judge shall sentence imposing the punishment which he deems adequate in relation to the acceptance of the acts by the accused and the evidence presented.”

former Soviet republics.<sup>195</sup> In Latvia, the 2005 CCP recognizes a defense “right to cooperate” with law enforcement officials as a basis for its cooperation agreements<sup>196</sup> which can lead to dismissal of charges in all but the most serious cases, as long as the defendant has aided in solving a crime more serious than the one he or she was charged with.<sup>197</sup>

In the US there are often no promises as to the extent of reduction of sentence or whether charges will be dismissed until the defendant actually “cooperates” and the prosecution has assessed the quality of such cooperation. This model seems to have also been adopted in Moldova, where no actual “plea-bargain” is entered into and a formal sentencing hearing is conducted before the actual sentence is determined.<sup>198</sup>

### 3.2.6. Must the Defendant Admit Guilt?

The Anglo-American “guilty plea” obviously originally assumed the defendant would admit the charges contained in the accusatory pleading, but over the years judges have also allowed the defendant, in the US, to accept a plea-bargain, or only enter a plea of *nolo contendere*,<sup>199</sup> which essentially amounts to an intent to “not contest” the charges, and do not require an explicit admission

<sup>195</sup>Chapter LXIV of the Georgian Code of Criminal Procedure signed into law on February 13, 2004 introduces a “plea agreement” designed to substitute for the full criminal trial. (§679-1(1) CCP). The “plea agreement” appears to be primarily introduced to effectuate co-operation of the defendant in the prosecution of public corruption and other serious crimes. (§679-1(2) CCP). In exchange, the prosecutor will ask for a reduced sentence or even, in the case of exceptional aid in solving serious cases, be able to dismiss the prosecution. (§§679-1(5,9) CCP). If the testimony or other co-operation proffered by the defendant is deemed to be unreliable or fail to prove guilt of the crime against the third party, the plea agreement shall be null and void. (§679-1(8) CCP). In LI (§210 CCP), the preliminary investigation may be suspended in cases of suspects who help in the detection of the activities of a “criminal association” after the suspect has confessed to such participation. However, if the suspect refuses to give evidence in the case of a member of such association, the proceedings may be re-opened. In laying out the procedure for plea-bargains in Moldova, the prosecutor should take into account “the desire of the accused, defendant to aid in the realization of the criminal prosecution or accusation of other persons.” MO (§505(1)(1) CCP).

<sup>196</sup>The “right to cooperate” can be expressed in: (1) choosing a simpler type of procedure; (2) influencing the conduct of the procedure; or (3) uncovering criminal acts committed by other persons. LA (§§21, 66(1)(20) CCP). In Moldova, the defendant also has the “right” to admit the charge and conclude an agreement to plead guilty, to agree to special procedures, to reconcile with the victim. MO (§§64(2)(8,9,10,21) CCP).

<sup>197</sup>LA (§410(1,2) CCP).

<sup>198</sup>Although the “agreement to admit guilt” is called a “deal between the public prosecutor and the accused ... who gave his agreement to admit his guilt along with a shortening of the punishment,” MO (§504(a) CCP) it appears that any recommendation of the prosecutor can be rejected by the judge who determines the punishment after argument of the parties. MO (§§508-09 CCP).

<sup>199</sup>US (p. 2).

of the facts underlying the accusatory pleading.<sup>200</sup> Other judges may require an admission of guilt or they will not accept the plea.<sup>201</sup> Furthermore, some US judges would even accept a “guilty plea” in cases where the defendant actually denied guilt for the offense charged.<sup>202</sup> This practice was upheld by the US Supreme Court, as long as the judge made sure there was a factual basis for a finding of guilt.<sup>203</sup>

The Spanish procedure of *conformidad*, somewhat like a US plea of *nolo contendere*, does not require an explicit admission of guilt, but is tantamount to an expression that the defendant has no objection, or expresses his agreement, with the charges.<sup>204</sup> The Italian *applicazione della pena sulla richieste delle parte* (application of punishment upon request of the parties) also was just as the title suggested: a request for punishment and not an admission of guilt. Many of the procedures modeled after the Italian *patteggiamento* also do not require any admission of guilt.<sup>205</sup> On the other hand, an unconditional admission of guilt is a prerequisite for the triggering of the guilty-plea-type procedures in some countries.<sup>206</sup>

<sup>200</sup>US (p. 4).

<sup>201</sup>Fed. R. Crim. P. 11(f) allows each judge to decide whether they will require an admission of guilt, US (p. 4).

<sup>202</sup>This is only possible in SA (p. 6), when defendants plead guilty to fine-only offenses and never actually go to court.

<sup>203</sup>North Carolina v. Alford, 400 US 25 (1970), US (p. 4). Such pleas are not accepted in England and Wales, R. Hatchard, *Criminal Procedure in England and Wales*, in R. Hatchard et al., *Comparative Criminal Procedure* 20 (1996).

<sup>204</sup>In other words, the defendant must admit that he is the accused who has been charged, SP (p. 2). Similarly in the Argentine federal CCP, he must agree that the act charged is true and that he was the perpetrator, Bovino, *supra* note 161, at 66. Bovino sees this as being tantamount to a confession. Córdoba, *supra* note 38, at 242. In CH (§406 CCP) it appears that the language of the Spanish procedure has been adopted, not requiring an explicit acceptance of guilt, though there is a dispute in the literature as to whether the *conformidad* is tantamount to a confession of guilt. Riego, *supra* note 127, at 462. No admission of guilt is required in Costa Rica, Llobet Rodríguez, *supra* note 172, at 440, or El Salvador, Amaya Cobar, *supra* note 188, at 404.

<sup>205</sup>CR (pp. 17, 19, but the defendant may not present evidence of innocence after requesting punishment in order to try to achieve an acquittal, unless this evidence was newly discovered). Although Estonian “settlement proceedings” are not patterned after the Italian *patteggiamento* but more on American plea-bargaining, an explicit admission of guilt is now not required, though an earlier procedure called “simplified proceedings,” introduced by amending the 1961 Soviet-era code, did require a confession. M. Sillaots, *Admission and Confession of Guilt in Settlement Proceedings under Estonian Criminal Procedure*, IX *Juridica International* (Univ. of Tartu, Estonia) (2004), at 117.

<sup>206</sup>SA (p. 6); DE (p. 29); BU (p. 14); PO (pp. 16-17); BO (§373 CCP); HO (§403(2), (3)(a) CCP); PAR (§420(2) CCP); VE (§376 CCP) (“admission of the facts”); FR (§495-7 CCP) (“admit the acts”). See also §679-3(2) CCP-Georgia. It is one of the circumstances that must be taken into consideration by the prosecutor upon agreeing to accept a plea in Moldova. MO (§505(1)(4) CCP). If an “agreement” is concluded during the trial in Latvia, the defendant must completely admit his guilt, LA (§544(2)(3) CCP).

### 3.2.7. Procedural Aspects: Stage of Proceedings, Veto by Judge, Prosecutor, or Aggrieved Party?

Procedural economy is maximized, of course, the earlier in the proceedings the defendant agrees to resolve the case consensually without a trial. On the other hand, without a minimum of investigative activity, there may be insufficient evidence for a judge to be able to assure a factual foundation for the judgment.<sup>207</sup> In the US, guilty pleas may be entered anywhere from the first appearance in court to the stage of jury deliberations after all evidence has been taken and closing arguments of the parties have been made.<sup>208</sup> In the UK, on the other hand, there are efforts to try to prohibit, or at least lessen the discount on punishment, for pleas made in the trial court, or after trial has begun. In international criminal proceedings, a guilty plea may be proffered at initial appearance, during pretrial proceedings, or during the trial.<sup>209</sup>

While the Spanish *conformidad* may be effectuated during the preliminary investigation or at its termination,<sup>210</sup> among the new European procedures, many, beginning with the Italian *patteggiamento*, foresee that the procedure will take place during the preliminary hearing before the *giudice dell'udienza preliminare*<sup>211</sup> after the preliminary investigation has been completed.<sup>212</sup> The procedures in Italy, as elsewhere, may also be implemented when the case is

<sup>207</sup>This criticism has been levied against the Guatemalan “abbreviated procedure” which may be triggered any time during the preliminary investigation, Loarca & Bertelotti, *supra* note 174, at 424-25.

<sup>208</sup>The same is true in SC (p. 15).

<sup>209</sup>Knoops, *supra* note 6, at 259. For slightly different procedures depending on whether an “agreement” is reached pretrial or at trial, *see* LA (§§539-45 CCP).

<sup>210</sup>SP (p. 2); in CR (p. 19), requests for punishment may only be made up to and at the completion of the preliminary investigation. In the Argentine federal CCP the *juicio abreviado* may be triggered by the accused’s *conformidad* at any time up to the setting of trial. Córdoba, *supra* note 38, at 231. In El Salvador, the “abbreviated procedure” must be commenced before the preliminary hearing, Amaya Cobar, *supra* note 188, at 403. In Honduras, the “abbreviated procedure” must be initiated before the case is set for trial, HO (§403(1) CCP).

<sup>211</sup>IT (p. 16); a preliminary hearing, presided over by the investigating magistrate, was introduced in the 1995 Spanish Jury Law, and some courts, and the office of the public prosecutor, believe that a *conformidad* in a jury case should be reached during the preliminary hearing, for then there is no need to select a jury, there being no adversarial controversy, SP (pp. 9-10). In Costa Rica, the motion for application of the *procedimiento abreviado* is made before the pretrial judge during the preliminary hearing and sentencing is then before the trial judge. Llobet Rodríguez, *supra* note 172, at 440.

<sup>212</sup>The request for an *conformidad*-like “abbreviated trial” is also made after the conclusion of the preliminary investigation in: BO (§373 CCP). The Chilean “abbreviated trial” may be requested during the hearing to prepare the trial, CH (§406CCP).



transferred to the trial court,<sup>213</sup> or even at the beginning<sup>214</sup> or at times during the actual trial.<sup>215</sup>

Clearly in countries with different court compositions depending on the seriousness of the charge, it is more likely that guilty pleas will be forthcoming in the courts dealing with the lower and middle level offenses, rather than the higher courts with lay participation, especially in Europe where they are reserved for the most serious offenses.<sup>216</sup>

In some jurisdictions in the US, and in other countries as well, the judge may veto a proposed consensual resolution of the case and set the case for a full-blown trial.<sup>217</sup> Where the judge may veto the procedure, however, the judge's act will always reveal a pre-evaluation of the evidence which should, theoretically, make that judge biased to act as trier of fact at the trial.<sup>218</sup> The prosecution or defense may appeal the judge's veto to a higher court

<sup>213</sup>In IT (p. 16), the procedure takes place in the trial court if the case is tried by a single judge; also, if the procedure was rejected in Italy and the case proceeds through a normal trial, the judge may nonetheless impose the reduced punishment at the conclusions despite the contrary decision of the judge of the preliminary hearing.

<sup>214</sup>Conformidad may also be accepted at the beginning of trials of both adults and minors, when the defendant is questioned, SP (pp. 2, 13); *see also*, SA (p. 7).

<sup>215</sup>In BU (p. 13), negotiations between public prosecutor and counsel at the time of indictment, and the settlement may occur as late as during the trial. The fact that the Venezuelan "admission of the facts" can take place during the trial has been criticized on grounds of procedural economy. E. L. Pérez Sarmiento, *Comentarios al Código Orgánico Procesal Penal* 420 (3<sup>d</sup> ed. 2000).

<sup>216</sup>Thus conformidades are not likely in Spanish jury courts for the most frequent crime subject to its jurisdiction, homicide, but are used for a number of lesser crimes, like threats, setting of forest fires, trespassing, or minor bribery cases, which are also subject to the court. Yet they are very frequent in the professional courts which preside over Spanish "abbreviate procedure," a streamlined procedure which simplifies both preliminary investigation and trial and is designed to be very accommodating to the institution of conformidad, SP (pp. 4, 9-10).

<sup>217</sup>SA (p. 7). Since in SP (p. 5, 9), only the judge can exercise jurisdiction, she may not be a passive participant during the conformidad procedure and may reject a proposed settlement if the qualification of the charge seems inappropriate or if it appears the defendant did not freely or knowingly proffer his conformity with the charges; the same is true in BU (p. 14), in addition, if the court thinks that a plea agreement does not adequately consider the public and the victim's interests, or is "contrary to law or morals." All Argentine procedures allow the judge to veto the procedures. Sarrabayrouse, *supra* note 161, at 310. Cf. BO (§373); CH (§410 CCP). The same is true in Guatemala, Loarca & Bertelotti, *supra* note 174, at 427, Georgia (§§679-3(2)(d), 679-4(4-6) CCP) and Latvia (§541(6) CCP). Either the judge of the preliminary hearing or the trial judge may reject a conformidad in Costa Rica if they doubt its veracity. Llobet Rodríguez, *supra* note 172, at 440. In ES (§248 CCP) the judge may either accept or reject the "settlement" entered into by prosecution and defense, but may not alter it.

<sup>218</sup>If the judge thinks the punishment is too lenient, then he/she would be biased against the defendant and if he thinks an acquittal should be forthcoming, he is then biased against the prosecution. Vitale, *supra* note 134, at 376-78. This is a possible problem in Guatemala, where the code is unclear as to whether the same judge who rejects a consensual resolution will ultimately try the case. Loarca & Bertelotti, *supra* note 174, at 429.

in some countries.<sup>219</sup> The aggrieved party (victim) has no procedural role in most systems of consensual resolution of criminal cases,<sup>220</sup> though their position on the case may affect the decision of the public prosecutor.<sup>221</sup> In a minority of jurisdictions, however, the aggrieved party must agree for the procedures to be applied.<sup>222</sup> In some jurisdictions, the judge plays no role in plea-bargaining, which takes place exclusively between the public prosecutor and the defendant.<sup>223</sup>

While the right to counsel may be waived in the US and plea-bargains accepted in the absence of counsel,<sup>224</sup> appointment of counsel is mandatory in many jurisdictions,<sup>225</sup> for settlement discussions to take place, and some civil law jurisdictions require that the defendant have full discovery of the entire contents of the investigative file.<sup>226</sup> In the US the defendant must explicitly be advised of his or her right to remain silent, right to confront and cross-examine witnesses, and the right to a jury trial<sup>227</sup> and must waive these rights

<sup>219</sup>This is true in CR (pp. 17, 20).

<sup>220</sup>IT (p. 15); PO (p. 17); SC (p. 16). In only seven US states does the victim have a right to participate in plea-bargaining proceedings, US (p. 1).

<sup>221</sup>SA (p. 7). In El Salvador the judge must hear the position of the victim, but may order the “abbreviated procedure” over her objection, Amaya Cobar, *supra* note 188, at 404. The aggrieved party has a right to be heard only in France, which, according to Saas, *supra* note 82, at 840, means that they seldom will.

<sup>222</sup>BU (p. 15); PO (p. 17); RU (§314(1) CCP); BO (§373 CCP); ES (§239(2)(4) CCP). Under the Spanish *conformidad* procedures, the defendant must stipulate to the truth of the accusatory pleading, whether that of the public prosecutor, the private prosecutor (victim) or the popular prosecutor, whichever seeks the most serious qualification of the criminal act and the highest punishment. Similarly, in Chile, if the victim charges a more serious charge that carries with it a punishment that exceeds five years, the *procedimiento abreviado* will not apply, CH (§408 CCP). The victim must agree to the *conformidad*-like proceedings, as well, in the CCP-Tierra del Fuego, Sarrabayrouse, *supra* note 161, at 302.

<sup>223</sup>SC (pp. 15-16). The court may not refuse to accept a plea and may only ask the prosecutor to reconsider. The imposition of punishment, however, which is not subject to bargaining, is completely up to the judge. Prosecutor and defense, following recent reforms, may also agree on a narrative of the offense for purposes of fixing the limits of aggravation and mitigation, *Id.*, p. 22.

<sup>224</sup>According to *Iowa v. Tovar*, 541 US 77 (2004), counsel may be waived without the necessity of advising the defendant that waiving counsel may leave him ignorant of viable defenses and deprive him of the opportunity to obtain useful legal advice about the wisdom of pleading guilty, US (p. 8-9). The US Supreme Court has even validated waivers of the right to counsel and pleas of guilty by arguably schizophrenic people to capital murder! *Godinez v. Moran*, 509 US 389 (1993).

<sup>225</sup>BU (p. 13); MO (§506(3)(1-2) CCP); LA (§83(2) CCP).

<sup>226</sup>BU (p. 13). This is not true in the US, where the prosecutor need not reveal exculpatory evidence prior to a plea and this does not undermine the “knowing” nature of the plea, *United States v. Ruiz*, 536 US 622 (2002), US (p. 3).

<sup>227</sup>US (p. 3).

on the record in open court for the guilty plea to be accepted. Similar waivers are required in other countries as well.<sup>228</sup>

In proceedings before ICTY and ICTR, four basic requirements are required for a plea to be accepted.<sup>229</sup> The plea must be made voluntarily in full cognizance of the nature of charge and its consequences. It must be informed, not only in relation to the recognition of guilt, but also to the implications of a guilty plea in the context of defense strategy. It must be unequivocal,<sup>230</sup> and there must be a factual basis for the plea.<sup>231</sup>

In the US and in some other countries, the prosecution may not use any statements made by the defendant during discussions related to consensual proceedings in a trial if the negotiations break down or if the consensual procedures are rejected by the judge.<sup>232</sup>

### 3.2.7. Does Charge or Sentence Bargaining Precede the Application of the Procedure?

As the term *plea bargaining* in America indicates, intensive bargaining and negotiating between public prosecutor and defendant, and sometimes even the judge, usually precedes the defendant's "guilty plea."<sup>233</sup> In the U.K., on the contrary, it is maintained that the guilty plea is induced only by an expectation of a mitigated sentence if one pleads guilty.<sup>234</sup>

In most of the new systems that have sprouted up in civil law jurisdictions there is no specific mention of bargaining, only a codified establishment of the discount a person will be entitled to upon consensual resolution of the case. Sometimes a sentence is suggested by the public prosecutor, which invokes similarities to the Spanish *conformidad* or the penal order.<sup>235</sup> Bargaining, however, likely occurs outside of court in many of these countries.<sup>236</sup> In some

<sup>228</sup>In SA (p. 7), the defendant must be advised of the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt, and the privilege against self-incrimination.

<sup>229</sup>These requirements are listed in Rule 62 bis of ICTY RPE.

<sup>230</sup>In the Erdemovic case, the defendant pleaded guilty but said he acted under superior orders and duress. Since this could have constituted a defense, the appeals chamber refused to accept the plea and ordered a trial. Knoop, *supra* note 6, at 259-260.

<sup>231</sup>*Id.*

<sup>232</sup>BU (p. 14); this is true in GR (§679-5 CCP) only if the breakdown in negotiations was due to an unexplained withdrawal of the defendant.

<sup>233</sup>In SC (p. 15), there is informal bargaining as to charge and even the narrative relating to the charge in the accusatory pleading so as to further restrict the judge's discretion in relation to assessing aggravating or mitigating circumstances.

<sup>234</sup>Hatchard, *supra* note 203, at 220.

<sup>235</sup>In France the public prosecutor makes a public recommendation of sentence at the time of the guilty plea. FR (§495-8 CCP).

<sup>236</sup>IT (p. 15). As to possibility of bargaining in Chile, see Riego, *supra* note 127, at 463-64.

countries, participation of the judge is expressly prohibited.<sup>237</sup> A more common occurrence than charge bargaining, however, will be bargaining on the parameters of the sentence.<sup>238</sup> A few countries, however, some of which were greatly influenced by American consultants during the discussions leading up to their criminal procedure reforms, have explicitly allowed bargaining between prosecution and defense before “plea agreements” are reached.<sup>239</sup>

### 3.2.8. Judicial Control: May Judge Acquit, Impose Lesser Sentence, Lesser Charge?

In the US, if a judge accepts an explicit plea bargain, then the judge must impose the bargained-for punishment.<sup>240</sup> The only exception, is if at sentencing some new evidence has come to the attention of the judge which leads her to believe that the agreed punishment, or the agreed charge does not reflect the facts of the case or the relative guilt of the defendant.<sup>241</sup> Then the judge must allow the defendant to withdraw his or her plea of guilty. In the federal system and in some states, the only promise that might be made to the defendant is that the prosecution will not oppose his or her request for a certain punishment, and in such cases the judge may sentence higher than the punishment the prosecution has agreed not to oppose. At other times, the punishment depends on the terms of a “plea agreement” and is often dependent on the defendant testifying in another case truthfully or otherwise aiding with the prosecution of a more serious case, and if the prosecutor asserts this has not been done, then the judge may sentence to whatever sentence he or she deems is appropriate, as long as it is within the sentencing parameters.

<sup>237</sup>SA (p. 7). Fed. R. Crim. Pro. 11(c) prohibits the judge from taking part in plea negotiations in the US federal courts and other US states follow this model. However, other states, such as California, allow direct involvement of the judge in negotiating the bargain in relation both to charge and punishment. La Fave *et al.*, *supra* note 20, at 1002.

<sup>238</sup>In SA (pp. 6-7), the parties may negotiate a “just sentence to be imposed by the court.” In IT (p. 15), the sentence requested is also a product of bargaining between the parties. In *conformidad* proceedings within the framework of Spanish “abbreviated procedure” the sentence is often a subject of bargaining, SP (pp. 4-5); in CR (p. 19), the party requesting application of punishment will expressly state the type and length of punishment it desires and only this punishment may be imposed.

<sup>239</sup>This is also the model adopted by the ICTY/R. This is the case with the Estonian “settlement proceedings.” Sillaots, *supra* note 205, at 117.

<sup>240</sup>Some courts, however, say the judge is never bound, if, during sentence, she thinks the bargained punishment does not reflect seriousness of the criminal conduct, but others courts say lenience itself is not a sufficient ground, US (p. 2).

<sup>241</sup>If the plea agreement calls for dismissal of charges, a federal court may defer its decision to accept or reject the bargain until the judge has seen a presentence report and formed an opinion about the gravity of the underlying conduct, US (p. 2).

In December 2001, Rule 62 ter of the ICTY RPE was adopted which provides that prosecution and defense may bargain to amend the indictment, together recommend a specific sentence or sentencing range, or the prosecutor may agree not to oppose a request by the accused for a particular sentence or sentencing range. The plea agreement must normally be disclosed in open court, and the trial judge is not bound by the parties' agreement.<sup>242</sup>

With the Spanish *conformidad* and some of the modern guilty-plea-like procedures, the judge may actually acquit the defendant, if he or she finds a fact that would exclude guilt, either substantively or procedurally.<sup>243</sup> In the *conformidad* procedures of the Argentine federal CCP, the judge may reject the procedure due to insufficient knowledge of the facts of the case or because the qualification of the offense does not correspond to the facts.<sup>244</sup> Punishment may be imposed for lesser offenses, also, if the proposed charges are not supported by the facts.<sup>245</sup> Often the discount is only a 1/3 off of what the judge would otherwise have imposed as a sentence, which means that there is no actual promise as to what the sentence will be.<sup>246</sup> In some countries, however, the judge must impose the sentence which the defendant or the parties have applied for.<sup>247</sup>

<sup>242</sup>Knoops, *supra* note 6, at 262. In *Prosecutor v. Nikolic* (Judgment on Sentencing Appeal, Feb. 4, 2005, Case No. IT-94-2-!, para. 89, the Appeals Chamber emphasized that Trial Chambers shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure." *Id.*

<sup>243</sup>IT (p. 16). In the ICTY/R an admission of guilt also does not require a conviction. Knoops, *supra* note 6, at 263. Judicial Acquittal is also possible in the Argentine province of Tierra del Fuego, Sarrabayrouse, *supra* note 161, at 302, Chile, Riego, *supra* note 127, at 460 and El Salvador, Amaya Cobar, *supra* note 188, at 404-05. In the *conformidad*-type procedures, the judge may not sentence to a higher term than that requested by the public (or private or popular) prosecutor: The same is true in BO (§374 CCP), and El Salvador, Amaya Cobar, *supra* note 188, at 405. In Guatemalan "abbreviated trials" rough statistics show, for instance, that judges returned 203 convictions and three acquittals in Guatemala City in 1996, 174 convictions and 10 acquittals in 1997 and 130 convictions and 9 acquittals in 1998, Loarca & Bertelotti, *supra* note 174, at 424. In Latvia the judge may "dismiss" the case if there are procedural impediments to conducting a trial, LA (§542(1)(1) CCP).

<sup>244</sup>Córdoba, *supra* note 38, at 231; *cf.* Langer, *supra* note 13, at 55. In Moldova, the judge, after a detailed examination of the defendant regarding voluntariness of the plea, understanding of charges, etc. MO (§506 CCP), decides whether to accept or reject the guilty plea. MO (§507 CCP). The judge may reject the procedure in France as well. FR (§495-12 CCP).

<sup>245</sup>In SA (pp. 6, 8) the judge may sentence to less than the term already reduced by 1/3 under the new expedited procedure.

<sup>246</sup>In France, prison time may not exceed one year nor be more than 1/2 the amount of time which would have been assessed under the normal procedure, Saas, *supra* note 82, at 831.

<sup>247</sup>IT (p. 14).

### 3.2.10. Judgment: Must Judge Give Reasons? Does it Result in Judgment of Guilt?

In the Common Law tradition, judges generally do not have to give reasons for the judgments they issue, even if it is a judgment by a judge sitting alone as trier of the facts, though judges in the US sometimes do include reasons. Juries do not have to give reasons in Common Law countries,<sup>248</sup> and judges, when accepting a guilty plea, do not need to write a reasoned judgment. The guilty plea is itself sufficient to impose judgment. Upon accepting a plea, however, the judge in the US must be convinced that there is a “factual basis for the plea.”<sup>249</sup> When this requirement is taken seriously,<sup>250</sup> which is not always the case, the recitation of the “factual basis” may simply be that the prosecutor asserts, that he or she would have proved the contents of the indictment.<sup>251</sup>

Most modern European procedures with guilty-plea type arrangements, require some kind of judicial activity which is similar to that a judge must do after a full-blown trial, usually consisting in the giving of reasons why guilt was deemed to have been proved and the particular sentence imposed.<sup>252</sup> With the Italian *patteggiamento* the procedure for writing the judgment (which is not one of guilt, but tantamount thereto) is much more simple than that required in

<sup>248</sup>Though in Austria and in the new Spanish jury system, there has been introduced a requirement that jurors, for instance in Spain, provide “succinct reasons” why they arrived at their verdict.

<sup>249</sup>Fed. R. Crim. p. 11, US (p. 2). Along the same lines, in PO (pp. 16-17), although there will be no more taking of evidence after a “voluntary acceptance of responsibility,” the circumstances of the commission of the crime must be “beyond doubt.” Rule 62 bis of ICTY RPE has also imposed this requirement. Knoops, *supra* note 6 at 260.

<sup>250</sup>Some courts have said the government need not demonstrate strong evidence of guilt in setting out the factual basis where there is otherwise adequate evidence to support the government’s allegations, US (p. 4).

<sup>251</sup>For an opinion that the procedure announcing the plea and the factual basis is often a “carefully rehearsed charade during which the participants merely enact a script that was carefully crafted in the backroom of the prosecutor’s office.” Dubber, *supra* note 136, at 552 (1997).

<sup>252</sup>The requirements for the judgment are the same as in normal cases in Chile, only the facts relied on are those stipulated in the “abbreviated trial.” Riego, *supra* note 127, at 460. The same appears to be the case in Moldova, MO (§509 CCP). In Latvia, the procedure is still called a “trial” and the judgment must include an appraisal of the legal justification for the agreement and the measure of punishment. If the judge has a doubt as to guilt he must reject the “agreement.” LA (§543 CCP). In France the judge must justify (homologuer) the judgment as to the charge, based usually in the admission, and as to the sentence, based in the characteristics of the defendant. This judgment has the same effect as a normal judgment of guilt. FR (§§495-9, 495-11 CCP). In accordance with a decision of the Constitutional Council, the judge should verify: “the reality of the acts, their legal qualification and the appropriateness of the punishment.” One commentator has called this a *boiteuse* (wobbly) intervention of the judge, Saas, *supra*, note 82, at 841.

a normal case and focuses mainly on appraising the congruity of the sentence with the facts of the case.<sup>253</sup> The same is true in other countries.<sup>254</sup>

On the other hand, it appears that in Estonia and other countries, the judge must either accept or reject the “settlement” but if it is accepted, there is no formal judgment, but just an affirmation of the terms of the agreement, which include charge, damages to the aggrieved party and sentence.<sup>255</sup>

### 3.2.11. Can the Defendant Appeal after Agreeing to Consensual Procedures?

In some countries, the defendant has no right to appeal the results of a consensual procedure if the judgment is not more severe than that which was promised him in the bargain, or by statute.<sup>256</sup> In others, the right to appeal is sacrosanct, even after the invocation of consensual proceedings.<sup>257</sup>

In the US a plea-bargain, otherwise attractive to the defendant, may include as a condition thereof, waiver of the right to appeal<sup>258</sup> or to take other post-conviction action, such as a writ of *habeas corpus*.<sup>259</sup> In other countries such waivers are expressly prohibited until after the defendant has actually been sentenced.<sup>260</sup> A guilty-plea coupled with dismissal of charges and sentence

<sup>253</sup>IT (p. 14, 16), the judge must give reasons, even if succinctly on the impossibility of acquitting and on the congruity of punishment.

<sup>254</sup>In BU (p. 15), a judge who accepts a “plea agreement” need not write a fully reasoned judgment; in CR (pp. 19-21), the court shall only state “the circumstances that were taken into consideration in imposing punishment” and bases this “judgment” on the facts in the investigative dossier; in SP (p. 5), the court must verify that the qualification of the crime subject to the conformidad is correct, the punishment justified, and that the defendant’s decision was made freely and knowingly.

<sup>255</sup>ES (§249 CCP).

<sup>256</sup>In SP (p. 6), appeal is only possible if the deal was violated or if consent is coerced; in IT (p. 17), a patteggiamento cannot be appealed, but may be reviewed in cassation based on an allegation that the defendant did not actually waive important procedural rights.

<sup>257</sup>In SC (p. 16), the defendant may always appeal, but may not move to withdraw her plea. Appeal is allowed according to the regular procedure in the Argentine federal CCP, Córdoba, *supra* note 38, at 232, and following the “abbreviated procedure” in Chile. Riego, *supra* note 127, at 460-61, notes that appeal is considered to be more important in such cases due to the weakness of the factual foundation for a finding of guilt. An appeal in cassation is permitted in LA (§542(2) CCP). As to the right to appeal in France, *see* Saas, *supra* note 82, at 841.

<sup>258</sup>US (pp. 3-4). Some courts have held that after a guilty plea, a defendant may not litigate the voluntariness of a confession given to the police, *McMann v. Richardson*, 397 US 759 (1970) or whether the proceedings should have been barred by double jeopardy, *United States v. Broce*, 488 US 563 (1989). *Id.*

<sup>259</sup>Although in US (p. 4), a habeas corpus action based on incompetence of counsel may never be waived as part of a plea bargain.

<sup>260</sup>DE (p. 32), except minor cases with punishment of less than 21 daily rates or 3000 Kroner, which are not subject to appeal. Sometimes the prosecutor will bargain to dismiss other cases if the defendant does not appeal, but this practice is viewed as highly questionable.

discounts in the US may be withdrawn before accepted by the judge,<sup>261</sup> and even after acceptance, if the judge has not yet pronounced sentence.<sup>262</sup> After sentence withdrawal of a plea usually requires the defendant to show that a “manifest injustice” will occur.<sup>263</sup>

### 3.2.12. Criticism in the Literature

In European countries with the inquisitorial tradition in which the investigating official, the *juge d’instruction* was originally also the sentencing official, the legislator has been meticulous to ensure that the judge who presides over the consensual resolution of the case is not either the investigating magistrate, or, of course, the ultimate trial judge. In 1988 the Spanish Constitutional Court found an earlier version of abbreviated trial to be unconstitutional because the investigating magistrate acted as trial judge in the abbreviated procedure.<sup>264</sup> The new *conformidad* provisions, in which the investigating magistrate (*juez instructor*) presides over arraignment, formulation of charges, and eventual *conformidad* in the mostly flagrant cases subject to expedited trial, has also been criticized because the role of sentencing and investigating judge have been combined.<sup>265</sup>

In Italy, the roles of two pretrial judges have been differentiated, so as not to confuse the judge who exercises control over the preliminary investigation, the so-called *giudice delle indagini preliminari* with the *giudice dell’udienza preliminare*, who supervises the alternative procedures, including the *patteggiamento*.<sup>266</sup>

Generally, consensual procedures are still criticized in civil law countries for violating the legality principle by not requiring an actual trial<sup>267</sup> and a

<sup>261</sup>United States v. Hyde, 520 US 670 (1997), US (p. 5).

<sup>262</sup>For instance, if there is a “fair and just reason,” Fed. R. Crim. P. 11(d)(2), such as a witness’s credible recanting of testimony, the discovery of potentially exculpatory evidence United States v. Ruiz, 229 F.3d 1240 (9<sup>th</sup> Cir. 2000), or an intervening court decision that might entitle defendant to a dismissal, United States v. Ortega-Ascanio, 376 F.3d 879 (9<sup>th</sup> Cir. 2004), US (p. 5).

<sup>263</sup>Fed. R. Crim.P. 32, US (p. 5).

<sup>264</sup>V. Gimeno Sendra *et al.*, Derecho Procesal Penal 32, 765-66 (1996); the French *injonction pénale* was invalidated in 1994 by the Conseil constitutionnel for similar reasons. Pradel, *supra* note 75, at 204.

<sup>265</sup>Proponents of the new law note, however, that the *juez instructor* has not yet performed any investigative functions when these cases come before her in the municipal investigative courts, usually the next day after arrest, SP (p. 7). This criticism has also been levied against the El Salvadoran “abbreviated procedure” which is conducted by the investigating magistrate. Amaya Cobar, *supra* note 188, at 405.

<sup>266</sup>W. T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 Mich. J. Int’l L 429, 436 (2004).

<sup>267</sup>Some Argentine critics interpret the constitutional right to a previous trial before imposition of sentence as being non-waivable, and requiring, theoretically, a jury trial (the constitutional right



clear judicial finding of guilt.<sup>268</sup> Prosecutorial charging, or the maximum punishment requested, determines whether the guilty plea procedures will be used in some countries, thus allowing the prosecutor to effectively engineer the avoidance of a trial with all the guarantees.<sup>269</sup> Some critics see such procedures as inherently coercive,<sup>270</sup> while others believe they open up the possibility of unequal treatment of similarly situated cases in different courts due to different approaches of prosecutors or judges.<sup>271</sup> In other countries, critics see the consensual procedures as violating the right to a defense, the presumption of innocence, and the right to personal liberty for similar reasons.<sup>272</sup> Some critics feel that plea-bargaining systems lead to disproportionate lenience in sentencing in relation to the seriousness of the crime.<sup>273</sup> The lack of traditional reasons for the judgment and the limited appellate possibilities have also been subject to criticism.<sup>274</sup> On the other hand, the procedural economy gained by such mechanisms has often been considered to be more important than the procedural deficits on the other side.<sup>275</sup>

to jury trial in Argentina, guaranteed since 1857, has still not been implemented with legislation however!), Bovino, *supra* note 161, at 67. Cf. Córdoba, *supra* note 38, at 236-37; others, like Gustavo Bruzzone, believe the right can be waived like other important constitutional rights. *Id.*, at 237. For a view that the relative disappearance of lay participation in both the US, due to plea bargaining, and in Germany, due to confession bargaining, expansion of the jurisdiction of the single judge courts and the use of diversion and penal orders, has led to a deficit in legitimation of the justice systems. Dubber, *supra* note 136, at 553, 601.

<sup>268</sup>SP (p. 14); in BU (p. 15), this was cause for vehement criticism when the new procedures were introduced although the criticism has since subsided. The Estonian settlement proceedings have been criticized, because the bargaining is conducted before the defendant agrees to the stipulation. If there is a full confession, which need not be the case, the punishment has been set before the full facts of the case have been laid out. Sillaots, *supra* note 205, at 120-21.

<sup>269</sup>This is true with Spanish *conformidad* as well as with its Argentine offspring, Bovino, *supra* note 161, at 66.

<sup>270</sup>CR (p. 21). In SC (p. 20), as well, critics feel that plea-bargaining induces the innocent to forego a trial and punishes those who are convicted after trial; as to Argentina, see Córdoba, *supra* note 38, at 250.

<sup>271</sup>In BU (p. 16), there are fears that wealthy defendants can bribe the prosecutors for sweet deals. In the US (p. 6), prosecutors may reward defendants, whose lawyers are generally compliant in encouraging plea-bargains or to ensure future compliance, or may refuse otherwise justifiable bargains to please victims or the police.

<sup>272</sup>IT (p. 17).

<sup>273</sup>BU (p. 16); see US (p. 6), for the opinion that it is "irrational" to reduce otherwise appropriate sentences just due to save court time. In SC (pp. 20-21), the High Court has set aside some judgments on the grounds of excessive lenience of the sentence, at times because the plea was entered late in the proceedings, thus sacrificing the goals of procedural economy.

<sup>274</sup>DE (p. 33). In Argentina the *conformidad* procedure has been criticized for justifying mitigation in the procedural behavior of the defendant, rather than in facts relating to the crime or the person of the defendant. Córdoba, *supra* note 38, at 247.

<sup>275</sup>CR (p. 21); after early criticism, the new procedure has been welcomed in BU (p. 16) due to its speeding up of caseloads and there are efforts to extend it to drug cases. In SC (p. 20), the High Court has given its stamp of approval for plea-bargaining based on reasons of procedural

In the US the great disparities between minimum and maximum punishments and the limited sentencing discretion enjoyed by judges in the federal and some state systems, due to the presence of sentencing guidelines, have led to criticism that it is the prosecutor, rather than the court, who determines the charge and the sentence with little influence of the court.<sup>276</sup> It is also often remarked, that it is the innocent themselves that are most coerced into entering pleas, because the differential between maximum and minimum punishments is the greatest, for the weakness of the prosecution's case will lead it to accept even a minimal or token punishment.<sup>277</sup> Even if the defendant is guilty, the Draconian sentences constitute such a pressure to plead guilty that *John Langbein* has compared American plea-bargaining to the use of torture on the pre-19<sup>th</sup> Century European continent.<sup>278</sup> The nearly uncontrolled opportunity principle in the US, coupled with sprawling untheoretical penal codes containing multiple offenses with nearly the same elements, also enable the public prosecutor to "overcharge" cases in order to pressure the defendant to plead guilty with the promise of dismissing charges.<sup>279</sup>

Furthermore, US plea-bargaining has been criticized because it encourages deception, gamesmanship and outright dishonesty in the relations between prosecution and defense.<sup>280</sup> Illegal searches and interrogation methods are directly or indirectly encouraged by the prevalence of plea-bargaining, because the violations will never be litigated in court, or the right to litigate them will be waived as part of the plea-bargain.<sup>281</sup>

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economy and has stressed that it raises public confidence in the court system when only the most serious or the most disputed cases are brought to a full-blown trial. In Costa Rica, judges and prosecutors are satisfied with the new abbreviated procedure due to its savings in time and resources. Llobet Rodríguez, *supra* note 172, at 435.

<sup>276</sup>US (p. 1). Langbein condemns the merging of "accusatory, decisional and sentencing phases of procedure in a single official, the prosecutor." Langbein, *supra* note 51, at 18.

<sup>277</sup>Damaska, *supra* note 4, at 1028; Langbein, *supra* note 51, at 13; Dubber, *supra* note 136, at 600. *See also* US (p. 6).

<sup>278</sup>*See in general*, Langbein, *supra* note 51. Both are methods to bypass the evidentiary demands of the procedure, whether it be those of the formal rules of evidence derived from Canon law, or the complicated evidentiary rules of American procedure. Both systems are and were equally ineffective in ensuring reliability of the "coerced" admissions and equally productive of cynicism about the way the criminal law is administered. US (p. 7); on the other hand, Stuntz and Scott claim that the wide margins between maximum and minimum sentences do not necessarily compel pleas, for such a claim would punish the lenience offered by prosecutors in such cases, *Id.*, p. 8.

<sup>279</sup>*Id.*, p. 9. Stuntz and Scott admit, however, that if plea bargaining were disallowed and all cases went to trial, overcharging would stop. *Id.* p. 10. According to Damaska, *supra* note 4, at 1027, overcharging compels the American defendant to "spend his bargaining chips to reduce charges down to the level that was the prosecutor's desideratum all along."

<sup>280</sup>US (p. 6).

<sup>281</sup>US (p. 6). For instance, issues of arguably compelled confessions, *McMann v. Richardson*, 397 U.S. 759 (1970), or illegally constituted grand juries, *Tollett v. Henderson*, 411 U.S. 258 (1973), are foreclosed by a guilty plea.

It has been further alleged that it is the incredibly complicated, time-and-resource-consuming American jury trial that has led to such a steady growth of plea-bargaining. Some voices have called for simplification of the jury trial, or more use of court trials,<sup>282</sup> or even the mixed court, in order to extend more trials to more people.

On the other hand, there are voices in the literature who feel that there will be even more convictions of the innocent if cases were tried before professional judges, mixed courts, or even juries if the procedures were expedited with less guarantees for the defense.<sup>283</sup>

### 3.2.13. Benefits in Procedural Economy: Extent of Usage of Guilty Plea Mechanisms

No civil law country has come even close to the procedural economy benefits enjoyed by the US with its system of uncontrolled plea-bargaining where over 95% of all cases are resolved by a guilty plea.<sup>284</sup> An earlier Bulgarian system of consensual resolution of cases was applied in around 36.6% of cases from 2000 to 2005 but statistics are not available yet for the new system.<sup>285</sup> In Guatemala, around 25% of all convictions were achieved via “abbreviated procedure” from 1996-1998.<sup>286</sup> In the first half of the year 2000, 22% of misdemeanors and 52% of felonies were resolved in the Argentine province of Buenos Aires by using the abbreviated procedure.<sup>287</sup> In Spain it has been estimated that between 15 and 30% of cases are resolved with a *conformidad*.<sup>288</sup> The figure for Italy’s *patteggiamento* was between 17 and 21% of cases in the misdemeanor courts and between 34 and 42% in the mid-level trial courts in the years 1990-1998.<sup>289</sup> In the main trial court in the Argentine province of Tierra del Fuego, there were 55 regular trials and 52 *conformidad*-type procedures in over three years. Of those who went to trial, 67.02% were convicted and 32.98% acquitted, whereas 81.69% were convicted and 16.9%

<sup>282</sup>US (p. 6).

<sup>283</sup>*Id.*, p. 8.

<sup>284</sup>US (p. 1). In 2001 over 96% of federal cases ended in plea bargains. E. Lichtblau, *Ashcroft Limiting Prosecutors’ Use of Plea Bargains*, New York Times, Sept. 23, 2003, at A1, A25. Similar statistics exist, however, in SC (p. 17), where, in 2004-05, 97% of all district court cases (excluding dismissals) were resolved through plea bargaining, 93% of Sheriff’s court summary proceedings and 81% of Sheriff’s Court solemn proceedings. The percentage dropped, however, to 63% in high court jury cases.

<sup>285</sup>BU (pp. 13-14, where less than 5% of proposed settlements were rejected by the trial courts).

<sup>286</sup>Loarca & Bertelotti, *supra* note 174, at 423.

<sup>287</sup>Langer, *supra* note 13, at 56-57.

<sup>288</sup>Gimeno Sendra *et al.*, *supra* note 264, at 330.

<sup>289</sup>Langer, *supra* note 13, at 52-53.

acquitted in the cases resolved without trial. In the lower correctional courts, however, nearly all the cases resolved without trial ended in convictions.<sup>290</sup>

The consensual mechanisms have, on the other hand, not been successful in significantly unburdening the courts in countries where defendants feel they can get better results by demanding trial according to the normal procedures and either depending on the lenient sentencing practices of the courts,<sup>291</sup> or their successful manipulation of the normal procedures.

## 4. Simplified and Abbreviated Trial Proceedings

### 4.1. Abbreviated Trial Procedures Not Involving Admissions or Stipulations of Guilt

#### 4.1.1. Statutorily Regulated Trials Based on the Investigative Dossier

The 1988 Italian Code of Criminal Procedure, the chief aim of which was a turn to adversary procedure and an oral trial buttressed with a strict prohibition on use of evidence from the dossier of the preliminary investigation, introduced the *giudizio abbreviato*, which ironically allows the defendant to elect to be tried by the judge of the investigation on the basis of the written evidence in the preliminary investigation dossier in classical inquisitorial style.<sup>292</sup> The inducement to select the old inquisitorial written trial is a discount of one-third on what otherwise would have been the sentence, and a reduction to thirty years of any sentence of life imprisonment.<sup>293</sup> The punishment following an abbreviated trial in the court of appeal, however, can be freely negotiated between the parties.<sup>294</sup>

Since amendments to the law in 1999, the defendant may compel trial by the abbreviated procedure, even if the public prosecutor and judge are

<sup>290</sup>Sarrabayrouse, *supra* note 161, at 307.

<sup>291</sup>In CR (pp. 22-24), there were only two “requests for rendering judgment” since 2004, likely due to the mild criminal policy in Croatia, where 67.48% of all sentences are suspended and those prison sentences imposed are often within 1/2 of the upper limit, thus making the consensual procedures irrelevant. Only 1% of cases were concluded with the “abbreviated procedure” in El Salvador from the time of its introduction on March 20, 1998, through May 30, 1999, while victim-offender conciliation resolved 31.77% of cases in that time. Amaya Cóbar, *supra* note 188, at 408-09.

<sup>292</sup>For an interesting ancient precursor to this procedure, one could see the procedure developed in the Paris abbey courts around 1300, whereby the accused could “accept the inquest,” or stipulate to the results of the examination conducted by the investigating magistrate which had the advantage of allowing the accused to avoid being tortured. Dawson, *supra* note 73, at 51.

<sup>293</sup>IT (pp. 18-19).

<sup>294</sup>In such cases the defense will renounce certain appellate grounds, IT (pp. 18-19).

in opposition.<sup>295</sup> In addition to basing the judgment on the contents of the preliminary investigation dossier, the defendant in the *giudizio abbreviato*, since 1999, may request to be interrogated, and may even ask the judge to call additional witnesses or adduce other types of evidence. If the judge, however, determines that this would defeat the goal of procedural economy underlying the abbreviated procedure, she may insist the case follow the full-blown trial procedure. Once the judge allows the defendant, however, to offer additional evidence, the prosecutor may offer additional evidence in rebuttal and the judge may also *sua sponte* ask that further evidence be taken.<sup>296</sup>

In Bulgaria, the judge may sentence below the minimum sentence if the defendant agrees to be tried based on the contents of the investigative file and agrees to curtail the questioning of certain witnesses and experts.<sup>297</sup> Similar procedures have also been introduced in some Latin American jurisdictions<sup>298</sup> and in the former Soviet republics on the Baltic Sea.<sup>299</sup>

#### 4.1.2. Statutorily Regulated Simplification of the Taking of the Evidence

Amendments to the 1988 Italian Code of Criminal Procedure have allowed the prosecutor and defense to stipulate to include any and all documents contained in the preliminary investigation dossier in the “trial dossier,” which actually goes to court and is admissible during the trial.<sup>300</sup> The code originally limited this trial file to pretrial depositions conducted in an adversary fashion, guaranteeing the confrontation rights of the defendant and other evidence “which cannot be repeated at trial.”<sup>301</sup>

<sup>295</sup>IT (p. 20). Certain opinions of the Italian Constitutional Court determined that the statute had to be interpreted to give the defendant this evidentiary initiative and legislation codified these changes. The victim also has no control over the decision, IT (p. 18).

<sup>296</sup>IT (p. 18). In cases where additional evidence is proffered, the procedure begins to look like a trial in an inquisitorial country like the Netherlands, where most of the evidence is merely read to the trial court and only selected witnesses testify.

<sup>297</sup>BU (p. 11).

<sup>298</sup>In §§500-501 CCP-Neuquen (Argentina), the public prosecutor, defense and the complaining witness can request that the trial be held on the basis of the preliminary investigation file. The trial consists then in the parties indicating the evidence which supports their positions and the defendant may request to be heard. The judge then decides the guilt question. There is no statutory reduction of the punishment, however. Vitale, *supra* note 134, at 366-67.

<sup>299</sup>In Estonia, a “trial on the file” is possible in all cases but those punished by life imprisonment. ES (§233 CCP). The accused may ask to be interrogated, ES (§237(5) CCP) and may then be acquitted by the judge or will get a mandatory 1/3 reduction in what would otherwise have been the appropriate sentence. ES (§238 CCP). In Latvia, the accused may “agree to not require the taking of evidence during the trial.” LA (§71(6) CCP).

<sup>300</sup>IT (p. 20).

<sup>301</sup>IT (§421 CPP), see E. Amodio & E. Selvaggi, *An Accusatorial System in a Civil Law Country: the 1988 Italian Code of Criminal Procedure*, 62 Temple L. Rev. 1211, 1217 (1989).

While there are no statutory discounts in sentence coupled with such stipulations, it cannot be ruled out that bargaining could take place around negotiations to stipulate to the reading of certain testimony to expedite the trial process.

Spain introduced an abbreviated trial procedure in 1988 which applies to cases in which the maximum sentence of deprivation of liberty could be nine years. It involves a streamlined preliminary investigation in which the public prosecutor, rather than the investigating magistrate, assumes the initiative in the gathering of evidence, and in which the procedural requirements at the trial stage have also been streamlined. The defendant does not necessarily have any role in selecting this procedure and no statutory discounts are involved.<sup>302</sup>

#### 4.1.3. Non-Statutorily Regulated Simplification of the Taking of the Evidence

While most *Absprachen* in Germany involve agreements reached between prosecutor, defense and court involve the negotiating of an in-court confession,<sup>303</sup> they will not infrequently involve negotiations to shorten the trial by not calling certain witnesses, or by withdrawing motions for the taking of further evidence.<sup>304</sup>

#### 4.1.4. Criticism

In Bulgaria, the abbreviated procedure has been praised by the public prosecutor and the judiciary because of the saving of time and resources and by defense counsel due to the benefits accorded in sentencing. However it has also been criticized for undermining the principle of material truth and, from the victim's point of view, for being too lenient.<sup>305</sup> The pioneering Italian legislation has been subject to little criticism because it has been seldom used.<sup>306</sup>

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<sup>302</sup>SP (p. 4).

<sup>303</sup>See section 4.2.4., *infra*.

<sup>304</sup>Such bargaining between prosecution and defense to shorten the trial also exists in BR (p. 8).

<sup>305</sup>BU (p. 12).

<sup>306</sup>IT (p. 19).

## 4.2. Inducing and Bargaining for Confessions to Expedite and Simplify the Trial

### 4.2.1. Introduction

From the beginnings of criminal procedure, the confession has always been the main simplifier and expeditor of criminal proceedings. When the defendant has confessed, the preliminary investigation may be curtailed or terminated. Similarly, when the defendant admits the charges at trial, the taking of evidence at trial may be curtailed, or the case may move directly on to closing arguments and deliberation of the court.

### 4.2.2. The Pre-trial Confession as Trigger for Expedited or Simplified Proceedings

Many of the expedited trial procedures used in Europe<sup>307</sup> and Latin America<sup>308</sup> allow for a skipping of the preliminary investigation and the setting of a trial within a short period of time when the defendant has given a credible confession to the police or the authorized investigative official during the pretrial stage. In Norway, a credible pretrial confession will lead to a case being tried by a single professional judge, rather than a mixed or jury court.<sup>309</sup> In Denmark, a confession will trigger a summary trial without even the filing of an accusatory pleading.<sup>310</sup>

In Japan, a person who confesses will normally be released from pretrial detention and, following a substantially simpler trial will usually be sentenced to either credit for time served or a substantially more mitigated punishment than she would otherwise have gotten had she remained silent and fought the

<sup>307</sup>Such as the Italian *giudizio immediato*, or the German *beschleunigtes Verfahren*, which may apply when the “facts are clear.” See Thaman, *supra* note 39, at 308-09. Some countries also apply expedited trial procedures to misdemeanors or crimes which do not involve pretrial detention. See the Chilean *procedimiento simplificado*, CH (§388 CCP), which applies where the maximum punishment could be 540 days deprivation of liberty and which allows the control judge (*juez de garantías*) to impose punishment and which, like the new Spanish expedited trials, seeks to induce an early *conformidad* or *acuerdo reparatorio*, CH (§241 CCP), which is similar to victim-offender conciliations. Riego, *supra* note 127, at 470-71.

<sup>308</sup>This is allowed in the Argentine Province of Neuquen, as long as there is no objection from the public prosecutor, victim or the defense, the case is not complicated and no pretrial detention is involved. §§497-500 CPP-Neuquen. Vitale, *supra* note 134, at 366.

<sup>309</sup>This procedure is only applicable if the maximum punishment is less than 10 years. The public prosecutor must consent, no formal accusatory pleading is filed, and there will be virtually no further taking of evidence, NO (p. 4).

<sup>310</sup>DE (p. 18).

charges. This has led some critics to characterize such a procedural system as one of “plea bargaining” although the Japanese themselves consider their system to be the antithesis thereof.<sup>311</sup>

#### 4.2.3. Confession at Trial as Trigger of Expedited and Simplified Proceedings

In many civil law jurisdictions the trial commences with the reading of the accusatory pleading and the questioning of the defendant as to whether he or she wishes to admit the charges. As was seen above, with Spanish *conformidad*, applicable in cases punishable by less than six years in the normal courts,<sup>312</sup> the defendant will then be immediately sentenced. In some countries, statutory provisions allow for either a greatly truncated taking of evidence<sup>313</sup> or even, in some cases, transition directly to closing statements and deliberation of the court.<sup>314</sup> In other countries, there need not even be reasons given for the factual or legal underpinnings of the guilt-finding,

<sup>311</sup> Johnson, *supra* note 56, at 142-45.

<sup>312</sup> In Kazakhstan, the procedure applies only to crimes of slight or mid-level seriousness, KA (§363(1) CCP) and in Lithuania grave or major crimes are excluded. LI (§269(1) CCP). §406(1) of the Draft-CCP of Turkmenistan would apply the procedure only to cases where no preliminary investigation was conducted.

<sup>313</sup> In NE (p. 21) the confession does not theoretically lead to a truncation of evidence-taking, but in reality little corroboration is needed for a conviction (finding the body of a murder victim would be sufficient). In NI (§271 CCP), following a spontaneous admission of the charges at trial, the judge may suspend the case for five days to take further evidence or may set the case over for sentencing without trial in 15 days. In some countries, following a confession, the court will question the defendant and the victim and immediately move to closing argument and judgment. KA (§363(3) CCP). In §406(3) of the Draft-CCP of Turkmenistan, a confession will lead to the questioning of the defendant and the victim, the arguments of the parties and the rendering of judgment. In Lithuania, the defendant is thoroughly examined as to the veracity of her confession but must waive the oral taking of other evidence. LI (§269(1) CCP). The evidence in the preliminary investigation file, however, is then read in court, LI (§287(1) CCP). Prior to the 2004 CCP, Estonian “simplified proceedings” followed this model. Sillaots, *supra* note 205 at 117-18.

<sup>314</sup> BU (p. 11). In DE (pp. 18, 28-29), the defendant must not only admit the acts underlying the charge but the actual crime charged. Then the case proceeds immediately to sentence without any taking of evidence. Both prosecutor and defense must consent to this procedure which has been in force since 1911. Such a provision was introduced in the 1993 Russian jury law but was seldom used and disappeared in the 2001 Russian Code of Criminal Procedure. S. C. Thaman, *The Resurrection of Trial by Jury in Russia*, 16 *Stanford J. Int’l L.* 61, 103-104 (1995). It found its way into the CCP of Belarus, BE (§326(1) CCP). The Argentine *omisión de pruebas*, §408 Federal CCP, provides for moving directly to argument following a full confession of the defendant, provided that the public prosecutor, the victim, and defense counsel and the judge agree. Similar provisions can be found in §377 CPP-La Pampa, and in the CCPs of other Argentine provinces such as Salta, Mendoza, San Juan, Santiago del Estero and La Rioja. Sarrabayrouse, *supra* note 161, at 303-04. Such procedures were included in the now obsolete



though the sentence must be reasoned.<sup>315</sup> Finally, in a third group of countries, the court may acquit if, despite the confession, it determines the evidence of guilt to be insufficient.<sup>316</sup>

#### 4.2.4. Outright Bargaining for Confessions in the Trial Court

In many systems trial judges have always exercised direct or indirect pressure on criminal defendants to admit their guilt so as to simplify the trial. Implicit in such pressure is a guarantee or promise that the defendant will receive a mitigated sentence.<sup>317</sup> As early as 1960, reported decisions of the German Supreme Court revealed such pressure applied by trial judges aimed at inducing confessions, yet the issue there was whether such pressure violated the law prohibiting coerced confessions.<sup>318</sup>

It was only in 1982, however, that a German lawyer<sup>319</sup> revealed to the general legal community what had been going on for years in the German criminal trial courts: the fact that in many cases judges, prosecutors and defense counsel were negotiating the confessions of defendants in exchange for a guaranteed mitigated punishment, so as to simplify and expedite the criminal trial.<sup>320</sup> While *Deal* maintained that the practice began with narcotics cases, its primary use was in cases of economic and environmental crime, where the complicated nature of the cases, the voluminous files, and the multiplicity of charges that could be filed made them the most likely candidate for trial-simplifying bargaining.<sup>321</sup> The secrecy of this practice was required inasmuch as such negotiations appeared to clearly violate the principle of

1973 Costa Rican CCP. Llobet Rodríguez, *supra* note 172, at 436 and exist in Panama as well, PA (§2243 Judicial Code).

<sup>315</sup>NE (pp. 11, 21).

<sup>316</sup>BU (p. 11).

<sup>317</sup>Although no bargaining apparently takes place in NE (p. 21), there is an implicit recognition that a mitigated sentence will follow and Dutch judges have a huge discretion in all cases to mitigate, even down to a fine of only 1 Euro. In earlier German jurisprudence, a confession was an accepted mitigating factor as long as it was motivated by remorse and inner acceptance of guilt. Under the modern practice of *Absprachen*, however, see *infra*, this is no longer the case, GE (p. 56).

<sup>318</sup>BGHSt 14, 189, 190 (1960), cited in Thaman, *supra* note 39, at 310-11.

<sup>319</sup>Writing under the pseudonym "Detlev Deal aus Mauschelhausen" in *Der Strafverteidiger* (1982), at 545, GE (p. 46).

<sup>320</sup>GE (pp. 40-41). Even legal scholars who claimed to expertise in German criminal law and procedure were completely unaware of what was going on in the German courtrooms. See J. H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 Mich. L. Rev. 204 (1979). Altenhain maintains that the practice probably did not exist in its present form before 1970, while Hamm claims such deals have always taken place, GE (p. 68), evidence of which could be the decision of the German Supreme Court cited above.

<sup>321</sup>GE (pp. 69-70). Since most such crimes did not have an obvious victim, they were treated as less-serious and thus suitable for the under the table procedures. *Id.*

official investigation of criminal cases.<sup>322</sup> Much as was the case in the US, the practice was finally challenged before the higher courts, and the German Supreme Court finally has issued a number of rulings approving of confession bargaining, provided that certain minimal procedural guarantees are met.

The main decision in this respect, was that of August 28, 1997,<sup>323</sup> in which a kind of rulebook for confession bargaining was laid out. The German Supreme Court stated that for a deal or *Absprache* to be accepted, the court may indicate a maximum sentence lower than the maximum sentence provided by law, but may not firmly set out the magnitude of the punishment to be imposed and, indeed, must advise the defendant that it might exceed the indicated punishment if new facts arise not known to the court at the time of the negotiations.<sup>324</sup> Although the discussions may occur off the record and even outside of court,<sup>325</sup> they must be publicly announced in court and put on the record.<sup>326</sup> The results of the negotiations must be communicated, of course, to the defendant, who seldom directly takes part,<sup>327</sup> and the lay assessors, who are also seldom directly involved.<sup>328</sup> Although the aggrieved party has full participatory rights during the trial in certain cases, especially those of sexual violence, as the “collateral complainant” (*Nebenklägerin*), and should be included in the discussions about negotiating an *Absprache*, this often does not happen.<sup>329</sup> The collateral complainant may appeal the “deal” but may not do so on grounds of an inappropriate punishment, the most likely ground she would allege.<sup>330</sup> The punishment imposed in the end must

<sup>322</sup>GE (p. 40).

<sup>323</sup>BGHSt 43, 195, GE (p. 44). For an English translation of this decision, see Thaman, *supra* note 19, at 145-50.

<sup>324</sup>GE (p. 58). Research has shown that, despite this language in the jurisprudence, the maximum indicated sentence usually always turns out to be the actual sentence or at most three to four months less, thus making the German practice more similar to American plea-bargaining in practice. The final sentence never exceeds the indicated maximum, GE (p. 58-9).

<sup>325</sup>A German judge told me that much of the negotiations traditionally took place when the judge, prosecutor and defense counsel took breaks in the trial to smoke. Thus, ironically, non-smoking judges and parties were generally involved in less such bargaining.

<sup>326</sup>GE (pp. 45, 53). Investigations have shown, however, that the deal is often not put on the record, or is only briefly noted, because trial judges are fearful if they put too many details on the record, they will be reversed on appeal, GE (p. 62). In BR (p. 8), however, the negotiations are never put on the record, as was the case in Germany before the 1980's or in the US before the 1960's.

<sup>327</sup>GE (p. 43).

<sup>328</sup>GE (p. 43); this aspect of the 1997 decision, required by the principle of publicity, has not led to the inclusion of the lay assessors in the great majority of cases, Dubber, *supra* note 136, at 583, and yet this fact has not led to any reversals of judgments rendered as a result of *Absprachen*, GE (pp. 54-55).

<sup>329</sup>GE (pp. 67-68).

<sup>330</sup>Aggrieved parties who do not constitute themselves as “collateral complainants” have no right to appeal. No “deal”, however, has been overturned upon appeal of a collateral complainant, GE (pp. 67-68).

still be proportionate to the defendant's guilt<sup>331</sup> and there may be no charge-bargaining: the charge must represent the actual level of defendant's guilt.<sup>332</sup> The defendant may not be subject to any explicit or implicit coercion to make a judicial confession which would result in a violation of the privilege against self-incrimination or the right to human dignity.<sup>333</sup> Although defendants want to know the minimum and maximum sentence, the prevailing view is that the judge should not announce this. It is, however, clear, that the announcement of a too-wide gap between maximum sentence and sentence offered by the trial judge, as often happens in the U.S., will result in the agreement being nullified due to its coercive nature.<sup>334</sup>

The defendant may not be forced to waive the right to appeal during the negotiations.<sup>335</sup> This is a ticklish point and many cases have been reversed on appeal on this ground.<sup>336</sup> Judge and prosecutor are, of course, eager for a waiver, but they must not insist on it until after judgment is pronounced and must hope defense counsel will be a good sport and convince the defendant not to appeal.<sup>337</sup> Seven days after pronouncement of judgment, the case becomes final if no appeal is entered and then the formal written judgment may be more skeletal as there will be no appeal.<sup>338</sup> Once a "deal" is appealed, it is more likely to be reversed because the evidence in the record will inevitably be thinner than after a full trial.

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<sup>331</sup>GE (p. 47).

<sup>332</sup>The German Constitutional Court found that "deals" were not clearly unconstitutional, but held that the principles of legal evaluation of facts and imposition of punishment cannot be thrown completely open to bargaining, BVerfG NStZ 1987, at 419, GE (p. 46). There have been cases, however, in which an "especially serious" crime has been reclassified as a normal crime, or a normal crime as a less serious crime. Although there has been no evidence of overcharging a particular count, as occurs in the US, there has been some evidence of adding numerous lesser offenses, which are related to the more serious offense, which will then be dismissed due to the prosecutor's unsureness as to whether they can be proved at trial as part of negotiations, GE (pp. 59-60). Although the German CCP only technically allows dismissal of lesser offenses punishing the same conduct, in practice prosecutors have bargained away "similarly grave" offenses. This gives a clever lawyer possibility to dismiss just those charges which would be considered to be the most serious at time of sentencing, GE (p. 41).

<sup>333</sup>The judge may offer a lower sentence, but it may not constitute an advantage not provided by law (i.e. be disproportionate to guilt). The courts are split as to whether the judge may actually indicate the approximate sentence he or she will impose, GE (p. 56).

<sup>334</sup>One case found a gap between six or seven years maximum, and a two years suspended sentence if the defendant confessed, invalidated the confession on grounds of coercion, GE (pp. 57-58).

<sup>335</sup>The defendant may negotiate away his right to appeal, however, in some countries, such as: BR (p. 8) and the US.

<sup>336</sup>GE (pp. 64-65).

<sup>337</sup>Defense counsel who are not good sports and encourage or let their clients appeal will not be dealt with any more. GE (p. 64).

<sup>338</sup>GE (p. 63).

Because courts have “encouraged” waiver of the right to appeal despite the questionable legality of this tactic, the appellate courts have struggled to find a bright line rule for the courts to follow in this area. Recently, the following rule was pronounced by the German Supreme Court sitting *en banc*: (1) the court must not mention waiver of appeal or influence it; (2) the presiding judge must instruct the defendant after judgment that he has of an unlimited right to appeal, and; (3) the waiver of appeal after judgment is without force if it is not preceded by an advisement of the right to appeal.<sup>339</sup> Critics claim that the admonition as to the right to appeal “cures” any court violations of the prohibition against influencing or pressuring the defendant.<sup>340</sup>

Normally the trial judge must be convinced of the credibility of the confession and even engage in questioning or taking other evidence to achieve this conviction.<sup>341</sup> While some cases involving *Absprachen* have been reversed because the confession was merely a procedural act which did not reveal sufficient evidence to prove guilt,<sup>342</sup> in other decisions, however, courts have accepted confessions as the basis for guilt-findings and mitigated sentences when the so-called confession has been as bereft of details about actual guilt as is an American plea of guilty or *nolo contendere*.<sup>343</sup>

In cases involving economic crimes the bargaining for confessions sometimes begins during the preliminary investigation, at the same time as would occur when the details of penal or diversion orders are discussed, and, if the latter do not result, a sentence reduction would result in the event of a confession when the case is set for trial.<sup>344</sup> During pretrial negotiations, of course, only prosecution and defense are involved. The preliminary hearing is also a place where the parties “feel each other out.” If a deal is reached pretrial, there is great pressure on the trial judge, who always plays a major role in negotiations in the trial court, to accept the deal.<sup>345</sup>

<sup>339</sup>BGH NJW 2005, 1440, 1445, GE (p. 65). According to Altenhain’s research, a majority of “deals” still violate these rules, GE (p. 75).

<sup>340</sup>GE (p. 66).

<sup>341</sup>GE (p. 60).

<sup>342</sup>GE (p. 40). Mere statements that “it was like that,” or stipulations to the correctness of the charge, have been rejected, because German law does not accept such stipulation. One court ruled that the confession must be “at least concrete enough, that it can be tested, whether it is sufficiently consistent with the material in the file and that no further investigation of the facts appears to be necessary.” GE (pp. 61-62).

<sup>343</sup>Some courts have accepted perfunctory acceptances of guilt, claiming the goal of procedural economy will be lost if the judge must nevertheless meticulously prove the credibility of the confession, GE (pp. 61-62). For an example of such a decision, see BGH NSTZ, 1999, 92, translated into English in Thaman, *supra* note 19, at 150-52.

<sup>344</sup>GE (p. 41).

<sup>345</sup>But most discussions take place in the trial court when defense counsel has more complete discovery of the state’s case, GE (pp. 41-42). For a recent comparative analysis of the impact of the participation of the German judge in confession bargaining, compared to the regime

Outright confession bargaining undoubtedly exists in many countries with civil law-inspired procedural rules.<sup>346</sup>

#### 4.2.5. Criticisms of the Confession-Based Procedures

As might be expected, practitioners in Germany praised the practice of *Absprachen* on grounds of procedural economy, while the academic community was overwhelmingly critical because of the perceived violations of the right to a fair trial; equal protection, the presumption of innocence, the principles of official investigation and that only judges may impose judgment on the basis of evidence presented at trial.<sup>347</sup>

Opponents have also stressed the fact that German law is antipathetical to bargaining and that the procedures have no basis in the codified law. The argument is, that judges may not assess the evidence or assess punishment before having heard the evidence, but proponents emphasize that trial judges do this all the time when they read the file and pre-evaluate the facts before trial in deciding whether to impose pretrial detention or set the case for trial.<sup>348</sup> The German Supreme Court has also held that the bargaining opened up by the introduction in 1974 of diversion proceedings and the opportunity principle in relation to minor offenses, in its day condemned as a kind of *Verdachtsstrafe* or punishment upon suspicion,<sup>349</sup> introduced an exception to the legality principle and opened up the door to bargaining among the parties and the judge which carried over to more serious cases.<sup>350</sup>

Despite the opposition of the academic community,<sup>351</sup> the overwhelming view of practitioners who have to work, day-in, day-out, in the criminal justice system, is that *Absprachen* are here to stay.<sup>352</sup> While the former Social

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of judicial involvement in several US states, see J. I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am. J. Comp. L. 199 (2006).

<sup>346</sup>Confession bargaining to simplify trials existed under the now obsolete Costa Rican CCP of 1973. Llobet Rodríguez, *supra* note 172, at 436.

<sup>347</sup>GE (p. 46).

<sup>348</sup>GE (pp. 49-50). Judges also allow dismissals of charges and imposition of measures in diversion proceedings, and this factor was emphasized by the German Supreme Court in its 1997 decision to show that bargaining and the opportunity principle are not entirely alien to German law.

<sup>349</sup>Opponents such as Weigend and Schünemann, still maintain this view. GE (p. 52).

<sup>350</sup>DE (pp. 49-52, 69).

<sup>351</sup>Most in the German academic community want “deals” legislatively prohibited, or at least want the rules of the 1997 Supreme Court decision to be codified. A minority of academia favors a new code of criminal procedure with more adversarial principles, so that one does not have an open conflict between inquisitorial and adversarial principles, GE (pp. 77-78).

<sup>352</sup>Altenhain, in his study, found a favorability rating of 5.84 on a 7 point scale, GE (p. 75). Most practitioners also feel, while the rules laid out in the 1997 decision of the Supreme Court are workable, they are too strict and unrealistic and thereby defeat the purpose of speeding up the

Democratic government favored a legislative solution, and a draft law based on the 1997 Supreme Court decision was even circulated,<sup>353</sup> the currently ruling Great Coalition of is no longer pushing amendment of the code.<sup>354</sup>

#### 4.2.6. Statistics Relating to Use of the Confession-Based Procedures

German *Absprachen* now are involved in the resolution of perhaps 30-50 % of German criminal cases.<sup>355</sup> The great majority of the cases are still those involving economic or white-collar crime, where a deal is attempted in 100% of the cases,<sup>356</sup> but it is also used in nearly all kinds of cases, including those of attempted homicide and manslaughter.<sup>357</sup>

In Denmark, 13.5% of all cases were handled as summary trials following a credible confession by the defendant.<sup>358</sup> By 2002 in Estonia, the “simplified trial,” which functioned from 1996 until 2004, 59.8% of all cases were handled with a confession and reduced punishment.<sup>359</sup>

## 5. Conclusion

It is clear that consensual procedures which lead to a truncation or elimination of phases of criminal procedure – whether it be the preliminary investigation, the preliminary hearing, the trial itself, or even the rendering of a reasoned judgment – are here to stay. Most practitioners welcome them due to their effects on procedural economy,<sup>360</sup> whereas academicians tend to be skeptical, highlighting the violation of the cherished principles of criminal procedure they studied in school, the pressure such procedures place on defendants, the sacrifices in the area of truth-ascertainment, and the exclusion of

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resolution of cases. They especially underline the prohibition of waiving the right to appeal, GE (pp. 74-75).

<sup>353</sup>GE (pp. 77-78). Proponents of legislation feel it is the only mechanism to get judges to follow the rules, because they do not hold the decisions of the Supreme Court to be binding.

<sup>354</sup>GE (p. 79).

<sup>355</sup>B. Huber, *Criminal Procedure in Germany*, in Hatchard *et al*, *supra* note 203, at 159-60.

<sup>356</sup>GE (pp. 74-75).

<sup>357</sup>GE (pp. 71, 74). It has been deemed not suitable to murder cases, where a mandatory life sentence (where one actually serves no more than 25 years) must be imposed.

<sup>358</sup>DE (p. 18).

<sup>359</sup>Sillaots, *supra* note 205, at 115-16.

<sup>360</sup>CR (p. 24); it has been calculated in SC (p. 19), that a plea in the High Court costs 324 pounds whereas a full trial estimated at 13,879 pounds. The respective sums in Sheriff's solemn procedure, are 117 pounds for a plea and 6,398 pounds for a trial; in Sheriff's summary proceedings, a plea costs 78 pounds and a trial, 1463 pounds.

victims.<sup>361</sup> At times the public itself has also been unwilling to accept the new procedures.<sup>362</sup>

The challenge for legislators and courts, where legislators are unwilling to act, is to find the right balance between the various forms of criminal procedure available for the trial of various types of criminal cases and to make sure that none of the forms presents a substantial risk that innocent persons will be convicted of crime and that convictions are based on procedures which adequately allow the courts to assess the credibility and strength of the evidence.

The new forms must also offer a sufficient enough incentive to the parties to avoid the normal full-blown trial procedures. So far this has not happened in Italy, where too few defendants choose the consensual procedures, Italy's court system is still over-burdened, and it continues to be condemned by the Eur.Ct. HR due to violations of the right to a speedy trial.<sup>363</sup>

German academicians who are opposed to the practice of *Absprachen*, believe that a system patterned on the penal order should be applied to all crimes across the board, but should be based on a fully adversarial preliminary investigation in which the right of the defendant to confront and cross-examine the witnesses would be protected to the greatest extent possible, and where the prosecutor, at the end of the investigation, would propose a resolution of the case which could be accepted or rejected by the defendant. If rejected, the bulk of the evidence gathered at the preliminary investigation would be admissible and would, in any event, provide a good foundation for a judge to write a reasoned judgment justifying the decision on guilt and punishment.<sup>364</sup> The accused could then be punished by no more than the punishment suggested by the public prosecutor in the proposed resolution of the case, thus avoiding any problems of *reformatiu in peius*.<sup>365</sup>

A lawyer's draft, on the other hand, suggests a reform of the penal code which would require a reduction in punishment of at least one-fourth in case of an *Absprache* and a reduction of the mandatory minimum sentence by one-half.<sup>366</sup> This has been criticized on grounds of equal protection, because of a lack of differentiation between a "deal" based on a truthful confession, or restitution, or one just based on a decision not to call witnesses, for instance.<sup>367</sup>

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<sup>361</sup>CR (p. 24).

<sup>362</sup>In IT (p. 22), the criticism has mainly been that the consensual procedures have reinforced the inequality in the enforcement of the laws.

<sup>363</sup>IT (p. 22).

<sup>364</sup>See GE (p. 79)

<sup>365</sup>This last provision has been criticized due to fears that a lid on the punishment will mean few people will accept the prosecutor's offer, GE (p. 80).

<sup>366</sup>GE (p. 82).

<sup>367</sup>GE (pp. 82-84).

In the last analysis, one should pose a question which will sound heretical in the countries of the civil law: if one wishes to resolve the overwhelming bulk of cases consensually and provides adequate incentives for defendants to renounce their right to a trial with all the guarantees, shouldn't one offer those few persons who wish to gamble a full adversarial trial before a court where the outcome is not more or less set in stone at the outset, that is of course, before a classic jury court, where the triers of fact and guilt have no previous knowledge of the case and can look at the facts through the non-bureaucratized<sup>368</sup> eyes of lay persons. It is, of course, only with such a court that the defense has a real "trump card" to play in the negotiations with court or prosecutor.<sup>369</sup>

But even having a jury court as the final arbiter of guilt or innocence is meaningless, if the system of consensual resolution of cases is more a child of the *inquisitorial* practice of coercing confessions rather than an *adversarial* procedure between two more or less equal opponents, as was the case with the Medieval practice of *wergeld* or *composition* between victim-accuser and defendant. Unfortunately American plea bargaining, and any system that makes the "deal" so tantalizing that going to trial becomes a risky endeavor, smacks more of inquisitorial coercion of confessions than a contract between equals.

Furthermore, no system which allows consensual resolution of cases which could result in deprivation of liberty, especially where there is inherent coercion, should allow the defendant to will his or her judgment of conviction without having a real procedure for a judge to verify that there is a factual basis for the plea. The US does not have such a guarantee, and therefore *Mirjan Damaska* is correct, when commenting on the practice of plea-bargaining in the international criminal tribunals, that guilty pleas in such a context should look more like the German *Absprache*, where the judge must still render judgment and provide reasons, and where the "guilty plea" consists in a detailed confession of what, in reality, the defendant did to merit the conviction.<sup>370</sup>

<sup>368</sup>For an opinion that he was a better judge when he was young, inexperienced, and not yet bureaucratized, see the interview with the current "star" investigating magistrate of Spain's National Court, R. Montero, *Fernando Grande-Marlaska: En el ojo del huracán*, El País Semanal, June 11, 2006, at 12.

<sup>369</sup>For a similar suggestion, see B. Schünemann, *Reflexionen über die Zukunft des deutschen Strafverfahrens*, in *Strafrecht, Unternehmensrecht, Anwaltsrecht*. Festschrift Für Gerd Pfeiffer 482 (1988).

<sup>370</sup>Damaska, *supra* note 4, at 1037-38.



## Appendix 1

### Questionnaire for Country Studies

- I. Organization of Criminal Procedure (More Serious Crimes)
  - A. Pre-Trial Stage
    1. Form of criminal investigation.
      - a. Is there a formal preliminary investigation in which the evidence is gathered before the case is formally charged and brought to trial? If so, is it conducted by an investigating magistrate or prosecutor or other state official?
      - b. Is the investigation informally carried out by police, prosecutor, or other body? Describe.
      - c. In arresting suspects and investigating crime, are law enforcement officials required to pursue all reported cases if they appear to constitute criminal violations? (Legality Principle). If not (opportunity principle) is their discretion limited by law?
      - d. Do defendant and/or victim (aggrieved party) have the right to conduct parallel investigations? If so, may they independently present their evidence to the court or must their evidence be funneled through the official investigator (1.1a)?
    2. Confessions and Admissions as Proof of Guilt: Interrogation Practice
      - a. Are police allowed to interrogate criminal suspects?
      - b. If so, may the police legally interrogate a suspect in the absence of counsel before the case is turned over to the official investigator or prosecutor? If so, must the suspect be advised of the right to remain silent before questioning? Must the suspect be advised of the right to consult with counsel? Must the suspect consult with counsel before the police attempt to interrogate? If the police fail to advise a suspect, may any statement given by the statement be used at trial? May any indirect evidence resulting from the statement (physical fruits, witnesses) be introduced at trial?
      - c. If defendant has a right to counsel during interrogation, how is counsel provided to the indigent suspect? Is the suspect/defendant allowed to waive the right to counsel? Are confessions/admissions given in absence of counsel admissible in court?
      - d. Is the head of the investigation (investigating magistrate, prosecutor) allowed to interrogate the suspect/defendant? (If so, answer same questions as in 1.2.b and c.)
      - e. Are law enforcement officials allowed to bargain for confessions during the pretrial stages? (by offering release from custody, dismissal of other charges, other favors, etc.)
    3. Which public official or body, if any, reviews the sufficiency of the evidence prior to charging? Pre-trial judge, investigating magistrate, trial judge, panel of judges, grand jury?
      - a. Is this at a formal adversarial hearing, or conducted *ex parte* by the official or body? Does the aggrieved party participate in this proceeding? Describe.
    4. If there is sufficient evidence to charge the case, must the case be charged (legality principle)? If so, who brings the charges? If the case is not charged, is the prosecutor's discretion limited by law (statute or case law)? May the aggrieved party appeal to a judge or other body to compel prosecution in the event the prosecutor does not charge the case or undercharges it?
      - a. May the aggrieved party or any other citizen bring criminal charges?
  - B. Trial Stage (Post-Charge)
    1. Once the case is charged in the trial court, may the charging official (usually prosecutor) dismiss or reduce the charges on his or her own motion? If he/she feels there is insufficient evidence to proceed? May the judge block the dismissal of the case? May the aggrieved

party? If the dismissal is blocked, which official presents the case at trial? May the aggrieved party act as private prosecutor?

2. May the defendant control the adjudication of his or her case by pleading guilty and preventing the hearing of the evidence and judgment by the trier of the facts? (if so, answer further, below, in section V.a )
3. Even if a defendant admits guilt or tries to plead guilty, must the court still pronounce sentence according to the same rules as used in the normal procedure?

## II. Organization of Criminal Procedure (Variations for Lesser Crimes)

### A. Procedure for Most Serious Crimes

1. In the prosecution of what types of crimes is the above-described procedure employed? Crimes punishable by more than a certain number of years deprivation of liberty? Death Penalty? Are other criteria used? (crimes against the person, crimes against national security, etc.)
2. What is the composition of the court in which the above-described procedures are used? If jury, how many jurors, how many professional judges. If mixed court, how many lay assessors and how many judges? If professional bench, how many judges?

### B. Are there Different Procedures for Less Serious Crimes?

1. Is there an elimination or simplification of the preliminary investigation phase (IA.1, above)? Describe
2. Are there any changes in practices of state officials in relation to the legality principle? Is there increased discretion not to charge such cases? Increased ability to dismiss without judicial or aggrieved party intervention? Is private prosecution by the aggrieved party or others allowed in relation to this level of crime? Explain.
3. What is the composition of the court for the trial of less serious crimes? (answer as in II.A.2.)

## III. Informal Mechanisms to Avoid the Full-Blown Trial (as in I)

### A. May the prosecutor choose to charge a crime less serious than the facts would warrant, so as to avoid the trial court or procedure required for serious crimes (i.e. jury trial, mixed court), in order for the case to be tried according to the procedure for lesser trials (i.e., without preliminary investigation, with only professional judges)? (as in French/Belgian *correctionnalisation*)

1. May the aggrieved party object to the case being so charged? May the defendant?
  2. May a judge *sua sponte* prevent such a charging practice?
  3. Is this practice approved by statute, case law? Has it been condemned by courts, in the literature? For what reasons?
  4. Does bargaining between prosecutor and defendant sometimes precede this choice of the prosecutor? If so, describe.
- ### B. May the court *sua sponte* decide that a case, which could be tried according to the procedure for serious crimes, shall be tried according to the procedure for lesser crimes? (as in English *either-way* offenses)?
1. May the aggrieved party object? May the defendant?
  2. Is practice approved by statute, case law? Explain. Has the procedure been condemned by the courts, in the literature? For what reasons?
  3. Does bargaining between defendant, prosecutor or court sometimes precede this choice? If so, describe.
- ### C. Are there statistics as to how often the above procedures are used?
- ### D. How long have these procedures been in use?

- IV. May the Prosecutor Replace the Charge with a Proposed Judgment which, if Accepted by the Defendant, will Result in Imposition of Judgment without Formal Charge or Trial (Penal Orders)
- If so, for what kinds of offenses is the penal order (or similar procedure) applicable? What is the maximum punishment possible according to this procedure?
  - Briefly describe the procedure: within how many days must the defendant decide? Does the aggrieved party have a say in the matter?
  - Does bargaining between defendant and prosecutor sometimes precede the issuance of the penal order?
  - Does the court actually pronounce judgment? Is it a judgment of guilt or just imposition of punishment? Explain.
  - Are there statistics indicating how often the procedure is used?
  - Has the practice been condemned by the courts? In the literature? For what reasons?
  - When was this procedure introduced? Has it undergone substantial change?
- V. May the Prosecutor and Defendant agree to Pretrial Diversion, or Suspension of the Charges Conditioned on the Defendant Performing certain Acts, Paying Restitution, etc.?
- If so, for what kinds of offenses?
  - Briefly describe the procedure. Must the aggrieved party agree?
  - Does bargaining between defendant and prosecutor sometimes precede the decision to conditionally suspend or divert?
  - Are there statistics indicating how often the procedure is used?
  - Has the practice been condemned by the courts? In the literature? For what reasons?
  - How long has this practice been in effect? Has it undergone substantial change?
- VI. Are there Procedures for Victim-Offender-Reconciliation?
- If so, to what kinds of offenses are they applicable?
  - To what extent are they incorporated in the diversion or conditional suspension of charge procedures discussed in V. above?
  - Does bargaining between defendant and victim/prosecutor take place?
  - Have there been a history of abuse on the part of powerful defendants? Powerful victims?
  - Are there statistics indicating how often the procedure is used and how successful it has been?
  - How long have these procedures been in effect? Have they undergone substantial change?
- VII. Guilty Pleas or Stipulations to the Correctness of the Charges
- May a defendant admit guilt or stipulate to the correctness of the charges and thereby completely eliminate the taking of evidence, so that the court may move to the pronouncement of sentence and imposition of punishment? (see above, I.B.2.)
  - Does the procedure require a judicial admission of guilt (guilty plea) or is a stipulation to the correctness of the charges sufficient? (plea of *nolo contendere*, *conformidad*). May the defendant plead guilty or stipulate to the correctness of the charges while maintaining innocence?
  - Is the procedure limited to particular types of crimes (i.e. punishable by not more than a certain number of years deprivation of liberty) or is it unrestricted?
  - Are there statutorily prescribed discounts in punishment? (as in Italian *patteggiamento* or Russian *soglasie so prediavlennom obvinenii*). If so, what discount is guaranteed the defendant)
  - If there is no statutorily guaranteed discount, are there traditional discounts or “tariffs” which one can expect in the courts? If so, explain.

- F. Do negotiations between defendant and prosecutor often precede the guilty plea or stipulation? Do they precede the actual charging of the case? May the court participate in such negotiations? May the court refuse to accept the negotiated settlement? May the parties negotiate both the charges to which the person pleads (or stipulates) and the sentence? (as in American plea bargaining). May the aggrieved party participate in the negotiations? May the aggrieved party block the execution of the plea or stipulation agreement? Are the procedures informal, or regulated by statute? Briefly describe how the proceedings are statutorily regulated.
- G. At what point in the procedure may the guilty plea or stipulation be proposed and realized? Must it be done before the case is set for trial? Is it done at a particular stage, such as the preliminary hearing or on arraignment in the trial court? may it be done during trial?
- H. Must the court still pass judgment and provide reasons for the guilt-finding and the imposed sentence? May the court actually find the defendant not guilty if the file reveals an impediment to a guilt-finding or insufficiency of evidence? Does the court actually find the defendant guilty, or merely impose punishment? Explain.
- I. May the defendant appeal? May the prosecutor require the defendant to give up the right to appeal? To give up any other statutory or constitutional rights, other than the right to a fair trial, to jury trial, the right to remain silent and other trial rights?
- J. Has the procedure been condemned in the courts? In the literature? For what reasons? If it has been upheld, explain why the procedure was challenged and the reasons for upholding it.
- K. Are there statistics indicating how often the procedure has been used? If so, please summarize.
- L. How long have these procedures been in effect? Have they undergone substantial changes?

VIII. Abbreviated Trial Procedures not Involving Admissions or Stipulations of Guilt

- A. May the defendant agree to an abbreviated trial in exchange for a reduction in the punishment? If so, explain at what stage of proceedings the decision is made. May the aggrieved party, the prosecutor, or the court compel the defendant to stand trial according to the ordinary procedure?
- B. Briefly describe the procedure, i.e., is the trial based on the contents of the preliminary investigation dossier? May the defendant testify? May witnesses be called?
- C. Are there statutorily fixed discounts for choosing this procedure? If not, are the discounts negotiated by the prosecution and defense before the abbreviated trial? If not, are their fixed tariffs?
- D. May the prosecutor compel an abbreviated procedure *sua sponte* or by the way he or she charges the case? If so, is it regulated by statute? Describe the procedure briefly?
- E. Have these procedures been criticized by the courts? In the literature? For what reasons? Have they been upheld by the courts? Explain briefly the grounds on which they were challenged and the grounds upon which upheld?
- F. Are there statistics indicating how often the procedure has been used and in what kind of cases? Explain.
- G. How long have the procedures been in effect? Have they undergone substantial change?

IX. Confession Bargaining at Trial (or Otherwise Bargaining to Simplify the Trial)

- A. Can the prosecutor, defendant, or even court, engage in discussions aimed at shortening or simplifying the trial by encouraging the defendant to confess, or otherwise not to present certain evidence? (Like German *Absprachen*). If so, briefly explain how these negotiations

- take place and whether the court is allowed to participate and how. Do the lay assessors or the jury get involved in these negotiations?
- B. Is the practice regulated by statute or court decision, or does it take place informally?
  - C. Explain the different types of trial-simplifying agreements which may be made.
  - D. May the prosecutor agree to reduce the charges? May the judge agree to a particular imposition of punishment? Is the agreement put on the record? May it be enforced if violated by the defendant or the court? May it include a promise not to appeal or to give up any other important statutory or constitutional rights other than the right to remain silent or to present evidence?
  - E. May the aggrieved party object to the agreement?
  - F. Have these procedures been criticized by the courts? In the literature? On what grounds? Have they been upheld by the courts? Against which attacks? On what reasons?
  - G. How long have these procedures been in effect? Have they undergone substantial change?
- X. Historical Perspective
- A. Is there evidence of consensual procedures in your country at any time in the past, which were subsequently superseded by other forms of procedure? Such as *compositions*, *wergeld*, mechanisms of restitution, etc.
  - B. Does your country still have areas governed by customary law in which consensual procedures for resolving criminal disputes still may be applied? Example: among the Miskito Indians in Nicaragua. If so, have these procedures had any influence on the reforms in the national criminal justice system?
  - C. Have consultants or representatives from other countries or international organizations played a role in the introduction of any of the forms of consensual procedure discussed above in your country? I.e. experts from the United States, Germany, the Council of Europe, the United Nations, etc.
  - D. Briefly summarize the effectiveness of the consensual procedures within the context of the normal procedures for resolving criminal cases, their reception among legal practitioners, legal scholars and the general public, and the prospects for further reforms in the future.

## Appendix 2

### Codes of Criminal Procedure

Armenia (AR)	Ugolovno-protssessual'nyy kodeks Respubliki Armenii, <a href="http://www.parliament.am/legislation.php?sel=show&amp;ID=1450&amp;lang=rus">http://www.parliament.am/legislation.php?sel=show&amp;ID=1450&amp;lang=rus</a>
Belarus (BE)	Ugolovno-protssessual'nyy Kodeks Respubliki Belarus'. Priniat Palatoy predstaviteley 24 June 1999. Odobren Sovetom Respubliki 30 June 1999. Yuridicheskiy tsentr Press. 2001. St. Petersburg. Augmented by web version with changes of to July 22, 2003.
Bolivia (BO)	Código de Procedimiento Penal Bolivia. Ley No.1970, Ley del 25 de marzo 1999.
Chile (CH)	Código Procesal Penal, Ley 19,696, Sept. 29, 2000, Final modification, Ley 19, 762, Oct. 13, 2001.
Estonia (ES)	Code of Criminal Procedure, RT 1, 2003, 166, Passed February 12, 2003, amended Dec. 17, 2003.
France (FR)	Code de Procédure Pénale, <a href="http://www.legifrance.gouv.fr/WAspad/UnCode?code=CPROPEL.rcv">http://www.legifrance.gouv.fr/WAspad/UnCode?code=CPROPEL.rcv</a> (Last viewed 17 June 2006).

- Georgia (GR) Chapter LXIX, amending the Georgian Code of Criminal Procedure, signed into law Feb. 13, 2004 by President Mikheil Saakashvili.
- Honduras (HO) Código Procesal Penal, Norma 9-99-E
- Kazakhstan (KA) Ugolovno-protsessual'nyy Zakon Respublika Kazakhstan. Almaty: Yurist (2003). Changes up to Sept. 25, 2003. Originally passed Dec. 13, 1997. No. 206-I.
- Latvia (LA) Ugolovno-protsessual'nyy zakon. Adopted by the Sejm. April 21, 2005 and Proclaimed by the President of the Government on May 11, 2005. With changes as of January 19, 2006. BIB. "Biznesa informācijas birojs". Riga. 2006. Translated by "Biznesa informācijas birojs".
- Lithuania (LI) Code of Criminal Procedure Baudziamoji proceso kodekso palvirtinimo ir įgyvendinimo Entered into force May 1, 2003.
- Model Code of Criminal Procedure for the Commonwealth of Independent States (MCCIS). Model'nyy ugolovno-protsessual'nyy kodeks dlia stran SNG. Feb. 17, 1996. Kommissiia mezhpaparlamentskoy Assambleiyei Sodruzhestva Nezavisimykh Gosudarstv. Informatsionnyy biulleten' 1996. No. 10. Appendix.
- Moldova (MO) Ugolovno-protsessual'nyy kodeks Respubliki Moldova. S.A. Cartea, Kishinev 2003). No. 122-XY. March 14, 2003. Went into force June 12, 2003.
- Nicaragua (NI) Código Procesal Penal de la Republica de Nicaragua, Ley No. 406, Signed by President Dec. 18, 2001.
- Panama (PA) Código Judicial. Libro Tercero, Proceso Penal. Gaceta Oficial. March 10, 1987.
- Paraguay (PAR) Código Procesal Penal, signed by President of the Republic July 8, 1998.
- Russian Soviet Socialist Federated Republic (RSFSR)  
Ugolovnyy-protsessual'nyy kodeks RSFSR, Affirmed by Supreme Soviet of the RSFSR. Oct. 27, 1960 published in Zakony RSFSR i Postanovleniia Verkhovnogo soveta RSFSR. Moscow: Supreme Soviet RSFSR (1960)
- Russia (RU) Ugolovno-protsessual'nyy kodeks Rossiyskoy Federatsii (Os' 89 Moscow 2006). With amendments up to January 9, 2006.
- Tadzhikistan (TA) Ugolovno-protsessual'nyy kodeks Respubliki Tadzhikistan. August 17, 1961. Dushanbe.
- Turkmenistan (TU) Ugolovno-protsessual'nyy kodeks Turkmenistana (Proekt)
- Uzbekistan (UZ) Ugolovno-protsessual'nyy kodeks Respubliki Uzbekistan. Confirmed by Law of RU of 9.22.94, No. 2013-XII, went into effect on April 1, 1995. Last amendment by N. 254\_II on 8.29.2001.
- Venezuela (VE) Código Orgánico Procesal Penal, Gaceta Oficial # 5208, Jan. 23, 1998. As revised in 2001.

