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PLEA AGREEMENT – *COMPARATIVE ANALYSIS*

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INTRODUCTION

Since 1980, plea bargaining has become an accepted and regular feature of life in the jurisdictions of all Western European countries, particularly in Germany and France. This is the case throughout all Western European states, with their very diverse and different modes of criminal procedure. Thus, it is fair to say that debates about plea bargaining have finally ceased in Western Europe. Everyone has accepted that plea bargaining does indeed exist in Europe and there are benefits to it.

Plea bargaining occurs around the world. It is a procedural revolution that began over the last 20 years. Plea bargaining occurs in a long list of countries with inquisitorial heritage, or common law heritage, or socialist justice heritage, spanning India, Russia, Italy and to Latin America. We see plea bargaining working successfully everywhere regardless of the country's social and economic heritage. It is a universal development, and I disagree with commentators who refer to the American model of plea bargaining as the classical model. I disagree strongly with this assertion. In my own country, the model is very, very different – and I would even dare to say better than the American model. Throughout Europe, we also have many various models to choose from. Thus, I think it is wrong to look at the defects in the American system and to say they are systemic to plea bargaining on the whole. They are not. If a country faces a problem such as a victim's non-participation, then you can simply include in the legislation, as do the Estonians, for example, a provision allowing the victim to play an active role in the plea bargaining. There are many models of plea bargaining and my major message in this paper is that we simply cannot afford to wait. We simply cannot afford to ignore plea bargaining due to increasing numbers of criminal cases and demands that we act accordingly. If we do not act accordingly, our criminal procedure will be downgraded to the point where serious injustice will occur. I think that it is no coincidence that the countries that originally developed plea bargaining were bastions of defending human rights.

My message is essentially that it is possible to organize a plea bargaining system without violating those principles. If you look, for example, at the European Court of Human Rights' case-law, then you will realize that very little of it concerns cases arising from plea bargains. This has not proved a rights

issue in either the United Kingdom or the United States, where the Supreme Court has repeatedly said that plea bargaining provisions do not violate the right to a fair trial and the presumption of innocence because you always have a right to a trial and you always have your presumption of innocence – only an individual properly advised who wishes to plead guilty can voluntarily decide to abandon these rights in pursuit of another interest.

THE ESSENCE AND FORMS OF A PLEA AGREEMENT

The "plea agreement" is a relatively new institute of the Georgian criminal justice system. Introduced in January 2005, the plea agreement intends to simplify the criminal justice administration and ensure quick and effective justice. In 2008, for the first time, the index of its application by Georgian courts exceeded 50 per cent of the total number of cases.

In its essence, the plea agreement is an accelerated and effective form of passing a judgment. The plea agreement encourages the defendant to cooperate with the investigation, provide information on various types of organized crime, and/or on cases known to the defendant, other past and potential offences and, of course, the offence of which the defendant is accused.

The plea agreement may be concluded during the preliminary investigation or substantial review hearing. The number of cases with plea agreements concluded during the preliminary investigation increases every year and motions are filed in courts on passing judgments without having a substantial hearing of the case.

The plea bargain may be initiated by the defendant or by the prosecutor.

The basic principle of the plea agreement is the following: the defendant pleads guilty and cooperates with the investigation hoping for more lenient punishment. Sometimes, there may be neither an admission of guilt, nor cooperation, but the defendant may agree to the measure of punishment proposed by the prosecutor and, thus, full-scale trial may be avoided (*nolo contendere*).

Parties are free to conclude a plea agreement on any case, but the seriousness of the crime dictates the conditions of the plea agreement and the severity of the punishment. In regards to the above, we should mention a case involving a plea agreement concluded with an individual charged with purchasing, keeping and shipping large quantities of narcotics into Georgia, whose sentence was more lenient than stipulated by law. The sentence could have been much higher, or even a life sentence.

In the case that parties reach a plea agreement, the court does not proceed with the examination of all the evidence, but rather only examines incidents of violations of the defendant's rights.

The plea agreement can be concluded based on a guilty plea or *nolo contendere* plea. In terms of the guilty plea, the defendant confesses. In terms of the *nolo plea*, he does not object to the charges

brought against him, and agrees with the prosecution on either the measure of the punishment or the total liberation from punishment. The plea results in conviction.

In terms of the plea agreement, the prosecutor may request the punishment's reduction, and in the case of multiple offences, decide upon the mitigation and/or partial removal of the charges.

Georgian criminal law does not determine the categories of cases subject to the plea agreement. When concluding the plea agreement, the prosecutor needs to consider the following: a. public interest; b. the punishment envisaged for the committed crime; and, c. the level of the act's culpability and illegality.

The plea agreement does not limit the defendant's right to request prosecution any incidents of torture or degrading and inhuman treatment against him. The plea agreement does not release the defendant from civil or other liabilities. Under special circumstances, the chief prosecutor or his deputy may apply to the court and request the release of a specific defendant from civil liabilities. In such a case, civil liabilities are assumed by the government.

A defendant who has been incriminated on the basis of a plea agreement must be informed fully about the agreement's content, including the information provided to the investigation.

In order to more clearly describe the essence of the plea agreement, we would like to examine a real case that took place in Georgia.

On April 7, 2007, an investigation was opened by the Interior Ministry's Special Operative Department on a criminal case against K.P. K.P. was charged with purchasing, keeping, and shipping large quantities of narcotics into Georgia. The crimes are defined in the Georgian Criminal Code (Article 260, Section III, Paragraph A, and Article 262, Section IV, Paragraph A).

The execution of the crime by K.P. was confirmed by the arrest and personal search reports, the witness questioning, the chemical examination, and the evidence provided by the suspects.

Upon receiving legal advice from his lawyer, the defendant voluntarily expressed a desire to cooperate with the investigation. Due to the circumstances, acting in compliance with public interests and aiming to maximize state resources, the prosecutor decided to enter into a plea agreement with the defendant.

In May 2007, a plea agreement was concluded between the prosecutor and K.P. over the guilty plea. Subject to this deal, K.P. consented to the prosecutor's proposal on a conviction without reviewing the case substantially. K.P. was convicted to nine years in prison for committing a crime under Article 260 (3) Paragraph A of the Criminal Code, whereby the court used its right under Article 55 to confer a lighter sentence in regards to the crime committed under Article 262 (4) Paragraph A of the Criminal Code, which originally entails a graver sentence for the respective crime.

Pursuant to Article 59 (1) of the Criminal Code, the aforementioned sentences were added to define the final sentence as constituting 18 years of imprisonment. Moreover, the accused has been advised that signing the plea agreement does not liberate him from civil liability.

The prosecutor filed a motion before the Tbilisi City Court in favour of approving the plea agreement.

The plea agreement was signed by the accused, his lawyer/defence attorney and the prosecutor.

In this case, a plea agreement was concluded regarding his guilt, as K.P. voluntarily made a guilty plea and cooperated with the investigation. Consequently, his sentence was significantly reduced (i.e. he was sentenced to a cumulative sentence of 18 years where the probable sentence would have been far graver and could have constituted life in prison). The court's judgment was rendered without reviewing substantially the case.

It should be noted that the plea agreement in the case of K.P. was concluded in the full observance of Georgian Criminal Law. In particular, in the process of the plea bargain, the prosecutor had advised the defendant that signing the agreement would not liberate him from civil or other liability (although in special circumstances, the chief prosecutor or his/her deputy are entitled to address the court on the issue of exempting the accused (defendant) from civil liability, in which case the civil responsibility is born by the court). The agreement was concluded in a prior written agreement with the supervisory prosecutor with the lawyer's (defence attorney's) direct participation and the accused's prior consent. The motion on the plea agreement is discussed by the court to clarify procedures.

I would like to discuss the judgment of the Tbilisi District Court from 16 May 2005. On 16 May 2005, the Tbilisi District Court rendered a judgment on the case of A.J. and R.A. without reviewing substantially the case and approved the decrees on the plea agreement from 6 April 2005.

The individuals were accused of committing a crime under Article 332 (1) of the Criminal Code.

On 8 April 2005, Tbilisi District Court received a motion from the Akhaltsikhe Regional Court to render a judgment without reviewing substantially the case. According to the motion, the prosecution requested the approval of the plea agreement's decree on the sentence from 6 April 2005, which was prepared by the prosecution and the accused with the defence lawyers. In particular, the prosecutor's office requested that A.J. be convicted according to Article 332 (1) of the Criminal Code and sentenced to a 1,500-lari fine without being banned from occupying a position or pursuing a particular type of activity pursuant to Article 55 of the Criminal Code.

In addition, the prosecution requested that R.A. be convicted according to Article 332 (1) of the Criminal Code and sentenced to a 500-lari fine without being banned from occupying a position or pursuing a particular type of activity to Article 55 of the Criminal Code.

After examining the case materials and considering the aggravating and mitigating circumstances of the accused's responsibility, the Court Chamber ruled on approving the plea agreement decrees and conferred a judgment without reviewing substantially the case.

From the example above, it is evident that this is the case of a plea agreement over the sentence. Since the accused have not admitted their guilt, but only consented to the sentence requested by

the prosecutor, based on which a lighter sentence was awarded. In particular, the crime envisaged under Article 332 (1) of the Criminal Code (Abuse of official authority by an officer or a person equal thereto in contempt of public service requirements to gain any profit or privilege for oneself or others who have come as a substantial prejudice to the right of a natural or legal person, legal public or state interest) shall be punishable by fine or by jail time up to four months or three years, by the deprivation of the right to occupy a position or pursue a particular activity for the term not in excess of three years. As already mentioned, in this particular case, pursuant to Article 55 of the Criminal Code, the Court Chamber requested from both defendants only the compulsory payment of fines (i.e. awarded a lighter sentence than that originally envisaged by the law).

The court rendered the judgment without reviewing substantially the case in accordance with the requirements laid down by the Criminal Code.

The Court Chamber listened to the participants in the court proceedings, was convinced that the plea agreement has been concluded voluntarily without coercion, intimidation, deceit, or any other illegal pledge, and that the accused had the right to receive competent legal aid.

Prior to the approval of the plea agreement, the Court Chamber was assured in the following:

- The accused fully understood the nature of the crime with which they were charged;
- The accused fully understood the sentence envisaged for the crime, the commission of which they did not admit, yet the sentence to which they consented;
- The accused were fully aware that if the court would not approve the plea agreement, it would have been impermissible to use against them any information that they would have submitted to the court in the process of the plea agreement discussion;
- The accused were fully aware that they were entitled to the following constitutional rights: a. right to defence; b. right to refuse agreement on a guilty plea; c. right to substantial the court reviewing substantially the case;
- The plea agreement was not the result of coercion, intimidation, or such a pledge, which goes beyond the limits (scope) of the plea agreement;
- All conditions pertinent to the agreement between the accused and the prosecutor were reflected in the plea agreement in written form.
- The accused and their defence lawyers fully knew the case materials.

The plea agreement was approved at the public court session (sitting) in accordance with the legislation (although according to the Criminal Code of Procedure it is possible to have a closed court hearing provided that significant grounds exist; in this event, the court renders the judgment reflecting the plea agreement).

COURT DECISION

The court passes a judgment within 15 days from the moment it receives the motion. The court is entitled to return the plea agreement without confirmation due to an absence of sufficient evidence or a violation of the CPC provisions on the motion. If so, the case is returned to the prosecutor's office to make the decision on the indictment. Before the case is returned to the prosecutor's office, the court may offer the parties to change the plea agreement's conditions.

The defendant is entitled to refuse such conditions at any stage before the court passes its judgment and to request a substantial review of the case. Such a refusal does not require the approval of the defence attorney. The parties are also entitled to change the conditions of the plea agreement prior to the rendering of a judgment. In the case that the defendant refuses to enter a plea agreement, the defendant will be indemnified from the guilty plea against him.

APPEALING JUDGMENT

Within 15 days from the moment of the judgment's rendering, the defendant is entitled to file an appeal in a higher instance court to request the cancellation of his decision to accept the plea agreement, if the:

- Plea agreement was concluded through deception;
- Defendant was limited as to the right to defence;
- Plea agreement was the result of coercion, duress or threat;
- Presiding judge ignored the legally applicable basic legal requirements.

The prosecutor is entitled to file an appeal in a higher instance court within a month if the defendant violates any conditions of the plea agreement. If the court approves the prosecutor's motion, it abolishes the plea agreement.

With regard to the aforementioned, it is interesting to look at a decision of the Supreme Court of Georgia. The prosecutor submitted a complaint to the Supreme Court denouncing the judgment of the Tbilisi District Court Criminal Law Chamber from 5 January 2007 on approving the plea agreement of the convict G.B.

The prosecutor's complaint was based on the fact that the judgment of the Tbilisi District Court Criminal Law Chamber approved the plea agreement between the prosecution and G.B. G.B. was pronounced guilty under Article 338 (2) Sub-paragraph B of the Criminal Code envisaging four years in prison and as an additional penalty G.B. was requested to pay a 500-lari fine.

The execution paper relevant to the payment of the additional 500-lari penalty was sent to the Tbilisi Bureau of the Justice Ministry's Execution Department.

According to the letter of the Tbilisi Bureau dated August 7, 2007, the convict violated the pledge noted in the plea agreement and approved by the court, and failed to pay the 500-lari fine.

The Supreme Court Criminal Law Chamber, acting in accordance with Article 679^6 (1) and (2) of the Criminal Code of Procedure denounced the judgment of the Tbilisi District Court Criminal Law Chamber, which had approved the plea agreement with regards to G.B. (Article 679^6 (2)) and returned the case to the Prosecutor General's Office for preliminary investigation (Article 679^6 (3)).

Based on the above, it is clear that the Supreme Court's decision was rendered in accordance with the Criminal Code of Procedure, as the convict violated the pledge that was part of the plea agreement.

VICTIM RIGHTS WITHIN THE PLEA AGREEMENT

A victim must be informed about the conclusion of the plea agreement, although he has no right to appeal such a decision.

In this regard, we must mention the case of "*Canadian Citizen Hussein Ali and Georgian Citizen Elene Kirakosiani v. Parliament of Georgia*" in the Constitutional Court of Georgia (#403,427. 19.12.2008). These individuals were victims in criminal cases involving a plea agreement. They believed that they were deprived of the right to a fair hearing (CPC 679^7, Part 2 and 679^8, Part 2), as those articles did not allow the victims to appeal the plea agreement and receive restitution for losses incurred as a result of the crime and reach a fair and adequate punishment for the crime. At the trial applicant stated that according to the Article 679^7 (2) of the Criminal Procedure Code accused and prosecutor are entitled to take a claim in appeal court about affirmation of plea agreement. Thus, according to Article 679^8 (2) of criminal procedure code of Georgia, victim has no right to appeal against plea agreement. According to the applications, questionable provision of the law is not in accordance with the constitution, because it excludes the opportunity of appeal to the court and fair trial guarantee.

The Constitutional Court did not grant constitutional motions, as the victims (appellants) reserve the right to file a civil suit and seek compensation. In the case of the plea agreement, the defendant makes a confession placing the victim in a favourable position, as the court judgment and plea agreement have an evidential effect on the court examining the civil suit, allowing it to make a decision regarding the restitution of loss. In addition to the above, the court is in no way limited in determining the volume of compensation on the basis of the above-mentioned documents. Also the Constitutional Court explained that right to appeal to the court is not absolute and it needs to be regulated by the law**.** Special interest which can be expressed by the victim towards the punishment

is insufficient in order to use right to appeal, which is underlined by the Constitution of Georgia (Article 42 (1)). Quick and effective implementation of justice, serves public interest and this is the purpose of plea agreement too.

TOTAL IMPUNITY OF DEFENDANT / TOTAL EXCULPATION OF THE DEFENDANT

An important aspect of the Georgian plea agreement is the possibility for the defendant's total impunity based on the "plea agreement". In specific cases when the defendant's cooperation with investigative bodies results in the identification of white-collar offenders and/or "most wanted" criminals and the defendant's personal involvement creates conditions to resolve these cases, the chief prosecutor can appeal to the court and request the defendant's total release from punishment. If the motion is satisfied, the individual is released from his punishment, although he is convicted. Full impunity in exchange for paying a fine is not allowed.

STATISTICS OF ADMINISTERING THE PLEA AGREEMENT IN GEORGIA

Below are the statistics of the plea agreement covering the years 2004-2008 and first six months of 2009, which prove that the necessity to administer the plea agreement grows daily.

Most criminal cases were resolved in 2005 through a substantial review and constituted 87.3 per cent. As for the plea agreement, it presented 12.7 per cent, or 680 criminal cases, of which 52 per cent were guilty pleas and 48 per cent were nolo contendere pleas.

For the 2006 year, judgments passed through the main hearing constituted 5,478 criminal cases, or 55.8 per cent, and 4,333 cases were resolved by a plea agreement, or 44.1 per cent.

Courts of the first instance passed judgments on 17,526 criminal cases in 2007. This figure includes 9,094 judgments resolved by substantial review, 51.9 per cent, and 8,432 judgments resolved by plea agreements, or 48.1 per cent.

A total of 8,790 criminal cases were resolved by substantial review in 2008, or 50.1 per cent, and 8,770 cases by plea agreement, or 49.9 per cent.

According to the data for the first six months of 2009, courts passed judgments on 3,341 criminal cases by substantial review, or 45.5 per cent, and on 4,007 cases by plea agreements, 54.5 per cent[1].

[1] The statistics in this chapter are the official figures of the Chief Prosecutor's Office of Georgia.

On the basis of the above figures, the dynamics of plea agreements during these years are: 12.7 per cent in 2005; 44.1 per cent in 2006; 48.1 per cent in 2007; 49.9 per cent in 2008; 54.5 per cent in 2009 (six months).

QUESTIONS AND ANSWERS ABOUT PLEA AGREEMENTS

Below I would like to respond to all of the stereotypes existing in relation to the plea agreement system in Georgia.

a. The institute of the plea agreement lacks transparency

This assessment may be countered by the following:

- The conclusion of the plea agreement involves both parties;
- On behalf of the prosecution, the plea agreement is approved by the senior prosecutor;
- The participation of the defence attorney is mandatory;
- All plea agreements are examined and confirmed by the court at an open hearing, i.e. public attendance is available.
- The court looks into the case materials, including the evidence;
- The judge needs to make sure that the defendant is fully aware of the plea agreement's content and its legal results. The defendant's consent is voluntary;
- The defendant is entitled to reject a plea agreement after it is concluded before its confirmation by the court (even at a hearing) and demand the case's substantial review;
- The judge is entitled to reject and return the plea agreement back to the prosecutor.

b. The idea is wrong that during the plea agreement's examination, the judge does not examine guilt and evidence, i.e. the innocent may be punished

According to the CPC Art 679[4], the court examines the justification of charges, the legality of the penalty indicated in the motion, and the voluntary nature of the confession. Therefore, if the court believes that the evidence is insufficient, it returns the plea agreement without confirmation to the prosecution.

The defendant is entitled to appeal the court judgment confirming the plea agreement if the defendant believes that the plea agreement was reached via deception or threat, he was deprived of the right to defence, or the court substantially violated legal requirements.

c. The idea that not all cases can be subjected to a plea agreement is wrong

It must be noted that this thesis is directly linked with another incorrect assessment (below) that the "plea agreement is concluded only in exchange for money" and, therefore, it may only be concluded on petty categories of crimes.

The idea is wrong for several reasons:

a. The plea agreement may be concluded not only on a fine, but on any other penalty;

b. If the plea agreement is concluded on an actual penalty (imprisonment) and the defendant cooperates with the investigation and helps to resolve other case or assist in another way, then the plea agreement may be administered on all types of crime;

c. Plea agreements are mostly applied in organized crime cases. Without this institute, it would be practically impossible to resolve organized crime and other complex cases;

d. The plea agreement may not be concluded only in exchange for a fine on any type of crime. If the case involves grave and/or violent crimes, then a necessary precondition for the plea agreement is the defendant's special cooperation with the investigation and the provision of important information.

d. The idea that the plea agreement is concluded only in exchange for money is wrong

According to the Criminal Procedures Code, the plea agreement is not limited by a fine. There are several unambiguous circumstances: a) as per Chapter XIV[1] of the Criminal Procedures Code, the plea agreement can be concluded based on a guilty plea or *nolo contendere* plea; b) any type of penalty may be imposed by a plea agreement – the deprivation of liberty, the restriction of liberty, on-the-job limitation of military service, correctional labour, public mandatory labour, the deprivation of the right to hold high posts or run certain business, fines, property seizures, or conditional sentences.

It must be mentioned that a plea agreement is the only tool enabling the imposition of a more lenient penalty than provided by law. Therefore, it is useless to argue that plea agreements are concluded only on fines. Court practice contains a plea agreement with a penalty of 21 years of deprivation of freedom.

EUROPEAN COURT ON HUMAN RIGHTS CASE LAW AND CRIMINAL LEGISLATION OF GEORGIA

Among the rights and freedoms envisaged by the European Convention of Human Rights, the most significant is the "Right to a Fair Trial", guaranteed by Article 6. It is a fundamental right with regards to which we will discuss the Georgian model of the plea agreement. Ensuring this right constitutes a significant guarantee for the protection of other rights of the European Convention on Human Rights. For example, if a person was arrested unlawfully and then found guilty of a crime, this would constitute a violation of Article 6.

The statement made by the European Court of Human Rights in the case of *Delcourt v. Belgium* has its roots in the most important character of that right. The court established that, in a democratic society, the fair implementation of justice has such a particular importance that the restricted interpretation of Article 6(1) would be irrelevant with the article's aims and essence.

In the case of *Neumeister v. Austria*, the European Court established that each party to the proceedings shall enjoy equal possibilities to represent their case and none shall have any advantage over the other.

In Georgian practice, the prosecutor, who is party to the criminal case, may "request reduction of punishment and in the case of multiple offences, make a decision upon the mitigation and/or partial removal of charges" by force of the plea agreement. The court found a violation of the principle of equality of arms in Article 6(1) in the case of *Borgers v. Austria* because the prosecutor gave recommendations to the court about whether or not to agree on the claimant's appeal and the prosecutor participated in the decision-making.

Although there is no straight indication of those two rights in Article 6, the European Court of Human Rights stated in relation to these rights in the case of *Murrey v. UK* that "in spite of the fact that there is no straight indication in Article 6, it is unquestionable that the right to silence during questioning and the right not to give testimony against herself/himself generally constitutes recognized international standards, which are seen as the core of the right to a fair trial recognized in Article 6".

As already mentioned above, the object of the plea agreement in accordance with the criminal proceedings law of Georgia is to ensure quick and effective justice. As well as from the norms regulating this institution, it is clear that the additional object of the institution is to encourage the defendant to cooperate with the investigation and to provide information on various types of organized crime and/or cases known to her/him. The general purpose of the plea agreement is to ensure quick and effective justice for the defendant and to decrease the workload of the judiciary and prosecution service.

The European court in the case of *Langoborger v. Sweden* made the following statement: "Even if persons are technically qualified to consider the particular issue, and there exists no ground to

call their honesty in question, it is important to protect requests of impartiality and sovereignty". Hence, the prosecutor brings charges and it is not desirable for her/him to determine the guilt of the accused, the possible sentence and to file a motion to the court to assert his assertions.

In the case of *Piersack v. Belgium*, the court defined that "former prosecutors cannot be judges on cases which were investigated by their departments; even if these cases have never been under their personal management". Except for the above cases, there can be found many judgments of the European Court of Human Rights where it has been shown explicitly how important it is for the judicial authority to be independent and impartial from investigating or prosecuting agencies to realize the right to a fair trial is envisaged by Article 6 of the European Convention of Human Rights.

PLEA AGREEMENT IN THE US

Many years have passed since the plea agreement was born in the American criminal justice system. As a mechanism for criminal prosecution, it was periodically used before the 19th century.

In the US the legislative definition of such practices occurred after the establishment of its legal – even if adverse – historical tradition, which some commentators call "invisible justice". The prosecutor and lawyer, often with the participation of a judge, consented to a certain qualification and punishment outside a court hearing, which in most cases ended up in a gentlemen's agreement. It was conditioned due to the peculiarity of the American judicial practice, where the participation of jurors is guaranteed and the implementation of criminal justice happens in accordance with the principle of adversity. The first is the growing financial burden of the state, and the second, is the sheer length of court hearings and the overloading of the judiciary due to the solid protection of formal procedures.

In spite of the fact that almost 90 per cent of criminal cases are decided by plea agreements, discussion ensues about how constitutional the practice of plea agreements actually is taking into account public court principles reflected in the US Constitution. Supporters of the plea agreement indicate the practice's effectiveness, claiming that it saves state resources and the right to a public court is not absolute. The defendant may waive his application and plead his guilt. Accordingly, a system of case law and legislation was established aimed at stimulating the plea agreements avoiding full-scale trial. The opponents of the plea agreement indicate that the wider application of the plea agreement infers the refusal of the conception of judicial justice and fundamental guarantee. In their assertion, despite its very first aim representing a decreasing workload of the judiciary, it factually excludes the administration of justice. To that end, the reference here is to genuinely "rapid" and "effective" proceedings, but not to "justice".

American justice is often called "rich man's justice". Hiring a lawyer is expensive and only wealthy defendants may spend money to support full-scale proceedings to prove his case. And the offices of public lawyers are overloaded and cannot ensure the proper representation of every single

defendant. The plea agreement is based on the hypothetical suggestion that both sides – the prosecutor and the lawyer – are placed in an equal "bargaining position".

CONCLUSION

At the end of this paper, I would like to suggest several good reasons why I think plea bargaining is a healthy part of any rights-respecting criminal justice system, and I will say a necessary part of any rights-respecting system of criminal justice.

My first point is simply efficiency. The point about plea bargaining is that it concentrates our resources on the cases that matter. We don't have the resources to give a careful and thorough and detailed trial to every case that appears before us. We can't do it. It is impossible. No country, however wealthy, can. So it's very important that we have a system allowing us to identify all cases simple or complex that are either important for us as a community or for the individual concerned, and which cover difficult issues that we need to resolve. Plea bargaining is a very effective method of dealing quickly with cases that can be dealt with quickly, allow us to spent time and effort and resources on cases requiring more time and effort and resources, and acts as a screening device. It is very effective and if we don't screen cases, then we are going to degrade our treatment of all criminal cases. And, therefore, I think it's very important that we consider how plea bargaining can work if properly controlled as a means of ensuring that good and important weighty cases are always given the maximal consideration and everyone keeps their absolute right to a fair trial in a public court with as many due process protections as necessary.

My second point is related to delay, as our court list gets longer and longer. Defendants have to wait longer and longer, and if we insist upon the unrealistic aim of giving every defendant equal time in court, then we create a fresh abuse of their rights, which is delaying their access to the court. As we see from Article 6 of the European Convention of Human Rights, and in the International Convection of Civil and Political Rights, delay is one of the most serious breaches of a defendant's human rights.

My third point is about victims. Now, many opponents of plea bargaining speak about the potential exclusion of victims from procedures in plea bargaining. That is not necessarily the case. You can decide to include the role of the victim within plea bargaining. That is not a problem. It is a historical accident that the role of the victim in the US and the UK has been very minimal. They only have "service rights" for the victim – the right to know what's happening. They don't give the victim participation rights largely because they are strongly adversarial countries and they believe in the conflict of adversaries. If they have a prosecutor and a victim as parties, then there is a violation of the balance, and effectively you have two prosecutors and one victim, which they regard as unfair. So, historically, they haven't given a role in court to victims. Other countries do. In many European countries, the victim is a party and can have representation in court and can appeal. Those countries

developed systems of plea bargaining very successfully by including victims. So there is no problem about the inclusion of the victim in the plea bargaining system if that's what a country wishes to do.

The other important point that I wish to make about victims is that, sometimes, particularly if the cases are very sensitive and deal with a very intimate matter, such as sexual offences, particularly sexual offences involving children, bringing that person into court to give evidence is traumatic and can result in repeated victimization. Many victims describe the experience of the questioning in court as a second violation. If there is a system of guilty plea and plea bargaining, the victim can be shielded and defended from having to go to court and that is a huge advantage that many victims might find very beneficial. So there are advantages also for victims within the plea bargaining and guilty plea system.

Equally, and this is my fourth point, a guilty plea system allows tremendous opportunities for restorative justice and conciliation, which involve victims. I think it is an important aspect of justice that we are all developing more and keeping cases out of court and allowing them to be dealt with in a restorative victim-centred format. Throughout Europe this is happening. Throughout the countries of the former Soviet Union this is also happening. I think plea bargaining enables and allows this new form of justice to function like medicine and it is also an excellent aspect of the system.

My fifth point is that plea bargaining and the guilty plea system provides a legitimacy for convictions. If you talked to people who have been convicted by single judges or even by juries, they tend to say that "the court prejudiced against me because I'm black, because I'm minority, and the whole thing was unfair, and I'm just a victim of the system". A defendant who has to stand up and say "Yes, I agree, I am guilty, I have done this, I want to expiate my guilt in public" receives the element of what scholars would call a personal acceptance of his guilt in public. It makes a powerful statement that is beneficial both to the individual and to the community. The guilty plea allows the person to practically state that they are guilty and they wish to rebuild themselves. It's very difficult to say after admitting your guilt in public that you have not been probably advised and that you are actually innocent.

As a sixth point, contrary to what many commentators are saying, I think that plea bargaining is an important aspect to adversarial justice. As I said earlier it is no coincidence that the plea bargaining system developed in countries that also developed an adversarial system and were the most committed to adversity. Plea bargaining envisages the defendant as an active participant, as an adversary in the system, not as an impassive object of the system, but rather as an active subject of the procedure.

In other words, a profoundly inquisitorial process sees the defendant as a scientific object to the inquiry and the adversarial process sees the defendant as an active adversary with the right to defend himself in the negotiated process. Therefore in my view, plea bargaining is emblematic of the defendant's active role protected by his or her rights, and of course, nothing can stand on the way of every defendant's right, if he has to choose to have a full trial in an open court. That's the fundamental idea of plea bargaining. Nothing can stand in the way of you being able to have your

case dealt with in court. The prosecution are prepared to put the deal on the table that you like. If you are against the plea bargain, then fine, you have to go to trial. That's absolutely fundamental.

My last point is that plea bargaining all over the world is the most effective weapon against corruption, which poisons every political system. And the best way of attacking it is using plea bargaining. Plea bargaining, to put it simply, offers the only route for prosecutors to break through the wall of silence that protects the corrupt because prosecutors can offer deals to minor players in corruption who can then in return for those plea deals provide evidence against major players.