

Judicial Control of Plea Agreements and the Right to Appeal: A Comparative Analysis of Common Law and Civil Law Models

*Controle judicial dos acordos criminais e o direito ao recurso:
análise comparativa dos modelos de common law e de civil law*

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ABSTRACT: This article considers how courts supervise negotiated agreements in criminal proceedings, looking at five different jurisdictions: the United States, England and Wales, France, Germany, and Poland. Although every system makes use of such agreements, they have developed in very different ways and the role assigned to the trial judge is far from uniform. What appears as a common minimum is the duty to check that the plea is voluntary and lawful, yet the depth of this review varies greatly. In some countries the judge's role is reduced almost to a formality, while in others it is linked directly to the search for truth and the proportionality of the sentence. The paper also points to the relationship between the first-instance court's control and the scope of appellate

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review, as well as to the risks that follow when judicial oversight gives way to prosecutorial dominance. The overall conclusion is that the more frequently consensual mechanisms are used, the more important it becomes to keep the court in its role as a genuine safeguard of fairness rather than a mere approver of bargains.

KEYWORDS: Negotiated justice; Judicial review; Plea bargaining; Comparative criminal procedure; Fair trial guarantees.

RESUMO: *O presente artigo examina como os tribunais supervisionam os acordos negociados no âmbito do processo penal, analisando cinco jurisdições distintas: Estados Unidos, Inglaterra e País de Gales, França, Alemanha e Polônia. Embora todos esses sistemas façam uso de mecanismos de negociação, seu desenvolvimento seguiu caminhos bastante diversos, e o papel atribuído ao juiz do processo está longe de ser uniforme. O ponto mínimo comum que se observa é o dever de verificar se a admissão de culpa foi voluntária e lícita, mas a profundidade dessa revisão varia significativamente. Em alguns países, o papel do juiz é reduzido quase a uma formalidade; em outros, está diretamente vinculado à busca da verdade e à proporcionalidade da sanção. O artigo também destaca a relação entre o controle exercido pelo juízo de primeiro grau e a extensão da revisão em grau de recurso, bem como os riscos decorrentes da supremacia do Ministério Público quando o controle judicial se enfraquece. Conclui-se que, quanto mais frequentemente se recorrem a mecanismos consensuais, mais essencial se torna preservar o papel do tribunal como verdadeira garantia de justiça e não como mero homologador de acordos.*

PALAVRAS-CHAVE: justiça negociada; controle judicial; plea bargaining; processo penal comparado; devido processo legal.

1. INTRODUCTION

Procedural agreements are not uniform. The differences between different types relate not only to the prerequisites for their application, but also to the bodies authorized to use them, the scope of the procedural rights of the parties to the agreements, the judicial review of the concluded agreements, and the possibility of appealing against rulings made according to consensual procedures. As recent comparative scholarship emphasizes, plea bargaining and related trial-avoiding conviction mechanisms are

increasingly understood as part of a broader global trend toward the administratization of criminal convictions, in which consensual or streamlined procedures shift substantial adjudicatory power from courts to prosecutors and investigative agencies³. However, it is impossible to ignore the axiological differences underlying the acceptance of consensualism in the various legal systems. This is quite understandable, since solutions have been developed in individual legal systems that are adapted to their own constitutional standards, legal traditions, legal culture, and organizational realities of the justice system. All this makes the study of the issue of procedural agreements multifaceted. This is demonstrated by contemporary analyses conducted from the perspective of criminal procedure law, constitutional law, human rights, and sociology of law, which reveal a wealth of theoretical approaches, as well as the practical consequences of using procedural agreements. On the one hand, they make it possible to identify common global trends, in particular the drive to consensualize criminal proceedings, relieve the burden on the courts, and increase the efficiency of the justice system⁴. On the other

³ LANGER, M., Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions, *Annual Review of Criminology*. Vol. 4, 2021, p. 406-407. <https://doi.org/10.1146/annurev-criminol-032317-092255>.

⁴ ALBERSTEIN Michal; ZIMERMAN, Nourit. Judicial conflict resolution in Italy, Israel and England and Wales: A comparative analysis of the regulation of judges' settlement activities. In MOSCATI, Maria Federica; PALMER, Michael; ROBERTS, Marian (eds) *Comparative Dispute Resolution*. Cheltenham: Edward Elgar Publishing, 2020, p. 298-310; ALTENHAIN, Karsten; JAHN, Matthias; KINZIG, Jörg. Die Praxis der Verständigung im Strafprozess. Baden-Baden: Nomos Verlag, 2020 <https://doi.org/10.5771/9783748922094>; ASHWORTH, Andrew. Plea bargaining, pragmatism and rights. In Müller-Dietz, Heinz; RADTKE, Henning (eds). *Festschrift für Heike Jung zum 65. Geburtstag am 23 April 2007*. Nomos: Baden-Baden, 2020, p. 19-28; BROOKS, Thom. Why should guilty pleas matter? In ROBERTS, Julian V.; RYBERG, Jesper (eds) *Sentencing the Self-Convicted: The Ethics of Pleading Guilty*. Oxford: Hart Publishing, 2022, p. 127-150, <http://dx.doi.org/10.2139/ssrn.4076318>; GAROUPA, Nuno; STEPHEN, Frank H. Why plea-bargaining fails to achieve results in so many criminal justice systems: A new framework for assessment. *Maastricht Journal of European and Comparative Law*. Vol. 15, Issue 3, 2008, p. 323-328, <https://doi.org/10.1177/1023263X0801500303>; GILLIÉRON, Gwladys. Comparing plea bargaining and abbreviated trial procedures. In BROWN Darryl K., TURNER Jenia Iontcheva, WEISSER Bettina (eds). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p.

hand, research also highlights the dangers of procedural agreements, such as the risk of violating the right to defense, weakening the principle of material truth, or reducing the role of the court to that of an entity that approves a deal reached between the prosecutor and the accused, without conducting full evidentiary proceedings⁵.

It is the latter issue that we have made the subject of this article. Its purpose is to analyze the legal solutions for the judicial review of procedural agreements in the common law system (the United States and England and Wales) and the statutory law system (France, Germany, and Poland). Based on the legal systems indicated, we want to determine whether the position of the court in the framework of procedural agreements - most often reduced to a formal approval of the agreement - makes it possible to consider the court as the body that decides on the outcome of the process and performs a review function over procedural agreements. This question becomes pertinent because in the consensual model, the court's role is often reduced to formally approving the agreement. After all, the court does not participate in shaping the content of the agreement, and its review function - concerning the voluntariness of the parties' pleas, the proportionality of the penalty, and the compliance with the rules of procedure - often takes on a superficial character. As a result, instead of acting as a guarantor of the fairness of the proceedings, the court becomes a kind of "notary" of the parties' agreement, which risks eroding the basic principles of the criminal process.

703–727; GRANDE, Eliabetta. Comparative approaches to criminal procedure. In BROWN Darryl K., TURNER Jenia Iontcheva, WEISSER Bettina (eds). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p. 67–88; WEIGEND, Thomas. Exclusion without trial? Exclusion of evidence and abbreviated procedures. *Revista Brasileira De Direito Processual Penal*. Vol. 7, Nr 1, 2021, p. 247–271, <https://doi.org/10.22197/rbdpp.v7i1.502>; BRADLEY, Craig. The Prosecutor's Role: Plea Bargaining and Evidentiary Exclusion, In LUNA Erik; WADE, Marianne (ed.) *The Prosecutor in Transnational Perspective*, OXFORD: Oxford University Press, 2012, p. 91–101.

- ⁵ HODGSON, Jacqueline S. *The metamorphosis of criminal justice: A comparative account*. Oxford: Oxford University Press, 2020, p. 115–141, <https://doi.org/10.1093/oso/9780199981427.001.0001>; GILLIÉRON, Gwladys. Comparing plea bargaining and abbreviated trial procedures. In BROWN Darryl K., TURNER Jenia Iontcheva, WEISSER Bettina (eds). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p. 703–727.

At the outset, we would like to point out that we will interpret the term “judicial review” mentioned in the title broadly. For the sake of completeness of the research, we want to focus not only on the role of the court of first instance, which decides on the agreement, but also on the possibility of appealing against a consensual judgment. Thus, we want to determine to what extent the different legal systems make it possible to protect the individual from the consequences of possible errors of the court of first instance. The research to be conducted will be comparative. Research of this nature makes it possible to better assess the functioning of judicial review of procedural agreements, to identify good practices that can be adapted, and to identify the risks associated with the reduction of the court’s position in consensual mechanisms. This is particularly important in the context of ensuring a balance between the efficiency of the justice system and the pursuit of a fair judgment and respect for the individual’s procedural guarantees. Comparative research makes it possible to assess how different legal systems reconcile values such as the right to a fair trial, the right to defense, the principle of truth, and the right to appeal with the need to streamline proceedings.

2. UNITED STATES OF AMERICA

The institution of plea bargaining, sometimes referred to in the literature as guilty plea bargaining, is one of the fundamental mechanisms of the American criminal justice system. It is a form of negotiation in which the prosecutor and the defense attorney reach an agreement on one or more criminal charges against the defendant, without holding a trial⁶. In its essence, the process involves negotiations between the public prosecutor and the defendant, usually with the participation of the defense attorney, aimed at reaching a consensual end to criminal proceedings through the admission of guilt by the defendant in exchange for certain concessions on the part of the justice system. A key element of plea bargaining is the defendant’s agreement to submit a plea of guilty, which in American doctrine is referred to as an act of self-conviction. In

⁶ HERMAN, Nicholas, *Plea Bargaining*, New York: Juris Publishing, Inc., 2012, p. 1-2.

exchange for this plea, the defendant receives official concessions from the prosecution or the court, which may relate to the sentence imposed or recommended, the nature of the charges brought, or other circumstances of the proceedings⁷.

The US Supreme Court's decision in *Brady v. United States*, in which the Supreme Court stated that a guilty plea is not unconstitutionally compelled when the defendant pleads guilty because he or she would prefer a certain or probable lesser penalty to the risk of a greater penalty⁸, played a significant role in shaping plea bargaining in the USA. The US Supreme Court even stated that plea bargaining was inherent in the criminal law and its administration⁹. In *Santobello v. New York*, 404 U.S. 257 (1971), the Supreme Court solidified its position, recognizing plea bargaining as an essential and desirable part of the process. The Supreme Court ruled that plea agreements are binding on the prosecution, and a breach by the prosecution requires remedial action from the court to ensure fairness to the defendant¹⁰. The discussion in case law regarding the permissibility and constitutional limits of the institution of plea bargain in US law has generally focused on the interpretation of the Sixth Amendment to the US Constitution (which guarantees, among other things, the right to a defense counsel and to effective assistance of a counsel). This is well illustrated by recent Supreme Court rulings, in particular in *Missouri v. Frye*, 566 U.S. 134 (2012). The Supreme Court confirmed that the right to effective assistance of a counsel also extends to the stage of considering and deciding on settlement offers, which may lapse or be rejected. Thus, it was concluded that the plea bargain negotiation phase is a "critical stage" of criminal proceedings in the context of the Sixth Amendment, and therefore it is covered by the guarantees regarding the right to a counsel. The ruling significantly broadened the standard of procedural protection

⁷ ALSCHULER, Albert W. Plea bargaining and its history. *Columbia Law Review*. Vol. 13, 1979, p. 211-245. PAOLINI, Gabriele, KANTOROWICZ-REZNICHENKO, Elena, VOIGT, Stefan. Plea bargaining procedures worldwide: Drivers of introduction and use. *Journal of Empirical Legal Studies*, Vol. 22, Issue 5. 2025, p. 28.

⁸ *Brady v. United States*. 397 U.S. 742 (1970).

⁹ *Ibidem*.

¹⁰ *Santobello v. New York*. 404 U.S. 257 (1971).

for the defendant in the context of settlements, shifting the focus from assessing the mere validity of the accepted plea to the negotiation stage and the due diligence of the defense lawyer during the negotiations.

The contemporary importance of plea bargaining in the American criminal justice-system can be assessed by looking at the statistics illustrating the scale of the phenomenon. The US Supreme Court estimates that at least ninety percent of criminal convictions in that country are based on guilty pleas¹¹. Some sources cite even higher statistics: in *Missouri v. Frye* (2012), the US Supreme Court stated that 97% of federal convictions and 94% of state convictions are the result of guilty pleas¹². This dominant position of plea bargaining in court practice makes this institution an alternative to the traditional trial but the main mechanism for resolving criminal cases. The prevalence of plea bargaining also reflects its strategic use by defendants, who may leverage the threat of proceeding to trial - particularly where cross-examination would impose a heavy burden on the victim or where prosecutorial evidence is fragile - to extract significantly more favourable sentencing concessions. As comparative research indicates, the American model may be seen as the most advanced expression of a broader global move toward trial-avoiding and administratized forms of criminal conviction¹³. Thus, in light of such statistics, the question of the admissibility of appeals against judgments based on plea bargaining seems extremely interesting.

The basic elements of plea bargains at the federal court level are governed by the Federal Rules of Criminal Procedure. According to Rule 11, a defendant may plead not guilty, guilty, or (with the court's consent) *nolo contendere*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

¹¹ *Brady v. United States*. 397 U.S. 742 (1970). See also: REIMELT, Alexandra W. An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal. *College Law Review*. Vol 51. Issue 13. 2010, p. 871-904.

¹² *Missouri v. Frye*. 566 U.S. 134 (2012).

¹³ PAOLINI, Gabriele. KANTOROWICZ-REZNICHENKO, Elena. VOIGT, Stefan, Plea Bargaining Procedures Worldwide: Drivers of Introduction and Use, *Journal of Empirical Legal Studies*. Vol. 22, Issue 1, 2025, <https://doi.org/10.1111/jels.12406>, p. 42-43.

Before the court accepts a guilty plea or *nolo contendere*, it is necessary to personally instruct the defendant at the hearing about the nature of the charges, his or her procedural rights, the consequences of waiving them, and the possible criminal and non-criminal consequences, and to make sure that the defendant fully understands them¹⁴. The role of the Court is essentially limited to ensuring that a plea is voluntary and to determining the factual basis for a plea. Before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in open court and determine that the plea is voluntary and not the result of force, threats, or improper promises (other than those contained in a plea agreement), and before entering judgment it must also ascertain that a sufficient factual basis supports the plea¹⁵.

An analysis of the procedural mechanisms of plea bargaining requires taking into account the temporal flexibility of this institution, which can be initiated both in the pre-trial phase, even before the formal filing of an indictment, and at any stage of court proceedings after the indictment is filed. This procedural versatility is one of the key attributes of the American system of procedural negotiations, allowing parties to optimize their legal strategy depending on the development of the situation in terms of the evidence available. While the conclusion of plea deals before the trial seems to be more common, since plea bargaining is also possible already in the pre-trial proceedings, it is argued in the literature that the defense's tactic may then be to deliberately prolong the trial, e.g. by calling a large number of witnesses, in order to tire out the prosecution and induce it to engage in plea bargaining talks¹⁶.

From a dogmatic perspective, it is possible to distinguish five basic models of plea bargaining developed in the practice of judicial decisions. The first is the prosecutor's abandonment of formal charges, which is the most far-reaching form of procedural concession. The second model involves the defendant pleading guilty or *nolo contendere* ("I do not contest")

¹⁴ United States Federal Rules of Criminal Procedure, Rule 11(a).

¹⁵ United States Federal Rules of Criminal Procedure, Rule 11, b (2), (3), c.

¹⁶ DYER, Gregory M.; JUDGE, Brendan. Criminal Defendants' Waiver of the Right to Appeal--An Unacceptable Condition of a Negotiated Sentence or Plea Bargain. *Notre Dame Law Review*. Vol. 65, Issue 3, 1990, p. 660-661.

statement regarding a charge of reduced gravity or lower legal classification. The third category includes partial admission of guilt in relation to selected charges in exchange for the dismissal of others. The fourth type of a plea bargain involves pleading guilty to a specific charge or a lesser charge while receiving a guarantee from the prosecutor regarding leniency in the penalty. Of particular interest from a theoretical point of view is the fifth model, which involves conditional guilty pleas or *nolo contendere*, subject to the right to appeal the judgment and possibly withdraw the guilty plea if the appellate court upholds certain procedural objections¹⁷.

Basic categories of plea bargaining include fact bargaining, guideline-factor bargaining, substantial-assistance bargaining, and charge bargaining¹⁸. Fact bargaining leads to the defendant admitting only to the prosecutor's specifically described version of the event, ignoring certain aggravating circumstances. Guideline-factor bargaining involves a system of formalized guidance on the impact of specific factual circumstances on sentencing, where the parties agree on the presentation of specific mitigating circumstances by the prosecutor. Substantial-assistance bargaining involves obtaining a benefit in exchange for providing substantial assistance to state authorities in the prosecution of other offenders, whereby the court may reduce the penalty imposed only with the approval of the prosecutor¹⁹. Charge bargaining occurs when prosecutors withdraw well-founded charges or agree not to bring well-founded charges in exchange for the defendant's guilty plea to a reduced set of charges²⁰.

¹⁷ HERMAN, Nicholas. *Plea Bargaining*. New York: Juris Publishing. Inc., 2012. p. 1-2.

¹⁸ CZERWIŃSKA, Dorota. *Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością* [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, 2024. p. 358-364.

¹⁹ BELLIN, Jeffrey. TURNER, Jenia, *Sentencing in an Era of Plea Bargains*, *North Carolina Law Review*. Vol. 102, Nr 1, 2023, p. 204. Breakdown shown according to: CZERWIŃSKA, Dorota. *Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością* [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, p. 358-364.

²⁰ LAFAVE, Wayne R. ISRAEL, Jerold H., KING Nancy J., KERR Orin S., *Criminal Procedure*. Minneapolis: West, 2017, p. 1166.

Although the judge is not involved in the negotiations, he or she is in a final and stronger position, because he or she can accept or reject the agreement reached. Under Rule 11(c)(1), the parties may agree in a plea agreement that the prosecutor will drop part of the charges (subparagraph A), recommend a specific sentence or not oppose the defense's motions (subparagraph B), or, in its most momentous form, the parties may enter into a plea agreement that is binding on the court (subparagraph C). This is where Rule 11(c)(5) provides an important procedural guarantee: if the court decides to reject a plea deal containing provisions of type (A) or (C), it must explicitly inform the parties of the rejection, personally instruct the defendant that he or she is not bound by the plea deal, provide him or her with an opportunity to withdraw the guilty plea, and indicate that, if upheld, the judgment may be less favorable to him or her than the one provided for in the deal. Such a mechanism is intended to safeguard the voluntariness of the defendant's decision and protect him or her against a situation in which he or she would be bound by a unilateral agreement of the parties, which the court ultimately will not accept.

While the court is required to ascertain that a factual basis exists for the plea, scholars emphasize that such safeguards do not in themselves eliminate the risk of unfairness: courts may duly inform defendants of their rights, confirm voluntariness, and establish a factual basis, yet still accept plea agreements that are substantively unfavorable - for instance, those containing waivers of the right to appeal despite potential police misconduct or judicial error²¹. The above leads directly to the question of the admissibility of appealing against plea bargains.

In federal practice, it has become a common feature of plea agreements in criminal cases for defendants to sign so-called appellate waivers, i.e., clauses waiving the right to challenge a penalty that has not yet been imposed. In the case law of appellate courts, a uniform view has been formed that such provisions are, in principle, effective and cover even some errors made in the sentencing²², as long as the waiver of the

²¹ DYER, Gregory M.; JUDGE, Brendan. Criminal Defendants' Waiver of the Right to Appeal-An Unacceptable Condition of a Negotiated Sentence or Plea Bargain. *Notre Dame Law Review*. Vol. 65, Issue 3, 1990. p. 669.

²² CALHOUN, Robert K. Waiver of the Right to Appeal. *Hastings Constitutional Law Quarterly*. Vol 23, 1996 p. 200-210.

right to appeal was made knowingly and voluntarily²³. Consequently, after an appeal is filed in violation of a plea agreement, the government usually files a motion to dismiss the appeal, and appellate courts - after giving the defendant an opportunity to respond - decide on this motion even before the merits of the grounds for the appeal are examined²⁴.

The traditional guilty plea closes the case in the sense that it results in a waiver of the right to appeal on all issues except the validity of the plea itself and the court's jurisdiction. In practice, the institution has emerged of the so-called conditional guilty plea - an agreement in which the prosecutor, the court, and the defendant agree that the guilty plea is conditioned on the preservation of the right to appeal in relation to selected legal issues. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea²⁵.

Although the standard safeguards associated with accepting a plea - such as establishing the voluntariness of the plea or the existence of a factual basis - are crucial, they do not rule out the possibility of successfully challenging a plea agreement in a criminal case.

The first point of reference remains the case *Strickland v. Washington*, 466 U.S. 668 (1984), in which the Supreme Court first formulated a general standard for evaluating a claim of ineffective assistance of a counsel in the context of the Sixth Amendment. A two-step test was then established: the defendant must first show that the counsel's

²³ See, e.g., *United States v. Guillen*, 561 F.3d 527, 529-31 (D.C. Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1318, 1324-28 (10th Cir. 2004); *United States v. Andis*, 333 F.3d 886, 889-92 (8th Cir. 2003); *United States v. Teeter*, 257 F.3d 14, 21-23 (1st Cir. 2001); *United States v. Schmidt*, 47 F.3d 188, 190-92 (7th Cir. 1995); *United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995); *United States v. Yemitan*, 70 F.3d 746, 747-48 (2d Cir. 1995); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51, 52-53 (4th Cir. 1990); *United States v. Navarro-Botello*, 912 F.2d 318, 321-22 (9th Cir. 1990).

²⁴ BERNARDO Kevin. Post-Sentencing Appellate Waivers. *University of Michigan Journal of Law Reform*. Vol. 48. Issue 2, 2015. p. 351-353.

²⁵ United States Federal Rules of Criminal Procedure, Rule 11(a) (2).

act or omission deviated from the objective standard of professional due diligence, and second, that the failure was “prejudicial,” i.e. there is a reasonable probability that, but for the defender’s errors, the outcome of the process would have been different. In this way the Court emphasized that the constitutional right to defense does not guarantee perfection, but requires the provision of effective and competent representation in a trial²⁶.

The standard from the Strickland case was subsequently developed in criminal settlement law. In *Lafler v. Cooper* (2012), the Supreme Court decided the issue of the consequences of ineffective assistance of a counsel that led to the rejection of a favorable plea agreement proposal. The defendant, following the erroneous advice of his attorney, did not accept the prosecutor’s offer, and then – after a properly conducted trial before a jury - was convicted and received a harsher penalty than provided for in the rejected offer. The Court emphasized that the right to effective assistance of counsel also covers the stage of plea negotiations, and that a full and fair trial does not eliminate the effects of a previous violation. Applying the test from Strickland, the court held that the defendant, in order to show the existence of a “prejudicial” failure, must prove that but for the erroneous advice, there was a reasonable probability (1) that he would have accepted the offer, (2) that it would have been presented to the court, (3) that the court would have accepted it, and (4) that the sentence imposed according to the offer would have been more lenient than the sentence actually imposed after the trial²⁷.

In light of the decision in *Lafler v. Cooper* before the US Supreme Court, three key elements of challenging a ruling related to a plea deal can be identified, citing violations of Sixth Amendment rights, including the right to a counsel. First, the essential argument may be ineffective and incompetent legal assistance provided in the course of plea deal negotiations. In the *Lafler* case, the defendant’s attorney convinced him

²⁶ *Strickland v. Washington*. 466 U.S. 668 (1984). GABRIEL, Richard L. The Strickland standard for claims of Ineffective assistance of counsel: emasculating the sixth amendment in the guise of due process. *University of Pennsylvania Law Review*. Vol. 134, 1986, p.1259-1289; GRIFFIN, Lissa. The Right to Effective Assistance of Appellate Counsel. *West Virginia Law Review*. Vol. 97, No 1, 1994, p. 2-50.

²⁷ *Lafler v. Cooper*. 566 U.S. 156 (2012).

that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. This erroneous advice led the defendant to reject a favorable plea deal offer. The second element is an erroneous demonstration of the court's error. In *United States v. Marin*, the error constituting grounds for appealing the plea deal was the fact that the sentence imposed exceeded the statutory maximum²⁸. In the facts of the case in *Lafler v. Cooper*, the court ignored the two-part test from *Strickland v. Washington*. The court only found that the defendant knowingly and voluntarily rejected the plea deal offer without examining whether this decision was a consequence of ineffective legal assistance. Finally, it is necessary to demonstrate that the counsel's error had an actual negative impact on the outcome of the case. In *Lafler v. Cooper*, the real negative consequence of ineffective legal assistance was that the defendant lost the opportunity to accept a plea bargain resulting in a much lighter sentence than the one imposed by the court.

In the context of the right to appeal against a plea deal, it is also worth referring again to *Missouri v. Frye* (2012), where the US Supreme Court examined whether the defendant could successfully challenge a valid plea deal despite its voluntariness and established facts, if there was a violation of the constitutional right to effective assistance of a counsel. The key was the defense counsel's failure to inform the client of a more favorable plea deal offer, which consequently expired. The Court clearly stated that the Sixth Amendment guarantees effective assistance at the negotiation stage as well, so the defendant can raise the claim of *ineffective assistance of counsel* on appeal. Moreover, in order to show the harm of the ineffective defense, the defendant must prove that, with proper action by the defense counsel, he would have accepted the offer, and its provisions would have been accepted by the court and the prosecutor. In this way, *Frye* confirms the way to challenge concluded plea deals in situations where their unfavorable content was the result of a violation of the constitutional standard of the right to defense²⁹.

Although federal law - particularly Federal Rule of Criminal Procedure 11 - prohibits judicial participation in plea discussions, the

²⁸ *United States v. Marin*. 961 F.2d 493. 496 (4th Cir. 1992).

²⁹ *Missouri v. Frye*. 566 U.S. 134 (2012).

question of whether and to what extent the judge may engage in plea bargaining is largely determined by state law. Several jurisdictions expressly authorise judicial involvement. North Carolina permits the trial judge to “participate in the discussions” between prosecution and defence³⁰. Similarly, Illinois allows judicial participation on the defendant’s request and with prosecutorial consent³¹, Maine provides one of the clearest statutory bases for judicial involvement in plea bargaining: Rule 11A(a), read together with Rule 18(b), expressly authorises the court to participate in plea discussions and to facilitate a plea agreement by suggesting or addressing specific terms under consideration³². Oregon follows a complex hybrid model: the trial judge is generally barred from participating in plea discussions, whereas a different judge may take part - on joint request of the parties or at the direction of the presiding judge - in an advisory and non-binding capacity, with strict procedural safeguards ensuring that the trial judge remains insulated from the negotiation process unless the defendant knowingly waives that protection³³. By contrast, states such as New Jersey maintain a strict prohibition on judicial participation in plea bargaining³⁴. This variation indicates that, in the United States, judicial involvement in plea bargaining seems to be shaped less by federal constitutional doctrine than by the procedural choices made within each state.

In conclusion, plea bargaining in the American criminal process, while relying on the rigors of voluntariness and establishing facts, remains an institution that is subject to appeal. In federal practice, waiver-of-appeal clauses are the standard, which significantly limit the possibility of challenging a judgment but does not eliminate constitutional guarantees

³⁰ NC Gen Stat § 15A-1021 (2024)

³¹ Illinois Supreme Court Rule 402(d)(1): Available at: <https://www.illinois-courts.gov/rules/supreme-court-rules?a=iv> (accessed 15 November 2025).

³² Maine Rules Of Unified Criminal Procedure, Available at: https://www.courts.maine.gov/rules/text/mru_crim_p_plus_2025-05-01.pdf, (accessed 15 November 2025).

³³ Oregon Revised Statutes § 135.432(1)–(5), Available at: https://oregon.public.law/statutes/ors_135.432, (accessed 15 November 2025).

³⁴ New Jersey Court Rule 3:9-3(a). Available at: <https://www.njcourts.gov/attorneys/rules-of-court>, (accessed 15 November 2025).

under the Sixth Amendment. The evolution of the Supreme Court's case law, from the general test in *Strickland v. Washington* to its adaptation in *Lafler v. Cooper* and *Missouri v. Frye*, shows that the constitutional right to effective assistance of a counsel sets limits on the stability of plea agreements. In practice, this means that even a properly concluded and accepted plea agreement can be challenged if it resulted from failures of the defense that limited the defendant's ability to make an informed and rational choice. From a systemic perspective, these guarantees are an important complement to the formal provisions of Rule 11, emphasizing that the foundation of the American criminal justice system remains not so much the procedural consensus itself, but the reliability and fairness of the entire procedure.

3. ENGLAND AND WALES

The legal system of England and Wales has also developed the institution of plea bargaining, understood as negotiations between the defense and the prosecution (sometimes with the participation of the court), the purpose of which is to obtain for the defendant leniency with regard to the criminal consequences in exchange for a guilty plea and a waiver of the right to a full trial. In practice, it takes three basic forms: charge bargaining, which involves dropping or modifying charges, fact bargaining, which involves shaping the factual basis of the case in a way favorable to the defendant, and sentence bargaining, which involves negotiations regarding the severity of the penalty³⁵.

Recent empirical work has also shown that, notwithstanding the policy objective of promoting expediency, plea bargaining may itself generate delay and additional procedural labour. As Hodgson notes, overcharging is structurally embedded in prosecutorial practice in England and Wales - when advising the police on charging decisions, Crown Prosecutors routinely indicate from the outset the counts on which they would be prepared to accept a guilty plea, thereby creating an incentive (sometimes even unconsciously) to frame charges ambitiously in order to

³⁵ RAUXLOH, Regina. *Plea Bargaining in National and International Law A Comparative Study*, New York: Routledge, 2012, p. 25-27.

preserve bargaining space. This dynamic, combined with the availability of charge and fact bargaining, reinforces the widespread perception among defence practitioners that early guilty pleas are often strategically unwise, even in a system that attaches substantial sentencing discounts to an early indication of guilt³⁶.

Nevertheless, England and Wales plea bargaining plays an important role in the practice of the criminal justice system. The vast majority of defendants in criminal cases plead guilty, and as a result, their cases end without a full evidentiary process. Research indicates that the overwhelming majority of these guilty pleas are the result of one form of plea bargaining - either expressly agreed more lenient legal classification of the charges (charge bargaining) or the presentation of a less incriminating version of the facts (fact bargaining). Most often, however, the decisive factor turns out to be the mechanism of the so-called sentencing discount, which involves a statutory reduction of the penalty (by up to one-third) if a guilty plea is submitted before the trial. Statistics further confirm the importance of this phenomenon: in 2011, as many as 70% of defendants before the Crown Court pleaded guilty to all charges, and in magistrate courts the percentage was probably even higher³⁷. More recent data point to the continued structural significance of guilty pleas: in Q2 2025, the guilty-plea rate in the Crown Court stood at 61%, broadly consistent with post-2023 levels and only slightly below the pre-COVID baseline³⁸.

³⁶ HODGSON, Jacqueline S., *Plea bargaining. a comparative analysis*. In Wright, J. D., (ed.) *International Encyclopedia of the Social & Behavioral Sciences*. Amsterdam: Elsevier, 2015, pp. 226-231; GORMLEY, Jay. *The inefficiency of plea bargaining*. *Journal of Law and Society*. Vol. 49, Nr 2, <https://doi.org/10.1111/jols.12360>

³⁷ HORNE, Juliet, *Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales*, *Warwick School of Law Research Paper*, 2013, p. 4. DOI: <http://dx.doi.org/10.2139/ssrn.2286681>.

³⁸ Ministry of Justice, *Criminal Court Statistics Quarterly: April to June 2025* (18 September 2025), available at: <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2025/criminal-court-statistics-quarterly-april-to-june-2025> (last accessed: 13 November 2025), section "Guilty plea rate"

At the same time, the practice of plea bargaining in England and Wales has actually existed only since the 1970s. Unlike in the United States, earlier the topic remained on the margins of legal debate and was rarely the subject of systematic research, and little was actually known about the informal negotiations between the prosecution and the defense. A turning point was the case *R. v. Turner* (1970, 2 All E.R. 281), in which Lord Parker – then Lord Chief Justice – explicitly prohibited judges from suggesting the penalty in exchange for a guilty plea. It was stressed that such a practice would constitute unacceptable pressure on the defendant and would be in contradiction to the basic principles of adversarialism, judicial independence, and the presumption of innocence³⁹.

Despite the formal prohibitions arising from *R. v. Turner*, mechanisms have emerged in practice that facilitated the so-called covert judicial plea bargaining. This phenomenon was made possible by several factors. First, in the traditional model of the attorney-client relationship, the dominant position was held by the professional attorney, who in fact made the fundamental strategic decisions in the case. Second, the judgment in the *Turner* case left room for attorneys to communicate freely with judges in private conversations, making it possible to obtain informal guidance on the expected sentence. Third, there was widespread awareness in the legal community of the existence of the so-called sentencing discount for admission of guilt, justified by practical considerations such as saving the court's time or reducing inconvenience to witnesses. All these elements created conditions conducive to covert forms of procedural negotiations, despite the formal prohibition of the judge's direct participation in plea bargaining⁴⁰.

An important turning point was the 1993 report of the Royal Commission on Criminal Justice, which recommended statutory regulation of the institution of sentencing discount. Since then, the justification for sentencing discount has shifted from the traditional categories of “remorse” or “expression of regret” to arguments of a purely pragmatic

³⁹ THOMAS, Philip A. Plea Bargaining in England. *Journal of Criminal Law and Criminology*. Vol. 69, Issue 2. 1978, p. 172. See also: FLYNN, Asher. Fortunately We in Victoria Are Not in That UK Situation': Australian and United Kingdom Perspectives on Plea Bargaining Reform. *Deakin Law Review*. Vol. 16, 2011. p. 372.

⁴⁰ *Ibidem*. p. 173.

nature, primarily those related to the need to ensure the efficiency and effectiveness of criminal proceedings. Subsequent reforms - such as the advance indication of sentence, the introduction of minimum sentences, and the development of the practice of procedural discussions - have significantly increased the pressure to plead guilty and perpetuated its perception as a tactical decision by the defendant. Today, the vast majority of convictions in England and Wales are based on a guilty plea, and plea bargaining has become central to the operation of the criminal justice system, although it still raises serious concerns about the risk of violating the voluntariness of decisions⁴¹.

In England and Wales, procedural agreements can also be entered into in cases of the most serious crimes adjudicated by the Crown Court. Negotiations usually take place before the first court session. The Code for Crown Prosecutors sets clear rules for accepting guilty pleas. Prosecutors may only accept a plea if the court can impose a sentence that properly reflects the seriousness of the offense, allows for confiscation where appropriate, and provides adequate powers to make ancillary orders. Particular caution is required where a plea would enable the defendant to avoid a mandatory minimum sentence, and pleas must never be accepted merely for reasons of convenience. In deciding whether to accept a plea, prosecutors should take into account the interests and, where possible, the views of the victim, while making clear to the court the exact basis on which the plea is offered and accepted. Where the factual basis is disputed and could affect the sentence, the court should be invited to hear evidence before sentencing⁴².

The court's role is to review the consistency of the agreed agreement with the evidence and the requirements of justice. Formally, the court may refuse to approve it, although in practice it usually approves the submitted agreements⁴³. At the latest at the first session, the court is

⁴¹ HORNE, Juliet, *Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales*, *Warwick School of Law Research Paper*. 2013, p. 5. DOI: <http://dx.doi.org/10.2139/ssrn.2286681>.

⁴² see: *The Code for Crown Prosecutors* 8th Edition, October 2018, s. 9.6.

⁴³ Johnston E., Smith T., *Criminal Procedure and Punishment*, Saltford 2020, p. 182. See also: CZERWIŃSKA, Dorota. *Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością* [Procedural Settlements in

required to read and explain the charge to the defendant and make sure he or she understands the consequences of the guilty plea. The guilty plea itself eliminates the need for evidentiary proceedings as to guilt, and the summary of the case presented by the prosecutor becomes the basis for the penalty, which also includes mitigating and aggravating circumstances⁴⁴. In contentious situations, the court has additional instruments at its disposal, such as the Newton hearing, which is a special evidentiary proceeding conducted in spite of a guilty plea, the purpose of which is to establish facts that are crucial to the determination of the sentence. This mechanism allows the court, after hearing evidence and witnesses, to determine the factual basis for the conviction and, consequently, impose a just penalty⁴⁵. A Newton hearing is a limited evidentiary proceeding held notwithstanding a guilty plea, designed to resolve material disputes about the factual basis of the plea that bear directly on sentencing. Originating from the Court of Appeal's decision in *R v Newton*, the procedure has since been codified in the Criminal Practice Directions. Its core principle is that significant factual disagreements cannot be resolved to the defendant's detriment without calling evidence. In practice, a Newton hearing is required where the parties advance conflicting accounts of facts that are either essential to the legal characterization of the offence or relevant to sentence. It may be triggered in two situations: where the prosecution and defence disagree on a material factual issue - provided the defence version is not so implausible as to be absurd - or where the court, despite an apparent agreement between the parties, harbours doubts as to the accuracy or fairness of the proposed factual basis. In such cases, both sides must set out their positions in writing, and the prosecution should generally seek a Newton hearing rather than acquiesce in the defendant's account simply because direct counter-evidence is unavailable.

Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, p. 330-334.

⁴⁴ CZERWIŃSKA, Dorota. Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, p. 330-334.

⁴⁵ GILESPIE, Alisdair A., The Right to a Newton Hearing: *Goldsmith v DPP*. *The Journal of Criminal Law*. Vol. 74, Issue 1, 2010, p. 7-9, DOI: <https://doi.org/10.1350/jcla.2010.74.1.610>.

Central to the system, however, is the framework for sentence reductions following a guilty plea. Under section 73 of the Sentencing Act 2020⁴⁶, and with reference to the Sentencing Council's guideline *Reduction in sentence for a guilty plea*⁴⁷, the court must take into account the stage at which the plea is indicated, with an early plea normally attracting up to a one-third reduction. The judge does not participate in plea negotiations as such but retains full sentencing discretion within this statutory and guideline-based framework and may, where appropriate and without exerting pressure, give an indication of the sentencing range that would apply upon a guilty plea⁴⁸.

The admissibility of appealing against plea agreements in England and Wales is not universal, but depends on a number of factors. First, English law places restrictions on judgments issued by magistrates' courts when they are based on admission of guilt - regardless of whether the guilty plea is part of an explicit plea agreement. Pursuant to Section 108(1) of the Magistrates' Courts Act, a person convicted by a magistrates' court may file an appeal to the Crown Court: (a) in the case of a guilty plea - only as to the penalty, (b) in the case of a plea of not guilty - both as to the guilt and as to the penalty⁴⁹. This means that the admission of guilt in proceedings before a magistrates' court rules out challenging the finding of guilt on appeal. Second, analogous restrictions do not apply to Crown Court judgments in more serious cases. In such cases, a defendant who has pleaded guilty retains the ability to challenge both the penalty and the findings related to guilt. One should bear in mind, however, that any appeal against a Crown Court's judgment requires the approval of the

⁴⁶ Sentencing Act 2020, s 73. Available at: <https://www.legislation.gov.uk/ukpga/2020/17/section/73>, (accessed 15 November 2025).

⁴⁷ Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (Sentencing Council for England and Wales, first published 2017, in force for first hearings on or after 1 June 2017). Available at: <https://www.sentencingcouncil.org.uk/guidelines/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/> (accessed 15 November 2025).

⁴⁸ See also: CZERWIŃSKA, Dorota. Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, p. 324-329.

⁴⁹ United Kingdom Magistrates' Courts Act 1980 (1980 c 43), s. 108 (1).

Appellate Court (leave to appeal). In practice, this means a significant narrowing of the possibility of challenging a guilty plea, since the Appellate Court extremely rarely allows appeals as to guilt in cases in which the defendant has previously pleaded guilty⁵⁰.

The issue of the ability to challenge guilty pleas also has a practical dimension related to the burden placed on appellate courts. As pointed out in the literature, if the ability to challenge judgments was allowed broadly, the large number of cases adjudicated on the basis of guilty pleas could lead to a significant increase in the number of cases before the Court of Appeal or the Crown Court as a result of appeals of judgments of magistrates' courts. This risk is reflected in the case law, which has adopted clear limitations on the grounds of appeal against judgments based on guilty pleas⁵¹. Indeed, in almost all such cases, defendants can only appeal claiming that their plea was made in an involuntary or equivocal manner. Thus, the scope of review in this type of cases has been deliberately reduced, which, on the one hand, protects the efficiency of the system and, on the other hand, raises questions about the adequacy of the protection of the defendant's procedural rights⁵².

Case law assumes that procedural errors that lead the defendant to wrongly believe that his or her behavior can be considered a crime, when in fact it cannot, or that he or she has no line of defense, although

⁵⁰ CZERWIŃSKA, Dorota. Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, p. 339-341.

⁵¹ An appellant who wishes to challenge a plea must show either that her plea was involuntary, or equivocal (ie she pleaded guilty without understanding the nature of the charge or without intending to admit that she was guilty of what was alleged), or based on fundamentally mistaken advice'. P. Taylor (ed.), *Taylor on Criminal Appeals*. Oxford: Oxford University Press, 2nd edn., para 9.03; NOBLES, Richard. SCHIFF, David. The Supervision of Guilty Pleas by the Court of Appeal of England and Wales – Workable Relationships and Tragic Choices. *Criminal Law Forum*. Vol. 31, 2020, p. 524,

⁵² NOBLES, Richard. SCHIFF, David. The Supervision of Guilty Pleas by the Court of Appeal of England and Wales – Workable Relationships and Tragic Choices. *Criminal Law Forum*. Vol. 31, 2020, p. 524, <https://doi.org/10.1007/s10609-020-09400-2>. NOBLES, Richard; SCHIFF, David. The Never-Ending Story: Disguising Tragic Choices in Criminal Justice'. *Modern Law Review*. Vol. 60, p. 293, 1997. .

in fact there is one, can form the basis of a successful appeal. In such cases, a guilty plea cannot be considered an actual admission of the perpetration of a crime. By contrast, errors that merely weaken the defendant's chances of acquittal - such as unfavorable court rulings or not fully competent advice by defense counsel - do not open the way for an appeal⁵³. Consequently, it should be assumed that the admissibility of challenges to procedural agreements in England and Wales is narrowly defined and strictly depends on the type of court and the nature of the transgressions. In cases before magistrates' courts, a guilty plea eliminates the possibility of challenging guilt and allows appeals only as to the penalty. In Crown Court proceedings, it is formally possible to challenge both the penalty and the findings regarding guilt, but the requirement to obtain a leave to appeal and the practice of the Court of Appeal make such appeals exceptional. In general, the only basis for a successful appeal is the lack of voluntariness or unequivocality of the plea, as well as serious errors leading to the defendant's erroneous belief as to the essence of the act or the lack of available means of defense. Transgressions that only weaken the chances of acquittal are not considered sufficient. In this way, the system balances the need for efficiency in the proceedings with a minimum standard for protecting the rights of defendants, although this raises significant concerns about the full realization of the right to defense.

4. FRANCE

The institution known as procedural agreements (*composition pénale* in French) was introduced into the 1957 French Code of Criminal Procedure by Law no. 99-515 of June 23, 1999. This was another stage, following the introduction in 1993 of the institution of mediation, of the formation of methods of ending criminal proceedings that would be an alternative to a trial. Leaving aside the evolution of the normative changes concerning French procedural agreements, it should be pointed out that such institutions include, without a doubt, conviction on the basis of a

⁵³ NOBLES, Richard. SCHIFF, David. The Supervision of Guilty Pleas by the Court of Appeal of England and Wales – Workable Relationships and Tragic Choices. *Criminal Law Forum*. Vol. 31, 2020, p. 526.

prior confession of guilt (*la comparution sur reconnaissance préalable de culpabilité* in French) and a penal composition (*la composition pénale* in French). The use of both institutions follows the prior consent of the suspect, which is a constitutive element of procedural agreements.

The first institution of French procedural law considered a type of procedural agreement is *la composition pénale*⁵⁴. It was introduced into Article 41-2 of the French Code of Criminal Procedure by an amending act passed in 1999, which came into force in 2001. *La composition pénale* may be used in cases concerning offenses punishable by imprisonment for up to five years (except for press offenses, political offenses, and manslaughter). Furthermore, this institution may also apply to minors over the age of 13 and to legal entities in cases concerning acts enumerated in the Code (Article 41-2). While *la composition pénale* is defined as an alternative to prosecution and does not amount to a formal conviction, it nonetheless requires that the measure be based on an official finding of guilt⁵⁵. . The initiative to conclude a procedural agreement always comes from the prosecutor who, personally or through a police officer or mediator, makes a specific offer to the suspect who has admitted to have committed the offense. This occurs when the prosecutor has no doubt about the suspect's guilt. Under *la composition pénale*, the prosecutor and the suspect can agree on the application of a very broad catalog of penal measures. It includes, among other things, the possibility to impose a fine, the forfeiture of items used in the perpetration of the crime, a driving ban of up to six months, an order to perform unpaid community service for up to six months, a ban on staying in certain places or contacting certain

⁵⁴ FOURMENT, François F. *Procédure pénale*. Orléans: Paradigme publications universitaires, 126-128, 2003; LEBLOIS-HAPPE, Jocelyne. De la transaction pénale à la composition pénale, loi nr 99-515 du 23 juin 1999. *Juris-classer périodique – La semaine juridique*. Vol. 1, 2000, p. 198.; PRADEL, Jean. Vers un “aggiornamento” des réponses de la procédure pénale à la criminalité. Apports de la loi nr 2004-204 du 9 mars 2004 dite Perben II. *Juris-classer périodique – La semaine Juridique*. Vol. 1, 2004, p. 131; ROGACKA-RZEWNICKA, Maria. Zasada oportunistu w świetle ostatnich reform francuskiej procedury karnej [The Principle of opportunism in light of recent reforms of French Criminal Procedure]. *Prokuratura i Prawo*. Vol. 4, 2006, p. 81.

⁵⁵ SOUBISE, Laurène. Guilty Pleas in an Inquisitorial Setting – An Empirical Study of France. *Journal of Law and Society*. Vol. 45, 2018, p. 398-426, <https://doi.org/10.1111/jols.12121>.

people, drug therapy at the suspect's own expense, and a responsibility training course to prevent and combat domestic and gender-based violence.

The suspect is free to decide whether to accept or reject the offer made. If the suspect agrees to the settlement offer, the prosecutor asks the court to approve the agreement reached⁵⁶. The judge validates the penal composition if the conditions set out in Article 41-2 of the French Code of Criminal Procedure are met and if he or she considers the proposed measures to be justified in view of the circumstances of the offense and the personality of the offender. He refuses to validate the settlement if he considers that the seriousness of the facts, in the light of the circumstances of the case, or that the personality of the person concerned, the situation of the victim, or the interests of society justify recourse to another procedure, or when the statements of the victim heard (...) shed new light on the conditions in which the offense was committed or on the personality of the perpetrator. Although the role of the court is reduced to validating or refusing to validate the settlement proposed by the prosecutor, in this case the court becomes the guardian of substantive and formal justice and the guarantor of bringing out the truth. However, this does not occur in every case. Following the amendment of March 23, 2019, procedural agreements under Article 41-2 of the French Code of Criminal Procedure do not require court validation if the criminal proceedings concern an offense punishable by imprisonment for no more than three years, and the agreed fine or value of the forfeiture of property does not exceed the amount of 3,000 euros⁵⁷.

The validation of an agreement by a court results in the agreement acquiring the status of a judicial decision. This does not mean that it ends the criminal proceedings. However, only the execution of the agreement results in the final discontinuation of criminal proceedings. It should be

⁵⁶ DECHEPY-TELLIER, Johan. The public prosecutor's office in the French legal system. *DPCE Online*. Vol. 61, No 1, p. 330. 2024, <https://doi.org/10.57660/dpceonline.2024.2082>; ROGACKA-RZEWNICKA, Maria. Zasada oportunizmu w świetle ostatnich reform francuskiej procedury karnej [The Principle of opportunism in light of recent reforms of French Criminal Procedure]. *Prokuratura i Prawo*. Vol. 4, 2006, p. 80.

⁵⁷ DECHEPY-TELLIER, Johan. The public prosecutor's office in the French legal system. *DPCE Online*. Vol. 61, No 1, p. 330. 2024, <https://doi.org/10.57660/dpceonline.2024.2082>.

added that the court's decision, if any, to consent to a penal composition (*la composition pénale*) is not appealable by either party (Article 41-2 2 of the French Code of Criminal Procedure). The inability to appeal applies to both negative and positive decisions. It weakens the court's position *vis-à-vis* the prosecutor. This has become more apparent after the 2019 reform, which increased the role of the prosecutor in the application of the institution of *la composition pénale*, even leading to the transformation of the prosecutor into a *quasi-judge*⁵⁸. On the one hand, the state has gained the ability to quickly conclude criminal proceedings and punish the offender, but on the other hand, the increase in the prosecutorial power may prevent the correctness of the prosecutor's decision from ever be verified by a court. Under this institution, the French penal composition does not allow the suspect to fully exercise the right to a fair trial, which appears as one of the safeguards provided to an individual against unauthorized interference by public authorities (including law enforcement agencies) with human rights and freedoms⁵⁹.

The second institution of the French criminal process, considered the equivalent of the American plea bargaining, is *la comparution sur reconnaissance préalable de culpabilité* (hereinafter referred to as CRPC)⁶⁰. It was introduced into the French Code of Criminal Procedure by an

⁵⁸ Following the reform implemented in 2019, judicial approval of a settlement is no longer required where the proposed and accepted fine is less than EUR 3,000 in respect of an offence punishable by a term of imprisonment not exceeding three years.

⁵⁹ Naturally, this procedural guarantee will exist if the suspect rejects the *composition pénale offered*, in in which case the matter is referred to the court for judicial determination.

⁶⁰ DESPREZ, François. La comparution sur reconnaissance préalable de culpabilité: 18 mois d'application à Montpellier (1er octobre 2004 – 1er avril 2006). *Archives de politique criminelle*. Vol. 28, No 1, p. 109-134. 2006, DOI 10.3917/apc.028.0109; BOSSAN, Jérôme, LETURMY, Laurence. Rapport final de recherche la comparution sur reconnaissance préalable de culpabilité. Bilans et perspectives, Novembre 2019, pp. 82, <https://shs.hal.science/halshs-02371728v1/document>; NIANG, Babacar. Le “plaider coupable” en France et aux Etats-Unis au regard des principes directeurs du procès pénal. Paris: L'Harmattan, 2014; HAMDAN, Stephanie. Absprachen im französischen Verfahren?. Baden-Baden: Nomos Verlag, 2018, p. 59-162.

amending act of March 9, 2004, which came into force on October 1, 2004.⁶¹ This procedure applies to all criminal offenses, with the exception of those mentioned in Article 495-16 of the French Criminal Code (offenses committed by minors, press offenses, manslaughter, political offenses, or offenses for which a special law exists) and voluntary or involuntary injuries and sexual assaults referred to in Articles 222-9 to 222-31-2 of the Criminal Code, if they are punishable by a prison sentence of more than five years.³ Furthermore, Article 495-8 of the French Code of Criminal Procedure provides that a penalty imposed under the CRPC procedure may not exceed three years of imprisonment and, at the same time, may not be greater than half of the statutory maximum penalty. In principle, the CRPC is concluded at the time of the investigation⁶². The prosecutor proposes one or more of the penalties prescribed for the crime in question to a legal person or individual, who formally admits guilt and does not dispute the facts of the case. If the suspect accepts the terms of the agreement, the prosecutor submits a request to the court to have the proposed sentence homologated by the President of the Judicial Court or the judge delegated by him. According to Article 495-9 of the French Code of Criminal Procedure, the court's role is to verify the veracity of the facts and their legal classification adopted in the request for conviction. These elements cannot be subject to the agreement, and only the legal consequences of the act can be agreed upon⁶³. The court

⁶¹ The current form was established by Law no. 2023-1059 of November 20, 2023 on the orientation and programming of the Ministry of Justice (2023–2027), which amended the CRPC regime to provide that the public prosecutor will be able to – after the President of the Judicial Court has refused once to approve the sentence proposed under the CRPC – refer the matter to the President a second time for the approval of another proposed sentence, <https://www.whitecase.com/insight-alert/negotiated-criminal-justice-and-french-guilty-plea-procedure-improved-rights>

⁶² It should be added that, if the case has been referred for a judicial investigation, the judge may – after exhausting the evidentiary steps in the investigation – issue an order to refer the case to the public prosecutor (instead of referring it to a court) to determine the conditions for the application of the CRPC (Article 180-1 of the French Code of Criminal Procedure).

⁶³ See PRADEL, Jean. *Manuel de procédure pénale*. Paris: Cujas, p. 568-569, 2006; DESPORTES Frédéric, LAZERGES-COUSQUE, Laurence. *Traité de procédure pénale*. Paris: Economica, 850-852, 2015; CZERWIŃSKA, Dorota. *Porozumienia procesowe w sprawach karnych. Między sprawnością a*

does not have the ability to modify the CRPC request⁶⁴. If the court refuses to approve the procedural agreement, the public prosecutor is obliged to refer the accused person to the criminal court for trial or to the investigating judge for the recommencement of the judicial investigation. The attractiveness of the CRCP procedure has been strengthened by the recent amendment of article 495-12 of the French Code of Criminal Procedure by the Law no. 2023-1059 of November 2023. According to the new version of the article, which entered into force on September 30, 2024, the public prosecutor may, after the failure of a first CRCP procedure, submit a second request for approval to the President of the Judicial Court. The prosecutor's authority to submit a renewed sentencing proposal affords an additional opportunity to the parties who have elected to proceed under the CRPC mechanism, particularly in circumstances where the President of the Judicial Court, or a judge delegated by them, has previously determined that the initial proposal was inadmissible on formal or substantive grounds.⁶⁵.

Unlike the previous two institutions of procedural agreements in French law, in the case of the CRCP it is possible to file an appeal against a decision of the President of the Judicial Court approving the agreement. The provisions of the fourth sentence of Article 495-11 and the fourth sentence of Article 495-13 of the French Code of Criminal

sprawiedliwością [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, p. 413-422, 2024. According to Article 495-8 of the French Code of Criminal Procedure, in addition to the penalties of imprisonment and fine, agreements may also include conditionally suspended prison sentences, early revocation of prohibitions or loss of rights, as well as waiving the entry of a conviction in the open parts of the criminal record.

⁶⁴ The absence of such a possibility has been consistently identified in the scholarly literature as a subject of critical. Concurrently, it has been argued that the judiciary should be endowed with the competence to amend judicial settlements, see NIANG, Babacar. Le "plaider coupable" en France et aux Etats-Unis au regard des principes directeurs du procès pénal. Paris: L'Harmattan, p. 322-323, 2014

⁶⁵ HAERI Kami. Negotiated Criminal Justice and French Guilty Plea Procedure: Improved Rights for the Prosecuted Individuals, 5 February 2024, <https://www.whitecase.com/insight-alert/negotiated-criminal-justice-and-french-guilty-plea-procedure-improved-rights>.

Procedure stipulate that the parties may appeal this decision according to general rules, within 10 days of its issuance (Article 498 of the French Code of Criminal Procedure). The broadest possibility to file an appeal is available to defendants. In their case, the French law provides no limitation. Another party to criminal proceedings, the victim, who can file a civil action (*l'action civile* in French)⁶⁶, cannot challenge the decision of the President of the Judicial Court by raising objections to the determination of guilt or penalty (Article 497(3) of the French Code of Criminal Procedure) but is only entitled to file a civil action. In addition to the defendant and the claimant in civil proceedings, the prosecutor is also authorized to challenge the decision of the President of the Judicial Court approving the agreement. The prosecutor's ability to file an appeal has been limited by the French legislature. Although the prosecutor can file an appeal in the same scope as the defendant, he or she can only do so if another party has filed an appeal (Article 495-11 of the French Code of Criminal Procedure). Thus, the prosecutor cannot independently challenge a decision of the President of the Judicial Court, or the judge delegated by him, homologating the proposed sentence, even if the approved agreement violates substantive rights⁶⁷. If on one appeals against the court's decision approving the proposed sentence, the judgment becomes final. The court's order refusing to approve the agreement cannot be challenged by any party, as it does not end the proceedings.

⁶⁶ According to Article 2(1) of the French Code of Criminal Procedure, civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanor, or a petty offense is open to all those who have personally suffered damage directly caused by the offense.

⁶⁷ DESPORTES Frédéric, LAZERGES-COUSQUE, Laurence. *Traité de procédure pénale*. Paris: Economica, 859-860, 2015; CZERWIŃSKA, Dorota. Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, 2024, p. 422.

5. GERMANY

The institution of procedural agreements has been introduced in the German Code of Criminal Procedure in 2009⁶⁸. The entry into force of Article 257c of the German Code of Criminal Procedure was intended to abolish informal procedural agreements (referred to as *Absprachen*) concluded using the existing procedural institutions since the 1970s⁶⁹. The provision of Article 257c of the German Code of Criminal Procedure stipulates the admissibility of agreements on the course of the proceedings and the sentence, which may be sought by the court with the participants, unless they violate the court's duty to clarify the facts of the case⁷⁰. The object of a procedural agreement - referred to in German literature as *Verständigung* - may only comprise the legal consequences which could be imposed by the judgment and of associated court orders, other procedural measures relating to the course of the underlying adjudication proceedings and the conduct of the parties during the proceedings. A confession should also be part of an agreement (Article 257c(2) of

⁶⁸ RAUXLOH, Regina E. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?. *Fordham International Law Journal*. Vol. 34, Issue 2, p. 296-331. 2011; WEIGEND, Thoman, TURNER, Jenia Iontcheva. The Constitutionality of Negotiated Criminal Judgments in Germany. *German Law Journal*. Vol. 15, nr 1, p. 82-104. 2014.

⁶⁹ HELLER Jens. Die gescheiterte Urteilsabsprache. Baden-Baden: Nomos, 2004; HERRMANN, Joachim. Rechtliche Strukturen für Absprachen in der Hauptverhandlung: Die Richtlinienentscheidung des Bundesgerichtshofs – BGHSt. *JuS*. Vol. 43, p. 1162-1167, 1999; IGNOR, Alexander. Die Zukunft des Strafverfahrens – Abschied vom Rechtsstaat? *Zeitschrift für die gesamte Strafrechtswissenschaft*. Heft 5, p. 927–937. 2007; SCHÜNEMANN, Bernd. Die Zukunft des Strafverfahrens – Abschied vom Rechtsstaat? *Zeitschrift für die gesamte Strafrechtswissenschaft*. Heft 5, p. 945–958. 2007.

⁷⁰ NIEMÖLLER, Martin. In NIEMÖLLER, Martin; SCHLOTHAUER, Reinhold; WEIDER, Hans-Joachim. Gesetz zur Verständigung im Strafverfahren. Kommentar. München: C.H.Beck, 2010, p. 55–125. It should be added that recent empirical studies have shown that informal *Absprachen* still exist, especially in lower courts, see NOLTE, Julia. Hinweispflichten bei gescheiterter Verständigung im Blickwinkel der aktuellen BGH-Rechtsprechung. *Leipzig Law Journal*. Vol. 1, p. 88, 2023; ALTENHAIN, Karsten; HERBST Lizanne; VAN BÜRK, Cassandra; JAHN, Matthias; KAUFMANN, Tim; SCHMITT-LEONARDY, Charlotte. In ALTENHAIN, Karsten; JAHN, Matthias; KINZIG, Jörg. Die Praxis der Verständigung im Strafprozess. Baden-Baden: Nomos, 2020, p. 83-84, 102.

the German Code of Criminal Procedure)⁷¹. Due to the fact that in the German criminal process “finding the truth” about a criminal incident plays a special role⁷², the object of the procedural agreement cannot be the legal qualification, which should be reflected in the evidence⁷³. German law requires that the facts uncovered during the investigation substantiate the level of guilt referenced in the confession agreement⁷⁴. This demonstrates that, in Germany, procedural agreements are not used to limit the public prosecutor’s investigation into the facts, as is often the case in the United States, but rather to shorten the trial proceedings⁷⁵.

⁷¹ SCHELBACH, Ralf. In GRAF, Jürgen Peter. In. *Strafprozessordnung: Mit Gerichtsverfassungsgesetz und Nebengesetzen, Kommentar*. München: C.H. Beck, 2010, p. 1043-1046.

⁷² RIEß, Peter. Ober die Aufgaben des Strafverfahrens. *Juristische Rundschau*. Heft 7, p. 270-710.2006; see also FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?. *Hanse Law Review*. Vol. 1, No 1, p. 197-220, 2009; MÜLLER-DIETZ, Heinz. Der Wahrheitsbegriff im Strafverfahren. *Zeitschrift für Evangelische Ethik*. Heft 15, p. 257. 1971; NEUMANN, Ulfrid. Wahrheit im Recht. Zu Problematik und Legitimität einer fragwürdigen Denkform. Baden-Baden: Nomos, 2004, p. 60-63

⁷³ It is even argued that the search for truth in criminal proceedings resembles “a buried piece of gold”, is constructed along the lines of a vertical model that revolves around the court, see. VOLK. Klaus, Konfliktverteidigung, Konsensualverteidigung und die Strafrechtsdogmatik. In WIDMAIER Gunter; LESCH, Heiko; MÜSSIG, Bernd; ROCHUS, Wallau (Hrsg.). *Festschrift für Hans Dahs*, Köln: Dr. Otto Schmidt KG, 2005, p. 496.

⁷⁴ BOYNE, Shawn Marie. Procedural Economy in Pre-Trial Procedure: Developments in Germany and the United States (October 23, 2013). Indiana University Robert H. McKinney School of Law Research Paper No. 2013-39, Available at SSRN: <https://ssrn.com/abstract=2344508>; WEIGEND, Thoman. Should We Search for the Truth, and Who Should Do it?. *North Carolina Journal of International Law and Commercial Regulation*. Vol. 36, Issue 2, p. 389-415. 2011; IGNOR, Alexander. In SATZGER, Helmut; SCHLUCKEBIER, Wilhelm (Hrsg.). *Strafprozessordnung: mit GVG und EMRK*. München: Carl Heymanns, 2016, p. 1523-1524.

⁷⁵ TURNER, Jenia Iontcheva. Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons. *William & Mary Law Review*. Vol. 57, Issue 2, p. 1573. 2016. Indeed, the main proceeding in Germany occurs even after an admission of guilt, but it is shorter than a contested trial. According to the Article 257c(1) sentence 2 StPO15 and the Article 244(2) StPO, the court’s obligation of a comprehensive investigation remains “unaffected”, procedural agreements. The Federal Constitutional Court concludes that “the plea agreement as such cannot form the basis of a judgment but can only be

The provision of Article 257c(2) explicitly indicates that “the verdict cannot be the object of an agreement.” Such plea bargaining provision bans agreements concerning the guilt of the accused⁷⁶. Consequently, a procedural agreement in German law does not relieve the court of the obligation to make sure that the defendant is in fact guilty of the offense named in the accusation and to achieve a state of certainty in this regard no less than in ordinary proceedings, as well as to verify the correct legal classification of the act of which the defendant has been charged⁷⁷.

The feature of German plea bargaining is the active role that judges play in the process. Firstly, the court is obliged to communicate

formed through a sufficiently founded conviction determined by facts and circumstances reached through the entire main trial”. This should lead to two consequences: First, a waiver of the right to present evidence and the taking of evidence cannot operate outside of what the obligation of a comprehensive *ex proprio motu* investigation demands. Second, a confession in the case of a plea agreement must always be checked for accuracy by taking evidence during the main trial, see MOSBACHER, Andreas. The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements. *German Law Journal*. Vol. 15, Special issue - Plea Bargains in Germany, p. 7-8, 2014.

⁷⁶ See ESCHELBACH, Ralf. In GRAF, Jürgen Peter. In. *Strafprozessordnung: Mit Gerichtsverfassungsgesetz und Nebengesetzen, Kommentar*. München: C.H.Beck, 2010, p. 1043-1046; IGNOR, Alexander. In SATZGER, Helmut; SCHLÜCKEBIER, Wilhelm (Hrsg.). *Strafprozessordnung: mit GVG und EMRK*. München: Carl Heymanns, 2016, p. 1542. Since the ruling of the Federal Constitutional Court on 19 March 2013, it has been emphasised in the literature that judges must do more to corroborate a negotiated confession, see MOSBACHER, Andreas. The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements. *German Law Journal*. Vol. 15, Special issue - Plea Bargains in Germany, p. 8, 2014; SCHEMMELE, Alexander; CORELL, Christian; RICHTER, Natalie. Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013? *German Law Journal*. Vol. 15, Special issue - Plea Bargains in Germany, p. 59-60, 2014.

⁷⁷ The Federal Constitutional Court, in its judgment of March 19, 2013, pointed out the necessity of verifying the defendant’s confession, especially if it is not supported by statements before the court as to the actual course of events. The judgment indicated that the possibility of reaching a plea agreement does not release the court from its obligation to investigate the facts of the case *ex officio*. A confession must not become a “tradeable commodity”; see the judgment of BVerfG of March 19, 2013, 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, § 110. Available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/03/rs20130319_2bvr262810en.html

to the parties to the proceedings what the content of such an agreement may be in particular. Secondly, German judges “discuss the case with the parties and indicate what sentence might be appropriate in light of the facts presented in the file and during the discussions. They also verify that the admission of guilt corresponds to the facts in the investigative file, and if they have any doubts about the case after the discussions, they have both the duty and the ability to investigate the facts independently for example, by calling witnesses during the main proceeding, which occurs even in negotiated cases”⁷⁸. The parties then have the opportunity to express their positions on the proposal. Finally, thirdly, German judges may reject them if legally or factually relevant circumstances have been overlooked or have arisen, or the prospective sentencing range is no longer appropriate to the severity of the offense or the degree of guilt. In addition, in Germany the court is not bound by its offer if the defendant’s further conduct in the proceedings does not correspond to that upon which the court’s prediction was based. In such a case, the defendant’s confession cannot be used in further proceedings. When withdrawing from an agreement, the court must immediately inform the defendant of the consequences of the withdrawal as well as instruct him or her on his or her procedural rights, which must should be reflected in the trial record (§257c(4) of the German Code of Criminal Procedure)⁷⁹.

Although the primary goal of *Verständigung* is to increase the speed and efficiency of criminal proceedings, the German legislature has chosen to preserve the broad possibility of an appeal against a court judgment. A prohibition of agreeing in advance to waive the right to appeal has been explicitly inscribed in the German Code of Criminal Procedure (§ 302 (1) sentence 2 of the German Criminal Procedure Code) that this ban undermine the judicial accountability required in a

⁷⁸ TURNER, Jenia Iontcheva. Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons. *William & Mary Law Review*. Vol. 57, Issue 2, p. 1573. 2016. See also TURNER, Jenia Iontcheva. Judicial Participation in Plea Negotiations: A Comparative View. *The American Journal of Comparative Law*. Vol. 54, p. 219-220, 2006.

⁷⁹ MATTHIAS Jahn; SCHMITT-LEONARDY Charlotte. The German “*Verständigung*” and Consensual Elements in German Criminal Trials. *German Law Journal*. Vol. 21, No 6, 2020, p. 1134-1148. doi:10.1017/glj.2020.69 21.

system based on a rule of law⁸⁰. German law contains no limitation on the appealability of a judgment based on Article 257c of the German Code of Criminal Procedure for any of the parties. The defendant, the prosecutor, and the victim, if he has joined the prosecution, may file appeals according to the general rules. Depending on the type of court approving a procedural agreement, it is possible to file an appeal on points of fact and law (*Berufung*) or an appeal on points of law only (*Revision*)⁸¹. The first of these appeals is filed against judgments issued by a local court of first instance (*Amtsgericht*) composed of one professional judge, in more serious cases sitting together with two lay judge. In an appeal on points of fact and law, the applicant can raise factual and legal objections. The applicant may also seek to present new facts and has the ability to formulate the need for a repeated assessment of the factual findings already made by the court of first instance. The submission of an appeal on points of fact and law (*Berufung*) results in a new trial on the merits. As a general rule, the appellate court may reject an appeal when there are no grounds for it, and may also overrule the judgment of the court of first instance and decide the case on its own. It is worth emphasizing that the appellate court is not bound by the findings of the court that previously adjudicated the case.

The second type of appeal, which is applicable to procedural agreements is the appeal on points of law (*Revision*). This appeal is available, among others, in the case of judgments issued in the first instance by regional courts (German: *Landgericht*) composed of panels with professional judges and lay judges sitting together. An appeal on

⁸⁰ TURNER, Jenia Iontcheva. Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons. *William & Mary Law Review*. Vol. 57, Issue 2, p. 1575. 2016. Despite the prohibition, a survey found that the parties frequently agree to waive appeals once a sentence agreement has been reached, see also ALTENHAIN, BRANDT, Tobias; Karsten; HERBST. In ALTENHAIN, Karsten; JAHN, Matthias; KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. Baden-Baden: Nomos, 2020, p. 441-442.

⁸¹ ESCHELBACH, Ralf. In GRAF, Jürgen Peter. In. *Strafprozessordnung: Mit Gerichtsverfassungsgesetz und Nebengesetzen, Kommentar*. München: C.H. Beck, 2010, p. 1055-1056; IGNOR, Alexander. In SATZGER, Helmut; SCHLUCKEBIER, Wilhelm (Hrsg.). *Strafprozessordnung: mit GVG und EMRK*. München: Carl Heymanns, 2016, p. 1539-1540.

points of law is filed with the higher regional court (*Oberlandesgericht*) if the case originated in local court. If district court or a higher regional court ruled in the first instance, the appeal is filed with the Federal Court of Justice (*Bundesgerichtshof*). An appeal on points of law is limited to legal issues. The appellant must claim that the trial court did not apply relevant norms of substantive or procedural law, or applied them incorrectly. In cases involving § 257c of the German Code of Criminal Procedure, the appellant can, for example claim that the trial court did not observe all formal requirements of an understanding or that the conviction is based on a misapplication of substantive law. However, a party may not challenge the trial court's evaluation of the evidence or offer new evidence. The appellate court hearing the appeal may declare the judgment of the first instance court to be correct or may overrule it if it was based on with significant violations of law. Only in exceptional situations can the court hearing the appeal (appeal on points of law) decide the case on its own. This is possible, for example, when, without further consideration of the facts, it is necessary to acquit the defendant or to discontinue the proceedings. This also applies to cases in which the judgment was based on a procedural agreement.

Article 302 (1) of the German Code of Criminal Procedure prohibits including a waiver of the right to appeal the judgment in a procedural agreement⁸². However, it does not prohibit the withdrawal of an appeal. Therefore, both types of appeal against a judgment based on a procedural agreement can be withdrawn. Withdrawal of an appeal by defense counsel is subject to the consent of the defendant. Also, an appeal filed by a public prosecutor for the benefit of the defendant may not be withdrawn without the defendant's consent (§ 302 (1) 3rd sent. CCP)⁸³. Withdrawal of an appeal can be declared the decision of the appellate court is issued. After the decision of the appellate courts is issued, withdrawal is ineffective.

⁸² WEIGEND, Thoman, TURNER, Jenia Iontcheva. The Constitutionality of Negotiated Criminal Judgments in Germany. *German Law Journal*. Vol. 15, nr 1, 2014, p. 92, 95.

⁸³ The judgment of BGH of 15 April 2010, 1 StR 64/10, *Neue Juristische Wochenschrift*. Heft 31, 2010, p. 2294–2295.

The existence of a broad possibility of challenging judgments based on a procedural agreement only appears to be seemingly an exceptional phenomenon. It arises from the general principles of the criminal process in Germany. Holding the court responsible for determining the truth in a criminal process, the requirement that the court ensure that the punishment imposed is commensurate with culpability, and that it is responsible for procedural fairness mean that the court's role in relation to procedural agreements is crucial⁸⁴. This was strongly expressed by the Federal Constitutional Court in its judgment of March 19, 2013, in which it indicated that “the principle of culpability rooted in the Basic Law and the corresponding obligation to investigate the truth, the requirement of a fair trial in accordance with the rule of law, the presumption of innocence and the courts' obligation of neutrality prohibit leaving the investigation of the truth, the application of the law to the case and sentencing principles to the free discretion of the parties to the proceedings and the court.”⁸⁵

⁸⁴ The German model diverges significantly from adversarial systems in that the court itself bears the primary responsibility for ascertaining the facts relevant to adjudication. Pursuant to § 244(2) of the German Code of Criminal Procedure (StPO), the court is obliged *ex officio* to take all evidence necessary for establishing the truth, thereby ensuring that the judgment is not merely the product of party negotiation or procedural maneuvering but rather the outcome of an active and impartial inquiry. This duty reflects a deeply embedded conviction that the legitimacy of criminal adjudication derives not solely from procedural fairness, but from its capacity to approximate an objective account of past events. Yet, as T. Weigend notes, this aspiration to material truth is not without its limits: practical considerations of efficiency, the growing role of negotiated settlements (*Verständigung*), and the epistemological impossibility of fully reconstructing historical reality constrain the court's truth-seeking function. Thus, in the German context, truth serves less as an empirically attainable end-state than as a normative and legitimating ideal, one that defines the structural orientation of the criminal trial and sustains public confidence in the judiciary as the guardian of justice, see Thomas Weigend, Should We Search for the Truth, and Who Should Do It?, *The North Carolina Journal of International Law*. Vol 36, 2010, p. 393-394; also MATTHIAS Jahn; SCHMITT-LEONARDY Charlotte. The German “*Verständigung*” and Consensual Elements in German Criminal Trials. *German Law Journal*. Vol. 21, No 6, 2020, p.1139, doi:10.1017/glj.2020.69.

⁸⁵ The judgment of Federal Constitutional Court of 19 March 2013, 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, see MATTHIAS Jahn; SCHMITT-LEONARDY Charlotte. The German “*Verständigung*” and Consensual Elements in

6. POLAND

Procedural agreements were first included in the 1997 Polish Code of Criminal Procedure, which came into force on September 1, 1998. The main motive for their introduction was to speed up the operation and reduce the cost of the justice system. This goal has undoubtedly been achieved and the consensual institutions have become a permanent part of the Polish justice system. Due to the framework and purpose of this article, we will not present the evolution of procedural agreements in the Polish legal system⁸⁶. For the purposes of the discussion at hand, it should be noted that there are two types of procedural agreements in the Polish Code of Criminal Procedure: conviction without a hearing (Article 335 of the Polish Code of Criminal Procedure) and voluntary submission to penalty (Article 387 of the Polish Code of Criminal Procedure). In both cases, the court is the guarantor of the correctness of the procedural agreements.

The institution of procedural agreement in the form of conviction without a hearing can be applied to a suspect of an offense when the circumstances of the offense and the defendant's guilt are not in doubt, the defendant's attitude indicates that the goals of the proceedings will be achieved, an agreement has been concluded between the prosecutor and the defendant, and the agreement takes into account the interests of the victim. Conviction without a hearing can be achieved in two ways: by filing an informal motion for conviction without a hearing (Article 335 (1) of the Polish Code of Criminal Procedure) or by enclosing such a motion with the indictment (Article 335 (2) of the Polish Code of

German Criminal Trials. *German Law Journal*. Vol. 21, No 6, 2020, p. 1134-1148, doi:10.1017/glj.2020.69 21.

⁸⁶ See, STEINBORN, Sławomir. Porozumienia w polskim procesie karnym. Skazanie bez rozprawy i dobrowolne poddanie się odpowiedzialności karnej, Kraków: Wolters, 2005; KOPER, Radosław. O nowej formie konsensualizmu w procesie karnym (art. 338a i 343a k.p.k.) [On the new consensual form of ending criminal proceedings (article 338a and 343a of the Code of Criminal Procedure)]. *Palestra*. Vol. 7-8, 2014, p. 8-16; CZERWIŃSKA, Dorota. Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością [Procedural Settlements in Criminal Matters: Between Effectiveness and Justice]. Warszawa: WoltersKluwer, 2024, p. 215-311.

Criminal Procedure)⁸⁷. The difference involves more than just formal considerations, since in the first case the legislature requires a plea of guilty by the perpetrator, while in the second case the evidentiary statements made by the defendant must not contradict the pre-trial findings. The initiative to conclude an agreement can come from the authority conducting the pre-trial proceedings, the defendant, or the defendant's defense counsel. The proposal put forward can be negotiated, but only with regards to the penalty and other measures, which includes penal measures, forfeiture, compensatory measures, as well as preventive measures. The agreement may also relate to litigation costs. Due to the special importance of the principle of truth in the Polish criminal process, negotiations may not concern the findings of facts, the legal qualification, or the number of charges brought. The body authorized to file the motions referred to in Article 335 (1) and (2) of the Polish Code of Criminal Procedure is the prosecutor. He or she makes this decision when the terms of the agreement are accepted by the defendant⁸⁸. The court with which a request for conviction without a hearing - standalone or enclosed with the indictment - is filed is obliged to examine its formal and substantive correctness. This examination takes place at a hearing and includes, among other things, determining whether the proposals in the prosecutor's motion comply with the substantive and procedural laws.

Unlike in France, a court in Poland may not only grant or refuse to grant a motion for conviction without a hearing⁸⁹, but may also require the prosecutor to make changes to the motion as indicated by the court

⁸⁷ KOPER, Radosław. Dwa tryby skazania bez rozprawy w procesie karnym [Two procedures for convicting without trial in criminal proceedings]. *Prokuratura i Prawo*. Vol. 10, p. 27-46, 2016; BORATYŃSKA, Katarzyna CZARNECKI, Paweł; KRÓLIKOWSKI, Michał. In SAKOWICZ, Andrzej (ed). *The Code of Criminal Procedure. A Commentary*. Warszawa: C. H. Beck, 2025, p. 1003-1006.

⁸⁸ If the defendant has consented to the issuance of a conviction without a hearing, then he or she may - until the conviction is issued - withdraw his or her previously expressed consent to the examination of the case according to the procedure proposed by the public prosecutor.

⁸⁹ In the case of an independent motion for conviction, the court, if the motion is not granted, does not forward the case for a trial, but return it to the prosecutor (Article 343 (7), first sentence of the Polish Code of Criminal Procedure).

and accepted by the defendant, as a condition for the granting of the motion (Article 343 (3) of the Polish Code of Criminal Procedure)⁹⁰. In a situation where a court grants the motion for conviction without a hearing or accepts an indictment with the such motion, the court convicts the defendant with a sentence. This can be done only if, in the opinion of the court, the evidence gathered in the pre-trial proceedings allows a full and unequivocal assessment of the crime committed and if there is no doubt about the circumstances of the crime and the guilt of the perpetrator.

The second type of procedural agreement in Poland is a defendant's voluntary submission to penalty (Article 387 of the Polish Code of Criminal Procedure). It is the defendant who initiates this type of procedural agreement. Before receiving a notice regarding the date of the hearing, the defendant may file a motion for conviction and imposition of a specific penalty or penal measure, forfeiture, or compensatory measure without evidentiary proceedings. The motion may also concern the issuance of a specific ruling on the payment of litigation costs (Article 338a of the Polish Code of Criminal Procedure). The defendant may also file the same motion until the end of the first examination of all defendants during the main trial (Article 387 of the Polish Code of Criminal Procedure). In the first case, the court's decision is made during a session, in the second - during the main hearing. The conditions for a defendant's voluntary submission to penalty are as follows: the defendant must file the motion referred to above, the crime charged against the defendant must be punishable by imprisonment for a period not exceeding 15 years, there may be no doubts as to the circumstances of the crime and the defendant's guilt, and it must be possible to achieve the objectives of the process without a full trial (Article 387 (1) and (2) of the Polish Code of Criminal Procedure). In addition, the application of voluntary

⁹⁰ This is in contrast to rules in a number of other jurisdictions, such as Italy and the United States, where judges are generally prohibited from participating in plea negotiations, and negotiations are conducted exclusively between the parties, see KRÓLIKOWSKI, Michał; SAKOWICZ, Andrzej. In SAKOWICZ, Andrzej (ed). *The Code of Criminal Procedure. A Commentary*. Warszawa: C. H. Beck, 2025, p. 1052-1053; FROMMANN, Maïke. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?. *Hanse Law Review*. Vol. 1, No 1, 2009, p. 204.

submission to penalty requires the consent of the prosecutor and the absence of objection by the victim to the court's granting of the defendant's motion. As in the case of conviction without a hearing, a defendant's motion for voluntary submission to penalty may only be granted if the circumstances of the crime and the defendant's guilt are not in doubt. In the case law of the Polish Supreme Court, it is accepted that the court - on the basis of the evidence gathered in the pre-trial proceedings - may not have doubts about all the characteristics of the alleged act, its legal qualification, the guilt, the effect of the criminal action, and the extent of the damage caused⁹¹.

Both forms of procedural agreements in Poland share the same restriction on the possibility of appealing judgments issued according to consensual procedures⁹². It was introduced by the amending Act of July 1, 2015, and its objective is to strengthen the durability of procedural agreements. The essence of the limitation on the filing of an appeal is that the basis of the appeal cannot be the fact that the findings on which the judgment is based were established incorrectly, if this might have affected the contents of the judgment and that the penalty, penal measure, or obligation to compensate for a harm imposed is egregiously disproportionate or a preventive, forfeiture or other measure was incorrectly imposed or the court incorrectly failed to impose it (Article 447 (5) of the Polish Code of Criminal Procedure). The filing of an appeal was therefore not ruled out, as it would be in conflict with the 1997 Polish Constitution. In the Polish legal system, the right to appeal against a judgment of a court of first instance derives from two provisions of the Constitution. Its Article 78 stipulates that each party shall have the right to appeal against judgments and decisions made at the first stage and exceptions to this principle and the procedure for such appeals shall

⁹¹ The judgment of the Supreme Court of 4 September 2013, III KK 168/13, LEX nr 138822.

⁹² BUŁAT, Adam. Rozstrzygnięcie sądu odwoławczego po rozpoznaniu apelacji od wyroku konsensualnego [Decision of an appellate court after hearing an appeal against a consensual judgment]. *Przegląd Sądowy*. Vol. 11-12, p. 88-98, 2020; SAKOWICZ, Andrzej. In SAKOWICZ, Andrzej (ed). *The Code of Criminal Procedure. A Commentary*. Warszawa: C. H. Beck, 2025, p. 1345-1346.

be specified by statute. Also, Article 178(1) of the Constitution provides that “court proceedings shall have at least two stages.”

In view of the need to preserve the two-instance procedure, the legislature did not rule out the possibility of alleging in an appeal the violation of substantive law, as well as the violation of procedural rules, if it could have affected the content of the ruling. Thus, the parties to proceedings (including the defendant) can file an appeal when an unlawful agreement has been concluded and, based on it, a judgment has been issued in violation of the law. Thus, a claim of violation of substantive law can be raised in an appeal when the court of first instance ruled in accordance with the agreement, but contrary to the law, e.g. the court failed to impose a mandatory penal measure or imposed an agreed penalty that was above or below the statutory range of the penalty. On the other hand, the claim of a violation of procedural law may refer to various situations, for example, when the prerequisites for issuing a judgment according to the consensual procedure were not met, or when these prerequisites were met, but the court ruled contrary to the agreement⁹³. In view of the above, it can be concluded that the Polish solution for filing an appeal against a consensual judgment does not eliminate the possibility of the appellate court reviewing the judgment of the court of first. It only limits the right to appeal⁹⁴. This occurs with

⁹³ ŚWIECKI, Dariusz. Ograniczenie podstaw odwoławczych do wniesienia apelacji w trybach konsensualnych (art. 447 § 5 k.p.k.) [*Restriction of the appeal grounds for filing an appeal in consensual procedures*]. Przegląd Sądowy. Vol. 9, p. 23-33, 2019; SAKOWICZ, Andrzej. In SAKOWICZ, Andrzej (ed). The Code of Criminal Procedure. A Commentary. Warszawa: C. H. Beck, 2025, p. 1345-1346.

⁹⁴ In addition, as in ordinary proceedings, the defendant is also able to raise an objection indicating a defect resulting in absolute grounds for appeal under Article 439 of the Polish Code of Criminal Procedure. Article 440 of the Polish Code of Criminal Procedure, which can provide a basis for the appellate court to make an ex officio correction of a grossly unjust sentence in favor of the defendant, also plays an important role. The appellate court, when ruling pursuant to that article, is not constrained by the limits of the appeal and the objections raised, which allows it to take into account also the defects falling within the scope of those grounds for appeal that the party could not raise in the appeal due to the limitation set forth in Article 447 (5) of the Polish Code of Criminal Procedure, see CZERWIŃSKA, Dorota. Porozumienia procesowe w sprawach karnych. Między sprawnością a sprawiedliwością

the consent of the defendant, who is instructed by the prosecutor (during the pre-trial proceedings) and before the court (before the first-instance conviction) about the consequences of the limitation on the filing of an appeal when the judgment is issued as a result of a procedural agreement. The existence of this indicated instruction and the voluntariness of the defendant's conclusion of a procedural agreement guarantee that the conclusion of the agreement will not be the result of an arbitrary action by the authorities conducting the proceedings, but of a conscious and voluntary decision by the defendant to waive the examination of his or her case in the traditional manner, i.e. at the main trial.

7. CONCLUSION

The analysis demonstrates that the consensualisation of criminal proceedings is neither a uniform phenomenon nor axiologically neutral. A common denominator across the examined jurisdictions appears to be the formal obligation of the trial court to verify the voluntariness of the plea, the defendant's awareness of its consequences, and the conformity of the agreement with the law. Even though the scope and intensity of this control differ from one legal system to another, the principle itself remains universal. Beyond this shared minimum, however, the models diverge significantly: from minimal arrangements in which the court confines itself to formal scrutiny and a rudimentary factual basis (United States), through mixed approaches that strengthen judicial control of facts relevant to sentencing (England and Wales, particularly through the Newton hearing), to more guarantee-oriented constructions in which the court actively shapes the framework of the agreement and ties it to the duty of establishing truth (Germany), or—albeit in a milder form— can correct the prosecutor's motion and requires the absence of any “doubt” as to guilt and circumstances (Poland). At the same time, in France the role of the court is marginal under *composition pénale*, whereas in the CRPC procedure the judge verifies the facts and legal classification but has no competence to modify the agreement.

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What follows from this comparison is a broader insight: negotiated settlements, while clearly serving the aim of procedural efficiency, necessarily involve a trade-off in which the accused gives up part of his or her procedural guarantees in return for a reduced sentence or simplified proceedings. Because the voluntariness of such concessions can never be fully insulated from the risk of pressure or imbalance of power between prosecutor and defendant, only the court – as an independent and impartial authority – is legitimized to ensure that no agreement is concluded at the expense of fundamental fair trial rights. Judicial control therefore fulfils a multidimensional role. It safeguards individual rights by preventing agreements resulting from excessive prosecutorial pressure; it protects the social interest by screening out settlements grossly inconsistent with proportionality or justice; and it preserves the balance between efficiency and legality by resisting the reduction of the criminal process to a purely transactional exchange. In contrast to the Anglo-American model, where plea bargaining is driven by negotiations between the prosecution and the defence, German and Polish law keep the court firmly at the centre of the process. The judge may actively indicate the acceptable framework of an agreement, and ultimately pronounces a conviction and sentence that affirms both the legality of the settlement and its consistency with the fact. In this regard, the judge acts as a guardian of the integrity of the negotiation, serving as an institutional filter that distinguishes agreements which may legitimately enter the legal order from those that would undermine the very foundations of a fair trial.

The position of the court at the trial stage appears to correlate with the architecture of appellate review, particularly in the context of procedural rights. Where the law permits waiver of appeals or significantly restricts them (waivers in the United States, the limits of grounds of appeal under Polish Article 447 § 5 CCP), the burden of safeguarding fundamental rights shifts to the trial judge, who must in practice “filter” the agreement in terms of legality, proportionality, and factual basis. Conversely, in systems that maintain full appellate review and prohibit contractual exclusion of remedies (Germany), the very prospect of robust second-instance control compels a more rigorous verification already “at the entry point” and reinforces the role of the court as guardian of fairness.

From the perspective of procedural safeguards, the strongest guarantees are provided by models that combine three elements: (1) a prohibition on “trading guilt” and a binding connection between the agreement, the evidentiary record, and material truth; (2) a genuine competence of the court to refuse, to modify, or at least to reconstruct the factual basis relevant for sentencing; and (3) a coherent appellate regime that cannot easily be contractually waived. In this respect, the German model serves as a benchmark for maximising the court’s guarantee function; the Polish model illustrates a balance between efficiency and substantive judicial scrutiny (particularly through the possibility of conditional acceptance of the prosecutor’s motion and the “no doubts” threshold); the English model demonstrates a pragmatic strengthening of judicial authority in sentencing (Newton hearings); while the American model and part of the French solutions expose the risks of “notarialisation” of the court’s role, where efficiency pressures and prosecutorial advantage dominate. In the French composition pénale, the risk of loss of judicial oversight is particularly evident, as in cases involving lesser offences the proceedings may be concluded almost without judicial involvement, leaving effective control of the agreement in the hands of the prosecutor alone.

The analysis nonetheless reveals a regularity of particular significance. Systems in which the role of the court is reduced, across a broad category of cases, to that of a formal approver (as in the United States) are simultaneously those in which negotiated agreements are used most frequently, effectively becoming the primary mechanism for disposing of criminal cases. This means that the risks flowing from limited judicial oversight - such as pressure to plead guilty, the weakening of equality of arms, or the marginalisation of the principle of material truth - materialise most strongly where consensualism dominates. From a guarantee perspective, this poses a significant challenge: the more widespread plea agreements become, the more essential it is to equip courts with effective instruments for verifying and, where necessary, correcting their content, so that they do not degenerate into mere tools of efficiency management but remain consistent with the requirements of fair trial. Significantly, in the United States it is the case law of the Supreme Court that has partly compensated for the absence of broad statutory frameworks for judicial control of plea deals, by specifying criteria that courts must

examine to avoid assuming a purely notarial role. These include, inter alia: (1) the possibility of raising a claim of ineffective or incompetent assistance of counsel during plea negotiations; (2) the demonstration of judicial error as to the basis of the disposition; and (3) proof that counsel's deficiency had a tangible, adverse effect on the outcome of the case. In this way, even in a system where plea bargaining predominates, there remain instruments designed to preserve coherence with the principle of material truth and the minimum guarantees of fairness.

An important element of judicial review of procedural agreements is the preservation of the defendant's right to appeal. Indeed, the mere approval of an agreement by the court of first instance cannot mean the definitive closure of the criminal process. The right to appeal against a judgment issued as a result of a procedural agreement is a necessary component of the system of procedural guarantees that ensures that even in a consensual procedure the possibility of reviewing the procedural agreement for legality and fairness is preserved. Depriving the defendant of this possibility would lead to a *de facto* weakening of the court's position and would threaten to erode the constitutional right to a fair trial in its full, two-instance dimension. For these reasons, we argue that judicial review of procedural agreements - both at the stage of their approval and through appellate proceedings - is not a luxury or an optional safeguard, but an absolute necessity for maintaining the delicate balance between the efficiency of the justice system and the inviolability of fundamental procedural rights. Only such a model can preserve society's trust in the judiciary as the ultimate guardian of justice.

All the national solutions presented show that the parties to the proceedings - to a greater or lesser extent - can file an appeal. This possibility looks interesting in the United States, where the Supreme Court has consistently held that a defendant can choose to waive many important constitutional rights and statutory rights during the plea bargaining process. These waived rights include the right to appeal the sentence. In this way, protection is sought against a "buyer's remorse" situation in which the defendant knowingly and voluntarily enters into a plea bargain, but later decides that he or she wants to risk a full trial. Despite such limitations, American courts have developed three basic situations that allow the defendant to file an appeal, which involve the occurrence of unreasonable defense errors, incorrect interpretation of

the law by defense counsel, and miscommunication of information that led the defendant to enter into an unfavorable procedural agreement. All these situations share a common denominator: ineffective assistance of counsel. It is the defendant who must prove that the assistance of the defense counsel was ineffective. It is also the defendant who must show that the defense lawyer's representation fell below the objective standard of reasonableness or there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Despite this situation, it may be possible to file an appeal to show defects in the conclusion of the procedural agreement. This makes it possible to assume that the right of appeal becomes necessary to ensure the fundamental fairness and reliability of judgments based on a guilty plea, as opposed to a determination of guilt at a full trial.

The right to appeal is different in France, Germany, and Poland. Unlike the solutions adopted in the common law system, the right to appeal in those countries is not restricted to situations involving a violation of the right to defense only. On the one hand, the right to appeal guarantees that a judgment issued based on a procedural agreement can be reviewed for compliance with constitutional principles of due process and respect for fundamental rights. On the other hand, the right of appeal is intended to allow the correction of any errors in the application of the law or in the procedure of conclusion of the agreement made by the court of first instance. After all, in Germany, and in Poland, the court can be actively involved in shaping the procedural agreement. This is due to the fact that in continental law it is the court that is charged with the responsibility of finding the truth about a criminal act in a criminal process. Consequently, it is argued that a procedural agreement, although permissible within the limits set by the legislature, always involves the risk of limiting material truth. In both systems indicated, there is a risk that an agreement will be reached under pressure - whether from the prosecutor or the court - which can lead to false confessions. Therefore, appellate control is necessary to verify that the agreement was entered into voluntarily, knowingly, in accordance with constitutional standards of due process and the principle of material truth. This allows us to claim that the right of appeal plays a fundamental role in building and maintaining public trust in the justice system and protecting individuals from abuse by justice system authorities. The appellate court,

examining not only the procedural correctness, but also the compliance of the judgment with the principle of proportionality of penalty and material truth, performs a guarantee function for the entire justice system.

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