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Consensual Penal Resolution

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Such disputes are rare in relation to the number of potential disputes and even grievances. Thus, the cases that form binding precedent are the disputes that show a surprising resilience to resolution by all existing social mechanisms as well as the formal means of dispute resolution associated with courts.

The Pinnacle's Importance

Interestingly, the conflict pyramid raises one other aspect of the relationship among the perception of injury, the development of a dispute, and the existing legal structure. Though representing only a very tiny fraction of all possible and current disputes, the nature and outcome associated with the resolution of disputes by courts (at the pinnacle of the conflict pyramid) actually shape the construction of injury and the resolution of disputes at all lower levels of the conflict pyramid. For example, Robert Mnookin and Lewis Kornhauser argue that parties bargain in a context of existing legal definitions of outcome in relation to existing disputes. The possibility of invoking the court is always a present possibility for grievances that are not resolved commensurate with the outcome currently offered by legal resolution. Thus, even social disputes outside the courts come to reflect legal definitions and legal outcomes despite the fact that they occur outside of formal legal intervention. Moreover, it is possible to extrapolate to the idea that the legal definition of an injury could come to dominate the social construction of injuries in many cases. In this context, the pinnacle of a pyramid is as much a part of defining the shape of the pyramid as are the elements that form its base.

—*Scott W. Barclay*

See also Cause Lawyers; Conflict; Court Caseload Statistics; Courts; Dispute Avoidance; Dispute Resolution, Alternative; Injury to Persons, Property, and Relations, Sociology of; Social Conflict

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Consensual Penal Resolution

The criminal procedure literature speaks of the field's growing reprivatization. The paradigm of the victim and the culprit reconciling following a show of remorse and acts of restitution or compensation, with its roots in the ancient history of criminal procedure, is very much alive today. Most new reforms of criminal procedure provide for reconciliation between victim and offender, mainly in the case of less serious crimes. The restoration of judicial peace, rather than the ascertainment of truth, is the proclaimed goal of such procedures.

Influence of United States Plea Bargaining

However, for the consensual resolution of more serious offenses, reformers invariably look at the U.S. system of plea bargaining, which has been so successful that trials (whether by jury or the judge) account for less than 10 percent of all final judgments. In America, prosecutors have full discretion in most states to

reduce or even dismiss otherwise provable criminal charges and even lock in the ultimate punishment in exchange for the defendant's promise to plead guilty. Because of the influence of plea bargaining and adversarial procedure in modern reforms, there is talk of the "Americanization" of criminal procedure worldwide.

The inquisitorial principles of legality, judicial evaluation of the adequacy of the proof, and reasoned judgments seemed to leave no room for the parties privately manipulating the charges and the sentence to reach an agreement, as happens in American plea bargaining, especially since American judgments require no thorough assessment of the evidence or reasons for judgment. Until recently, jurists considered even allowing an accused to plead guilty anathema in Germany, France, the Soviet Union, Italy, and all of Latin America. A suspect's admission of guilt was treated only as a piece of evidence to be evaluated by the trier of fact. Europeans talked of "bargaining with justice" in very derogatory terms.

An exception appeared to have been a procedure in use since the late nineteenth century in Spain, which allows the accused to express her "conformity" with pleadings and move directly to sentence. Today, this procedure of *conformidad* is applicable as long as the punishment does not exceed six years. Europeans also began introducing streamlined "penal orders" for minor crimes, usually punishable only by fine, whereby the prosecutor would suggest a punishment by a letter to the defendant and the punishment would become final if the accused did not object.

However, the reality of overcrowded dockets and the tidal surge toward the accusatorial-adversarial procedural model led to big changes in the late 1980s. The 1988 Italian Code of Criminal Procedure allows the accused to make a "request for application of punishment" if charged with a crime and the maximum term of imprisonment does not exceed five years; when the defendant chooses this procedure, his punishment will be reduced by one-third. Russia introduced a similar procedure in 2001, which is now applicable to crimes punishable by up to ten years; similar procedures have been adopted in other new codes in former Soviet Republics and in Latin America. Even France relented in 2004, introducing a procedure for accepting guilty pleas in cases punishable by no more than five years. The Italian code also permits a person accused of more serious crimes to agree to a trial based primarily on the contents of the dossier of the preliminary investigation in exchange for a one-third discount in punishment.

The other surprise in the 1980s was the revelation of a long-standing secret practice in the German courts of what amounts to "confession bargaining." To shorten the trial, the judge would offer to limit punishment to a specified period (or a fine) less than the maximum if the defendant confessed in court. The German Supreme Court in the 1990s eventually validated this practice of *Absprachen* (agreement).

Wide-open American-style plea bargaining, which the U.S. Supreme Court has approved even in situations that lead to the death penalty or in which life imprisonment is threatened to induce a plea to, for example, five years, has found few adherents as of yet around the world. In most European systems, the "agreement" is not considered an admission of guilt, and the judge must still justify the finding of guilt based in the materials of the case.

Many voices in the literature find the "wild" American system inherently coercive. However, some new codes of criminal procedure, for example, those in Estonia (2003) and Nicaragua (2002), have adopted procedures that allow seemingly unrestricted bargaining between prosecution and defense.

Goals of Consensual Procedures

Most consensual procedures aim mainly at economizing court time and unburdening court dockets by simplifying procedures, and the search for truth is consciously demoted to second place. On the other hand, some "consensual" procedures aim substantively at ascertaining the truth, such as those that follow the model of American "cooperation" agreements. This is an agreement by the accused to cooperate in solving other crimes or testifying as a prosecution witness in more serious cases, all in exchange for a lower punishment or even dismissal of her pending case. Here, the perceived truth of the information offered by the bargaining defendant is

crucial to the acceptance of the "bargain." This kind of "inquisitorial" bargaining, pushed by American lawyers overseas as an effective vehicle to fight organized crime, has been adopted in the Moldovan Code of Criminal Procedure of 2003 and in 2004 amendments to the Georgian code. Whether use of such cooperation agreements actually leads to the ascertainment of truth has been recently called into question in the United States due to the many innocent persons who have been cleared after being sentenced to long prison terms, or even death, based in whole or in part on testimony resulting from this type of consensual arrangement.

With the triumphal march of consensual procedures and the concomitant decline of the legality principle and the full-blown trial, with all its guarantees, criminal procedure begins to look more like informal arbitration than litigation, and the search for truth will inevitably suffer. In order that such changes do not lead to increased injustice because of the dismantling of procedural safeguards, their introduction should be accompanied by increased decriminalization of minor offenses and drastic reduction in the length of prison sentences, which could be imposed in cases subject to such procedures. Minimally, the "bargaining" defendant should not be faced with maximum or mandatory minimum punishments so excessive that they would compel even an innocent person to accept a radically reduced punishment.

—Stephen C. Thaman

See also Decriminalization; Legality and Discretion; Mafia and Organized Crime; Penal Court Procedures, Doctrinal Issues in; Plea Bargaining; Plea Bargaining, Economics of; Prosecutorial Discretion; Restorative Justice

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Constitutional Courts

Constitutional courts are bodies that adjudicate questions concerning the constitutionality of legislation and, sometimes, administrative action. From their origins in the American experience, they have spread around the globe to become part of the standard institutional architecture of democracy. While some systems (such as the United States) give the function of constitutional adjudication to ordinary courts or to a unified Supreme Court, the clear trend in the past two decades has been to create special bodies to fulfill this important function, an innovation associated with the constitutional thought of Hans Kelsen (1881–1973). As they have increased in number, constitutional courts have also become increasingly important sites of governance and rights protection around the globe.

History

Constitutional courts are closely tied to the history of judicial review, an American innovation that had been adopted by very few European countries before 1914. After World War I, officials asked the legal theorist Kelsen to write a constitution for Austria. Kelsen's legal theory, the "pure theory of law," placed great emphasis on the democratically elected legislature as the sole legitimate source of norms. Judges were not to make law, but rather to limit their role to interpreting the legal commands of the legislature. Therefore,