PLEA BARGAINING, COOPERATION AGREEMENTS, AND IMMUNITY ORDERS

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The term "plea bargaining" has become a label often used to describe a series of disparate mechanisms to investigate, prosecute, and adjudicate criminal liability. For some, plea bargaining is the indispensable tool to address criminal conduct, while for others it has become a symbol of coercion and injustice. The purpose of this Article will be to distinguish the very different mechanisms that are often grouped under the plea bargaining concept, to examine their key characteristics, and to analyze some of the benefits and costs that come with each approach.

I. PLEA BARGAINING

From the payment of *wergeld* to the victim's family by the accused among Germanic tribes in Roman times, the consensual resolution of criminal liability is an ancient practice. Today, different forms of plea bargaining practices are growing around the world. Jurisdictions from both the adversarial and the inquisitorial traditions provide alternatives to the full criminal trial.

At its essence, the plea bargain is an admission of guilt in return for, or in hope of, a shorter sentence or alternative disposition. It does not necessarily require cooperation, just acceptance of personal responsibility in return for mercy. While plea bargaining is sometimes thought of as an innovation of the United States and contrary to the search for the truth obtained during a full trial and the principle of legality (mandatory, rather than discretionary, prosecution decisions) observed by civil traditions, consensual resolution and abbreviated trial procedures in criminal cases follow a long tradition existing in both common law and civil law jurisdictions.

Plea bargaining can serve multiple purposes. The expedited procedures allow for more efficient resolution of cases, which promotes judicial and prosecutorial efficiency. As full blown trial with the full panoply of rights takes substantial judicial resources, many countries have adopted plea bargaining to reduce court congestion. The consensual resolution of simpler or minor offenses is seen as needed to ensure that the right to a speedy trial in more serious cases can be protected.

There are additional motivations for adopting plea bargaining. Trials are inherently uncertain; in some countries, prosecutors see plea bargaining as a way to ensure that defendants who they believe have engaged in criminal activity receive some punishment, even if the length of sentence is reduced. In addition, in cases where witnesses have been traumatized by the underlying criminal activity, a plea bargain allows the victims to avoid having to face the very same individuals who harmed them. In cases where investigative or other confidential information (or possibly illegal investigative action) is involved, a plea bargain may avoid the need to disclose such information during a public trial.

Finally, a plea bargain can be seen as serving a valuable penological purpose. Defendants in most plea bargains must acknowledge their own guilt in open court. Such public acceptance of responsibility can be an important first step on the defendant's road to rehabilitation. In the context of international criminal tribunals and crimes against humanity, such acceptance of responsibility may have even larger societal benefits as a step toward national or international reconciliation.

There is a variety of plea bargaining and other consensual resolution systems employed in different

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jurisdictions. The particular approach adopted reflects past historical experience, different legal cultures, distinct criminal systems, and particular motivations for change.[1]

In countries with civil law traditions where plea bargaining was not historically considered acceptable, the diversion of minor criminal offenses where the punishment did not involve detention was still considered appropriate. There is the possibility of bargaining by the parties in such cases, but without the possibility of imprisonment, such bargaining is not seen as unduly coercive to the accused. Depending on the system, a confession may be required. In other countries, judges are not involved in the diversion.

Another form of consensual resolution of cases is victim accused reconciliation. This approach, which has always existed in traditional criminal justice systems, is enjoying an intellectual renaissance elsewhere under the concept of "restorative justice". Typically involving some type of payment from the accused to the victim or the victim's family, this type of victim-centered resolution is more often applied where the injury is of a more private nature, such as petty assaults, and for offenses where private prosecutors on behalf of the victim, rather than public prosecutors of the state, were empowered to bring charges. It often involves direct bargaining to reach a compromise between the accused and the victim's representatives and therefore is seen as not violating the civil law "principle of legality" as it exists outside the framework of state prosecution. Such reconciliation is seen as a tool to restore community peace and avoid ongoing blood feuds. It faces criticism, however, because it can permit particularly wealthy and powerful defendants to avoid criminal liability.

Pioneered in Prussia in the nineteenth century, penal orders are another form of consensual resolution of cases.[2] Prosecutors offer defendants a specific punishment on a take it or leave it basis prior to the initiation of criminal proceedings, although in some countries additional bargaining remains a possibility. Penal orders face criticism as they are often implemented without the assistance of defense counsel or judicial oversight.

Other countries, such as Italy and Russia, provide for a fixed statutory discount, typically a one third reduction in sentence, for agreeing to plead guilty and forego a criminal trial. Some jurisdictions have limited this option to more minor cases, although once a legal system begins to experience the significant reduction in caseload, the range of cases often has been statutorily expanded.[3] Some countries such as France set a minimum discount of one third, but judges remain free to sentence defendants to shorter term, while in other jurisdictions there is a maximum discount, such as in Croatia which limits the actual sentence to at most two thirds of the sentence provided by statute. Admission of guilt is not always a prerequisite — sometimes a plea of *nolo contendere*, such as in Spain and Italy, is sufficient. As the sentence reduction is determined by statute, there is little bargaining. In jurisdictions where there is a high degree of corruption, such a statutorily-determined plea bargain system reduces a suspicious public's perception that a plea agreement was arrived at corruptly.

Yet other countries, such as Bulgaria and Argentina, still have a trial, but use expedited procedures. The defendant agrees to a trial on the investigative file, waiving some procedural rights to confront witnesses, for example, in return for a lighter punishment. Such forms of abbreviated trials may help with court congestion, but do less to contribute to reconciliation as the defendant does not admit his or her guilt and can even be acquitted.

On the far end of spectrum is the U.S. system of plea bargaining, where all cases are subject to

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[1] A comprehensive description with specific citations of the different approaches to plea bargaining throughout the world is contained in Stephen C. Thaman, Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases, Electronic Journal of Comparative Law, vol. 11.3 (Dec. 2007).

[2] D. T. Johnson, Plea Bargaining in Japan, in M. M. Feeley & S. Miyazawa (eds.), The Japanese Adversary System in Context 142-45 (2002). There is some academic dispute as to whether plea bargaining exists in Japan — some observe that the apparent fact that a Japanese defendant in pretrial custody who admits to his crime is often then released and later sentenced to time served is a form of plea bargaining.

[3] For example, in 2001, Russia first introduced plea bargaining for cases involving punishment less than five years, and then expanded it to ten years only two years later. Similarly, in Italy, the system expanded plea bargaining from cases punishable by three years' imprisonment to those punishable by five.

bargaining both over the charges and the punishment. Given the wide range of punishment for specific offenses, some critics see the plea bargaining system in the U.S. -- which has grown from approximately half of all U.S. criminal cases in the 1920s to around ninety-five percent of criminal cases today -- as highly coercive. Even within such a system, there are potential protections, including increased discovery to the defense prior to the guilty plea, procedural safeguards to the defendant at the time of plea, and judicial control over sentencing. In federal U.S. prosecutions, the plea bargain is memorialized in a written agreement where the benefits of leniency in return for the guilty plea are defined through the United States Sentencing Guidelines, which provide for a specific reduction of the defendant's applicable offense level, and corresponding sentence range, in return for such "acceptance of responsibility."

There has been a significant wave of expansion in the growth of plea bargaining mechanisms throughout the world. Beginning twenty-five years ago with the introduction of the *patteggiamento* in Italy, countries in the former Soviet Union, South America, Europe, and elsewhere have adopted new systems of consensual resolution of cases. These laws more than changed the law books; plea bargaining has rapidly been used to resolve an increasingly significant portion (often more than fifty percent in some countries) of new criminal cases.

This increase in the spread of plea bargaining has not been without its critics. Adversarial systems more readily adopt plea bargaining, finding that if the adversarial parties reach agreement, no trial is needed. Civil law countries hold closer to the idea of the search for the material truth, and therefore legal commentators believed that such plea bargains prevent that truth from being found. Many critics believe that the absence of equality of arms during the investigative stage makes plea bargaining inherently unfair, while others believe that lack of procedural and substantive protections to the accused during the plea bargaining process and the overall lack of judicial supervision increase the possibility that the innocent will increasingly be coerced into pleading guilty to avoid potentially draconian punishment if they go to trial. Some commentators lament the introduction of plea bargaining as part of an "Americanization" of criminal procedures, without appropriate consideration of whether such "transplanted" ideas are appropriate within the existing traditions of the receiving country.[4] Others see plea bargaining as a return to the show trials of the past, while a few see the process of plea bargaining to obtain confessions of guilt as almost the modern form of torture.[5]

With the expansion of different forms of consensual case resolution expanding to many civil law jurisdictions, it appears that plea bargaining, in whatever form, is likely to continue. Whatever particular form that prevails, it would seem that some protections, such as providing the accused some basic understanding of the evidence against them, as well as ensuring that any plea is knowing, intelligent, and supported by a factual basis through a judicially-controlled process with the participation of a defense attorney are emerging as potential international "best practices".

II. COOPERATION AGREEMENTS

By comparison to traditional plea agreements, cooperation agreements are investigatory tools. The cooperating defendant's admission of personal guilt is not the primary goal; the point is to use this cooperating defendant, proactively or historically, to develop evidence to prosecute other individuals, usually co-conspirators. Often seen proverbially as using "the little fish to catch the big fish," in some jurisdictions, such as the U.S., it can involve using the big fish to catch some of the little ones too.

The use of witnesses, sometimes called "crown witnesses,"[6] who themselves are participants in

[4] See, e.g., M. Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, Harv. Int'l L. J. 1 (2004); Cynthia J. Alkon, Plea Bargaining as a Legal Transplant, A Good Idea for Troubled Criminal Justice Systems, 19 Transnat'l L. & Contemp. Problems 356 (2010.

[5] J. H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3 (1978).

[6] In this Article, such witnesses with their own criminal exposure will be referred to as cooperating defendants when such defendants face criminal prosecution for their own conduct, and immunized witnesses when excused from criminal prosecution. Often provisions for such cooperating witnesses are contained in newer witness protection laws, rather than in the traditional criminal procedure.

criminal activity is an increasingly accepted international practice. For example, Article 37 of the United Nations Convention against Corruption (UNCAC) provides:

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.[7]

The driving motivation for the use of cooperating defendants is the need to combat organized criminal groups more effectively. Often operating under a code of silence, these criminal enterprises are tightly knit and hierarchical. The criminal bosses are often several steps removed from the street-level criminal activity, making their criminal prosecution without the cooperation of lower-level participants unrealistic.

In a case where multiple defendants are arrested, the accused might collectively benefit by remaining silent, but each knows that if one of the other defendants cooperates in the hopes of obtaining leniency, they might be left behind if they hold out. This "prisoner's dilemma" encourages each defendant to consider pursuing cooperation at the earliest moment in the hopes of moving into the cooperating defendant status as quickly as possible before other defendants pursue that option and the door is closed.

While the concept of using cooperating defendants is straightforward, the mechanics can be trickier. Cooperation can take place at different stages of the case. Cooperation with the police, particularly at the time of the arrest or when the investigation first becomes known to that individual can be of substantial value as the cooperating defendant may be able to surreptitiously elicit incriminating statements from co-defendants prior to their learning that the cooperating defendant has been arrested and before the co-defendants have obtained counsel. Such proactive cooperation can also be extended to cooperation in other unrelated cases, where the cooperating defendant's knowledge of how particular criminal activity transpires, such as in the narcotics area, makes them potentially ideal to engage in controlled purchases.[8]

While such early cooperation can be of particular benefit to the investigation, in the U.S., only the prosecutor can formally move a defendant into the cooperating status. An investigator may promise a defendant that they can bring the cooperation of the defendant to the attention of the prosecutor, but they lack the legal capacity to do so unilaterally.[9]

Naturally defendants approach the idea of cooperation with trepidation. There is of course the physical danger that cooperation may place them or their family in for betraying their former partners in crime. Witness protection can help address this problem to varying degrees. Indeed, most individuals in the United States Marshals Service's "Federal Witness Protection Program" are criminal defendants who are cooperating against their co-conspirators, not innocent citizens who happened to

[7] Article 26 of the United Nation's Convention Against Transnational Organized Crime (UNTOC) provides similar encouragement.

[8] Proactive cooperation can potentially take place throughout the process or even after the trial, although its potential for success substantially diminishes over time and such street work may raise problematic bail and liability issues particularly for violent criminals once a cooperating defendant has been charged or after s/he pleads guilty. As time passes from the moment for arrest, historical cooperation in the form of information and testimony regarding past criminal activities become more the normal form of cooperation.

[9] In many jurisdictions around the world, the police may offer to "look the other way" regarding a defendant's criminal exposure and never bring that activity to the attention of prosecutors in return for information on the criminal activities of others. Such "informal" cooperation arrangements are more similar to immunization as the criminal informant will not face any criminal prosecution, although s/he will lack the legal protections of a formally immunized witness.

witness criminal activity.[10]

In addition, the process of cooperation can be a complicated. Seeking to cooperate, the accused may have to waive his or her right against self-incrimination and admit guilt prior to knowing whether the proposed cooperation will ultimately be accepted by the prosecutor and they will receive the benefits of cooperation. Some defendants may face such overwhelming evidence of their guilt that confession without any form of limitation against its future use may be their only option. For others, the U.S. prosecutor offers a "proffer agreement" a short term written agreement to govern a meeting between the defendant, the defense attorney, the prosecutor and law enforcement agent at which the defendants can offer his or her potential cooperation to law enforcement law enforcement without those admissions being directly usable against the defendant in court so long as their statement are truthful. Indeed, in some jurisdictions, the potential cooperating witness must not only admit their culpability to the crime under investigation, but also must describe their entire past criminal history to allow the prosecutor to evaluate them as a potential trial witness, thereby increasing their potential criminal exposure if their cooperation does not work out.

In some countries, such cooperation in return for leniency can only be offered to the least culpable defendant. In the U.S., it is not so limited based on the idea that since the cooperating defendant will still be pleading guilty, they will face punishment consistent with their role in the criminal activity, minus whatever reduction their cooperation earns them. Thus, serious criminals are not getting a "free pass" for their cooperation, but rather only a reduction.

If the potential cooperation looks promising, the U.S. prosecutor then negotiates a written cooperation agreement with defense counsel which provides that the defendant will plead guilty to specific criminal charges and provide cooperation under the direction of law enforcement. In return, the prosecution agrees that should the defendant's cooperation be determined to be both truthful and "substantial,"[11] the prosecutor will submit a motion to the defendant's sentencing judge detailing the cooperation and attendant circumstances. While the paradigmatic form of cooperation is testimony against co-conspirators, cooperation can come in different forms: in could be both proactive and historical, testimony and information (particularly if that intelligence or possibility of testimony led to guilty pleas of co-defendants), and could apply to cases before that court or in a court in a different jurisdiction, including a different country.

At trial, the cooperating defendant may be in an unusual procedural posture. In some jurisdictions, such as Russia, the defendant remains part of the same case as the defendants against which s/he will testify. This causes some concern, when the defense attorneys for the remaining defendants seek to discredit the cooperating defendant and the court criticizes them for playing the role of prosecutor. In the U.S., by contrast, severance is the approach. The cooperating defendant separately pleads guilty earlier in a separate and generally closed courtroom proceeding, and then testifies against the co-conspirators as a government witness. While the cooperating defendant has pled guilty prior to testifying against their co-conspirators, they typically have not yet been sentenced, allowing the prosecutor and later the judge an opportunity to assess their full cooperation before determining what reduction in sentence, if any, their cooperation has earned.[12] Thus the U.S. prosecutor must determine whether the cooperating defendant will prove to be a productive witness and sufficiently corroborated by other evidence despite the fact that they will be aggressively cross-examined by the remaining defendants regarding the cooperation agreement that they have entered into with the government and their motivation to blame their co-defendants in an effort to gain the favor of the prosecutor in order to receive a reduced sentence.

Under the U.S. system, the judge maintains discretion over the sentencing of the cooperating defendant. The United States Sentencing Guidelines gives the sentencing judge the authority to reduce the sentence of the cooperating defendant as follows:

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[10] Robert E. Courtney III, Insiders as Cooperating Witnesses: Overcoming Fear and Offering Hope (2010).
[11] As noted above, the UNCAC also makes use of the "substantial" standard to measure cooperation.
[12] Rule 35 of the U.S. Rules of Criminal Procedure permits post-sentencing reductions under limited circumstances, so most cooperating defendants hope to have their sentencing delayed while they cooperate.

§5K1.1. Substantial Assistance to Authorities Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.[13]

III. IMMUNITY ORDERS

Immunized witnesses are a close cousin of the cooperating defendant, but for the immunized witness, the result is even better. So long as they provide truthful testimony, they typically face no criminal liability at all.

There are two broad categories of immunity. First a witness could receive the broader "transactional immunity", which precludes the Government from prosecuting a witness for any offense (or "transaction") related to their compelled testimony. Alternatively, a witness could receive "use immunity," which precludes the Government from using, directly or indirectly, the witness' compelled testimony in a later prosecution of that witness. As a practical matter, the limitations on indirect use of compelled testimony make use immunity the near functional equivalent of transactional immunity.

The concept of immunity enjoys some international sanction. Section 37(3) of the UNCAC specifically encourages the state parties to consider such provisions:

> Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.[14]

Given that the immunized witness receives immunity from prosecution, in many countries, the immunized witness is limited to the individual in the conspiracy with the least culpability.

Why provide such an attractive offer to the witness? Generally speaking, there are two reasons. The first is that the witness has a minor role with little criminal exposure, but until the threat of that limited exposure is legally removed, the witness can still exercise their right against self-incrimination to testify. In order to secure their testimony, an immunity order or a non-prosecution agreement[15] can be negotiated removing the possibility that their testimony can be used directly or indirectly against them so long as it is truthful (perjury by a witness following the grant of immunity still remains a basis for criminal liability). This tool can be particularly useful in the area of corporate criminal liability,

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[13] See United States Sentencing Commission Guidelines Manual (Nov. 2012).
[14] Similarly, Article 26(3) of the UNTOC provides similar encouragement.
[15] Immunity orders and non-prosecution agreements serve the same purpose, but are slightly different in form and process. An immunity order is entered before the court whereas a non-prosecution agreement is an agreement, much a plea agreement, between the prosecutor and witness.

where lower-level employees engage in criminal activity at the instruction and for the benefit of senior management.

The second type of immunized witness is where there is suspicion of serious wrongdoing by the witness but insufficient evidence against them in order to pressure him or her to be a cooperating defendant. Therefore, the offer of immunity is the only means to gather sufficient evidence in order to bring a criminal case against the co-defendants. Indeed, if all the co-defendants could enforce an agreement to remain collectively silent, there might be no criminal convictions at all. At least in the U.S., the grant of immunity allows the government to compel testimony from a defendant, like it could from any other person under its jurisdiction, because the right against self-incrimination no longer exists when the possibility of criminal prosecution against the testifying witness has been removed. This second category of immunized witness presents a more significant problem — a potentially very significant criminal may be avoiding prosecution and the prosecutor may not have a full sense of their criminal exposure. The general public may be outraged that an admittedly guilty individual is facing no criminal sanctions at all because they received immunity. It is therefore more of a tool of last resort.

Because immunity will generally allow a guilty person to avoid criminal liability, there need to be adequate safeguards to ensure that it is not misused. In the U.S. federal system, the grant of immunity can only be obtained from a centralized office, the Department of Justice's Office of Enforcement Operations, to ensure that the grants of immunity are used only in appropriate cases and to ensure that one prosecuting office does not inadvertently grant immunity to a witness who was subject to an active criminal investigation in another office without proper consultation.

As a result of these concerns, immunity must be granted only after careful deliberation. Some criteria in making this decision could include:

a. The seriousness of the offense, and the importance of the case in achieving effective enforcement of the criminal laws;

b. The value of the potential witness' testimony or information to the investigation or prosecution;

c. The likelihood of the witness providing useful testimony;

d. The person's culpability relative to other possible defendants;

e. The possibility of successfully prosecuting the witness without immunizing him; and

f. The possibility of adverse harm to the witness if he testifies pursuant to a compulsion order.

While thought of as primarily a tool in criminal prosecutions, immunity can be used outside the criminal law context. For example, under U.S. law, an immunity order is potentially available:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
- and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false

statement, or otherwise failing to comply with the order."[16]

In short, the grant of immunity is a significant tool in investigating criminal enterprises. Because of the substantial concern in allowing the truly guilty to go free, it must be used carefully.

[16] Title 18, United States Code, Section 6002.