PLEA BARGAINING,

A COMPARATIVE STUDY OF AUSTRIAN AND CANADIAN LAW

by

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Magister iuris, Universität Wien, 1993

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAW

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

December 1995

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ABSTRACT

This thesis deals with plea bargaining, a method of settling criminal cases without litigation. Plea bargaining is any agreement by the accused to plead guilty in return for the promise of some benefit.

While the practice is openly discussed in Canada, little literature exists about this topic in Austria. An analysis of the practice is thus made by comparing the Austrian law enforcement system to the Canadian one. After a comparison of the rules and principles that govern the procedures in both countries, the thesis deals with the problems that are caused by plea bargains. Proponents have said that plea bargaining is a practice that eases the administration of justice without either prejudicing the rights of the innocent or occasioning real injustice to the guilty. The second part of this work thus focuses on the rights of the accused and the rules that are designed to protect him.

The defendant who pleads guilty receives mild treatment as a reward for his admission of guilt. Whether or not this is consistent with the public's claim for justice is dealt with in part three of the essay. The method used is an exploration of the goals and purposes of criminal punishment in Austria and Canada. It is shown that plea bargaining not only causes a lack of protection for the accused, it also creates inequality. The practice leads to a goal displacement. In the pursuit of efficiency the original goals of the penal system and the idea of justice are neglected.

TABLE OF CONTENTS

Meiner Mutter

INTRODUCTION

"Fast jeder kennt es,
Fast jeder praktiziert es,
Nur keiner spricht darüber."[1]
("Almost everyone knows about it,
Almost everyone is doing it,
but no one talks about it")

'Deal' is describing agreements in the criminal process. Although the issue of plea bargaining is openly discussed in Canada, Deal's words still seem to be accurate for the present situation in Austria.

But just because this practice is kept secret and there is no literature about this topic in Austria, it does not mean that bargains in Court do not exist in this country. Bargains do exist, but they are kept secret. Yet, the bargains that occur in Austrian courts differ a lot from the plea discussions that take place in the hallways of the Canadian criminal courts. Still, the outcome of a case often depends on informal discussions, which are neither governed by procedural rules, nor subject to control.

Furthermore, the costs of the Austrian criminal justice system are growing and the government is looking for new ways to deal with crimes. Reform tendencies include diversion

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[1] Deal, Detlef (Pseudonym), 'Der strafprozessuale Vergleich" (1982) StrVert. 545 at 545, (hereinafter: Deal).

programs, victim participation and decriminalisation of certain acts. Plea agreements are one way of cutting down the costs of the system.

This thesis will consider whether or not plea agreements would be a method that could be introduced to the Austrian justice system. The compatibility of plea bargaining with the Austrian norms and the understanding of justice in Austria will thus be the main focus of this work. The rules and principles governing the criminal justice system are devices,[2] created by the respective legislatures, to best achieve what is perceived as being just. An attempt will, therefore, be made to identify the different values of justice and philosophies of law.[3]

Hence, the goal of this thesis is to investigate whether plea bargaining is a method that can be applied to the Austrian criminal procedure. This will be done by comparing it to the situation in Canada. Hence, the differences will be shown, but also the similarities of the two systems. The method that will be used is an exploration of the goals and purposes of criminal punishment in both countries.

Some might question whether it is even possible to compare two systems as different as the Continental-European and the Anglo-American, which are different even in the method of judicial reasoning. Characteristics of Continental jurisprudence are systematical codifications of all the fields of law, abstract thinking, construction of and deduction from norms and statutes. The Continental-European lawyer makes plans and rules for the future. The roots of this way of thinking can be traced back to the 17th century. People then tried to liberate themselves from

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[2] See Thomas Weigend, "Strafzumessung durch die Parteien" (1984) KrimJ 11 at 14, (hereinafter: Weigend, Strafzumessung).

[3] See John F. Klein, *Let's Make a Deal* (Lexington, Mass.: Mexington Books, 1976), (hereinafter: Klein) at 2.

traditional and institutionalized authorities, such as the state and the church. They questioned the old, disunited rules of those authorities and created new rules in a planned and organised way.

These theoretical norms without historical roots have not been adopted by practical thinking common law lawyers, conscious of their historical traditions.

The common law lawyer does not plan into the future. He waits until a problem arises and decides every case individually. He does not appreciate generalizations and abstract norms. He improvises and thereby relies upon his own experience.

One of the main differences between civil and common law is the judicial decision-making: case to case reasoning in common law as opposed to norm-related arguments in civil law. [4]

In spite of all these distinctions, the ideological background in those countries is basically the same. Both are open and pluralistic systems of society, and both have a similar view about justice. Furthermore, in spite of the fact that Canada has a common law setting, the field of criminal law is codified in this country.[5]

The topic will be dealt with in three parts.

Part I: In the first part the scope of action the participants possess in both countries will be examined. This will be done by giving an overview of the criminal proceedings in Austria and Canada and of the procedural principles. Criminal procedure has two goals: first, to explore the circumstances of an offence, thus creating a basis for a just sanction, and second to protect the

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[4] See e.g., Zweigert, *Einführung in die Rechtsvergleichung* (2nd ed., Amsterdam; New York: North-Holland Puls.Co., 1987).

[5] See *Criminal Code*, R.S.C. 1985 c. C-46.

rights of the alleged offender and prevent the punishment of the innocent. The criminal process thus balances the need to discover the truth as a basis for the decision against the protection of the alleged offender.

Thereby, the Austrian and Canadian criminal procedures have gone two different ways. The Austrian process, following the French tradition, is governed by the inquisitorial principle, while the Canadian is adversarial. Furthermore, the Austrian process is characterized by mandatory prosecution, whereas the Canadian Attorneys-General have broad discretionary powers. Yet, both procedures are accusatorial: the criminal process has to be instigated by a person independent from the judge.

Next, the practice of plea bargaining as well as the prosecutor's and the judge's range of actions will be examined.

Plea bargaining is the pleading guilty of an accused person in return for some benefit from the prosecutor or judge. Plea bargaining is not the lawful exercise of discretion by the law-enforcement agents, nor is it the voluntary guilty plea of the accused. Plea bargaining is the connection between these two behaviours. A plea agreement consists of the defendant pleading guilty because of some kind of reward from the prosecutor or judge who exercise their discretion in favour of the accused in return for his plea.

Plea bargaining has been justified mainly on the grounds of expediency. The system cannot deal with the amount of cases without plea negotiations. It would break down, the backlog of cases being hardly manageable even with the present practice of bargaining.

Advocates of the practice contend that the plea bargaining process does ease the administration of justice without either prejudicing the rights of innocent or occasioning real injustice to the guilty.[6]

Two problems are prone to arise with the settlement of cases by way of negotiations in the shadow of courtroom procedure: first, penological considerations might suffer, the prosecutor agreeing to a punishment (or the judge imposing a sentence) that does not fit the crime, thus violating the public's claim for appropriate sanction. Secondly, an individual's rights might be violated either because an innocent person gets convicted or because an offender receives a penalty which is too harsh.

Part II: The second part of this thesis will deal with problems concerning the protection of the accused. Both, the *Canadian Charter of Rights and Freedoms* and the *European Convention of Human Rights* are designed to protect the accused from violations of their personal rights and freedoms by the state. The main focus of this part will thus be given to those procedural principles. The compatibility of plea negotiations with the Charter of Rights and constitutional guarantees will be examined. The Canadian and the Austrian Charter of Rights show great similarities. Yet, their interpretation by the courts differ greatly.

Part III: After having analysed the compatibility of plea bargaining with the provisions designed to protect the accused, the goals of the criminal law system will be discussed in the third part. If plea bargaining is inconsistent with the Austrian provisions the provisions can be changed.

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[6] See Purves, R.F., 'That Plea Bargaining Business: Some Conclusions from Research" (1995) Criminal Law Review 470 at 475 (hereinafter: Purves).

Yet, the rules and principles of procedure are not a goal in itself. Their object is to carry out the criminal law. But what is the aim of the criminal law? Is it the assertion of absolute justice? And who defines justice?

The principal goal of the criminal justice system is to prevent crime.[7] On the one hand, the individual offender himself should be restrained from committing more offences; on the other hand, other potential offenders shall be deterred.[8] Another aim of the criminal law might be the psychological support for the victim. Saving of time and money is not an object of the criminal justice system. But the resources have to be used in a way to best achieve the goals mentioned above.[9]

Whether or not these goals are reached by negotiating for guilty pleas is open to discussion. Theories of criminal law and justice, philosophical approaches and the public opinion will be examined,[10] and the compatibility with the aims of the Austrian criminal justice system will be considered.

PART I: REALM OF ACTION

In order to understand the courses of action taken by the persons involved in plea negotiations, a summary of the criminal procedures in Austria and Canada will be given and the

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[7] See e.g., Nigel Walker, *Why Punish?* (Oxford Univ. Press, 1991).

[8] See e.g., Stanley E.Grupp's Introduction in Stanley E.Grupp, ed. *Theories of Punishment*, (Indiana Univ. Press, 1972), (hereinafter: Grupp, Introduction) at 7.

[9] See e.g., Purves, *supra* note 6 at 470.

[10] See Stanley A. Cohen and Anthony N.Dobb, 'Public Attitudes to Plea Bargaining" (Canada), (1989) 32 Criminal Law Quarterly 85, (hereafter, Cohen); see also Peter H. Solomon Jr., *Criminal Justice Policy - From Research to Reform* (Toronto: Butterworths, 1983) (hereafter: Solomon).

principles that govern these procedures and thus frame the practice of plea bargaining will be pointed out. Furthermore, a short overview of the way plea agreements are arrived at will be given and the prosecutor's and judge's discretion with respect to plea bargaining will be analysed.

A. Overview over the Criminal Procedures in Austria and Canada

1. Canadian Proceedings

In Canada it is the police who collect the evidence and are responsible for the investigations in criminal matters. The police can, like any other individual,[11] act as a prosecutor in summary conviction offences. Yet, the typical prosecution for a *Criminal Code* offence is a public prosecution which is conducted by Crown counsel acting as agent of the provincial Attorney General. The Attorney General draws his powers from the definition of "Attorney General" in s.2 of the Canadian *Criminal Code*.

The prosecution usually commences with the laying of the information. It can also begin with actions to compel the appearance of the suspect. The information will then be laid after these actions to compel appearance. To institute the criminal prosecution the information must be sworn before a Justice (usually a Justice of the Peace). The information is a formal charge in which the informant alleges that the accused committed the offence specified therein. It is the only form of charge used in summary conviction prosecutions and in indictable offence

[11] See Canadian *Criminal Code*, s. 504.

prosecutions tried in Provincial Court. Although the Justice of the Peace cannot refuse to receive the swearing of the information, he can decline the issue of process (ss. 507 and 508).

The steps taken after an information is laid vary, *inter alia*, with the nature of the offence and the mode of trial. There are three types of offences: indictable offences, summary conviction offences and hybrid offences. The classification depends on how the offence is described in the statute. As a general rule, indictable offences (e.g., s. 235) are the most serious; summary conviction offences (e.g., s. 56) are the least serious; hybrid offences are those that are stated in the statute to be either indictable or summary conviction at the option of the Crown (e.g., s. 255(1)). The law does not require pre-trial procedures in summary conviction cases, in trials of indictable offences in the absolute jurisdiction of a provincial court judge[12] and in trials of electable offences[13] after the accused has elected trial by provincial court judge.

a. Election

Where the accused is charged with an indictable offence which does not fall within the absolute jurisdiction of a provincial court judge under s. 553 or in the exclusive jurisdiction of a superiour court under s. 469, the accused can elect the mode of trial. If the accused elects trial by superiour court judge alone or judge and jury a preliminary inquiry will take place.

b. Preliminary Inquiry

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[12] See Canadian *Criminal Code*, s. 553.
[13] See Canadian *Criminal Code*, s. 536.

A preliminary inquiry is a hearing before a justice dealing with the charge specified in the information. The purpose of the preliminary inquiry is to determine if there should be a trial. At the conclusion of the hearing the justice shall either order the accused to stand trial or discharge the accused.

c. Indictment

In order to bring the accused to trial in superior court an indictment is required. The indictment is a formal charge on paper (s.580) setting forth the offence with which he is charged (s.566 (1), s. 574). It replaces the information before trial in superiour court. No one may be tried in superior court, with or without a jury, except on an indictment preferred by the proper authority.

d. Pleadings

The information and indictment are the basic pleadings in a criminal prosecution. They define the issues to be litigated at trial. The accused can only be convicted of the offence or offences charged, an attempt to commit those offences or included offences. The accused pleads to the information or indictment. The typical pleas to consider are guilty or not guilty (s.606). If he pleads guilty, no trial dealing with the question of guilt takes place. If he pleads 'not guilty' the legal and factual defences are put in issue and a trial will take place to determine whether or not the defendant is guilty of the alleged offences. If he is found guilty, a sentence hearing takes place and the judge decides upon the punishment.

2. Austrian Proceedings

a. Pre-proceedings

In Austria the procedure usually starts with someone telling the police about an offence or about suspicious circumstances. The police pass the information on to the state attorney (§ 84(1), § 86 StPO) and wait for further instructions. Police have the right to conduct investigations that do not permit delay. (§ 24 StPO) Investigation does not permit delay when evidence will get lost if not secured immediately. Police do not have the right to conduct prosecutions themselves.

The state-attorney starts the pre-inquiries (Vorerhebungen), i.e., he indicates what evidence he will need and directs the police, the investigating judge or the local courts to collect this evidence (§ 88). The police, the investigating judge and district courts are obligated to do so, even if they believe it to be a useless task. The state-attorney himself is not allowed to conduct investigations (§ 88(3), § 97(2)).

If the pre-inquiries lead to sufficient grounds of suspicion against a particular person the state-attorney can either let the inquiries continue or apply for the initiation of the pre-investigations (Voruntersuchung, § 91).

If the court decides to initiate the pre-investigations it takes over the supervision of the proceedings. It is the court which decides now which evidence will be collected (§§ 96,97(1)). Usually the investigating judge conducts the investigations himself (§ 93).

The court stays the proceedings in the case where the state-attorney withdraws the application or where the court itself is of the opinion that the suspect person is innocent. (§ 109) In the second case the state-attorney can appeal the court's decision.

The court closes the pre-investigations when it believes the evidence to be sufficient to warrant an indictment. (§ 111)

If the state-attorney thinks the results of the pre-inquiries and pre-investigations are sufficient to lead to a conviction he files an indictment (§ 207).

b. Intermittent Proceedings

The intermittent proceedings ('Zwischenverfahren') are the period where the presiding trial judge prepares the trial. He fixes a date for the trial, notifies the persons whose presence at trial appears necessary of the date and orders them to appear in court (§ 221). He can initiate further investigations if he believes it necessary (§ 224).

c. Main Proceedings

The trial (main proceedings) takes place, dependent on the kind of offence, either before a single judge, a panel of 2 judges and 2 laymen (§ 13(1,2)) or a panel of 3 judges and 8 jurors. One of the judges acts as presiding judge. The presiding judge directs the trial. A plea of guilty cannot replace the trial which takes place anyway.

The presiding judge first asks the defendant for his name, date and place of birth and profession (§ 270). After the state-attorney's narrative of the indictment the presiding judge asks the accused whether or not he wants to plead guilty.

Independent of the kind of plea, the defendant is then called on to give an account of the circumstances of the case (§ 245(1)). The accused may refuse to give evidence all together or just refuse to answer single questions. (§ 245(2)).

After having told his story the accused is subject to questioning by the presiding judge. Under the presiding judge's supervision, the state-attorney, the other judges and the defence counsel may ask questions as well (§ 249).

Then the evidence is heard. The witnesses have to be given the opportunity to give a coherent account of whatever they want to say (§ 167). Only after their narrative are they subject to questioning by the judges and parties. (§ 245)

Which pieces of evidence are to be produced depends on the motions of the two parties in the first place. But the presiding judge can order the production of evidence as well.

After the hearing of evidence, the state-attorney, the defendant and his counsel have the opportunity to make their pleading (§ 255(1)). The prosecutor always goes first. Then the accused and his counsel state their arguments. If the prosecutor wishes to reply, the defendant, nevertheless, has to get the final say. (§ 255(3)).

Then the presiding judge closes the procedure. No separate sentence hearing takes place. The court retires to deliberate on the verdict and the sentence. When verdict and sentence have been found the presiding judge pronounces them together with the main reasons.

Both verdict and sentence are subject to appeal by both parties.

B. Procedural Principles

In what follows the main principles that govern the criminal procedures in Austria and Canada and their influence upon the practice of plea bargaining between the prosecutor and the defendant will be presented.

While distinct differences in the criminal procedures of the two countries do exist, there are still a lot of similarities. For example both procedures are accusatorial by nature. Due to this principle, sentencing falls into the judge's responsibility. The prosecutor nevertheless has a certain influence on the judge's sentencing decision. He can affect the sentence either in the manner of charging or in making recommendations to the judge as to what would be an 'appropriate' sentence.

A characteristic of the Austrian criminal process is the 'Prinzip der materiellen Wahrheit' (principle of substantial truth, inquisitorial principle), which is the counterpart of the adversarial principle that governs the Canadian criminal process. And the main difference between the Austrian and the Canadian criminal procedure seems to be the 'Legalitätsprinzip' ('principle of legality' = compulsory prosecution) as opposed to the discretion of the Canadian prosecutor.[14]

What do these principles really mean? Inquisitorial principle makes one think of mediaeval procedures, without any powers of defence for the accused.

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[14] See Donna C. Morgan, 'Controlling Prosecutorial Powers - Judicial Review, Abuse of Process and Section 7 of the Charter" (1986-87) 29 Crim.L.Q. 1 at 16 (hereinafter: Morgan).

One has to distinguish the inquisitorial procedure, which was the common procedure in the European Middle Ages from the inquisitorial principle. The differences in the two meanings of inquisitorial will be pointed out.

1. Accusatorial Principle

The prosecutor plays the main role in initiating the proceedings. The Austrian,[15] like the Canadian process, is governed by the accusatorial principle. A basic characteristic of this principle is that the party instituting the procedure does not take part in the judging. This constitutes a division of powers between the prosecutor and the judge.[16]

This kind of procedure bears a number of advantages: first, it secures the judge's impartiality. If he was the one who initiated the investigations and instituted the proceeding, it would be almost impossible for him to remain impartial and unbiased. A second advantage is that the defendant has an opponent ('benefit of opponent'),[17] whom he can criticize without running the risk of vexing the judge.

The accusatorial principle has the following consequences:

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[15] See Art.90/2 B-VG, *Österreichisches Bundes-Verfassungsgesetz* (Austrian Federal Constitutional Code), StGBl 1920/450, wv. BGBl. 1930/1, i.d.F. BGBl. 1986/212; compare Art.10 Abs.2 of the Staatsgrundgesetz über die richterliche Gewalt (Fundamental State Law about the Judicial Power), RGBl 1867/144; and see § 2 Abs.1 StPO, Strafprozeßordnung (Code of Criminal Procedure) vom 23.5.1873, zuletzt wv. BGBl 1975/631, i.d.F. BGBl. 1986/164.

[16] See Bertel, Christian, *Grundriß des österreichischen Strafprozeßrechts*, (2.Aufl., Wien 1984) (hereafter: Bertel, Grundriß) at Rz 22.

[17] 'Rechtswohltat des Gegners", see Henkel, H., *Strafverfahrensrecht*, (2.Aufl., Stuttgart 1968); see also Wilfried Platzgummer, *Grundzüge des österreichischen Strafverfahrens* (Wien - New York 1984) (hereafter: Platzgummer) at 11.

A criminal prosecution has to be instituted by a prosecutor. It can only be continued as long as the prosecutor does not withdraw the charges or stay the proceedings. Furthermore, the charge defines which offences the accused can be convicted for.[18] Offences that a person is not accused of having committed cannot lead to a conviction.

In both the Austrian and the Canadian legal system, criminal law and procedure falls into the realm of public law.[19] The criminal process is supposed to serve the idea of order and to help impose this authoritative order. While Private Law is concerned with the relationship of individuals on the basis of equality, the Public Law is characterized by the subordinate role of the individual in relation to the State.[20] Therefore, the accused is not a party with equal rights, but a person subject to the state's power.

Due to his subordinate position and his limitation of resources (compared to those of the Attorney-General / State Attorney), the defendant has to be protected against the State's power.[21] This is the role of the trial judge. In order to be able to protect the accused's rights, the

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[18] For exceptions, see Canadian *Criminal Code* s.660 (conviction for attempt on a charge of the complete offence) and s.662 (conviction for "included offences").

[19] 'Public Law: All law dealing with relations between an individual and the state..., i.e. criminal law,..." (Dukelow and Nuse, *Dictionary of Canadian Law*, (2nd ed., Scarborough, Ont.: Carswell, 1995)).

[20] See Triffterer, Otto, *Österreichisches Strafrecht, Allgemeiner Teil* (Wien - New York 1985), (hereinafter: Triffterer) at 35.

[21] The argument has been made, that it was the accused who is controlling the outcome of the trial. If he would not plead guilty, the administration of justice would break down. (see e.g. Deal, *supra* note 1 at 49; see also Dörr, 'Besprechung von W. Schmidt-Hieber: Verständigung im Strafverfahren" (1987) StV 466 at 467, (hereinafter: Dörr); and Terhorst, 'Vereinbarungen im Strafrecht" (1988) DRiZ 296, (hereinafter: Terhorst). While it might be true, that the criminal justice system would break down if all the accused would insist on a trial, the system can unquestionably deal with a single case. Compare Weigend Thomas, 'Das Verfahren des plea bargaining im amerikanischen Recht", (1982) 94 ZStW 200 (hereinafter: Weigend, Amerika).

judge has to be independent from the State and from the prosecution. The judge has to safeguard the good conduct of both parties at trial.

In Austria, the accusatorial principle of the procedure was introduced as a rejection of the inquisitorial nature that governed the criminal process until the 19th century. The inquisitorial process constitutes the concentration of all the functions of punishing in the state. Agencies of the state act as prosecutors and as adjudicators. The accused is object in the process. The claim for general, unbiased and paternalistic legality did not leave any scope for the accused as a person and subject with rights in the criminal process.

The liberal movements in the 19th century brought reforms of the criminal procedure. Personalization of the process was demanded. Yet, although these movements led to the accusatorial nature of the process, the realm of the defendant's rights remained limited. It should not lie in the individual's power to dispose of the public claim for substantial justice.

The defendant's rights in the criminal process are limited. He has extensive rights only within a single stage of the procedure: the trial stage.

The reformed criminal process constitutes a compromise between the adversarial and the inquisitorial process.[22] The accusatorial principle divides the unity of the criminal process into different stages. Different agents are held responsible for these different parts of the procedure. The accusations are prerequisites of the trials.[23]

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[22] See Prof. Dr. Peter Rieß, Bemerkungen zur Struktur des Ermittlungsverfahrens und zu den Reformtendenzen in der BRD (Österreichische Richterwoche 1988, 20.-26.3.1988, Badgastein) (hereinafter: Rieß, Bemerkungen).

[23] See Bertel, Grundriß, *supra* note 16 at Rz. 657; see also Platzgummer, *supra* note 17 at 62 f.

2. Adversarial - Inquisitorial Principle

In Austria, the accusatorial principle has only been realized in a formal sense. The substantive accusatorial process (adversarial process) has not been adopted. The form of examination is inquisitorial. It bears the obligation to investigate the circumstances of the case *ex officio*, to inquire into the substantial truth.

At the root of both the adversarial and the inquisitorial principle lies the idea that a just outcome of the trial can best be achieved if as many facts as possible are known. If the truth becomes apparent, the principles of punishment can be applied and the innocent person does not get convicted. Therefore, the inquisitorial principle is also called "principle of substantial truth".

a. Adversarial Principle

The Canadian process, apart from the prosecutor's discretion concerning charging, is characterized by its adversarial nature. The adversarial system is one by which disputes between opposing parties are resolved.

The idea is the following: The truth can best be found if two opposing parties argue for their respective sides. Both parties present evidence that backs up their standpoints. The person who adjudicates can make an intelligent decision, because he learns all the facts from the parties who are responsible for the production of all the pieces of evidence. If a point is not disputed by either party, it is held to be true.

The assumption is made that both parties argue in their best interest and that the interests of the two parties are opposite.

In the adversarial system, just as in the inquisitorial, it is the judge in a non-jury trial who finds the facts and imposes the sentence. In a jury trial it is the laymen's responsibility to find the truth. The parties' assignment is it to provide the adjudicator with the necessary knowledge to make his or their decision. The judge must decide if the facts presented by both parties are consistent. If they are, they are seen as the truth and there is nothing to decide.

Yet, the parties maintain their responsibility of providing the jury with the necessary evidence for their respective standpoints.

The judge who presides over the trial has the power to take action in case one party uses unfair methods, because in such a case the balance of powers would be disturbed. Without a balance of powers, one party would be able to exercise undue influence upon the outcome of the case, which would lead to a result that might not be just.

Both the adversarial and the inquisitorial system have started off with the premise that the truth is the best foundation for a sanction in the best interest of society.

The adversarial process has left the production of evidence to the opposing parties. The adversarial nature is a safeguard against biases on the part of the judge. If it is the judge who investigates, he cannot maintain his impartiality and thus the process becomes inquisitorial in the medieval sense. In the adversarial system the court is the custodian of the law but is supposed to leave fact development to the lawyers to present their respective cases for and against conviction and in a jury trial, fact determination is left to the jurors to decide between contending versions of the facts.

In the determination of guilt, the obligation of the parties to present evidence and their responsibility for the production of facts that are necessary to find the truth has given them the opportunity to make compromises and to create their own truth. The two-person structure of prosecutor and accused person thus is not only a formal principle, but has become a substantial presupposition of the process. The concept of adversariness carries the liberty of the parties to dispose of their rights and the accused may thus waive his right to dispute the accusations and to force the prosecutor to produce evidence. Similarly, the Attorney-General and his agents can refrain from prosecuting. If the dispute can be settled a judge is only necessary for the ratification of the result.

The Anglo-American lawyer thus sees a trial in the case where both parties agree upon an issue as a useless waste of time and money. A trial is only necessary where a conflict exists: Why litigate if there is no dispute?

The inquisitorial process answers this question by holding that just because a conflict does not exist, the undisputed facts may not be true. The parties may have settled an issue for various reasons other than the acknowledged goals of punishment. In many cases the facts that serve as the basis for the sentence are just a result of a compromise. Since the just solution demands the knowledge of truth, a trial must still take place.

A shift has taken place in the adversarial process. Initially, the idea was to assess the true facts by hearing the opposing sides and to preserve the judge's impartiality. Yet, the discretion vested in the two parties has given them the power to determine the outcome of the case through a compromise. The judge endorses the result and guarantees that no unfair methods are being used. The Attorney-General is not responsible to the judiciary but to the people by whom he is

elected and, accordingly, it is up to the Attorney-General and the Crown to lay charges or to withdraw charges. It is up to the courts to try the charge as laid and to sentence appropriately. The best interest of society is looked after by the prosecution who represents the public.

b. Inquisitorial Principle

Contrary to the Canadian criminal procedure, the Austrian proceedings are governed by the inquisitorial principle (= principle of substantial truth). This principle must not be confused with the inquisitorial process. The inquisitorial process is the counterpart to the accusatorial process, whereas the inquisitorial principle, which is codified in paragraph 3, 96 and 232/2 StPO (Code of Criminal Procedure) has the following substance: By virtue of paragraph 3 StPO (Code of Criminal Procedure) all the authorities in criminal matters have to take into account factors favouring the defence as well as incriminating factors and treat them equally. § 3 StPO provides that the court must examine all the important circumstances *ex officio* and has to identify the true facts of the case.

The inquisitorial principle has two aspects. First, the inquisitorial structure of the procedure, which holds the court responsible for the production of evidence. Second, the aspect of substantial truth. This aspect of the principle provides that the real facts of the case have to be the basis for the decision..

Both aspects have their roots in the inquisitorial process and bind not only the judge, but also the prosecutor. The court has to investigate legally important facts of the case, even if the parties do not dispute them.[24]

Again, the best basis for a just decision is seen to be the truth. Therefore, the decision maker is bound to make his decision according to the real facts of the case (principle of substantial truth). How the truth is found differs from the adversarial process. The responsibility for the finding of truth lies in the hands of the court. In the inquisitorial system the court is another investigator, different from previous investigators in also possessing the power to decide the case. There the presiding officer of the court asks most of the questions and develops the facts. Attorneys do not play a significant role in fact determination; their function is to argue the interpretation that should be placed on those facts by the fact-finder.[25] The principle of the duty of the court to further investigate the charge (Instruktionsmaxime) lays down that the court, in order to discover the truth shall, *ex officio* extend the proof of evidence to all facts and documents which are relevant for its decision. Within the limits of the indictment, the courts are authorised and obliged to act independently and are not bound by the pleas of the parties acting in the case.[26] Since both parties have their own interests, which do not necessarily coincide with the principles of punishment and the interests of the state, the production of evidence cannot be left to them without control. Therefore, the court has to lead the investigations. The parties have the right to present their arguments, to make suggestions and recommendations with regard to which

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[24] See Platzgummer, *supra* note 17 at 10.

[25] See Barton C. Ingraham, *The Structure of Criminal Procedure* (New York: Greenwood Press, 1987), (hereafter: Ingraham) at 121-122.

[26] See H.H. Jescheck in J.A. Coutts, ed. *The Accused - a Comparative Study* (British Institute, Studies in International and Comparative Law, London, Stevens, 1966), (hereinafter: Jescheck, the accused) at 246.

additional pieces of evidence would be necessary. But the ultimate responsibility remains with the judge. Just because the opposing parties agree upon an issue does not mean that the undisputed facts are true. It means that there is no conflict. Yet the parties may have agreed upon the question for various reasons, plea bargaining being the best example. Since the Austrian judge has the obligation to base his decision on the "real facts of the case" and it is his duty to find the truth, the parties cannot settle an issue unless the court is satisfied that this settlement is consistent with the substantial truth.

This presupposes that the common good is best served by a decision grounded in the complete knowledge of the real facts. Yet, the basis for a conviction is always the judge's perception of the truth, never the truth itself.[27]

Gallandi[28] argues that in most cases even the inquisitorial procedure is not capable of revealing the substantial truth. Judges get only a fraction of the information that constitutes the truth. The criminal activity is only a small part of the offender's life. Yet his life is the background of his criminal career and influences the degree of guilt and culpability. Hence, why not replace the judge's with the parties' perception of truth?

The question thus arises whether or not the court can abandon its obligation to research the substantial truth with the consent of the accused.

The obligation of the court to investigate the truth does not only constitute a right for the defendant but for the public as well. The public has an interest in seeing that the laws are being

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[27] See Volk, K., *Prozeßvoraussetzungen im Strafrecht* (Ebelsbach 1978).

[28] Gallandi, Volker, "Vertrauen im Strafprozeß. Vom fehlgeschlagenen Vergleich und der Bedeutung nicht formalisierter Regeln der Verständigung im Strafprozeß", (1987) MDR 801 at 804 (hereinafter: Gallandi).

obeyed. In the criminal process the public is represented by the State Attorney (Attorney General) who claims that the criminal laws have been broken. The court has to decide whether or not this claim is rightful. The court's obligation to find the truth, thus, is an obligation towards the defendant and the public. The defendant alone cannot free the court from this duty.

It has been argued that both together, the defendant and the public prosecutor, representing the population, should be able to do so. If all the participants in a case agree upon what is right it should be sufficient and they should be allowed to refrain from conducting a formal trial.[29]

Yet, in the inquisitorial system it is the legislature that decides what constitutes the best interest of society. The judge is responsible for a solution according to law, independent of the parties' wills. Hence, the court is not only responsible for the imposition of a just sentence but also for one that is in the best interest of society. The statutes leave a broad area of discretion as to the severity and kind of punishment in every individual case.[30] In order to be able to find the best decision according to the law the judge has to know all the circumstances of the case. Because the judge has to find a solution that meets the standards of justice and public interest set by law and not the ones set by the parties, he is obligated to assess the true facts of the case.

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[29] See Bode, "Verständigung im Strafprozeß" (1988) DRiZ 281 at 288 (hereinafter: Bode).
[30] See Triffterer, *supra* note 20 at 504.

3. Discretion - Mandatory Prosecution

a. Authority to Prosecute

a.a. PRIVATE PROSECUTION

Apart from public prosecution, the procedural rules in both countries allow private prosecution as well. The latter is very limited in Canada and in Austria. In Austria, only the victim of the crime has the right to lay charges and he is very restricted in the exercise of this right. He is, for example, bound to very short limitation periods and other procedural difficulties.

In Canada every individual has the right to lay information and conduct the prosecution, at least in summary conviction matters. This right is limited, though, by the power of the public prosecutor to take over the prosecution and his power to stay or withdraw the charge.[31]

Due to those restrictions, private prosecutions are not very common in Austria or in Canada. Although public charges are not exclusive they are the primary form of prosecution. This thesis will therefore be focused on public prosecutions.

a.b. PUBLIC PROSECUTION

The public prosecutors in Austria and Canada are administrative officers, who are accountable to the Minister of Justice or (in Canada) to the provincial Attorneys-General. The

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[31] See e.g., *R.* v. *Leonard* (1962), 133 C.C.C. 262 (Alb.S.C., App.Div.); on the limitation on private prosecutor's power to indict and therefore bring the accused to trial (other than a trial by provincial court judge) see *Criminal Code* ss. 566 (trial by judge alone) and 574, 577 (trial by judge and jury); on the power to stay, see s.579.

Minister of Justice is the highest prosecutor in each country and is accountable to and controlled by the Parliament or provincial legislature alone.[32] In Canada, the prosecution is divided into federal and provincial jurisdiction. Ordinary criminal prosecutions are conducted by Crown counsel representing the provincial Attorney General. In Austria, the prosecution of criminal offences falls into federal jurisdiction only.[33]

In both countries the prosecution, belonging to the administrative branch, is independent from the courts.

The Canadian, like the Austrian prosecutor, has to act objectively and it is his duty to represent the public's best interests. In Austria this implies that he not only has to take into account circumstances that constitute the crime but also facts that work in favour of the defence. In Canada the obligation to act in the 'best interest of the public" goes beyond the Austrian understanding of this phrase. The Canadian prosecutor makes political decisions regarding the best interest of society.

(i.) Canadian Prosecutor

The Canadian Attorney-General gains his power to prosecute from his historical role as an agent for the Monarch of England,[34] whose 'primary responsibility it was to maintain the sovereign's interest in the royal courts, resulting in his status as principal law officer of the

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[32] See *R.* v. *Harrigan and Graham* (1976), 33 C.R.N.S. 60 at 70 (Ont. C.A).
[33] See Triffterer, *supra* note 20 at 20.
[34] See Philip C. Stenning, *Appearing for the Crown: a legal and historical review of criminal prosecutorial authority in Canada* (Montréal, Brown Legal Publications, 1986), (hereinafter: Stenning) at 6.

Crown."[35] In the conduct of criminal prosecutions the Attorney-General would institute prosecutions on the sovereign's behalf and in his name, his concomitant discretion to do so springing from the Royal prerogative of Justice and its enforcement in maintaining the King's peace.[36] While he had the right to act as a prosecutor, he was not obligated to do so. The general powers to carry forward the prosecution and to choose and withdraw the charge were part of the common law grant of authority to the Attorney-General. Therefore, whether or not he prosecuted an offence was left to his discretion.[37] This discretion encompassed, *inter alia*, the choice of charge, the staying of the proceedings or the withdrawal of charges.

In the Canadian system the Attorney-General represents the population. Being an 'attorney' for the people, he is only accountable to the public and is therefore controlled by the Parliament or provincial legislature alone. A breach of his duty to act fairly renders him accountable solely to the legislature.[38] And even his accountability to the legislature does not apply to individual cases.

Because the Attorney-General is a representative of the people, he does not only have the power to prosecute offences against the laws of the people, but also the power to forgive such offences. In doing so he is like every counsel, obligated to represent his clients in their best interests.[39] This is the basis of the prosecutors duty to take into account the public interest.

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[35] See Morgan, *supra* note 14 at 18.
[36] See *R.* v. *Smythe* (1971), 3 C.C.C. (2d) 366, 16 C.R.N.S. 147 (S.C.C.).
[37] See *R.* v. *Betesh* (1975), 30 C.C.C. (2d) 233, 35 C.R.N.S. 238 (Ont. Ct. GSP).
[38] See *Re Balderstone and the Queen* (1983), 8 C.C.C. (3d) 532, 4 D.L.R. (4th) 162 (Man. C.A.); yet the *Canadian Charter of Rights and Freedoms* has brought a change in the court's power to supervise decisions of the administrative branch.
[39] "When exercising his 'grave' discretion he [the Attorney-General] must take into account not only the position of the individual, but what the public interest demands. In doing so, he must stand alone, acting independently of political or other external influences. He is to be neither

(ii.) Austrian Prosecutor

In Austria the State-Attorney represents the population as well but the idea of public prosecution is different.

The Parliament makes laws, which express the will of the people and it is the legislature only that can make political decisions. In doing so, the Parliament has to take into account the public interest.

The German and Austrian procedures derive from the French one, which, at its origin in the 14th century, was governed by prosecutorial discretion as well.[40] The courts were bound to the principle of legality. The prosecutor on the other hand had the double task to supervise the courts and the application of this principle and at the same time to work for and act with regard to the best interest of society.

The judge, who was bound by the law could not ignore denunciations and had to convict even though it was not in the best interest of society as a whole. Therefore, the decisions concerning the best interest of society had to be made by the prosecution. This agency decided upon charges and their expediency in individual cases.[41]

The last century brought a change with respect to prosecutorial discretion. Political interference and arbitrary decisions led to a widespread mistrust towards the executive branch.

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instructed or restrained, save by his final accountability to Parliament.", Morgan, *supra* note 14 at 19.

[40] See Foregger, Edmont - Georg Kodek, *Die österreichische Strafprozeßordnung (StPO 1975) samt den wichtigsten Nebengesetzen*, (Manzsche Kurzkommentare, 6.Aufl., Wien 1994), (hereinafter, Forregger-Kodek) at 3; see also Jescheck H.-H., *Lehrbuch des Strafrechts, Allgemeiner Teil*, (3. Auflage, Berlin 1978), (hereafter: Jescheck, Lehrbuch).

[41] See Weigend Thomas, *Anklagepflicht und Ermessen*, (Baden-Baden 1978) (hereinafter: Weigend, Anklagepflicht).

The legislature wanted to avoid the possibility of unequal and unfair treatment of different suspects for political reasons.[42] The principle of mandatory prosecution was thus introduced.

In order to ensure that the political will of the population is applied in every single case, the administrational branch (which includes the public prosecution) is strictly bound by law.[43] This is a manifestation of the division of powers between administration and legislation.

Even if a statute leaves room for discretion (which it always does, due to the insufficiency of the language, which makes interpretation necessary and thus creates a realm for discretion) the discretion has to be exercised with respect to the substance of the statutes. Room for discretion exists, where the State Attorney decides upon the strength of the case. But if the evidence is strong enough, he is obligated to prosecute. The rule of mandatory prosecution also implies that he always has to pursue the most serious offence with all the aggravating elements. In doing so, the state attorney has to act objectively and therefore has to take into account all the circumstances, not only the aggravating aspects, but also the mitigating ones. The prosecutor cannot only present the aggravating facts and promise to disclose the mitigating elements in case the accused pleads guilty. It is his duty to present the case at trial with all the evidence that is available to him.

A prosecutor who has knowledge of a crime and sufficient evidence to prove the involvement of a suspect, yet does not lay charges against this person, commits an offence. (§

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[42] See Prof. Dr. Bernd Schünemann, "Gutachten zum 29. Deutschen Juristentag 1990", (hereinafter: Schünemann, Gutachten) at B 69 and B 82.

[43] See Dr. Bernd-Christian Funk, "Reform des Sicherheitspolizeirechts" in Strafrechtliche Probleme der Gegenwart, 19. Strafrechtliches Seminar 1991 (hereinafter: Funk).

302 of the Criminal Code: 'Mißbrauch der Amtsgewalt') Whether or not the public interest makes prosecution necessary, is a question that has to be decided by the legislature.

b. Authority to Refrain from Prosecution

The Attorney General (State Attorney) derives his power to prosecute from statutory rules. In Canada, the definition of Attorney General in s. 2 of the *Criminal Code* combined with various Code provisions granting powers to the Attorney-General serves as the basis for legal authority to prosecute. In Austrian Law it is § 26 StPO, which entitles the State Attorney to conduct prosecutions.

Where does the prosecutor take his authority from to refrain from prosecution? The main difference between the Austrian and the Canadian criminal justice system with respect to plea bargaining can be found here. It has been shown that the Austrian State-Attorney has a much smaller realm of discretion.

In Canada the prosecutor's discretion is founded in common law and recognized in the Code.[44]

In Austria the principle of compulsory prosecution obliges the Austrian State Attorney to lay charges,[45] whenever he becomes aware of an offence and whenever there is enough evidence available to guarantee a reasonable likelihood of conviction.[46]

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[44] See, e.g., s.524(1) ("may prefer an indictment") and s.579 (power to stay); see also *Re Forrester and the Queen* (1976), 33 C.C.C. (2d) 221, 37 C.R.N.S. 320 (Alb.S.C., Trial Div.).

[45] But see Univ.-Prof. Dr. Schmitz-Jortzig, Kiel; "Möglichkeiten der Aussetzung des strafverfolgerischen Legalitätsprinzips bei der Polizei" (1989) 3 NJW at 130 (hereinafter: Schmitz-Jortzig).

(i.) Substantial and Procedural Discretion[46]

The legislator can create two kinds of discretion. One is granted through procedural rules, the other one is substantial. The legislative power can, for example, provide that a particular activity constitutes a criminal offence regardless of the degree of culpability. At the same time it grants "procedural" discretion to the prosecutor whether or not to lay charges and orders that the amount of guilt be taken into account in the exercise of this discretion.

The legislator, on the other hand, can provide that the same activity constitutes a criminal offence if committed with a certain degree of culpability. Unless this level is arrived at, the behaviour does not constitute a crime at all. In this case the discretion is substantial because the law enforcement agents have to evaluate the essence of the law: whether or not the level is reached. If the law grants substantial discretion it is the legislator who balances issues of justice against the public interest. Not every morally blameworthy behaviour constitutes a crime. The offences in the Austrian Criminal Code are of a kind that their prosecution is generally warranted by the best interest of society. If the circumstances are such that punishment seems to be needless, the legislature has to provide so, which it has done for example in § 42 of the Criminal Code. (The realm of this provision will be discussed later.) Where exemptions do exist (e.g. in § 42 StGB) it is the lawmaker who has laid down the circumstances under which the law enforcement agents may refrain from punishing. The discretion left to the lawyers is only substantial, hence they may subsume the facts under the rules, but they must not make policy decisions regarding the best interest of society. In this system the State Attorney is not really an attorney, because of his lack of discretionary power. He rather seems to be a messenger for the

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[46] See § 34 Abs. 1 and § 87 Abs.1 StPO; see also Platzgummer, *supra* note 17 at 17.

public who is just expressing the will of the population instead of creating a will on his own.[47] The Austrian prosecutor's duty to take into account the best interest of society obliges him to look not only for aggravating but also for mitigating circumstances. This is necessary to assess the true facts and thus apply the law's evaluation of what constitutes the public interest. Yet his duty ends there.

The Canadian criminal law, on the other hand, only gives a preliminary outline of what constitutes the balance between justice and the best interest of society. Hence the Canadian Criminal Code encompasses activities that do not constitute criminal offences in Austria.[48]

It is the Canadian prosecutor who decides what the public interest demands. He thus exercises procedural discretion. In doing so the prosecutor can only balance aspects that fall into his realm. Hence he cannot refrain from prosecution in order to save resources for the social security system. Yet he can decide which crimes to prosecute in order to obtain the optimum output of goals of the criminal justice system.

(ii.) Procedural Exemptions from Mandatory Prosecution in Austria

On first sight the Austrian prosecutor does not have the legal authority to refrain from prosecution. But there are exceptions to the principle of compulsory indictment. These

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[47] In Germany, scholars and courts do not even refer to the prosecutor as a "party" any more. See e.g., Rieß, *supra* note 22; see also BGHSt. 15, 159.

[48] The offence of "Operation of a motor vehicle while impaired" in s. 253(*a*) of the Canadian *Criminal Code*, for example, constitutes a criminal offence in Canada, while it is only a violation of administrative rules in Austria. In the field of administrative penal law the police who prosecute these offences do have procedural discretion.

exceptions are listed in § 34 StPO (Austrian Code of criminal procedure) and consist to a great part in offences with relation to a foreign country. More exceptions exist in the areas of drug offences, of offences committed by juvenile offenders, by soldiers during their military service and offences committed during incarceration.

Apart from the exceptions mentioned above, § 34 of the Austrian Code of Criminal Procedure also provides the opportunity for the state attorney to refrain from prosecution under certain circumstances; those circumstances are:

The accused has allegedly committed a multitude of offences; the fact that the prosecutor refrains from charging one offence is presumably not going to change the overall sentence. Because the State Attorney is entitled to refrain from prosecution only if the sentence will remain the same (because the offence at issue is unimportant compared to the other offences), it does not really serve as a reward to the accused. The accused will not have an interest in pleading guilty to the remaining charges because he does not benefit from the dropping of the lesser charge.

(iii.) Substantial Exemptions from Mandatory Prosecution in Austrian Law

The state attorney has the discretion to refrain from prosecution whenever a conviction is not to be expected. It is difficult to exercise any control over the conduct of the prosecutor. The words 'if a conviction is likely to be expected" in § 90 (2) of the Austrian Code of Criminal Procedure are very vague and leave a broad area for discretion and it finally depends on the

interpretation of the evidence when it comes to the decision as to which course of action to take.[49]

§ 42 StGB (Criminal Code) provides that an offender may in certain circumstances be acquitted, albeit having committed an offence. By virtue of § 42 StGB there are a multitude of requirements that must be met in order to be authorized to refrain from prosecution[50]:

- § 42 StGB is applicable to petty offences only (with a sentence range up to 1 year),
- the guilt of the offender must have been minor,
- the damage must be negligible,
- a conviction must not be necessary for the purpose of general or individual deterrence.

If all these elements are met, the prosecutor may refrain from prosecution. Under those circumstances the trial judge would have to acquit the offender because he is bound to the same standards.

The Austrian prosecutor thus has a certain space for discretion as well. Yet, it seems that neither § 34 StPO nor § 42 StGB can serve as valid authorities for a bargained guilty plea because refraining from charging on the basis of those provisions does not change the outcome of the proceeding. Therefore, the defendant has no interest in making such a deal.

(iv.) Factual Limitations to the Principle of Mandatory Prosecution

The state can prescribe a certain conduct, it can make rules and order that its subordinates follow these rules. Yet it is easy to outlaw certain behaviour; it is much harder to exercise control

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[49] See Platzgummer, *supra* note 17 at 19.
[50] See Triffterer, *supra* note 20 at 519.

over the obedience to the rules. The duty of the state itself to investigate violations of its rules raises problems of a factual nature.

The principle of legality obliges the state to take actions against every suspicious person in every single case. However, it has never been possible to factually realize the principle.

Apart from simply prescribing a principle, the state has to ensure that its agents have the means to act according to this principle. Hence, it has to provide the resources to prosecute every single case. The state has to employ enough police, prosecutors and judges and provide all the money and items necessary for the successful prosecution of every single case. Yet the resources are limited and the state balances the mandatory prosecution of criminal cases against all its other assignments, thus setting limits to the principle of legality by limiting the resources.

The resources influence the exercise of the prosecutorial tasks. If the state does not provide enough money, the fulfilment of the compulsory prosecution becomes an impossible assignment. The law enforcement agents refrain and have to refrain from prosecution due to the financial and personal restrictions.[51]

On first sight refraining from prosecution constitutes a violation of the principle of legality. Yet to do the impossible can never be an obligation. ("Impossibilum nulla obligatio est")[52]

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[51] In Germany, in 1985 in only 42% of cases reported by the police was a public prosecution instigated. Of the 58% of cases where the charges were dropped 33% were dropped for lack of evidence, in 25% the principle of mandatory prosecution was violated. (see Dr. Roland Miklau, "Grundfragen der Reform des Vorverfahrens" (Österreichische Richterwoche 1988, 20.-26.3. 1988, Badgastein (hereinafter: Miklau, Grundfragen)); compare Prof. Dr. Rieß, *supra* note 22.

[52] Celsus, *Digesten* 50,17,185.

Since the state is not willing to provide enough resources and thus to enable its agents to investigate and prosecute every single case, it cannot oblige them to do so. The factual limitations act as limitations to the duty to prosecute. Hence, there exists an inconsistency between law and reality.

The issue arises how the limited resources should be distributed. Every single case, looked at individually, can be brought to an satisfactory end. Only all the cases together are impossible to deal with. The law leaves its agents without guidelines and information how to act. Although it is possible to investigate single cases, it is impossible to prosecute them all to their full extent. The law enforcement agents thus have to decide which cases to pursue. They have to act in the best interest of society and have to take into account the importance of the single crimes, the proportionality of investment and seriousness of the offence.

Since the state cannot insist on the obedience to a principle that is impossible to follow to its full extent, the principle of mandatory prosecution can only order the "optimal" prosecution. Hence, the law enforcement agents have the obligation to prosecute as much as possible, whereby the optimum is not the greatest number of cases, but the optimal balance of seriousness and number of cases.

Thereby the police face the problem of not knowing in advance which evidence will be important, which case will lead to a conviction and which traces to follow. They have to rely on personal experience and their estimation of the importance of cases. Hence, reality and factual limitations create a large realm of decision making power for the law enforcement agents. Yet, in Austria it is not the State-Attorney who investigates criminal cases. Therefore, factual limitations

can serve as an authority for the police to refrain from investigations, yet they cannot serve as an authority for the State-Attorney to refrain from prosecution.

(v.) Summary

So far the legal position of the prosecutors in Austria and Canada have been discussed and it can be concluded, that the Canadian prosecutor has a much broader range of competence and discretion compared to the Austrian, whose power is rather limited.

Within the range of possible actions, the only area where the Austrian State Attorney is free to decide whether or not to take action concerns the evidential strength of the case. Only if there are reasonable grounds to believe that a case will lead to a conviction does he have to lay charges.[53] Whether or not there is enough evidence to give probable grounds is subject to the prosecutor's interpretation.

The Canadian prosecutor has a much wider margin for bargains. After having considered the evidence and come to the conclusion that it is sufficient for bringing charges, he has to decide whether or not to do so. He has to take into account the public interest. He can refrain from charging; he can also choose to lay lesser charges if he believes it to be in the best interest of the public. However, if the prosecutor structures his policy decisions in harmony with norms of expediency rather than with norms of crime prevention the best interest of society will not be well served. It will not enhance the overall good to neglect the acknowledged goals of punishment in order to conserve assets. Furthermore, leniency as a result of plea bargaining may be a serious

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[53] See Dr. Frank Höpfel, "Gründe für ein Absehen von Verfolgung und Bestrafung nach geltendem Strafprozeßrecht" (Schriftenreihe des BMfJ: Strafrechtliche Probleme der Gegenwart, 1987) (hereinafter: Höpfel).

threat to the sentencing authority of the judge. Through plea settlements the prosecutor may usurp the sentencing function of the judge.

C. The Plea Bargain

1. The Accused's Part in the Bargain

A great number of 'agreements' take place in the course of a criminal process and one can imagine all kinds of 'benefits' the accused renders to the judicial system (e.g. compensating for the damage, serving as an informant, waiving the right to call evidence, not to appeal) This discussion will focus on deals where the accused's part of the bargain is a guilty plea.

Hence, the definition of 'plea bargaining' as the Law Reform Commission of Canada (in 1975) has pronounced it will be adopted:

> "We define plea bargaining as any agreement by the accused to plead guilty in return for the promise of some benefit."
>
> "A plea bargain between the Crown and the accused is made possible by the accused's right to plead guilty, and by the Crown's discretionary powers, particularly in charging."
>
> (Law Reform Commission of Canada, 1975)[54]

[54] Law Reform Commission of Canada, Working Paper No. 15, *Criminal Procedure: Control of Process*, 48 (1975), (hereinafter: the Commission, 1975).

a. Guilty Plea and Confession

A plea bargain is a deal between the accused and the prosecutor/judge whereby the accused's consideration consists in pleading guilty.

Yet, in Austrian Law a guilty plea with the effects of definitely disposing of the question of guilt or innocence does not exist. Dispositions thereof cannot bind the court. Although the judge will, at the beginning of the trial, ask the defendant which stance he or she takes towards the accusations,[55] the judge will have to investigate whether or not the plea is consistent with the facts of the case, even if the defendant pleads guilty. A guilty plea in Austrian Law is nothing other than a confession. But if a confession is not questioned further it may have the same effect as a guilty plea.

Therefore the court decisions and scholarly arguments with respect to how a confession should be treated and in which cases the court should further investigate must be examined.

Contrary to the Anglo-American process, an agreement between the State Attorney and the accused can never replace a trial. The defendant may plead guilty or make a confession in the course of the trial, but the judge will always have to call evidence to prove the truthfulness of the confession. How much more evidence is needed, apart from the defendant telling in detail what has happened, is subject to scholarly discussions.

The purpose of the plea agreement is to shorten the procedure (in Canada, to avoid a trial completely).

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[55] See § 245/1 StPO (Austrian Code of Criminal Procedure).

Austrian and German scholars are unanimous in holding that a plea settlement cannot replace the obligation of the court to investigate the substantial truth.[56]

In Austria, although a confession cannot replace the trial itself, it can substitute a lengthy production of evidence. In order to achieve this, the confession has to encompass more than just a guilty plea. The accused has to go beyond admitting his contribution to the unlawful act. He has to explain the details of the crime and talk about all the facts the court needs to be able to assess the truth and to make a just judgement. The accused has to give an account of every aspect of the offence.

Even after a confession that meets all these requirements it is questionable whether or not the court has the duty to inquire further.

Some German scholars say that a detailed confession can even replace additional evidence. Dahs[57] expressed this in the following way:

> "The inquisitorial principle is not a goal in itself and it can therefore be limited on the grounds of procedural economy and savings in time and costs."[58]

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[56] See Schmidt-Hieber, "Verständigung im Strafverfahren", NJW 1982, 1017 at 1020 (hereinafter: Schmidt-Hieber); see also Baumann Jürgen, "Von der Grauzone zur rechtsstaatlichen Regelung: Ein Vorschlag zur Einführung des Rechtsgesprächs in § 265 StPO" (1987) NStZ at 157 (hereafter: Baumann); and Schünemann, "Absprachen im Strafrecht" (1989) NJW at 1896 (hereinafter: Schünemann, Absprachen).

[57] Dr. Hans Dahs, "Absprachen im Strafprozess, Chancen und Risken" (1988) 4 NStZ 153 at 154 (hereinafter: Dahs, Absprachen).

[58] "Die Wahrheitsfindungspflicht ist kein Selbstzweck, sondern kann aus Gründen der Verfahrensökonomie und Prozeßbeschleunigung eingeschränkt werden.", Dahs, Absprachen, *ibid.* at 154.

Some authors argue that a very detailed confession can reduce the need for more evidence.[59] Others[60] think, that the court has to investigate in addition to a confession only if the documents, the applications or submissions of the parties or the facts, that have been determined during the course of the trial rise doubts about the truthfulness of the confession.

And the German Constitutional Court, in a resolution on the 27th of January 1987,[61] reduced the general principle of substantial truth even further by stating that in case of agreements between the parties, the court is only obliged to make inquiries if serious doubts arise.

It could be argued that within the realm of plea negotiations the doubts about the truthfulness of the confession are serious by nature.[62]

If the court contents itself with the confession it runs the danger of acting on a false admission of guilt. It might misinterpret a fictitious confession for being authentic. The defendant might honestly believe that what he is telling is true. He might not be able to remember what really happened. Or he may start to believe himself facts that he has heard over and over again at the police station when he was questioned about the crime.

On the other hand, the defendant may be aware of making a false confession but might want to cover up more offences or aggravating circumstances.

A confession can be a result of tactical decisions as well as a sign of resignation. The longer the procedure lasts and the stronger the evidence against a person is, the more even the

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[59] See Diskussionen zum 29. Deutscher Juristentag 1990, Abteilung Strafrecht (Discussions at the 29th German Legal Convention 1990, Department of Criminal Law).

[60] See e.g., Kleinknecht Th.- K.Mayer, *Strafprozeßordnung* (38. Aufl., München 1987) (hereafter: Kleinknecht-Mayer).

[61] DtBVerfG, Beschl. v. 27.1.1987, 2 BvR 1133/86 (=NStZ 1987, S.419).

[62] See Schünemann, Gutachten, *supra* note 42 at B 82.

innocent might be inclined to confess. If the probability of getting convicted is high the accused will want to soothe the consequences by admitting guilt.

Because of the possibility of false confessions, the court runs the risk of deciding unjustly if it contents itself with the defendant's guilty plea as the sole basis for its judgement. The court might convict an innocent or not punish the guilty offender according to his desert.

Therefore, the court has to examine whether or not the confession is believable and true. It must not simply accept with the defendant's account. More evidence is necessary to back up the accused's story.

Even the Canadian judge has the discretion[63] to examine the circumstances under which the guilty plea is entered. It does not go as far as the duty of the Austrian judge, though. The Canadian judge does not inquire about the substance of the plea, but rather about the circumstances under which the defendant pleaded guilty (e.g., voluntariness,[64] legal representation of the accused).

b. The Defence Counsel's Role in the Plea Bargaining Process

The defence counsel is a main actor in the plea bargaining process. Legal representation makes a substantial difference in plea bargaining. The defendant himself usually does not even

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[63] See *Adgey* v. *the Queen* (1973), 13 C.C.C. (2d) 177 at 177, 23 C.R.N.S. 298 (S.C.C.); in a 3:2-decision Dickson, J.J. for the majority stated: 'The trial judge is not bound as a matter of law in all cases to conduct an inquiry after a guilty plea has been entered." In the view of the minority, the trial judge has an obligation: 1. to determine that the plea was made voluntarily and that the accused has a full understanding of the nature of the charge and its consequences and 2. to determine that on the basis of the facts offered in support of the charge, the accused could be in law convicted of the offence charged.

[64] See e.g., *Guerin* v. *The King* (1933), 60 C.C.C. 350 (Que. K.B.).

participate in the discussions. On many occasions the defence counsel enters into plea negotiations without even consulting his client. It is only after having reached an agreement that he informs his client that negotiations have taken place.[65] The absence of legal counsel is usually accompanied by an absence of plea negotiation.[66] Often, the accused will not know what constitutes a "good deal". In that respect he has to trust his counsel.

The good relationship between the defence counsel and the prosecutor is essential in the bargaining process. Contrary to the accused, whose appearance in court is an exceptional event, the defence attorney is a regular actor in the courthouse. He has an interest in maintaining a good relationship with the other court actors.[67]

For the defence counsel a clear advantage of the negotiated guilty plea over trial practice is that the former permits the busy practitioner to deal quickly and efficiently with a much larger case load. In the pursuance of his own goals the defence attorney may forget about his client's interests. Although he has to rely on his counsel's integrity, the defendant has no means of controlling his conduct.[68]

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[65] See Hassemer-Hippler, "Der strafprozessuale Vergleich", StV 1986, 360 at 361 (hereafter: Hassemer); see also Terhorst, *supra* note 21 at 297.

[66] See T. Hartnagel, "Plea Negotiations in Canada" (1975) 17 Canadian Journal of Criminology and Corrections at 45; see also B.Grosman, *The Prosecutor: An Inquiry Into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969).

[67] See Dr. Hans Dahs, "Fallschilderungen", (1988) NStZ 154 at 157 (hereafter: Dahs, Fallschilderungen).

[68] See Widmaier, "Absprachen im Strafprozeß" (1986) StV 355 at 357 (hereinafter: Widmaier); see also A. Alschuler, "The Defense Attorney's Role in Plea Bargaining" (1975) 84 Yale L.J. 1179.

2. Rewards Offered by the Law Enforcement Agencies

While the accused's contribution is a guilty plea/confession, the question arises as to what kind of reward he/she receives in return for his/her admission of guilt. Plea negotiations can either take place between the accused and the prosecutor and/or police, or between the accused and the court. The possible benefits are thus dependent on the identity of the negotiators. The reward the accused is usually interested in is a lenient sentence.[69] Apart from a mild sanction, the prosecutor can offer rewards that are not directly connected to the sentencing process. He sometimes offers not to lay charges against friends and family members, not to apply for preventive detention, to recommend the place of imprisonment, the type of treatment, or the time of parole or not to oppose release on bail.

However, there are other reasons why an accused would want to plead guilty, for example, avoidance of expensive legal fees;[70] 'pleading guilty minimizes time, expense and uncertainty'; avoidance of public humiliation.[71] These benefits are not so much a result of plea bargaining but of the guilty plea *per se*.[72]

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[69] See Thomas Church, Jr.; 'Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment" (1976) Oakland University, Law & Soc. 8 (hereafter: Church, Plea Bargain).

[70] See Gerald Ferguson and Darrell W. Roberts, 'Plea Bargaining - Directions for Canadian Reform" (1974) 52 Can. Bar Rev. 497 (hereafter: Ferguson and Roberts).

[71] See David Lynch, 'The Impropriety of Plea Agreements: A Tale of Two Countries (From the Trenches and Towers: Plea Bargaining in the Trenches)" (1994) 19 Law and Social Inquiry 115 at 118 (hereinafter: David Lynch).

[72] See e.g., Schünemann (Gutachten), *supra* note 42 at B35; see also Solomon, *supra* note 10 at 41.

a. Rewards Offered by the Prosecutor

Plea negotiations usually take place between the prosecuting attorney and the defence counsel. The defendant himself is rarely involved. The prosecutor receives the file from the police and determines which charges are being laid. If the defence counsel has not approached the prosecutor already, the latter tries to get in touch with him. The two attorneys either communicate by telephone or they meet in court, in their offices or even at some other place. Plea discussions usually take place before the accused is asked to plead. Yet, the accused can always change his plea from not guilty to guilty; therefore, the parties can continue to negotiate until the trial judge (jury) has pronounced his/her verdict. When the two counsel have reached an accord, defence counsel will discuss this compromise with his client. If the defendant agrees to the terms of the bargain, he pleads guilty.

As noted above, many agreements occur between the prosecutor and the defendant. Therefore, the range of action the prosecutor possesses and the concessions he can offer in return for a guilty plea will be looked at.

It will be seen that the principles of procedure influence the kind of plea bargaining that takes place. The main differences in the criminal process may be observed in this area. The opportunities the respective principles and rules of both countries present for negotiations will be discussed. A good deal of attention will be given to the prosecutor's charging practice.

Due to the accusatorial nature of the procedure, the prosecutorial and the judging activity may not be amalgamated in the same person. This does not only signify that the judge is not

allowed to prosecute, but it also implies that the prosecutor cannot participate in the decision of the verdict and the sentence. Hence, what other possibilities does the prosecutor have to affect the severity of the sanction?

There are several ways to influence the outcome of the case.

One way to affect the sentence is to submit recommendations to the court as to the type or the severity of the sentence ("sentence bargaining") or to exercise influence on who is going to be the judge ("judge shopping").

Another way to exercise an influence on the sentence is by giving or withholding information concerning aggravating or mitigating circumstances ("fact bargaining") or by the choice of the charge, the decision as to how many and how serious offences to prosecute[73] ("charge bargaining").

(i.) Recommendations Concerning Sentencing ("Sentence Bargaining")

In Canada the prosecutor has the common law power to make submissions concerning sentencing. "Crown counsel is entitled to make submissions, but it is the prerogative of the court to accept such suggestion."[74]

The prosecutor thus has the right to submit sentence recommendations to the court. The latter is not bound to follow those recommendations.[75] The court's decisions to follow the suggestions vary greatly, even within a single jurisdiction.

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[73] See e.g., David Bereton and Jonathan D. Casper, "Differential Sentencing and the Functioning of Criminal Courts" (1981-82) 16 Law & Society Rev. at 68 (hereinafter: Brereton).
[74] *R.* v. *Mouffe* (1971), 16 C.R.N.S. 257 at p.261 (Que. C.A.), Riffert, J.A.

The Austrian Procedural Code obliges the prosecutor explicitly to apply for a certain punishment (§ 255/1). By virtue of this provision the prosecutor has to bring forward a motion concerning a range within which the sentence should be situated. He has the right to specify a certain punishment within this range. However, he is obliged to give reasons for all these suggestions.

While the prosecutors in both Canada and in Austria are entitled to make submissions concerning sentencing, the judges do not have to follow such recommendations.[76] Whether a judge will adopt the suggestion put forward by the prosecutor depends on his individual style and varies greatly, even within a single jurisdiction. Not only recommendations, but also joint submissions are always subject to the overriding discretion of the court. It will always be the judge who bears the main influence on the severity of the sentence and finally decides upon punishment. The accused therefore always has to take into account the risk the judge represents.[77]

Judges will probably be more inclined to follow the joint submissions of prosecution and defence[78] than those of only one party. While the judge is not obligated to accept the prosecutor's sentence recommendation, it is rare that a judge hands out a sentence that is more severe than that recommended by the prosecutor.[79] Usually the judge will follow the crown's

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[75] See e.g., Paul Thomas, "An Exploration of Plea Bargaining" (1969) Crim. Law Rev. 69 at 71 (hereafter: Paul Thomas, Exploration); compare *Attorney-General of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 (Que.Q.B.).

[76] See Paul Thomas, Exploration, *supra* note 75 at 73.

[77] See Law Reform Commission of Canada, Working Paper 60, *Plea Discussions and Agreements* (Ottawa: The Commission, 1989) (hereinafter: the Commission, 1989) at 46.

[78] See *R.* v. *Greene* (1971), 20 C.R.N.S. 238 (S.C.C.).

[79] See Klein, *supra* note 3 at 18.

recommendations but they may also reject them,[80] and they have to and will do so, if they believe, that the recommended sentence is not justified by the facts of the case.[81]

(ii.) Determination of the Person of the Judge ("Judge Shopping")

An additional object for bargains and a method to influence the sentence is the prosecutor's choice to proceed before a particular judge. The prosecuting attorney can threaten the defendant to go before a judge who is known for his harsh sentences if the defendant does not plead guilty.

In Canada the person of the judge depends on the trial date, which is usually fixed a long time ahead. It is therefore very difficult to exercise any influence regarding the identity of the adjudicator. Judge shopping is not a very common way of plea bargaining.

Similar is the case, where the prosecutor promises not to force trial by jury or to choose summary conviction instead of indictable procedure in hybrid offence cases. The range for sentences is lower in summary proceedings.

In Austria this way of action does not serve for negotiations. The Austrian accused has a right guaranteed by Constitution to be tried before a judge who is determined by Law ('Recht auf den gesetzlichen Richter').[82] The level of court (county or provincial court) is determined by the nature of the offence. A case falls into the jurisdiction of a particular court if the crime has been committed within the geographical area of the court's jurisdiction. If this jurisdiction consists of

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[80] See *R.* v. *Simoneau* (1978), 40 C.C.C. (2d) 307 (S.C.C.).
[81] See Ferguson and Roberts, *supra* note 70 at 561.
[82] See Art. 83 Abs.2 B-VG (Federal Constitutional Code).

more than one judge, each judge is responsible for a group of letters. One judge would, for example, be responsible for the letters A-E, another one for the letters F-L, etc. A case will then be assigned to a particular judge on the basis of the last name initial of the offender.[83] As for the right to be tried before a judge who is determined by law, the possibility of the prosecutor to threaten an accused with a severe judge, or, on the contrary, to entice him with a lenient one is not existent in Austrian Law. The State Attorney cannot exercise any influence in these matters.

(iii.) Fact Bargaining

Fact bargaining is a method to influence the severity of the sanction, whereby the prosecutor promises not to mention aggravating circumstances. The prosecutor can, for example, refrain from mentioning a criminal record or make submissions about the role the accused has played in committing the crime (e.g.: instigator or assistant[84]). However, the 'Legalitätsprinzip" (principle of legality) obliges the prosecutor to disclose all the circumstances of a case. What's more, the inquisitorial principle requires that the courts investigate all the circumstances, whether or not a party has referred to them.

Furthermore, the Austrian State-Attorney is not the one who collects the evidence. Even though factual limitations to the principle of legality permit certain restrictions to the duty to

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[83] See Art. 87 Abs.3 B-VG; § 18 u. §§ 32 u. 3 GOG (BGBl. 1951/264).

[84] The accused's role in the offence is a relevant sentencing factor. See ss. 21, 22, 23 and 463 of the Canadian *Criminal Code* for definitions of parties and accessories after fact. An aider and abettor or an accessory after the fact may deserve a lesser sentence than a principal actor. (see *R.* v. *Morrisette* (1970), 1 C.C.C. (2d) 307; 12 C.R.N.S. 392: 75 W.W.R. 644; 13 C.L.Q. 268 (Sask. C.A.); also *R.* v. *Maruska* et al. (1983), 8 C.C.C. (3d) 74 (Que.C.A.); *R.* v. *Gordon* (1983), 47 A.R. 31 (Alta.C.A.); *R.* v. *Rouse* (No.2) (1981), 59 C.C.C. (2d) 25 (B.C.C.A.); *R.* v. *Lecapoy* (1974), 18 C.C.C. (2d) 496 (Alta. C.A.); *R.* v. *Ponak and Gunn* (1973), 11 C.C.C. (2d) 346 (B.C.C.A.).

conduct investigations, these limitations do not apply to the prosecutor but to the police. Therefore, it is the police who have the opportunity to enter into fact bargaining.

It follows that the prosecutor does not have the statutory power to prevent further investigation and convictions for more serious offences. A deal between him and the defendant therefore always bears a risk for the latter, for the prosecutor is not in the position to guarantee any outcome of the trial.

(iv.) "Charge Bargaining"

As mentioned before, the procedures in Austria as well as in Canada are accusatorial by nature. If the Attorney General (State Attorney) does not lay charges, there can never be a conviction. The Canadian judge's discretion to reject a plea is limited insofar as he is not allowed to go beyond the information or indictment.[85] Yet s.434(6) of the *Criminal Code* suggests that a judge may refuse to accept a plea to a lesser charge. Ultimately, however, the Crown's power to initiate a stay of proceedings could nullify any judicial attempt to oversee the 'appropriateness' of charge reductions and withdrawals by the Crown.[86]

Some[87] argue that the promise to have a charge reduced in exchange for a guilty plea can be meaningless in terms of the outcome of the sentence. But whether or not it actually affects the sentence, is not important for the purpose of plea negotiations. As long as the defendant believes that he will receive a lighter punishment, he will be inclined to plead guilty. However, the prosecutor is typically interested in a conviction. Not to take actions against a suspect in a case

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[85] See *R.* v. *Shand* (1977), 30 C.C.C. (2d) 23 (S.C.C.).
[86] See s. 579 of the Canadian *Criminal Code*; see also Ferguson and Roberts, *supra* note 70.
[87] See e.g., Schünemann, Gutachten, *supra* note 42 at B39.

only makes sense if the alleged offender pleads guilty, in return, to another charge or at least to a lesser included offence.

A lesser offence can be an included offence, for example manslaughter instead of murder.[88] The original offence is, for example, constituted by the facts A,B,C,D, but the prosecutor lays charges for an offence that is constituted by the facts A,B and C only. He can, for example, charge an attempted instead of the completed offence.

In addition, any offence that has a more lenient range of punishment can serve as a lesser offence for the purpose of plea negotiations.

The guilty accused, who profits from this kind of deal, has every interest to plead guilty to the less serious offence, otherwise he would be in jeopardy of being convicted for a more serious offence and have a harsher sentence imposed on him. Why would the prosecutor agree to these conditions?

He need not engage in a lengthy and costly trial to prove his case.[89] It may also present an advantage for the victim who does not have to be called as a witness.[90]

Although those reasons clearly present an advantage for the prosecutor, it is questionable whether they are in the best interest of society.

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[88] See *Criminal Code*, s.662 (included offences) and s.660 (attempts).

[89] See e.g., Bode, *supra* note 29 at 244; see also Dörr, *supra* note 21 at 487 and Terhorst, *supra* note 21 at 296.

[90] See *R.* v. *Shanower* (1972), 8 C.C.C. (2d) 527 (Ont. C.A.); see also *R.* v. *Spiller*, [1969] 4 C.C.C. 211 (B.C.C.A.).

The prosecutor has an interest in winning the case, hence to see the accused convicted with as little effort as possible and the least possible expenditure of time and money. If a person has committed an offence A and is consequently convicted of a lesser offence B, it might still represent a success for the prosecutor. It would be an even bigger success if the accused would be convicted of the offence A.

In order to achieve this, prosecutors sometimes lay charges for an even more serious offence or create a number of counts rising out of the same occurrence and afterwards bargain down to the charge, that is in fact normally laid.[91] This practice is called 'overcharging".[92] A statement commonly found is, that plea bargaining induces the prosecutor to overcharge[93] with the intention of bargaining down to a "normal charge."

There are a variety of ways to overcharge. The prosecutor can lay multiple charges that rise out of a single transaction, he can charge different offences out of different transactions. He can on the other hand accuse the defendant of one offence and bargain down to an included offence or attempt of the same offence.

Why would the accused agree to plead guilty to a less serious charge if he could only be convicted for this lesser offence anyway?

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[91] See Weigend, Amerika, *supra* note 21 at 200.

[92] See e.g., Richard Ericson and Patricia Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto, University of Toronto Press, 1982), (hereinafter: Ericson) at 115.

[93] See Church, Plea Bargains, *supra* note 69 at 3, "The system produced a tendency toward overcharging. The level of charge was the predominant currency ... and thus was almost always negotiable."

A reason for the accused to enter into negotiations deals with the interpretation of the evidence. Many accused persons suffer more from the uncertainty about the outcome of the trial than from the actual punishment. They just want to "get it over with".[94]

Often the situation is not clear and the outcome of the trial is subject to the interpretation and discretion of the judge. This uncertainty is even greater in jury trials. It may therefore present an advantage for both parties to enter into negotiations and to find a compromise.[95] The defendant might, for example, plead guilty to 2nd degree murder if the evidence would allow a conviction of either 1st degree murder on the one hand side or manslaughter on the other hand.[96]

However, in Austria like in Canada the court's competence is restricted by the prosecutorial submissions as far as it concerns the facts.[97] But contrary to the Canadian courts, the Austrian courts are not bound by the prosecutor's legal assessments (§ 262 StPO).[98] As long as the facts are consistent with the facts in the charge, the court is free to interpret them and arrive at its own conclusions as to the legal nature of the offence. And even with respect to the facts of the case, the court has to base its ruling on the circumstances that have been assessed during the course of the trial, which is also true in the case where those circumstances lead to a conviction for a different offence than the one charged (§§ 261/1, 262).[99] The judge can

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[94] See Widmaier, *supra* note 68 at 358; see also Ferguson and Roberts, *supra* note 70 at 529, "...a reduced charge or a lighter sentence [...] is better than running the risk of a conviction of a serious charge which carries a heavy sentence."

[95] See Kenneth Kipnis, "Plea Bargaining: A Critic's Rejoinder" (1979) Law & Soc. Rev. 555.

[96] See Ericson, *supra* note 92 at 132.

[97] See § 267 and § 281 Abs.1 Z.8 StPO (in jury trials § 345 Abs.1 Z.7).

[98] See Bertel, Christian, *Die Identität der Tat* (Wien - New York, 1970) (hereinafter: Bertel, Idendität); see also H. Wegscheider, *Echte und scheinbare Konkurrenz* (Berlin, 1980) at 97f.

[99] See Bertel, Idendität, *ibid.* at 92ff.

therefore convict the accused for a more serious offence than the one charged as long as it concerns the same actual occurrence.

b. Judicial Plea Bargaining

The rewards the judge can offer in return for an admission of guilt will now be examined. While the prosecutor has a big realm of discretion and thus the power to affect the outcome of the proceedings greatly in Anglo-American law, in Austria it is the judge who exercises the main influence.

Thomas Church, Jr.[100] describes his experiences in an American county court, where a new county prosecuting attorney had instituted a policy forbidding charge bargaining.

> "...he [county prosecuting attorney] instituted a strict policy forbidding charge reduction plea bargaining in drug sale cases ... Prior to the new prosecutor's plea bargaining initiative, the vast majority of criminal cases were disposed of without trial after negotiation between assistant prosecutor and defence attorney. Reduced-charge-guilty-pleas - the predominant mode of disposition in 1972 - were almost eliminated. The trial rate soared and the total proportion of cases decided through pleas of guilty fell considerably. ... even at their most intransigent, nearly three out of every four post-policy drug sale defendants pleaded guilty.... a more explicit plea bargaining system would emerge again, albeit in *sub rosa* fashion. The kinds of bargains struck and the arena in which they took place changed. Bargain justice continued. The basic concern is sentence.
>
> Defence counsel ... began to seek direct sentence assurances. The judge and "his" prosecutor... often developed close working relations based upon mutual respect and trust. The judge encouraged sentence recommendations... and almost invariably followed them. The prosecutor was still doing the bargaining. The judge himself made no pre-plea assurances concerning sentence. In some courtrooms the position of "chief bargainer"... was filled by the judge. In others, the position apparently remained vacant. The major difficulty ... was lack of information relevant to the sentencing decision. The process appeared more as the statement of a

[100] Church, Plea Bargains, *supra* note 69 at 8.

> hypothetical situation to the judge to which he responded with a hypothetical sentence. Any explicit granting ... was intentionally avoided. Roughly half the bench would make some form of pre-plea sentence commitment."

Church's observations of the bargaining practice in this county court in the United States give an accurate account of the situation in Austrian courts. It is not the prosecutor who bargains, but the judge who more or less expressly indicates the sentences for a conviction subsequent to a confession or after a full trial.

The Austrian judge profits from a plea bargain because he does not have to engage in lengthy trials. If the defendant confesses, the judge does not have to question witnesses and investigate further. Moreover, if the parties have reached an agreement, it is unlikely that one side will appeal the decision. If no party appeals the judge does not have to write a detailed judgement. A confession on the part of the accused will therefore reduce the judge's workload. A confession will also ease the judge's moral responsibility. For notwithstanding all the evidence proving his guilt, the defendant who denies guilt could be innocent. It is easier to punish a person who admits guilt and thus agrees to be punished.

The defendant profits from judicial plea bargaining because the judge can directly affect the outcome of the case. The prosecutor can affect the severity of the sentence by his decision concerning the number and the kind of the charges and by his submissions concerning the sentence. However, one has to bear in mind that there will always be the judge's discretion as an uncertain element and it can therefore be quite hazardous for the defendant to rely on such a deal. The prosecutor cannot guarantee that the judge will follow his sentence recommendations. Even if he charges a lesser included offence he cannot warrant a lenient sentence. The Canadian judge has broader discretionary power in sentencing than that given to any single lower court judge in

Europe, the Commonwealth or the United States. With only a few exceptions, there are no mandatory sentences in Canada.[101]

The Austrian Criminal Code indicates sentence ranges for the different offences. The Austrian judge, nevertheless, has a very broad discretion for sentencing.[102]

Therefore, a defendant who seeks a favourable deal should concern himself more with a negotiated sentence than a negotiated charge.[103] However, judicial plea bargaining is not very common in Canadian courts. Judges rarely get involved in plea discussions but typically ratify the agreement. Any participation in the plea bargaining practices by judges is regarded as being very improper.

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[101] The basic Code rules granting discretion to the sentencing judge are set out in s.717 (1) and (2) and s. 736 of the Canadian *Criminal Code*, allowing absolute or conditional discharges. For an example of a mandatory sentence in Canada, see s. 235 (1) of the *Criminal Code*: the punishment for first and second degree murder is life imprisonment.

[102] See §§ 75 ff. StGB (Penal Code), BGBl.1974/60 i.d.F. BGBl. 1984/295.

[103] See Klein, *supra* note 3 at 10.

PART II: PPROTECTION OF THE ACCUSED

Two problems are likely to arise with the settlements of cases by the way of negotiations. First, the public interest may suffer, the punishment being too lenient. And a second problem might be the violation of the defendant's rights of due process.

One point of criticizm is the lack of protection for the accused. Opponents of the plea bargaining system argue that innocent people might get convicted. Furthermore, there seems to be little protection for the accused in case the other party does not comply with the terms of the bargain. Can the plea agreement be enforced? The issue arises whether or not a plea settlement is binding for the parties involved. This problem is related to the question of the nature of a plea settlement. The decisions of the appellate courts will be examined in order to find out how those courts rule in cases where fair play issues are irreconcilable with appropriate sentences. How can the accused be protected against unfair methods on the part of the prosecution? In order to determine possible remedies the Canadian Charter[104] and the common law doctrine of "abuse of process" will be discussed.

A. Enforcement of the Plea Agreement - Nature of the Bargain

A plea agreement consists in a deal between the prosecutor/judge and the defendant, whereby the defendant pleads guilty in return for the promise of some benefit from

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[104] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982 c11 [hereinafter Charter].

prosecutor/judge. Given that there are good reasons for a guilty plea leading to a lower sentence, the question remains: What is the bargain in all this? Some scholars call it a tacit bargain,[105] but it is arguable whether it is a bargain at all.

Some scholars argue that most defendants would plead guilty no matter what, even without the inducement of a 'bargain'.[106] On the other hand, it has been said that in most cases the punishment after a full trial is the same as after a guilty plea.[107] Only if the defendant pleads guilty just because of the negotiations is the element of the bargain met.[108] The accused's guilty plea and the lenient sentence thus have to stand in some relation to one another. Therefore the nature of this relation will be examined. Is the plea settlement a contract, an informal deal without any legal consequences or a gentlemen's agreement?

1. Contract

> "A contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing. It is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[109]

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[105] See e.g., Ferguson and Roberts, *supra* note 70 at 510.
[106] See Ferguson and Roberts, *supra* note 70 at 521-522.
[107] But see Brereton, *supra* note 73 at 48, '[the] findings strongly suggest that most principal court actors share the view that it pays to plead guilty."
[108] See Schünemann, Gutachten, *supra* note 42 at B 67.
[109] Henry Campbell Black, *Black's Legal Dictionary*, (6th ed., St. Paul Minn., West Publishing Co., 1991).

Hence a contract is legally binding on the parties. If they do not act in accordance with the plea agreement the contract can be enforced.

In Austria, the agents of the state derive their ability to take legal actions from the law unlike the accused who, as a human being, has natural rights and whose actions are legal unless there is a norm prohibiting them. The representatives of the state are only allowed to act if a norm exists that entitles them to do so. Whatever is not explicitly permitted by a rule, is prohibited. Hence, while the law has only a limiting function in relation to the defendant it is the root of all the moves of the law-enforcement agents.[110] They may not do anything without a legal rule which serves as a basis for their actions. If a plea contract is to take place within the legal framework a rule has to be found that can serve as a basis for it.[111] What are laws that can provide a basis for administrative acts in general and more specifically for actions in the administration of criminal justice? Sources of law are the codified rules. There is a controversy in Austria whether or not the constitution excludes common law as a source of law in addition to the statutory rules.[112] However, in the field of criminal law common law is expressly excluded by Art. 18 B-VG.

If plea agreements are to be legal there has to be a statutory rule entitling the prosecutor or the judge to bargain. Such a rule does not exist.

It has been argued that the basis for plea agreements is not the law itself but the rationale of the law. The procedural rules admit some forms of co-operation between the courtroom

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[110] By virtue of Art.18(1) B-VG (Federal Constitution Law) the entire administration of the state may only be exercised on the basis of the laws. "Die gesamte staatliche Verwaltung darf nur aufgrund der Gesetze ausgeübt werden."

[111] See Schünemann, Gutachten, *supra* note 42 at B 72.

[112] See Robert Walter, "Die Gewohnheit als rechtserzeugender Tatbestand", OJZ 1966, 1(6f.); Adamovich-Funk, *Allgemeines Verwaltungsrecht*, (2. Aufl., Wien - New York, 1984) 238f.

actors. Plea negotiations are not explicitly prohibited. The persons involved will settle issues where it is advantageous and in the best interest of everyone.[113] However, this opinion holds that whatever is not proscribed is approved. The law's function alters from being a basis of all state actions to circumscribing them. This conflicts with the principle that that the government and the administrative branch may only proceed on the basis of a legal norm.[114] Therefore the prosecutors and judges may not make plea contracts with the defendant.

In Canada statutory rules permitting plea agreements do not exist either. But here, apart from statutory rules, common law is accepted as a source of law.[115] Thus court decisions have to be consulted to determine whether or not they recognize plea settlements as legally binding contracts.

The courts and the scholars deny the binding nature of a plea bargain by arguing that such an agreement 'may result in a judge binding himself to an inappropriate sentence at a time when he does not have a pre-sentence report or other relevant sentencing data. This would leave the judge in the difficult position of either violating the bargain or imposing an inappropriate sentence."[116]

Furthermore, the prosecutor negotiating with the defendant can never bind the judge.

> "Again, it must be pointed out, that the judge is never bound by the bargain in law ... The judge is not bound to impose the ... sentence and herein lies the root cause for appeals by

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[113] See W. Schmidt-Hieber, "Verständigung" (1986) StV 355 (hereinafter: Schmidt-Hieber, Verständigung).
[114] See Art.18 B-VG.
[115] See ss.8 and 9 of the Canadian *Criminal Code.*
[116] See Ferguson and Roberts, *supra* note 70 at 558.

> defendants. A defendant may be quite satisfied ..., but the bargain may not be kept by the other side... The problem of enforcement ... is ... one of the gravest."[117]

Hence, the prosecutor cannot promise something that falls into the sphere of the judge's responsibilities. The judge should have a free hand in disposing of a case as he or she sees fit after hearing all the evidence.

"Neither the lawyer nor the prosecutor can bargain for the court." [118] They can only make sentence recommendations[119] which can be rejected by the judge. Even if the judge agrees with these representations he is only morally bound.[120]

It is questionable whether or not the Crown can make binding promises regarding its own responsibilities.

In *Attorney-General of Canada* v. *Roy*[121] plea bargaining was not regarded with favour by the court. The court held that it was not bound by Crown counsel's suggestion.[122] The judge should be satisfied that the accused realized the sentence would be determined by the court. Yet the Court said that the Crown upon an appeal would not be heard to repudiate its position taken at trial except in circumstances where the imposition of the sentence was illegal or where the Crown had been misled at trial or where the public interest in the orderly administration of justice outweighed the gravity of the crime and the gross insufficiency of the sentence.[123]

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[117] Paul Thomas, Exploration, *supra* note 75 at 71.
[118] *Cortez* v. *U.S.*, 337 F. 2d 699 (C.A. Cal., 1964).
[119] See e.g., *R.* v. *Agozzino*, [1970] 1 C.C.C. 380 (Ont. C.A.); *R.* v. *Mouffe* (1971), 16 C.R.N.S. 257 (Que.C.A.); *R.* v. *Kirkpatrick*, [1971] C.A. 337 (Que. C.A.).
[120] See Paul Thomas, Exploration, *supra* note 75 at 74.
[121] In *A.G. of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 (Que.Q.B.), Crown counsel at trial suggested a fine in a certain amount. The accused was subsequently fined that amount upon entering a plea of guilty. After the sentence was given, the Crown then appealed on the grounds that the sentence given was too lenient.
[122] See also *R.* v. *Morrison* (1981), 63 C.C.C. (2d) 527 (N.S.S.C. App. Div.).
[123] Upheld in *R.* v. *Kirkpatrick* (1971) and *R.* v. *Agozzino* (1970), both *supra* note 119.

In *R.*v.*Agozzino*[124] the Court held that "...it would be quite unfair ... for the Crown, by means of the appeal to change its position by asking for a substantial term of imprisonment. ... The appeal repudiates the position taken by Crown counsel at the trial...."

Hence, although the plea agreement is not a legally binding contract a repudiation of the bargain would constitute an abuse of process on the part of the Crown.

Therefore, some scholars recommend giving the concluded bargain the status of a legally enforceable contract and adopting a more distinct procedure in arriving at a bargain.[125]

2. Gentlemen's Agreement

> "A gentlemen's agreement generally is an unsigned and unenforceable agreement made between parties who accept it's performance because of good faith."[126]

A gentlemen's agreement follows a discussion between the participants whereby the judge or prosecutor tells the defence counsel how they will act in a certain case. The parties sometimes refer to hypothetical situations.

Due to the lack of legal basis, the plea bargain cannot be made in the form of a legally binding contract between the parties. Yet rules exist that entitle the court actors to communicate and negotiate without legally binding themselves. A gentlemen's agreement is only morally binding. The parties discuss their future motions and agree to behave in a certain way. The

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[124] *Supra* note 119;
[125] See Paul Thomas, Exploration, *supra* note 75 at 75.
[126] *Black's Legal Dictionary*, *supra* note 109.

prosecutor or judge who enters into negotiations needs a legal basis for these discussions as well. Consequently a norm has to be found that can serve as a foundation for plea negotiations.

In Austria, § 198 StPO (Code of Criminal Procedure) provides that the investigating magistrate may, during the pre-proceedings, ask the defendant to give an account of the circumstances of the crime. Furthermore, § 220/1 StPO obligates the presiding trial judge to question the defendant within 24 hours before the trial takes place.

These rules entitle the court to communicate with the defendant. And although they cannot serve as a basis for binding contracts, they provide a foundation for negotiations. Yet the law enforcement agents may not promise any rewards that are illegal. They can only agree to act in a way that is prescribed by procedural rules. Hence the law enforcement agents can declare how they will handle a case but they may not make concessions that are not warranted by the facts and provided for in law.

Most scholars hold that the plea discussions lead to a result in form of a gentlemen's agreement. According to a German survey, ten out of thirteen participants absolutely confirmed the obligating nature of the deal.[127] Yet this obligation is rather a moral than a legal one. If the actors at court want to maintain their good relationship with each other,[128] they have to keep their promises. Therefore, the morally binding deal can be just as reliable due to the interests of

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[127] See Hassemer, *supra* note 65 at 362; see Bode, *supra* note 29 at 288; see also Hanack, "Absprachen", (1987) StV at 500 (hereinafter: Hanack), "An agreement is only a declaration of one's intentions and thus not binding."

[128] See Schünemann, Gutachten, *supra* note 42 at B 34.

the parties and the relationship of trust between the participating actors.[129]A deal is regularly made just with defence lawyers who are trustworthy. A breach of trust is a "deadly sin".[130]

3. Concerted Action

> "A concerted action is an action that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme. It is a mutually contrived or planned activity."[131]

The parties are not even morally bound, they comply with the terms of the concerted action due to their mutual interests. A concerted action can also take the form of a 'tacit plea bargain."[132] The parties do not even discuss the case. Yet all participants know that a sentence discount for a guilty plea exists and thus act accordingly. It is questionable whether a concerted action can be called plea bargaining at all. Ferguson and Roberts argue that,

> "...a charge reduction in exchange for a guilty plea is plea bargaining unless the prosecutor would have reduced the charge ... regardless of whether or not the accused agrees to plead guilty."[133]

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[129] See Dahs, Absprachen, *supra* note 57 at 154.
[130] Hanack, *supra* note 127 at 503; compare the *Code of Professional Conduct of the Canadian Bar Association* (1988).
[131] *Black's Legal Dictionary*, *supra* note 109.
[132] Ferguson and Roberts, *supra* note 70 at 502, 'Plea bargaining may be divided into two major types: express and tacit."
[133] Ferguson and Roberts, *ibid.*

The defendant pleads guilty and thereby relies on the judge's sentencing practice to grant a concession for the admission of guilt. If the accused's expectations are violated he has no means to change the result.

B. Charter Issues and Abuse of Process

The plea agreement cannot be enforced. If a party breaks the deal the opponent has no other legal device but refraining from fulfilling his part of the agreement. A problem arises if the accused has already pled guilty or confessed, yet the other party does not stick to the terms of the agreement. Are there any safeguards for the accused who pleads guilty other than the integrity of the law enforcement agents?

In Canada, the defendant who pleads guilty can, under certain circumstances, withdraw his plea. In Austria, the defendant cannot take his confession back. The only retribution for the prosecutor is a rejection of its appeal.[134] The only legal device for the defendant who has pled guilty is to take motions of appeal on the grounds of a Charter violation or on an abuse of process on the part of the prosecution. Therefore, the remedies enshrined in both, the Canadian Charter and the European Convention of Human Rights will be investigated.

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[134] An appeal court will take into account any impropriety or unfairness in the conduct of the Crown prosecutor on a sentence appeal. (see *R.* v. *Wood* (1975), 26 C.C.C. (2d) 100, [1976] 2 W.W.R. 135 (Alta. C.A. App.Div.)).

1. Charter Rights

> "Plea bargaining is the process by which the defendant in a criminal case relinquishes his right to go to trial in exchange for a reduction in charge and/or sentencing"[135]

The purpose of the Charter of Rights is to protect individuals from the violation of their personal rights by the State.[136] It is intended to constrain government action inconsistent with those rights and freedoms. Hence, it is the protection of the accused which will be considered here. This will be done by examining Charter ss. 7 and 11(*d*) and their counterparts in the European Convention of Human Rights. Although the Canadian Charter and the European Convention sound similar, the interpretation given to those provisions by Canadian courts differs a lot from the Austrian interpretation.

Section 11 (*d*) of the Canadian Charter provides that "[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

The European Convention in its article 6 provides:

> (1) In the determination of civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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[135] See Milton Heumann, *Plea Bargaining, the Experiences of Prosecutors, Judges and Defense Attorneys* (Univ. of Chicago Press, 1978) (hereafter: Heumann).
[136] See e.g., *Hunter* v. *Southam Inc.* (1984), 41 C.R. (3d) 97, 14 C.C.C. (3d) 97 (S.C.C.).

Both the European Convention, which has the status of a constitutional law in Austria and the Canadian Charter guarantee the presumption of innocence and the procedures that must be followed to rebut that presumption.[137]

Is plea bargaining consistent with these constitutional guarantees? There might be problems with the presumption of innocence. It is not only the judge, but also the prosecutor who is bound by this presumption.[138] How can the parties bargain at all if they hold that the defendant is presumably innocent. Is not the very fact that negotiations take place a reversal of the presumption of innocence?[139] While scholars and courts in Austria clearly hold that plea agreements offend this procedural guarantee, the Canadian Courts have ruled otherwise. An analysis of the arguments that have been brought forward by both points of view will be made.

In Canada, plea bargaining is a practice that is not provided for in law. The prosecutor uses his broad discretion to negotiate for a guilty plea. The question arises whether the courts have the right to review actions of the Crown which belong to the administrative branch.

In *Operation Dismantle Inc.* v. *R.*.[140] the Court unanimously held that cabinet decisions are reviewable by the courts under the Charter and that the executive branch of the Canadian government bears a general duty to act in accordance with the Charter.

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[137] See Jerome Atrens, *The Charter and Criminal Procedure - The Application of Sections 7 and 11* (Toronto: Butterworths, 1989) at section 11(d), 6.6.

[138] See Schünemann, Absprachen, *supra* note 56 at 1712; compare *Attorney-General of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 (Que.Q.B.); but see EKMR, Ev.23.3.1972 (5076/71), CD 40,64.

[139] See § 3 StPO.

[140] [1985] 1 S.C.R. 441, (1985) 59 N.R.1 (S.C.C.); see also Nestler-Tremel, "Absprachen im Strafprozeß" (1988) DRiZ, 288 ff. (hereinafter: Nestler-Tremel).

In Austria a special "Administrative Court" reviews decisions by the administrative branch. Furthermore, the "Constitutional Court" reviews not only court decisions but also administrative actions.

a. Presumption of Innocence

The constitutional guarantees of the presumption of innocence in Austria and Canada use similar words. In both countries a person is presumed innocent until proven guilty according to law. Yet, although there is a clear similarity in the provisions dealing with the presumption of innocence, their respective interpretation differ quite a bit.

Schünemann[141] holds that a literal interpretation of Art. 6 of the European Convention indicates the inconsistency of plea bargaining with the presumption of innocence. A guilty plea does not constitute a proof in a fair and public hearing and thus should not be sufficient ground for a conviction. But the Canadian courts have not ruled plea bargaining to be inconsistent with s.11(*d*) of the Charter; nor has the European Court of Human Rights so ruled in relation to Art. 6 (1,2).[142]

In Canada it is section 11(*d*) of the Canadian Charter of Rights and Freedoms which provides:

> "Any person charged with an offence has the right ...(*d*) to be presumed innocent until proven guilty according to law in a fair an public hearing by an independent and impartial tribunal."

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[141] Schünemann, Gutachten, *supra* note 42 at B 79.
[142] See e.g., EKMR, Ev.23.3. 1972 (5076/71), CD 40,64.

(i.) Procedural Presumption of Innocence

The Court defines the presumption of innocence as the principle that puts the burden of proof on the prosecutor.[143] It is not the accused who has to prove his/her innocence; every essential ingredient of the offence must be proved by the Crown beyond a reasonable doubt.[144]

Because trial processes are never perfect and mistakes are bound to occur, the innocent accused has to be protected against such mistaken judgements. In civil matters a mistaken judgement for one side is no worse than a mistaken judgement for the other since both parties have the same interest at stake.[145] In a criminal case on the other hand, the individual charged with an offence faces grave social and personal consequences, including potential loss of physical liberty. In light of these consequences the presumption of innocence is crucial.

The courts may have increased the total number of mistaken decisions in criminal cases, but with the worthy goal of decreasing the number of one kind of mistake - conviction of the innocent. The view is thus expressed that it is "significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free." [146]

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[143] See e.g., *R.* v. *Oakes* (1986), 50 C.R. (3d) 1, 24 C.C.C. (3d) 321 (S.C.C.); yet, the duty of the Crown to prove every essential ingredient of the offence is subject to statutory exceptions that have been held to be justified under s.1 of the Charter.

[144] See *R.* v. *Graham* (1972), 7 C.C.C. (2d) 93 (S.C.C.); see also *R.* v. *Appelby* (1971), 3 C.C.C. (2d) 354 at 365 (S.C.C.), Laskin J., "...the presumption of innocence gives an accused the initial benefit of a burden of a right of silence and the ultimate benefit of any reasonable doubt." And see Don Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough, Ont.: Thompson, Professional, 1991), at 261, "The true essence of a persuasive burden is that it arises for resolution at the end of the case, never shifts, and the trier of fact must find against the burdenholder in borderline cases... the essence of an evidential burden is that the burdenholder does not have to do any proving..."

[145] See E.W.Cleary, *McCormick on Evidence* (3rd ed., St. Paul, Minn.: West, 1984) at 962.

[146] W. Blackstone, *Commentaries on the laws of England* (4th ed., 1770), Bk.IV, chapt.27, 358.

> "The presumption of innocence is a hallowed principle lying at the very heart of criminal law... An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social psychological and economic harms. In the light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond a reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice."[147]

The presumption of innocence thus consists of two elements: the evidential and the persuasive burden of proof. The effect of s.11(*d*) is to create a procedural and evidentiary rule at trial that the prosecutor must prove guilt beyond a reasonable doubt. Hence, section 11 (*d*) imposes on the prosecutor both, the evidential burden of presenting evidence and the persuasive burden of convincing the judge or jury of the defendant's guilt beyond a reasonable doubt. It is the prosecutor who carries the onus of proof. He has to make out a case against the accused before he/she need respond. [148] If the defendant is required to prove a factor to avoid conviction, the presumption of innocence is violated.[149] The presumption of innocence guarantee is also infringed when the defendant is liable to conviction despite the existence of a reasonable doubt as to guilt by the trier of fact.[150]

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[147] *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321 at 333-334 (S.C.C.), Dickson C.J.C.

[148] See *Dubois* v. *R.* (1985), 48 C.R. (3d) 193, 22 C.C.C. (3d) 513 (S.C.C.).

[149] See *Whyte* v. *R.* (1988), 64 C.R. (3d) 123, 42 C.C.C. (3d) 97 (S.C.C.).

[150] See *R.* v. *Keegstra* (1990), 1 C.R. (4th) 129, 61 C.C.C. (3d) 1 (S.C.C.); see also *R.* v. *Vaillancourt* (1987), 60 C.R. (3d) 289, 39 C.C.C. (3d) 118 (S.C.C.); *Dubois* v. *R.* (1985), 48 C.R. (3d) 193, 22 C.C.C. (3d) 513 (S.C.C.); and *R.* v. *Oakes* (1986), 50 C.R. (3d) 1, 24 C.C.C. (3d) 321 (S.C.C.); note again, that some such statutory violations can be justified under s.1 of the Charter.

The rule only applies to the trial stage of the criminal process where the guilt is to be determined and the punishment imposed and hence does not operate to prohibit pre-trial bargains which assume guilt.[151]

In Austria the presumption of innocence is regulated in Art. 6 (2) of the European Convention of Human Rights and Freedoms. It is a treaty which has the status of constitutional law in Austria.[152] Art. 6 (2) of the Convention states:

> "Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law."

In Austria too the presumption of innocence guarantees that an accused person must not prove his/her innocence.[153] Yet, an onus of proof does not exist in criminal law. The prosecutor does not have to make out a case against the accused. The state-attorney is not even allowed to conduct investigations (§ 97 Abs. 2 StPO). Instead, it is the investigating judge during the pre-proceedings and the trial judge during the trial who investigates the truth. Evidentiary rules do not exist. Unless the adjudicator is convinced that the determined facts constitute a crime, he/she has to acquit the accused. If the judge is unable to determine the truth the accused will be acquitted *in dubio*. The principle *"in dubio pro reo"*, which is not explicitly mentioned in the Code of Criminal Procedure,[154] provides that where reasonable doubt about the guilt of a person exists he or she has to be acquitted. Again it has to be emphasized that a burden of proof does not exist in Austrian criminal law. The entire evidential burden consists in the obligation of the

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[151] See *R.* v. *Pearson* (1992), 17 C.R. (4th) 1, 77 C.C.C. (3d) 124 (S.C.C.).
[152] *Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (EMRK), BGBl 1958/210, Verf.-Rang: Art. I-B-VG, BGBl. 1964/59.
[153] See Vfslg. B 795/90.
[154] See EvBl 1947/247.

court to investigate the truth. Hence, the Austrian counterpart of the evidential burden of presenting evidence is the obligation of the court to investigate the truth.

(ii.) Substantive Presumption of Innocence

In Canada the substantive component of the presumption of innocence falls under s. 7 of the Charter of Rights and Freedoms. In Austria, it is Art. 6 (2) of the European Convention which deals with this aspect of the presumption of innocence.

The significance of the presumption of innocence under Art. 6 (2) of the European Convention is not limited to its procedural and evidentiary rule at trial. The presumption of innocence is a presumption of law which has the object of protecting the accused of all the inconveniences he/she faces once he/she has been convicted.[155] *Every person charged with an offence shall be presumed innocent until proven guilty according to law.* There is a fact that operates as a condition for the presumption of innocence, the fact being that the accused person has not yet been convicted of the alleged offence. The law draws the inference from this fact that the person is innocent. Therefore the meaning of "presumption of innocence" goes beyond the mere assignment of the court to investigate the truth and discharge unless it is convinced of the defendant's guilt. The principle that every person charged has the right to be presumed innocent until proven guilty cannot be limited to the procedural rule of proof. A wider interpretation adds to this procedural rule the principle that nothing shall be done during the criminal procedure which would in any way prejudge the guilt of the accused.[156] Hence, the presumption of

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[155] See Vfslg. B 193/86, B 474/26.

[156] See Höpfel, *supra* note 53 at 76; see also J.E.S. Fawcett in John A. Andrews ed., *Human Rights in Criminal Procedure, a Comparative Study* (The Hague; Boston: M.Nijhoff; Hingham, Kluwer Boston 1981) at 26.

innocence is more than just the guarantee that a case has to be proved beyond a reasonable doubt.[157] It is also a substantive rule that people have to be treated as innocent persons, with all due respect and careful consideration of all coercive actions against them. For in the eyes of the law every man is honest and innocent until proven legally to the contrary. The presumption of innocence reflects the belief that individuals of the community are decent and law-abiding members of the community until proven otherwise.[158]

The question thus arises whether or not plea bargaining is consistent with the substantive presumption of innocence. A person who has not been convicted has to be treated like an innocent person. It is questionable whether the initiation of a plea bargain by the prosecutor/judge is a treatment that may be imposed on an innocent person.

A citizen who has not been convicted must not be treated as though he was guilty. In plea discussions the prosecutor or judge promises some kind of remuneration in case the defendant pleads guilty. In doing so they treat him as if he was guilty. It would not make sense for the prosecutor to say: 'I believe you are innocent, but if you plead guilty to this charge I will withdraw another one." The very fact that plea discussions are initiated thus seems to constitute a presumption of guilt.[159]

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[157] See James C. Morton and Scott Hutchison, *The Presumption of Innocence* (Carswell, Toronto-Calgary-Vancouver, 1987).

[158] See *R.* v. *Oakes* (1986), 50 C.R. (3d) 1, 24 C.C.C. (3d) 321 (S.C.C.).

[159] See Albert W. Alschuler, 'The Changing Plea Bargaining Debate" (1981) 69 California Law Review at 708 (hereafter: Alschuler, Debate), "A prosecutor ... who asserts that a defendant is factually guilty although this defendant might not be convicted at trial simply presumes his own superiority as a factfinder to the body that has been authorized by law to make this determination. This observer asserts the superiority of his personal fact-finding methods to the procedures that the legal system has devised and refined over the centuries for the resolution of factual disputes."

An accused person, on the other hand, has to face actions taken against him, indicating a presumption of guilt, during the whole course of the criminal process. Unless the agents of the state think a person is guilty they do not (or at least should not) take any steps against this person. How can a police officer say: "I believe you are innocent, but I arrest you nevertheless."?

The measures taken by law-enforcement agencies aim at discovering the truth and thus prove the guilt of the alleged offender. An accused person may not be burdened more than could be expected from an innocent person as a sacrifice for the general good. The agents for the state must not believe that the accused is innocent but they have to presume that he might be innocent. A law can never command someone what he ought to believe, but it can order a certain behaviour. The presumption of innocence thus provides that the law enforcement agents take the necessary measures to clear the crime in the least intrusive way possible, since the accused always has to be considered as a potentially innocent person who sacrifices for the finding of truth. Therefore, they may take actions trying to prove the defendant's guilt, but they may not treat him as though he was a guilty person. Investigations lead towards more evidence indicating either guilt or innocence. Plea bargaining assumes the defendant's guilt and leads only towards a conviction.

It has been argued that an offer by the prosecutor or the judge is only testing the defendant's innocence. Because an innocent person would not plead guilty, the refusal of an agreement by the accused is an indication of innocence. However, it seems that the readiness to plead guilty depends more on the strength of the evidential situation, the kind of remuneration offered in return for a guilty plea and the defendant's nerves than on his guilt.

Hence, the initiation of plea discussions makes sense only for a guilty person and thus assumes the accused's guilt, thereby violating the presumption of innocence.

Although the prosecutor and the judge do violate Art. 6(1,2) of the European Convention when they initiate plea bargaining, the defendant himself may do so.[160]

The question arises how the presumption of innocence affects the practice of plea bargaining. The aspect of the distribution of evidential and persuasive burden does not seem to have an impact on plea bargaining at all, since it is a rule governing the trial. When the defendant pleads guilty a trial does not take place. The defendant who pleads guilty waives his right to a trial, thus waiving his right to be presumed innocent, his right to a public hearing and his right to be tried by an independent and impartial tribunal. He/she also waives his/right not to incriminate him/herself. Can a person waive constitutional rights? And if so, under which circumstances can a person waive those rights?

Before looking at the possibility of waiving constitutional rights, an overview of the rights contravened by plea bargaining will be given.

b. Right to a Public Hearing

The right to a public hearing is a method of exercising control over the criminal justice system by subjecting it to public observation. Public scrutiny guarantees the fairness of trials. In

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[160] See Kammerentscheidung des dtBVerfG, Beschluß vom 27.1.1987, 2 BvR 1133/86 (=NStZ 1987).

Canada the right to a public hearing is guaranteed by s. 11(*d*) of the Charter. In Austria it is Art. 6 (1) of the European Convention of Human Rights which guarantees the right to the accused to be tried publicly. This article states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

Furthermore, Art. 90 (1) of the Austrian Constitution and § 228 (1) of the Code of Criminal Procedure provide that criminal trials have to be public.

c. Independent and Impartial Tribunal

> "Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' ... connotes absence of bias, actual or perceived. The word 'independent' in section 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status of relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."[161]

The right to be tried by an independent and impartial tribunal is laid down in s.11 (*d*) of the Canadian Charter and Art. 6 (1) of the European Convention. The right to be tried by an independent tribunal is also guaranteed under Art. 87 (1) of the Austrian Constitution and §§ 72 to 74.a of the Austrian Code of Criminal Procedure provide for the accused to be tried by an impartial adjudicator.

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[161] *R.* v. *Valente* (1985), 49 C.R. (3d) 97 at 105 (S.C.C.), Le Dain J.

A 'tribunal" is not limited to a court but includes a commission, a board of inquiry, a judge sitting alone and a jury trial. The trier of the issue must be independent, that is, must be free from influence or bias and must not be connected to or related to one of the parties. An impartial tribunal is one that does not favour one side or another or one that does not have any prejudices or bias and is disinterested.

d. Privilege Against Self-Incrimination

The right against self-incrimination is secured in s.11 (*c*) of the Canadian Charter. Under this section

> "any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence."

A person charged with an offence enjoys the initial benefit of a right of silence and its corollary, a protection against self-incrimination. The underlying principle is that the crown must first present a 'case to meet".[162] Nobody is bound to accuse himself or to give evidence against himself. The accused is never required to answer questions put to him by the police or the prosecution and he may even maintain silence, if he wishes, at his trial without fear of being punished for doing so. The privilege against self-incrimination has a similar aspect as the presumption of innocence insofar as it relates to the evidential burden. Yet, s. 11 (*c*) of the Charter applies not only to the trial stage, but also to pre-trial court proceedings or similar tribunals.

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[162] See *Dubois* v. *R.* (1985), 48 C.R. (3d) 193, 22 C.C.C. (3d) 513 (S.C.C.).

In Austria the protection against self-incrimination is not explicitly mentioned in the European Convention. Yet it falls under the fair-trial-provision of Art. 6 (1) and is also warranted by § 179 (1) and § 202 StPO. The significance of the right against self-incrimination in Austria differs from the Canadian one. The Austrian, like the Canadian defendant has the right to remain silent.[163] Not only the judge, but also the police have to inform the defendant before they begin to question him of the criminal act which is the object of the investigation. He must also be told that he is free to answer or to remain silent. Nonetheless, in Austria[164] the accused's silence will be taken into consideration in the evaluation of the evidence. The behaviour of the accused is a piece of evidence that can work in his favour but also against his interests. Although the accused has the right to remain silent, all evidence, including the demeanour and attitude of the accused is subject to the free and unrestricted evaluation of the court.

However, under Austrian criminal procedure the accused cannot be a witness in his own case. Of course he is questioned at trial if he is willing to answer. Before the accused is questioned by the investigating magistrate the latter has to ask the accused to tell the truth. However, he is always heard as an accused and never as a witness. Therefore, the defendant is not obligated to give a true account of the circumstances of the crime.[165] An accused person can never commit the offence of perjury because he/she does not have the status of a witness. He/she may remain silent, deny any involvement in the offence or find an excuse for his participation. The defendant may try to convince the adjudicator of his version of the story and thereby lie; he will

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[163] See § 179 (1) StPO.

[164] In Canada, the accused's silence may also be taken into consideration. (see e.g., *François* (1994), 91 C.C.C. (3d) 289 at 295 and 304 (S.C.C.)). Yet s. 4 (6) of the *Canada Evidence Act* (R.S.C.1985, c.C-5) prohibit judge or prosecutor from commenting on the accused's failure to testify.

[165] See EvBl 1966/438.

never be subject to criminal persecutions for doing so.[166] It seems completely unacceptable to Austrian lawyers, to burden an accused with the witness's obligation to tell the truth. This would seem to put him in a situation where he might be compelled to choose between self-incrimination and criminal liability for perjury.

Whatever the differences may be, in both countries the privilege against self-incrimination is designed to protect the citizen from erroneous conviction and harassment by the state.

e. Principles of Fundamental Justice

According to s. 7 of the Canadian Charter "[e]veryone has the right to life, liberty and security and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Therefore, even if the accused relinquishes his/her right to go to trial he/she maintains the right not to be deprived of his/her right to life, liberty and security of the person except in accordance with the principles of fundamental justice.

The rights that are protected by this section are the right to life, liberty and security of the person. It was emphasized in *Reference re s. 94 of the Motor Vehicle Act*[167] that the right not to be deprived thereof except in accordance with the principles of fundamental justice is a qualifier of the former rights and does not constitute a right on its own.

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[166] See KH (=Plenarbeschlüsse und Entscheidungen des k.k. Obersten Gerichts- und Kassationshofes, veröffentlicht von der Redaktion der Allgemeinen Österreichischen Gerichtszeitung und in der Folge von der k.k. Generalprokuratur / Decisions of the Royal Supreme Court and Appelate Court, published by the Austrian Court Journal, later by the Royal General Prosecuting Attorney) 3534; SSt 21/85, 34/12, 35/44, 38/33; KH 1459, 2002, 2203, 3993; SSt 3/59, 4/96, 17/137; see also EvBl 1965/41.

[167] (1985), 23 C.C.C. (3d) 289 at 300 (S.C.C.), Lamer J., for the majority.

(i.) Applicability of s.7

When a person is charged with a criminal offence and faces an incarceration term, his liberty is at issue. In some cases the offence is of a kind that justifies only a fine. It is questionable whether the words life, liberty and security of a person include a financial deprivation.[168]

Contrary to s.7 of the Charter, the Canadian Bill of Rights makes express provision for the right of "enjoyment of property" in addition to the right to 'life, liberty and security of the person" in its section 1(*a*). The decision not to mention them in section 7 of the Charter was a deliberate one. The arguments, that the protection granted by section 7 does not include a fine are strong.

However, sentencing judges always have the option of imposing a prison term for Criminal Code offences under the present law. The accused, therefore, always risks the loss of liberty.

(ii.) "Fundamental Justice"

If plea bargaining takes place it is not the trial but the guilty plea that serves as the basis for the conviction. Therefore the procedure that leads to the guilty plea should be in accordance with the principles of fundamental justice. It is arguable whether or not this is the case.

A general rule of fundamental justice, such as s.7 of the Canadian Charter, does not exist under the European Convention. Article 5 of the European Convention guarantees the right to

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[168] See *R.* v. *Morgentaler* (1988), 37 C.C.C. (3d), 449, 44 D.L.R. (4th) 385, (1988) 1 S.C.R. 30 (S.C.C.).

liberty and security of the person and permits deprivations of those rights only in certain cases, one of them being a criminal conviction. This provision states,

> "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> *a*. the lawful detention of a person after conviction by a competent court."

Art. 6 (1) regulates the procedure that leads to such a criminal conviction and provides that the trial has to be a fair one. Yet, the guarantee of fairness and justice under Art. 6 (1) only applies to the trial stage of the procedure. However, some of the safeguards encompassed in s. 7 of the Canadian Charter are protected by the substantive aspect of the presumption of innocence under Art. 6 (2) of the European Convention.

The Supreme Court of Canada has decided in *Reference re s.94(2)* that the principles of fundamental justice have to be interpreted broadly, not only as procedural principles, but also as substantive guarantees. Furthermore, the court asserted that ss. 8 to 14 are illustrative of the general right enshrined in s.7. The interests and protections of s.8 to 14 are related to those of s.7 as mere specifics of a general enunciation of principle. Section 7 complements and supplements the other rights.

In *Swain*,[169] Lamer C.J.C. for the Supreme Court asserted that the principles of fundamental justice contemplated an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings.

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[169] (1991), 63 C.C.C. (3d) 481 (S.C.C.); compare *R.* v. *Czuszman* (1986), 26 C.C.C. (3d) 43, 49 C.R. (3d) 385 at 388 (Ont. C.A.), Brooke J.A. for the Ontario Court of Appeal stated, 'In our

Whether the deprivation of the accused's full defence constitutes a breach of fundamental justice and fairness, depends on the methods that have been used by the prosecutor to induce the admission of guilt.

2. Waiver of Constitutional Rights and Guarantees

The defendant who pleads guilty forgoes all these constitutional rights and guarantees. A trial does not take place. Hence, the defendant who pleads guilty gives up his right to be presumed innocent as well as his right to be tried by an independent, impartial judge in a public hearing. Furthermore, the accused admits guilt and thus incriminates himself. Whether or not and under which circumstances a person can waive these rights will be considered below.

The Supreme Court of Canada has recognized the accused's right to waive procedural rights under the Charter in several decisions.[170] In *Czuczman*[171] the Ontario Court of Appeal held that constitutional rights were not absolute and that their scope had to be measured against corresponding rights of others and society in the due administration of justice. The court continued by saying that a constitutional right could be waived.

Yet, given the importance of constitutional rights, any waiver's effectiveness is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is

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system, the right of an accused to be present to face his accuser and cross-examine him, to give evidence, to make full answer and defence and generally to participate in the trial is fundamental. Fairness demands no less than this..."

[170] See e.g., *Manninen* (1987), 34 C.C.C. (3d) 385 at 393 (S.C.C.); *Rahey* (1987), 33 C.C.C. (3d) 289 at 313 (S.C.C.); *Korponey* v. *A.G.Can* (1982), 65 C.C.C. (2d) 65 (S.C.C.).

[171] *Supra* note 169.

doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.[172] Therefore, the Canadian defendant may waive all the rights mentioned above, as long as he is aware of the consequences of this waiver and the his decision is a free and voluntary one. The standard for the validity of any waiver is very high. However, the factors to be taken into account by the judge in determining whether there has been an effective waiver will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect.[173]

According to the European Convention of Human Rights, a waiver of constitutional rights is possible as well. However, a minimum of the substance of the constitutional right has to remain in force. Constitutional rights are not only rights warranting a fair trial for the defendant, but also a guarantee for the standard of fairness and justice in the state. Therefore whether or not a constitutional right may be waived does not only depend on the defendant's will.[174] Only where the law allows the waiver of a procedural principle, may the parties relinquish a constitutional guarantee.

The Austrian accused can, to a certain extent, give up his right to a public hearing. By virtue of § 229(1) of the Code of Criminal Procedure the public may be excluded on certain grounds (for example safety reasons). The court has to consent to the accused's application for a removal of the public from the courtroom.

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[172] See *Clarkson* v. *R.* (1986), 50 C.R. (3d) 289, 25 C.C.C. (3d) 207 (S.C.C.).
[173] See *Korponey* v. *A.G.Can.* (1982), 65 C.C.C. (2d) 65 (S.C.C.), Lamer J.
[174] See ÖJZ-MRK 1992/21.

The accused can waive his right against self-incrimination,[175] yet he/she cannot relinquish his right to be tried by an independent[176] and impartial[177] judge, nor his right to be presumed innocent and to have a trial.

The accused cannot waive the right to be presumed innocent, because the presumption of innocence is not a right of the accused. Contrary to the Canadian Charter which states in its s.11 (*d*): *"Any person charged with an offence has the right to be presumed innocent..."* Art. 6 (2) of the European Convention says: *"Any person charged with an offence shall be presumed innocent..."* Furthermore, § 202 of the Austrian Code of Criminal Procedure provides that the judge has to continue his investigations even if the accused admits his guilt.

Hence, while in Canada the accused can waive all those constitutional rights and guarantees, in Austria he can only relinquish his privilege against self-incrimination. The Canadian defendant can thus forgo the whole trial by pleading guilty, whereas the Austrian defendant can only confess, thus producing evidence against him/herself. According to the Canadian authorities, the waiver of the right to trial has to meet certain standards of fairness. First of all it has to be the result of a voluntary and intelligent decision of the accused.

Similarly, the confession of the Austrian accused, hence his waiver of the privilege against self-incrimination has to meet the standards laid down in § 202 of the Code of Criminal Procedure. § 202 provides that the accused has to be free from pressure. It prohibits the use of illegal promises, threats, tricks or coercion to induce the accused to admit guilt.

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[175] See § 199 (2) StPO.
[176] See § 1 StPO.
[177] See §§ 65 ff. StPO.

3. Voluntary and Intelligent decision

In pleading guilty/confessing the defendant relinquishes his defence rights and incriminates himself. The accused's choice to do so must be voluntary and intelligent.[178]

Since the principal aim of the criminal law system is to convict the guilty without also convicting the innocent, it has become established at common law that a plea of guilty to be valid has to be express and voluntary.[179]

Ferguson[180] argues that all bargained for guilty pleas are involuntary because by definition plea bargaining involves a promise of advantage and a threat of more serious consequences. Kenneth Kipnis takes a similar stance, comparing a plea bargain with a robbery at gunpoint.[181] The defendant has the same choice as the victim of the robbery who is threatened with a gun to render his money. He must chose between a lesser more certain penalty and a greater less certain penalty.[182] Yet, in civil matters too, in every day's business life a person is often put to the choice between a lesser more certain evil and a greater less certain evil. Wertheimer thus observes that negotiated pleas are like contracts, and maintains that the criteria for voluntariness governing contracts ought to apply to plea agreements as well. Too many agreements that are *prima facie*

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[178] See Miklau, Grundfragen, *supra* note 51.
[179] See *Powlter's* case (1610), 11 Co.Rep. 290 77 E.R. 1181.
[180] Ferguson and Roberts, *supra* note 70 at 548-549.
[181] Gunman paradigm, by Kenneth Kipnis, "Criminal Justice and the Negotiated Plea" (1975/76) 86 Ethics at 93 (hereafter: Kipnis, Criminal Justice).
[182] See Ferguson and Roberts, *supra* note 70 at 529, "...a reduced charge or a lighter sentence (...) is better than running the risk of a conviction of a serious charge which carries a heavy sentence."

unobjectionable would be ruled out by a principle that holds choice conditions like the one mentioned above to cause involuntariness.[183]

And Thomas W. Church Jr. holds that 'plea bargaining is constitutionally permissible and morally legitimate, since both sides voluntarily engage in and benefit from the practice."[184]

Hence, this is not really a question of voluntariness. Even the victim of a robbery is given the choice between losing his money or his life. He will in most cases decide to give up his property in order to save his life. Whatever he decides to do, the choice is made voluntarily. Furthermore, plea bargaining removes the uncertainties of the trial. The accused chooses between a reduced charge or a lighter sentence instead of running the risk of a conviction of a serious charge which carries a heavy sentence. From the defendant's point of view this choice situation is advantageous.

The issue then is whether or not there is pressure[185] on the defendant to plead guilty and if so how much 'voluntariness" is required[186] to meet the standards of fairness in plea settlements.[187] In what way and to what extent may the state influence the choice conditions? The state ought not to enforce agreements made in response to the choice conditions imposed by the

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[183] See Michael Philips, "The Question of Voluntariness in the Plea Bargaining Controversy: A Philosophical Clarification" (1981-82) 16 Law & Soc. Review 207 at 210 (hereafter: Philips); but see Alan Wertheimer, 'Legal and extra-legal Voluntariness: a Response to Philips" (1983) 17 Law & Soc. Review 637.

[184] Thomas W. Church Jr., 'In Defence of Bargain Justice" (1979) 13 Law & Soc. Rev. at 509 (hereafter: Church, Defence).

[185] See § 202 StPO (Austrian Code of Criminal Procedure); see also Art.6 EMRK (European Convention of Human Rights).

[186] See Philips, *supra* note 183 at 207,

"1. Are negotiated pleas involuntary in a sense that renders them legally invalid?

2. Are negotiated pleas involuntary in a sense that justifies abolishing the practice of plea bargaining?"

[187] See Foregger-Kodek, *supra* note 40 at 286.

gunman. The state has no business imposing such conditions on citizens. Yet, 'what the gunman does is clearly illegal, while what the prosecutor does at least seems to be within the law."[188]

As Michael Philips[189] observes "...institutions (e.g., police) are permitted to constrain in some ways that private individuals are not: and [...] private individuals are allowed to constrain in certain ways and under certain conditions that are not permitted to officers of public (or private) institutions."

The protection against self-incrimination is a protection against the conviction of innocent persons. If a person pleads guilty/confesses he should do so because he regrets his criminal act. Usually the accused will also take into account the costs and inconveniences of the process. Yet the avoidance of expensive legal fees is a benefit of guilty pleas *per se*, not of plea bargaining. Some accused plead guilty because the evidence is overwhelming and a trial would invite public humiliation. Hence they calculate the risk of getting convicted and balance it with the inconveniences and expenses of a trial. No one ever contended that this choice condition is illegal.

The question of voluntariness deals with the problem of to what extent the defendant's decision to admit guilt should be influenced by the law enforcement agents? The main issue thus is the method that is used to induce a guilty plea and whether or not the accused is under duress.[190]

The law enforcement agents may not use illegal techniques to induce an accused to plead guilty, they may not use legitimate means to achieve an illegal aim: the confession by the

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[188] Philips, *supra* note 183 at 209.
[189] Philips, *ibid.* at 214.
[190] "...a contract is involuntary when it is made under duress... The question of the legal voluntariness...comes down to the question of whether such pleas are made in response to duress." Philips, *ibid.* at 215.

innocent. And naturally, they may not use illegal methods to induce the innocent to plead guilty. The situation reminds more of the crime of extortion than of a robbery. 'Extortion is the obtaining of property from another induced by wrongful use of actual or threatened force, violence or fear, or under colour of official right."[191]

Similar to the Canadian defendant who waives his defence rights, the Austrian accused who relinquishes his privilege against self-incrimination by confessing has to do so voluntarily. The Austrian Code of Criminal Procedure in its § 136a/1/3 and § 202 prohibits any pressure on the accused to make a confession by using any kind of promise, trick, threat and coercion.[192]

Before analysing the methods that can be used to prompt the admission of guilt by the defendant, the common law doctrine of "Abuse of Process" will be looked at.

4. Abuse of Process

In addition to the remedies for a violation of Charter guarantees and a breach of the principles of fundamental justice the court has the possibility to stay proceedings if the prosecution has employed abusive practices. The common law doctrine of 'abuse of process" has the purpose of protecting the accused against unfair methods on the part of the prosecution. An abuse of process constitutes a violation of the principles of fundamental justice. The test to be applied regarding abuse of process is whether the proceedings would violate the fundamental principles of justice which underlie the community's sense of fair play and decency, or whether

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[191] *Black's Law Dictionary*, *supra* note 109.

[192] See Platzgummer, *supra* note 17; see also Schmoller, 'Erzwungene selbstbelastende Aussagen im Strafprozeß", Jbl. 1992, 69.

the proceedings were oppressive or vexatious.[193] On this basis the courts have the power to stay the proceedings.

The doctrine of Abuse of Process is a Canadian common law doctrine, independent of the Charter,[194] which gives the court the authority to enter a stay of proceedings as a means of controlling prosecution behaviour which operates prejudicially to accused persons. The doctrine was finally and unequivocally recognized in *Jewitt.*[195] This case arose before the Charter came into effect.

Plea bargaining is possible because of the prosecutor's broad discretionary powers regarding the choice of charge, the decision whether to prosecute at all, etc. The *Criminal Code* provides no guidelines for the exercise of discretion. The mere exercise of a discretionary power is not in itself an abuse of process. In *Beare*[196] (1988), La Forest J. for the Supreme Court stated:

> The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

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[193] See e.g., *R.* v. *Keyowski* (1988), 40 C.C.C. (3d) 481, 62 C.R. (3d) 349 (S.C.C.); see also *R.* v. *Jans* (1990), 59 C.C.C. (3d) 398 (Alta.C.A.).

[194] See *R.* v. *O'Connor* (1994), 29 C.R. (4th) 40, 89 C.C.C. (3d) 109 (B.C.C.A.).

[195] *R.* v. *Jewitt* (1985), 21 C.C.C. (3d) 7, 47 C.R. (3d) 193 (S.C.C.); reaffirmed in *Keyowski, supra* note 193.

[196] (1988), 45 C.C.C. (3d) 57, 66 C.R. (3d) 97 at 116 (S.C.C.).

The fairness of the plea bargaining system in day-to-day life depends upon the way in which the discretion is exercised.[197] If in a particular case it is established that the prosecution has exercised its discretion for improper or arbitrary motives the court may intervene on the ground of an abuse of process. The Quebec Court of Appeal has, for example, quashed convictions and entered stays in a case of robbery where the prosecution had been in breach of a police agreement not to prosecute.[198]

5. Methods Used to Induce an Admission of Guilt

a. Promise

According to § 202 of the Austrian Code of Criminal Procedure the defendant may not be influenced to confess by the promise of an impermissible advantage. It is not clear what constitutes an illegitimate advantage. One opinion holds that every promise of an advantage whatsoever is inadmissible because it creates pressure.

Some scholars argue that only the promise of an illegal advantage is prohibited. The promise of advantages that may be granted is allowed. The promise of such an advantage does not cause undue pressure.

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[197] See *R.* v. *Ertel* (1987), 35 C.C.C. (3d) 398, 58 C.R. (3d) 252 (Ont.C.A.).

[198] *R.* v. *Demers* (1989), 49 C.C.C. (3d) 52, 69 Man. R. (2d) 259 (Que.C.A.); see also *Re Smith* (1975), 22 C.C.C. (2d) 268 (B.C.S.C.); *Ittoshat,* [1970] 5 C.C.C. 159, (1970) 12 D.L.R. (3d) 266 (Que. Sess. P.); *R.* v. *Bruneau* (1982), 69 C.C.C. (2d) 200, 2 C.R.R. 223 (B.C.S.C.).

An advantage is illicit if it may not be accorded at all or if it may not be granted in this particular case.[199]

In Canada, Ferguson and Roberts take a similar stance by holding that concessions like the promise not to apply for preventive detention, the recommendation as to the place of imprisonment, the type of treatment or the time of parole or not to oppose release on bail are prima facie illicit.[200] The decision whether or not to keep an accused in pre-trial detention has to be made with regard to his dangerousness or the probability of evasion. Whether or not someone pleads guilty is no criterion for the exercise of discretion in this case.

Similarly the type of treatment, the mentioning of a previous criminal record or the time of parole should depend on reformatory aspects, not on the defendant's willingness to enter into an agreement with the prosecution.

The kind of promises mentioned above constitute unfair methods if they are of a kind to influence the defendant's will in a way that his guilty plea has to be perceived as under duress. Yet, even if the prosecutor offers illegal concessions in case a guilty plea is entered it does not necessarily infringe the accused's rights. The latter only draws advantage from the prosecutor's offer. His choice situation is better under the bargain system than under the no-bargain system.

If the prosecutor offers an illegal advantage in case a guilty plea is entered, but proceeds according to the law if the accused decides to have a trial the defendant can only end up with a better result.

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[199] See EvBl. 1950/283.

[200] See Ferguson and Roberts, *supra* note 70 at 513.

However, the prosecutor usually offers either the withdrawal of charges or favourable sentence recommendations as rewards for a guilty plea. It seems that the accused can only profit from these actions. If he pleads guilty he ends up with a mild punishment; if he does not he receives a sentence that he would have got even without the prosecutor's offer.

Yet the trial with all its defence rights and the privilege against self-incrimination are guardianships against the conviction of the innocent. Important reasons for accused persons to plead guilty include pressure from the prosecutor, pressure from the defence attorney, the sentence offered, the perceived likelihood of conviction and the defendant's feelings (remorse, desire to minimize family suffering, desire to be co-operative).[201] All the reasons but the ones mentioned last create pressure for the innocent accused as well.

It has been argued that although there is no such thing as a beneficial sentence for an innocent defendant, there likewise is no guarantee that an innocent defendant will always be acquitted at trial. How many innocent persons who would likely be acquitted at trial plead guilty?[202]

Yet this argument misses the point. Each individual case has to be examined in order to determine if the advantage is of a kind that is incentive enough for an innocent person to plead guilty.

John C. Brigham cites a study conducted by W.L. Gregory:[203]

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[201] See Bordens, K.S., & Basett, J. "The plea bargaining process from the defendant's perspective: A field investigation." (1985) Basic and Applied Social Psychology, 6, 93-110.

[202] Ferguson and Roberts, *supra* note 70 at 544.

[203] Gregory, W.L., Mower, J.C., and Linder, D.E. "Social Psychology and Plea Bargaining: Applications, Methodology, and Theory." (1978) Journal of Personality and Social Psychology 36, 1521.

> "...half of the subjects were induced by a confederate to cheat on a test (to gain extra credit). In a complicated scenario, the experimenter later told each subject he suspected that the subject had had prior information about the test because he scored so well. The researcher offered each subject a deal: If he admitted receiving prior information (pled guilty), the subject would not receive credit for participating in the study, but he would not be taken before the Psychology Department Ethics Committee. If he refused to admit the "crime," he would be taken before the Committee. Not one of the innocent subjects (those who had not been induced to cheat) accepted the deal, but 75 percent of the guilty subjects did. This experiment underscores the powerful role of guilt and expectation of conviction in plea bargaining."

This survey shows that the innocent will not likely plead guilty unless they are offered great concessions. Yet the prosecutor offers more discounts the less likelihood of conviction exists.

Many prosecutors are loath to risk losing a case at trial. They will therefore resort to offering incredibly lenient punishments to assure the entry of guilty pleas in those weak cases that probably would and should be lost at trials.[204]

Hence, the voluntariness of the guilty plea must be denied if the difference is so great that even an innocent person would plead guilty.[205] If sentencing differences are kept down an accused is less likely to be induced into pleading guilty in cases where he should not.[206]

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[204] See David Lynch, *supra* note 71 at 132.

[205] In *Bodenkircher* v. *Hayes*, 434 U.S. 357 (1978), the U.S. Supreme Court upheld the constitutionality of imposing a life sentence upon a trial defendant who had declined a prosecutor's offer to recommend a five-year sentence in exchange for his plea of guilty.

[206] See Ferguson and Roberts, *supra* note 70 at 530.

b. Trick

It is the judge who has the authority to fix the sentence.[207] The prosecutor can make sentence recommendations, but the judge is not bound to follow them. The defendant may rely on the prosecutor's recommendations, plead guilty and get a harsher punishment, because the judge does not consider the recommended sentence to be appropriate.[208] If the prosecutor presents his offer in a way that makes the accused believe that it is the Crown who has the authority to determine the sanction, the defendant will feel especially deceived.[209] The alleged offender will usually rely on the prosecutor's influence. The prosecutor who pretends that he has power that he actually does not have, and promises something that does not fall into his authority tricks the accused into admitting guilt and thus violates principles of fairness.[210]

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[207] See s.717 of the Canadian *Criminal Code.*

[208] See e.g., *R.* v. *Morrison* (1981), 63 C.C.C. (2d) 527 at 530 (N.S.C.A.): A plea of guilty had been entered to the charge of trafficking in a narcotic contrary to s.4(1) of the *Narcotic Control Act.* The Crown prosecutor and the defence attorney had entered into a plea bargaining arrangement whereby if the appellant re-elected and changed his plea to guilty, the prosecutor would recommend to the court a sentence of three months' imprisonment consecutive to the sentence the appellant was then serving. The appellant did not appeal his conviction but rather took the position that the bargain must be carried out. Pace J.A. said: 'I completely reject the appellant's argument in this regard and state as firmly as I can that courts are not bound by plea bargaining agreements made by counsel. It may be that under certain circumstances a Court will not permit a party to repudiate an agreement once submitted before the trial judge (see *R.* v. *Goodwin* (1981), 21 C.R. (3d) 263 (N.S.C.A.), but that does not mean that the Court is held to carry out an agreement..."

[209] The Provincial Crown Handbook in B.C. provides in III., 'the Crown is not to ...(d) agree to a specific sentence." at 360 in John Hogarth, ed. *Sentencing: Cases and Materials for Law 500, 1992/93* (hereinafter: Hogarth, *Materials*).

[210] See *Provincial Crown Handbook in B.C., ibid.*: 'Crown counsel should never fetter his position with respect to speaking to sentence in order to encourage a plea of guilty by the defence. He may indicate to defence before plea his position in the event of a finding of guilty by the court. Crown counsel must be prepared to advise the court of all sentencing options available to the Court in any given case."

The prosecutor, on the other hand, has the power to drop charges. Since he is usually interested in having the accused punished for the alleged offences, he may create more charges in order to have something to bargain with.[211] Similarly, he may agree to a guilty plea to only one of a number of charges, but read all the other facts into the record. Given the penalty structure in Canada, the offender who successfully negotiates for a lesser charge may find himself serving a sentence that is the same as the sentence normally given for the conviction on the original charge. The same holds true when some counts are dropped.[212] In most instances, a promise to have a charge reduced in exchange for a guilty plea can be meaningless in terms of the outcome of the sentence.

The accused ends up with the same punishment that he would have received after a full trial.[213] In *R.*v. *Doerksen*[214] it was postulated that the Crown cannot accept a plea of guilty to the

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[211] A factor that influences plea bargaining is the common law principle of *res judicata* that was broadened by the *Kienapple* decision (1974), 26 C.R.N.S. 1, 15 C.C.C. (2d) 524 (S.C.C.); see also *R.* v. *Prince* (1986), 30 C.C.C. (3d) 35 (S.C.C.). In *Kienapple* the Supreme Court of Canada appeared to suggest that the doctrine of *res judicata* could be extended to prohibit multiple convictions for different offences that arose out of the same incident. The Court ruled that, while an offender in certain circumstances can only be convicted of one offence arising out of the same incident, it is still legitimate for the crown to lay more than one charge. The *Kienapple* decision and its subsequent interpretations have therefore tacitly endorsed the relatively frequent police practice of laying multiple charges in relation to a single incident. See *Plea Bargaining and Sentencing Guidelines, Research Report of the Canadian Sentencing Commission* (Ottawa: Department of Justice Canada, Research and Development, 1988) (hereafter: Sentencing Guidelines).

[212] See Klein, *supra* note 3 at 10.

[213] The court should sentence according to the offence charged even though the accused might have committed a more serious offence than that charged. See e.g., *Flamond* v. *R.* (1971), 4 W.W.R. 479 (Sask. C.A.); *R.* v. *Young* (1983), 21 Sask.R. 308 (Sask. C.A.); *R.* v. *Coughlan* (1982), 53 N.S.R. (2d) 350 (N.S.C.C.). Evidence from untried charges should not be used for sentencing a particular offence unless the evidence is needed for reviewing the background and character of the accused. See e.g., *R.* v. *Morelli* (1977), 37 C.C.C. (2d) 392 (Ont. Prov.Ct.), *Roud* v. *R.* (1981), 21 C.R. (3d) 97 (Ont. C.A.). Withdrawal of other charges against an accused should not affect the sentence given for the current charges. See *R.* v. *Fairn* (1973), 12 C.C.C. (2d) 423 (N.S.C.C.).

less serious charge, and then ask the court to take a view of the facts which would have justified a conviction on the more serious charge.

Eisenstein and Jakobs[215] suggest what is necessary is not an actual sentence differential but the widespread belief on the part of defendants that trials are punished by harsher sentences. The accused is usually represented by an attorney who has to inform him of the risk of relying on sentence recommendations from the Crown. Defendants have two primary sources of information: the jailhouse culture and their attorneys.[216] The lawyer must advise his client fully as to his rights, as to the alternatives available to him, and of the fact that neither the lawyer nor the prosecutor can bargain for the court.[217]

c. Threat

Plea discussions are often an interplay between "carrot and stick".[218] An abusive practice is the use of discretionary power to threaten the defendant into pleading guilty. The prosecutor does not only have the discretion to drop charges and withhold facts. He can, e.g., choose to proceed by way of indictable instead of summary conviction. The Crown can also proceed in a way that binds the sentencing judge to a statutory minimum sentence. If the more severe proceedings are not warranted by the seriousness of the case, the prosecutor can use this

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[214] (1990), 53 C.C.C. (3d) 509, 62 Man. R. (2d) 259 (Man. C.A.).

[215] James Eisenstein and Herbert Jakobs, *Felony Justice, An Organizational Perspective* (Boston: Little Brown, 1977).

[216] See Brereton, *supra* note 73 at 65.

[217] See *Cortez* v. *U.S.*, 337 F. 2d 699 (C.A. Cal., 1964).

[218] See Conrad G. Brunk, "The Problem of Voluntariness and Coercion in the Negotiated Plea" (1979) 13 Law & Soc. Rev. 527 (hereinafter: Brunk).

discretion as a threat. He can also use his authority to make dangerous offender applications,[219] charge friends or family members of the accused or make bad sentencing recommendations as a threat to induce a guilty plea.

A threat to proceed in a way that is not warranted by the circumstances of the case, just to induce the defendant to plead guilty, will always be an unfair method.

> If prosecutors and police could count on grilling a suspect as much as they pleased they might not take the trouble to build up a solid case from objective proofs...[A]n innocent man can get convicted on the basis of an untrue confession given under great pressure.[220]

No agreements made in response to immoral threats[221] ought to have legal standing.

d. Coercion

The term "coercion" can be understood in a psychological and in a physical sense. Physical torture is an illegal method to achieve an admission of guilt from the accused.[222] The infliction of mental duress on someone has already been dealt with under the heading "threat". Yet, the pressure on the accused can be so great as to amount to mental torture. A waiver of constitutional rights following torture, whether physical or psychological will always be invalid.

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[219] See s. 753 of the Canadian *Criminal Code.*

[220] Zechariah Chafee, *The Blessings of Liberty* (1st ed., Philadelphia, Lippincott, 1956) at 186.

[221] See Purves, *supra* note 6 at 471.

[222] See *Übereinkommen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe samt Erklärungen der Republik Österreich* (= Treaty against torture or other inhuman treatment), (BGBl 1987/492); see also Soyer, "Ein Verwertungsverbot gemäß Art. 15 der UNO-Konvention gegen die Folter" (1992) AnwBl. 349.

e. Pressure on the Part of the Defence Counsel

In addition to unfair methods used by the law enforcement agents, the defendant can be subject to pressure from his own defence counsel. Sometimes the defence attorney is merely a 'double agent', deceiving his client into trusting in his skill, while all he wants is to collect a fee and for his client to plead guilty.[223] Some defence counsels have practiced for years without going through a trial process. Especially in legal aid cases, where fees are low, lawyers prefer to dispose of a case by the way of plea bargaining instead of engaging into a time consuming trial. Plea bargaining may appeal as a means of getting rid of an unwanted, unprofitable or unduly difficult case. The defence counsel could respond by putting undue pressure on an accused.[224] It is sometimes difficult to draw the line between a legitimate mode of communication when presenting his advice and an illegal threat.[225]

6. Remedies

The methods described above constitute an abuse of process by the prosecution. They violate the principles of fundamental justice. At the same time they influence the accused's free will in a way that the admission of guilt cannot be seen as voluntary and intelligent decision any more. The standards that have to be met for the validity of a waiver of constitutional rights amount to the same standards that warrant prosecutorial fairness and fundamental justice.

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[223] See Abraham S. Blumberg, 'The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession" (1967) 15 Law & Soc. Rev. 18; see also Maier, "Absprachen" (1987) NJW 1187; Widmaier, *supra* note 68 at 357.

[224] See Ferguson and Roberts, *supra* note 70 at 541.

[225] See Paul Thomas, 'Plea Bargaining and the Turner Case" (1970) Crim. L.R. at 560 (hereinafter: Thomas, Turner Case).

Therefore, if the prosecutor uses unfair methods the requirements for a valid waiver of the accused's constitutional rights are not met.

In Canada, if a judge suspects that one of the above methods has been used to urge the guilty plea/confession he has to record a plea of not guilty.[226] Another possible remedy is a stay of proceedings on the grounds of the common law doctrine of abuse of process or in application of s. 24 of the Canadian Charter. This section states:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Remedies other than the stay of proceedings can be the admission of a change of plea to not guilty[227] or compelling the prosecution to comply to the terms of the agreement.[228]

Hence, the Canadian accused has at least some legal protection against the breach of a plea agreement by the Crown. Yet, the power to stay proceedings is only used in the clearest of cases and it is the accused who has to prove on a balance of probabilities that such an agreement exists and the circumstances under which it has been made. Due to the secretive manner in which plea negotiations take place it might be hard to prove the existence and the breach of a plea arrangement. It is almost impossible to subject plea bargaining to any control. One of the main

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[226] See *Brosseau* v. *The Queen* (1969), 5 C.R.N.S. 331, [1969] 3 C.C.C. 129 (S.C.C.); see also *Rex* v. *Hand (No.1)*, 62 B.C.R. 359, 1 C.R. 181, [1946] 1 W.W.R. 421, 85 C.C.C. 389, [1946] 3 D.L.R. 130 (B.C.C.A.); and *Rex* v. *Milina* (1946), 2 C.R. 179, [1946] 2 W.W.R. 584, 86 C.C.C. 374 at p.592 (B.C.C.A.).

[227] See *R.* v. *Bamsey* (1960), S.C.R. 294 at 298, 32 C.R. 218 (S.C.C.).

[228] See *R.* v. *Wood,* [1976] 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta. C.A.).

points of criticism is the secretive manner in which plea discussions take place. The public is unaware of what is going on behind the scenes of the official process.

In Austria a remedy will have to be based on the invalidity of the waiver of the right against self-incrimination. The methods described above cause the waiver to be involuntary. However, a confession cannot be taken back. The defendant can tell the trial judge that the confession was made because of an agreement. The judge will then evaluate the trustworthiness of such a confession. Confessions obtained by police or others by violence, trickery, or some other stratagem incompatible with defendant's right to a fair trial may be considered too unreliable to serve as evidence for a conviction. A bargained for confession might leave some doubts as to its truthfulness, yet it will not be excluded as a piece of evidence. If the bargain has taken place between the defendant and the judge, the defendant can take motions of appeal on the basis of lack of impartiality of the judge. The trial will then take place before a different judge. The confession will nonetheless be in the files. There is no legal way to oblige the prosecution/judge to adhere to the terms of the agreement. It thus constitutes a considerable risk for the defendant to admit guilt before his/her "opponent" has performed his/her part in the deal.

7. Plea Bargaining as an Unfair Method

Does plea bargaining itself constitute an unfair method? The prosecutor/judge who enters into plea negotiations uses his/her discretion as a bargaining device. The discretion allows him/her to offer rewards to the defendant in return for a guilty plea. Yet, plea bargaining itself is just the utilization of the discretionary powers.

The principles of fundamental justice are a safeguard against the infliction of pain without due process. The Supreme Court of Canada gives a broad interpretation to the meaning of 'Fundamental Justice". The guarantee not to be deprived of life, liberty and security of the person does not only relate to the trial state, but to the whole process of criminal prosecution. Only a very small number of cases actually go to trial. Ericson and Baranek[229] reported about 70% of their sample of accused entered guilty pleas to at least some of their charges and a large percentage of these guilty pleas have their roots in plea discussions. Since, by plea bargaining, the determination of a person's guilt does not actually take place in open court, the procedure that really leads to the finding of guilt should meet the standards of justice and fairness too. Hence, the procedural guarantees at the trial stage (the principles of publicity, of an unbiased adjudicator, of the presumption of innocence) should to some extent govern the plea negotiations as well. The question thus arises whether plea bargaining is a practice that is *per se* unfair.

a. Secrecy

On of the main points of critizism is the secret manner in which plea bargaining takes place. Plea bargaining is a practice that leads to convictions without public scrutiny. Not only is the public excluded; in many cases the fact that a guilty plea has been reached through negotiations is not even communicated to the judge. Contrary to the principle of publicity, the reality of plea discussions is characterized by secrecy, which throws discredit upon the criminal procedure.

Not only should the law-enforcement agents be subject to public control, the confidence of the population in law and law enforcement shall be fostered. Therefore, not only should the

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[229] Ericson, *supra* note 92.

results of the cases become public, but also the means by which these outcomes have been reached. Whether a well-balanced discussion or a one-sided threat has led to the guilty plea cannot be assessed by seeing the outcome alone.

b. Independent and Impartial tribunal

Plea discussions do not take place in open court. In Canada it is usually the prosecutor who bargains with the defence lawyer. A judge rarely participates. The prosecutor is neither independent nor unbiased. He represents the public and acts as the accusing party. There is no independent judge supervising the negotiating process. The prosecutor who has investigated the case will be desirous to get a conviction. It is difficult for a person acting as prosecutor to act objectively and to keep the defendant's interests in mind.

Due to the differences in the Austrian legal system, it is regularly the judge who bargains with the defendant. If the judge participates in plea discussions, he becomes a party interested in a confession and therefore he/she loses his/her impartiality.

c. Proof Beyond Reasonable Doubt

The very purpose of plea bargaining is to eliminate the requirement of proof beyond reasonable doubt. The parties aim to attain a compromise where the prosecution saves time and money because they do not have to produce all the evidence needed for a conviction at trial. In the process of plea discussions a burden of proof does not exist. Furthermore, the accused is treated as if he/she was already convicted. Plea bargaining connects the issue of guilt with the issue of punishment.

d. Requirements of Fundamental Justice

The guarantee to be presumed innocent until proven guilty under Art. 6 (2) of the European Convention is independent from the circumstances of a particular case. The requirements of fundamental justice under s. 7 of the Canadian Charter, on the contrary, vary with the circumstances of each case. They are not immutable.[230] The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned.[231] The principles of fundamental justice are concerned not only with the interests of the person who claims that his/her liberty has been limited, but also with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally.[232] Plea bargaining is characterized by secrecy and treating the accused like a guilty person without conclusive proof of his guilt. Furthermore, it is not supervised by an independent judge. Therefore, it is a *prima facie* violation of s.7. Yet, a violation of the principles of fundamental justice will depend on the means chosen by the state in relation to its purpose. It will thus depend on the seriousness of the case, on the interests that are at stake and whether or not the accused is represented by a counsel. The court must consider whether the means used are necessary to achieve the state objective. The principles of fundamental justice are violated when the state, pursuing a legitimate objective, uses means which are broader than necessary to accomplish that objective.

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[230] See e.g., *Lyons* (1987), 37 C.C.C. (3d) 1 at 45 (S.C.C.).

[231] See *Singh* v. *Canada (Minister of Employment and Immigration)* (1985), 17 D.L.R. (4th) 422, 58 N.R. 1 (S.C.C.).

[232] See e.g., *Cunningham* v. *Canada* (1993), 80 C.C.C. (3d) 492, [1993] 2 S.C.R. 143 (S.C.C.).

The objective of plea bargaining is the saving of public expenses by forgoing a trial. The functioning of the law enforcement system has to be weighed against the right of the defendant to a full trial. The trial helps finding the truth which is the basis for a just solution. But if the system breaks down due to the lack of resources justice cannot be done. Hence a functioning law enforcement system is necessary to make the search for truth and justice possible. Both the functioning of the system and the trial have the purpose to warrant a just solution. If the conduct of full trials in every case leads to the break down of the system justice cannot be done. On the other hand justice might suffer in a system of plea negotiations.

Yet, it has been argued, that most defendants would plead guilty anyway, because they want to get it over with, they want to avoid the expenses of a trial, the publicity of it or just because they feel remorse. Furthermore, research is required to determine how much money and manpower a plea bargaining system really saves. Without plea negotiations the system would probably become more expensive, yet it does not have to break down.

Furthermore, one can imagine less intrusive means to save administrative expenditures and thus prevent a break-down of the penal system. Plea negotiations under the supervision of an independent judge (who must not be the trial judge) or less formal trials could be alternatives for the current plea bargaining model.

Because plea bargaining deprives the accused of the right of life, liberty and security of the person in a way that cannot be seen as in accordance with principles of justice and fairness it violates the principles of fundamental justice.

PART III: PPRINCIPLES OF PUNISHMENT

The prosecutor who grants concessions in return for a guilty plea has to act in the public interest and thus has to take into account penological considerations.

Similarly, although the ranges for sentences are very large in both jurisdictions, the judges both in Canada and in Austria have to resort to acknowledged principles of punishment. Sentences are subject to control by appellate courts and judges have to find appropriate sentences, that take into account the different criteria related to each case.

One of the main points of criticism of plea bargaining is the alleged lack of proper sentencing standards.[233] The compromise of criminal cases through negotiation may conflict with basic values inherent in the philosophy of laws.[234]

> "The concern persists ... that plea bargaining compromises our aspirations to justice at the same time that it undermines the effective punishment of serious offenders"[235]

Since plea bargaining performs a sentencing function it must be evaluated according to its ability to generate dispositions that comport with accepted sentencing standards.[236] Those sentencing standards will be analysed and their compatibility with plea bargaining will be examined.

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[233] See e.g., David Lynch, *supra* note 71 at 133.
[234] See Klein, *supra* note 3 at 2.
[235] Stephen J. Schulhofer, "A Wake-up Call from the Plea Bargaining Trenches" (1994) 1 Law and Soc. Inquiry 135 at 135 (hereinafter: Schulhofer).
[236] See Ferguson and Roberts, *supra* note 70 at 526.

Why sanctions should be imposed on offenders and how to justify punishment, as well as how much and what kind of punishment is accurate in a particular case has been dealt with by many authors for centuries. The main theories are the retributivist and the utilitarian ones. These theories and their impact on plea bargaining will be looked at in the subsequent part of the thesis.

One has to differentiate between the goals of the legislation and the application of the general rules by the executive. Punishment is a corollary of law breaking by a member of society whose law is broken. Considerations of utility come in on two quite different issues: Should there be laws and what laws should there be? Therefore, the first issue deals with the objective of the criminal law. The second point will be its application in individual cases.

A. Criminal Law

> If I see a man ill-treating a horse in a country where cruelty to animals is not a legal offence, and I say to him "I shall now punish you," he will reply rightly, "What has it to do with you? Who made you a judge and a ruler over me?"[237]

Crime is a cultural phenomenon that exists in every society. In any society which has advanced beyond the most primitive stage of development there is an institution for dealing with types of strongly disapproved conduct.[238] No method has been found yet to abolish criminal behaviour. A criminal act is described as some kind of socially harmful behaviour, which violates

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[237] Mabbott, J.D., 'Punishment" (1939) (hereinafter: Mabbott, Punishment) in H.B. Acton, ed. *The Philosophy of Punishment* (Macmillan, St. Martins Press 1969) (hereinafter: Acton, *The Philosophy of Punishment*).

[238] See Nigel Walker, *Punishment, Danger and Stigma: the Morality of Criminal Justice* (Basil Blackwell, Oxford, 1980) (hereinafter: Walker, *Morality*) at 1.

values of the community in a way that cannot be ignored without endangering the peaceful co-existence of the population. Hence, the purpose of criminal law is to create some kind of safeguard against the most serious violations of rights and thus to guarantee the peaceful co-existence of the people.[239] It does this by exercising coercion and intervening into personal freedoms and rights of individuals. Because the efficiency of criminal law has been put at issue by many scholars and because of the suffering caused by punishment, the legislator should be very restrictive in the use of criminal law. It should be used in cases only where tort law and other measures are not sufficient to keep the peace in society.[240]

The criminal law is a declaration of what the society in question condemns. The moral standards in legal rules are derived from the moral values of the members of parliament. The parliament supposedly represents the population and expresses the public's will and the moral values imminent in society in the form of laws. In a society every person usually has different values and moral attitudes. The legal rules often constitute a compromise between different opinions and values. This compromise is a question of policy-making which is the role of the parliament. Only the laws can decree punishment for crimes; authority for this can only reside with the legislator. A system of punishment depends on the existence of a set of substantive laws which define certain types of conduct as offences and attach penal sanctions to them.

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[239] See the *Report of the Canadian Sentencing Commission (Sentencing Reform): A Canadian Approach* (Canadian Sentencing Commission, Ottawa: Canadian Govt. Pub. Center, 1987) (hereinafter: Report of the Canadian Sentencing Commission).

[240] See Otto Triffterer, *Österreichisches Strafrecht, Allgemeiner Teil* (Wien - New York 1985) 20 ff.

Hence, the aim of all punishment is the protection of those social values which the dominant social group of a state regard as good for society.[241] A problem might arise due to a certain discrepancy between the moral values of the legislation and those of the population, or at least parts of the population. The governing class tends to protect the *status quo* and therefore deals with activities that are prone to disturb the power structure more severely than other ones. Furthermore, crimes that are more likely to occur among the poorer classes of society are treated as morally more blameworthy than, for example, white collar crimes.[242]

However, while there are different attitudes towards some kinds of offences, a general consensus seems to exist in relation to most of the crimes encompassed in the Criminal Code.[243]

B. Punishment: The Application of Criminal Law

A system of criminal law seeks to guide and control the conduct of those who are subject to it by prohibiting certain types of conduct and by attaching sanctions to proven failures to obey those requirements.[244] While obedience to these rules may be encouraged by the citizens' own consciences, and by informal kinds of social pressure, it will also be useful to have some more organised way of dealing with actual or potential disobedience.

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[241] See Thoston Sellin, foreword in Georg Rusche and Otto Kirchheimer, ed. *Punishment and Social Structure* (New York: Russell & Russell, 1968).

[242] See e.g., Jackson Toby, 'Is Punishment Necessary?", in Stanley E. Grupp, ed. *Theories of Punishment* (Bloomington, Indiana Univ. Press, 1972).

[243] See F.J.O. Coddington, 'Problems of Punishment" (hereinafter: Coddington), in Stanley E. Grupp, ed. *Theories of Punishment* (Bloomington, Indiana Univ. Press, 1972).

[244] See R.A. Duff, *Trials and Punishment* (Cambridge Univ. Press, 1986) (hereinafter: Duff) at 77.

Punishment is the corollary of criminal law.[245] 'It is essential to the law's effectiveness. Without its application the law would be an empty letter."[246] Cesare Beccaria describes this in a very dramatic way by saying:

> "Some tangible motives had to be introduced, therefore, to prevent the despotic spirit, which is in every man, from plunging the laws of society into its original chaos."[247]

The state is responsible for the well-being of all its citizens. The representatives of the state have to look after the best interest of the population. They must try to increase the overall happiness in society. Therefore the goal of the punishment system is the prevention of crime. The idea of prevention has been developed by utilitarian thinkers. The justification of the penal system is the necessity to stop future crimes from occurring. The aim of preventing crime can only be achieved by a penalty system that is oriented towards the future. Punishment is the necessary corollary of criminal law. Punishment ought to be imposed according to the aspects of specific and general prevention.

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[245] See Mabbot, Punishment, *supra* note 137 at 48.

[246] Johannes Andenaes, *Punishment and Deterrence* (Univ. of Michigan Press, 1974); compare F.J.O. Coddington, *supra* note 243.

[247] Cesare Beccaria, 'On Crimes and Punishment" in Stanley E. Grupp, ed. *Theories of Punishment* (Bloomington, Indiana Univ. Press, 1972).

C. Plea bargaining and the Goals of the Criminal Law

1. specific deterrence

One reason for punishment is specific deterrence. The individual offender will be prevented from committing further crimes by deterring him through the infliction of some kind of suffering. The pain caused by the sanction has to be greater than the advantage gained by the offence.

Burgstaller argues that the need for preventive measures is reduced because of the remorseful confession.[248] Triffterer follows Burgstaller holding that active counteractions to the offence make the unlawful act appear in a different light.[249] Such actions thus justify a milder sanction on utilitarian grounds. Hence they contend that the admission of guilt is a sign of less culpability and thus has an impact on the need for specific deterrence. This holds true if the confession is made because the offender regrets his act. The repentant offender will not tend to commit further crimes. But a bargained for guilty plea cannot always be attributed to remorse.

On the other hand, individual deterrence may be weakened by the practice of plea bargaining. The offender may feel that he can commit crimes without great risk, because somehow he can always bargain for a lenient sentence in case he gets caught. He might get the impression that it is not the seriousness of the criminal act but someone's abilities in negotiating that determines the severity of the sentence.

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[248] Manfred Burgstaller, "Strafzumessungsrecht", ZStW 1982, Bd. 94 at 140 (hereinafter: Burgstaller); compare *R.* v. *DeJong* (1970), 1 C.C.C. (2d) 235 (Sask.C.A.).
[249] Triffterer, *supra* note 240 at 514.

Moreover, his plea to a lesser charge will not reflect the gravity of his conduct[250] and he thus might get off so easily that he only loses respect for the system.[251] For that reason, a result of the practice of the lesser plea might be an undermining of the deterrent effect of punishment.

Specific deterrence thus does not justify a more lenient sentence after a guilty plea has been entered following an agreement.

2. reform

A second utilitarian aspect of punishment is the reformatory theory. The reformist theory depends upon belief in the free will of the individual. The criminal can repent, can become a good citizen, if only he wants to. A person who is to be reformed has the mental capability to understand the wrong of his actions and is thus responsible for his offences. The purpose of reformation is to reduce the offenders tendency to commit crimes in general or crimes of a particular sort. At first sight deterrence seems to be the best way to reform a person. If someone is afraid of a harsh penalty one would expect his tendency to commit a further crime to be quite small.

A long prison term, on the other hand, usually has quite the opposite effect on people. In the prison environment they meet an atmosphere of despair, of disillusion with the justice system. Often prisoners are under great pressure to ascertain their status among the co-habitants. Many of them get mentally or physically abused. Prisoners learn new techniques and get new ideas about

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[250] See Ferguson and Roberts, *supra* note 70 at 527.
[251] See David Lynch, *supra* note 71 at 132.

how to commit crimes, and when they have left the penitentiary they have often improved their criminal skills rather than their skills to deal with life.[252]

Furthermore, the longer the incarceration term, the less can links to family and friends be maintained. The person leaves prison often without money and a job, and has little chance to find employment due to his/her criminal record. All he/she can do and what he/she knows best is to re-offend.[253]

Even a fine can lead to an increased tendency to re-offend. If the person has broken the law in the first place because he/she needed money, a fine will not solve his/her problems. The person may feel an even greater financial pressure, forcing him/her to commit more criminal acts.

Finally, harsh punishments can make people lose their faith in the justice system. They might feel no obligation to act in accordance with rules which are unjust.[254] If a penalty is very severe for a minor offence, potential offenders might go for a more serious crime. After all, they risk a severe sanction in any case. And the next time they offend, they are more careful and sophisticated about their actions.

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[252] See e.g., Dr. Rainer Amann, "Integrationspräventives, opferorientiertes Täterstrafrecht" (Schriftenreihe d. BMfJ, Bezauer Tage; Strafrecht 1989) (hereinafter: Amman); see also Dr. Frank Höpfel, "Gründe für ein Absehen von Verfolgung und Bestrafung nach geltendem Strafprozeßrecht" (Schriftenreihe des BMfJ, Strafrechtliche Probleme der Gegenwart, 1987).

[253] See *Decisions of the Working Group on short-term Prison Sentences in Europe*, printed with a review of the frequency of short-term prison sentences in European countries, (1959) Bewährungshilfe, at 219 ff., 264f.; see also Hermann Mannheim, *Group Problems in Crime and Punishment and Other Studies in Criminology and Criminal Law* (2nd enlarged ed., Montclair Patterson Smith, 1974) at 242 ff.

[254] See Barbara Hudson, *Justice through Punishment: a Critique of the 'Justice Model' of Corrections* (Basingstake: Macmillan Education, 1987).

Reform is supposed to work by changing the criminal's moral attitudes. Furthermore, the offender will learn how to lead a law-abiding life, and how to cope with problems without having to resort to criminal activity as a solution.

Reformation, therefore, indicates a more lenient punishment. It should fit the individual offender and thus requires a great deal of information about the circumstances of the crime and the criminal.

A milder punishment after a guilty plea has been justified[255] on the grounds that the offender who admits guilt has taken a first step towards reform.[256]

Again this is only true if the guilty plea is connected to remorse. If the accused loses respect for the system and starts to believe that justice can be bought it may even be contrary to his reformatory interests. The major lesson he/she learns is not remorse but that the system can be manipulated by the knowing offender.[257]

Reform, on the other hand, indicates a sanction that meets the particularities of the specific offence and offender. One advantage of plea bargaining is said to be its capacity of finding individual solutions. The reasonableness of the plea agreements have been frequently lauded. Plea bargaining is an attempt to avoid too harsh a result for a particular accused. Some go so far as saying that bargaining permits conviction on a charge which may not fit the evidence but which permits a lesser sentence. This argument may be accurate in the United States where

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[255] See e.g., *R.* v. *Summer* (1989), 73 C.R. (3d) 32 (Alta. C.A.).

[256] See Brereton, *supra* note 73 at 67; see also Thomas, Turner Case, *supra* note 225 at 561; compare *R.* v. *McKimm* (1969), 1 C.C.C. 340 (Ont. C.A.); *R.* v. *Wisniewski* (1975), 29 C.R.N.S. 342 (Ont. C.A.).

[257] See Ferguson and Roberts, *supra* note 70 at 551.

the sentencing judges have little discretion in imposing a sanction and are very much bound by guidelines that cannot always take into account the particularities of a single case.

However, in Canada just as in Austria, the courts have a very broad spectrum of sanctioning possibilities. 'In so far as the prosecutor has adopted tactics that guarantee a lenient sentence to the accused, the court has been deprived of its power to impose a sentence appropriate to the offence and the offender."[258] Due to the practice of plea bargaining, aspects of prosecutorial expediency rather than aspects of the particular case determine the sentence.

Yet sometimes the conviction itself counteracts reformatory goals. A person who has a criminal record is stigmatized and meets big problems in everyday life. Although this may be a good reason to convict someone on a lesser charge the same reasoning would have to be applied to a person who gets convicted after a trial. If plea bargaining was really necessary to reach a just solution this would indicate that the law needs reform rather than breaking the law in as many cases as possible.

In holding that plea bargaining is essential to avoid the harshness of the law the assumption is made that plea agreements circumvent the lawful outcome and consequently are illegal.

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[258] See Law Reform Commission 1975, *supra* note 54.

3. incapacitation

The third method of specific prevention is incapacitation.[259] It protects society by locking up the offender to make it impossible for him to re-offend, at least during the period of time he spends in prison. Incapacitation is not supposed to effect the offender's attitude towards his behaviour. 'Lock' em up and throw away the keys" expresses the core reasoning of this method of crime prevention. 'Incapacitation seeks to preserve the social order ... by caging criminals ... - inmates will no longer be at liberty to prey on law-abiding members of society."[260] But in pursuing this way of crime prevention the best method to stop any crime would be to lock up everyone who belongs to a high risk group in society.[261] Crime control through preventive incarceration would be the consequence.

A relatively short prison term cannot be justified on grounds of incapacitation because the idea of incapacitation leads to a lengthy period of incarceration. On the contrary, dangerous criminals who would have to be incapacitated might get away too leniently.

4. general deterrence

The deterrent model was developed by the classical school of criminology during the 18th and early 19th centuries. Taking its departure from the rational view of a man as pleasure-

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[259] Incapacitation will, for example, be the predominant aim where the accused presents a continuing danger to young children, and the prognosis for cure is poor: *R.* v. *Noyes* (1986), B.C.D. Crim. Sent. 7175-02 (B.C.S.C).

[260] Francis T. Cullen and Karen E. Gilbert, *Reaffirming Rehabilitation* (Ohio: Anderson Pub. Co., 1982), (hereinafter: Cullen) ch.7.

[261] See Norval Morris, Foreword in Johannes Andenaes ed. *Punishment and Deterrence* (Univ. of Michigan Press, 1974).

seeking, pain-avoiding creature, the objective is to deal with the criminal in such a way as to serve notice on potential offenders.[262] Deterrence aims to protect the social order by making offenders suffer sufficiently to dissuade them as well as onlookers entertaining similar criminal notions from venturing outside the law on future occasions.[263]

General deterrence, just as individual deterrence, seems to be best achieved by as severe a penalty as possible. A judge is supposed to give out harsh sentences,[264] thus leading people to refrain from criminal activity. Crime shall not pay. The punishment has to be at least severe enough not to make the offence worthwhile.[265] The offender has to feel some pain on top of his restitutional duties.

However, potential offenders are more deterred by the certainty of getting punished than by the harshness of the sanction.[266] Furthermore, most offences never get to be known. The clearance rate in most categories of crime is very low.[267] The punishment thus has to be at least severe enough not to make the risk of committing a crime worthwhile.

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[262] See Stanley E. Grupp, Introduction in Stanley E. Grupp, ed. *Theories of Punishment* (Bloomington, Indiana Univ. Press, 1972).

[263] See e.g., Cullen, *supra* note 260.

[264] Heavy sentences have been imposed because of the prevalence of the crimes in *R.* v. *Henderson* (1979), 8 C.R. (3d) S-19 (B.C.C.A.); *R.* v. *Marshall* (1977), 23 N.S.R. (2d) 234 (N.S.C.A.); *R.* v. *Sears* (1978), 39 C.C.C. (2d) 199, 2 C.R. (3d) S-27, S-28 (Ont. C.A.); *A.G. Can.* v. *Sigouin* (1970), C.A. 569 (Que. C.A.).

[265] See Beccaria, Cesare, "On Crimes and Punishment" in Stanley E. Grupp, ed. *Theories of Punishment* (Bloomington, Indiana Univ. Press, 1972).

[266] See John Hogarth, "The Principles of Sentencing: Ouimet Revisited" in Helene Dumont, ed. *Sentencing* (1987); see also the Survey of Young Offenders conducted by Schumann-Berlitz-Guth-Kaulitzky, "Jugendkriminalität und die Grenzen der Generalprävention" (1987), a summary of the results can be found in (1987) Kriminologisches Journal 13.

[267] In 1988 the clearance rate of break and enters in Vienna was 9.6% (Schriftenreihe d. BMfJ, Bezauer Tage, Strafrecht 1989, Aktuelle Gesetzesvorhaben auf strafrechtlichem Gebiet, Dr. Roland Miklau). According to the Security Report of the Austrian Federal Government 88% of the offences that have been reported to the police in 1988 remained without punishment.

General deterrence does not work for all kinds of wrong-doings. It can only have an impact on people's behaviour if they plan their offence and calculate the advantages and risks. There is empirical evidence that capital punishment, where it exists does not have any impact on the number of murders that take place.[268] Emotional crimes can hardly be prevented by deterrence.[269]

A danger that might arise if penalties are too high is the fact that potential criminals commit more and more severe crimes, because should they get caught they face a long prison term anyway.

However, general deterrence demands that offenders are punished according to their wrongdoing. If the population has the perception that criminals get off easily they might lose respect for the law. If the risk of getting caught plus the fact that sentences can be bargained down make criminal activity seem worthwhile the goal of general deterrence is not attained.[270]

5. educative effect

Another utilitarian aspect of punishment is its educative effect[271] on the population. By outlawing a certain behaviour the general perception of it can be changed. The moral object of punishment as such is to make people think of a certain kind of act as very bad.[272] Yet, if

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[268] See e.g., Thorston Sellin, Harper & Row, ed. *Capital Punishment* (New York, Evanston, and London, 1967).
[269] See Jackson Toby, *supra* note 242.
[270] See Schünemann, Gutachten, *supra* note 42 at B 57.
[271] See James F. Doyle, 'Justice and Legal Punishment" (1967) (hereinafter: Doyle), in Acton, *The Philosophy of Punishment*, *supra* note 237 at 159; see also EB zur RV (55,56).
[272] See A.C. Ewing, *The Morality of Punishment* (Montclair, N.J., Patterson Smith, 1970).

sanctions are perceived as being too harsh it does not feel just any more and can have the opposite effect on the public. The population, instead of seeing the offence as morally wrong might perceive the penalty as such and thus sympathize with the offender rather than with the legal authorities.[273]

The citizen, on the other hand, is entitled to rely on the law as it exists. If a rule is never applied, an illegal behaviour never punished, the population might start to perceive this behaviour as not being morally wrong at all.

The accused who pleads guilty acknowledges that he/she has broken the law.

Frisch[274] argues that the criminal offence causes damage to the authority of the law. This damage can be tempered if the offender takes responsibility for his actions. The confession is the recognition of the violated norm. For the educative effect of the law, remorse is not necessarily a prerequisite. The accused who openly admits guilt and declares that he accepts the law, thus upholds its supremacy, whether he/she is remorseful or not.

6. confirmation of the law

A similar goal to the education of the public is the confirmation of the law. This denunciatory objective of a penalty declares that in the society in question the offence is not tolerated.[275] If all rules could be broken without sanctions the faith in law and order would get

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[273] See H.L. Packer, 'The Limits of the Criminal Sanction: Toward an Integrated Theory of Criminal Punishment"(1968) (hereinafter: Packer) in Hogarth, *Materials*, *supra* note 209 at 30.
[274] Frisch, "Schuld und Strafe", ZStW 99 (1987) 780ff.
[275] See Walker, *Morality*, *supra* note 238 at 28.

lost. This would ultimately lead to a situation where no law exists. It is questionable whether or not norms without sanctions can be called law at all.

In *Lees* v. *The Queen*[276] and *R.*v. *Bridges* (No.2)[277] it was held that the attitude of the offender at his trial, toward both the offence and the criminal process may be taken into account in sentencing. A lenient sentence may be justified on the grounds that the harm is alleviated through the recognition of the violated norms.

D. Imposition of Punishment in Particular Cases

One has to distinguish between the goals of the criminal law system and the application of the law in every individual case. It is subject to controversy whether or not utilitarian aspects do have a significance on their own at all. According to Pallin the relationship between desert and prevention is one of instrumentality and objective. The deserved punishment is the mode to attain the goal which is the prevention of crime.

The Criminal Codes and case law give guidelines for the imposition of punishment in particular cases. For the determination of the penal sanction the Austrian judge is guided by the rules and special criteria found in the general section of the Criminal Code.[278] Yet, he maintains a

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[276] [1979] 2 S.C.R. 749, 15 C.R. (3d) 97, 46 C.C.C. (2d) 385 (S.C.C.).

[277] *R.* v. *Bridges* (No 2) (1989), 48 C.C.C. (3d) 535, 61 D.L.R. (4th) 126 (B.C.S.C.).

[278] See Leukauf-Steininger, *Kommentar zum Strafgesetzbuch* (Eisenstadt, 1979), § 32, Rz.3, S.192f.; see also Pallin, *Die Strafzumessung in rechtlicher Sicht* (Wien, 1982) Rz 1 und 85.

wide margin for discretion that he has to exercise in accordance with the values expressed in the substantial criminal law.[279]

> "...to constitute a crime against human laws, there must be, first, a vicious will and, secondly, an unlawful act consequent upon such vicious will." (Blackstone)

Guilt is a prerequisite for punishment. The principle that punishment ought not to be imposed without the element of culpability has its roots in the idea of justice. Every penalty should stand in some relation to the severity of the crime and the culpability of the criminal. ("nulla poena sine culpa")[280]

According to § 4 and § 32 (1) StGB (Austrian Criminal Code) the basis of the punishment is the degree of responsibility of the offender, that has been realized in the criminal act. By virtue of § 32 (2) StGB, the punishment should be more severe the more the offence can be attributed to an attitude that is rejecting, or the more deviant the offender is, towards legally protected values. Hence, it is not the act alone that constitutes the offence, but also the criminal mind[281] that has been expressed in the offence. [282] § 32 (3) states that the factual side of the offence is the relevant component. A person, therefore, may not be punished for his personal blameworthyness

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[279] See Burgstaller, *supra* note 248 at 129; see also Jeschek, Lehrbuch, *supra* note 40 at 699.

[280] Andrew von Hirsch, (*Doing Justice: the Choice of Punishment* (1976), in Hogarth (*Materials*), *supra* note 209 at 37) contests that "the amount of pain or deprivation inflicted on the individual offender should be appropriate to the amount of injury inflicted on society by the offence." This is only true, if Hirsch speaks of moral injury. The factual damage has to be dealt with by the means of tort law. The amount of pain or deprivation inflicted on the individual offender should be appropriate to the amount of moral culpability.

[281] Compare F.J.O. Coddington, *supra* note 243.

[282] See Burgstaller, *supra* note 248 at 153; see also Steininger, "Prozessuale Aspekte der Strafzumessung" (1982) RZ 247 at 250.

alone. Blame[283] always requires some behaviour that can be reproached. The culpability relative to the alleged criminal act has to be taken into account. The personal circumstances such as premeditated or cruel commission are facts that have to be added to the factual side of the crime.

By virtue of § 270/2/5 StPO the judge does not have to give reasons for his decision to the same extent as for his decision about the conviction. He just has to specify which aggravating and mitigating circumstances he has found.

In Canada the judge has not as many guidelines laid down by law[284] as the Austrian judge, but he has to take into account the existing case law, which points towards principles similar to the Austrian Criminal Code.[285] The judge who imposes the sentence has to take into account the gravity of the offence and the degree of responsibility of the offender. Bill C-41,[286] as passed by the house of Commons on June 15th, 1995, pronounces in its s. 718.1,

> "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

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[283] See J.E.R. Squires, 'Blame" (1968) in Acton, *The Philosophy of Punishment*, *supra* note 237 at 204.

[284] see Part XXIII of the Canadian *Criminal Code*; also see Bill C-41.

[285] see Part IV of the Austrian *Criminal Code* (§§ 32 ff.).

[286] Bill C-41 is not yet in force. If in force, Bill C-41 will make major changes in the sentencing law of Canada, including substitution of a new Part XXIII of the Code for the existing Part XXXIII, dealing with sentencing.

E. Sentencing Principles - Equality

One principle of punishment and of both the Austrian and the Canadian Constitution is the principle of equality which will be discussed next.

All people are equal before the Law. The right to equal treatment before and under the law not only is a constitutional guarantee with the objective of protecting the accused. It is also a principle of justice and fairness and a sentencing parameter.

The accused who has successfully bargained for a lenient sentence or the dropping of charges will be quite satisfied with the outcome of his/her case and he/she will not complain.[287] The situation adopts a different appearance from the point of view of a co-accused who has committed the same offence under the same mitigating or aggravating circumstances but was less successful in bargaining for a sentence. A harsher punishment will be perceived as discriminatory by him/her.[288]

One of the main problems that arise because of the practice of plea bargaining is said to be the unequal treatment of different offenders. The accused who insists on going to trial receives a sentence that is much higher than that of a co-accused who pleads guilty.[289] Although it has been

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[287] See Alschuler, Debate, *supra* note 159 at 687.

[288] See Andrew von Hirsch, 'Doing Justice: the Choice of Punishment" (1976) in Hogarth, (*Materials*), *supra* note 209 at 35.

[289] See Uhlman and Walker, 'He takes some of my time, I take some of his. An analysis of judicial sentencing patterns in jury cases." (1979-80) 14 Law & Soc. Rev. 323.

denied by some scholars that sentencing differentials actually do exist[290] most surveys and the principal court actors share the view that it pays to plead guilty.[291]

By virtue of s.15 (1) of the Canadian Charter of Rights and Freedoms[292]

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The European Convention of Human Rights states in its Art. 14:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Furthermore, Art. 26 of the International Convention provides that,

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law..."

The principle of equality is also postulated in s. 718.2 (*b*) of the proposed bill C-41:

> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

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[290] See e.g., Eisenstein and Jakobs, *supra* note 215.

[291] See Brereton, *supra* note 73 at 68.

[292] In contrast to the remainder of the Charter, the guarantee of equality in s.15 came into force on April 17th 1985, by virtue of s. 32(2) of the Constitution Act, 1992.

When a person first enters the criminal process as an accused he does not know what to expect. The outcome of his case is dependent on a variety of factors: the strength of evidence, the charging and sentencing policy regarding the offence in question, the quality of his defence counsel, etc.

Two accused who have committed the same offence might end up with totally different results, one getting acquitted, the other one convicted and sentenced to a long period of incarceration, because a different jury came to different conclusions. Hence, we face a situation of unlike treatment of like cases.

Furthermore, two offenders who have committed the same crime might face a different outcome, because in one case the prosecutor decides not to lay charges due to the weakness of evidence.[293] Here again, a situation is met where like cases are treated differently.

Both the Canadian Charter and the International Convention of Human Rights prohibit discrimination. This is not to say that distinctions are not allowed. The legislator not only has the right, but the obligation to make distinctions between persons due to their different merits.[294] The like treatment of like situations has as a corollary the different treatment of unlike situations.

The issue then arises, which factors constitute a basis for distinction and which do not, thus ending up being discriminatory. The main problem in the examination of the breach of an

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[293] The 29. German Legal Convention (29. Deutscher Juristentag, Abteilung Strafrecht, 1990) has expressed the dangers of prosecutorial discretion for the even administration of justice by stating: '(The prosecutorial discretion) favors firstly the privileged classes and secondly the person who is member of the governmental majority."

[294] Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions: La Forest, J. in *Reference Re Workers' Compensation Act,* [1989] 1 S.C.R. 143 at 194 (S.C.C.).

equality right is the determination of justifiable grounds of distinction. Justice requires the equal treatment of like situations.[295] The issue is: Equal and unequal in what? There may be differences in treatment of persons by reason of legislative enactment. What is required in pursuance of the basic principle that equals should be treated equally, is to determine whether persons who are similarly situated are treated equally. In other words, does a classification which is set up in a scheme treat persons who are similarly situated in a different manner? If it does, then there has been a breach of an equality right and it then can be determined whether such dissimilar treatment can be reasonably justified.[296]

Mr. Justice McIntyre in *Andrews* v. *Law Society of B.C.*[297] expressed this in the following manner:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individuals or groups not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

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[295] See *R.* v. *Hamilton* (1986), 54 C.R. (3d) 193 (Ont. C.A.).

[296] "...s.15 was never intended to eliminate all governmental distinctions - indeed such an approach would be unworkable... Specific Charter guarantees such as equality must be read in conjunction with the other rights and freedoms guaranteed in the Charter", A. Wayne McKay and Dianne Pothier, 'Developments in Constitutional Law: the 1988-1989 Term" (1990) 1 Supr. Ct. Law Rev. 81 at 86.

[297] [1989] 1 S.C.R. 143 at 174, (1989) 56 D.L.R. (4th) 1 (S.C.C.).

Both, the Canadian Charter and the International Convention of Human Rights hold that distinctions on the basis of sex, race, colour, religion, national or ethnic origin, etc., are discriminatory. A classification on these grounds is not a valid one.

In plea bargaining those factors might lead to a different outcome of cases, but where a trial is held rich, white, middle class persons who can afford to hire an expensive lawyer have an advantage as well.

The International Covenant uses the words "such as", which would indicate that other grounds of discrimination would be subject to scrutiny. The Canadian Charter uses the words "and in particular" before the enumeration of grounds, which effectively gives the same message.

Distinction may be made where it is based on relevant differences. A problem only really arises where irrelevant differences rather than crucial and relevant ones are used to distinguish groups or individuals.[298] Equality should not be confused with uniformity or homogeneousness. It is the like treatment of like situations and as a corollary the unlike treatment of unlike situations. Equality means proportional equality,[299] thus equality that has regard to the relative merits of the

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[298] In *R.* v. *Swain* (1991), 63 C.C.C. (3d) 481 at 483 (S.C.C.) Chief Justice Lamer for a five to one majority held that a common law rule that would allow the Crown to raise evidence of insanity only where the accused's own defence had put mental capacity for criminal intent into issue did not infringe s.15(1). 'The Court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e. equality before the law, equality under the law, equal protection of the law and equal benefit of the law) This inquiry will focus largely on whether the Crown has drawn a distinction between the claimant and others, based on personal characteristics. Next, the Court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others."

[299] See C.W.K. Mundle, 'Punishment and Desert" (1954), Postscript 1968, in Acton, *The Philosophy of Punishment, supra* note 237 at 65, 'In order to apply the principle of proportion all that is necessary is that we should be able to compare different offences in respect of their

person concerned.[300] Persons with similar backgrounds, records, etc. who have committed the same kind of offence should be subject to the same treatment. If two cases show different features they should be treated differently. Hence, cases have to be compared and like cases have to be treated alike. Justice requires that if two persons are equals they should have equal shares, if they are unequal, they should have unequal shares, but in proportion to their inequality. There is no inequality if unequals are treated in proportion to their mutual inequality. The question remains: equality and inequality in what?

A hypothetical situation shall be presumed where two persons have committed an identical offence with the same degree of guilt under the same circumstances.

1. One person enters into plea negotiations, one does not. The person who goes to trial gets acquitted, the one who plea bargains is subject to a relatively mild punishment.

The difference in outcome between those two cases can simply be justified by the presumption of innocence. Since the accused who gets acquitted is not guilty according to law, the difference in punishment is a difference between a guilty and an innocent person. To punish the guilty and not to punish the innocent is a just classification and does not violate equality rights.

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relative moral gravity and to compare different penalties in respect of their relative unpleasantness."

[300] See Stalley, R.F., *An Introduction to Plato's Laws* (Oxford: Basil Blackwell, 1983).

2. The offender who plea bargains receives a more lenient sentence than the one who gets convicted at trial.

A concession following a guilty plea consists in a milder punishment. The criteria that allow an unequal treatment of offenders who plead guilty compared to those who go to trial thus have to be consistent with the principles of punishment. The question arises whether a plea of guilty ought to have an independent significance in sentencing,[301] that is, whether or not the fact that the accused has pleaded guilty rather than not guilty ought to influence the severity of the sentence imposed.[302]

Why and how can a guilty plea or a confession justify a lenient sanction? A lot of literature exists on this issue and courts and scholars have found a variety of justifications and conclusions. One of them, and probably the most significant one, holds that a guilty plea is a sign of remorse.[303] Other ones refer to the good prospects of rehabilitation, the saving of public time and money.[304] But are those legally acceptable reasons for a mild sentence?[305]

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[301] See *Regina* v. *Spiller,* [1969] 4 C.C.C. 211 (B.C.C.A.), "...it is not a principle of universal application that because a person has pleaded guilty he should be treatet more leniently... The court's refusal to apply the principle of leniency for guilty pleas since the accused was 'inescapably caught' suggests that leniency is a reward for willingness to admit guilt where strict proof of guilt might be difficult... Other justifications for leniency are when a guilty plea shows true remorse, avoids an expensive trial, or saves the victim the embarrassement of an unnecessary public trial."

[302] See Paul Thomas, Turner Case, *supra* note 225 at 561.

[303] See Schmidt-Hieber, Verständigung, *supra* note 113 at 355; also see Widmaier "Absprachen im Strafprozeß" (1986) StV 358; compare *Scott* v. *U.S.*, 419 F. 2d 264, 278 (D.C.Cir. 1969).

[304] See Schmidt-Hieber, Verständigung, *supra* note 113 at 356; compare *Reg.* v. *Johnston and Tremayne* (1970), 4 C.C.C. 64, 2 O.R. 780 (Ont. C.A.): The Ontario Court of Appeal reduced the sentences on the ground that it was obvious that little, if any consideration was given by the trial judge to the fact that these two men had pleaded guilty and thus saved the community a great deal of expense.

[305] See BGH in (1955) NJW 1158.

Whether or not the admission of guilt following a plea bargain is a mitigating factor will be examined next.

a. Lenient Sentence: Confession/Guilty Plea as a Mitigating Factor

Plea bargaining takes place after the criminal act has been committed but before a conviction has been entered. Therefore the mitigating factors have to be circumstances that arise after the termination of the offence. To what extent should actions that occur after the offence influence the sanction?[306]

Jescheck[307] holds that the behaviour has to show some connection to the crime itself. And Bruns[308] adds that an affinity has to exist between the post-criminal behaviour and the offence or the offender's personality in order to be a relevant sentencing parameter. A remorseful confession and the alleviation of the consequences of the crime[309] seem to be the main reasons that indicate a more lenient sentence.

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[306] See e.g., *R.* v. *Laroche* (1983), 6 C.C.C. (3d) 268 (Que. C.A.); see also *R.* v. *Bartlett* and *Cameron* (1961), 131 C.C.C. 119 (Man. C.A.): Surrender to the police or cooperation with the prosecution may justify the mitigation of the sentence.

[307] Jescheck, Lehrbuch, *supra* note 40 at 257.

[308] Bruns, *Strafzumessungsrecht, Gesamtdarstellung* (2.Aufl., Köln - Berlin - Bonn - München, 1974), (hereinafter: Bruns) at 562.

[309] See § 33 of the Austrian *Criminal Code*.

(i.) Remorse

One reason for the difference in sentence is said to be the offender's remorse[310] and the willingness to amend his ways[311] which both becomes apparent in the guilty plea.

Nowakowski holds that a remorseful confession is an indication of the degree of culpability at the time the crime has been committed.[312] It allows a judgement of the offence and the offender's attitude towards his activity.[313] He thus sees the admission of guilt as a retributivist ground for leniency. Yet, such a conclusion is only possible if the court is convinced that the confession was given due to remorse.

Contrary to the Austrian situation, a confession is not explicitly mentioned as a mitigating circumstance in German law. Hence German scholars had to deal with the question how a

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[310] See Dr. Hans Valentin Schroll, "Aktives Reueverhalten: Möglichkeit einer Prozeßbeendigung im Vorverfahren" (Österreichische Richterwoche 1988, 20.-26.3.1988, Badgastein, 203ff.); see also *R.*. v. *M.E.R.* (1989), 49 C.C.C. 475 (N.S.S.C. Appeal Div.): When the court is satisfied that an accused will not re-offend and is genuinely remorseful the sentence may be suspended; Evidence that the offence is out of character and that it will not be repeated may act as a mitigating factor: *R.* v. *Adams and Waltz* (1989), 49 C.C.C. (3d) 100 (Ont. C.A.); *R.* v. *Boss* (1988), 68 C.R. (3d) 123, 46 C.C.C. (3d) 523 (Ont. C.A.); Yet in *Sawchyn.* v. *R.* and *R.* v. *Sawchyn* (1981), 5 W.W.R. 207 (Alta. C.A.) and *R.* v. *Arsenault* (1981), 21 C.R. (3d) 268 (P.E.I.C.A.) the court has held that the absence of remorse does not justify a more severe sentence.

[311] *R.* v. *Ikalowjuak* (1980), 27 A.R. 492 (NWT S.C.); R. v. Beriault (1982), 26 C.R. (3d) 396 (B.C.C.A.)

[312] Nowakowski, "Absolute Strafzumessungstheorie" (1974) StPdG 183 mN.

[313] Where the accused appears to be remorseful this may act as a mitigating factor: see e.g., *R.* v. *Austin* (1986), B.C.D. Crim. Sent. 7290-04 (B.C.C.A.); see also *R.* v. *Stegmeier and Stegmeier* (1988), B.C.D. Crim. Sent. 7092-03 (B.C.C.A.); It was seen as an aggravating factor where the accused displayed no indications of remorse: see e.g., *R.* v. *Blackwater* (1987), B.C.D. Crim. Sent. 7525-03 (B.C.C.A.) (CA007306 April 13, 1987); *R.* v. *Hughes* (1987), B.C.D. Crim. Sent. 7517-10 (B.C.C.A.) (CA005718 Feb.9, 1987); *R.* v. *M.G.O.* (1990), 54 C.C.C. (3d) 79 (N.W.T.S.C.).

confession that is based on a plea agreement can justify a lenient sanction. The main issue is, whether or not a confession indicates remorse at all.[314]

It is of course proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty. But just because a person pleads guilty he/she does not necessarily regret what he/she has done. Ferguson and Roberts deny that an admission of guilt resulting from plea bargaining has any psychological effect on the offender:

> "The accused's reasons for pleading guilty were usually self-serving, exploitive, and not remorseful." [315]

Most offenders regret the fact that they have been caught, rather than the criminal act itself. A confession that is made because of the promise of some advantage is an indicator against remorse. Furthermore, if the defendant pleads guilty through his counsel, the trial judge cannot even determine whether or not the accused shows remorse.

Hence, in *R.* v. *Spiller*[316] the Court held that,

> "...[i]t is not a principle of universal application that because a person has pleaded guilty he should be treated more leniently ...[T]he court's refusal to apply the principle of leniency for guilty pleas since the accused was 'inescapably caught' suggests that leniency is a reward for willingness to admit guilt where strict proof of guilt might be difficult..."

Some authors argue that a confession must always be seen as a sign of remorse: because of the principle "*in dubio pro reo*" (if there is any doubt it has to work in favour of the accused)

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[314] See *R.* v. *Thompson* (1989), 50 C.C.C. (3d) 126 (Alta. C.A.).
[315] Ferguson and Roberts, *supra* note 70 at 530.
[316] [1969] 4 C.C.C. 211 at 215 (B.C.C.A.), Robertson, J.A.

the judge regularly has to assume that remorse is at least part of the reason for the defendant's admission of guilt.[317]

This argument has been criticized by others who deny that the principle 'in dubio pro reo" is applicable in this context.[318] If a confession is made after the parties have reached an agreement with regard to the sentence this confession is obviously not rooted in remorseful feelings. A confession may in single cases indicate repentance and thus be relevant for the severity of the sanction. But denial too can be caused by shame about one's behaviour.[319] Since in this case the principle of *in dubio pro reo* has to be applied as well there may not be a difference in sentence between a person who confesses and one who does not.[320]

Furthermore, in offering a sentence discount a situation is created where a calculated instead of a remorseful confession must be expected.

> "...with the inducement of a lighter sentence dangled before him, the sincerity of any cries of mea culpa becomes questionable. Moreover, the refusal of a defendant to plead guilty is not necessarily indicative of a lack of repentance. A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction. "[321]

(ii.) Alleviation of the Consequences of the Crime

Another connection between an admission of guilt and a mild sentence and thus a justification for leniency is seen in the fact that a confession saves the victim the embarrassment

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[317] See e.g., Widmaier (1986) StV, *supra* note 68 at 358.
[318] See Nestler-Tremel, "Absprachen im Strafprozeß", DRiZ 1988 at 288.
[319] See e.g., *Phillips* v. *The Queen* (1973), 24 C.R.N.S. 305 (P.E.I.S.C. in banco): Failure to cooperate with the police or prosecution is *not* an aggravating factor.
[320] See dBGH in (1955) NJW 1158.
[321] *Scott* v. *U.S.*, 419 F. 2d 264, 271 (D.C.Cir. 1969), Bazelon, C.J.

of an unnecessary public trial[322] and facilitates the investigations and fact findings because a guilty plea avoids an expensive trial.[323]

The guilty plea can be combined with the offer to make restitution to the victim. Reparation of the damage alleviates the harm caused by the offence.[324] The relevant moment for the determination of the extent of harm is the time of conviction.[325] It is a mitigating factor if an accused has voluntarily offered restitution to his victim.[326] Yet, the defendant who elects a trial can offer restitution as well. The compensation of the damage is not specifically linked to a guilty plea.

The defendant who pleads guilty alleviates the consequences of the crime because the victim does not have to testify.[327] Especially when the victim is a child, its appearance in court can cause additional psychological damage. In *R.* v. *Shanower*[328] the Ontario Court of Appeal held as a mitigating factor that the accused pleaded guilty, and thus saved the girl the considerable embarrassment of having to testify at the trial. If one agrees with this standpoint, accused persons will receive different sanctions not because of differences as to the gravity of the

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[322] See *R.* v. *Johnston and Tremayne* (1970), 4 C.C.C. 64, 2 O.R. 780 (Ont. C.A.); *R.* v. *Wisniewski* (1975), 29 C.R.N.S. 342 (Ont. C.C.); and *R.* v. *Stephens and Moore* (1989), 51 C.C.C. (3d) 557 (P.E.I.S.C.).

[323] See Paul Thomas, *supra* note 225 at 561.

[324] See Zipf, H. 'Die mangelnde Strafwürdigkeit der Tat" (Gutachten zum 7. Österreichischen Juristentag 1979); see also OLG Linz 1982 (ÖJZ-LSK 1983/1); but see OGH (ÖJZ-LSK 1977/293, 1978/129), OLG Innsbruck (21.5.1980, 3B. 128/80).

[325] See Pallin, "Generalprävention und Alternativen zur Freiheitsstrafe" (1980) RZ 120 at 124.

[326] See e.g., *R.* v. *Clarke* (1985), B.C.D. Crim. Sent. 7130-05 (B.C.C.A.); *R.* v. *Chagnon* (1980), 42 N.S.R. (2d) 236 (N.S.S.C. App. Div.).

[327] See e.g., *R.* v. *B.J.W.* (1989), 51 C.C.C. (3d) 35 (P.E.I.S.C.).

[328] (1972), 8 C.C.C. (2d) 527 (Ont. C.A.).

offence but simply because in one case the victim was made of sterner stuff than the victim in another.[329]

It has been said that the person who pleads guilty alleviates the effects of his criminal act,[330] because he saves public time and money expenditures.[331] The reason for imposing a milder sentence on a person who pleads guilty is to reward the accused for saving expenses caused by the criminal process.

It can be argued that at least part of the harm caused by an offence is the procedure to detect crimes and punish offenders. The evil evoked by an unlawful act consists at least in part in the troubles and inconveniences of the law-enforcement agencies. The damage caused by an unlawful act has an impact on the severity of the sanction through retributive considerations, hence through the guilt of the offender.[332] Yet, the accused did not have any intent to cause expenses by being prosecuted. It can be reasoned, though, that a person who commits an offence knows that police investigations will take place and he at least has to bear in mind the possibility of getting caught and being submitted to criminal prosecution.

However, to hold that the criminal proceedings are part of the harm caused by the offence means that the accused who opts for a full trial gets punished for doing so. To get punished for the exercise of one's right to a trial violates s.7 of the Canadian Charter of Rights and Freedoms.

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[329] See Ferguson and Roberts, *supra* note 70 at 541.
[330] See e.g., Schmidt-Hieber, "Verständigung im Strafverfahren" (1986) StV 356.
[331] See *R.* v. *Johnson and Tremayne* (1970), 4 C.C.C. 64, (1970) 2 O.R. 780 (Ont. C.A.).
[332] "The meaning of 'punishment' includes a reference to past guilt", J.D. Mabbott, 'Professor Flew on Punishment" (1955) in Acton, *The Philosophy of Punishment*, *supra* note 237, 115 at 121.

In Austria it constitutes a violation of Art. 6 of the European Convention of Human Rights. Furthermore, if the procedures that lead to the conviction of the criminal are part of the mischief, then so would be the costs of incarceration. Hence, the offender would deserve an even harsher punishment for causing expenses to the prison system.

If one agrees with the view that the guilty plea alleviates the consequences of the crime, the offender who pleads guilty and thus waives his right to trial would always deserve a sentence discount. An offender who is proud of his unlawful acts and admits guilt out of this pride will consequently be subject to a more lenient punishment as well.

In *R.* v. *Johnston and Tremayne* the Ontario Court of Appeal reduced the sentences on the ground that

> "...little, if any, consideration was given by the trial judge to the fact that these two men pleaded guilty and thus saved the community a great deal of expense."[333]

The criminal procedure is expensive and so is the maintenance of prisons.[334] While all the goals and principles of punishment try to justify penal sanctions, financial expediency indicates a minimization of any kind of penalization and tries to justify the abstention from punishment on utilitarian grounds.

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[333] *R.* v. *Johnston and Tremayne* (1970), 4 C.C.C. 64 at 67, 2 O.R. 780 (Ont. C.A.), Gale C.J.O.

[334] It costs $ 95.000,- to keep a young offender in secure custody for a year, the average daily cost in provincial jails $110, in a federal jail $120 (*Globe and Mail*, Sat. April 1st, 1995); in Austria the costs for a day in prison amount to öS 600,- (Dr. Rainer Amann, 'Integrationspräventives, opferorientiertes Täterstrafrecht", Schriftenreihe des BMfJ, Bezauer Tage, Strafrecht 1989).

Plea bargaining is said to be vital for 'the administration of justice and serves an important role in the disposition of today's heavy calendars."[335] Without it, the courts would be overwhelmed by a mass of trials they would be unable to handle.[336] There are heavy pressures placed on the police and the courts to deal with more crime and to process more offenders than the organizations are properly equipped to handle if they are to operate in their ideal forms. 'The whole administration of justice could grind to a halt without it."[337] Most lawyers assert that the massive criminal caseloads could not possibly be processed without bargaining.[338]

Correspondingly, Chief Justice Burger in *Santobello* v. *N.Y.* [339] contended,

> "...Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full scale trial, the states and the Federal Government would need to multiply by many times the number of judges and court facilities. [It is] ...not only an essential part of the process but highly desirable for many reasons: it leads to prompt and largely final disposition of most criminal cases..."

When the judge imposes the sentence the question of guilt is already solved. Hence, whether or not he punishes leniently has no effect on the expenses in the particular case any more.

Yet the negotiations take place before the issue of guilt or innocence is decided. At the time the promise of a mild sentence in return for a guilty plea is made the admission of guilt does save money. But the judge may only grant concessions that are provided for in law.

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[335] *Santobello* v. *New York*, 404 U.S. 257 at 264 (1971).
[336] See David Lynch, 'The Impropriety of Plea Agreements: A Tale of Two Countries (From the Trenches and Towers: Plea Bargaining in the Trenches)" (1994) 19 Law and Social Inquiry 115.
[337] Ferguson and Roberts, *supra* note 70 at 520.
[338] See e.g., Klein, John F., *Let's Make a Deal* (Lexington, Mass. Mecington Books, 1976) at 5.
[339] 404 U.S. 257 at 264 (1971).

The relevant moment for the determination of the factors relevant for the imposition of the sanction is the sentencing hearing. The judge can only promise to impose a sanction that will be justified by the circumstances at this moment. Again it has to be pointed out that the mild sentence at that time does not save expenses any more.

Therefore, for the imposition of the punishment by the judge expediency is not a relevant sentencing criterion.

(iii.) Summary

A judge who participates in plea bargaining and makes sentence concessions as a reward for a guilty plea has to keep all the above principles and goals of punishment in mind. He may therefore impose a milder sentence on a person who pleads guilty on the retributive ground that the consequences of the offence include the testimony of the victim, which becomes part of the criminal act. Furthermore, a more lenient sentence is indicated when the accused couples the guilty plea with restitution and on the utilitarian ground of the educative effect of the law and the confirmation of its supremacy. Yet, if at all, these reasons only justify a minor difference in punishment, since all the other penological purposes have to be taken into account when a sentence is fixed. They do not warrant an additional three year prison term for a person who exercises his constitutional right to a jury trial.[340] Furthermore, such behaviour will always be mitigating. Consequently, the judge may not only take it into account, he has to do so. Even where a judge has not communicated with the accused prior to the imposition of the punishment

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[340] Interview conducted in March 1995 in a Provincial Court in British Columbia: The accused was charged with bank robbery and offered a three year prison term. He nevertheless pleaded not guilty and was consequently convicted and sentenced to a six year incarceration period.

he will have to give a sentence discount on these grounds. Therefore, it cannot be called a bargain at all. Only where the judge grants further concessions are the elements of a bargain met. Yet such concessions are unlawful because the judge is not exercising his discretion according to the sentencing principles laid down by law.[341]

b. Prosecutorial Expediency

However, the prosecutor acts before the sentencing stage. At the time plea discussions take place the admission of guilt is still capable of saving public resources and thus constitute grounds for leniency. If the greatest overall good is the goal of criminal law, then punishment should only be imposed on a balance between expenses and the penological reasons for punishment. The state grants concessions in order to save money and time.

Yet, retributivists claim that the state always has to impose the deserved punishment. Justice demands that a person gets punished according to his/her desert. According to the retributivist theory expediency is not a valid factor to consider when a person gets punished. The relationship between utiltarism and retributivism shall thus be examined.

Plea bargaining does not raise problems with regard to the justification of punishment. The defendant who pleads guilty receives a sentence discount on utilitarian grounds. The question that arises is not if the state may but whether or not the state should punish. Hence it is the purpose of punishment that is at issue. The question then arises what the goals of the criminal

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[341] See §§ 32 ff. StGB.

justice system are. Should the state punish with regard to retributivist equality, hence adopt a classification of relevant sentencing factors that includes only aspects of moral responsibility? Or should the state punish with regard to utilitarian expediency?

(i.) Retributivism

Defenders of the retributivist theory contend that the culpability is sufficient to determine a precise sanction. Hence only the offender's guilt should be taken into account. Punishment is justified on retributivist grounds and retributivism is its purpose. Utilitarian goals are side-effects of the deserved sanction. This standpoint insists that punishment may and has to be imposed to a degree warranted by the culpability of the offender. This is the upper and the lower limit. The state has the right to inflict pain on a person because this person has deserved it. A person has broken the law knowing that he/she would be subject to punishment if caught. The offender has chosen between conformity with the law and a sanction. Beccaria[342] speaks of a contract between all the individuals of the state. The advantage gained by intruding into the sphere of others justifies punishment. Just as a person who has done well deserves a reward, an offender deserves punishment. But not every person who has done something good gets a reward. Do we have to impose punishment every time someone has committed a crime? What is the purpose of punishment?[343]

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[342] Cesare Beccaria, *supra* note 247.

[343] See Andrew von Hirsch, "Doing Justice: the Choice of Punishment" (1976) in Hogarth (*Materials*), *supra* note 209 at 37.

According to the retributivist theory the purpose is retaliation.[344] Annulment[345] of the offence committed is said to be the aim of retribution. Retributivists ask that the individual is treated in such a manner as to effectively mitigate, if not completely satiate, the demands for retribution. For the retributivist it is an evident moral principle requiring no justification outside itself that crime deserves punishment and a punishment equivalent in kind to the evil done. The values of society are restored by retribution. Punishment should be imposed to annul the evil[346] done and for the supremacy of justice. Punishment ought not be imposed with regard to external facts[347] like the public interest and the common good, but only with regard to the individual who has broken the law, his culpability and the circumstances of the crime. Whether or not this has any positive effect on the public, are consequences only the future may tell. According to this theory economical factors can never lead to a sentence discount. The 'lex talionis" is the best known example for the retributivist view.[348]

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[344] "The Retributivist defends the desirability of a punitive response to the criminal by saying that the punitive reaction is the pain the criminal deserves, and that it is highly desirable to provide for an orderly, collective expression of society's natural feeling of revulsion toward an disapproval of criminal acts.", Grupp, Introduction, *supra* note 262.

[345] Annulment doctrine: this maintains that only the guilty are to be punished and that the guilty are always to be punished. See James F. Doyle, *supra* note 271.

[346] The standard objection to the retributive theory is that retributive punishment simply adds evil to evil. Mabbott contests that "evil" is inappropriate, because the deserved sanction is moral and because it is positive. He holds that punishment is not the infliction of evil, but the deprivation of something the offender would like to retain. (J.D. Mabbott, Professor Flew on Punishment, *supra* note 332) It could be argued that the criminal in committing the offence, does not produce evil either. If he steals something he just deprives another person of property; if a murderer kills someone, he deprives the victim of his life.

[347] An offender who has been caught and convicted should not be made the scapegoat for other persons who have committed similar crimes, but have not been caught and convicted. See *R.* v. *Sears* (1978), 39 C.C.C. (2d) 199 (Ont. C.A.); see also K.G. Armstrong, "The Retributivist hits back" (1961) in St.E.Grupp, ed. *Theories of Punishment* (Bloomington, Indiana Univ. Press, 1972).

[348] "An eye for an eye and a tooth for a tooth."

Yet, law is nothing else than an ordinance of reason for the common good made by the authority who has care of the community. It may be equated with morality in some instances but not in others. If the state had the duty to punish moral offences as such, the State ought to punish everyone, for which person is without sin?[349] Moreover, the idea of the law, unlike morality, demands only external obedience, and is not concerned about the citizens motive or reason for obeying it. A "criminal" thus means a man who has broken the law, not a bad man; an "innocent" man is a man who has not broken the law in connection with which he is being punished, though he may be a bad man and have broken other laws.

What's more, the retributivist theory roots in the idea of individuality. A person should never be used for some higher goals. Each human being is an end in himself/herself. This view adopts Emanuel Kant's standpoint that "one person is an end in himself, each a being whose worth cannot be estimated, for it is absolute.[350] Hence this theory serves as a protection for the individual: if punishment is not deserved it may not be imposed, not even for the best of society as a whole.

Therefore retribution can serve as a justification but not as a goal of punishment. If sanctioning an offender does not enhance the overall happiness in society the state has no reason to impose it. Justice for justice's sake is not a sound basis for causing pain to someone.[351]

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[349] See C.W.K. Mundle, "Punishment and Desert" (1954) in Acton, *The Philosophy of Punishment*, *supra* note 237, 65 at 68.

[350] Emanuel Kant, *Metaphysik der Sitten* (1797), Schriften zur Ethik und Religionsphilosophie.

[351] See C.W.K. Mundle, *supra* note 349.

(ii.) Utilitarian Theory

The principle of utility has been advanced by Jeremy Bentham. This principle "approves or disapproves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question."[352]

Utilitarian scholars argue that the deserved punishment sets only the upper limit. Although punishment may be imposed up to the level indicated by retributivism, this duration of the sentence is not necessary for the general good. Since no more pain should be caused than necessary, a sanction should not be more severe than indicated by utilitarism. The purpose of punishment on utilitarian grounds is the maximization of the overall good. If utilitarian parameters indicate a more lenient sentence, this milder sanction has to be imposed.[353] If the deserved punishment is not necessary to enhance the overall well-being in society, it should not be prescribed. Therefore, if plea bargaining increases the public interest by conserving resources, discounts from the deserved sentence would be permissible.

The utilitarian theory claims that it is the state's duty to guarantee the greatest good for everyone. Hence, the overall outcome of the case has to be looked at. If the greatest happiness for the biggest number of people can be achieved by refraining from punishing then the state must and should do so. However, Bruns[354] holds that the deserved sanction is best able to achieve utilitarian goals. Punishment is seen as the necessary consequence of criminal offences. The public

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[352] Jeremy Bentham, J.G. Burns and H.L.A.Hart, ed. *Introduction to the Principles of Moral and Legislation* (Oxford: Clarendon Press, 1970).

[353] See Pallin, "Die Strafzumessung in rechticher Sicht" (Wien 1982) Rz.8.

[354] Bruns, Gesamtdarstellung, *supra* note 308 at 335; compare Jescheck, Lehrbuch, *supra* note 40 at 18.

interest demands that crimes be prosecuted.[355] Therefore, the imposition of a sanction ought not depend on arbitrary decisions of single citizens or prosecutors. Justice and equality are not only ends in themselves but they figure large in utilitarian considerations as well. Many of the utilitarian aims can be best achieved by finding a just solution. A state that always acts unjustly will not be one that enhances the well being of its citizens. Most of the utilitarian aspects of punishment indicate a just sanction. It will rarely be in the best interest of society to impose a sentence that differs greatly from the one indicated by the culpability of the offender.

The state has the possibility to waive its claim for justice if it enhances the overall good. The question is: should it use this possibility for plea bargaining? The approved justifications for penalties, whether retributive or reductive, cannot be logically used as conclusive reasons for outlawing expedient interference with them.[356] What attitudes should be taken towards 'expedient interference' with penalties as distinct from leniency or severity that can be justified by reference to penal aims?

How can the overall good be increased if an offender who deserves a six year imprisonment term gets sentenced to only three years of incarceration? The state's claim for punishment is not fulfilled. Can it be in the best interest of society to let criminals get away easily?

It is, on first sight, not in the public interest to impose a three year sentence on someone who deserves a six year prison term. Yet, the resources do not allow prosecution of all criminals. And even if the prosecution of all offenders would be possible, the investigation of all crimes is

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[355] See Pallin, *supra* note 353.
[356] See Nigel Walker, *Morality, supra* note 238 at 140.

not. Hence, the state has to decide whether it is better to punish a smaller percentage of all offenders to the full extent or a larger number to only a fraction of what they deserve. Therefore, the prosecutor does not favour a three year to a six year sentence for one offender. The prosecutor who plea bargains decides that it serves the public interest better to have two offenders sentenced to three years of jail each rather than one person sentenced to a six year incarceration period.

The state does not have the resources to detect, investigate and prosecute all criminal offences. Even if it is possible to provide enough resources to investigate, prosecute and sanction all crimes, these assets have to be taken away from other administrative duties. The state would have to cut down on its social security schemes, for example.

What's more, over-enforcement can be just as disastrous as under-enforcement. If criminal law were strictly enforced, the state would lack a sufficient number of unconvicted guards to keep the rest of the population behind bars.[357] The state thus has the right and the duty to waive its claim for retributive justice if the costs of the law enforcement outweigh the interests of punishing an offender. The question remains if the discretion to refrain from investigating crimes should be used to bargain for guilty pleas. Under the circumstances described above the prosecutor would always have to refrain from prosecuting an offence. Furthermore, the prosecutor would have to grant the same concessions to every offender who pleads guilty, independent of his bargaining position.

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[357] See Bernard Botstein, *The Trial of the Future: Challenge to the Law* (New York, Simon and Schuster, 1963) at 52; see also Wolf Middendorff, *The Effectiveness of Punishment and Other Measures of Treatment* (Strasbourg, 1967) at 70.

3. Both offenders enter into plea discussions. The evidence against one person is weak, therefore the prosecution offers him a "good deal". He pleads guilty, but gets away leniently. The other offender pleads guilty after an agreement as well, but his punishment is harsher, because the evidence against him was stronger. If both persons would have gone to trial, the first one would have been acquitted, the second one convicted.

Contrary to case 1, both accused get convicted. Hence, both are guilty according to law and get punished. How can a sentence differential be justified by the fact that the evidence against one person was weaker? It has been argued that the first person deserves a more lenient punishment because his risk of getting convicted at trial is smaller. He gives up his chances of getting acquitted and thus merits a mild sanction. A three year sentence constitutes a compromise between six years in case the accused gets convicted at trial and an acquittal due to a lack of evidence. Professor Alschuler expressed this by stating, "A half a loaf is better than none." Hence, the penal sanction takes procedural aspects into account. The function of the criminal procedure and its compatibility with plea bargaining will thus be investigated.

F. Relationship between Penal System and Law Enforcement System

The criminal justice system consists of substantial criminal law and a set of procedural rules and principles which structure the criminal process of trial, verdict, sentence.[358] The

[358] See R.A. Duff, *supra* note 244 at 8.

substantial criminal law would not be effective in fulfilling its assignments - whatever they may be - without a system that connects the general rules with the particular cases.[359]

The trial is an instrument; it contributes as a means to certain further ends; its procedures should be those which will enable it to serve those ends most efficiently.[360] The essential purpose of a criminal trial is to identify those who are to be punished. The criminal process is a system of tribunals whose task it is to identify those who should, because they have broken the law, be liable to special coercive measures. The general justifying aim of the process lies in its instrumental contribution to the aim of preventing criminal conduct, by denouncing such conduct, and by identifying those who should be subject to the law's coercive provisions.

The trial's justifying aim must be that the guilty should be detected, convicted and duly sentenced. The pursuit of these consequentialist ends must be constrained by non-consequentialist concerns with fairness and with the rights and moral status of citizens.[361] It is however a requirement of justice, not merely of utility, that a criminal conviction should express an accurate judgment on a defendant's past conduct. Justice requires that only those who have broken the criminal law are subject to it's coercive sanctions; and the penal system aims to convict and condemn all and only those who deserve such condemnation by reason of their guilt.[362] It is not always possible to achieve this aim and since the unintentional conviction of the innocent is a greater evil than the unintentional acquittal of the guilty, the presumption of innocence has been adopted. The lack of evidence should lead to an acquittal. The presumption of innocence

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[359] See Foregger-Serini, *StPO*, Manzsche Kurzkommentare, 6. Auflage, S.4.
[360] See Duff, *supra* note 244 at 101; see also M.Feeley, "Two Models of the Criminal Justice System: An Organizational Perspective" (1973) 7 Law and Society Rev. 405.
[361] See Duff, *ibid.* at 102.
[362] See Duff, *ibid.* at 109.

indicates that a person may not get punished unless he is guilty beyond a reasonable doubt. If sufficient evidence does not exist to prove the defendant's guilt beyond a reasonable doubt he should not get convicted. On a balance between the interest of society and the protection of the rights of individuals the second has preponderance.[363] The state is not entitled to deprive a citizen of his rights unless the person has deserved it. The alternative would be a crime control model where punishment is justified by bureaucratic efficiency rather than by justice.

However, plea bargaining confuses the means with the ends. The criminal process has been compared to an examination at school.[364] The criminal process is the examination of the defendant's guilt, just as an examination in school serves as a basis for the determination of the student's skills. Plea bargaining has been compared to a system of grade bargaining in which a teacher would offer a student a favourable grade in exchange for a waiver of his right to have the teacher read the final examination. The student might be able to negotiate for a better mark. When the teacher is very busy and the paper long the student's negotiating position might improve.

This method of grading may even present an advantage to the school and to the public, because the teacher saves time, which can be spend on teaching other students.

In some cases the result subsequent to an agreement will be the same as if the teacher had read the paper. It can be argued that the grading procedure is arbitrary no matter what, because grades depend more on the taste of individual examiners than on the paper itself. And the teacher's offer might be tailored to his impression of each student's scholastic merit. Hence,

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[363] See Miklau, Grundfragen, *supra* note 51.
[364] See Kenneth Kipnis, Criminal Justice, *supra* note 181 at 104.

negotiations for grades are just as fair as the normal grading procedure. Moreover, if the student is allowed to negotiate, the grade might reflect his feelings towards his own work.

Yet, in both instances, school examinations and plea bargaining, the procedure has been confused with the substance. Students do not get grades for their negotiating skills but for their knowledge which is assessed in the examination. Similarly, an accused person does not get punished for the criminal procedure, but for the offence he has committed. Both, the trial and the school examination are mechanisms to establish the substance. Courts aim to reach just ends by just means. Yet, the means are not an end in itself.

The criminal justice system is one in which persons should be justly given, not what they have bargained for, but what they deserve, irrespective of their bargaining position.[365] Tactical decisions are not yet recognized as penological goals for punishment. In criminal cases the extent of an offender's punishment ought to turn primarily upon what he did and, perhaps, upon his personal characteristics rather than upon a postcrime, postarrest decision to exercise or not to exercise the procedural option.[366] Therefore, a distinction based on the strength of evidence constitutes a discrimination of the offender who receives a harsher sentence and violate the right to equality. The fact that a crime cannot be proven should never lead to a differential in sentence.

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[365] See Kipnis, Criminal Justice, *ibid.;* see also Alschuler, "The Changing Plea Bargaining Debate", *supra* note 159 at 705.

[366] Recommendation No.7 of the Research Report of the Canadian Sentencing Commission: Plea bargaining and Sentencing Guidelines (1988) holds that, "...if sentencing guidelines are to be implemented in Canada they should not include an explicit discount for a guilty plea."

CONCLUSION

The objective of this thesis was the evaluation of the plea bargaining practice. In the search for new ways of dealing with crime, plea bargaining seemed to be an alternative to the current Austrian penal system. It's advantages are clear: it aids in saving public resources, it removes the uncertainty of a trial, it shortens the process, etc. Because of all these advantages some Austrian lawyers already entertain plea negotiations on an informal basis. Whether or not this is consistent with the Austrian criminal procedure, with the rules, designed to protect the accused, and with the Austrian understanding of justice had to be discussed.

First, an overview over the criminal procedures in Austria and Canada has been given and the different rules and principles governing both procedures have been examined. Both, the Austrian and the Canadian procedure are accusatorial. In Austria the accusatorial principle has only been realized in a formal sense. While it is the prosecutor's responsibility to initiate the proceedings, it is the judge who is responsible for the examination of the case. The Austrian prosecutor is not allowed to conduct investigations. Hence, the form of investigation is inquisitorial. Although a criminal procedure may only take place after having been initiated by a prosecutor, the judge is not bound by the legal assessments in the charge. The court must investigate mitigating and aggravating circumstances *ex officio*.

Another difference between the Austrian and the Canadian punishment system is the principle of mandatory prosecution as opposed to the prosecutorial discretion in Canada. The

principle of mandatory prosecution obliges the Austrian State-Attorney to lay charges whenever he becomes aware of an offence and whenever there is enough evidence available to guarantee a reasonable likelihood of conviction.

However, rules are never precise enough not to leave any space for discretion. Therefore, the Austrian prosecutor exercises discretion as well. Yet his discretion is of substantial nature as opposed to the procedural discretion vested in the Canadian Attorney-General. The few procedural and substantive exemptions from the principle of compulsory prosecution leave little room for plea negotiations. Due to the principle of mandatory prosecution and the inquisitorial principle the Austrian prosecutor has a much smaller realm of action than his Canadian counterpart.

The judge has a much larger realm of actions than the prosecutor. He has broad discretion in sentencing an offender. He can offer a sentence reduction in return for an admission of guilt. In Austria the judge also leads the investigations. Therefore, plea bargaining in Austria is more likely to occur between the judge and the defendant than between him and the prosecutor.

However, in Canada judges rarely participate in plea negotiations. Judicial plea bargaining is regarded as being very improper.

Apart from the powers vested in the law enforcement agents, the defendant's scope of action has been analysed. Contrary to the Canadian accused, the Austrian accused cannot plead guilty and thus waive his right to trial. Yet, he can make a confession. However, a confession on the part of the defendant does not prevent a trial from taking place. Whether or not a confession liberates the judge from his obligation to further investigate the truth depends on the quality of

the confession. If the confession is detailed and does not leave doubts as to its accuracy, the judge does not have to investigate further.

The defendant's actions are largely shaped by his defence counsel. It does not happen very often that accused persons personally participate in plea negotiations. They have to rely on their attorneys to act in their best interest.

In order to evaluate plea bargaining the problems that are linked to the practice had to be examined. Hence, after a description of the powers of the persons involved in the plea bargaining process the problems were discussed. There are two sets of problems that can arise. Firstly, the defendant's rights might get violated and secondly the public interest might suffer.

Plea bargaining should be encouraged if it fulfils the same tasks as the trial. The aim of the criminal procedure is to screen the suspects in order to acquit the innocent and punish the guilty. Hence, the first issue that had to be dealt with was whether or not there is enough protection for the innocent. It has been shown that the Austrian accused does not have much protection against unfair methods used by either the prosecution or the judge.

The unfair methods that can be used by the prosecution or judge consist of promises, threats and tricks, not to mention coercion. Furthermore, the accused may be subjected to pressure from his own defence counsel. The accused might admit his guilt, not getting anything in return, because a sentence discount does not really exist. The punishment would have been the same after a conviction at trial.

Under the Canadian Charter of Rights and by virtue of the common law doctrine of abuse of process, the Canadian judge can, under certain circumstances enter a stay of proceedings, allow the defendant to change his plea to "not guilty" or compell the prosecution to comply to the terms of the agreement. None of these remedies is available to the Austrian defendant. While the Canadian defendant can take his guilty plea back where unfair methods have been used, the Austrian defendant has no means of retracting his confession. But even the Canadian defendant has to prove on a balance of probabilities that a plea agreement has been made. Moreover, he will have to prove the terms of the settlement and the fact that those terms have been violated by the other party. This will often be an insurmountable problem. One of the main problems of the plea bargaining practice thus is the lack of protection for the accused.

Not only the innocent accused has the right to be protected against unfair methods on the part of the law enforcement agents. The guilty person also has the right not to be harassed by the state. Not only the result of the case but also the means of obtaining that result must be just. There is a problem concerning the fairness of the plea bargaining system as such. The process which really leads to the conviction in criminal cases is neither governed by law nor supervised by an independent judge. It is characterized by secrecy and is not subject to any control. The terms of the agreement are only known to the participants of the bargain and if a party violates the deal it is difficult to prove its terms. These shortcomings cannot even be justified by the system's necessity because measures could be taken to create safeguards for the accused who enters into plea negotiations. The plea negotiations could, for example, take place in the presence of an independent judge. The deal could be documented in a written statement, signed by the parties.

The trial itself could become more informal. The plea bargain that takes place solely between the prosecutor and the defence lawyer violates the principles of fairness and fundamental justice.

The European Convention of Human Rights does not have a provision governing the fairness of the procedure. Yet, art. 6 (2) of the Convention guarantees the right to be presumed innocent until proven guilty. The realm of this provision is much broader than the guarantee to be presumed innocent under the Canadian Charter of Rights. The presumption of innocence under the European Charter is more than just a procedural guarantee and cannot be waived by the accused. The accused can waive single procedural rights, yet he cannot waive a trial altogether. Furthermore, the presumption of innocence indicates that an accused must be treated with all the respect an innocent person deserves. Plea bargaining assumes the defendant's guilt. For all these reasons it violates the presumption of innocence under the European Convention of Human Rights.

However, when the accused person who has engaged in plea negotiations is pleased because he has received a sentence discount, the second problem becomes relevant. How can such a discount be justified. The defendant will not complain, but a co-accused or any other defendant who receives a harsher punishment after exercising his right to trial might loose his faith in justice. The public perceives plea bargaining as a procedure that allows criminals to purchase justice at the bargaining table.[367] Is a sentence concession compatible with the principles

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[367] See Stanley A. Cohen and Anthony N. Dobb, 'Public Attitudes to Plea Bargaining" (Canada) (1989) 32 Crim. Law Quarterly 85; see also the plea bargain between the prosecutor and *Carla Homolka* in the case of *Bernardo,* [1995] O.J. No. 2249 (Ont.Ct. General Div.).

and goals of punishment? In order to recommend any legislative action the consistency of plea negotiations with the idea and goals of the criminal law had to be examined.

The objectives of punishment have been discussed in Part III of this thesis. The acknowledged goals of the criminal law system are not consistent with plea bargaining. Neither general nor specific prevention can justify a system of plea bargaining.

One of the main principles of justice is the right to equal treatment before and under the law. Yet, every person is different and the equal treatment of equal situations raises the question: equal in what?

The criteria that had to be taken into consideration were the principles of punishment. How can a confession/guilty plea justify a more lenient punishment? It has been demonstrated that the admission of guilt can under certain circumstances be a mitigating factor on both, retributive and utilitarian grounds if the admission of guilt is accompanied with signs of remorse. Yet these factors are a reason for leniency even without negotiations taking place. Both the prosecutor and the judge have to take them into account in any case. Furthermore, a confession that was made because a reward was offered cannot really be attributed to remorse. Therefore, the judge does not have much scope for plea bargaining if he acts in accordance with the acknowledged sentencing principles. A confession based on a plea agreement does not constitute a significant mitigating factor either on retributive or on utilitarian grounds. Hence, one of the

main points of criticism of plea bargaining is it's indifference to relevant sentencing criteria, and its contribution to sentencing disparity.[368] Offenders do not receive their deserved punishment.

However, a reason for a milder treatment of the person who pleads guilty is money and time he saves for the system. This is not a mitigating fact for the judge, because at the time when he imposes the sentence, the question of guilt has already been solved. But for the prosecutor who engages in plea bargaining public expenses are reason for refraining from prosecution. If the expenses for proving an offence cannot be justified by the importance of the case, the prosecutor may refrain from charging a person, because it does not enhance the overall good. Expediency is a reason for a waiver of the public claim for punishment, independent from the accused's motives to admit guilt. Therefore saving of public expenses can justify the prosecutor's decision to drop charges. Yet, in Austria expediency is a reason for the police not to conduct investigations, maybe even for the judge to refrain from examining the truth and to apply the principle *in dubio pro reo*. The Austrian prosecutor, however, has the obligation to conduct prosecutions whenever he/she is aware of a criminal offence. The question thus arises whether a system of prosecutorial expediency should be implemented in the Austrian criminal justice system. If the state's interest in punishment does not justify the infliction of a penal sanction in a given case, should the prosecutor then have the discretion to refrain from prosecuting? It has been shown that the goals of the criminal law are utilitarian. It is the state that decides what actions constitute criminal offences. Therefore, the state can waive its claim for punishment. The lawmaker has to keep the best interest of society in mind. However, retributive aspects figure largely in what constitutes the

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[368] Ferguson and Roberts, *supra* note 70 at 527.

interests of society. Yet, if the public interest does not outweigh the pain imposed on the offender the state has no motive to punish a person. Financial expediency, therefore, is a valid reason to refrain from punishment. However, if the importance of the case does not justify the costs for a conviction the agents of the state must always refrain from punishing. The issue whether or not to punish a person has to be distinguished from the issue whether or not to bargain for a guilty plea.

The Austrian criminal justice system emphazises retributive (or substantive) justice. As philosophically opposed thereto, plea bargaining focuses on distributive (or procedural) justice. The first tends to have procedures which efficiently separate the wheat from the chaff as far as prosecutable and unprosecutable cases are concerned. The Austrian law enforcement agents then ruthlessly, but still (for the most part) honestly, seek the truth of the matter through investigation and interrogation. On this basis the judges impose sentences mainly designed instrumentally to reduce the level of crime and restore the offender to his former place in society or isolate him from it. In this system the emphasis is placed on the screening phase of the criminal process where a careful investigation ensures the correct determination of factual guilt.[369] The existence within this legal system of some reasonably effective due process is assumed as natural and self-evident.[370]

A system of plea bargaining, on the other hand, views the criminal action essentially as a private dispute, which is litigated in a way which is likely to produce the maximum satisfaction

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[369] See Barton C. Ingraham, *The Structure of Criminal Procedure* (New York: Greenwood Press, 1987) at 121.

[370] See C.J. Hampson, 'The Rule of Law as Understood in the West" (1957) Les Colloques de Chicago at 13.

for the persons who use it by fairly distributing favorable outcomes between them. While adjudication is designed to answer the question of which side is correct on a case-by-case basis, settlement is not designed to answer this question but to produce an acceptable middle ground. This type of system is likely to emphasize procedure over substance and to transform the proceeding into a kind of game in which the litigants are lawyers who use the law, especially procedural rules and rights, tactically to gain advantage or to act as a bargaining chip in the disposition of the case.[371] The workload pressure might lead to an additional goal displacement: In the pursuit of efficiency, the original goals of the organization may be given secondary importance.[372]

> "Society's claim for justice can be bought with guilty pleas being the acceptable currency."[373]

Plea bargaining connects the risk of losing a case at trial with the penal sanction. Guilt is relative, merely a prediction of what the courts will in fact do. Yet, the purpose of the trial is to create the basis for the penal sanction by establishing the facts. If an offender gets punished he should get punished for his crime, not for his disposition at the trial. A person should not get punished for his bargaining abilities, but solely for the offence committed.

Plea bargaining creates problems not only with respect to the procedural fairness and the protection of the innocent accused, but also with respect to the goals of the penal system and the

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[371] See Barton C. Ingraham, *supra* note 369 at 117.
[372] Thomas Klein, *Let's Make a Deal* (Lexington, Mass. Mecington Books, 1976) at 5.
[373] Ferguson and Roberts, *supra* note 70 at 532.

idea of justice. Therefore, implementing a system of negotiated justice into the Austrian criminal justice system cannot be recommended.

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