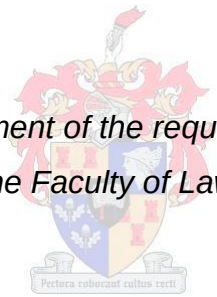
PLEA BARGAINING

IN SOUTH AFRICA AND GERMANY

Martin Kerscher



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Supervisor: Prof. Gerhard P. Kemp

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ABSTRACT

Plea bargaining describes the act of negotiating and concluding agreements in the criminal procedure. Usually the prosecutor and the accused agree that the accused will plead guilty to the charge brought against him in exchange for some concession from the prosecution. The bargain is not limited to the presented subject. Agreements can contain the non-prosecution or reduction of charges, specific terms of punishment, conditions of probation and much more. In many countries the vast majority of criminal cases are disposed by way of bargaining. Plea bargaining breaches with the concept of a conventional trial and consequently clashes with well-known fundamental principles of the criminal procedure. Moreover, bargaining before criminal trials strongly implicates the constitutionally secured rights of the accused as well as of the public interest. Although plea bargaining is broadly criticized for its implications on essential rules and principles, the use of the practice is widespread. There are clear benefits to the participant, such as to avoid a lengthy trial with an uncertain outcome. South Africa, as a legal system with roots in the common law, adopted the procedure in 2001 with the implementation of s 105A into the Criminal Procedure Act. The German legislature in 2009 decided to regulate what until then had been informal practice by inserting several rules into the German criminal procedure, amongst which s 257c contains the main provisions. The implementation of bargains into the German law has produced tensions particularly due to the inquisitorial basis of the criminal procedure that stands in civil law tradition.

This thesis evaluates how South African and German provisions on plea bargaining differ, i.e., on which different backgrounds they are based on, how the bargain procedures are construed and to what extent statutory plea bargaining in both legal systems displaces informal traditional agreements. The comparison is enriching under the aspect that both countries implemented the bargain procedure but had to place them on fundamentally different grounds.

Having presented the grounds that motivated the research (Chapter I.), the origins of plea bargaining in general as well as the legal development toward the present statutory provisions in both countries are examined (Chapter II.). The bargain procedures are compared in detail (Chapter IV.). A large part focuses on particular problem areas and how both legal systems cope with them (Chapter V.). The result of the research is summarized in a conclusion (Chapter VI.).

OPSOMMING

Pleitonderhandeling kan beskryf word as die proses van onderhandel en die aangaan van ooreenkomste in die strafproses. Die vervolging en die verdediging sal gewoonlik ooreenkom dat die beskuldigde skuldig sal pleit in ruil vir een of meer toegewings deur die vervolging. Ooreenkomste kan insluit die nie-vervolging of vermindering van klagte, spesifieke aspekte van vonnis, voorwaardes van parool en talle meer. In ‘n hele aantal lande word die oorgrote meerderheid van sake afgehandel by wyse van pleitooreenkomste. Dit is egter duidelik dat pleitooreenkomste in konflik is met die konsep van ‘n gewone verhoor en is gevolglik ook in konflik met van die grondbeginsels van die strafprosesreg. Dit raak ook die grondwetlike regte van beskuldigdes en die belange van die samelewing. Ten spyte van hierdie kritiek en meer, is die praktyk van pleitonderhandeling wydverspreid. Daar blyk besliste voordeel te wees vir die deelnemende partye, byvoorbeeld die vermyding van lang verhore met onsekere beslissings. Suid-Afrika (met ‘n sterk gemeenregtelike tradisie) het die praktyk van pleitonderhandeling formeel en per statuut in 2001 aanvaar, met die aanvaarding en invoeging van artikel 105A in die Strafproseswet, 1977. Die wetgewer in Duitsland het in 2009 besluit om die informele praktyk van pleitonderhandeling te formaliseer met die invoeging van sekere bepalings in die Duitse strafproseskode. Hierdie invoeging het sekere spanning veroorsaak in die Duitse strafproses, veral weens die inkwisitoriese tradisie in daardie jurisdiksie.

Hierdie tesis evalueer die Suid-Afrikaanse en Duitse benaderings tot pleitonderhandelinge, hoe dit verskil, die verskillende regskulturele kontekste waarbinne dit plaasvind, en die mate waartoe pleitonderhandeling in beide sisteme informele ooreenkomste vervang het. Die vergelykende ondersoek bevind dat beide stelsels die pleitooreenkoms ingestel het, maar dit moes doen mvn fundamenteel verskillende gronde.

Hoofstuk I (die motivering vir die studie), word gevolg deur ‘n historiese ondersoek (Hoofstuk II). Die verdere hoofstukke fokus op die regsvergelykende aspekte en die gevolgtrekkings word in Hoofstuk VI uiteengesit.

DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Martin Kerscher

March 2013

NOTE ON GENDER TERMS

Throughout this thesis the pronouns as he, him and his are used purely for stylistic convenience and convention and are intended to refer to females as well as to males.

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I. Motivation

Plea agreements are a common instrument in criminal procedure. They enable the prosecutor and the accused or his defendant to negotiate and settle an agreement on plea and sentences. Plea bargaining in pure form places the criminal proceeding, fact-finding, legal consequences and even legal judgement at the parties' disposal.[1] In both Germany and South Africa, such agreements have become more and more important over the past several decades. Especially in large and difficult cases, e.g. 'white collar crime', plea agreements are seen by commentators as an effective means of avoiding long trials with uncertain outcomes. Statutory plea bargaining was introduced into South African law in 2001 while in Germany it developed informally until it was implemented into the statutory law in 2009. There are many good reasons for incorporating consensual elements into the criminal justice system. Nevertheless, there is also a lack of clarity about the use of this instrument that can deeply affect the nature of a criminal trial and draw constitutionally guaranteed rights into question. Basic rules and principles of criminal procedure are affected and need to be assured. For example, openness in criminal proceedings is a legitimate public interest that must be considered.[2] Furthermore, the presumption of innocence may be violated through the bargain procedure. In particular, cases may appear highly questionable if the prosecution relies entirely on the accused's cooperation just to secure any conviction at all.[3] Moreover, there generally is a need to ensure that legal proceedings are not permeated by the 'smell of the marketplace'.[4] Plea bargaining cannot be limited to the single function of easing the strain on resources, which would be a circumstance a democratic society could not afford.[5] The legitimacy of the process has to be preserved, and the courts must maintain discretion in the process. Plea bargaining is a deliberate movement away from conventional trial procedure. Yet there is no prevailing opinion about the true nature of plea bargaining, i.e., whether or not it crosses the line and becomes a consensual procedure *sui generis*.

All above-mentioned aspects already indicate the fundamental questions surrounding the issue: Does plea bargaining relegate the legitimacy of the criminal justice system to second priority in the name of greater expediency?[6] To what extent can easing trials by way of bargaining be acceptable? What provisions in both German and South African law

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1 SK-*Velten*, StPO, s 257c, para 3.
2 Compare Bennun (2007) *SACJ* 17 at 45.
3 Bennun (2007) *SACJ* 17 at 45.
4 Compare Bennun (2007) *SACJ* 17 at 33.
5 Bennun (2007) *SACJ* 17 at 45.
6 Compare Bennun (2007) *SACJ* 17 at 45.

are meant to warrant established, unquestioned rules and principles of the criminal procedure and how are they interpreted?

A comparison of South African and German law is particularly enlightening. South Africa's law is basically accusatorial and characterised by common-law principles.[7] Thus South Africa is a classic example of a country that adopted plea bargaining after the Anglo-American model. German bargain procedure on the other hand was not directly influenced by foreign law. Rather, its consensual elements developed out of a pre-existing legal framework, the essence of which is inquisitorial.[8] This in particular conflicts with the implementation of bargain procedure as a party's disposal of the scope of the trial is foreign to continental criminal law. It is of great benefit to examine how Germany addressed these tensions and to compare them to the South African regulations, particularly because the German criminal justice system has served as a model for a number of other civil-law countries around the world.[9] Thus the presented comparison between plea bargaining in South Africa and Germany is at its core a comparison of plea bargaining's introduction into the common-law tradition and its introduction into the civil-law tradition.

II. General Introduction

There are different approaches to the phenomenon of plea bargaining that are not necessarily based solely on the differing legal systems of each country. Bargaining before criminal courts can be defined and described by general features and characteristics. An analysis of the motives for and benefits and general perception of agreements in the criminal trial will help to understand the later discussed problems and concerns surrounding the issue. As will be presented, the bargain procedure possibly does not conform to basic principles and rules of criminal procedure, for both traditional and constitutional reasons.

1. Definitions

Defining 'plea bargaining' concisely often proves difficult because term can be used in many different situations and contexts.[10] Thus, there are diverging opinions, and heaps of

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7 Explanation of the term 'accusatorial' will follow in Chapter II.6.b.
8 Explanation of the term 'inquisitorial' will follow in Chapter II.6.a.
9 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 74.
10 Trichardt/Krull (1987) *THRHR* 428 at 430 with further references.

confusion, over the question of what constitutes plea bargaining.[11] As a simple illustration, consider that plea bargaining already is a combination of two terms, the latter of which, 'bargaining,' seems foreign to the very nature of every criminal trial.

a. Dictionary

One way to define plea bargaining is to consider common definitions. The Oxford Dictionary of English defines plea bargaining as 'an arrangement between prosecutor and defendant whereby the defendant pleads guilty to a lesser charge in exchange for a more lenient sentence or an agreement to drop other charges'.[12] More generally, the noun 'bargain' describes 'an agreement between two or more people or groups as to what each will do for the other.'[13] The verb means to 'negotiate the terms and conditions of a transaction'.[14] Interestingly, 'bargain' is probably of Germanic origin and related to the German word for 'to borrow', i.e. 'borgen'.[15]

Instead of the terms 'plea bargain' and 'plea bargaining' one can also use the terms 'plea agreements' and 'plea negotiations'. A reason for the use of the latter terms might be seen in the fact that the words 'bargain ' and 'bargaining' tend to imply that a party is getting a benefit or making a good 'deal,' which is considered inappropriate in the context of criminal trials.[16] *Bekker* notes that the term 'bargain' was a frequent source of misunderstanding and irritation and regards the word as an unhappy choice.[17] In his opinion 'bargain' is misleading as it does not precisely describe what occurs at the court.[18] The term suggests the idea of a 'sale' at the courthouse.[19] However the term 'bargain' generated public belief that the accused are getting 'a break' or 'less than he they deserve' or 'a deal', which was not always true.[20] 'Bargain' is considered by many to be provocative and pejorative rather than descriptive.[21] Nevertheless the term 'plea bargaining' became commonly used. The use of the term 'plea Bargaining' is U.S.-American lingo.[22] *Bekker* suggests that one could also speak of 'settlement', or a simple 'bargain', 'contract' or 'agreement'.[23] Bargaining,

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11 Bekker (1996) 19 (1) *CILSA* 168 at 172.
12 Oxford Dictionary of English, 3ed (2010), 'plea bargaining'.
13 Oxford Dictionary of English, 3ed (2010), 'bargain', noun, No 1.
14 Oxford Dictionary of English, 3ed (2010), 'bargain', verb.
15 Oxford Dictionary of English, 3ed (2010), 'bargain', origin.
16 Trichardt/Krull (1987) *THRHR* 428 at 430 with further references.
17 Bekker (1996) 19 (1) *CILSA* 168 at 173.
18 Bekker (1996) 19 (1) *CILSA* 168 at 173.
19 Bekker (1996) 19 (1) *CILSA* 168 at 173.
20 Bekker (1996) 19 (1) *CILSA* 168 at 173 with further references.
21 Bekker (1996) 19 (1) *CILSA* 168 at 173.
22 Clarke (1999) *CILSA* 141 at 142.
23 Compare Bekker (1996) 19 (1) *CILSA* 168 at 173.

especially in German provisions concerning pre-trial agreements, is oftentimes named 'discussion'.[24] The term generally means 'the action or process of talking about something in order to reach a decision or to exchange ideas'.[25] The term 'discussions' is used to indicate and emphasize that it is not a 'bargain'. It can be summed up that it oftentimes has been proposed to generally name plea bargaining 'plea discussions' and 'plea agreements', because the use of terms as 'plea bargaining' and 'plea negotiations' tend to imply that the procedure is not proper or even has an evil characteristic.[26] Nevertheless the use of the term 'plea bargaining' is very common.

b. Other jurisdictions

U.S. law defines plea bargaining as follows:[27] 'Plea bargaining consists of the exchange of official concessions for a defendant's act of self conviction. Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged, or a variety of other circumstances; they may be explicit or implicit and they may proceed from any number of officials.'[28] Another description of the nature of plea bargaining reads as follows: 'plea bargaining is a form of negotiation by which the prosecutor and defence counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial.'[29]

The Canadian Law Commission, a commission that investigated the practice of plea bargaining in 1989 and recommended to establish statutory provisions, defined plea bargaining as 'any agreement by the accused to plead guilty in return for the promise of some benefit'.[30] The Commission later used the more neutral terms of 'plea negotiations' and 'plea discussions,' as it wanted to describe the process of reaching a satisfactory agreement rather than making a bargain.[31] The term 'plea agreement' was consequently defined as 'any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action'.[32]

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24 Compare ss 160b, 202 of the StPO.
25 Oxford Dictionary of English, 3ed (2010), 'discussion'.
26 Trichardt/Krull (1987) *THRHR* 428 at 430 in footnote 21 with further references.
27 Steyn (2007) *SACJ* 206 at 208.
28 Alschuler (1979) 79 *Colum. L. Rev* 1; Steyn (2007) *SACJ* 206 at 208; compare also South African Law Reform Commission, Project 73 (2001) para 2.3.
29 Herman, *Plea Bargaining*, p. 1 (§1:01).
30 South African Law Reform Commission, Project 73 (2001) para 2.4; Law Reform Commission of Canada 'Criminal Procedure: Control of the Process Working Paper 15 (1975) at 45.
31 South African Law Reform Commission, Project 73 (2001) para 2.4.
32 Bekker (1996) 19 (1) *CILSA* 168 at 173; South African Law Reform Commission, Project 73 (2001) para 2.5.

c. Definitions Case law

In *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)*, Uijs AJ defined plea bargain as 'being the practice of relinquishing the right to go to trial in exchange for reduction in charge and/or sentence.'[33] In *S v Armugga & others*'s case, Msimang J stated the following: 'In the present context plea bargaining can be defined as the procedure whereby the accused person relinquishes his right to go to trial in exchange for a reduction in sentence. As the term itself connotes, the system involves bargaining on both sides, the accused bargaining away his right to go to trial, in exchange for a reduced sentence and the prosecutor bargaining away the possibility of a conviction, in exchange for a punishment which he or she feels would be retributively just and cost the least in terms of the allocation of resources. In the process of bargaining, numerous assumptions are made and mistakes are bound to happen. Provided that a party is found to have acted freely and voluntarily, in his or her sound and sober senses and without having been unduly influenced when concluding a plea bargaining agreement, the fact that the assumptions turn out to be false, does not entitle such a party to resile from the agreement.' [34]

d. German terminology

As the German language and German society are inclined to adopt English terms rather quickly and to use such Anglicisms to describe new developments, agreements negotiated in a criminal proceeding were often called 'deals' in German in the past. This 'denglish' (for *Deutsch* and *English*) term smacks of something irregular, not contemplated by the principles of criminal procedure,[35] which indicates that these agreements have been and are commonly considered to be problematic. This may have been a motivation for the drafters of the statutory provisions to name plea bargaining in German 'Verständigung' (*understanding* or *convergence of minds*). This term was preferred over 'Absprache' (*arrangement*) or 'Vereinbarung' (*agreement*). Although all these terms stand for 'agreement', the latter do underscore a quasi-contractual and binding character. 'Verständigung' however only gives us the impression of a simple communication that has taken place.

Another important aspect is that German criminal procedure does not incorporate a formal

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33 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 670c.

34 *S v Armugga & others* 2005 (2) SACR 259 (N) at 265a-c.

35 Compare Meyer-Goßner, StPO, s 257c, para 31.

plea to a charge.[36] As there is no 'plea,' strictly speaking, one cannot use the term 'plea bargaining' when discussing the subject with regard to the German provisions and law. One rather ought to speak of 'agreements', 'negotiated agreements', 'bargain' etc. Nevertheless in order to standardise the use of the term 'plea bargaining,' all such discussions, negotiations and agreements under German law will be described with this term.

2. Reasons for plea bargaining

There are plenty of reasons why the plea bargaining system has reached its present proportions.[37] While much of the discussion surrounding plea bargaining deals with its benefits (which will also be examined later),[38] first studying its general origins, the reasons why plea bargaining was established in practice, will aid understanding down the road. Therefore it is necessary to examine the factual, historic and socio-scientific background of plea bargaining.

a. Factual case pressure

One could assume that the guilty plea system has grown largely as a product of circumstances and as a result of general tendencies towards consensual elements in the criminal procedure rather than due to a choice.[39] On the example of the United States *Bekker* explains that the volume of crime had increased over decades and that the criminal law focused on areas of human activity that were formerly beyond its scope.[40] Simultaneously, the length of the average criminal trial had increased significantly. All these developments led to a major administrative crisis in American criminal courts in the 1990's.[41] The guilty plea system was seen as a solution that would enable the courts to process their case loads in light of seriously inadequate resources.[42] Nowadays plea bargaining is the predominant method of resolving criminal cases in the United States.[43] As the above examples reveal, the most widely cited rationale for plea bargaining is

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36 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 74; which will be further explained later in this thesis.
37 Compare Bekker (1996) 19 (1) *CILSA* 168 at 178.
38 See Chapter II.4.
39 Bekker (1996) 19 (1) *CILSA* 168 at 178.
40 Bekker (1996) 19 (1) *CILSA* 168 at 178.
41 Bekker (1996) 19 (1) *CILSA* 168 at 178.
42 Bekker (1996) 19 (1) *CILSA* 168 at 178; F Allen 'The borderland of criminal justice' 3 (1964).
43 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 7; La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 551 (§ 21.1(a)).

administrative necessity or case load pressure.[44] Plea bargaining is seen as a means to spare the state the time and expense intrinsic to lengthy criminal trials.[45] By way of extensive use of plea bargaining, the courts can handle more cases in the same time span.

b. Historic causes

In addition to the case load argument, there are several further reasons for the advent of plea bargaining. Historically, the rise of professional police and prosecutors who developed and selected their cases more carefully, so that there were relatively few genuine disputes over guilt or innocence, represents one of the first steps towards plea bargaining.[46] But there were also contributing factors on the opposite side, including the specialisation and professionalism of legal representatives, broadening of the right to and spread of counsel and the objective of attorneys to be of assistance to their clients.[47] Many more accused had legal representation and that representation wanted to assist their clients at a pre-trial stage as well as throughout trial.[48] The due process revolution is another contributing factor, in that it made additional demands on the prosecutor's office in pre-trial and post-conviction proceedings and strengthened the defendant's bargaining position by affording him additional rights.[49] Another reason for the rise of plea bargaining might be the expansion of substantive criminal law and new criminal legislation which did not always have the full weight of the society behind it.[50] Changes in sentencing practices increased the certainty and amount of penalty, which built a basis for bargaining.[51] Also the prosecution and judge might aim to reach a sentence through the bargain that to their minds would be more appropriate than that otherwise permissible under strict sentencing statutes.[52] The development might have caused participants to seek 'substantive justice in the face of legal inflexibility'.[53]

Even though there may exist plenty of arguments, to the majority of scholars the

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44 Bekker (1996) 19 (1) *CILSA* 168 at 179 with further citations.
45 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 242 (Chapter 14, 3).
46 Bekker (1996) 19 (1) *CILSA* 168 at 178; La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 524 (§ 21.1(b)).
47 Bekker (1996) 19 (1) *CILSA* 168 at 178; La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 524 (§ 21.1(b)).
48 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 524 (§ 21.1(b)).
49 Bekker (1996) 19 (1) *CILSA* 168 at 179.
50 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 525 (§ 21.1(b)).; Mather, 13 Law & Soc.Rev. 281, 283 (1979); Alschuler, 13 Law & Soc.Rev. 211, 242 (1979).
51 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 525 (§ 21.1(b)).
52 Bekker (1996) 19 (1) *CILSA* 168 at 179.
53 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 525 (§ 21.1(b)).

administrative necessity of plea bargaining i.e. the case load pressure argument, remains the striking reason.[54] The argument that a great overall development in criminal justice and growing case numbers caused the advent of plea bargaining is partly opposed. *De Villers* for instance regards it as false that the implementation of s 105A was inevitable.[55] Instead he argues that the inefficient criminal justice system was the main contributor to the rise of plea bargaining.[56] He holds that, through an improvement of the police service and the prosecution, there is a choice whether to make use of plea and sentence agreements, or at least whether to limit the extent to which such agreements are concluded.[57]

c. Socio-scientific approach

Empirical studies however might cast doubt on the above mentioned argument that the major reason for plea bargaining is case load pressure ('case pressure theory'[58]).[59] Studies have shown that there is no significant correlation between case load and plea bargaining.[60] Other studies found that case load pressure generally determined the need to plea bargain, although there was no indication which specific cases will be dealt with by way of plea bargain or what stipulations the bargain would contain.[61] *Bekker* sums up that, however case load determines in general the kind of cases that are more likely to be plea bargained and gives the example that the greater the pressure of cases, less attention is given to petty and less serious crimes.[62] He expects prosecutors to negotiate more easily when a case is either weak or difficult, thus requiring a long trial.[63]

Besides the case pressure theory, there are two theories that try to explain the spread of plea bargaining. The common basis of both theories is the idea that there is general tendency among the participants of a trial towards cooperation.

The organisational theory comes to this conclusion through an analysis of the courtroom setting. Scholars supporting this theory assume a mutual interest of all parties involved in the criminal proceeding in order to avoid conflict, thereby reducing uncertainty and maintaining group cohesion.[64] Such scholars explain that the mutuality of social dynamics,

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54 Bekker (1996) 19 (1) *CILSA* 168 at 179.
55 De Villers (2004) *De Jure* 244 at 252.
56 De Villers (2004) *De Jure* 244 at 252.
57 De Villers (2004) *De Jure* 244 at 252.
58 Bekker (1996) 19 (1) *CILSA* 168 at 179.
59 Bekker (1996) 19 (1) *CILSA* 168 at 179.
60 Bekker (1996) 19 (1) *CILSA* 168 at 179; Worden (1973) *Judicature* 335 at 339.
61 Bekker (1996) 19 (1) *CILSA* 168 at 179 with further citations.
62 Bekker (1996) 19 (1) *CILSA* 168 at 179 with further citations.
63 Bekker (1996) 19 (1) *CILSA* 168 at 179 with further citations.
64 Bekker (1996) 19 (1) *CILSA* 168 at 180 with further citations.

i.e. the structure of roles and relationships among the individuals that participate in the process, motivates the parties to enter into plea and sentence negotiations.[65]

Socialisation or adaption theory, as originated by *Milton Heumann*, considers the participants' conduct an outcome of socialisation, emphasizing that applicants are more influenced by learning than by teaching and that they gain knowledge of the reality of the criminal procedure that differs from what they expected and were being taught.[66] Against the background that most of the clients are factually guilty and thus there are few if any legal matters that could be of budding use, adaption theory assumes that attorneys choose to plea bargain as a last option of defence.[67] Indeed, one should not undervalue the impact of practical experience on the court's practice. However to argue that plea bargaining initially was motivated by the spread of the practice of bargaining would be a circular argument. The present establishment of bargains cannot be seen as an initial reason for the practice. Rather it is an explanation for its ongoing spread.

Another approach to the phenomenon of plea bargaining is to view society through its relationship to the State. One could argue that the development of plea bargaining reflects the development of a new relationship between state and citizen.[68] Vertical power and pressure between the state and the subordinated citizen is replaced by equal partnership.[69] Administrative law adapted to the changed relationship of the interacting participants earlier and may have served as an example.[70] The state would rather discuss with the citizen than expose him to sanctions.[71] In the eyes of *Rauxloh* it all started with white collar and environmental crime 'where the new extended legislation disregards the principle of *ultima ratio*.'[72] Areas that were previously friendly to negotiation are now subjected to criminal procedure which implies the principle of compulsory prosecution.[73] Consequently this encourages the use of plea bargaining. However this also implies that the procedure of plea bargaining has spread to all areas of society.[74] *Bussmann* reports the tendency resulting therefrom, that courts sentence leniently in large-scale proceedings

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65 Bekker (1996) 19 (1) *CILSA* 168 at 180 with further references in footnote 86.
66 Compare Bekker (1996) 19 (1) *CILSA* 168 at 180; Heumann, *Plea bargaining*, p. 2-6.
67 Compare Bekker (1996) 19 (1) *CILSA* 168 at 180; Heumann, *Plea bargaining*, p. 91.
68 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 5; Hermann (1992) 53 *University of Pittsburgh Review* 775 at 776.
69 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 5.
70 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 5.
71 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 5.
72 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 5; Rönnau, *Die Absprache im Strafprozess*, p. 45.
73 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 5, 6 with further references.
74 Compare Gerlach, *Absprachen im Strafverfahren*, p. 23.

due to class considerations.[75] Offenders of white collar crimes more often belong to the same class of society as prosecutors and judges and like them are more respected members of society[76] These cases are most likely to be plea bargained.[77]

d. Imitation

With regard to German law, one more factor, amongst many others, could have played a role: imitation. In comparison with common law legislations German law developed agreement procedures relatively late and still today hesitates to explicitly call plea bargaining by its name. This indicates that German legal practice, out of which the German agreement procedure arose, may have been influenced by the extensive use of plea bargaining in other jurisdictions like the U.S.A.. This standpoint is similar to adaption theory except that it examines adaption on a larger scale, i.e., among different legal systems, and does not only analyse the social dynamics of court room members. Surely also South African law is greatly influenced by the use of bargains in the U.S.-American legal system.[78]

3. Empiric view

Inquiries show that plea bargaining is a widely spread phenomenon.[79] Exact numbers are hard to find though.

a. South Africa

Statistics on plea bargaining in South Africa are rare. The South African Law Commission in a comparative overview referred to the U.S.A., where 85 - 95 % of all cases were disposed of through guilty pleas, mostly as a result of negotiations.[80] The Commission confirmed that there is no statistical study relating to the prevalence of plea bargaining and the degree to which the procedure is used to avoid trials.[81] It can be assumed that the application of plea bargaining in South Africa has not yet reached the proportions of U.S. legal practice. Already in 1999's *North Western Dense Concrete* case however it was

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75 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 6; Bussmann, *Die Entdeckung der Informalität*, p. 29.
76 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 6.
77 Compare Chapter V.13.b.
78 Compare only Bekker (1996) 19 (1) *CILSA* 168.
79 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 8; Altenhain/Hagemeier/Haimerl (2007) *NStZ* 71 at 79.
80 South African Law Reform Commission, Project 73 (2001) para 2.7 with further references.
81 South African Law Reform Commission, Project 73 (2001) para 3.13.

stated that it is commonly known that the process of negotiating a plea 'takes place probably daily, at every level of the criminal justice system'.[82] In 2010/2011 the South African prosecution concluded a total of 604 plea and sentence agreements successfully, comprising of 2,034 counts.[83] The annual report states that although the number of agreements does not appear to be significant – what is true against a total number of cases finalised in 2010/2011 of 460,891 – that a great time savings had been achieved.[84] The fact that in 184 of the bargained cases (equivalent to 36%) the sentence imposed included direct imprisonment further evidences this reality.[85] In 2005/2006 the prosecution succeeded in 2,164 cases in reaching an agreement.[86] *Steyn* held that with all the benefits it was a disconcertingly low number.[87] The statistics however might not be representative as they do not reveal the circumstances of each agreement. For instance it can be assumed that the counted agreements were only those formally concluded and reported. Out of habit, many prosecutors may still not use the formal bargain procedure as contained in s 105A.[88] Another factor, which will be explained later, is that s 105A does not provide for all kinds of agreements.[89] Thus the actual number of cases that are plea bargained remains a mystery.

b. Germany

Where formerly plea bargain procedure seemed to dominate in white collar crime trials,[90] it is now established in trials for crimes such as homicide and other crimes of heavy guilt. Indeed, the agreement practice has now spread over nearly all fields of criminal law. Even German jury courts, i.e. special chambers at the Regional Courts that deal with heavier offences such as murder, are dominated by the practice of agreements.[91]

It is difficult to ascertain the number of bargained cases. In 1986/1987 *Schünemann* examined and reported that 20-30 % of all proceedings are concluded with an

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82 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 674e.
83 National Prosecuting Authority Annual Report 2010/2011 (www.npa.gov.za) p. 21.
84 The numbers indicated by the National Prosecuting Authority are asthonishing low; the percentage of bargains based on 2,034 bargained counts in comparison to a total case number of 460,981 would only be less then 1 %, i.e. 0.44 %
85 National Prosecuting Authority Annual Report 2010/2011 (www.npa.gov.za) p. 21.
86 National Prosecuting Authority Annual Report 2005-2006 (www.npa.gov.za) p. 27.
87 Steyn (2007) *SACJ* 206 at 215.
88 Compare Advocate Schutte's statement in Steyn (2007) *SACJ* 206 at 216.
89 E.g. not for pre-trial agreements or agreements that do not contain a negotiated sentence.
90 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 10.
91 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 10.

agreement.[92] In between 1985 and 1990 *Siolek* regarded 50 % as concluded by means of bargains.[93] More narrowly, 61.5 % of white collar crimes are plea bargained according to a 2007 analysis.[94] *Schöch* states that the overall rate is above 50 % and in white collar crime up to 80-90%.[95] An actual inquiry of *Heller* concludes that 25 % of all proceedings are solved by way of plea bargaining.[96] In white collar crimes the number lies between 76-100%.[97] It can thus be assumed that the percentage of all plea bargaining cases is around 50 %, with some peak rates in white collar crime.[98] Interestingly, these agreements still likely take place mostly outside the courtroom and the main proceedings, and as a result they are conducted in camera.[99] Thus it has to be taken into account that most of the mentioned inquiries only focus on the main proceedings. A lot of bargaining – as will be explained later – takes place before a trial is initiated by a charge.

4. Benefits and interests

Plea bargaining offers various benefits to the parties involved. Oftentimes where the parties, i.e., the accused and the prosecutor, view each other adversarially, they will have a mutual interest to enter into an agreement. Identifying these parties' interests will help to understand and further approach the system of plea bargaining.

a. Prosecutor's position

The usual objective of a prosecutor is to obtain a plea as close to the outcome of a trial as possible.[100] However, this aim is affected by various circumstances and other interests. One major reason which may motivate the prosecutor to bargain is the strength of his case. As the prosecution must prove the case beyond reasonable doubt, prosecutors often tend towards bargaining in cases where suspicion cannot be proved easily or at all.[101]

The use of plea bargaining in such cases is questionable however. For instance, the prosecutor can increase its bargaining power by systematically charging the accused with

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92 Schünemann, *Gutachten B*, p. 18.
93 Siolek (1993) *DRiZ* 422 at 423; Siolek, *Verständigung in der Hauptverhandlung*, p. 31 seqq.
94 Altenhain/Hagemeier/Haimerl/Stammen, *Die Praxis der Absprachen in Wirtschaftsstafsachen*, p. 54 in footnote 153.
95 Schöch, *Urteilsabsprachen in der Strafrechtspraxis*.
96 Heller, *Das Gesetz zur Regleung der Verständigung,* p. 297/298.
97 Heller, *Das Gesetz zur Regleung der Verständigung,* p. 297.
98 Frommann also assumes 50% in Frommann (2009) *HanseLR* 197 at 200 and refers to sources in footnote 17.
99 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 10.
100 Herman, *Plea Bargaining*, p. 5 (§2:02).
101 Herman, *Plea Bargaining*, p. 5 (§2:02).

multiple and more serious offences.[102] This contradicts the notion that a prosecutor has a duty not to convict but to seek justice.[103] Thus, the benefits for the state implicate basic principles of criminal procedure. State, prosecution and the administration of justice have a common interest in reducing through the process of plea bargaining the number of prisoners awaiting trial.[104] For instance South Africa's prisons are overcrowded, and figures that show that the number of prisoners is around 178,000 inmates, with each inmate costing around R 117 per day.[105] Many of these prisoners are awaiting trial.[106]At the same time conventional trials are expensive, time consuming and possibly traumatic for certain participants.[107] *Steyn* thus regards it as obvious that the state can financially benefit from plea bargaining, taking into account the crime rates and the fiscal realities of South Africa.[108] Generally plea bargaining allows the prosecution to prioritize those cases that will be prosecuted by bargaining the others.[109] Consequently, the prosecutor might use the bargaining procedure as a means of steering the outcome and – as the judge might see it as well – lessen the workload. A guilty plea avoids the necessity of a public trial and frees time which can be used to focus on more serious and complex cases.[110] The prosecution might thus head towards a negotiated outcome in order to ease the strain on resources.[111] Prosecutors might also benefit from more flexibility in cases where there are multiple accused.[112] The prosecutor might have an incentive to enter into negotiations in exchange for the accused's cooperation, for instance the assistance in an on-going.[113] Reaching a plea bargain with one accused opens the possibility of using that accused against the others in cases where such testimony should be required.[114] The prosecution might also take into account the feelings of the victim and the public sentiment.[115] The view of the public and the victim will influence the decision of whether to enter into

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102 Combs, *Guilty pleas in International Criminal Law*, p. 127; see also *Du Toit & Snyman* (2001) TRW at 144.
103 Herman, *Plea Bargaining*, p. 14 (§3:02).
104 Steyn (2007) *SACJ* 206 at 212.
105 Steyn (2007) *SACJ* 206 at 211, 212; BMN Balfour 'Budget vote address in the National Assembly by Mr BMN (Ngconde) Balfour, MP, Minister of Correctional Services', 15 June 2004, available at http://www.info.gov.za/speeches/2004/04061511451001.htm, accessed on 13 July 2007.
106 Steyn (2007) *SACJ* 206 at 212; National Prosecution Authority Annual Report 2005/2006 at 27.
107 Steyn (2007) *SACJ* 206 at 212.
108 Steyn (2007) *SACJ* 206 at 212.
109 Herman, *Plea Bargaining*, p. 7 (§2:02).
110 Steyn (2007) *SACJ* 206 at 212.
111 Bennun (2007) *SACJ* 17 at 31.
112 Steyn (2007) *SACJ* 206 at 212.
113 Herman, *Plea Bargaining*, p. 7 (§2:02).
114 Steyn (2007) *SACJ* 206 at 212.
115 Herman, *Plea Bargaining*, p. 6 (§2:02).

negotiations.[116] The nature of the crime also plays a role. The graver the offence, the less likely the prosecutor will enter into an agreement.[117] But, on the contrary, a prosecutor might make use of plea bargaining in order to secure a conviction in cases of more serious offences with more burdensome evidentiary standards. Several final considerations potentially influencing the prosecution's decision are the personal background of the defendant, i.e., the employment, family circumstances, prior criminal record, health, social status and he is on bail or in prison pending trial,[118] in addition to any media attention or political considerations that might surround the case.[119]

b. Accused's position

The first thought of the accused might be similar to that of the prosecution: how strong is my case, i.e., how are my chances for a successful defence? If the accused feels that he has a good chance to prove his innocence, his motivation to enter into a plea agreement diminishes.[120] The most far reaching aim of the accused is to have the charges brought against him dismissed.[121] If this cannot be achieved, the objective is to have the number of charges brought against him reduced, to plead to a reduced and less serious charge, to avoid imprisonment or shorten the time of imprisonment or to gain treatment or rehabilitation.[122] There may even exist cases in which the accused − even if innocent[123] − enters into the agreement to receive a lenient sentence. A German inquiry showed that 48 % of all defence counsel surveyed had experienced a scenario where an accused confessed due to the threat of a serious sentence and yet the counsellor was not convinced of the charges brought against the defendant.[124] The accused's motivation to bargain increases even more if he fears to face a custodial sentence. Moreover there are motivations concerning the trial procedure itself. An accused might favour s 105A procedures as an attractive alternative if he wishes to have the case disposed of as quickly as possible and considers that a sufficient reason to forgo a full hearing.[125] In this manner,

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116 Herman, *Plea Bargaining*, p. 6 (§2:02).
117 Herman, *Plea Bargaining*, p. 6 (§2:02).
118 Herman, *Plea Bargaining*, p. 6 (§2:02).
119 Herman, *Plea Bargaining*, p. 6 (§2:02).
120 Herman, *Plea Bargaining*, p. 8 (§2:03).
121 Herman, *Plea Bargaining*, p. 7 (§2:03).
122 Herman, *Plea Bargaining*, p. 8 (§2:03).
123 De Villers (2004) *De Jure* 244 at 251; in U.S.-terminology this is known as an 'Alford plea'; Herman, *Plea Bargaining*, p. 8 (§2:03).
124 Altenhain/Hagemeier/Haimerl (2007) *NStZ* 71 at 79; even more suprisingly the inquiry solemly did examine white collar crime cases.
125 Bennun (2007) *SACJ* 17 at 31.

a defendant could avoid a public trial with all its traumatic consequences.[126] Furthermore the bargain also removes the unavoidable risk and uncertainties of a conventional trial.[127] Plea bargaining might be seen as a second chance in life.[128] Another aspect is that s 105A procedures offer the accused greater control of the proceedings.[129] Only the accused can decide whether to offer a guilty plea on a less serious or offensive charge.[130] Also the accused exert control and influence over the process by speeding up the trial process and sentencing.[131] He even may consider the admission of guilt as a first step towards rehabilitation[132] if the decision to plead guilty results simply out of remorse or the sense of having to take responsibility for one's actions.[133] Finally there is also a financial aspect to consider: an accused who does not qualify for expensive legal aid may benefit financially from plea bargaining due to reduced legal fees corresponding to a shortened trial.[134]

German inquiries show that 57.5 % of all persons asked consider the accused to have gained the most from plea bargaining.[135] Additionally, 47.5 % of all legal representatives report that, where the accused is not willing to consent to an agreement, courts announce a sentence altered up to a third above the sentence proposed in the terms of an agreement.[136] Thus, there is a very strong argument that the accused, by virtue of playing a more central role in the overall criminal process, benefits the most from plea bargaining.

c. Third party's position

Aside from the prosecution and the accused, there are other profiteers of the institution of plea bargain procedure.

The presiding judge, for one, may be motivated to accept an agreement in order to avoid a lengthy trial and to thereby lessen his workload.[137] Especially in Germany, where drafting a judgment affords the judge intensive work, plea bargaining saves a great amount of time as the judge is entitled to write a brief summary of the bargain procedure in the judgment and to refer to the confession without having to decide each particular fact and piece of

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126 Steyn (2007) *SACJ* 206 at 212.
127 Trichardt/Krull (1987) *THRHR* 428 at 432.
128 Steyn (2007) *SACJ* 206 at 212.
129 Steyn (2007) *SACJ* 206 at 212.
130 Steyn (2007) *SACJ* 206 at 212.
131 Steyn (2007) *SACJ* 206 at 212; Trichardt/Krull (1987) *THRHR* 428 at 433.
132 Trichardt/Krull (1987) *THRHR* 428 at 432; Steyn (2007) *SACJ* 206 at 212.
133 Herman, *Plea Bargaining*, p. 9 (§2:03).
134 Compare Trichardt/Krull (1987) *THRHR* 428 at 432.
135 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 10; Altenhain/Hagemeier/Haimerl (2007) *NStZ* 71 at 72.
136 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 10.
137 Rodgers (2010) *SACJ* 239 at 260.

evidence in the case.

The defence counsel benefits in the sense that he can take on more cases as the trials are shortened and thus is able to earn more money.[138] Even if the bargain does not lead to an agreement the legal representative of the accused can gain insight on the prosecutor's view of the case.[139] He may also benefit from learning the court's opinion about his contributions to the trial.[140] The defence counsel could also generate a reputation for taking an interest in, and perhaps successfully sparing, the court's time.[141] Also prosecutors tend to have an interest in, as *Alschuler* describes it, 'maintaining comfortable relationships with defence attorneys and going home early.'[142] Defence attorneys can benefit as they are not the only party that wants to ensure a good atmosphere.

The victim may also benefit from the plea bargaining procedure.[143] The victim does not have to testify and thus is not exposed before the court.[144] Nevertheless, the victim will rarely have an actual interest in the initation of a bargain as the advantage of not having to testify regulary stands opposed to the disadvantage that the accused benefits from a leniency of his sentence.

There are even benefits to society as a result of plea bargaining.[145] As the procedure shortens trials, the public saves on the costs of trials and there is more capacity for serious cases.[146] Plea bargaining also supports law enforcement officials as it may motivate one accused to testify against other offenders.[147] In such cases, the testifying accused is usually offered a more lenient sentence in exchange for cooperation.[148]

5. Stages and content of agreements

There are different stages of the criminal process in which plea bargaining can take place and different kinds of subjects plea bargaining can take into account. Despite the fact that the main focus lies on plea bargaining during the main proceeding with the aim to achieve a lenient sentencing, one should not lose sight of the surrounding areas of practice. A brief

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138 Trichardt/Krull (1987) *THRHR* 428 at 433.
139 Trichardt/Krull (1987) *THRHR* 428 at 433.
140 Trichardt/Krull (1987) *THRHR* 428 at 433.
141 Trichardt/Krull (1987) *THRHR* 428 at 433.
142 Bennun (2007) *SACJ* 17 at 18; Alschuler (2005) 88 *Cornell L. Rev*. 1412 at 1412.
143 Compare also ChapterV.5.a.
144 Steyn (2007) *SACJ* 206 at 212.
145 Trichardt/Krull (1987) *THRHR* 428 at 433.
146 Trichardt/Krull (1987) *THRHR* 428 at 433.
147 Trichardt/Krull (1987) *THRHR* 428 at 433.
148 Trichardt/Krull (1987) *THRHR* 428 at 433.

overview follows below.

a. Pre-trial and agreements related to the main proceedings

The distinction between pretrial agreements and agreements related to the main proceedings might appear confusing to the South African reader. Does not the accused relinquish his right to a trial by entering into the agreement? In German law, agreements only accompany a trial which is overall conducted in the conventional manner, even if they significantly shorten the process. Thus an agreement does not prevent a trial. South African bargains make a trial obsolete, however, and thus are partly called 'pre-trial agreements' as a general description. This was often the case in the period preceding the statutory amendment in 2001.[149] As will be presented later, bargaining under the present South African law can also be divided into trial-related agreements, i.e., procedure in terms of s 105A, and 'authentic' pre-trial agreements. The latter procedure might not be explicitly ruled outlined in the Criminal Procedure Act which will be examined later.[150] Both stages overlap if early negotiations at a pre-trial stage later lead to an s 105A agreement.

In German law, pre-trial negotiations became statutory as part of the new law on agreements in 2009.[151] Section 160b StPO (*Strafprozessordnung*) states that 'the public prosecution office may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings' and that 'the essential content of this discussion shall be documented'. Of note here is that the legislators decided to speak of a 'discussion of the status of proceedings' rather than to name it directly 'agreements'. What this reveals will be further emphasized later.[152] In any event, the purpose of pre-trial negotiations is either to prepare for a s 257c-agreement that comes into existence during the main proceedings or to achieve – from the defendant's point of view – a dispensation of prosecution.[153]

b. Plea, sentence and other agreements

The South African terminology usually uses the term 'plea and sentence agreement,' which already reveals what content might be obligatory in such an agreement. The 'plea' gives 'plea bargaining' its name. The negotiations for a plea are what plea bargaining is

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149 Compare the use of the term in Clarke (1999) *CILSA* 141.
150 Compare Chapter V.2.
151 SK-*Wohlers*, StPO, s 160b, para 1.
152 Compare Chapter V.2.a.
153 Compare SK-*Wohlers*, StPO, s 160b, para 2.

essentially all about.[154] The usual agreement aims to achieve a guilty plea to the initial charge or charges filed.

From a German perspective the term 'plea bargaining' has to be handled with care, as German law does not provide for formal pleas.[155] Instead, negotiating 'the plea' in the German context should be understood as a negotiation surrounding the question of whether the accused will make a confession. The confession could be seen as the complement to the plea in South African criminal procedure.

In a 'sentence agreement' the accused accepts to plead guilty to the charge in exchange for the prosecutor's proposal of a lenient sentence or for the recommendation of a specified sentence.[156] Either the prosecutor agrees to recommend a particular sentence to the court or the court itself agrees to impose a particular sentence.[157] The bargain oftentimes includes a mixture of an agreement on both the charge and the sentence in exchange for the guilty plea.[158] In German law, in the strict sense of the provision, there cannot exist an agreement on the sentence. The court is by the terms of s 257 (3) 2 StPO only entitled to indicate a possible sentence range.[159] Furthermore, an agreement on the sentence is not an obligatory part of a s 257c agreement, as it is under South African law.[160]

In addition to the plea or confession and the sentence, agreements can contain various other negotiated terms. What *Bekker* calls a 'charge bargain' is a the situation in which a defendant pleads guilty to a charge in exchange for the prosecutor's dismissal of other charges filed, in return for a prosecutor's promise not to file new charges, or in return for either a prosecutor's dismissal of the more serious charge or his promise not to file the more serious charge.[161] Thus the benefit lies in a reduction of the charges so that they are less serious, less numerous or both.[162] To sum it up, 'charge bargain' can describe either a plea on the original charge in exchange for a promise from the prosecutor concerning the sentence or it can describe a plea to a less serious charge.[163] Thus, as distinct from the common plea bargain situation where a plea of guilty to the original charge in typically

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154 Compare only Bennun (2007) *SACJ* 17 who named an article 'Negotiated pleas(...)'.
155 Compare above.
156 Bekker (1996) 19 (1) *CILSA* 168 at 175.
157 Bekker (1996) 19 (1) *CILSA* 168 at 176.
158 Bekker (1996) 19 (1) *CILSA* 168 at 176.
159 Compare Chapter V.7.b
160 Compare Chapter V.1.a
161 Bekker (1996) 19 (1) *CILSA* 168 at 176 with further references.
162 Bekker (1996) 19 (1) *CILSA* 168 at 176 with further references.
163 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 521 (§ 21.1(a)).

lessens the sentence, charge bargains deal with negotiations concerning the charge itself.

The filed charges are just one more example amongst various others of a possible subject to be bargained. Almost every procedural measure or concession of the parties is negotiable (for instance, the accused or even the prosecutor may offer to waive their right to summon certain witnesses).

6. Accusatorial and inquisitorial procedure

Plea bargaining emerges from a new approach to criminal procedure. The roots of bargaining before criminal courts have to be traced back to the different procedural traditions in order to understand the true impact that the rise of plea bargaining has had on the actual criminal systems of both Germany and South Africa. Besides the already mentioned conflict with fundamental principles of the constitutions and fundamental principles of criminal procedure, criticisms relating to mandatory prosecution and other inquisitorial trial features arise from the particular legal framework of the German system.[164] The previously discussed inquisitorial tradition is a central value of the German criminal procedure.[165] As plea bargaining affects this value and might even approach accusatorial law traditions, the accusatorial and inquisitorial procedure shall be reviewed in more detail.

a. Inquisitorial system

The inquisitorial system could also be named 'continental' as it originates from continental Europe.[166] From the 13th to the early 19th century in Europe criminal justice was inquisitorial.[167] 'Inquisitorial' means that the trial is conducted under the guidance of the state, i.e. the state leads the 'inquisition' or what also could be called the investigation. The prototype and forerunner of inquisitorial criminal procedure was the decree of Pope Innocentius III. in 1198, which enshrined compulsory interrogation of the accused, eliminated the right to silence and the privilege against self-incriminating testimony and advanced the legitimisation and institutionalisation of torture.[168] These principles formed the basis and influenced the advent of the well-known *Constitutio Criminalis Carolina*

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164 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 76.
165 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 76.
166 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 76.
167 Clarke (1999) *CILSA* 141 at 148 with further references.
168 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4).

instituted by Charles V. in 1532.[169]

In contrast to the accusatorial system the judge − as an inquisitorial judge − plays a more active role during, and even before, the trial.[170] The judge here is the master of the proceedings (*dominus litis*).[171] The trial is not seen as a contest of two opposing parties; instead, it is the judge's duty to take evidence and to question and examine the accused.[172] The inquisitorial principle (*Amtsermittlungsgrundsatz*) is embodied in s 244 (2) of the StPO, which states that 'in order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision.' Thus, one of the striking characteristics of this system is that the judge is entitled to a full 'inquiry' of the witnesses and all other evidence.[173] Consequently, in an entirely inquisitorial system there exists no plea bargaining.[174] However, the modern procedure cannot be equated with the ancient Continental inquisitorial procedure.[175] Over time the position of the accused has been transformed from the central object of the inquiry to a procedural subject with own rights.[176]

b. Accusatorial system

The inquisitorial mode stands opposed to the accusatorial system, which can also be called adversarial.[177] The theory behind the accusatorial system is that the parties determine what shall be made subject to the trial.[178] The accusatorial is marked by two significant features: the passive role of the judge on the one hand and the active role of the opposing parties in presenting evidence on the other hand.[179] The adversarial tradition lays the responsibility for proof of guilt upon the parties and not the judge.[180] The primary investigative force is the police, who pass the collected evidence to the prosecution in a file. The prosecution then act as the *dominus litis*, or in other words it is the prosecution

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169 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4); also named '*Peinliche Gerichtsordnung'*, CCC or *'Carolina'*.
170 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12.
171 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4).
172 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12.
173 Compare Clarke (1999) *CILSA* 141 at 148.
174 Clarke (1999) *CILSA* 141 at 148 mwN.
175 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12.
176 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12.
177 Clarke (1999) *CILSA* 141 at 149.
178 Clarke (1999) *CILSA* 141 at 149.
179 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11.
180 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11.

that decides whether, and which offences, to charge.[181]

The adversarial model developed out of the English common law system.[182] Its purpose is, amongst others, to give the parties the opportunity to participate in and to control the criminal procedure and by such means to strengthen the constitutional rights of the accused.[183] Some scholars' view on the origins of the common law is that Americans − of interest here because plea bargaining originated in the U.S. − 'were attracted to the English common law trial system because it de-emphasized the use of statutes, rigorous rules, and emphasized passive neutrality of the judge as a state representative'.[184] The pure adversarial system does not exist anymore however, as other alternative dispute solutions such as mediation, negotiation and arbitration (in civil cases) and plea bargaining (in criminal cases) have arisen.[185]

As a rule, the accusatorial judge cannot proceed upon his own initiative.[186] On the contrary, the judge is only entitled to react to the propositions of the parties.[187] Nevertheless the judge will oftentimes steer the trial toward areas which have not been properly enlightened or brought before him by the parties.[188] This is necessary to prevent the trial from becoming ineffective due to the incompetence of or manipulation by one or both parties.[189] As a consequence, the judge in an accusatorial system remains entitled to recall witnesses that already have been heard or even call new witnesses[190] which have not been called by one of the parties.[191] There are also certain rules which necessitate that the court assist an illiterate and unrepresented accused throughout the trial.[192] Nevertheless, judicial examinations shall be handled restrictively in an accusatorial system.[193] Literally, the court is obliged to 'hold his tongue until the last possible moment

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181 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4).
182 Clarke (1999) *CILSA* 141 at 149.
183 Clarke (1999) *CILSA* 141 at 149.
184 Clarke (1999) *CILSA* 141 at 149; Strier, Reconstructing justice, an agenda for trial reform (1990) 210.
185 Clarke (1999) *CILSA* 141 at 149.
186 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11.
187 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11.
188 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11.
189 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11.
190 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11; Clarke (1999) *CILSA* 141 at 150.
191 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 11 with reference to s 186 CPA stating that 'the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'
192 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12 with further reference.
193 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12.

and up to this moment should be wise as he is paid to look'.[194] Or with other words, 'the judge is in the role of detached umpire, who should not enter the arena of the fight between the prosecution and the defence for fear of his becoming partial or losing perspective as a result of all the dust caused by fray.'[195]

c. Bargaining as a hybrid model

Neither of these presented models still exists in its pure form. Nevertheless South African law is informed by accusatorial common law tradition and German law is shaped by inquisitorial thinking. Plea bargaining surely is not inquisitorial, but then again not purely adversarial either. The incorporation of attributes of the inquisitorial system into negotiations either by statutory law or exercise of judicial discretion has caused plea bargaining to lose its purely adversarial character.[196] *Clarke* marks the legal development with a headline that reads as follows: 'the death of purely-accusatorial and purely inquisitorial criminal justice systems.'[197] Consequently, one could mark this process, i.e., statutory bargaining before criminal courts as accompanied by provisions that warrant the accused certain rights, as a hybrid model between the adversarial and inquisitorial traditions. The character of the present systems of plea bargaining in South Africa and Germany will be examined later.[198]

7. Constitutional considerations

The constitutionality of plea bargaining does not seem to be a major issue in the controversy in South Africa. Yet the implications of plea bargaining on constitutionally secured rights and principles are strong. As to constitutionality, the South African Law Commission[199], when proposing changes to the criminal procedure, had only proposed to limit the procedure of plea bargaining to certain courts.[200] As *Bennun* states, it is not to the credit of the Commission that it did not raise other questions and concerns.[201] He further points out that the Law Commission did not alert Parliament to the potential dangers of plea bargaining as reflected upon by many scholars, based on both empirical research and

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194 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 12.
195 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4).
196 Clarke (1999) *CILSA* 141 at 149.
197 Clarke (1999) *CILSA* 141 at 148.
198 Compare Chapter V.15.
199 South African Law Reform Commission, Project 73 (2001).
200 Bennun (2007) *SACJ* 17 at 20; South African Law Reform Commission, Project 73 (2001) at 5.10.
201 Bennun (2007) *SACJ* 17 at 20.

scholarly scrutiny.[202] There were no warnings sent that the procedure, which offers potential benefits, can also be a hazard to the legitimacy of criminal justice unless certain rights are protected and care is used when drafting the provisions.[203] *Bennun* emphasises that 'in South Africa, the old way of doing things needed to be reviewed in the light of constitutional and legislative changes.'[204] He hints that the role, power of discretion and independence of the prosecution service are now regulated by the Constitution and subsequent legislation and also that 'the rights of arrested persons and the concept of a 'fair' criminal trial are defined in the Bill of Rights.'[205] In Germany however these constitutional aspects and concerns have long been recognized. The principle of judicial inquiry in the inquisitorial tradition was seen by scholars as conflicting with the notion of a consensual procedure.[206] Consequently some scholars even held that inquisitorial systems like Germany's generally would resist the adoption of plea bargaining.[207]

a. Constitutional provisions

Constitutional provisions govern the system of criminal procedure.[208] Due to the principle of the supremacy of the Constitution, those provisions are the most important sources of criminal procedure rules and thus have to be obeyed.[209]

Under South African law such fundamental rights and principles can be found in s 35 of the Bill of Rights, while in German law the rights are referred to in Article 20 (3) of the Grundgesetz (GG)[210] and Article 6 of the European Convention on Human Rights (ECHR). The ECHR as a multilateral agreement is not equal to the Grundgesetz.[211] Nevertheless, national courts have to take into account the ECHR in the interpretation of the statutory provisions such as the Strafprozessordnung (StPO).[212] Some of the fundamental principles

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202 Bennun (2007) *SACJ* 17 at 20.
203 Bennun (2007) *SACJ* 17 at 20.
204 Bennun (2007) *SACJ* 17 at 21.
205 Bennun (2007) *SACJ* 17 at 21.
206 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 77.
207 Weigend in Jackson et al, 39 at 43-44.
208 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 25 (Chapter 1, 5.1).
209 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 25 (Chapter 1, 5.1).
210 'Grundgesetz' means Basic Law and is the German Constitution.
211 BVerfG (2004) *NJW* 3407 seqq.; BVerfGE 74, 358, 370.
212 ECHR is binding as the German Consitution is entended to accommodate internatin law; moreover according to Article 46 of the ECHR the contracting parties are bound to the case law of the European Court of Human Rights (BVerfG 74, 358 at 370); thus the ECHR, although not of constitutional rank, has to be considered in the application of national legislation and thus is 'extra-statutory'(Compare Meyer-Ladewig, EMRK, Einl, para 33).

of criminal procedure are defined in the StPO,[213] while others can only be found by reference to the general constitutional provision of Article 20 (3) GG. The latter one very briefly states that 'the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.' How these institutions can be protected in legal practice has to be determined and interpreted. Consequently, considering plea bargaining in Germany, the provisions of Article 6 ECHR play a fundamental role as they provide for the right to a fair trial and explicitly name the rights of everyone charged with a criminal offence. Other than the provisions of the Grundgesetz, Article 6 ECHR is most similar to s 35 of the Bill of Rights, as the rights of the accused are stated clearly and do not have to be interpreted out of a general provision.

b. Affected rights and principles

Plea bargaining affects a grand variety of constitutional rights and principles. Overall the principle of a fair trial mainly entails conflicts with plea bargaining.

The German Constitutional Court (*Bundesverfassungsgericht*) in 1987 confirmed that the principle of a fair trial and the rule of law (*Rechtsstaatsprinzip*) do not forbid plea bargaining,[214] although it was said that use of the practice is not at the participant's disposal.[215] The Constitutional Court emphasized that an essential part of the rule of law is the idea of justice.[216] The state's claim for punishment has to be pursued.[217] This implies that prerequisites for an application of the procedure had to be developed, which the Constitutional Court later did in its decision and which was further elaborated upon in BGHSt 43, 195 and BGHSt 50, 40.[218] BGH confirmed that plea bargaining is in general admissible and that it complies with German Criminal Procedure.[219] The court held that the principle of a fair trial and the principle of guilt form a guideline which the plea bargaining procedure has to follow.[220] The accused has a right to proceedings that are fair and that comply with the Rule of Law as contained in Article 2 (1) and 20 (3) of the German Constitution.[221] Although Article 6 of the ECHR in its subsection 3 explicitly names certain components of the right to a fair trial, it is applicable as a universal principle. For instance,

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213 'Strafprozessordnung' means German Code of Criminal Procedure.
214 BVerfG (1987) *NJW* 2662 at 2662.
215 BVerfG (1987) *NJW* 2662 at 2662.
216 BVerfG (1987) *NJW* 2662 at 2663 with reference to BVerfGE 33, 367 at 282 = (1972) *NJW* 2214; BVerfGE 80, 297 at 308 = (1986) *NJW* 767 = (1986) *NStZ* 185.
217 Compare BVerfG (1987) *NJW* 2662 at 2663.
218 The content of these Court decisions will be presented in more detail in Chapter III.3.d and III.3.e.
219 BGH 50, 40 at 48.
220 BGH 50, 40 at 48.
221 BGH 50, 40 at 48.

before plea bargaining became statutory, a German court was only bound to a plea agreement on the basis of the principle of a fair trial. As this example shows, the idea of a fair trial serves an important function when new instruments are developed in practice. The application of criminal procedure must always comply with procedural fairness. Thus the principle of a 'fair trial' serves as an umbrella term for various more detailed principles and rights and where the latter do not exist as a general guideline.

As noted before, constitutional concerns were not prominently raised in South Africa. These concerns are left to U.S. scholars that extensively discussed the constitutionality of plea bargaining with regard to their constitution and common law system.[222] Absent evidence to the contrary, it should be assumed that both in Germany and in South Africa the potential for conflict is comparable. Apparently South African scholars, when discussing the admissibility and application of plea bargaining with compelling logic, do gaviate towards the constitutionality of the topic, although they rarely refer directly to constitutional provisions. However, in South African law the abovementioned right to a fair trial is enshrined in s 35 (3) of the Bill of Rights. This subsection, together with the other subsections (1) and (2), contains similar fundamental constitutional rights as those in Article 6 of the ECHR, of which the following are potentially affected: the presumption of innocence, the right to remain silent, the right not to testify during proceedings, the right not to give self-incriminating evidence, the right not to be compelled to make any confession or admission that could be used as evidence (*nemo tenetur se ipsum accusare*), the right to a public trial, the principle of legality, etc. Moreover, attendance duties, proof beyond a reasonable doubt, adversary hearings and procedural safeguards might also be undercut.[223]

c. Conflicting inquisitional principles

There are two principles conflicting with plea bargaining that are of particular significance to the German criminal system:[224] the inquisitorial principle (*Amtsermittlungsgrundsatz*) as contemplated in s 244 (2) and the principle of mandatory prosecution (*Legalitätsprinzip*) in the terms of s 152 (2). As mentioned before, the inquisitorial system of German law generally seems to oppose plea bargaining. Consequently, it is a challenge to develop a bargain procedure that complies with these principles. Whether the German legislator has achieved this goal will be discussed later.

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222 Compare Herman, *Plea Bargaining*, p. 11 (§3:01).
223 Compare Bennun (2007) *SACJ* 17 at 20.
224 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 76.

8. Concluding remark

It can be summed up that over the past few decades plea bargaining has become a reality in South African as well as in German legal practice. There exist diverse needs that have pushed legal practice into the seemingly unusual procedure of bargaining before a criminal court or at a pre-trial stage. However, in both countries critics have not yet been silenced, and there is still an ongoing controversy surrounding this institution.

III. Legal development

There is no definite point in time to which one can trace the history of plea bargaining.[225] Throughout the history of law the punishment to be imposed upon wrongdoers has been subject to negotiation.[226] The origins of the practice of plea bargaining are lost in unrecorded history.[227] One can only state that plea negotiations must have originated from practical considerations.[228] In addition, the phenomenon of plea bargaining in South Africa and Germany and its legal development in each country cannot be properly analysed without considering its international context, as the rise of plea bargaining is an international phenomenon that first appeared neither in South Africa nor in Germany.

Over the last three decades plea bargaining has been introduced into justice systems around the world and even in those which had long opposed the practice.[229] First utilized in the United States of America, plea bargaining has now reached nations such as Russia, India, Taiwan, Australia and Argentina and is even considered by nations as China and Indonesia.[230] Interestingly plea bargaining even in the United States of America, where it originated and is most entrenched, remains controversial.[231] The spread of the procedure however indicates that plea bargaining will continue to play a significant role into the foreseeable future.[232] The law of two countries that adopted the procedure, such as South Africa and Germany, cannot be compared without a brief regard to the general origin of plea bargaining.

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225 Trichardt/Krull (1987) *THRHR* 428 at 429.
226 Trichardt/Krull (1987) *THRHR* 428 at 429.
227 Trichardt/Krull (1987) *THRHR* 428 at 429.
228 Trichardt/Krull (1987) *THRHR* 428 at 429.
229 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 1.
230 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 1.
231 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 1.
232 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 2.

1. United States of America

It should be helpful here to review more closely the legal development and current state of affairs in the United States of American, where plea bargaining began and has persisted for more than a century and a half[233] and where it is still a significant part of the criminal justice system and practiced extensively nowadays.[234] For these reasons, plea bargaining in the U.S. is established more firmly than elsewhere.[235]

a. Historical roots

The system of plea and sentence negotiations has been long recognized and accepted in the United States of America and also in the United Kingdom.[236] The legal history of plea bargaining can be traced back to colonial times.[237] Since that time the 'procedure of a guilty plea', i.e. a defendant's declaration that he is guilty in terms of the charge, has operated to waive his right to a trial and allow immediate punishment.[238] Some scholars, such as *Albert Alschuler*, argue that guilty pleas were rare and treated with suspicion until the nineteenth century.[239] At least plea bargaining, which can also be described as the guilty plea as a result of negotiations, was in fact unknown in the Unites States until that time.[240] Before, trials were generally less formal concerning matters of evidence and the procedure as a whole and the accused were often not legally represented by a lawyer.[241] As a consequence, there was little reason for the development of a plea bargaining procedure. Scholars presume that the rise of formality provided the impetus for the establishment of plea bargaining.[242] In the further course, plea bargaining developed from an unknown instrument into a method that dominated the criminal trials in the mid-nineteenth and early twentieth century.[243] However, this legal development was not accompanied by corresponding legislation.[244] Scholars consider the increasing caseload that was caused by a growing population and crime rates to be the reason for the rise of

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233 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 7.
234 De Villers (2004) *De Jure* 244 at 250.
235 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 522 (§ 21.1(a)).
236 Allen (1987) *Obiter* 46 at 46.
237 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 8; Alschuler (1979) 79 *Colum. L. Rev.* 1.
238 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 8.
239 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 8; Alschuler (1979) 79 *Colum. L. Rev.* 1.
240 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 523 (§ 21.1(a)) state that plea bargaining began to appear in the early 19th century.
241 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 8.
242 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9 (with further references in Fussnote 6).
243 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9 (with further references in Fussnote 7).
244 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9.

plea bargaining,[245] as plea bargaining offered a quick and simple solution to this problem.[246] Furthermore, the criminal justice system was challenged by a greater complexity of jury trials and professionalization in general.[247] Under this pressure, plea bargaining might have appeared as a primary solution to the mentioned problems.[248] Even the steady criticism plea bargaining faced throughout its development did not slow its growth towards the dominant mode of conviction in the United States.[249] Under American Law an approximate number of 80 – 90% of all criminal cases is resolved by plea agreements.[250]

b. Statutory Law

Although plea bargaining had already developed and took place routinely in criminal proceedings, it was not until 1970 that the Supreme Court in *Brady v. United States*[251] first held that plea bargaining conforms to the voluntariness of guilty pleas.[252] Judge Tuttle held that a 'plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).'[253] In 1971 a subsequent court decision, by name *Santobello v. New York*, marked plea bargaining as 'not only an essential part of the process but a highly desirable part for many reasons'.[254]

Plea bargaining is codified in U.S. law. Rule 11 (c) of the Federal Rules of Criminal Procedure recognizes and provides for plea agreements.[255] As an essential element of the system, plea negotiations are encouraged.[256] The legitimacy of the procedure is ensured by means of disclosing the plea negotiations and agreements in open court and having the

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245 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9; Fischer (2000) 109 *Yale L.J.* 857 at 865.
246 La Fave/Israel/King/Kerr, *Criminal Procedure, Vol. 5*, p. 526 (§ 21.1(b)).
247 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9 (with further references in Fussnote 9).
248 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9 (with further references in Fussnote 10).
249 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 9.
250 De Villers (2004) *De Jure* 244 at 250; Bekker (1996) 19 (1) *CILSA* 168seqq.; Clarke (1999) *CILSA* 141 at 144; Snyman/Du Toit (2000) *SACJ* 190 seqq.; South African Law Reform Commission, Project 73 (2001) para 2.7; Mehler/Gleeson/James, *Federal Criminal Practice*, § 27-2.
251 *Brady v. United States*, 397 U.S. 742 (1970).
252 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 10, 18.
253 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 14 with further references.
254 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 18; *Santobello v. New York*, 404 U.S. 260 (1971).
255 For an overview see Turner/Chodosh, *Plea Bargaining Across Borders*, p. 22-72.
256 South African Law Reform Commission, Project 73 (2001) para 2.9 with further references.

agreement reviewed by the presiding judge.[257] Interestingly, in the state of Alaska plea bargaining was prohibited in 1975.[258] Later however the procedure was accepted.[259]

2. South Africa

Statutory plea bargaining was introduced into South African Law in 2001.[260] Before the statutory amendment, the operation of traditional[261] plea bargaining only occurred informally in criminal proceedings.[262]

a. Introductory remarks

Prior to the enactment of s 105A plea bargaining was subject to analysis and also criticism.[263] The South African Law Reform Commission (SALRC) confirmed that plea negotiations and agreements do take place and shall be deemed to be legal and are considered legal.[264]

A personal experience may illustrate the situation at the very outset. *Bennun* reminds himself shamefully of plea bargaining in the 1960's.[265] He describes the way in which poor and mainly black accused were treated and dealt with.[266] The situation was made worse through the existing language barrier and the absence of capable and motivated court interpreters.[267] *Bennun* holds that 'the system encouraged inadequate work done impatiently.' This was especially true in murder cases, where most were handled by unaided junior counselors, who were unpaid and *pro deo* acting young barristers at the beginning of their careers at the Bar and who were scheduled to defend accused charged with the death sentence.[268] This brief memory of *Bennun* points towards the whole relevance of the legal development towards the present provisions on plea bargaining.

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257 South African Law Reform Commission, Project 73 (2001) para 2.9.
258 African Law Reform Commission, Project 73 (2001) para 2.14; Bowen, An Analysis of Alternative Methods of Plea Negotiations, p. 17.
259 South African Law Reform Commission, Project 73 (2001) para 2.14.
260 See *Government Gazette* 22933 of 14 December 2001.
261 'traditional' means pre-statutory and is used by scholars interchangeably with 'informal'; another interpretation of the term is to describe informal agreements as agreements that may still exist at present at the side of formal statutory bargaining; the latter meaning will be examined later.
262 Rodgers (2010) *SACJ* 239 at 240; *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 674e.
263 Overview at Rodgers (2010) *SACJ* 239 at 241; for an analysis of pre-statutory plea bargaining see Bekker (1996) 19 (1) *CILSA* 168 at 222; for early criticism see Clarke (1996) 1 *CILSA* 141 at 141.
264 Rodgers (2010) *SACJ* 239 at 241; South African Law Reform Commission, Project 73 (2001) at 5.1.
265 Bennun (2007) *SACJ* 17 at 18.
266 Bennun (2007) *SACJ* 17 at 18.
267 Bennun (2007) *SACJ* 17 at 18.
268 Bennun (2007) *SACJ* 17 at 18.

b. Pre-statutory plea bargaining

Plea bargaining generally already had been a long established practice in common law criminal justice systems, used as an instrument of both the prosecutor and the defendant.[269] South African law can be regarded as a common law system, as it has its roots reaching back to both Roman-Dutch and English law.[270] Plea bargaining was not regulated in the statutory provisions of the South African Criminal Procedure Act prior to 2001. The term 'plea bargaining' was used seldom.[271] As *Bekker* reported in 1996, the opinion about the existence and application of plea bargaining differed greatly at that time.[272] Partly it was held that aspects of U.S.-influenced plea bargaining emerged in many instances of pre-trial considerations between the opposing parties, i.e. the prosecutor and the accused.[273] Nevertheless one could not say that there was a system of plea bargaining. Due to the lack of empirical research it was (and still is) hard to tell to what extent the bargain procedures takes place.[274] *Trichardt* and *Krull* summed up the present state in 1987 as follows: 'Thus, if it seems that plea bargaining has taken place in a case like *S v Ngubane*,[275] then the prosecutor and defence can bargain for the court, because it is bound by the agreement reached between the prosecutor and the defence. It is apparent that aspects of plea bargaining do emerge in many instances of informal pre-trial deliberation between prosecution and defence in South Africa, but it cannot be said that a plea bargaining system exists.'[276] Authors such as *Kriegler* held that although there were no statutory provisions on plea bargaining installed, it could not be denied that the practice had been applied for many years.[277] He argued that no matter if regulated or not the procedure would continue to exist.[278] A good way to sum it up is that plea bargaining historically lacked formal recognition and that its function as a pre-trial procedure with a specific purpose in the criminal process was disregarded.[279]

Uijs AJ in *North Western Dense Concrete CC and another v Director of Public*

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269 Steyn (2007) *SACJ* 206 at 206.
270 Steyn (2007) *SACJ* 206 at 206; Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4); Burchell, *South African Criminal Law and Procedure, Vol. I*, p.8.
271 Steyn (2007) *SACJ* 206 at 206.
272 Bekker (1996) 19 (1) CILSA 168 at 218.
273 Bekker (1996) 19 (1) CILSA 168 at 218.
274 Bekker (1996) 19 (1) CILSA 168 at 218; Trichardt/Krull (1987) *THRHR* 428 at 441.
275 *S v Ngubane* 1985 (3) SA 677 (A).
276 Trichardt/Krull (1987) *THRHR* 428 at 441.
277 Bekker (1996) 19 (1) CILSA 168 at 218.
278 Bekker (1996) 19 (1) CILSA 168 at 218. With reference to Hiemstra, Suid-Afrikaanse Strafproses (5th Edition 1993 edited by J Kriegler) 259.
279 Compare Steyn (2007) *SACJ* 206 at 206.

Prosecutions (Western Cape) gave an insight into the bargain procedure that reaches further back than most reviews. He presents the situation prior to the introduction of the present Criminal Code in 1977, i. e.namely under the Criminal Procedure Act 56 of 1955. The situation was as follows: generally there was an evidence-taking of the relevant witnesses in the magistrates' court which was put to record.[280] These records, together with other records of evidence, were then forwarded to the advocates, who were involved as defence counsels as well as to the presiding judges.[281] Thus, everyone who was involved in the cases, including the judges, had a preview of what evidence was relevant to the case and was therefore likely to place before the court.[282] Often it happened that candid and open discussions took place in the presiding Judge's Chambers.[283] Uijs AJ reports that: 'These discussions often led to the process of justice being considerably expedited, as agreement could be reached on an appropriate plea and even, on occasion, on an appropriate sentence. No one in those days regarded such discussions as being at all "improper" - despite the fact that, if one must be perfectly candid, one must admit that such discussions often involved the furnishing of advice to the prosecutor and/or defence counsel by the presiding Judge, particularly when that Judge was one of those who adopted a more "robust" attitude. Indeed, counsel often welcomed advice from the presiding Judge, as such advice could often free the logjam created when negotiations had reached an impasse.'[284] The benefit of the ancient procedure was that the Superior Courts before whom summary trials were conducted received a kind of preview of the evidence.[285] However, the accused did not have the opportunity of such insight and thus was in a 'disadvantaged' position.[286] However, the presented excursus may serve only to show that plea bargaining had already taken place under fundamentally different procedural circumstance.

What should be clarified once again at this point is the slightly confusing use of terminology. Pre-statutory bargains are also named 'traditional' or 'informal' due to the

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280 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675b.

281 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675b.

282 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675c.

283 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675c,d.

284 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675d-f.

285 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675f.

286 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676a.

former's lack of formal provisions regulating the procedure. Consequently, in the present context 'informal' can be used to describe negotiations and agreements that took place prior to the statutory amendments. Another more common interpretation of the term describes informal agreements as agreements that may still exist at present aside from formal statutory bargaining, i.e. plea bargaining that does not comply with formal requirements. The relevance of informal plea bargaining will be examined later.

c. North Western Dense Concrete Case

The case of *North Western Dense Concrete CC and Another v DPP (Western Cape)*, decided in 1999, had a vast impact concerning the judicial recognition of plea bargaining.[287] Before the judgment in *North Western Dense Concrete CC* there were nearly no reported judgments on the procedure of plea bargaining.[288] After its decision, the case motivated the finalisation of s 105A,[289] as it had already significantly motivated the South African Law Commission to finally draft a proposal for statutory provisions in 2001 after reflecting on the subject since 1989. In *North Western Dense Concrete CC* Uijs AJ exposed the realities of plea bargaining, although the court also held that s 112 of the CPA was 'virtually tailormade' for such agreements.[290]

In *North Western Dense Concrete* CC the first applicant, a close corporation, and the second applicant, a member of the closed corporation, were charged in the Regional Court together with Mostert, who was the production manager of the close corporation.[291] The applicants were charged with culpable homicide.[292] While Mostert was not charged with anything else, the other applicants were arraigned on additional charges that were not relevant for the purpose of the judgment.[293] In substance they were charged with causing the death of an employee by failing to ensure that certain safety precautions were in place at his workplace at the close corporation. The employee had been killed when an electrical short-circuit occurred and hit him while he worked in the firm.[294] Mostert was finally

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287 Rodgers (2010) *SACJ* 239 at 241.
288 South African Law Reform Commission, Project 73 (2001) para 3.13.
289 Compare Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-6.
290 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677c.
291 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671c.
292 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671b.
293 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671c,e.
294 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671d.

convicted based on a written 'plea explanation,' which he had given in terms of 112 (1) (b).[295] It appeared to the court that this was the direct result of plea bargaining.[296] The course of the trial took place as follows: the legal representative of the applicants had requested to the prosecutor that Mostert would plead guilty to culpable homicide if the respondent agreed to withdraw all the charges against them.[297] Thus, in exchange for Mostert's plea of guilty to the charge of culpable homicide, the state agreed to the proposed conditions and withdrew all the charges.[298] The prosecutor was orally invited by a senior advocate in the office of the respondent to close the deal.[299] The suggestion was then made that the state would accept the invitation in return for Mostert's plea on a specified basis, which the State then would accept.[300] If the state were to refuse the offer, the advocate announced, then all the accused would plead not guilty and as a consequence the trial would have to proceed.[301] This would have mean that the state would have to prove the evidence against each particular accused.[302] The public prosecution found the deal acceptable[303] and orally consented to it.[304] The charges were then withdrawn and Mostert pleaded guilty to the charge of culpable homicide, whereupon he was convicted and finally in due course sentenced.[305] Subsequently, an application was made by an undisclosed third party, later the respondent, to the Director of Public Prosecutions for a certificate *nolle proseque* in terms of s 7.[306] The prosecution reinstituted the charges against the applicants, who had applied to the High Court for an order interdicting the respondent from proceeding with the prosecution.[307] This led to the court decision in *North Western Dense Concrete CC*, in which Uijs AJ had to decide: whether to

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295 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671g; Uijs AJ stated 's 112 (2) (b)' which is obviously false and was therefore corrected by the author to 's 112 (1) (b)'.

296 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671g.

297 Rodgers (2010) *SACJ* 239 at 241.

298 South African Law Reform Commission, Project 73 (2001) para 3.14.

299 South African Law Reform Commission, Project 73 (2001) para 3.14.

300 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671h.

301 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672a.

302 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672a.

303 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672b.

304 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672c.

305 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672d.

306 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672e.

307 South African Law Reform Commission, Project 73 (2001) para 3.14.

grant relief; whether plea bargaining was an integral part of the law of criminal procedure; and, if it was, whether it could and/or should interfere with the decision to reinstitute the charges against the applicants.[308]

First the court considered whether plea bargaining should be afforded recognition as an essential part of criminal procedure, as this would cause certain results.[309] Uijs AJ used the decision to explain the whole phenomenon of plea bargaining.[310] This is because in 1999 many judicial officers had little or no knowledge of plea bargaining and thus Uijs AJ regarded an explanation as contributing not only to the understanding of his own judgment but also to the recognition of plea bargaining in general.[311] Describing the current state of plea bargaining in 1999 in his judgment,[312] he pointed out how relatively little judicial attention plea bargaining was given.[313] Uijs AJ also broadly pointed out how academics regarded the procedure at that time.[314] Finally he came to the conclusion that 'plea bargaining is an integral part of the process of criminal justice' and that 'too many articles in legal journals spelling out this fact have been written to ignore the finding of the learned authors thereof'.[315] He concluded that, 'with great respect to those who find plea bargaining offensive, to pretend that the procedure does not take place is not only to be unrealistic, it is to ignore the provisions of our statute law governing criminal procedure.'[316] Uijs AJ further stated that 'the provision of the Criminal Code implicitly allows for recognition of the procedure'.[317] He held that plea bargaining could 'adequately be governed by the existing provisions of the Statute, common and constitutional law of South Africa'.[318] Accordingly, the court disagreed with the SALRC finding that statutory law would

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308 South African Law Reform Commission, Project 73 (2001) para 3.14.

309 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672h.

310 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672h.

311 Compare *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 672h.

312 Compare Compare *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 673, 674.

313 Compare Compare *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 674.

314 Compare Compare *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 674, 675.

315 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676e.

316 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676j.

317 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677.

318 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677f.

be necessary to regulate such agreements.[319]

d. South African Law Reform Commission

Already in 1989 the Minister of Justice had advised the South African Law Reform Commission (SALRC) to investigate the possibility of simplifying criminal procedure. Particular reference was made to a number of questions, two of which were: 'whether the existing provisions relating to the procedure of pleading are unnecessarily cumbersome and/or whether they give rise to abuse; (and) whether any other provisions relating to criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuse.'[320] An interim report of 1996 recommended the introduction of statutory provisions in order to formally recognize the process of plea negotiations.[321] Subsequent to this report the Select Committee on Justice (Senate) considered a Bill[322] and adopted a resolution that documented its attention to the subject.[323] The Committee recommended that the Minister of Justice be made aware of the possibility of enacting a provisions regulating the procedure of plea bargaining.[324] This was stated in view of the beginning of the 1997 session of Parliament.[325] However, the report did not have a huge impact on the Department of Justice.[326] Although it caused an inquiry, the Commission finally only received a request which instructed the Commission to reconsider the issue of plea negotiations as part of its general investigation on the simplification of criminal procedure.[327] This reconsideration was fulfilled in 1999 in a meeting.[328] In the meantime the National Director of Public Prosecution had stated that he supports the idea of an introduction of plea bargaining into the statutory law.[329] Furthermore the two scholars *Bekker* and *Clarke* had published articles on the subject in 1996 and 1999.[330] Professor *Bekker* had written a study on plea bargaining in the United States and South Africa and *Catherine Clarke* had published a study on plea negotiations

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319 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677f.
320 South African Law Reform Commission, Project 73 (2001) para 1.1.
321 South African Law Reform Commission, Project 73 (2001) para 1.3.
322 South African Law Reform Commission, Project 73 (2001) para 1.4.
323 South African Law Reform Commission, Project 73 (2001) para 1.4.
324 South African Law Reform Commission, Project 73 (2001) para 1.4.
325 South African Law Reform Commission, Project 73 (2001) para 1.4.
326 South African Law Reform Commission, Project 73 (2001) para 1.5.
327 South African Law Reform Commission, Project 73 (2001) para 1.5.
328 South African Law Reform Commission, Project 73 (2001) para 1.6.
329 South African Law Reform Commission, Project 73 (2001) para 1.7.
330 South African Law Reform Commission, Project 73 (2001) para 1.8; Bekker (1996) 19 (1) CILSA 168; Clarke (1996) 1 CILSA 141.

in South African Criminal courts.[331] As these studies showed that in fact plea and sentence negotiations are widespread in the South African criminal practice, they gave further emphasis to the investigations of the Commission. Finally the *North Western Dense Concrete CC and Another v DPP (Western Cape)* case of 1999 accelerated the development.[332] In 2001 with the Fourth Interim Report, the Commission finally recommended to formally recognize plea bargaining.[333] The proposed principles and procedures widely conform to the statutory provisions that are known today.[334]

e. Statutory plea bargaining

With the enactment of s 105A, the uncertainty that had surrounded the legality of plea bargaining had been resolved.[335] The Criminal Procedure Act 51 of 1977 of South Africa now contained in s 105A a statutory provision for plea bargaining. It was inserted by s. 2 of Act 62 of 2001.[336] S 105A (1) enables a prosecutor and an accused who is legally represented to negotiate and enter into an agreement. The intention of the legislator was to confirm the legality of plea bargaining and to regulate the procedure by legislation.[337] It should be noted here that the preceding report of the South African Law Reform Commission was limited to sentence agreements. The Commission held that the Criminal Procedure Act sufficiently provided for other plea agreements and thus legislation was not required.[338] There had been no evidence for an abuse of the provisions that were used for plea agreements prior to the advent of s 105A.[339] Although one could find doubt by assuming that there may have been a lack of record of the abuse since the practice was not regulated, this anyhow reveals that the legislator concentrated on the regulation of sentence agreements.[340] Most of the Commission's findings and ideas played a significant role in the drafting of the s 105A and most of them were incorporated into the provision.[341] Furthermore, it is remarkable that the negotiation procedure in s 105A is as non-prescriptive as possible.[342] The negotiation procedure is however illustrated in little more detail by the Directives issued by the NDPP which accompany the provision of s 105A.

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331 South African Law Reform Commission, Project 73 (2001) para 3 of the executive summary.
332 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C).
333 South African Law Reform Commission, Project 73 (2001) para 7 of the executive summary.
334 Compare list at South African Law Reform Commission, Project 73 (2001) of the executive summary.
335 Rodgers (2010) *SACJ* 239 at 244.
336 See *Government Gazette* 22933 of 14 December 2001.
337 Rodgers (2010) *SACJ* 239 at 244; South African Law Reform Commission, Project 73 (2001) para 4.17.
338 South African Law Reform Commission, Project 73 (2001), executive summary.
339 South African Law Reform Commission, Project 73 (2001), executive summary.
340 Compare Rodgers (2010) *SACJ* 239 at 243.
341 Rodgers (2010) *SACJ* 239 at 244; De Villers (2004) *De Jure* 244 at 244.
342 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-7.

f. Directives issued by the NDPP

The prosecutor must not only comply with the provisions of s 105A but must also take into account the Directives issued by the NDPP.[343] S 105A (11) (a) reads as follows: 'The National Director of Public Prosecutions, in consultation with the Minister, shall issue Directives regarding all matters which are reasonably necessary or expedient to be prescribed on order to achieve the objects of this section and any Directive so issued shall be observed in the application of this section'. The Directives were issued on 14 March 2002,[344] not long at all after s 105A came into operation on 14 December 2001.[345] S 105A states that the Directive 'shall be observed in the application of this section'. This indicates that nonobservance could lead to the invalidity of the agreement.[346] The agreement could be found null and void even though all other requirements of s 105A have been met and despite the fact that the judge, convinced of the guilt and that the sentence is fair and just, had convicted and sentenced the accused subsequent to and on the basis of the agreement.[347] *Du Toit et al* consider that, 'much will depend on the facts of the case, as well as the nature, purpose and wording of the specific Directive as read in the context of the objects of s 105A.' *Rodgers* however emphasises that s 105A 'does not compel the court to ensure compliance with the Directives' and that 'non-compliance would need to be raised by the negotiating parties and this is, admittedly, implausible'.[348]

3. Germany

German legal practice developed plea bargaining over a time span of approximately 30 years, culminating in the statutory amendment of provisions on plea bargaining in 2009. Prior to that event, case law formed the guidelines of the agreement procedure. These guidelines were widely adopted by the regulations that later became law.

a. Introductory remarks

Langbein in 1979 held that Germany was still a 'land without plea bargaining'.[349] In the following decades however plea bargaining rapidly spread, although through the 1980s

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343 Rodgers (2010) *SACJ* 239 at 248.
344 Rodgers (2010) *SACJ* 239 at 248; Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-24.
345 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-22.
346 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-22.
347 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-22.
348 Rodgers (2010) *SACJ* 239 at 248.
349 Langbein (1979) 78 *Mich. L. Rev*. 204; a frequently quoated title which even already in 1979 might not have been correct.

mostly unnoticed.[350] In white collar crime, agreements were settled out for years regardless of whether participants were aware that the BGH would not accept the practice.[351] A study from 1986 stated that plea bargaining aside from white collar crimes mostly takes place in drug cases.[352] The first broad recognition of the phenomenon in the 1980's caused several later decisions of the German Federal Supreme Court (*Bundesgerichtshof, BGH*) as well as of the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), which confirmed that the procedure would not contravene fundamental constitutional and criminal procedure principles.[353] Finally in 2009 a new law on agreements regulated the practice of plea bargaining.

b. Rise of the practice

The advent of s 257c of the StPO in 2009 followed a long practice of informal agreements and three crucial decisions, amongst which two are decisions of the BGH regulating the admissibility of bargains. Historically, the judge, prosecutor and the legal representative of the accused used to negotiate in camera, outside the court room. Until the mid 1970s, Germany seemed to get along without agreements in the criminal proceedings.[354] There are several explanations. One reason for the relatively late development of plea bargaining surely is the rapidity of German criminal procedure in comparison to common law countries.[355] The system has been efficient enough to allow a trial of every case of imprisonable crime.[356] Germany's relatively low crime rate may serve as an explanation.[357] Today it is said that there is no doubt that the flood of trials that are huge and complex makes procedural changes necessary.[358] Plea bargaining enormously reduces and eases both the judge's and prosecutor's workload.[359] From their point of view the practice of agreements shows no disadvantages.[360] The presented circumstances were and still are a fertile breeding ground for plea bargaining to grow. The implementation of s 153a of the

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350 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 74.
351 Rauxloh, *Formalisation of Plea Bargaining in Germany*, p. 16; Bussmann, *Die Entdeckung der Informalität*, p. 126.
352 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 75; Hassemer/Hippler (1986) *StV* 360 at 361.
353 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 75.
354 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 46.
355 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 46.
356 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 47; Langbein (1979) 78 *Mich. L. Rev*. 204 at 209.
357 The Us crime rate is four times higher; Langbein (1979) 78 *Mich. L. Rev*. 204 at 209.
358 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 47; Meyer-Goßner, StPO, Introduction, para 119b.
359 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 47.
360 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 47; Schünemann, *Gutachten B,* p. 169.

StPO in 1974, allowing the dispensation of the prosecution in exchange for the fulfilment of conditions, caused a rapid spread of consensual procedure.[361] The first sentence of S 153a (1) states that 'in a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle'. Thus with the amendment of this provision, 'agreements' on the decision whether to prosecute became possible at the stage of preliminary proceedings. The dispensation of charges in terms of s 153a (2) is even possible if public charges have already been preferred. In terms of the provision the court, with the approval of the public prosecution office and of the indicted accused, may provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined and may concurrently impose the conditions and instructions referred to above.

A few years later, in 1982 an anonymous law article in StV 82, 545, published under the synonym of 'Detlef Deal' first prominently addressed the practice of informal agreements with reference to the main proceedings, i.e. plea bargaining. This brought widespread attention to the issue and led to the early court decisions presented in the following.

c. BVerfG (BVerfG of 27. 1. 1987)

The first court decision that explicitly dealt with plea bargaining came from the Federal Constitutional Court in 1987, stating that a 'trade with justice' cannot exist but finding the present case not to be of such nature.[362] The Court stated that agreements are not generally inadmissible.[363] Furthermore, it was emphasized that the rule of law as contemplated in Art. 20 (3) GG requires that the sentence correspond to the guilt, that the sentence be just and that the absence of arbitrariness be warranted.[364] Therefore the accused generally has to play an active role and must be free from psychological pressure.[365] The Court further stated that the courts' obligation to establish the truth in terms of s 244 (2) StPO remains in force.[366] That final declaration meant that courts have an obligation to take further evidence, even in light of the accused's confession, if the

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361 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 46; Schünemann in Riess-FS, 525 at 526.
362 SK-*Velten*, StPO, s 257c, para 1.
363 BVerfG (1987) *NJW* 2662 = (1987) *NStZ* 419 with comment *Gallandi*.
364 BVerfG (1987) *NJW* 2662; Huttenlocher, *Dealen wird Gesetz*, p. 11.
365 BVerfG (1987) *NStZ* 419 at 420.
366 Huttenlocher, *Dealen wird Gesetz*, p. 11.

presiding judge had doubt.[367] In the following years, courts did not establish a common clear line right away.[368] Practice nevertheless made use of the instrument and even became cavalier. As an example illustrating the 'proliferation' at the time, one accused charged with infliction of bodily harm causing death was offered a two years of imprisonment on probation as part of an agreement.[369] When he refused to enter into the agreement he was sentenced to seven years.

d. BGHSt 43, 195 (4th Penal Senate of BGH 28. 8. 1997)

After the BGH already had to deal with the issue in several decisions,[370] in 1997 it finally announced a seminal decision[371] which set the terms and conditions for the admissibility of agreements. Although the BGH only dealt with confessions in exchange for a lenient sentence, the decision nevertheless formed case law that established plea bargaining in legal practice and served other courts as a general guideline.[372] The BGH's findings had great influence on the later s 257c.

The BGH established the following principles (guiding principles):[373]

(1.) An agreement in the criminal proceedings that involves a confession of the accused and the imposition of a sentence is not generally inadmissible. It has to be conducted however with the participation of all parties of the proceedings and in the main hearing of the trial. This does not exclude preliminary talks.

(2.) The court cannot impose a particular sentence prior to the deliberations on the judgment. It may however, in case the accused confesses, announce an upper sentence limit that will not be exceeded. The court is not bound to the sentence limit imposed if the main proceedings emerge new and serious circumstances at the expense of the accused (that had been unknown to the court); such derogation has to be disclosed in the main proceedings.

(3.) When imposing an upper sentence limit that is not to be exceeded, the court shall observe the general principles of sentencing as it is obliged to in the later judgment.[374] The sentence limit imposed has to comply with the accused's guilt.

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367 Huttenlocher, *Dealen wird Gesetz*, p. 11.
368 SK-*Velten*, StPO, s 257c, para 1.
369 SK-*Velten*, StPO, s 257c, para 1; Jähnke (2001) *ZRP* 574 at 575; Kempf (2009) *StV* 269 at 270.
370 Summary in BGH 43, 195 and (2004) *NJW* 2536.
371 BGH 43, 195 = (1998) *JR* 245 with supporting comment *Kintzi*.
372 Compare Meyer-Goßner, StPO, Introduction, para 119 seq.; BGH 49, 84 at 88.
373 Free translation by the author.
374 One has to be aware oft he fact that the German bargain procedure does not replace the conventional

(4.) The refusal of a confession does not forbid a mitigation of the sentence.

(5.) Any agreement on the waiver of the right to appeal before the pronouncement of the judgment is inadmissible.

e. BGHSt 50, 40 (Grand Criminal Panel of BGH 3. 3. 2005)

A second fundamental decision coming in 2005 dealt with waiving the right to file an appeal, which courts often willingly included in such agreements. Despite the fact that BGH 43, 195 had declared that a waiver of the right to appeal cannot be part of an agreement,[375] practice had widely made use of the waiver as a second main negotiation position of the accused besides the notification of a confession. The waiver of the right to appeal became part of the vast majority of all negotiated cases and there was an uncertainty about the admissibility of that instrument.[376] This provided the impetus for a new landmark decision of the BGH dealing with the issue.[377] Once again the Grand Criminal Panel[378] confirmed the admissibility of plea bargaining and its compatibility with the principles of criminal procedure.[379] BGH 50, 40 also confirmed the earlier BGH 43, 195 with regard to waiver of the right to appeal. The court was not entitled to steer negotiations in such a direction or to conclude an agreement of such content.[380] The BGH stated that the court shall not participate actively.[381] Nevertheless the accused remained entitled to introduce a possible waiver into the negotiations. However the BGH generally considered as effective a waiver declared subsequent to an agreement and after the pronouncement of the judgment.[382] The BGH also decided that a waiver is ineffective if declared subsequent to an agreement that contained the promise of the accused to waive his right to appeal[383] This conformed with the principle of a fair trial. Under aspects of legal security BGH did however set up a major exception to these principles and the legal consequences thereof. Upon qualified instruction, i.e., where the accused is instructed and made aware that his right to appeal remains untouched by the agreement, a later waiver of the right to

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trial procedure.

375 Compare BGH (1998) *JR* 245 at 247.

376 Meyer-Goßner, StPO, Introduction, para 119g.

377 BGHSt 50, 40 = BGH GSSt 1/04 = BGH GSSt (2005) *NJW* 1440; a translation of the judgment into the English language can be found at Turner/Chodosh, *Plea Bargaining Across Borders*, p. 84-97.

378 The BGH's convening as a Grand Criminal Panel is fo instance comparable to a U.S. Appeals Court sitting *en banc*.

379 BGHSt 50, 40 at 48.

380 BGHSt 50, 40 at 56.

381 BGHSt 50, 40 at 57.

382 BGHSt 50, 40 at 58.

383 BGHSt 50, 40 at 60.

appeal is possible and effective.[384] The Grand Criminal Panel held that the duty to provide the accused information regarding his rights was sufficient to secure the accused's legal position.[385]

The guiding principles of BGH 50, 40 give an overview of the presented principles:[386]

(1.) In the course of negotiations toward an agreement, the court shall neither participate in the discussions with regard to, nor shall it work toward, a waiver of the right to appeal.

(2.) Subsequent to each judgement based on an agreement, the person entitled to appellate remedy, who is to be instructed of such a right in terms of s 35a StPO, shall always also be instructed of the fact that the agreement does not affect his free decision whether to lodge an appeal (qualified instruction). This also applies in cases in which the agreement did not contain a waiver of the right to appeal.

(3.) The waiver of the right to appeal subsequent to an agreement is inadmissible if the person entitled to appellate remedy has not received qualified instruction.

f. Statutory law on agreements

In 2005 the Grand Criminal Panel in BGH 50, 40 concluded that an agreement between the participants were about to lose the shape of 'open negotiations' that could easily comply with current principles of criminal proceedings.[387] Instead the BGH considered plea negotiations as similar to a contractual procedure.[388] German criminal procedure however was orientated toward the principle of material truth.[389] Thus the Court called on the legislator to enact a law regulating the plea bargaining procedure.[390] Various drafts for such a new law were presented.[391] Finally, plea bargaining was regulated in 2009 in German law by the 'Act to regulate the understanding in criminal procedure' ('*Gesetz zur Regelung der Verständigung im Strafverfahren*'[392]).

The new law on agreements inserted several new sections into the StPO, namely ss 160b, 202a, 212, 257b, 257c. While the others deal with agreements in the stadium of

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384 BGHSt 50, 40 at 61.
385 BGHSt 50, 40 at 62.
386 Free translation by the author.
387 BGHSt 50, 40 at 63.
388 BGHSt 50, 40 at 63.
389 BGHSt 50, 40 at 63.
390 BGHSt 50, 40 at 64 and the annotation of Rieß (2005) *JR* 430 at 438.
391 Comprehensive presentation: Huttenlocher, *Dealen wird Gesetz*, pp. 163-487.
392 Dated 29 July 2009, BGBl. I 2353.

preliminary proceedings or decisions concerning the opening of the main proceedings, s 257c contains the central and most important provisions concerning the main proceedings themselves.[393] The most striking feature of the new law is that it remains strictly faithful to the principle of *ex proprio motu* investigation.[394] Due to inquisitorial law tradition the court retains its strong position. It is the judge who leads through the process and determines the scope of scrutiny. The purpose of the new law was to regulate a factual practice and procedure that has developed *contra legem*.[395] The legislator did not consider himself to be in a position to suppress the practice of plea bargaining.[396] On the contrary, the statutory law is a formal recognition of this practice.[397] The legislator saw the benefit of shortened criminal proceedings. Nevertheless, the rationale of the new statutory law is to prevent a total domination of the principle that the subject-matter of a case is delimited by the parties in the criminal trial.[398] Furthermore the purpose of the law is to ensure the autonomy of the accused in his procedural conduct.[399] Finally, the law aims to uphold public interest and control of the criminal trial.[400]

One could argue at this point that the legislature did not make a clear choice for a new consensual procedure.[401] Others think that the legislature purpposely did not decide to establish a consensual procedure.[402] *Meyer-Goßner* is of the opinion that s 257c implies a procedure that pretends to comply with the principles of criminal proceedings but in fact violates them.[403] This will be further examined later: how the new law on agreements is to be judged in regard of its procedural nature.[404] Interestingly, amongst 29 prosecutors and judges asked, 65 % were of the opinion that the new statutory law did not affect daily practice.[405] That could be due to the fact that statutory law widely regulated what formerly has been case law.

4. Concluding remark

Plea bargaining is a worldwide phenomenon and has been adopted by criminal procedure

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393 For wording see Annex at page 203.
394 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 8.
395 SK-*Velten*, StPO, s 257c, para 1.
396 SK-*Velten*, StPO, s 257c, para 1.
397 SK-*Velten*, StPO, s 257c, para 1.
398 SK-*Velten*, StPO, s 257c, para 1; BT-Drucks. 16/12310, pp. 1, 8.
399 SK-*Velten*, StPO, s 257c, para 1; BT-Drucks. 16/12310, pp. 1, 8.
400 SK-*Velten*, StPO, s 257c, para 1; BT-Drucks. 16/12310, pp. 1, 8.
401 Compare SK-*Velten*, StPO, s 257c, para 8.
402 Also compare discussion for South Africa at Lubbe/Ferreira (2008) *SACJ* 151.
403 Meyer-Goßner, StPO, s 257c, para 3; Murmann (2009) *ZIS* 526 at 532.
404 Compare Chapter V.15.
405 Heller, *Das Gesetz zur Regelung der Verständigung*, p. 317.

law and practice worldwide. The process of legislation in South Africa took years. Formerly recognized and accepted by case law, statutory provisions were inserted into the South African Criminal Procedure Act in 2001. In Germany the provisions on plea bargaining were drafted and enacted in rather short time. Nevertheless it was not until 2009 that the legislature decided to insert statutory provisions into the German law.

IV. Essential features of the bargain procedure

The bargain procedure in both legal systems differs. This is partly due to their different, accusatorial and inquisitorial, traditions. For instance these legal traditions fundamentally determine which role the judge plays throughout the trial and especially throughout the bargain procedure. The conduct of the bargain procedure shall be reviewed in order to thereafter examine and compare single problematic topics of further interest.

1. Plea system in general

A plea is 'a formal statement by or on behalf of a defendant or prisoner, stating guilt or innocence in response to a charge, offering an allegation of fact, or claiming that a point of law should apply'.[406] It is the accused's first formal reaction to the state's allegations.[407] The formal asking of the accused to plead determines the procedure which the court is to follow. The plea agreement in terms of s 105A substitutes the prescriptions of s 105 Criminal Procedure Act.

The German criminal procedure does not know a formal plea.[408] Instead, at the beginning of a trial the defendant in terms of s 243 (4) of the StPO shall be informed that he may choose to respond to the charges or may choose not to make any statement on the charges. The presiding judge must, in terms of s 136 (2) of the StPO, offer the accused this opportunity to dispel the grounds of the accusations against him and to assert the facts which weigh in his favour.[409] It is in the accused's free will whether to respond to a charge by giving a statement or to remain silent. If the accused decides to respond, he undergoes a first examination by the terms of ss 243 (4), 136 (1) of the StPO. The provisions of s 243 (4) 2 of the StPO are aimed at enabling the accused to defend himself and to cause the court to take account of his statements throughout the further

406 Oxford Dictionary of English, 3ed (2010), 'plea' No 2.
407 Hiemstra's, *Criminal Procedure*, p. 15-1.
408 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 74.
409 Compare Meyer-Goßner, StPO, s 243, para 18a.

procedure.[410] He might even confess at the very outset of the trial. Anyhow, the opportunity the accused is given to make a statement during the first examination is not formalized and therefore does not affect the procedural rules to be followed in general. A recording of particular 'pleas' does not take place. Of course, whether the accused confesses will greatly influence how the trial is conducted. In this respect the confession can be compared to a plea of guilty.[411] The confession is considered as evidence for the accused's guilt and consequently substantially shortens the trial.[412] The examination of the accused at the beginning of the trial and the confession he may make based on his or her free will without being asked for it shortens the taking of evidence. Nevertheless the confession does not determine the ambit of the dispute and the procedure to be chosen like for instance s 112 and s 115 CPA do in South African criminal procedure. In German law the accused cannot avoid the conventional trial procedure by pleading guilty.[413] To sum it up and repeat it again with *Weigend*: 'The defendant does not plead but is invited (though not obliged) to make a statement in open court. Even if he comes forward with a confession at the beginning of the trial, that does not relieve the court of the duty to "discover the truth." According to s 244 (2) of the StPO, the court is, responsible for ascertaining that all evidence needed to discover the truth about the case is produced at trial. Hence, even when the defendant has confessed, the court may have to call witnesses and take other evidence in order to find out to what extent the defendant correctly and completely related the facts of the case.'[414] For that reason one cannot talk about 'plea bargaining' in German criminal procedure in its literal sense. This term however will be used as a general expression for agreements in criminal proceedings despite the lack of a formal system of pleas in Germany.

2. Conduct of the bargain in South Africa

How plea bargaining is conducted and how agreements are settled differs greatly in both legal systems. First, the South African system shall be briefly reviewed. As *De Villers* presents, the process of plea bargaining can be subdivided into five stages: 'negotiations

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410 Meyer-Goßner, StPO, s 243, para 18a; BGH (1957) *NJW* 1527; (1981) *NStZ* 111; BayObLG 53, 130 = (1953) *MDR* 755; KG (1982) *StV* 10 at 10.

411 Compare Hildebrandt, *Gesetzliche Regelung der Verständigung im Straverfahren*, p. 28.

412 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 74.

413 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 74.

414 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 77; Thomas Weigend, The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure, in John Jackson et al., Crime, Procedure and Evidence in a Comparative and International Context 39,43-44 (2008); citation style of the provision adapted.

on plea and sentence, verification of requirements by court, consideration of plea agreement, consideration of sentence agreement and the keeping of records and statistics.'[415] This enumeration forms a rough guideline of the following passages.

a. Initiation and role of the participants

The initiation of an agreement in terms of s 105A (1) usually is the result of negotiations between the prosecutor and the legally represented accused. S 105A (1) (a) states that a prosecutor authorised thereto in writing by the National Director of the Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement. The negotiations are not described in further detail. S 105A remains non-prescriptive.[416] It is up to the prosecution not only to initiate negotiations but also to steer them and find a common ground with the accused that can be presented to the court.[417] The Directives issued by the NDPP in terms of s 105A (11) lead the prosecutor and further describe how negotiations are to be conducted. As the prosecutor is, besides the defence, entitled to initiate negotiations, this also determines his role in the process. He has the power, even the duty, to decide whether the criminal proceeding is going to be settled in an agreement under s 105A.[418] This implies a prejudgment of the accused's guilt and also enables the prosecutor to avoid the uncertainty of a full trial and to ensure a conviction by means of a s 105A agreement.[419] Plea bargaining is a demonstration of the prosecutor's discretion which he not only retains in full throughout in bargain procedure but which also provides him with greater bargaining power.[420] Whether the prosecutor would abuse his power, and how this situation can be avoided, will be further examined later.[421]

Nevertheless, s 105A provides for some further prescriptions: The agreement is to be settled by the prosecution through a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge (s 105A (1) (a) (i)). If the accused is convicted of the offence to which he or she has agreed to plead guilty, the court will impose a just sentence, postpone the sentence according to the terms of section 297 (1) (a), or will impose a just sentence which the operation of the whole or any part

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415 De Villers (2004) *De Jure* 244 at 245.
416 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-7.
417 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-7.
418 Bennun (2007) *SACJ* 17 at 33. This also raises the question by which means the court is held back from using this power to steer a process by concerted use of informal plea bargaining.
419 Bennun (2007) *SACJ* 17 at 34.
420 Compare Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-7.
421 Compare Chapter V.14.

thereof is to be suspended in terms of section 297 (1) (b). Also, if applicable, the court will award compensation as contemplated in section 300 (s 105A (1) (a) (ii)).

The prosecutor has several duties during the pre-agreement stage. He has to be certain to comply with these before he may enter into the agreement as contemplated in s 105A (1) (a).[422] In terms of s 105A (1) (b) the prosecutor may enter into an agreement after consultating with the person charged with the investigation of the case (s 105A (1) (b) (i)). This must happen with due regard to, at least, the nature of and circumstances relating to the offence, personal circumstances of the accused, previous convictions of the accused − if any − and the interests of the community (s 105A (1) (b) (ii)). Furthermore the prosecutor may enter into the agreement after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding the contents of the agreement. The prosecutor must also include in the agreement a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss (s 105A (1) (b) (iii)). The provision of s 105A (1) (c) states that the requirements of paragraph (b) (i) may be dispensed with if the prosecutor is satisfied that the consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative (s 105A (1) (c) (i)) and affect the administration of justice adversely (s 105A (1) (c) (ii)). This aspect will be referred to later.

What should be annotated and be briefly afforded attention is the relationship between prosecution and defence. In the present criminal procedure prosecutor and defence are equals ‘on either side of the adversarial fence’.[423] Formerly, the accused was deprived of any insight into the evidence that the State held against them.[424] Police dockets were privileges and neither the accused nor his legal representative could sight thereof.[425] With the present law, the accused is entitled to view the content of police dockets and also to consult with state-witnesses at a pre-trial stage.[426] On the other hand, the prosecution is

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422 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-10A.

423 *North Western Dence Concrete CC v Director of the Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676e.

424 *North Western Dence Concrete CC v Director of the Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675h.

425 *North Western Dence Concrete CC v Director of the Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 675i.

426 *North Western Dence Concrete CC v Director of the Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676b.

not entitled to investigate details of accused's defence and the evidence held by them.[427] The prosecutor still has the advantage of unlimited access to state's resources to use for investigations though.[428] To sum it up, the negotiating parties conduct the bargain as equals.

Regarding the judge, s 105A (3) provides that the court shall not participate in the negotiations. This will be revealed as a major difference to the German provisions and should therefore be kept in mind. It is appropriate to note at this stage that although judicial participation in the negotiations is not allowed, the outcome of the negotiations is required to be approved by the court. This will be presented in the following.[429]

b. Form and information

Formal requirements of the agreement are set up in s 105A (2). The parties need to present the court a 'package'.[430] According to the provision, the agreement shall be in writing and shall at least state that the accused, before entering into the agreement, has been informed that he has the right: to be presumed innocent until proved guilty beyond reasonable doubt, to remain silent and not to testify during the proceedings and to protected against compulsory self-incrimination. Furthermore, the agreement shall state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused. Finally, the agreement must be signed by the prosecutor and the accused and his or her legal representative, and, if the accused has negotiated with the prosecutor through an interpreter, must contain a certificate by the interpreter to the effect that he interpreted accurately during the negotiations and in respect of the contents of the agreement.

There is also an obligation to inform the accused of certain rights. This is, after the prescriptive of the written form, the second safeguard to ensure that a plea and sentence agreement is not obtained at the expense of substantial rights of the accused.[431] The agreement has to confirm that the accuse was, before entering into the agreement, informed of his right to be presumed innocent until proved guilty beyond reasonable doubt (s 105A (2) (a) (i)), his right to remain silent and not to testify during the proceedings (s

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427 *North Western Dence Concrete CC v Director of the Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676b,c.

428 *North Western Dence Concrete CC v Director of the Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 676c.

429 Compare Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-8.

430 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-7.

431 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-14.

105A (2) (a) (ii)) and his right not be compelled with self-incriminating evidence (s 105A (2) (a) (ii)). These rights are all components of the constitutional right to a fair trial and are contained in s 35 (3) (h) and (j) of the Bill of Rights.[432] The rights may also be called the 'passive defensive rights of an accused'.[433]

Interestingly, the provisions fail to indicate whose responsibility the duty to inform is.[434] They simply state that the written agreement must declare that this information has been given. *Du Toit et al* hold that it was not the court's nor the prosecution's duty to inform the accused of his rights but instead is the duty of the accused's legal representative.[435] With *Rodgers* it can be said that although there is no primary duty of the court and the prosecution to inform, it is in the state's and court's best interest to ensure that the accused is aware of his constitutional rights before the agreement is finalised, in order to avoid judicial disapproval.[436]

c. Admissible content

The subject of a plea bargain may vary. As s 105A (1) (a) (i) and s 105A (1) (a) (ii) (aa) show, an agreement must at least contain a plea of guilty to an offence and an agreement upon the sentence. German provisions are not that restrictive, as will be revealed later.

d. Verification of basis

S 105A (4) (a) states that the prosecutor has the duty to inform the court that a written agreement has been negotiated. The accused will not be required to plead before the prosecutor fulfills this duty. The court must then satisfy itself of two aspects:[437] first, s 105A (4) (a) (i), which provides that the court must require the accused to confirm that such an agreement has been entered into; and second, s 105A (4) (a) (ii), which provides that the judge must make sure that the prosecutor has consulted the person charged with the investigation of the case (s 105A (1) (b) (ii)) and, where it is reasonable, has afforded the complainant or his representative the opportunity to make representations (s 105A (1) (b) (iii)). However 'the pre-agreement consultation as required by s 105A (1) (b) (i) can be dispensed with if the prosecutor is satisfied that such a consultation will delay the proceedings to such an extent that it not only could cause substantial prejudice to the

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[432] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-14.
[433] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-14.
[434] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-14.
[435] Rodgers (2010) *SACJ* 239 at 247.
[436] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-14.
[437] Rodgers (2010) *SACJ* 239 at 251.

prosecution, the accused, the complainant or the latter's representative (s 105A (1) (c) (i)) but could also affect the administration of justice adversely (s 105A (1) (c) (ii)).'[438] If the court is not satisfied that the agreement complies with the requirements of s 105A (1) (b) (i) and (iii), the court must inform the prosecutor and the accused of the reasons for non-compliance and afford them both the opportunity to comply with the requirements concerned. Interestingly, there is no further written duty that the court must prove compliance with s 105A (2) and its formal requirements for the agreement.[439] Taking a closer look at the provision of s 105A (2) with its peremptory terms, however, it appears that there is a court duty to ensure that these requirements have been met.[440] The reason for this assumption is that it would otherwise not be appropriate for the court to proceed on the basis of an inadmissible agreement.[441]

e. Scrutiny of agreement

S 105A (5) states that, if the court is satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), then the court shall require the accused to plead to the charge and shall order that the contents of the agreement be disclosed in court. After the disclosure of the contents of the agreement, s 105A (6) (a) provides for a judicial questioning of the accused. By the terms of the provision, once the contents have been disclosed the court has to make sure that the accused confirms the terms of the agreement and the admission made by him in the agreement (s 105A (6) (a) (i)). Furthermore the court has to ascertain whether, with reference to the alleged facts of the case, he admits to the allegations to which he has agreed to plead guilty (s 105A (6) (a) (ii)). To this judicial questioning, case law rules and principles relating to s 112 (1) (b) are applicable, though with the necessary changes.[442] The court furthermore is required to ensure that the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced (s 105A (6) (a) (iii)). To plead guilty freely and voluntarily is a fundamental principle of South African criminal procedure.[443]

After the questioning of the accused the court should in terms of s 105A (6) (b) in three

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438 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-11.
439 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-16.
440 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-16.
441 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-16.
442 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-17.
443 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-2; 15-17; *Chetty v Cronje* 1979 (1) SA 294 (O) p. 297g-h; *S v Mbothoma en 'n ander* 1978 (2) SA 530 (O); *S v Seabi & another* 2003 (1) SACR 620 (T) 623f-h.

cases record a plea of not guilty and inform the prosecutor and the accused of the reasons therefore. The plea of not guilty is to be recorded: if the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into (s 105A (6) (b) (i)); if it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted and such allegation or that the accused has a valid defence to the charge (s 105A (6) (b) (ii)); or, for any other reason, if the court is of the opinion that the plea of guilty by the accused should not stand (s 105A (6) (b) (iii)). Once the court has recorded a plea of not guilty, the agreement becomes null and void.[444] Also prior to the recording, there is no opportunity for both prosecutor and defence to convince the court of the guilt of the accused by presenting new evidence.[445] Furthermore the accused is not entitled to demand a verdict on the merits – an acquittal or conviction – as provided for in s 106 (4). The provision of s 105A (6) (c) clarifies that after the recording of a plea of not guilty, the trial will start *de novo* before another presiding officer. By the terms of this section the accused may also, in the alternative, waive his or her right to be tried before another presiding officer. Although not provided for in the provision, the prosecutor where appropriate may bring an application that another presiding officer should preside the trial *de novo* despite the accused's waiver, as referred to in s 105A (6) (c).[446]

If the court is satisfied that the accused admits the allegations in the charge and that he is guilty of the offence in respect of which the agreement was entered into, the court shall then under S 105A (7) (a) proceed to consider the sentence agreement. It is important to point out that the court must proceed to consider the agreement without yet having formally convicted the accused.[447] This only happens after the sentence, upon which the parties have agreed, has been found just, as required in s 105A (8).[448] For the purpose of the court's consideration in terms of s 105A (7) (a), the court may direct relevant questions − including questions about the previous convictions of the accused − to the prosecutor and the accused and hear evidence, including a statement by or on behalf of the accused or the complainant (s 105A (7) (b) (i)). The questioning about previous convictions appears unusual as, in a conventional trial, such questioning by the court would be irregular if the prosecutor has decided not to prove any previous convictions.[449] As *Du Toit et al* state,

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444 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-17.
445 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-17.
446 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-18.
447 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-18.
448 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-18.
449 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-18.

this provision is sensible because 'the previous convictions of the accused should right from the start form part of the facts which the parties wish to present to the court in support of the sentence agreement.'[450]

During the course of the consideration mentioned above, the court has the power and the duty to receive evidence and other statements for purpose of considering the sentence agreement. That the court in its consideration of the sentence is not limited to those facts placed before it by the parties is a fundamental principle of criminal procedure.[451] The section applies to the conventional trial situation and the relevant provisions of s 121 (7), which states that nothing shall prevent 'the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence' and to s 274 (1), which states that the 'court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed'.[452] The purpose is to be sure that the court holds sufficient information upon which to base its conviction.[453] S 105A (7) (b) (i) ensures that this standard is also met in the plea bargaining procedure. The section empowers the court to call witnesses where the parties have failed to provide sufficient information for the purpose of considering the agreement.[454] It remains a question, however, how extensively the courts will make use of this opportunity to have an inquisitorial review of the case and to search for further evidence. It appears that this might only be the case if the parties failed to present the court with a solid basis for their agreement. The parties are entitled to adduce evidence or to present a statement though. It should be noted however that this cannot occur permanently, as it conflicts with the procedure provided in s 105A.[455] The factual bases of an agreement are usually not in dispute.[456]

Furthermore, the court must give due regard to the provisions of the Criminal Procedure Act and other law (s 105A (7) (b) (ii)) if the offence concerned is an offence referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997) or is an offence for which a minimum penalty is prescribed in the law creating the offence,.[457] The provision

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450 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.
451 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.
452 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.
453 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.
454 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.
455 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
456 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
457 See also *S v Esterhuizen & others* 2005 (1) SACR 490 (T) at 493g-h; *S v De Koker* 2010 (2) SACR 196 (WCC) at [19.4].

clarifies that prescribed minimum sentences cannot be disregarded on the simple fact that one has agreed that these barriers are not applicable.[458] A similar protection is intended by Directives 12 and 13 issued by the NDPP.

Finally, the court has to satisfy itself that the sentence is just in terms of s 105A (8). If so, the court shall inform the prosecutor and the accused that it is satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement. If not, if the court finds that the sentence agreement is unjust, s 105A (9) (a) provides that the court shall inform the prosecutor and the accused of the sentence which it considers just. A court finding that an agreed sentence is unjust will likely negate the prior achievements of negotiation and render a successful outcome of the s 105A procedure doubtful. Both prosecutor and accused may by the terms of s 105A (9) (b) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence or they may withdraw from the agreement. If the prosecutor and the accused abide by the agreement as contemplated in subsection (b) (i), the court shall convict the accused of the offence charged and impose the sentence which it considers just (s 105A (9) (c)). If the prosecutor or the accused withdraw from the agreement, the trial shall start *de novo* before another presiding officer, provided that the accused may waive his or her right to be tried before another presiding officer (s 105A (9) (d)).

f. Conclusion of the agreement

The agreement comes into existence as soon as the parties sign a written agreement that complies with the prerequisites of s 105A (2). Before or apart from a formal agreement, negotiations might possibly develop a binding effect due to the principle of a fair trial and the rule of law. To discuss the point in time in which the agreement exactly is concluded might appear to be of less relevance. In South African bargain procedure the signing terminates the negotiations and at the same time initiates the scrutiny. By contrast, the conclusion of the agreement in Germany marks the end of both the negotiations and the court's scrutiny. The whole issue will be examined in detail later.[459]

g. Other procedure

It is important to note that the presented procedure only describes the branch of bargains

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458 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.

459 Compare Chapter V.9.

that has been implemented by the statutory provisions. Already, Directive No. 1 reveals that 'the procedure enacted in s 105A does not supplant the standard procedure for pleas of guilty in terms of s 112 of the Act'. In *North Western Dense Concrete CC*, which took place in 1999, at a stage prior to the advent of statutory provisions on plea bargaining, a 'plea explanation' was settled in terms of 112 (1) (b).[460] Uijs AJ stated, while explaining the then-little known and judicially less recognized procedure of plea bargaining that, as mentioned before, s 112 was 'virtually tailormade' for such agreements.[461] If s 112 could provide for plea agreements, one could ask whether s 112 is still of relevance to the subject after the statutory amendment of s 105A. This will be further examined throughout the thesis. Furthermore the previously mentioned Directive No. 1 states that 'the established practice of accepting initial pleas of guilty on the basis of bona fide consensus reached, remains applicable'. Moreover, the legislature only tends to regulate the bargains on plea and sentence. Informal bargaining, for instance on subjects other than the plea and sentence or at a stage when charges are not yet filed, remains possible.[462] Thus there are more models of plea bargaining than those presented here. Their relevance will be examined later.

h. Concluding remark

The South African conduct of the plea bargaining procedure is generally accusatorial. That means that prosecution and accused independently initiate and carry out the bargain procedure. Nonetheless s 105A prescribes inquisitorial elements such as verification and scrutiny by the court. In practice however this scrutiny is almost completely focused on formal points.

3. Conduct of the bargain in Germany

A better understanding of plea bargaining requires taking a first look at the conduct of the procedure in Germany and highlighting obvious and clearly noticeable essential differences compared to the South African provisions. The German criminal procedure differs in several essential aspects, a few of which will be briefly pointed out here at the outset. For one, German law does not provide for a jury trial. Lay participation is

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460 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 671g; Uijs AJ stated 's 112 (2) (b)' which is obviously false and was therefore corrected by the author to 's 112 (1) (b)'.

461 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677c.

462 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-8.

guaranteed through lay judges who together with the professional judge or judges represent the court.[463] The vote of lay judges counts equally to those of the professional judges.[464] Also, as mentioned before, in Germany there is no formal plea of the defendant at the beginning of a trial, as there is under South African law.[465] Nevertheless, it is possible to base a sentence on a reliable confession.[466] If the reliability is in doubt, then the judge is obliged to clarify.[467] Inconsistent pleading is thus not possible.[468]

When s 105A of the Criminal Procedure Act is compared to s 257c of the StPO, which regulates plea bargaining in Germany, the first thing to notice is the length of the provisions. The South African law on plea bargaining is much more detailed and explicitly describes the specific steps to be taken. Take, for instance, that S 105A consists of approximately 1750 words whereas s 257c StPO only contains around 300 words.[469] This is due to a different methodology by which to shape law. German law in general tends to keep provisions brief and short. The use of undetermined legal terms and notions, which have to be interpreted and extracted in order to reveal their essential meaning, is very common to the German system of law. Thus there is often a need for interpretation. This explains the difference in the length of the provisions.

Negotiations can take place in the main proceedings in terms of s 257c or at an earlier stage. The point in time in which both discussion and negotiations take place is not further specified.[470] Already, the wording of s 257c (1), speaking of the opportunity to reach an agreement 'on the further course and outcome of the proceedings,' reveals that these negotiations have to occur at the beginning of the proceedings.[471] The position of s 257c after the sections about the taking of evidence in s 244 to s 257 and right before the s 258 about the closing arguments to the mind of *Meyer-Goßner* gives the false impression that the agreement is to be concluded at the end of the taking of evidence.[472] Indeed, the purpose of plea bargaining, i.e., to avoid a further, possibly large-scale or delicate

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463 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 37.
464 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 37.
465 Compare chapter on terminology above that explains why the term plea bargaining cannot be used in its literal sense in Germany.
466 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 37; Landau/Eschelbach (1999) *NJW* 321 at 324.
467 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 37; Landau/Eschelbach (1999) *NJW* 321 at 324.
468 Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 37.
469 Compare Annex.
470 SK-*Velten*, StPO, s 257c, para 19.
471 SK-*Velten*, StPO, s 257c, para 19.
472 Compare *Meyer-Goßner* in Böttcher-FS, p. 115.

procedure, (e.g., hearing witnesses), should dictate that it occur at the beginning of trial.[473] It has to be admitted that the bargain usually takes places at the beginning of the trial. However, the formal conclusion, i.e., the parties' declaration of their mutual consent to the terms, instead occurs towards the end of the trial, as the position of s 257c indicates. Nevertheless, however early the parties come up with an agreement in terms of s 257c, the formal conclusion must be predated by, at the least, the prosecutor reading out the charges (s 342 (3)) and the court verifying the identity of the accused and examining his personal situation (s 243 (2) 2).[474]

a. Initiation and role of the participants

A crucial aspect of the new statutory provisions in Germany to point out upfront is that the German approach is unique compared to all other commonly-known law systems.[475] The German legislature gave the judge, among various others, the role of guiding the criminal proceedings.[476] This role is further emphasized and maintained in the new provisions on agreements. S 257c (1) states that in suitable cases it is the court that may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. As contemplated in s 257c (3) 1, it is the court's duty to announce what content the negotiated agreement might have. This requires, prior to the announcement, a discussion of the status of the proceedings in terms of s 257b. That section states that at the main hearing the court may discuss the status of the proceedings with the participants insofar as this appears suitable to expedite the proceedings. The significance of s 257b is very limited. The major provision on bargains remains s 257c.

The abovementioned provisions state that discussions on the status of the proceedings and the subsequent agreement under German law are to be initiated by the court. It should be emphasized that although the court has the right to initiate the plea barging according to German law, it remains inadmissible for the court to put pressure on the accused.[477] Under South African law, the participation of the court in the negotiations is explicitly forbidden by s 105A (3), a major difference between the legal systems.

However, the initiation of negotiations is not limited to the court under German law. The

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473 Meyer-Goßner, StPO, s 257c, para 1.
474 SK-*Velten*, StPO, s 257c, para 19.
475 Frommann (2009) *HanseLR* 197 at 204.
476 Frommann (2009) *HanseLR* 197 at 204.
477 Compare BGH (2007) *HRRS* 944.

agreement can also be suggested by the prosecutor or the accused or his legal representative.[478] This occurs often because many times negotiations will already have taken place at the stage of preliminary proceedings according to the terms of s 160b.[479] As a consequence, s 257c, in stating that the court 'may' reach an agreement, only indicates the legislature's assumption as to the usual procedure. In practice the initation is most frequently done by the defence.[480] It should be remarked that legal representation is not a prerequisite to the bargain. Mandatory legal representation may only result out of the general provision of s 140 StPO, for instance if the case is placed before a Regional Court.

b. Form and information

Under German law the recording of the agreement is less formal than in South Africa. At the beginning of the main hearing the presiding judge states whether discussions toward an agreement have taken place and, if so, states their essential content.[481] The agreement is then only put to court record in terms of s 273 (1a) of the StPO, which requires that the record indicate in essence the course and content as well as the outcome of the negotiated agreement.By the terms of s 267 (3) 5, the agreement furthermore is mentioned in the ensuing judgment. Thus, in German criminal proceeding requirements such as written components of the agreement are only, if ever, fulfilled in the judgment itself. It should be emphasized that the judgment only contains rough outlines of the agreement, oftentimes only consisting of a few sentences. The agreement is thus only documented roughly in the judgment as well as in the court record.[482] There is also no need for the participants to sign. As a result the agreement according to German s 257c StPO might appear less like a contract.

Subsection (5) of s 257c prescribes an obligation to instruct the accused of certain consequences of the agreement. It states that the defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4). Subsection (4) states that 'the court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of

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478 SK-*Velten*, StPO, s 257c, para 19; Meyer-Goßner, StPO, s 257c, para 23.
479 Meyer-Goßner, StPO, s 257c, para 23.
480 Boll however holds that it were the court and the accused, see Boll, *Plea Bargaining and Agreement in the Criminal Procedure*, p. 40.
481 See s 243 (4) StPO.
482 Compare BGH 43, 195 at 206.

guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based.' Other than in South African law, the information given to the accused is not about his fundamental legal rights, such his right to remain silent, but about the actual legal consequences of the agreement to be concluded. It should be emphasized however that – as the bargain procedure in Germany is conducted in a conventional trial – comparable instructions are nevertheless given at the outset of each conventional trial according to the terms of the general provision of s 243 (5). The instruction in the terms of s 257c however has to take place prior to the conclusion itself.[483] The instruction must also be indicated in the court's record by the terms of S 273 (1a) 2. The duty to instruct is upon the court. The accused may waive his right to be instructed, which he may do if already instructed by his legal representative,[484] but it remains the court's primary duty to inform.

c. Admissible content

S 257c (2) 1 prescribes the admissible content of an agreement and states that 'the subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial.' S 257 (3) 2 provides that an agreement can also indicate an upper and lower sentence limit. The provision is interpreted very strictly. It is impermissible to negotiate on a certain specific sentence.[485] The reason therefore lies in basic guidelines of German criminal procedure and the inquisitorial law tradition. Those will be further examined later. It should be emphasized at this stage that the impermissibility of a specific sentence, e.g., specifying exactly 2 years and 6 months of imprisonment, as part of an sentence agreement occurs to be unique in comparison to many other jurisdictions similar to South Africa.

The confession is not a necessary component of the agreement. The indication of an upper or lower sentence limit therefore does not require a confession *quid pro quo*. It can also be set forth in exchange for any other kind of the conduct on the part of the accused.[486] The accused's contribution to the agreement is thus not limited to the confession, and a confession is not required for an agreement to come into existence. If

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483 SK-*Velten*, StPO, s 257c, para 53.
484 Meyer-Goßner, StPO, s 257c, para 31;
485 SK-*Velten*, StPO, s 257c, para 19.
486 Krekeler/Löffelmann/Sommer-*Püschel*, StPO, s 257c, Rn.17; SK-*Velten*, StPO, s 257c, para 11.

the accused's offer includes particular conduct, which he is free to negotiate, this could for instance be in exchange for a waiver of some procedural application.[487] An example of a right that can be waived is the right to an objection in the proceedings by the terms of s 238 (2) on the grounds that an order by the presiding judge relating to the conduct of the hearing is inadmissible.[488] Furthermore, the accused may consent to the replacement of a witness's examination, whether from an expert or co-accused, by reading out a record of another examination or a certificate containing a written statement originating from him as according to s 251 (1) No. 1.[489] Another example is the accused's opportunity to waive his procedural right concerning the obligation to fulfil the time limits for summons by the terms of s 217 (2).[490] That provision provides that, if such time limit has not been observed, the defendant may request suspension of the hearing at any time prior to commencement of his examination on the charge.[491]

d. Verification of basis

There is an essential difference between the two countries' systems in the court's scrutiny. As in South African law prosecutor and accused conduct and conclude the negotiations independently and then form an agreement, there is thus a need for the court's approval that certain requirements have been met. The material content in adversarial terms is more up to the parties, which is why the court's scrutiny is basically focused on formal aspects. In the inquisitorial tradition – at least that is the legislature's assumption – the German court leads through the process of bargaining and participates in each and every step towards the finalisation of the agreement. It is not the court's duty to check whether the prosecution has complied with certain formal prerequisites. Moreover the court, as the leader throughout the bargain procedure, itself underlies such formal requirements. Thus, the following passage will present the usual conduct of the bargain.

A striking and basic difference to South African law on criminal procedure that must be emphasized at this point is that in Germany the judge has full knowledge of the prosecution file. The file is sent to the judge in advance of the trial. Throughout the main proceedings and right from the beginning the judge is through that means familiar with the case, all its details and all investigations already undertaken. Consequently, the judge can independently develop an opinion with full awareness of both the pre-trial investigations

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487 Krekeler/Löffelmann/Sommer-*Püschel*, StPO, s 257c, Rn.17; SK-*Velten*, StPO, s 257c, para 11.
488 SK-*Velten*, StPO, s 257c, para 11.
489 SK-*Velten*, StPO, s 257c, para 11.
490 SK-*Velten*, StPO, s 257c, para 11.
491 SK-*Velten*, StPO, s 257c, para 11.

and the outcome of the hearings.[492] The fact that the judge fully reads and goes through the prosecution file determines to a huge extent his role in the process. This difference to South African law cannot be emphasized enough. This smacks of a problem area with regard to the judge's role in the agreement procedure, as will be discussed further.

The crucial conduct of the plea bargain procedure is set down in subsection (3) of s 257c. According to s 257c (1), as presented before, the court initiates the plea bargain. Usually the proposal of an agreement already contains the possible subjects for negotations according to the terms of s 257c (3) 1. Thus, the law does not provide for a consideration or an approval of the content that would have been discussed earlier by the parties, as German law advises the court to propose all possible content right away. If the court role has the role of deciding which subjects should form part of an agreement, there is no further need for an approval through the court. Factually, however, negotiations will often have already taken place in between the parties at an earlier, pre-trial stage. The sections 160b, 202a, 212 of the StPO deal with these preceding discussions of the status of the proceedings. The discussions usually already have the character of negotiations toward a concrete agreement. As a consequence, there is a already pre-discussed and thus negotiated content to an agreement that must be scrutinized through the court in order to determine that its content is admissible and takes into account all provisions on the agreement procedure. It can however be stated that, even if the agreement is pre-discussed, the court usually conducts the bargain in the same way, as if the judge had presented the possible content. Consequently, if it is not already part of the court's proposal of an agreement or if the court consented to a sentence limit the parties had earlier negotiated, the court may, upon its free evaluation of all circumstances, then indicate an upper and lower sentence limit by the terms of s 257 (3) 2. According to s 257 (3) 3, thereafter the court is obliged to give the parties the opportunity to make submissions. Finally, by the terms of s 257 (3) 4, the negotiated agreement comes into existence if the defendant and the public prosecution office agree to the court's proposal. The complainant is not involved and has no right to *veto*.[493]

e. Scrutiny of agreement

There is no scrutiny that takes place after the conclusion of the agreement. Rather, the agreement usually is initiated by and always concluded under the guidance of the court,

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[492] Compare Frommann (2009) *HanseLR* 197 at 205.
[493] Krekeler/Löffelmann/Sommer-*Püschel*, StPO, s 257c, Rn.24.

which implies judicial approval during the process of negotiating. Thus, under German law there is no need for judicial scrutiny of what the parties had negotiated in camera, as the court participated in such negotiations right from the start or at least joined and substantially influenced the negotiations toward the finalisation of the agreement. Thus, what shall be presented under the topic of the scrutiny is the guidelines the court must follow when proposing the possible content (or in practice consenting to the parties proposal) of an agreement.

S 257 (2) 1 states that 244 (2) remains unaffected. S 244 (2) provides that in order to establish the truth the court shall *proprio motu* extend the taking of evidence to all facts and means of proof relevant to the decision. This presumption of a full taking of evidence does not comport with the reality in the court rooms.[494] Some scholars have marked this provision as a 'legislator's lie'.[495] If the obligation to establish the truth fully applied, the benefits of plea bargaining would be diminished. S 257c (1) 2 must be applied in such a way that the court and the participants, in light of the obligation to establish the truth, cannot agree on a certain legal consequence without at least briefly investigating the facts of the case.[496] The court has to understand and state the facts of the case. By the terms of s 257c (2) 3, a verdict of guilty is not negotiable, e.g., qualifications that the accused caused bodily harm by dangerous means cannot be dropped by agreement. The court is obligated to scrutinize whether the confession complies with the outcome of the prosecutions investigations.[497] A 'formal' confession, i.e., an accused's confession that is not further examined as to whether it conforms to material facts – which would be comparable to a plea of guilty which does not exist in German law – is not sufficient.[498] The confession has to appear plausible.[499] The formal scope of the scrutiny is thus rather wide. It will however be examined later how courts deal with the obligation to investigate, at the least, the substantial facts the agreement is based on in practice.[500]

f. Conclusion of the agreement

First of all, recall that there is no written plea and sentence agreement in German law. Consequently, one cannot refer to a signing. Furthermore, it is fundamentally important to consider that in German law the agreement is the final outcome of the bargain process,

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494 Compare Krekeler/Löffelmann/Sommer-*Püschel*, StPO, s 257c, Rn.7.
495 SK-*Velten*, StPO, s 257c, para 34; Fezer (2010) *NStZ* 177 at 181; Weigend in Maiwald-FS, 829 at 833.
496 Meyer-Goßner, StPO, s 257c, para 4 and prior to that BGH (2009) *StV* 60 at 61
497 Meyer-Goßner, StPO, s 257c, para 17a; BGH (2009) *NStZ* 467; OLG Celle (2011) *StV* 341.
498 Meyer-Goßner, StPO, s 257c, para 17a; Köbel/Selter (2009) *JR* 447 at 449.
499 SK-*Velten*, StPO, s 257c, para 35; Meyer-Goßner, StPO, s 257c, para 17.
500 Compare Chatper V.6.b.

which also already includes a process of judicial scrutiny. Thus, the question of when exactly the agreement is conluded is essential due to the fact that at that point the bargain procedure has been determined and only has to be finalised by the subsequent conviction and sentencing to be done by the court solely.

S 257c on plea bargaining does not regulate a conclusion of the agreement. German law provides for certain general principles concerning the roles of the participants though.[501] The conclusion procedure can be explained through the terminology of the civil law (which suits the contractual nature of plea bargaining in general). The 'offer,' i.e., the proposal of an agreement, is presented by the court.[502] Accused and prosecutor then have to declare 'acceptance' of the court's proposal.[503] Thus, the court's proposal has to contain the '*essentiali negotii*' of the agreement.[504] The court furthermore has to act with the intention of creating legal relationships.[505] The mutual 'contractual services' have to be named explicitly.[506] Nevertheless, the exact point in time when the agreement is concluded remains in the dark as the process of negotiations may be lengthy. Much will rely on the participants' determination. The strongest indicator for the conclusion of an agreement is an official entry into the court record. Statements prior to an official entry into the court record might either be interpreted as consent to the agreement or might become binding due to the principle of a fair trial. These aspects will be examined in more depth later.

g. Other procedure

The main focus of the present described procedure was on the bargain procedure in the terms of s 257c. The section corresponds to s 105A, i.e., it deals with bargains during the main proceedings. The act that regulated plea bargaining in German criminal procedure did however also implement some other provisions into the StPO, such as s 160b, 202a and 212. They regulate bargaining that takes place during the preliminary stage, before a charge is filed, or on bargaining at the stage when the judge descides whether to proceed with the main proceedings.[507] Such regulation is unknown in the South African provisions. The South African provisions, mainly dealing with pre-trial agreements, will be surveyed in further detail later.

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501 SK-*Velten*, StPO, s 257c, para 20.
502 SK-*Velten*, StPO, s 257c, para 20.
503 SK-*Velten*, StPO, s 257c, para 20.
504 SK-*Velten*, StPO, s 257c, para 20.
505 SK-*Velten*, StPO, s 257c, para 20.
506 SK-*Velten*, StPO, s 257c, para 20.
507 A stage of proecdure of ist own in German law in terms of ss 199 seqq.

Other procedures that are in some way linked to the issue of bargains may be seen in the sections on the dispensation of charges in s 153 seqq. The decision not to proceed with or not to begin prosecution in exchange to the fulfilment of certain terms and conditions by the accused may be contained in the elements of the agreement. Furthermore, the penal order (*Strafbefehl*) in terms of s 407 seqq. could be mentioned.[508] The penal order procedure, similar to the bargaining procedure, breaks with essential principles of the criminal procedure.[509] Just to name one example, penal orders do not require any search for substantial truth or any investigation of facts by the court. The relevance of the topic will be exposed later.

Finally, it must be mentioned that in German law there are no specific Directives of the prosecution offices concerning plea bargaining. The Directives for Criminal Procedure and Fine Procedure (*Richtlinien für das Strafverfahren und das Bußgeldverfahren – RiStBV*), which is an administrative regulation, does not provide for any provisions concerning negotiations and agreements.

h. Concluding remark

From a procedural point of view, the German provisions on plea bargaining provide for a strong role of the court which comports with inquisitorial values of the German criminal procedure. It is for instance already the court who in suitable cases may initiate the bargain and propose the possible content. Nonetheless, the legal practice is strongly oriented towards accusatorial values. The most outstanding differences in comparison to the South African system might be that the agreement is not set forth in writing, that there are no compulsory material components such as an agreement on the sentence and that the accused does not require legal representation.

4. Concluding remark

Essential differences in the practice of plea bargaining shall be presented once again in the following table. Further distinctions will be uncovered thereafter.

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508 S 407 seqq. StPO provides a special type of procedure. As stated in s 407 (1) StPO, in proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offence may, in the case of misdemeanors, be imposed, upon written application by the public prosecution office, in a written penal order without a main hearing. Where objections to the penal order are not lodged in time the order shall according to s 410 (3) StPO be equivalent to a judgment that has entered into force.

509 Compare Meyer-Goßner, StPO, Introduction to s 407 seqq., para 1.

Feature		South Africa	Germany
General	General law tradition	English and Roman-Dutch	National
	Legal system	Common law	Continental
	Criminal Procedure	Accusatorial	Inquisitorial
Plea bargaining	Statutory Law	2001	2009
	Typical participants	Defence, prosecutor	Defence, prosecutor, judge
	Formal requirements	Written agreement that is signed by all participants	Rough content filed in the court record and mentioned in the judgement
	Legal representation	Required	Not required
	Prosecutor	Written authorisation	Generally authorized without special permit
	Subject	Agreement on plea and sentence is mandatory	No mandatory content
	Offences	No limitation	No limitation
	Active role of the judge	No	Yes
	Waiver of right to appeal	Admissible	Inadmissible
	Percentage of bargains	Could not be ascertained[510]	~ 50 %

V. Problem areas

In both the South African and German legal systems, agreements are still a controversial

[510] Statistics are rare or not usable; compare Chapter II.3.a; a rough estimate without proof of the author would be 60%.

issue even after many years of practice and, in the case of South Africa, over a decade since the statutory amendment in 2001. As *Bennun* remarks, 'there is a great deal to be uneasy about concerning plea bargaining generally in an accusatorial system, for it involves bypassing the finder of fact.' The legitimacy and success of a criminal process is put into question if it is concluded by way of a plea and sentence agreement.[511] *Bennun* highlights that 'the enthusiasm for plea bargaining has distracted attention from the consideration that a s 105A agreement which bypasses a proper trial in the usual manner is an exceptional procedure and not the normal procedure in which criminal justice should be dispensed.'[512] 'The well intended attempt to codify and to regulate the negotiated outcomes of a prosecution', he states further, 'seems to have been implemented without adequate consideration being given to the enormous implications this would have for some of the most fundamental issues in criminal justice.'[513]

Three facts are especially enriching upon comparing the South African and German systems. The first is a similarity: both legal systems have adopted plea bargaining and codified it over the last decade. The second is a dissimilarity: South African law implements plea bargaining into a common law legal system with accusatorial traditions whereas German law however is a continental law system characterized by inquisitorial roots. The third fact is that the German approach to plea bargaining is unique because it illustrates the difficulties of reconciling agreement procedure with inquisitorial principles and has developed out of itself rather than being adopted after the model of another legal system.[514]

1. Subject of agreements

Already the admissible content of an agreement varies in both countries, which uncovers fundamental differences. Generally, the subject to plea bargaining can be differentiated into two aspects. Negotiations and agreements can either relate to the progress or the outcome of the proceedings.[515] An example of a subject concerning the progress of the proceedings is an agreement on the procedures for taking evidence or on the extent of such procedures. The outcome of a process, on the other hand, can be negotiated with regard to the sentence but also with the aim of a dispensation or limitation of the

511 Compare Bennun (2007) *SACJ* 17 at 45.
512 Bennun (2007) *SACJ* 17 at 45.
513 Bennun (2007) *SACJ* 17 at 44.
514 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 73.
515 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 9.

prosecution.[516]

a. Mandatory content

In South Africa s 105A proceedings require, in addition to the accused's consent to plead guilty, an agreement on the sentence.[517] On the contrary, in Germany a sentence agreement can form part of the agreement by the terms of s 257c, but this is not a compulsory component. The reason for this – as will be presented – is the fundamental differences in the background and understanding of plea bargaining. Already at this stage, it can be observed that South African law is closer to a contractual and adversarial understanding whereas German law still seems, even with regard to the bargain procedure, to uphold the inquisitorial nature and tradition of the criminal procedure. Consequently, German juridical practice considers the bargain as a means to 'streamline', 'optimize' or even 'simplify' the conventional criminal procedure in cases that are suitable for a bargain. As the final agreement is not to be equated with the conviction – to the contrary it only serves the role of a 'preparatory assistance' towards a conventional conviction – it is in the eyes of German scholars, courts and practitioners not necessary to make the '*essentiali negotii'* of a usual criminal conviction, i.e. the plea and sentence, a mandatory part of the bargain. The function of the bargain thus differs greatly in both legal systems from an initial standpoint. South African law regards the bargain as a method to avoid having to conduct a conventional trial. German law can make use of the bargain in such a way, but such an application is not absolutely essential. Rather, negotiations and agreements can help to advance and promote the proceedings through any usable aspect. This also is evidenced by ss 160b, 202a, 212 StPO, speaking simply of pre-trial discussions on the status of the proceedings. The discussions in term of the mentioned provisions do not afford to focus on certain essential components. Rather they can deal with almost every aspect of the proceedings.

Consequently, German law is not restrictive concerning the possible content of the agreement. There are no mandatory components, although s 257c (2) 3 states that a confession should be an integral part of any negotiated agreement.[518] The confession is the counterpart to the plea of guilty in German law, but itis not a mandatory component

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516 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 9.

517 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-9.

518 The translation of s 257c StPO by the German Federal Ministry of Justice in cooperation with juris GmbH, author: *Kathleen Müller-Rostin,* 2011 originally contained the term 'shall' which might be misleading due to the fact that the orgininal text with the German word 'soll' clearly indicates that the confession is not a mandatory component.

either.[519] Nevertheless, in the usual bargain procedure, an agreement on the accused's confession is the core of all negotiations.

b. Further possible content

Bennun states that it is 'misleading and simplistic to regard the process of negotiating the outcome of a trial as involving no more than the plea and the sentence, which the South African legislation seems to imply.'[520] A look at a common definition of plea bargaining casts light on what negotiations are about. A plea bargain is 'an exchange of any concession, actual or apparent, for a plea of guilty,' which includes sentence bargaining, charge bargaining and 'implicit' bargaining.[521] One could also speak of 'fact bargaining'.[522] This explains what is meant by 'any concession'.[523] One can imagine an accused's interest in having certain facts presented in a particular way or in withholding an aggravating feature in exchange for a guilty plea.[524]

As a criminal trial is a complex process,[525] the subject of plea bargaining cannot be reduced to the conviction and sentencing.[526] Under the practice of plea bargaining a whole range of possible outcomes can be negotiated.[527] It is nearly impossible to limit the scope of the negotiations.[528] The actions and activities to be dealt with by way of plea bargaining depend on the interests of the parties involved.[529] *Steyn* names various examples:[530]

- A plea to the main charge but on the basis of lesser culpability, i.e. admitting dolus eventualis as opposed to dolus directus;
- A withdrawal of charges against co-accused on condition that the other accused pleads guilty to the charges;
- A conditional withdrawal of a charge based on a undertaking by the accused to perform certain duties, for example to attend counselling sessions or to do community work;
- A request to the court to dispose of a matter in terms of s 112 (1) (a) as opposed to

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519 SK-*Velten*, StPO, s 257c, para 22.
520 Bennun (2007) *SACJ* 17 at 21.
521 Bennun (2007) *SACJ* 17 at 21.
522 Bennun (2007) *SACJ* 17 at 21 with further references.
523 Bennun (2007) *SACJ* 17 at 21.
524 Bennun (2007) *SACJ* 17 at 21.
525 Bennun (2007) *SACJ* 17 at 21.
526 Compare Bennun (2007) *SACJ* 17 at 21.
527 Steyn (2007) *SACJ* 206 at 210.
528 Steyn (2007) *SACJ* 206 at 210.
529 Compare Steyn (2007) *SACJ* 206 at 211.
530 Following list can be found at Steyn (2007) *SACJ* 206 at 211.

s 112 (2) of the Criminal Procedure Act;

- The issuing of a notice in terms of s 57A of the Criminal Procedure Act whereby the accused can pay an admission of guilt fine with specific conditions for its suspension;
- An undertaking not to seek a sentence of direct imprisonment;
- An undertaking not to request that the accused would be under 'house arrest' as opposed to direct imprisonment, an application of s 276(h) of the Criminal Procedure Act;
- An undertaking as to what facts would be revealed to the presiding officer.

The scope of possible content in Germany is unlimited and consequently negotiations on almost every subject are imaginable. Nevertheless, a summary of some principles for admissible subjects to plea negotiations in German law is possible. The subject of the agreement has to comply with formal and material law. S 257c does not provide for unwritten exceptions from the provisions of the StPO.[531] Measures and decisions that are inadmissible where there are no negotiations or agreements do not suddenly become admissible through an agreement. An agreement can only generate admissibility where such measures and decisions depend on the consent of the participants. In such cases, the agreement contains the parties' consent to the particular instrument or conduct. S 257c (2) 3 provides for inadmissible content. The provision clarifies that the verdict of guilt, as well as measures of reform and prevention, are not admissible subjects of a negotiated agreement. Furthermore, to mention one of the unwritten examples, the so called 'measures of rehabilitation and incapacitation'[532] cannot be part of an agreement.[533] Another example for an inadmissible subject would be the driving disqualification order described in s 69 of the StGB (*Strafgesetzbuch*).[534] Generally, it can be said that prosecution and court cannot agree on a measure or declare to make a particular decision if prosecutor or judge is not permitted to act, i.e., if they do not have authority and jurisdiction over the subject-matter and territory.[535] Finally, the conduct has to be objectively justified by legitimate aims. The agreement can only serve the purpose of

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531 SK-*Velten*, StPO, s 257c, para 12.
532 Measures in terms of s 61ff StGB that are not sentence, but are deemed to prevent the public from dangers caused by the accused.
533 Krekeler/Löffelmann/Sommer-*Püschel*, StPO, s 257c, Rn.19.
534 Krekeler/Löffelmann/Sommer-*Püschel*, StPO, s 257c, Rn.19.
535 SK-*Velten*, StPO, s 257c, para 13.

carrying out appropriate and necessary means.[536]

c. Concluding remark

It can be summed up that in both legal systems the subject of plea bargaining can vary. Negotiations traditionally surround the subject of plea and sentence but are not necessarily limited to these issues. In South African law an agreement on the fact that the accused will plead guilty to a charge and on a certain sentence are essential and mandatory components. In German law the scope of possible subjects is entirely free. Even a plea, i.e., a confession and/or a sentence agreement under German law, is not mandatory.

2. Pre-trial agreements

As indicated before, German provisions provide for so called 'discussions' at a pre-trial stage in s 160b.[537] It should be examined then: whether South African law also provides for bargaining at a pre-trial stage; to what extent pre-trial bargaining in general affects the further proceedings; and, what can be subject to the bargain outside the main proceedings. Inquiries show that in Germany agreements mainly occur outside the main proceedings, under exclusion of the public, lay judges and the accused.[538] The term 'pre-trial agreement' is not precise with regard to the South African law system. In South Africa the plea and sentence agreement results in a trial not being conducted. Some scholars thus generally speak of 'pre-trial negotiations' to describe negotiations toward an agreement, as the agreement terminates the further trial procedure.[539] Nevertheless, the distinction between pre-trial agreements and agreements in the main proceedings shall be upheld. 'Pre-trial' can be understood as the stage before the prosecution files a charge against the accused. *Bennun* explains that it was clear from s 105A (1) 'that, before any question of plea and sentence negotiations can possibly arise, there must first be a decision to prosecute and a charge accordingly brought against an accused.'[540] Consequently, the stage after the decision to prosecute but before the charge is brought against the accused can be named 'pre-trial'.

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536 SK-*Velten*, StPO, s 257c, para 13.

537 Schünemann in Riess-FS, 543 and Weigend (1999) *NStZ* 59 raise concerns; Meyer-Goßner (in Kolloquium for Gollwitzer 2004, 175) supports s 160b as an agreement procedure.

538 SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 10; it hast o be assumed that *Velten* understand the exclusion of the accused in the way that his legal representative takes part in the negotiations.

539 Compare Clarke (1999) *CILSA* 141.

540 Bennun (2007) *SACJ* 17 at 24.

a. Statutory recognition

German law acknowledges pre-trial agreements, although the term ‘agreement’ is not used. Instead of the term ‘Verständigung’ (*understanding, convergence of minds*), which is used by s 257c StPO for agreements in the main proceeding, pre-trial negotiations are called ‘Erörterung’ (*discussion*) in s 160b StPO. This carefully chosen term reveals the concerns of the German legislature. It is intended to avoid the impression of negotiations and agreements in a contractual sense. Nevertheless, the provision aims to enhance the participants’ ability to discuss the status of the proceedings at the stage of preliminary proceedings.[541] Such discussions have always been common practice.[542] A prohibition of such a communication would not be enforceable.[543]

In South Africa negotiations and agreements seem to be less considered or even maybe less recognized as a pre-trial instrument. Unlike in Germany, there are no explicit provisions regulating discussions towards mutual consent at a pre-trial stage. However, South African scholars unwittingly touch on the issue. *Steyn* mentions in passing that plea bargaining − with regard to the situation prior to 2001 − once 'lacked formal recognition as a pre-trial procedure that fulfilled a specific function in the criminal process'.[544] He points out that 'prosecutors are in a position to withdraw charges and stop prosecutions without any questions being asked by the judiciary as to what informed the decision'.[545] *Steyn* makes the personal observation that such prosecutorial discretion in a majority of cases was the result of informal plea negotiations or representations that were made by the defence to the prosecutor to intervene in this way. This 'informal' practice, in his mind, was formalised by s 105A.[546] The use of the term 'informal' in this context is thus misleading. Whether bargains are formal or informal simply depends on the question of whether they comply with existing statutory provisions. What *Steyn* touches upon instead is the distinction between different stages of proceedings, i.e., the pre-trial and trial stages. Clearly, the use of the term ‘pre-trial’ oftentimes is used to describe plea bargaining in general, as the right to a trial is relinquished by the accused. Nevertheless, *Steyn* reveals that he speaks of the negotiations during the preliminary proceedings when he mentions the prosecution’s discretion to steer the proceedings, i.e., to decide whether to initiate or stop prosecution.

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541 Meyer-Goßner, StPO, s 160b, para 1.
542 Meyer-Goßner, StPO, s 160b, para 1.
543 Meyer-Goßner, StPO, s 160b, para 1.
544 Steyn (2007) *SACJ* 206 at 206.
545 Steyn (2007) *SACJ* 206 at 206.
546 Steyn (2007) *SACJ* 206 at 207.

Although pre-trial communication will often prepare for and result in a s 105A bargain procedure, such early discussions should not be equated with the usual plea bargain procedure before the court. Technically they have to be differentiated, i.e., the pre-trial stage has to be viewed separately from the trial and the main proceedings. This is already evidenced by the fact that pre-trial negotiations can by themselves lead towards the withdrawal of the charges, which makes a plea and sentence agreement superfluous. Thus, this stands to disagree with *Steyn*, who seems to be of the opinion that pre-trial negotiations became statutory in South Africa in 2001. As the comparison with Germany shows, while the explicit s 160b was inserted into the code along with the s 257c regulating the bargain in the main proceedings, such a provision cannot be found in the South African law. S 105A obviously does not include pre-trial negotiations. Thus, it can be concluded that pre-trial negotiations still are conducted informally due to a lack of provisions. This will later be further proven by the presentation of *Rodgers*' view.[547]

b. Conduct of pre-trial agreements

The prosecution can initiate pre-trial discussions but is not obliged to do so.[548] The participants of the pre-trial stage are the same as in the later main trial, except that the court does not take part.[549] The acting parties of the pre-trial stage obviously include the defendant and his legal representative.[550] The victim as a complainant can also take part in these discussions.[551] Oftentimes it will be appropriate to integrate the victim into the discussion.[552] Witnesses however usually do not participate.[553] The requirement that the status of the proceedings has to appear suitable to expedite the proceedings – as prescribed in s 160b – cannot be overstressed.[554] Usually this requirement is fulfilled.[555]

Most of the discussion involves the dispensation of the prosecution.[556] Possible reasons for dispensing prosecution are petty offences (s 153) or a dismissal under conditions and instructions that are sufficient to eliminate the public interest in criminal prosecution (s 153a). Furthermore, the prosecution may discuss the dismissal of insignificant secondary penalties (s 154) or may limit the prosecution if individual, severable parts of an offence or

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547 Compare Chapter V.3.c.
548 Meyer-Goßner, StPO, s 160b, para 1.
549 Meyer-Goßner, StPO, s 160b, para 2.
550 Meyer-Goßner, StPO, s 160b, para 2.
551 Meyer-Goßner, StPO, s 160b, para 2.
552 Meyer-Goßner, StPO, s 160b, para 2.
553 Meyer-Goßner, StPO, s 160b, para 5.
554 Meyer-Goßner, StPO, s 160b, para 5.
555 Meyer-Goßner, StPO, s 160b, para 5.
556 Meyer-Goßner, StPO, s 160b, para 6.

some of several violations of law committed arising from the same conduct are not particularly significant (s 154a StPO).

Another purpose is the preparation of a s 257c-agreement in the main proceedings. S 160b opens the door to sounding out whether the other party is willing to enter into an agreement later or to negotiate the possible content at present.[557] Discussions can still take place after the decision to open the main proceedings has been made. The provision of s 202a of the StPO is very similar to s 160b of the StPO. The difference is that, after the court's decision to open the main proceedings, now the court formally initiates discussions. The court's initiation may also be replaced by an initiation of the discussion by the accused and his legal representative or the prosecution.[558] Other accused in the same trial must be informed of the content of the discussion.[559] Only if the court plans not to open the main proceeding is the initiation of discussion inadmissible. S 202a discussions usually serve the function of preparing for a s 257c procedure, including a final agreement. In contrast with the s 160b procedure, s 202a discussions cannot enter into the conclusion of an agreement. The content of s 202a discussions does not become binding.[560] This demonstrates the preparatory function of s 202a, i.e., it only prepares for a full s 257c agreement at the stage of the deciding whether to open the main proceedings. Consequently, a pre-trial agreement that ends the proceedings prior to the trial can only be concluded in terms of s 160b.

There are no formal requirements for pre-trial discussions.[561] Usually they are conducted orally.[562] Not all participants have to be present.[563] In accordance with s 160b 2[564] of the StPO, the essential content of the discussion has to be documented in the prosecution file.[565] A major difference is that the court is not involved, as with the agreement procedure during the main proceedings.[566] This must be highlighted due to the fact that in German law the judge generally plays a central role throughout the bargain procedure. Nevertheless, at a pre-trial stage such involvement of the court is not possible. Thus, the discussions can be conducted more liberally and can be free from any conflicting intentions the court might have.

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557 SK-*Wohlers*, StPO, s 160b, para 1; BT-Drucks. 16/12310, p. 11seq..
558 Meyer-Goßner, StPO, s 202a, para 1.
559 Meyer-Goßner, StPO, s 202a, para 1; BGH (2009) *NStZ* 701; (2011) *StV* 72.
560 Meyer-Goßner, StPO, s 202a, para 3.
561 Meyer-Goßner, StPO, s 160b, para 8. SK-*Wohlers*, StPO, s 160b, para 5.
562 Meyer-Goßner, StPO, s 160b, para 8.
563 Meyer-Goßner, StPO, s 160b, para 8.
564 Sentence 2.
565 SK-*Wohlers*, StPO, s 160b, para 6.
566 Compare s 257c (1) 1 StPO that already reveals that it is the court that initiates the bargain.

Another striking difference to the usual bargain procedure during the main proceedings is that s 243 (4) StPO is not applicable with regard to s 160b negotiations, i.e., negotiations that only have occurred during the pre-trial stage and which have not formally been implemented in the main proceedings. This provision describes the course of the main proceedings and states that the presiding judge shall declare whether discussions pursuant to ss 202a or 212 have taken place. Thus, s 160b negotiations are not disclosed in the trial. It can be assumed that informal negotiations, i.e., negotiations that do not comply with mandatory formal requirements and that are 'kept in the dark,' are associated with s 160b StPO. The provision does not set clear borders or requirements for the bargain, and oftentimes the parties will not think of the provision when negotiating at the early stages of proceedings. As s 160b StPO simply allows these 'discussions', parties disregard statutory legality in case that they stick to negotiated terms during the subsequent trial without disclosing such consent to the court.

As said before, pre-trial negotiations in South Africa are not regulated by law. Consequently, there is no formal bargain procedure that can be presented. Pre-trial negotiations in South Africa are instead conducted informally. The application of these informal bargains at a pre-trial stage will be presented in the subsequent chapter.[567]

c. Related procedure

Bargaining at a pre-trial stage in both legal systems has been surrounded by provisions with consensual elements for a long time. Whereas plea bargaining at the trial-stage had not been regulated before the advent of s 105A in 2001 and of s 257c in 2009, provisions on, for instance, the consensual dispensation of charges have long been known. This particular procedure is regulated by s 153 seqq. of the German StPO. The consensual disposal of proceedings at a pre-trial stage is not completely unknown under South African law either. Generally, it is within the discretion of the prosecutor to decide which offence will be charged and whether the prosecution will proceed.[568] For example, a prosecutor may charge an accused with a less severe offence, which due to prescribed maximum sentences materially affects the ability of the court to sentence the accused.[569] The prosecutor may consequently accept a plea of guilty to an alternative or lesser charge, as contemplated in s 6 of the South African Criminal Procedure Act.[570] *Isakov* and *van Zyl*

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567 Compare Chapter V.3.c.
568 South African Law Reform Commission, Project 73 (2001) at para 3.1.
569 South African Law Reform Commission, Project 73 (2001) at para 3.1.
570 South African Law Reform Commission, Project 73 (2001) at para 3.2.

Smit explain that 'accordingly the prosecutor may at any stage before the trial accept such reduced pleas as he think fit'.[571] Also, s 57, providing for an admission of guilt and payment of fine without appearance in court, may be used in an arrangement with the accused. As these brief examples show, consensual disposal of charges prior to a trial is not foreign to the criminal law of either country. Provisions on the disposal of charges however do not regulate the mutuality of the bargain. Therefore, they have to be combined with agreements which in South Africa due to the lack of provisions are frequently informal.

d. Concluding remark

Under German law pre-trial discussions offer a loophole for liberal negotiations that are not formally guided by the court. This is an important benefit considering the fact that the German judge generally has a powerful and central position and thus dominates the conduct of the proceedings. By making use of pre-trial negotiations the parties, i.e., the defendant and the prosecutor, are enabled to even more effectively steer the later trial by themselves, if they have not already agreed dispense the charges. If negotiations take place in preparation for a s 257c-agreement, both the documentation in the prosecution file and the negotiated terms, such as the possible renunciation of a further search for evidence or the preliminary hearing of witnesses by the prosecutor, will affect the court's view of the case. It has to be kept in mind that the prosecution file is the basis for the court to judge on the case. In South Africa, however, pre-trial discussions seem to be out of the scope of scholarship and mostly seem to be regarded as a mandatory first step towards a s 105A agreement.

3. Informal agreements

The term 'informal agreement' is used in two ways. One is to describe the practice of plea bargaining prior to the advent of statutory provisions such as s 105A of the Criminal Procedure Act and s 257c of the StPO. The other refers to negotiations and agreements that do not meet – and are not aimed to conform to – the formal requirements of statutory bargain provisions. This chapter will focus on the latter meaning of informal negotiations and agreements, i.e., the calculated neglect of formal requirements by the parties. Informal bargains may be conducted because of various aspects. Aside from examination in the context of specific problem areas, a general first approach to informal negotiations and

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[571] South African Law Reform Commission, Project 73 (2001) at para 3.2; Isakov/ van Zyl Smit (1986) *SACC* 10.

agreements shall be made upfront.

a. Relevance

Informal plea bargaining may be of relevance where statutory formal plea bargaining may not apply, where it sets insurmountable barriers or simply where it is too time consuming because it necessitates a certain formal conduct. *De Villers* even states that it could be argued 'that the only reason why an accused would rather enter into a cumbersome section 105A agreement instead of a conventional plea and sentence agreement is because the conventional agreement does not bind the court.'[572] Some presiding officers may still not be willing to make use of s 105A agreements that could be − in the eyes of *De Villers* − easily done away with by means of appropriate legislation.[573] *De Villers* however does not further specify this proposal.

While informal plea bargaining remains possible in South Africa even in light of its statutory provisions,[574] this is not the case in Germany. The new German law on agreements inserted, despite s 257c, the main provision on plea bargaining and several other provisions, such as ss 160b, 202a, 212 StPO, that deal with negotiations during the preliminary proceedings and the stage of preparation of the main hearing. The statutory law in Germany tries to cover negotiations of all kinds at any stage of the criminal procedure. S 160b, along with s 202a, describes the difference between formal and informal bargaining at a pre-trial stage and the obligation to document the essential content of the discussion. Documentation is only mandatory if the outcome of the discussion is either positive or negative; it is not necessary if the discussions have not dealt with essential aspects.[575] The conclusion of an agreement has to be documented in detail to prevent dispute over its content at a later time.[576] The same applies to an agreement that has been concluded with reference to a later agreement in the main proceedings.[577] Thus, pre-trial 'informal bargaining' only needs to be documented in order to become formal. Against this background, the BGH recently stated that informal agreements that do not meet the requirements of the above mentioned provisions do not comply with the criminal procedure and therefore shall be null and void.[578] Thus, informal bargaining can be assumed to be interdicted after the statutory amendment of the new

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572 De Villers (2004) *De Jure* 244 at 253.
573 De Villers (2004) *De Jure* 244 at 253.
574 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-8.
575 Meyer-Goßner, StPO, s 160b, para 8; Bittmann (2009) wistra 414.
576 Meyer-Goßner, StPO, s 160b, para 8; BGH court order of 29 November 2011 − 1 StR 287/11.
577 Meyer-Goßner, StPO, s 160b, para 8.
578 Compare BGH court order of 4 August 2010 − 2 StR 205/10.

comprehensive provisions on plea bargaining in 2009.

In South Africa, however, there may still be a bigger need for informal plea bargaining, because – to mention one example contrary to the German provisions – s 105A (1) (a) requires in addition to the plea of guilty a sentence agreement. As a result, the formal procedure is limited to cases in which the parties at least enter, into a sentence agreement, amongst others. It can be assumed that the legislator only intended to regulate the sentence agreement procedure.[579] As a consequence, all bargaining that is not about a sentence agreement has to follow the informal procedure, whereas Germany's s 257c covers all kind of negotiations. Another aspect indicating a need for informal bargaining is that formal bargaining is limited to accused that are legally represented. Thus, informal bargaining offers opportunities to those who are not represented. Summed up, all bargains that do not contain plea and sentence agreements under participation of a legally represented accused are informal.[580]

An interesting aspect concerning the question of why informal bargains in South Africa coexist with statutory provisions lies within the very fundamental differences of the criminal procedure in both countries. In an accusatorial system, such as South Africa's, informal negotiations remain admissible because the mutual consent of the accused and the prosecutor generally is a significant feature of the proceedings. In a system with inquisitorial traditions, such as the German StPO, all parties are bound to the instruments and written procedures that more strictly guide the investigation of facts.[581] Nevertheless, in both legal systems it remains unclear what impact informal negotiations have on the trial. It will be examined later whether a court that waives certain formal requirements that would otherwise be necessary for a binding formal agreement is bound to its decision to waive those requirements due to the principle of fair trial.[582] Furthermore, it will be presented whether there is a protection against having the court steer a trial and the conduct of the accused by making concerted use of informal plea bargaining.[583]

b. Preceding of formal procedure

Informal bargaining applies to the preparation of formal agreements in terms of s 105A or s

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579 South African Law Reform Commission, Project 73 (2001) at para 5.14; Rodgers (2010) *SACJ* 239 at 244.

580 See examples at Rodgers (2010) *SACJ* 239 at 240.

581 The impact of accusatorial and inquisitorial law tradition on the nature of bargains will be discussed at the end of the thesis in further detail.

582 Compare Chapter V.9.b.

583 Compare Chatper V.14.

257c. Oftentimes these preceding negotiations will take place at a pre-trial stage during the preliminary investigations. Informal agreements that precede formal procedure will be approached here by taking a broad view of the issue.

Rodgers examines the general difference between formal and informal agreements and starts off with the initiation process.[584] Directive No. 17 issued by the NDPP provides for the manner in which s 105A bargaining is to be initiated.[585] The rule states: 'Where it is clear that a legal representative of an accused has expressed a firm intention to enter into formal negotiations with a view to a s 105A agreement, the prosecutor must request a written offer to negotiate (which shall include the accused's proposals) be submitted to him/her at least 14 days before the intended trial date. Where the decision to prosecute is that of a Senior Public Prosecutor, the written offer is to be submitted to that Prosecutor and the period for submissions may be lengthened particularly where the Senior Public Prosecutor is at a centre removed from the court.' *Rodgers* holds that this description contains the distinction between formal and informal bargain.[586] As the Directive provides for a very strict and formal initiation process, this procedure is usually predated by a non-formal communication.[587] Directive No. 17 is clear enough that one cannot within reason consider a simple communication as a part of the formal procedure.[588] Thus, informal negotiations usually precede formal negotiations.[589] Moreover, the formal negotiations offer the prosecution the opportunity to initiate the bargain.[590] If the Directive is interpreted strictly − which it should be − formal initiation can only be done by the legal representative of the accused.[591] *Rodgers* emphasizes that 'the effect of Directive 17 means that undertakings made during informal negotiations cannot bind the state until the defence requests that formal negotiations commence.'[592] Thus, informal agreements can be initiated by both sides and formal negotiations only by the defence.[593] *Rodgers* holds that her interpretation is also indirectly supported by *Du Toit et al*. The latter describe that 'it is left to the prosecutor (who must have the necessary authorisation) and the accused (who must have a legal representative) to initiate the process and find such common ground as they can for purposes of a plea and sentence agreement which they can present to the

584 Rodgers (2010) *SACJ* 239 at 249.
585 Compare Rodgers (2010) *SACJ* 239 at 249.
586 Rodgers (2010) *SACJ* 239 at 250.
587 Rodgers (2010) *SACJ* 239 at 250.
588 Rodgers (2010) *SACJ* 239 at 250.
589 Rodgers (2010) *SACJ* 239 at 250.
590 Rodgers (2010) *SACJ* 239 at 250.
591 Rodgers (2010) *SACJ* 239 at 250.
592 Rodgers (2010) *SACJ* 239 at 250.
593 Rodgers (2010) *SACJ* 239 at 250.

court'.[594] Furthermore she refers to *Du Toit et al*'s statement that 'in practice much will depend upon each party's assessment of the probable outcome of the case and the bargaining power available to him or her.'[595] Under a strict interpretation of Directive 17 these statements can only be seen as an allusion to informal bargaining.[596] The conclusion that, once initial and tentative discussions have taken place and the defence has expressed an interest, Directive 17 should be followed describes the point in which informal procedure leads to formal proceedings.[597] *Rodgers*'s distinction between formal and informal negotiations is indeed correct from a descriptive point of view. What *Rodgers* did not state clearly enough is that the distinction between formal and informal is not limited to the initiation of the bargain procedure, as she examined the distinction with special regard to Directive 17. Nor is the distinction limited to bargaining in the main proceedings.[598] Moreover, the term 'informal' generally can be used to describe negotiations and agreements that do not comply with formal requirements.[599] One specific feature of South African law is that it only provides for statutory law concerning the agreement concluded in the main proceedings. Bargaining at the pre-trial stage, or even very early in the trial, is not regulated by law. The fact that South African law does not contain explicit pre-trial provisions besides s 105A, regulating plea bargaining with regard to the trial, could be a reason why the general distinction between formal and informal might appear to the South African reader to be less significant than the distinction between procedures that comply with s 105A and those that do not. To speak of informal agreements only in the sense of agreements that do not conform to s 105A ignores that, in additon to this application, there is a second main field of application under South African law: the pre-trial stage.

German law, however, with s 160b for the preliminary proceedings and s 202a, 212 for the stage of discussion whether to open the main proceedings, provides for provisions on bargaining at the pre-trial stage.[600] The German legislature tried to regulate bargaining in

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[594] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-7.

[595] Rodgers (2010) *SACJ* 239 at 250; Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-10

[596] Compare Rodgers (2010) *SACJ* 239 at 250.

[597] Compare Rodgers (2010) *SACJ* 239 at 250; Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-10.

[598] The term 'main proceedings' is used rather than the term 'trial' to generally describe the corresponding stage in both legal; in Germany an agreement does not exclude a trial, i.e. the agreement procedure is not an alternative to the trial, it only shortens the conventional trial procedure.

[599] That the term is also used to describe traditional, pre-statutory negotiations and agreements has been said before.

[600] The latter is a stage of procedure of its own (ss 199 – 211 StPO) in which the judge decides, after the prosecution has already judge positively and had handed in the charge, whether or not to say yes to the question if the investigations offer sufficient reason for a trial.

all forms and at all stages. Informal plea bargaining therefore is inadmissible. Nonetheless, there will always be informal bargaining at a pre-trial stage if the prosecution does not document successful or unsuccessful negotiations in the prosecution file (because the documentation makes the negotiations formal). However, as the documentation is the only prerequisite for formal pre-trial bargaining, there may occur informal bargaining due to carelessness with regard to this obligation. But there is no need for these informal bargains in order to circumvent certain requirements or limitations. These informal preparatory negotiations occur naturally.

Discussions in terms of s 202a (which other than s 160b-discussions take place after the decision of the court to open the main proceedings) are preparatory negotiations towards an s 257c-agreement and therefore do not bind the court. [601] Without violating the agreed outcome of the preparatory discussions the court may deviate from the bespoken content. The court may only have the duty to indicate its deviation.[602] This is a major distinction to the bargaining in terms of s 160b, which allows the conclusion of an enforceable agreement that binds the parties.[603]

c. Strictly informal bargains

In addition to the function of informal bargain as a forerunner of formal plea and sentence bargains, there is a field of application in which informal bargaining does not serve the function of arranging later formal procedure. Such bargaining is instead intended to remain informal throughout the whole proceedings and thus is used as an unofficial and hidden means. What shall be named a 'strictly informal' bargain can occur at the pre-trial stage or during the main proceedings. It is the consequent conduct of bargain in an informal manner. *Steyn* for instance states that her 'personal experience suggests that the exercise of such prosecutorial discretion in a majority of cases is a result of informal plea negotiations or representations that are made by the defence to the prosecutor to intervene in his way.'[604] *De Villers* holds that it was foreseeable that undefended accused will make use of the informal system of plea bargaining where there is less supervision than with the section 105A procedure.[605] Thus there are fields of application for a strictly informal bargain procedure both at a pre-trial stage as well as an alternative to s 105A-procedure. It is best to recall that in Germany it is assumed that with the new statutory

601 Meyer-Goßner, StPO, s 202a, para 3.
602 BGH (2011) *NJW* 3463.
603 Compare Chapter V.9.
604 Steyn (2007) *SACJ* 206 at 206/207.
605 De Villers (2004) *De Jure* 244 at 254.

provisions on plea bargaining there is no room left for informal bargaining. Nevertheless, there will always be a tendency not to use mandatory procedural instruments that may even act, especially in case of pre-trial negotiations in terms of s 160b, simply to circumvent obligatory documentation requirements. On the other hand, in South Africa statutory plea bargaining is not considered the only admissible way to plea bargain. Although provisions on plea bargaining have been inserted in the South African criminal procedure, informal bargaining remains possible. As said before, the motivation to make use of these instruments might be even greater due to the fact that South African law sets up stricter requirements concerning, for instance, their admissible content.

A recent BGH case illustrates the refusal to use formal procedure.[606] In a case before the BGH, the court had entered into negotiations during the preparation stage the trial and had announced that a suspension of the sentence could possibly be allowed in return for the confessions already given. The court recorded that the negotiations did not result in an agreement under s 257c. Later, the court imposed a custodial sentence that was not suspended. The BGH dismissed the remedy against this decision. *Meyer* considers this an abuse of the only apparent distinction between formal agreements that met the standard of ss 202a, 257c of the StPO and informal agreements.[607] He states further that the BGH violates the principle of a fair trial contained in Article 6 of the ECHR and the corresponding trust of the accused in a certain conduct of the court. This raises the question of which rules courts are bound to in informal negotiations. This is especialy relevant for German law, as the court according to s 257c (1) 1 has the right to initiate and lead through the negotiations, which it has not in South African law, s 105A (3) CPA. Should the court be allowed to negotiate and at the same time indicate a certain conduct, it is not bound if the judge simply formally declares that a s 257c - agreement has not been settled. As this question refers to a great extent to the question whether agreements bind or not, this shall be examined later.[608]

d. Accidental informal procedure

A third category concerns cases in which the court or the parties unwittingly fail to fulfil formal requirements. In contrast with the preceding category, informal procedure is not intentionally used as an alternative to the formal procedure. If the participants fail to conform to certain requirements, they will nonetheless have a shared interest to proceed in

606 BGH court order of 4 August 2010 − 2 StR 205/10 = (2011) *NStZ* 107.
607 Meyer (2011) *HRRS* 17 at 17.
608 Compare Chapter V.9.b.

the regular way. Thus, the issue is of less relevance because it can be assumed that the parties will not challenge the outcome of their wrongful negotiation. An example of accidental informal procedure is the case where a German prosecutor conducts negotiations and enters into an agreement with the accused on the further proceedings but later accidently fails to record the fact that negotiations and the parties' agreement. In most cases, however, the record will be incomplete or too short, which will render as wrongful conduct a nevertheless formal bargain procedure.

e. Legal consequences

It is a key issue whether informal agreement procedure have an enforceable outcome, i.e., whether they bind the court or at least determine a particular conduct based on the principle of a fair trial. It can be said that informal agreements in both legal systems do not formally bind the court. [609] As informal agreements generally do not bind the court, this raises the question of how informal procedural actions affect the conduct of the trial. A binding effect, even though not formally acknowledged, may arise out of the principle of a fair trial. This will be further examined in the corresponding chapter which deals with the binding effect of agreements.[610]

Another striking difference in the legal consequences is that informal bargains in South Africa do not replace the conventional trial procedure as the parties do not enter into a written agreement with an annexure that terminates the trial. In Germany on the other hand formal bargaining is marked only by the documentation of the bargain and a 'few' requirements that have to be fulfilled. The bargain procedure, apart from the documentation duties, is very similar, regardless of whether it is informal. Consequently, informal bargaining in South Africa is more of an alternative procedure which follows its own rules than in Germany.

f. Concluding remark

It can be summarized at this point that informal procedure in Germany is generally inadmissible, while in South Africa it is admissible. In practice, however, informal bargains also occur in Germany.

There are two major functions of the informal bargain. One is to serve as an alternative procedure that does restricted by the requirements of formal plea bargaining which the

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609 For South Africa: De Villers (2004) *De Jure* 244 at 253; for Germany: BGHSt 43, 195 at 205 seq.; (2001) *NStZ* 555 at 556; (2009) *NStZ-RR* 1 = only recorded formal agreements bind the court.

610 See Chapter V.9.

participants may wish to avoid. An example is the aspect of bargains that exceptionally do not contain an agreement on the sentence, (which South African law does strictly require) but instead are solitary deals with certain procedural steps. Another example would be an agreement in which the accused consents to a confession in exchange for the prosecution sparing certain family members from having to testify. The other major field of application of informal bargaining is the pre-trial stage. The actual state of legislation is presented in the following table.

Feature		**South Africa**	**Germany**
Stage	Pre-trial	Informal	Formal (s 160b, 202a) Informal inadmissble
	Main proceedings	Formal (s 105A) Informal admissible	Formal (s 257c) Informal inadmissible
Subject	Sentence and plea related	Formal	Formal
	Not sentence and plea related	Informal	Formal

4. Public trial before an ordinary court

The right to a public trial is an essential constitutional principle both in South Africa and Germany. As plea bargaining mainly takes place between the accused and the prosecution, the principle that a trial has to be conducted in public could be violated. Usually only the trial is under public surveillance. Plea bargaining in South Africa replaces a trial; in Germany it significantly shortens it. Usually negotiations towards an agreement are conducted in camera outside the courtroom, which raises concerns.[611] Already the pre-statutory decision of BGHSt 43, 195 – motivated by broad criticism − stated in its first guiding principle that the bargain is to be conducted in a public trial, i.e., during the main hearing, and that this however does not exclude preliminary talks.[612] Interestingly, the SARLC also observed that the public's attitude toward agreements is one of suspicion and thus admitted that secret negotiations have a grave impact on the image of the

611 BGH (1998) *JR* 245 at 247; Baumann (1987) *NStZ* 157; annotation of Böttcher (1991) *JR* 116 at 118.
612 See Chapter III.3.d.

administration in justice.[613] Nonetheless, the SALRC considered this argument to be 'ill-conceived' if the process was properly regulated.[614] The secrecy would be removed through the courts approval of the agreement.[615] Furthermore, it would be unrealistic and unattainable to fully conduct an open trial.[616] One could question if the abovementioned safeguards indeed have been installed with the statutory provisions as proposed by the SALRC and furthermore if a full performance of the bargain in the main proceedings as assumed in German law is realistic.

a. Public trial and ordinary court

The principle of a public trial and the right to be tried before an ordinary court shall be further examined. Directive 2 of the Directives issued by the National Director of the Public Prosecutions on 14 March 2002 states that 'the demands of justice and/or the public interest' shall not be sacrificed when utilizing the s 105A procedure. S 35 (3) (c) of the Bill of Rights states that an accused's right to a fair trial includes the right 'to a public trial before an ordinary court'.[617] This right not only matters to the accused but also serves public interests. It is in the public interest that criminal justice is not been done behind closed doors.[618] S 35 (3) (c) aims to guard against the iniquities of secret trials and is destined to contribute to public confidence in the justice system.[619] A public trial is one that is open to the public and one that the media can report on.[620] Although there are a number of statutory exceptions from this rule, such as for example s 153 (circumstances in which criminal proceedings shall not take place in open court.) and s 154 (prohibition of publication of certain information relating to criminal proceedings), s 105A does not provide for one. Although the public trial is not explicitly mentioned in the German Constitution, it is enshrined in the rule of law (*Rechtsstaatsprinzip*) in the terms of constitutional Article 20 (3) of the GG, Article 6 (1) 1 of the ECHR and explicitly in s 169 of the GVG of the legislation.

'Ordinary court' does not only mean that an accused is tried in a court that is 'previously established by law' and which applies 'duly established procedures'.[621] Indeed, the term

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613 South African Law Reform Commission, Project 73 (2001) at para 5.13.
614 South African Law Reform Commission, Project 73 (2001) at para 5.13.
615 South African Law Reform Commission, Project 73 (2001) at para 5.13.
616 South African Law Reform Commission, Project 73 (2001) at para 5.13.
617 Bennun (2007) *SACJ* 17 at 37; Constitution of South Africa, 1996, s 35 (3) (c).
618 Bennun (2007) *SACJ* 17 at 38.
619 Currie/de Waal, *The Bill of Rights Handbook*, p. 782; *Klink v Regional Court Magistrate NO* 1996 (3) BCLR 402 (SE).
620 Currie/de Waal, *The Bill of Rights Handbook*, p. 782; Steytler, *Constitutional Criminal Procedure*, p. 251.
621 Currie/de Waal, *The Bill of Rights Handbook*, p. 783; Steytler, *Constitutional Criminal Procedure,* p. 267.

'ordinary court' also tends to protect the accused from abuse by the executive to harm judicial independence and impartiality.[622] These rights are secured by s 185 of the Constitution, outside the Bill of Rights.[623] Plea bargaining may imply implications with these principles.

b. Protection of the accused's interests

The principle of a public trial has a 'passive' and an 'active' component. The passive feature is that the public participates in criminal trials and by that means controls the criminal justice system. The active feature is that the accused has a right to be placed before an ordinary court and that the trial is held in public. The latter component shall be briefly examined.

It is questionable in which way this constitutional right of the accused is secured throughout the plea bargaining procedure. Msimang J, in the *S v Armugga* case on defining the term plea bargaining, amongst other statements held that 'the accused (is) bargaining away his right to go to trial'.[624] *Bennun* explains to the point that 'bargaining away the right' can only be in reference to the accused's constitutional rights. The accused would not be free to waive the right to a public trial, on the other hand, because in that case the public interest could be defied at will by the accused'.[625] *Bennun* furthermore raises the question of 'whether an accused has the right to use s 105A to secure a trial conducted in such a manner that evidence which would otherwise have been in the public domain does not reach it.'[626] Indeed, the effect of an agreement 'is to change greatly what the public may learn about a case from what would have emerged had there been no such agreement.'[627] Thus, plea bargaining can offer the accused the opportunity to protect himself from unwelcomed public attention, which especially well-known personalities may appreciate. Whether the public interest opposes such conduct will be examined in the subsequent section.

Although there are benefits for the accused, it should not be lost out of sight that the accused may be pressured to consent to deviate from the conventional trial procedure by means of the offer of a chance to receive a lenient sentence. Experience shows that plea

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622 Currie/de Waal, *The Bill of Rights Handbook*, p. 783; Steytler, *Constitutional Criminal Procedure,* p. 267.
623 Currie/de Waal, *The Bill of Rights Handbook*, p. 783.
624 *S v Armugga & others* 2005 (2) SACR 259 (N) at 265a.
625 Bennun (2007) *SACJ* 17 at 38, who supports Devenish, The South African Constitution (2005) para 168.
626 Bennun (2007) *SACJ* 17 at 37.
627 Bennun (2007) *SACJ* 17 at 21.

bargaining usually results in such a reduction and can even be considered as an essential part of the bargain.[628] Consequently, the accused might fear losing the benefit of such a reduction if he refuses an offer to negotiate. If he agrees to negotiations under such circumstances, the accused might also lose the relief of being proved not guilty in a public trial or of presenting to the public the uncertainties of the case.

c. Protection of public interests

As presented earlier, the accused waiving his right to a public trial also affects public interests. One could therefore ask whether it would be in the public interest to allow an accused to waive the right to a public trial before an ordinary court, as mentioned in s 35 (3) (c) of the Constitution, without considering the motives for the waiver.[629] On the other hand, it is hard to imagine a procedure in which the accused would have to state his motives for the agreement. Thus, abuse of the bargain procedure possibly only is achieved by reliable legislation and a well-functioning internal control of the prosecution.[630] Consequently, it is not within the public's discretion whether the accused waives his right to a public trial and enters into an agreement.

The following remarks will confirm that it is the accused's free decision whether to negotiate. Furthermore, the public elements of the plea bargaining procedure will be revealed. The first point to state is that s 105A CPA does not contain any restrictions intended to exclude certain cases from bargaining due to the public interest in a public trial. S 105A (2) (a) sets up the requirement that the accused must be informed of certain procedural rights at a pre-agreement stage. These rights are the right to be presumed innocent until proven guilty beyond reasonable doubt, the right to remain silent and not to testify during the proceedings and the right not to be compelled to give self-incriminating evidence.[631] The right to a public trial before an ordinary court does not form part of the information that has to be given to the accused. One reason could be that the legislature regarded a properly concluded agreement under s 105A not to stand in the way of a public trial before an ordinary court.[632] This raises the question of to what extent plea bargaining still can be considered a 'public' trial, i.e., to what extent statutory plea bargaining secures

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628 Only compare Trichardt/Krull (1987) *THRHR* 428 at 433.
629 Bennun (2007) *SACJ* 17 at 39.
630 Compare Chapter V.14.
631 S 105A (2) (a) (i)-(iii) CPA; All these rights are contained in the Bill of Rights and are components of the constitutional right to a fair trial (s 35 (3) (h) – (j) of the Constitution; Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-14.
632 Bennun (2007) *SACJ* 17 at 40.

the public interest.[633] Another question would be how abuse, i.e., 'behind closed doors' trials, can be avoided. The trial can still be considered 'public' due to s 105A (2) (b). The section contains the requirement that the factual basis of the plea and sentence agreement be set out fully, i.e., that the agreements 'state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admission made by the accused.'[634] This requirement is regarded to be of crucial importance due to the fact that a conventional trial will not take place.[635] *Bennun* contrariwise puts into question whether compliance with the mentioned provisions already guarantees the trial to be 'public'.[636] The substantial facts would not include some information about the key witnesses and how their potential testimony is to be judged.[637] Indeed, the written agreement does not state anything about these judgments. Thus, there is no opportunity to form for oneself a picture of the substance of these facts, i.e., whether they are true or not. To emphasize it once again, the main problem is that the written agreements do not reveal the court's view on the case other related thoughts and concerns. Furthermore, *Bennun* is right when he asks if these are not matters 'in which the public might have a legitimate interest and, if they are, who would have the *locus standi* to porsue the matter – and by which procedure?'[638]

A focus on the German Law at this point could be worthwhile. The right to a 'public trial' has always been an issue of outstanding significance.[639] German s 169 of the Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*) guarantees the right to a public trial. Thereafter the hearing before the adjudicating court, including the pronouncement of judgments and rulings, shall be public.[640] A violation of that rule forms a so called 'Absolute Ground for Appeal on Law,' which means that the appeal in any case will be successful. S 338 No. 6 StPO, which enumerates all absolute grounds, explicitly mentions 'the provisions concerning the public nature of the proceedings'. Already the pre-statutory BGH case law provided for the rule that negotiations toward an agreement have to take place in public main hearings and that all

633 Bennun (2007) *SACJ* 17 at 40.
634 See s 105A (2) (b) CPA; Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-15.
635 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-15.
636 Although he gives no answer to the question raised; Bennun (2007) *SACJ* 17 at 40.
637 Bennun (2007) *SACJ* 17 at 40.
638 Bennun (2007) *SACJ* 17 at 40.
639 Maybe due to german history in which military courts convicted soldiers and cilvilians to death without any public participation.
640 Compare s 169 GVG.

participants of the trial have to be present.[641] The decision was motivated on the following grounds. BGH stated that one of the greatest concerns that put the admissibility of agreements into doubt was the fact that they oftentimes were negotiated outside the main proceedings and the main hearing.[642] In the eyes of the BGH the publicity of the trial as written in s 169 of the GVG was violated.[643] The requirement that the trial be public is seen as one of the most fundamental institutions of the rule of law (*Rechtsstaatsprinzip*).[644] It serves not only to provide the public information but also as a means to control the justice system. Hence this ought to amount to trust in the courts. Control requires an insight into the essential course and the results of the main hearing.[645] The BGH in 1997 thus considered these principles to be violated by the agreement practice in Germany at that time. To make sure that the trial remains public, BGH set up the following requirement. Introductory discussions outside the main hearing shall be principally admissible.[646] But the court is required to expose the essential content of the negotiations and the outcome of the bargain in the main proceedings.[647]

Statutory law adopted these case law principles. First, as already shown earlier, s 243 (4) StPO, describing the main hearing, states that the presiding judge shall state: whether negotiations at a preliminary stage have taken place, whether their subject matter had been the possibility of a negotiated agreement (s 257c) and, if so, their essential content. By the terms of s 243 (4), this duty shall also attach in the further course of the main hearing, insofar as changes have occurred in regard to the information given at the commencement of the main hearing. Second, s 273 on the record contains subsection (1a), inserted by the new law on agreements in 2009, which states that the record must also indicate, in essence, the course and content as well as the outcome of a negotiated agreement pursuant to s 257c. Furthermore, it states that the same shall apply to the observance of the information and instruction requirements set out in s 243 (4), s 257c (4) 4 and s 257c (5). Finally, the provision stipulates that, if no agreement was negotiated, this shall also be noted in the record. Pre-trial negations also have to be filed in terms of ss 160b and 202a. To sum it up, German law only provides for formal requirements

641 BGH 43, 245 = (1998) *JR* 245.
642 BGH (1998) *JR* 245 at 247; BGH court order of 20 June 1998 − 2 StR 275/97; Baumann (1987) *NStZ* 157; annotation of Böttcher (1991) *JR* 118; Hassemer (1989) *JuS* 890 at 892; Rönnau, *Die Absprache im Strafprozeß,* p. 161 seqq.; Wolfslast (1990) *NStZ* 409 at 414; Zschockelt in Salger-FS, 437.
643 BGH (1998) *JR* 245 at 247.
644 BGHSt 9, 281.
645 Rönnau, *Die Absprache im Strafprozeß,* p. 167.
646 BGH 43, 245 = (1998) *JR* 245.
647 BGH (1998) *JR* 245 at 248; Schäfer (1989) *DRiZ* 294.

concerning the fact that negotiations have taken place and concerning their essential conduct. Although s 257 (2) 2 assures that the obligation to establish the truth as codified in s 244 (2) of the StPO remains unaffected, which means that the judge still has the duty to investigate and clear up the substantial facts of the matter.[648] These investigations do not take place in the main hearing.[649] There is no statutory duty to discuss these matters in public. The fact that an agreement has been concluded is only taken down in the final judgement in terms of s 267 (3) 5. The judement does not have to state the content of the bargain.[650] This cannot serve the interest in a public trial, because the judgment stands at the end of the trial and frequently does not give any detailed information of the bargain procedure. Against this background the aim of preventing the court and the other participants from negotiating in the dark is not fulfilled under the use of a public trial. Actual case law only states that negotiations that have not been reduced to the court record in terms of s 273 (1a) do not bind the court.[651] This is a protection against a complete concealment of the negotiations. It can be summed up that the procedure established to guarantee public information in Germany are rules on how the bargain has to be filed, on which components have to be mentioned in the court record and on the obligation to present the essential content of the agreement in the main proceedings. In South Africa the documentation of a written agreement is intended to declare what has been subject to negotiations. These aspects are the public components of plea bargaining.

d. Public control

It could be argued that the participation of lay judges would solve the problems of deficient information and especially of control by the public. As plea bargaining mainly occurs off the record, this might even be the central means by which to guarantee public control.[652] But the role of lay judges is rather minimal.[653] Lay judges usually first hear about the fact that negotiations have been concluded in the trial itself, not during the stage of preparing the trial or even before. This is because in German law they are not empanelled until the main proceedings begin.[654] Furthermore, unlike the professional judge they are not entitled to

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[648] Compare BGH (2010) *StV* 60.
[649] S 267 (3) 5 of the StPO.
[650] Meyer-Goßner, StPO, s 267, para 23a; BGH (2010) *NStZ* 348; (2011) *NStZ* 170.
[651] Meyer-Goßner, StPO, s 257c, para 31; BGH 43, 195 at 206; BGH (2001) *NStZ* 555; (2001) StV 554; (2009) *NStZ-RR* 01.
[652] Turner/Chodosh, *Plea Bargaining Across Borders*, p. 98.
[653] Turner/Chodosh, *Plea Bargaining Across Borders*, p. 98.
[654] Turner/Chodosh, *Plea Bargaining Across Borders*, p. 99.

review the case file. [655] Not all professional judges extensively discuss the issue with their lay judges but rather ask for their consent. [656] Consequently, the lay judge's influence is weak.

Having examined the lay judges and shifting back to the public's view, one could argue that the essential public interest in a 'public trial' however lies in a continuous report and full information about the process as it is conducted and on the court's finding on important issues, such as the essential witnesses and their testimonies. This material duty that is also anchored in the obligation to establish the truth[657] under German law, is not secured by formal requirements guaranteeing control by the public. Thus, the current state of legislation is comparable to the situation in South Africa. The public is neither given a satisfactory insight into the bargain procedure nor is provided a procedure by which to pursue matters that do not seem to comply with public interests in the case. However, one has to ask whether the public had such power in a conventional trial. In the conventional trial the public may enter into the courtroom and attend the trial. Procedural powers to steer the trial or review the judgment are not provided for. This task is fulfilled by the State. Even if assumed that the principle of a public trial is violated by the present regulations on plea bargaining in both countries, it must be asked whether the violation can be justified. A violation of constitutional principles is not always unlawful. The right to a public trial is limited where there are justified exceptions in terms of the limitation clause.[658] A drawback of the principle of a public trial is imaginable for instance where available courtrooms are limited.[659] Nevertheless, control through the public has to be upheld under all circumstances.[660] Even if public attention is restricted, substantial control must be granted. A lack of public participation is certain because the agreement in South Africa and the court record in Germany only give a summary of substantial facts without going into further detail. But on the other hand, the legitimacy of the public's interest should not be overrated. It is paramount that the public is acknowledged of the fact that a case has been bargained.

The details of the agreement − for instance *Bennun* mentions the indication of witnesses

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655 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 99.
656 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 99.
657 Compare s 257c (1) 2 and s 244 (2) of the StPO.
658 Compare Currie/de Waal, *The Bill of Rights Handbook*, p. 782; Burchell, *South African Criminal Law and Procedure, Vol. I*, p. 12.
659 BGH 24, 72.
660 BGH 24, 72 at 74; 27, 13 at 15; 29, 258, at 259 seqq.

and the nature of their testimonies[661] − are desirable, but not mandatory, components of the bargain procedure. This will be explained and justified as follows. First, in an accusatorial system such as South Africa's, it is easier to explain why the public is partly excluded from criminal proceedings and only informed by way of a summary. The opposing parties are free to bargain out the factual bases of the case and to agree upon which evidence shall be presented. The responsibility for proof of guilt lies upon the parties and not the judge. Thus, it is in terms of an accusatorial thinking explainable why there has been established a procedure that to a great extent leaves out the public. The prosecutor that is involved in the bargain is indirectly controlled by the public. He needs a written authorisation by the NDPP, and the state administration generally has to justify its actions. Apart from that the legality of the process is warranted by inquisitorial elements, such as the court's s 105A (4) obligation to satisfy itself that certain requirements of s 105A (1) (b) (i) and (iii) have been met. The latter sections contain formal requirements. The substantive requirements as contemplated in s 105A (1) (b) (ii), i.e., the nature of and circumstances relating to the offence, personal circumstances of the accused, any previous convictions of the accused and most importantly interests of the community, are within the responsibility of the prosecution, which on the bases of these features must initially decide whether to enter into negotiations. As said before, the prosecution has to be controlled by the public.[662] Thus, one can conclude that although public participation is weak, the principle of a public trial is still warranted.

In German law, as it comes from the inquisitorial tradition, it is argued that the principle of a public trial is not violated by the implementation of s 257c of StPO. Generally what is subject to a trial can be determined neither by the defence nor the prosecution. Inquisitorial principles afford that the court fully investigates a case and bases his conviction on findings of fact and on the guilt of the accused. However, there already exist procedures in German Criminal Procedure law that make an exception from these strict principles, for instance the possibility of a penal order. S 407 seqq. of the StPO provides a special type of procedure. S 407 (1) of the StPO states that, in proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offence may, in the case of misdemeanours, be imposed, after written application by the public prosecution office, in a written penal order without a main hearing. Where objections to the penal order are not lodged in time the order shall in terms

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661 Bennun (2007) *SACJ* 17 at 40.

662 Compare s 147 GVG regulating the right of supervision oft he prosecution.

of s 410 (3) StPO be equivalent to a judgment that has entered into force. As s 409 rules, the penal order requires very minimum content, amongst other things an enumeration of the evidence and legal consequences. The penal order does not reveal the court's or the prosecution's judgment of details. Even then, the court does not need to be convinced of the guilt of the accused; it is satisfactory that the court finds 'sufficient grounds for suspicions.'[663] This example reveals that established procedures, such as the penal order, limit the public's participation with regard to the details of a conviction. Thus, one cannot conclude that a judgment following an orally concluded agreement − which usually only contains mere and formal statement with regard to the bargain procedure − necessarily violates public interests. Furthermore, it would be contradictory to allow adversarial elements to be adopted and at the same time to insist on strict inquisitorial principles which may very well include an extensive public participation.

e. Concluding remark

Regarding the aspect of a 'public trial,' neither legal system offers attractive instruments aimed at guaranteeing comprehensive public participation. That the accused may, out of selfish motives, waive his right to stand before the bench in public is accurate. It is the accused's decision to shorten his own trial and spare himself from a lengthy procedure. In both legal systems the public's interest is guaranteed by inquisitorial elements which require the court to check compliance of several requirements and report substantial facts of the matter, as well as of the procedure and a prosecution that is controlled by the public. Even if an extensive discussion and report of substantial facts regarding a plea bargained case may be desirable, neither country's laws provide for such a requirement: not through legislative nor through constitutional demands. Furthermore, one would have to ask which procedure should be made available to the public in order to control plea bargaining.[664] Even in a conventional trial the public's participation is limited to information. Consequently, both the German court record and the South African written agreement, each containing the outlines and the content on the plea bargain, have to be regarded as sufficient.

5. Victim participation

The issue of victim participation at first glance seems to embrace nothing but the interest

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663 Meyer-Goßner, StPO, Introduction to s 407, para 1; Schaal Meyer-GedSchr p 427 seqq.; Schlüchter, *Das Strafverfahren*, para 788.5.

664 Bennun imposed such question in Bennun (2007) *SACJ* 17 at 40.

of those violated by an offence. In fact, the victim's procedural power and position may also serve the public interest and could also help ensure that justice is served. In that specific aspect the participation of the victim relates to the topic discussed before, which is that victim participation should neither be viewed as an equivalent to nor as entirely separate from public participation. [665] The main difference, however, is that public participation concerns the public in general while victim participation is aimed at a specific group of people.[666] Victim participation forms part of the German as well as of the South African provisions, which both recognise the interest of the victim in a formal way. Nevertheless, the victim's role in the process remains formal in that the victim is not given the power to effectually influence the outcome of the plea bargaining procedure, as will be shown.

a. Interests

In his 1996 article *Bekker* points to three main interests that necessitate victim participation. First, he mentioned the victim's financial interest in restitution being imposed as part of the sentence.[667] Where there is a case bargain the aim is to ensure that the defendant pleads sufficiently seriously so to allow restitution; in case of sentence bargain the aim is to promote an award of restitution.[668] Second, *Bekker* emphasizes the victim's interest of revenge that can occur as one amongst other broader interests.[669] Participation secures the victim's feeling that the violation led to a severe punishment.[670] Third, *Bekker* indicates society's interest in giving the victim a right to participate in the plea bargain.[671] Society benefits from victim participation in that more information is provided to the decision maker. At the same time it endorses the effective functioning of the criminal justice system.[672] The theory behind this view is that the consulted victim does not feel irrelevant and alienated and as a result is motivated to continue to report crime and cooperate in its investigation and prosecution.[673] The victim's participation could also help counteract the notion that bargaining serves only the interests of the accused.[674] Society's interests exist parallel to the personal interests of the victim. Its participation lends

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665 Lubbe/Ferreira (2008) *SACJ* 151 at 155.
666 Lubbe/Ferreira (2008) *SACJ* 151 at 155.
667 Bekker (1996) 19 (1) *CILSA* 168 at 208.
668 Bekker (1996) 19 (1) *CILSA* 168 at 208.
669 Bekker (1996) 19 (1) *CILSA* 168 at 208.
670 Bekker (1996) 19 (1) *CILSA* 168 at 209.
671 Bekker (1996) 19 (1) *CILSA* 168 at 209.
672 Bekker (1996) 19 (1) *CILSA* 168 at 209.
673 Bekker (1996) 19 (1) *CILSA* 168 at 209.
674 Steyn (2007) *SACJ* 206 at 213.

legitimacy and credibility to the process and furthermore enhances transparency.[675] To sum up, it can be safely argued that the purpose of victim participation exceeds pure victim satisfaction and that victim participation serves public interests.

The benefit of plea bargaining for the victim is widely considered to be the fact that it will not suffer the trauma of being exposed to secondary victimisation in court.[676] The victim is spared from having to testify. This argument should not be generalized.[677] How important the victim's protection is throughout the process depends on several factors. There is for example the question of whether the victim is relatively young and/or whether victims of certain offences such as murder or rape are concerned.[678] The degree to which the victim is affected always depends on individual characteristics of the offence and of the victim.[679] One could potentially doubt if there was indeed a profound benefit for the victim. A first hint to this assumption is an actual enquiry of lawyers in Germany. According to 59.5 % of the interviewees the victim never initiates the agreement procedure; 32.7% stated that this happens seldomly.[680] For a better understanding of how solid the victim's position actually is, it has to be taken a look at the procedural rights.

b. Procedural participation

S 105A (1) (b) (iii) of the South African Crimininal Procedure Act contains the prosecutor's duty to afford the complainant or his representative the opportunity to make representations. It is one of the few provisions in South African criminal procedure that 'recognises the interests of the victim in a formal way'.[681] It can be held that the provision accentuates the importance of victim participation.[682] The requirement is confined by cases 'where it is reasonable to do so and taking into account the nature of any circumstances relating to the offence and the interests of the complainant'.[683] Directive 11 issued by the NDPP states that, in the case of a homicide, the relatives of the victim are to be consulted. According to Directive 10 a person in *loco parentis* is to be consulted in the event that the victim is a child under the age of 18.

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675 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-12; *S v Sassin & others* 2003 (4) All SA 506 (NC) at 11.4.

676 Steyn (2007) *SACJ* 206 at 212 with further reference; primary victimisation is caused by the offence; secondary victimisation occurs when the social environment takes notice; consequently the victimisation in the trial can be seen as a tertiary (Kiefl/Lamnek, *Soziologie des Opfers*, p. 272 seqq.)

677 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 13.

678 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 24.

679 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 24 with further references.

680 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 157.

681 Steyn (2007) *SACJ* 206 at 213.

682 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.

683 See S 105A (1) (b) (iii) CPA.

S 105A (1) (b) does not state how the fulfilment of the requirement of the asking of the accused shall be indicated to court.[684] In *S v Sassin & others* the participants gave affidavits confirming that s 105A (1) (b) had been satisfied.[685] *Watney* recommends adopting this method if the complainant or another party does not agree to the terms of the agreement.[686] It is however not required that effect should be given in the agreement to the complainant's representations.[687] The prosecution is not bound by these representations, which means that the prosecutor is entitled to proceed with an agreement without adhering to the requests of the complainant.[688] As a result the complainant who does not agree with the terms of the agreement is only able to announce disagreement in a formal way, i.e., without a profound impact on the further proceedings.[689] *Watney* however holds that 'the representations of the complainant (whether complied with by the prosecution or not) might be a factor the court may consider to determine whether the sentence agreement is just.'[690]

It must also be highlighted that the victim's participation does not depend on the formal invitation by the prosecutor. The complainant or his representative is entitled to make representations which the prosecutor should not ignore.[691] This right of the accused serves an important function as it cultivates or strengthens society's acceptance of plea and sentence agreements as a method of avoiding a traditional adversarial trial.[692]

German law gives the victim a comparable set of rights to those descibed above. S 257c (3) 3 of the StPO states that the participants shall be given the opportunity to make submissions. The submissions are made in the main hearing before the court. The question is how a protest of the victim should be documented. S 243 (4) 3 only provides that the judge in the main proceedings shall announce the fact that a negotiated agreement has been entered into and describe its essential content. The reasons for the judgment in terms of s 267 (3) 5 only contain the fact that an agreement has been settled. The content or conduct does not need to be indicated.[693] The general duty to document certain facts in the court record is regulated by s 273. The German court record thereafter only has to contain the 'essential formalities'. As submissions are neither compulsory for

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684 Watney 2006 *TSAR* 224 at 226.
685 *S v Sassin & others* 2003 (4) All SA 506 (NC) at 509.
686 Watney 2006 *TSAR* 224 at 226.
687 Watney 2006 *TSAR* 224 at 226.
688 Watney 2006 *TSAR* 224 at 226.
689 Watney 2006 *TSAR* 224 at 226.
690 Watney 2006 *TSAR* 224 at 226.
691 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-13.
692 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-13.
693 BGH (2010) *NStZ* 348; (2011) *NStZ* 170.

the complainant to make nor do they affect the trial, they cannot be interpreted as procedural statements. Statements that have to be documented usually have to cause a particular legal consequence. Thus, it can be assumed that the submissions are not filed in the court record. Their lack of direct relevance opposes their qualification as an essential formality. Consequently, the victim's submissions are only expressed orally or as a written statement in the court file and thus can only influence the actual proceedings, i.e., the attitude of the judge and the other participants towards the case. They cannot effectively influence the preceding bargain. Due to this lack of documentation, submissions have no further impact on the trial. Thus, it can be summed up that, although victim participation generally plays a more important role than in other jurisdictions, German law does not provide for an influence over the negotiations or consultation of victims before an agreement is reached.[694]

Looking at the two pieces of legislation, it will be noticed that in both of them the victim's participation is the sole formal right that cannot bind the prosecution or court. It hence serves only an advisory function. *Du Toit et al's* statement that the process of plea bargaining provides for victim participation where possible, consequently must be opposed.[695] The victim's position in fact is weak.

c. Informal agreements

The victim's participation in the process differs fundamentally between pre-statutory and statutory plea bargaining.[696] Concerning the time of pre-stratutory barganinig in South Afirca, it remains in the dark whether victims actually participated in such negotiations towards an agreement at all and if so, to what extent they were able to influence the conduct of the negotiations.[697] *Rodgers* describes that traditionally there were no formal or recognised rights in the process of plea negotiations[698] and states that, by contrast, the new statutory law makes provisions for victim participation.[699] What is also very interesting to examine is how victims' rights relate to present informal plea bargaining in the sense that the bargain does not follow formal requirements of the statutory provisions on agreements.[700] Very little is known, however, about if and how victims take part in these informal, even secret and invisible, negotiations. It can be argued that in informal

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694 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105; stated in comparison to the USA.
695 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-8.
696 Rodgers (2010) *SACJ* 239 at 257.
697 Rodgers (2010) *SACJ* 239 at 257.
698 Rodgers (2010) *SACJ* 239 at 257; Bekker (1996) 19 (1) *CILSA* 168 at 208.
699 Rodgers (2010) *SACJ* 239 at 258.
700 Compare the section on the different meanings if 'informal' above.

agreements the prosecutor is not obliged to consider the victim's participation and that there is no court scrutiny as to the reasons for excluding the victim.[701] Under German law, informal bargaining is generally inadmissible, which is why there will not be victim participation either. *Rodgers* sums up that 'victims in informal agreements are treated differently from victims in statutory agreements' and that this differentiation is unlikely to withstand a constitutional challenge.'[702] Although in South Africa a general rule on the complainant's rights such as the German s 397 does not exist, the general rule of law affords that the victim is at least given the opportunity to make representations even though the bargain is conducted informally. This is why *Rodgers*'s view that an obligation to consider victim participation would not exist should be opposed.[703] The prosecutor might not in each and every case be obliged to consult the victim, but in cases of heavier violations participation of the victim has to be considered.

d. Active rights

Steyn is of the opinion that s 105A could be interpreted in the sense that a victim has the right to request that the matter should go to trial in cases where they elect to find closure by way of the trial process.[704] However, neither South African nor German law provides for such a right.

Besides the requirement of the formal procedure that the victim has to be asked to make submissions, as shown above, German criminal procedure also provides for rights of the victim that enable the victim to steer the outcome of the trial and to secure constitutional rights. The complainant's procedural position under German law is enshrined in s 397 (1) which states: 'The complainant[705] shall be entitled to be present at the main hearing even if he is to be examined as a witness. (...) The complainant shall also be entitled to challenge a judge (s 24 and 31) or an expert (s 74), to ask questions (s 240 (2)), to object to orders by the presiding judge (s 238 (2)) and to object to questions (s 242), to apply for evidence to be taken (s 244 s (3) to (6)), and to make statements (s 257 and 258). Unless otherwise provided by law, he shall be called in and heard to the same extent as the public prosecution office. (...).' Especially the latter mentioned sentence raises questions. The

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701 Rodgers (2010) *SACJ* 239 at 258 in footnote 17.
702 Rodgers (2010) *SACJ* 239 at 258 in footnote 17.
703 It cannot be argued that the obilgation does not exist due to the lack of such provisions as the informal conduct of plea bargaining is based on the non-application of statutory law.
704 Steyn (2007) *SACJ* 206 at 213.
705 The translation of s 397 StPO by the German Federal Ministry of Justice in cooperation with juris GmbH, author: *Kathleen Müller-Rostin,* 2011 originally contained the term 'private accessory prosecutor'.

position of the defendant is equated to that of the prosecution. The various rights of the complainant shall guarantee that he controls the court and ensures a proper application of the court's obligation to establish the truth by the terms of s 244 (2).[706] In general the complainant holds, for instance, the means to apply for further evidence to be taken. In the plea bargaining procedure the appreciable possibilities of the complainant to exert influence are drastically curtailed. The statement in s 257c (1) 2 that s 244 (2) remained unaffected has already been marked as a 'lie' by some scholars.[707] The bargain procedure undercuts established rules on fact-finding and evidence-taking. This shortening of the fact-finding and evidence-taking is however the very essence of the bargain procedure. Consequently, the legislature's intent to provide the complainant with a comprehensive means of influencing the search for truth grasps at thin air.

The agreement also does not afford the complainant's acceptance,[708] nor does the complainant's disagreement avoid the formation of the agreement.[709] There is no power to *veto* upon the conclusion of an agreement.[710] *Böttcher* remarks that, especially in cases in which the accused committed the offence of rape or caused grievous bodily harm, it may be frustrating to the victim if prosecutor and accused consent to a confession made by the accused in exchange for leniency ing sentencing.[711] However, he admits that the legislature only regulated a right to be heard, which may have also resulted out of general principles but did not provide the complainant with further means to influence the trial.[712] Consequently, the complainant's influence is limited to the opportunity to make submissions and thereby to possibly influence or even change the prosecutor's and judge's opinion on the case.[713]

Although Majiedt J in *S v Sassin & others* held that victim participation was an 'absolutely essential cog in the machinery of plea bargaining and plea agreements', neither the South African provisions nor the case law provide for a stronger procedural position of the complainant than the German law.[714] The position of the victim is in principle confined to

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706 Meyer-Goßner, StPO, s 397, para 6.
707 Compare op cit 495.
708 Meyer-Goßner, StPO, s 257c, para 24.
709 Meyer-Goßner, StPO, s 257c, para 24.
710 SK-*Velten*, StPO, s 257c, para 53; during the German legislative procedure the State of Saarland suggested the implementation of a right to veto, but was not heard. (BR-Drucks. 65/3/09 of 4 March 2009, p. 1 seqq).
711 Böttcher in Schöch-FS, 929 at 944.
712 SK-*Velten*, StPO, s 257c, para 23.
713 Compare Meyer-Goßner, StPO, s 257c, para 24.
714 Compare *S v Sassin & others* 2003 (4) All SA 506 (NC) at 11.4; the fact that in the case the affidavits of 31 out of a toral of 1600 complainants out of practicability have resonably been regarded as 'representative of the total investors in the scheme' [11.5] in the present context is not of further interest.

that of an ordinary witness.[715] The right to be heard as contemplated in s 105A (1) (b) (iii) has already been presented.

The question is whether the law on plea bargaining in both countries (*de lege ferenda)* affords the implementation of the power to *veto* upon the conclusion of an agreement by the complainant. In part, it is argued that 'sufficient provision is made for participation that indirectly benefits the public and directly benefits the victims in particular.'[716] Considering *Böttcher* and the example of heavy offences with grave consequences the victims has to suffer, this could be called into doubt.[717] It has to be stated however that the prosecution of offences is the state's task and generally cannot be suggested by other parties. The fact that one is violated by an offence generally does not modify this principle. Due to substantial personal rights – such as for instance in the German Constitution: the personal freedoms and dignity enshrined in Article 2 (1) and 1 as well as the right to life and physical integrity in Article 2 (2) – it is questionable to suggest that the heavily violated victim does not need to be provided with farther reaching rights. This is of relevance if the prosecution does not fulfil its duty to reach a conviction but instead agrees to too lenient a sentence. Thus, it is a question of how to avoid abuse of plea bargaining by the prosecution, which will be examined further later.[718]

e. Concluding remark

The legal status of the victim in South Africa and Germany is very similar. In the plea bargaining procedure the complainant is given the opportunity to make representations. In both countries there are no clear prerequisites for the documentation of the victim's comment or attitude towards the fact that negotiations have been conducted. Nonetheless, it should be observed that the relatively weak position of the victim is not a specific feature of plea bargaining. Also, in the conventional trial or other special procedure the victim's procedural position is not intended to be more powerful.

6. Factual basis

A central question within the plea bargaining procedure is whether the plea or the

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715 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 13 (Chapter 1, 2.5).
716 Lubbe/Ferreira (2008) *SACJ* 151 at 167.
717 Böttcher in Schöch-FS, 929 at 944.
718 Compare Chapter V.14.c.

confession reflects the facts of the case.[719] The requirement that the factual basis be scrutinized serves the obligation to establish the truth. But its purpose is not limited to the truth-seeking function of the criminal trial; it also serves to protect the accused from false pleas.[720] It is obvious that the plea bargain procedure in some way shortens, quickens or even undercuts the search for factual truth, as this acceleration is one of the main benefits of plea bargaining. Nonetheless, it is questionable which minimum requirement of factual proof has to be demanded in order to warrant the legitimacy of the process.

a. Conventional trial practice

The search for the facts is the central purpose of the criminal trial.[721] The participants generally are entitled to demand that the court extends the taking of evidence to all facts and admissible means of evidence which are relevant to the case.[722]The scope of the court's duty to ensure that all relevant facts are presented is determined by the file that the judge holds; thus, the participants' application and requests and thereby how the facts that have been uncovered over the course of the proceedings urge a further search for facts.[723] An essential part is the appraisal of the circumstances and special features of the present case.[724] The less the evidence seems to be sufficient and justified, the further court must search for other and new sources of evidence.[725] The shown principles reflect the inquisitorial tradition of German criminal procedure.

With South African law the approach is slightly different as fact-finding is not solely the duty of the court. Moreover, accusatorial principles determine the procedure to follow. At the outset of a South African trial, the parties place the evidence before the court. Similarly, under German law the prosecution file is sent to the court and forms the basis of the further procedure. But in contrast with the South African system, as soon as the trial begins the evidence and decision as to which evidence is to be heard or further searched for solely lies within the court's discretion. To the contrary, the South African court relies on the facts and evidence presented to him by the parties. It is however a fundamental principle of South African law that a court at the stage of sentencing not be confined to

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719 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 41.
720 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 41.
721 Meyer-Goßner, StPO, s 244, para 11; BVerfGE 57, 250 at 275; 63, 45 at 61.
722 Meyer-Goßner, StPO, s 244, para 11; BGH 1, 94 at 96; 32, 115 at 124 [GSSt].
723 Meyer-Goßner, StPO, s 244, para 12; BGH 3, 169 at 175; 10, 116 at 118; 23, 176 at 187; 30, 131 at 140; (1983) *NStZ* 210; (1981) *StV* 164; 91, 337.
724 Meyer-Goßner, StPO, s 244, para 12; BGH (1996) *NStZ-RR* 299; (1998) *NStZ* 50; BGH court order of 23 November 2004 – KRB 23/04 with annotation of Gössel (2005) *JR* 389 at 392.
725 Meyer-Goßner, StPO, s 244, para 12; BGH (1996) *StV* 249; (1996) *NStZ-RR* 299; (2003) *NStZ-RR* 205.

those facts placed before it by the parties.[726] South African s 274, as a general rule of the conventional trial procedure, states in its subsection (1) that 'a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.' The South African Constitutional Court confirmed that 'there was no legal reason why a judge should, in considering sentence, be restricted to the material placed before the Court by the parties.'[727] Consequently, during the conventional trial procedure the judge depends initially on the facts and evidence placed before him, but when considering an appropriate sentence he is obliged to extend the scrutiny to all evidence which he considers relevant. The principles and elements shown here have been implemented into the provisions on plea bargaining.

b. Scope of scrutiny in the bargain procedure

Plea bargaining does not comport with the desire to search for material truth as it shortens the evidence gathering. Nonetheless, the German legislature tried to emphasise the importance of the court's obligation to establish the truth enshrined in s 244 (2) by letting s 257s (1) 2 state that this principle remains unaffected in the bargain procedure. It is remarkable that s 257c does not contain any other rules on the evidence gathering.[728] However, it is clear that the bargain will always affect the obligation to establish the truth and, furthermore, that the legislature's assumption of a full application of the principle possibly gives us a false impression of the reality.[729] Nonetheless, the legislature did not give way to a procedure in which the accused confesses on basis of facts that have been placed before the court by the parties and which are not further scrutinized by the judge. In this sense it can be assumed that the statement that s 244 (2), containing the obligation to establish the truth, found expression in the German provisions on plea bargaining.[730] In accordance with the conventional trial system, plea bargaining in Germany only hopes to pave the way for a confession and to enhance the economy of the proceedings.[731] It is hard to determine what way the rule on evidence-taking will be upheld in a bargain procedure. A full search for facts conflicts with the very essence of bargains. The purpose of plea bargaining is to reduce the obligation to establish the truth in order to shorten the

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726 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.
727 *S v Dzukuda & others*; *S v Tshilo* 2000 (2) SACR 443 (CC) with reference to *S v Dlamini* 1992 (1) SA 18 (A) 30d-31d.
728 Compare the comprehensive legislation in South Africa in s 105A (6) and (7).
729 Compare op cit 495.
730 SK-*Velten*, StPO, s 257c, para 33.
731 SK-*Velten*, StPO, s 257c, para 33.

trial. [732] *Velten* seems to oppose this view and holds a surprisingly simple position. He states that the obligation to establish the truth generally does not require a full investigation of all facts and thus can be applied with unchanged content.[733] The obligation to establish the truth indeed does not require taking all evidence available. The court can confine itself to the taking of evidence which it considers to be of essential importance.[734] Nevertheless, the court must tackle and consider exonerating evidence.[735] Even if there is no exonerating evidence available, other evidence besides the confession has to be provided.[736]

The need for evidence-taking is generally determined by the three factors: the content of the file, the participants and the outcome of the main hearing.[737] The value of the already examined evidence has to be taken into account.[738] Against the background of the general principles described earlier, *Velten* is right when he states that the obligation to establish the truth does not require a full investigation of all facts and evidence available. The characteristics of plea bargaining however afford a sophisticated view. In the typical situation, the court will not hold much more than the confession of the accused. *Velten* holds that with the general principles it is possible to base the conviction solely upon this confession, especially if it was – which he admits is not the rule − highly substantiated and credible.[739] The problem with bargaining is that the confession is usually a so called 'formal' or 'slim' confession, i.e., a confession that fully admits the charges and does not go into details. In that case it is not possible to base the conviction solely upon the conviction. Nevertheless, the fact that the accused made or is willing to make a confession reduces the expense of the evidence-taking.

Case law regards it as sufficient that the confession conforms to the content of the file − even if there is possibly exonerating evidence available – as long as the court generally is convinced of the confession's reliability.[740] In order to prove the reliability, the court also has to question the accused in order to see if his statements conform to the outcome of the investigations. In part, it has been held that, in cases of 'formal' confessions that simply admit the allegations, the scrutiny has to go beyond the court file and the simple

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732 SK-*Velten*, StPO, s 257c, para 33; Jahn/Müller (2009) *NJW* 2625 at 2631.
733 SK-*Velten*, StPO, s 257c, para 34.
734 Meyer-Goßner, StPO, s 244, para 12; SK-*Velten*, StPO, s 257c, para 34.
735 SK-*Velten*, StPO, s 257c, para 35.
736 SK-*Velten*, StPO, s 257c, para 35.
737 SK-*Velten*, StPO, s 257c, para 34; Köbel/Selter (2009) *JR* 447.
738 SK-*Velten*, StPO, s 257c, para 34.
739 SK-*Velten*, StPO, s 257c, para 35.
740 BGHSt 50, 45 at 49; BGH (2009) *StV* 232; BGH (2007) *NStZ-RR* 307 at 309; SK-*Velten*, StPO, s 257c, para 36.

questioning of the accused. The confession's compliance with the facts has to be proven with other available evidence.[741] The views presented slightly differ. Nevertheless, it can be annotated that the German legislature generally intended to preserve the inquisitorial principle in the terms of s 244 (2).[742] The evidence-taking due to the fact that this is an essential component of plea bargaining is shortened. Nevertheless, the court has to ensure that the presented evidence, which is in most cases the confession, complies with the court file and other indications and evidence.

The scope of scrutiny in South African law is different though. To a great extent this is due to its different, adversarial law tradition. It has to be recalled that the plea system in South Africa differs at a fundamental level from the German procedure. In Germany the plea system is unknown. Recall that the accused however may at the beginning of a trial announce that he is willing to confess, which also determines the further evidence gathering procedure, which then can be shortened. South African law with s 105 and s 106 does provide for certain types of procedure depending on the kind of plea the accused chooses. Now in the case of a plea bargain, the accused pleads guilty after having negotiated certain conditions. The subsequent procedure follows specific rules that are contained in subsection (6) and (7) of s 105A.[743] The essential feature is that no evidence is heard 'from any witness other than the accused, whose testimony is limited in complying with the requirements of s 105A (6) (a)'.[744] The section reads as follows: 'After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether− (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement; (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.' The essential part is subsection (ii) in which the court ensures that the plea of guilty complies with the alleged facts of the case. It has to be remarked and emphasized again that the plea of guilty only is scrutinized by a judicial questioning of the accused. *Du Toit et al* confirm that 'neither the prosecution nor the defence can adduce evidence in an attempt to convince the court of the accused's

741 BGH court order of 1 March 2011 − 1 StR 52/11; SK-*Velten*, StPO, s 257c, para 36 with reference to a dispute between the two Senates. While the 3th Senate holds that the obligation to establish the truth remains in force (BGH court order of 19 August 2010 − 3 StR 226/10, the 5th Senate holds that a reference to the charge shall be sufficient (BGH court order of 24 February 2010 − 5 StR 38/10 = (2010) *StV* 470).

742 Compare SK-*Velten*, StPO, s 257c, para 36.

743 For a general summary review Chapter IV.2.e.

744 Bennun (2007) *SACJ* 17 at 31.

guilt.[745] It appears uncertain at exact what point in the procedure the court has to convince itself of the accused's guilt. S 105A (6) does not state that the guilt of the accused has to be evident yet. On the other hand, the subsequent s 105A (7) (a) states that, 'if the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.' Subsection (b) and the subordinated (i) (bb) then begins that 'for purposes of paragraph (a), the court' may 'hear evidence, including evidence or a statement by or on behalf of the accused or the complainant'. The mechanisms of these provisions are not quite clear. It is not obvious whether the passage 'for purposes of paragraph (a)' applies to the question if the court holds the accused guilty and considers the sentence agreement or whether it solely embraces the latter one. The question is of utmost relevance because it determines whether evidence has to be considered in order to find the accused guilty. Commentaries assume that the evidence-taking only serves the function of considering the sentence agreement.[746] *Du Toit et al* introduce subsection (7) as follows: 'if the court is satisfied that the accused admits the allegations in the charge and that he is guilty (...), the court shall (then and only then)[747] proceed to consider the sentence agreement.'[748] Thus, this demonstrates the adversarial character of the prescribed procedure. The guilt is proved solely upon the questioning of the accused and focuses mainly on the questions of whether the accused admits the allegations and whether he entered into the agreement freely and voluntarily. The evidence the judge may take in terms of s 105A (7) (b) (i) (bb) only relates to his scrutiny of the sentence. This is a fundamental difference to the German system in which the guilt has to be proved by evidence.[749] It can be stated that this difference is based on the difference between adversarial and inquisitorial understanding. With the German inquisitorial thinking it is hard to accept that the courts satisfy themselves of the accused's guilt without taking into account any evidence.

As judicial evidence-taking however takes place in terms of s 105A (7), aiming to place the judge a the position where he can consider the sentence, the procedure shall be examined

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745 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-17.

746 Only compare the heading of s 105A (7) (b) (i) (bb) in Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19 which reads as follows: 'Power and duty of the court to receive evidence and other statements for purposes of considering the sentence agreement' and the similar heading of s 105A (1) (b) (i) (aa).

747 Emphasis in brackets added.

748 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-18.

749 Only in the exceptional case that the confession is absolutely reliable and does conform to the court file and the so far investigations the court may make an exception from this principle. Compare above.

in more detail. Even though the search for the factual basis of the agreement does not serve the function a proving the guilt, it nevertheless may fulfil the purpose of a safeguard against wrongful convictions. S 274 (1) contains the general rule for the conventional trial that the court, 'before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed'. Summary trial rule s 112 (3) contains that 'nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence'. The rule also ensures that the court holds sufficient information to allow him to determine an appropriate sentence.[750] *Du Toit et al* pointed out that 'neither s 274 (1) nor s 112 (3) caters explicitly for the situation where a court – though satisfied that an accused is guilty ut without having formally convicted an accused – is required to consider whether a sentence agreement is just' and that s 105A (7) (b) (i) (bb) covers this situation.[751] The provision empowers the judge but also makes it a duty for the court to call witnesses of its own accord.[752] This is necessary where the parties fail to provide sufficient evidence.[753] However, even the accused may serve as a witness.[754] *Du Toit et al* are right to remark that 'however, it is submitted that such a procedure is highly undesirable and conflicts with the very essence of s 105A, namely that a plea and sentence agreement as presented by the parties has a factual basis which is not in dispute.'[755] Thus they recommend the parties ensure that they agreed on facts that are comprehensive enough and upon which the sentence agreement can be based in order to avoid further evidence-taking by the court.[756] Interestingly, s 105A (7) (b) (i) (bb) reveals the desire of the South African legislature of having inquisitorial elements implemented into the plea bargaining procedure. Obviously it did this half-heartedly as the court's duty and opportunity to scrutinize and search for further evidence was set up with regard to sentencing but does not refer to the question of guilt, i.e., the conviction.

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750 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19; *S v Sikhindi* 1978 (1) SA 1072 (N*); S v Serumala* 1978 (4) SA 811 (NC) 815a-b.

751 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.

752 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19 also stating that the constitutional right of the accused to remain silent and not to testify during the proceedings in terms of s 35 (3) (h) remains applicable.

753 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19.

754 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-19 with the restrictions annotated in op cit 752.

755 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.

756 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.

To sum it up, the scope of scrutiny in both legal systems focuses on the plea or the confession, which is more or less only proven on points of consistency and credibility. Other facts and evidence are not included in the scrutiny of the South African court and only slightly so by the German court.[757] Although the general procedural systems are opposed to each other, the standard situations of a negotiated plea of guilty in South Africa and the negotiated 'formal' or 'slim' confession in Germany are almost congruent. The slightly different scope in the judicial scrutiny has already been presented. It can be held that, against the background of the practice of a more or less brief approval by the court, the obligation to establish the truth only serves the function of a guideline and that its application in the context of plea bargaining only serves to control and prevent from heavy abuse.[758] One could argue that the parties may suppress evidence and that the state may even breach its obligation to fully pursue offences, all while the court is limited to a symbolic approval of the agreement.[759] Regardless, the parties' ability to 'suppress' or in other words limit the scope of the evidence is a significant feature of the accusatorial system. If German law adopts a bargain procedure one may have to come to the terms with the fact that the fact-finding and evidence-taking is in some way restricted, although the general law tradition is not accusatorial but inquisitorial.[760]

c. Scrutiny in practice

German scholar *Heller* conducted an interesting inquiry on how the rules dealing with the obligation to establish the truth are handled in German practice.[761] This inquiry especially illustrates which means German practice uses to ensure the credibility of the confession made in a bargain procedure. The essential conduct of the scrutiny has been documented as following: 'rarely' witnesses or experts were heard; 'rarely to occasionally' even no scrutiny at all would took place; 'occasionally' documentary evidence was compared; and, 'almost frequently' the accused was questioned with regard to single issues and the confession was compared to the file. The outcome of the inquiry reveals that evidence is rarely considered beyond a comparison of the confession to the courts file along with a questioning of the accused. The classic instrument of evidence, the hearing of witnesses, is spared. One can assume that the usually undertaken scrutiny reflects the benefits of

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757 Given that the confession is reliable, it is however − other then the plea of guilty − briefly compared tot he file and other sources evidence despite only the questioning of the accused.

758 SK-*Velten*, StPO, s 257c, para 1 and almost identical Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20 commenting s 105A (7) (b) (i) (bb).

759 South African Law Reform Commission, Project 73 (2001) at 5.14.

760 Compare the later discussion on the true nature of plea bargaining in Chapter V.15.

761 Heller, *Das Gesetz zur Regelung der Verständigung*, p. 307; inquiry of 2012 amongst German judges.

plea bargaining. Although it may have been the legislature's wish that the judge scrutinize all essential facts and evidence, practice will always tend to minimize the effort made as the sparing of time and resources is one of the main benefits of plea bargaining.

d. Concluding remark

Plea bargaining can been criticized for its potential to undermine the search for truth.[762] Nevertheless a reduction of the effort to take evidence and search for the facts of the case lies within the nature of plea bargaining and can be regarded as its very essence. The obligation to establish the truth is formally warranted by the clear wording of German s 257c (1) 2 as well as by the South African requirement of questioning the accused in terms of s 105A (6) (a) in order to confirm the guilt together with the possibility of a further scrutiny of evidence in terms of s 105A (7) (b) (i) (bb) to ensure that the considered sentence is adequate. Nevertheless, these principles will only form a guideline. A certain disregard of the facts lies within the nature of plea bargaining.

7. Sentencing

Sentencing is one of the court's essential responsibilities in the criminal trial. As amongst others, the essential motive to bargain is to achieve a leniency in the sentence; the rules and features of sentencing are of specific interest. While the German judge retains his sentencing discretion, which is indicated by way that the agreement can only contain a lower and upper sentence limit (which is followed by the court's decision which only has to comply with this sentence range), the South African judge is limited to an approval whether a specific sentence, upon which the parties had agreed, is just and appropriate. In view of both legal systems, it is an interesting question whether the scrutiny is more of an approval of negotiated terms concerning the sentence or if the judge undertakes a hypothetical sentencing with no regard to the negotiations.

a. Justness of the sentence

In the plea bargaining process the court has to ensure that the negotiated sentence fulfils certain requirements. Before the court can convict an accused on a charge, a presiding officer must determine whether the negotiated sentence is 'just'.[763] S 105A (8) CPA therefore states that 'if the court is satisfied that the sentence agreement is just, the court

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762 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 1.
763 Steyn (2007) *SACJ* 206 at 214.

shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the sentence charged and sentence the accused in accordance with the sentence agreement.' In s 105A (9) (a) it is written that 'if the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.' It can be stated that the provisions on the judicial scrutiny of the agreed sentence do not provide for more than the term 'just'. They do not lay down a formal guideline that, for instance, contains which aspects determine the justness of a sentence. Thus, the interpretation of these provisions leads to difficulties.[764]

It is a significant aspect that the legislature chose the term 'just' as opposed to 'appropriate'.[765] The Oxford Dictionary of English defines 'just' as 'morally right and fair, appropriate, well founded or justifiable.'[766] It is remarkable that the Afrikaans text of the Criminal Procedure Act uses the word 'regverdig,' which means 'in ooreenstemming met wat reg is; regmatig, onpartydig, billik, eerlik' which may add to the understanding of how the legislature's intention is to be judged.[767] It is however uncertain in what way the use of the term 'just' instead of the term 'appropriate' affects the scrutiny that has to be undertaken. *Du Toit et al* hold that 'the question whether the sentence agreement is "just" does not require a fundamental readjustment of the ordinary approach which applies to the situation where an accused must be sentenced after having been convicted in a conventional trial'.[768] With reference to *Terblanche*, it should be pointed out that the sentence has to be 'appropriate, considering all the circumstances of the case' and yet an 'appropriate sentence need not be the only appropriate sentence'.[769] Sentencing is always regarded as an inexact and imperfect procedure and thus this leads to a substantial range of appropriate sentences.[770] This might be a reason why the legislature preferred the use of the word 'just' as opposed to 'appropriate' sentence.[771] The fact that the criterion 'just' is vague, to the mind of *Du Toit et al*, has the benefit that the term 'creates scope for individualisation without sacrificing important principles such as equality before the law and

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764 Steyn (2007) *SACJ* 206 at 214.
765 Steyn (2007) *SACJ* 206 at 214; *S v Sassin & others* 2003 (4) All SA 506 (NC) at 15.5.
766 Oxford Dictionary of English, 3ed (2010), 'plea bargaining', adjective.
767 Compare *S v Sassin & others* 2003 (4) All SA 506 (NC) at 15.7.
768 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
769 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20; Terblanche, *A Guide to Sentencing in South Africa*, p. 146 and 165; *S v Martin* 1996 (2) SACR 378 (W) 380a-b.
770 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20; Terblanche, *A Guide to Sentencing in South Africa*, p. 146.
771 Compare Steyn (2007) *SACJ* 206 at 214.

judicial consistency in sentencing.'[772] It is further assumed that the task of the sentencing and the function of the court generally remain the same when imposing a sentence following a section 105A agreement.[773] *Terblanche* holds that 'a heavily mitigated sentence is possible because of the plea of guilty and its indications of remorse and because the interests of justice (and society) are served by the shortened process.'[774] Nevertheless, the principle of proportionality i.e., the principle that legal consequences must still fit the crime committed shall remain in force, despite the fact that other considerations can be taken into account.[775]

Thus, it can be summed up that *Du Toit et al* hold that the question of whether the sentence is just or not applies to the situation in a regular trial where the accused is sentence after having been convicted.[776] In the context of plea bargaining there is no need for a readjustment.[777] The presiding officer judges on the basis of regular principles of sentencing, i.e., the principle that the judge is convinced that the negotiated sentence is an appropriate one.[778] In the eyes of *Du Toit et al* 'it need not be the most appropriate one' or the 'only one.'[779] They further emphasize that s 105A does not contain a requirement that the court must find itself in full agreement with the negotiated sentence.[780] The provision of s 105A (8), stipulating that the court has to be satisfied that the sentence is just, does not imply that the court necessarily agrees with the negotiated sentence.[781] Els J approaches this result from a different angle and gives regard to practical aspects. Els J stated in *S v Esterhuizen & others* that 'it must be so that the court, in considering the 'justness' or 'unjustness' of a sentence agreement cannot simply decide for itself *in vacuo* what sentence it would have imposed for crimes to which the accused is pleading guilty.'[782] The judge admitted in his judgment on the case that he 'would not be able to find that the sentence as agreed on in this matter is "just"' and that he 'would have probably imposed a much heavier sentence under the circumstances.'[783] He presumes that, in a case that is difficult to prove, the concession of a plea of guilty is a result which satisfies the interests

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772 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
773 Terblanche, *Guide to Sentencing in South Africa*, p. 111.
774 Terblanche, *Guide to Sentencing in South Africa*, p. 111.
775 Terblanche, *Guide to Sentencing in South Africa*, p. 111.e
776 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
777 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
778 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20.
779 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20; *S v Sassin & others* 2003 (4) All SA 506 (NC) at 15.5.
780 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20A; compare also *S v Sassin & others* 2003 (4) All SA 506 (NC) at 15.5.
781 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20A.
782 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494b.
783 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494c.

of justice, i.e., that the crime that has been committed results in a conviction that has been achieved through the bargain.[784] Els J summarizes that 'the price may be that the sentence which would normally flow from the commission of such a crime is lower than might otherwise have been imposed. This does not mean that justice has not been achieved.'[785] Els J defines 'just' in terms of s 105A as a sentence that bears an adequate relationship to a crime and the moral blameworthiness content of the crime committed.[786] He finds this requirement fulfilled in his present case. Els J thereby admits that a sentence that does not completely comply with his personal view on the case however still serves the demands of justice. In the case, he stipulated the following rules the court has to follow:[787] first, 'the consideration of the well-known triad as set out in *S v Zinn* 1969 (2) SA 537 (A)'.[788] The 'triad' consists of 'the crime, the offender and the interests of society'.[789] Second, 'the taking of a broad overview of the facts admitted[790] and the crimes admitted to having been committed together with the proposed sentence to be imposed, all with a view toward establishing whether the sentence agreed upon and its effective content bear an adequate enough relationship to the crimes committed taking into account all of the agreed facts, both aggravating and mitigating, so that it can be said that justice had been served.'[791]

It can be summed up that in South African Law the justness of the sentence in the context of plea bargaining is understood as an appropriate sentence that does not necessarily has to match the court's own judgment of the case. The court serves the function of a safeguard and is limited to the task of ensuring that the sentence is not inadequate.[792] The judge, through a process of questioning the accsued, remains responsible for assessing the guilt and thus remains the final arbiter of what an appropriate and just sentence is.[793] The plea and sentence agreement is subject to the court's finding that the agreement is

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784 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494g.
785 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494h.
786 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494h,i.
787 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494i - 495b
788 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494a.
789 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-20A; *S v Zinn* 1969 (2) SA 537 (A) at 540g.
790 And moreover the facts the court might search for in terms of s 105A (7) (b) (i) (bb).
791 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 495a,b.
792 In considering whether the sentence is just the court has also to take into account the possible existence of mandatory minimum sentences (Compare Directive 13 issued by the NDPP, Watney 2006 *TSAR* 224 at 227 seq.) or the requirment of imprisonment due to public interests (Compare Directive 3 issued by the NDPP, Bennun (2007) *SACJ* 17 at 27 seqq.).
793 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-8.

just and that the court decided independently of the parties of the agreement.[794] *Watney* finds the following words: 'the procedure to adopt in accessing whether a sentence agreement is "just", involves consideration of the same factors a sentencing court would normally consider but with the proviso that any sentence that could possibly be considered appropriate under the circumstances would suffice'.[795]

b. Idea of a sentence range

The structure of sentencing in Germany generally is very complex as there are no specific provisions dealing with the principles of sentencing. Case law determines that the judge's discretion to sentence is wide.[796] The principle that the sentence has to be just is not written but is an accepted principle.[797] The BGH also strictly forbids a sentence to the point (*Punktstrafe*), which is a sentence that has a specific amount and where specific features of the present case may not have been observed.[798] The reason for that is that there will always result a personal impression of the accused and the case that forbids judging a case without letting these factors influence the sentencing decision.[799] The law only indicates this in s 267 (3) 1, which states that 'the criminal judgment shall further specify in its reasons the penal norm which was applied and shall set out the circumstances which were decisive in assessing the penalty.'

Against this background the German provision on plea bargaining under the specific aspect of sentencing is no surprise. S 257c (3) 2 StPO on the other hand states that the court only indicates an upper and lower sentence limit that the parties may consent to. The agreement on a specific sentence remains inadmissible, which is in line with the former case law of the BGH concerning informal agreements.[800] This is motivated by the desire that the court's ability to sentence remain unaffected as well as the aim that the principle of free consideration of evidence in terms of s 261 StPO not be violated by the parties' agreement.

In legal practice, however, the indicated upper sentence limit of the sentence range the court had imposed usually corresponds to the later sentencing such that one could safely

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794 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-8; *S v Yengeni* 2006 (1) SACR 405 (T) at para 25.

795 Watney 2006 *TSAR* 224 at 227.

796 Fischer, StGB, s 46 para 20 with reference tot he ‚ellbowroom-theory' of BGH 7, 28; 10, 263; 20, 266; 29, 230.

797 Compare only BGH (1979) *NJW* 1666 at 1667.

798 BGHSt 27, 1 at 3.

799 Compare BGHSt 27, 1 at 3.

800 Meyer-Goßner, StPO, s 257c, para 11; former case law see BGH 51, 84 with further citations; (2011) *NStZ* 231; KG (2004) *NStZ-RR* 175 at 178; SK-*Velten*, StPO, s 257c, para 19.

argue that in fact the parties do negotiate on a specified concrete sentence.[801] The court and the parties are only entitled to discuss a sentence range. They do have to obey this principle in order to comply with BGH case law. In fact the parties however agree upon that the upper sentence limit is the later specific sentence.[802] Consequently, also in Germany the agreement might contain –although not formally indicated – a specific sentence. It is held that this practice does not violate the prohibition of a sentence to the point (*Punktstrafenverbot*), as the possibility of a lower sentence still is given.[803]

Due to the legislature's presumption that the court only indicates a range, no provisions have been implemented that ensure that the terms of the negotiated agreement are just, i.e., that the parties bargained on a just sentence. In the German inquisitorial tradition, it is the court that indicates the possible sentence range and leads through the further proceedings. Consequently, there is no need for an approval on whether a negotiated sentence is just. Instead the court when indicating the sentence range has to apply the general sentencing principles. Nevertheless, these principles afford that the sentencing results in a 'just' sentence. Although the justness of the sentence is not a written requirement in German law, the prerequisite that the sentence range (on the in practice frequently only indicated upper sentence limit) be 'just' can be read into the present statutory provisions of German law. If the legislature decided to formally let the court decide and judge which sentence range it might indicate to the participant, it is more than clear that this also creates a duty for the court to make certain that any sentence range bargained for without the court's participation complies with the court's findings on the case. A further question is if there is a similar controversy concerning the difference between the sentence as a 'just' or an 'appropriate' one, as in South Africa. German legislation on plea bargaining does not use either of these terms, nor any comparable term. The judicial scrutiny of the 'justness' of the sentence is accomplished through the determination of the sentence range. Nevertheless, the general principles of sentencing have to be respected.[804] They are indicated by s 46 of the StGB. The provision states: '(1) The guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender's future life in society shall be taken into account. (2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to the motives and aims of the offender;

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801 SK-*Velten*, StPO, s 257c, para 21; Meyer-Goßner, StPO, s 257c, para 17 holds that is usually is the lower sentence limit that will later be sentenced.

802 Siolek in Riess-FS, 563 at 569.

803 SK-*Velten*, StPO, s 257c, para 21.

804 Compare Haller/Conzen, *Das Strafverfahren*, para 627.

the attitude re ected in the offence and the degree of force of will involved in its commission; the degree of the violation of the offender's duties; the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim. (3) Circumstances which are already statutory elements of the offence must not be considered.'[805] Thus the judge – based on the general principles of sentencing – has to independently evaluate all relevant facts of the case, both in the regular trial as well as in the plea agreement procedure.[806] However, this does not reveal whether it is more appropriate that the court decides on the case without referring to the bargain or if the judge only ensures compliance of a bargained sentence range to general principles of sentencing.

To emphasize the problem once more one could mark the problem as follows: the court that scrutinizes a bargained sentence concerning compliance to general provisions ensures that the sentence is 'just'. On the contrary, an 'appropriate' sentence implies that the court either proposed the sentence without reference to an agreement or found the sentence agreement hypothetical.[807] In the latter case the court could only consent to the agreement if the negotiated sentence exactly meets the findings the court would have made in a regular trial.[808] As there is no way to simulate the regular outcome of a trial, this idea can only be pursued in theory, i.e., hypothetically.

c. Hypothetical sentencing vs. approval

In both legal system it remains vague whether sentencing in the context of plea bargaining is an approval of bargained terms or is the court's own decision on the case. It can be stated that the whole idea of plea bargaining implies that the court does not undergo a scrutiny isolated from the bargain. *Watney* holds that 'it is submitted that to interpret "just" to imply that the sentence should be the exact sentence what the court would have imposed, will render the purpose of section 105A meaningless.'[809] Indeed, one of the main aims or benefits of plea bargaining is to receive a lenient sentence or at least to favour predictable sentencing. This benefit would be eliminated if the court would judge the case

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805 Wording of s 46 of the StGB.
806 Meyer-Goßner, StPO, s 257c, para 23.
807 Consequently one could imgaine different sentences to be 'just'.
808 Niemöller/Schlothauer/Weidner-*Niemöller, Gesetz zur Verständigung im Strafverfahren* , p. 55 support a hypothetical evaluation.
809 Watney 2006 *TSAR* 224 at 226.

without any reference or consideration to the outcome of earlier negotiations. As a consequence – given that the legislator in both legal systems decided to formally establish plea bargaining and to insert such provisions into the criminal procedure – the principle that the sentence agreement or the sentence range has to be 'just,' in terms of s 105A (8) of the South African Criminal Procedure Act or in terms of s 257c (3) 2 of the StPO respectively, can only mean the following: the court has to ensure compliance with fundamental principles of sentencing, has to take into account the substantial facts of the case and has to judge on the guilt of the accused. The process of determining and seeking a specific amount of sentence in both legal systems is obsolete.[810] Thus, one could state that the court undergoes the full procedure of sentencing right to the point where the judge would impose a specific sentence. This is either left to parties that negotiate on a specific sentence or, if the court only indicates a sentence range (which under German law might also partly occur), left to the final judgment of the court. In either case, the court, even though it regards the general principles and guidelines of sentencing, does not at the stage of negotiations and agreements actually form a sentence This is subject to the bargain.

d. Concluding remark

The German legislature's presumption is that the court retains its full sentence discretion and is only limited in the sense that the judge has to impose a sentence range for the agreement as prescribed in s 257c (3) 2. This is a strong inquisitorial element. Nevertheless, legal practice circumvents this prerequisite by using the upper sentence limit as a factual specific sentence the participants agree upon. South African law however provide that the agreement has to contain a certain sentence, upon which the court after s 105A (8) and (9) has to decide whether it is just or not. The South African legislation has the advantage of providing an obvious indication of the sentence the participants are aiming for. Also, the procedure by which the court must explicitly announce whether the proposed sentence is just appears to be highly transparent. The German system of a sentence range gives the false impression of flexibility and untouched judicial sentencing discretion, which in realtiy does not exist.

8. Legal representation

A main difference in between the South African and the German provisions is the aspect of

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[810] Sentencing can generally be seen as a two step process: first the mandatory sentece range hast o be identified; then the specific features have to be weight; in the later process the scope of a possible sentence step by step is narrowed down.

legal representation. According to s 105A the accused must have a legal representative to enter into a plea and sentence agreement. This requirement has been criticized in that it puts into question the usefulness of s 105A, as the procedure is then only available to the relatively small percentage of represented accused.[811] In contrast, German s 257 (3) 4 states that the accused's consent to the agreement is sufficient. The accused does not necessarily have to be legally represented.[812]

a. Mandatory legal representation

The advantage of mandatory legal representation is quite obvious. Procedural rights of the accused are typically better protected when the prosecution has to face a legally educated counterpart. As a result, the risk of procedural or other abuse is diminished. In the bargain procedure, mandatory legal representation is a strong safeguard against a misuse of the procedure against uninformed and indigent accused.[813] On the other hand it limits agreements to cases where the accused either is able to afford legal representation or where representation is compulsory, after s 73 of the Criminal Procedure Act as well as s 35 (2) (c) and s 35 (3) (g) of the Constitution. In addition, to *De Villers* the South African provision seems quite indecisive since the unrepresented accused is able to plead guilty in terms of s 112 of the Criminal Procedure Act and can also be sentenced without the assistance of a representative.[814] Even a conventional trial allows conviction of an unrepresented accused.[815] The plea bargaining procedure does provide for the prerequisite of full information of the accused in terms of s 105A (2) (a) and for the judge to assure himself of the guilt of the accused in terms of s 105A (6) and (7). It can be said that the plea bargaining procedure would even ensure a safe procedure for the accused where he does not have the assistance of a representative. Consequently, the reason for the prerequisite of a mandatory legal representation cannot be seen in the simple fact that the accused consents to pleading guilty or that he has to be aware of certain rights. Providing information to the accused is warranted throughout the bargain.

The only apparent explanation for the need of compulsory legal representation is that the legislature feared an abuse of the bargain procedure which motivated him to strengthen the accused's position. Legal representation generally is necessary in cases of serious offences or cases where the facts and evidence are difficult to judge. The plea bargain

811 De Villers (2004) *De Jure* 244 at 253.
812 Meyer-Goßner, StPO, s 257c, para 25.
813 De Villers (2004) *De Jure* 244 at 253.
814 De Villers (2004) *De Jure* 244 at 254.
815 De Villers (2004) *De Jure* 244 at 254.

procedure by which the accused relinquishes his right might be seen to be of such a quality that it necessitates a relatively complex judgment. The accused has to anticipate the hypothetical outcome of a procedure and possibly, on the other hand, even anticipate the routine and predictable behaviour of the prosecution in the bargain procedure, like for instance which evidence the prosecutor usually holds and how much leniency he might offer. These are good reasons to provide the accused with the professionalism and experience of a representative.

However, the accused might rather favour to waive his right to counsel. One could imagine a situation in which the prosecutor might offer a favourable plea and sentence agreement and the accused is held back from consenting to it simply out of the fact that he is not legally represented.[816] If then convicted to a harsh sentence, compulsory legal representation appears questionable. However, a waiver of the right to counsel is not possible under the actual South African law as it is clearly required as written in s 105A (1).

b. Social impact

Steyn reports that plea bargaining has been viewed in South Africa as a procedure that will only benefit the rich.[817] Successful bargains of members of parliament, Mark Thatcher[818] and Roger Kebble,[819] who by means of an agreement achieved to be released from prison, reinforce this perception.[820] Also, plea bargaining has been traditionally applied mostly in white collar crimes where the accused can typically afford legal representatives. It should not to be lost from sight, however, that most accused in the lower courts cannot afford a legal representative.[821]As a consequence, those accused are not able to benefit from plea bargaining.[822] *Steyn* points out that the principle of a fair trial, enshrined in s 35 (3) of the Constitution, secures an equal treatment.[823] Whether constitutionality is affected by the fact that a significant portion of the South African population is excluded from the benefits of plea bargaining by way of the requirement of legal representation has not yet

816 Compare De Villers (2004) *De Jure* 244 at 254.
817 Steyn (2007) *SACJ* 206 at 218.
818 Sir Mark Thatcher(*1953), 2nd Baronet, son of Sir Denis Thatcher and Lady Margaret Thachter, the former Conservatice British Prime Minister (www.wikipedia.org).
819 Roger Brett Kebble (1964-2005) was a South African mining magnate with close links to factions in the ruling political party (www.wikipedia.org).
820 Steyn (2007) *SACJ* 206 at 218 with further references.
821 Steyn (2007) *SACJ* 206 at 218.
822 Steyn (2007) *SACJ* 206 at 218.
823 Steyn (2007) *SACJ* 206 at 218.

been challenged.[824] *Steyn* doubts if s 105A will survive such scrutiny.[825]

Interestingly, in his 1996 article, *Bekker* suggests that the system of legal aid and public defence would have to be increased dramatically before accepting the existence of plea bargaining.[826] However, he admits that at that time this still was impossible and impracticable.[827] As long as there is a lack of funds for such support of undefended accused, *Bekker* proposes or at least suggests to allow plea bargaining only at the Supreme Court.[828] However, in present practice plea bargaining is a practice used in all courts.

c. Alternatives for unrepresented accused

The 'problem' of mandatory legal representation could be of lesser relevance than assumed due to the fact that many lower court bargains possibly can be and are solved by way of a plea of guilty in summary trials as contemplated in s 112. S 112 aims to avoid injustice by providing measures referred to the guilty plea in summary trials.[829] If the court is of the view that a reasonably minor punishment is appropriate, it may accept the plea of guilty and abide further actions (s 112 (1) (a)).[830] In cases of relatively heavy punishments, the presiding judge is obligated to verify the accused's plea of guilty before he can convict (s 112 (1 (b) and (2)).[831] Thus, the procedure might also provide sufficient safeguards against abuse.[832] Moreover, *De Villers* is right when he states that it was 'foreseeable that undefended accused will simply make use of the informal system of plea bargaining where there is less supervision than with the section 105A procedure'.[833] Thus there are various alternative methods of which the accused may make use. It should not be lost out of scope, however, that statutory plea bargaining offers the accused several important benefits. Just to mention two: the accused in the formal bargain procedure enters into a written agreement which documents and thereby ensures him an exact outcome of the bargain to which prosecution and court are bound. Informal bargains for instance do not offer such certainty. Second, the assistance of legally sophisticated assistance is generally advisable. The lack of counsel to poor accused in the ideal case is solved by the institution

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824 Steyn (2007) *SACJ* 206 at 218.
825 Steyn (2007) *SACJ* 206 at 218.
826 Bekker (1996) 19 (1) *CILSA* 168 at 222.
827 Bekker (1996) 19 (1) *CILSA* 168 at 222.
828 Bekker (1996) 19 (1) *CILSA* 168 at 222.
829 Hiemstra's, *Criminal Procedure*, p. 17-2.
830 Hiemstra's, *Criminal Procedure*, p. 17-2.
831 Hiemstra's, *Criminal Procedure*, p. 17-2.
832 S 112 will be extensively examined in Chapter V.12.
833 De Villers (2004) *De Jure* 244 at 254.

of public defence. However, as predicted by *Bekker* in 1996, money to realise this is lacking.[834]

d. Optional legal representation

German law has no prerequisite of legal representation in the s 257c bargain procedure. The issue of whether this would be a useful supplement to the provisions on plea bargaining surprisingly has not been a substantial part of the controversy yet. However, the demand for counsel can arise out of general provisions. The agreement procedure formally is conducted before the court and forms part of the conventional trial procedure. Thus, the general rule of s 140 of the StPO that provides for cases in which defence is mandatory can be applied. The participation of defence counsel thereafter is mandatory if: '1. the main hearing at first instance is held at the Higher Regional Court or at the Regional Court; 2. the accused is charged with a felony; 3. the proceedings may result in an order prohibiting the pursuit of an occupation; 4. remand detention pursuant to Sections 112 or 112a or provisional committal pursuant to Section 126a or Section 275a subsection (5) is executed against an accused; 5. the accused has been in an institution for at least three months based on judicial order or with the approval of the judge and will not be released from such institution at least two weeks prior to commencement of the main hearing; 6. committal of the accused pursuant to Section 81 is being considered for the purpose of preparing an opinion on his mental condition; 7. proceedings for preventive detention are conducted; 8. the previous defence counsel is excluded from participation in the proceedings by a decision.'[835] In other cases 'the presiding judge shall appoint defence counsel upon application or ex officio if the assistance of defence counsel appears necessary because of the seriousness of the offence or because of a difficult factual or legal situation (...)'[836] If not already due to one of the enumerated formal reasons, the latter prerequisite of a case with a difficult factual or legal situation can be applied to a bargain situation that is possibly accompanied by difficulties. It can be summed up that as soon as the situation involves grave consequences, s 140 prescribes legal representation. Thus, most cases of plea bargaining in Germany will include representation, nonetheless it is not a formal prerequisite be concluded under the surveillance and aid of a representative. Moreover, it can be assumed that due to inquisitorial law traditions, courts and prosecutors will hesitate to initiate a bargain procedure with an unrepresented accused as he lacks the

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834 Compare above.
835 S 140 (1) StPO.
836 S 140 (2) StPO.

assistance of an equal counterpart. Inquiries have shown that in approximately 59 % of all cases the accused's representative initiates the bargain.[837] Finally, it can be stated that the situation of an unrepresented accused almost never occurs, in scholarly opinion on bargaining in Germany, a last indicator for some minor relevance of the issue.

e. Concluding remark

The prerequisite of mandatory legal representation offers both advantages and disadvantages. The duty to have a counsel gives the impression of a more accurate protection to the accused against the abuse of plea bargaining. Moreover, the accused benefits from a more equal bargain position as he is supported by a professional advocate. At the same time, the unrepresented accused suffers inconvenience from procedures that may serve for him as an alternative to for instance informal plea bargaining. It is hard to determine whether German law should adopt the duty to have a counsel or not. It can be held, however, that in practice however in a majority of the cases the accused is legally represented. In South Africa, against the background of an equal treatment of the rich and the poor, there might be a need for either abolishing the prerequisite or else practice should – which would be the solution to be preferred − provide for public defenders for those who cannot afford a legal representative.

9. Binding effect of agreements

An highly relevant issue is whether agreements bind the court. Interestingly, in U.S. law, Rule 11 of the Federal Rules of Criminal Procedure dealing with plea bargaining provides for types of agreements that bind the court and others that do not.[838] On the contrary, both South African and German law do not know such a distinction under statutory law. Agreements in terms of their statutory provisions generally aim to bind the participants. It is

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837 Schöch, *Urteilsabsprachen in der Strafrechtspraxis*, p. 132 in an inquiry amongst judges, prosecutors and defence counsels.

838 Rule 11 (c) (1) of the U.S. Federal Rules of Criminal Procedure reads as follows: '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. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will: [...] (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request *does not bind the court*); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request *binds the court* once the court accepts the plea agreement). [...]'; emphasis added.

however questionable at what point in time the procedure becomes binding for the further procedure and if there exists a bargain procedure that has no binding effect.

a. Statutory agreements

The key issue to be discussed in the present and the subsequent passages is when exactly a bargain process becomes binding. This question might appear confusing to the South African reader. South African provisions provide for the conclusion of a signed agreement that is subsequently scrutinized by the court. Thus, it can be held that the agreement is binding right from the start. German procedure however differs essentially. The negotiations on the one hand and the court's scrutiny on the other form a homogenous process in Germany. Both parallel running and mutually conducted parts of the process are finalised by the conclusion of the agreement at the very end of the whole bargain procedure. Thus, both issues, i.e. when the agreement becomes effective and when the parties are bound to it, are of high relevance. It is for instance imaginable that certain behaviour already leads to a binding effect before the parties have formally consented to an agreement. The German law in s 257c (3) 4 states that the agreement becomes effective as soon as both the accused or his legal representative and the prosecutor accept the court's proposal. The exact time the parties actually do accept the agreement is not quite obvious. Instead of a signing of a written agreement, in Germany the agreement is only put to the court record. It is essential to remark that this step is only declaratory. The parties might have already agreed at an earlier stage. The problem is that the terms and conditions of the bargain are fluently discussed. One has to point out the time by which court, prosecutor and accused have consented to the '*essentialia negotii*' of the bargain.[839]

The court is bound to the agreement once it comes into existence. Prior to the statutory law, case law therefore had to refer to the principle of a fair trial in terms of Article 6 of the ECHR. With the statutory law there still is no written binding effect on the court. Rather, such effect is taken for granted without reference to explicit statutory provisions.[840] S 257c (4) 1 only tells in which case the court shall cease to be bound. *Argumentum e contratrio*, the court generally is bound as soon as the agreement becomes effective. It is essential that the agreement does not only bind the court but also offers the accused a claim for

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839 Concerning the conclusion of the agreement review Chapter IV.3.f.

840 SK-*Velten*, StPO, s 257c, para 28.

performance.[841] The agreement is enforceable.[842] This is considered to be the most fundamental improvement of the legal position of the accused in comparison to the formerly unregulated informal practice of bargaining.[843] That ability to call for compliance to the content of the agreement refers to all stages of the proceedings and only ends with the final judgment.[844] Without a doubt this binding effect applies to the court of first instance.[845] Case law partly tends to hold that only the court of first instance that participated in the bargain shall be bound.[846] It is argued that the appeals courts would not have been part of the negotiations and the agreement and therefore cannot be bound to what has been negotiated. *Velten* however holds that this view violates the principle that the bargain finalises the trial.[847] *Velten*'s opinion is accurate. If appeals courts were not bound to the agreement, the accused could not trust in the outcome of the bargain. This would diminish the benefits of plea bargaining and offend its very essence.[848]

The binding of prosecutor and accused is not regulated. Nevertheless is must be so that after having given their consent prosecutor and accused are bound to the agreement.[849] As 'debtors' of 'contractual commitments,' their obligation arises out of the promise of a certain procedural behaviour.[850] As there are no written rules, the binding of prosecutor and accused in statutory agreements follows the same mechanisms as in the informal agreement procedure. That is why the issue shall be discussed in the subsequent chapter on informal agreements.

As presented earlier, the conclusion and binding of agreements have to be precisely analysed under the German provision of s 257c. There is a need to determine the exact point in time during the negotiation process that the parties consider the agreement as concluded. In South African law, however, the point of conclusion under the terms of s 105A (2) is obvious. It can be assumed that the agreement becomes binding as soon as the accused actually pleads guilty.[851]

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841 SK-*Velten*, StPO, s 257c, para 29.
842 SK-*Velten*, StPO, s 257c, para 29.
843 SK-*Velten*, StPO, s 257c, para 29.
844 SK-*Velten*, StPO, s 257c, para 29.
845 SK-*Velten*, StPO, s 257c, para 29.
846 OLG Düsseldorf (2011) *StV* 80 at 81.
847 SK-*Velten*, StPO, s 257c, para 29.
848 The issue will be discussed in more detail in Chapter V.9.
849 Niemöller/Schlothauer/Weidner-*Niemöller, Gesetz zur Verständigung im Strafverfahren*, p. 28.
850 Compare SK-*Velten*, StPO, s 257c, para 28.
851 Compare Bekker (1996) 19 (1) *CILSA* 168 at 206 with reference to U.S. law.

b. Informal agreements

Considering the procedural conduct of the bargain, formal bargaining in Germany is mainly characterised by the documentation in the court record and certain rules like that the parties may only consent to a sentence range. The process of consenting is a matter of material mutuality. Thus, no matter whether the outcome of the bargain is later documented (which makes it a statutory bargain) or is solely agreed upon in camera (which makes it an informal bargain), the 'contractual principles' of consenting are the same. These have been presented earlier.[852] Thus, the agreement becomes effective by the time the conduct of the parties can be interpreted as a mutual consent.

A striking point important to emphasize is that South African informal agreements are very similar to the German procedure of bargaining. German plea bargain procedure is an example of the formalisation of an informal procedure.[853] The mechanics of concluding an agreement have in essence retained their informal characteristics.[854] Consequently, the above presented principles concerning statutory plea bargaining in Germany apply not only to the German informal bargain procedure but also to the application of informal procedure in South Africa. The relevance to South African law shall be explained once more. The conclusion of the agreement in terms of statutory law, as well as the conclusion of informal agreements, is not a matter of concern in South Africa. As soon as the requirements of s 105A (2) are fulfilled, the agreement comes into existence. In contrast, the informal bargain does not result in an agreement document. The conclusion of the agreement has to be interpreted by the conduct of the participants.

The interesting question that shall now be examined for both German and South African informal bargains is if the agreements are binding. Scholarly opinion in South Africa is that informal agreements do not bind.[855]In Germany, however, informal bargaining has generally been considered inadmissible since the advent of the new provisions on plea bargaining. Before, there was nothing but an informal bargain procedure. These former informal negotiations had a binding effect on the participants.[856] Courts therefore referred to the principle of a fair trial in terms of Article 6 of the ECHR. With the new law on agreements, however, any bypassing of statutory formal requirements in terms of s 257c

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852 Compare Chapter IV.3.f.

853 *Turner* still generally names German plea bargaining 'informal'; compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 73 seqq.

854 Remember that there is no written agreement and the outcome is only documented in the court record in essence.

855 De Villers (2004) *De Jure* 244 at 253.

856 See generally BGHSt 43, 195; 50, 40.

means that the agreement is not binding.[857] Consequently, informal bargaining in Germany has no binding effect.[858] Thus, it can be summed up that both in Germany and in South Africa informal bargains generally do not have a binding effect.

This rule is surprisingly strictly upheld. Most scholars and courts seem to have lost out of scope that certain conduct and statements made may bind the court or the prosecutor even though formal requirements are not met. What is described as a binding effect in this context is not a formal rule stating that the agreement becomes binding on all participants involved. Moreover, the acting participants may be bound due to the principle of fairness and the rationale that forbids a *venire contra factum proprium*. If an agreement procedure does not comply with statutory provisions, it is difficult to refer to a legal basis. Flemming DJP for instance experienced such difficulties when he tried to explain in a judgment why the acceptance of the state to a s 112 (2) statement binds the court even where the statement was not entirely consistent with the allegations and general probabilities of the situation, i.e., an informal agreement.[859] If all participants mutually agree to the terms of an agreement, they are bound to that agreement on the basis of the principle of a fair trial. Otherwise the court and the prosecutor would act against the very fundamental essence of the rule and law and the principle of fairness. The nonformal binding will be presented with the help of an actual BGH case. In that case, there was no mutual consent given to an informal agreement. As will be shown, there are nevertheless fields of application for certain behaviour to have a binding effect if the accused trusts, and is entitled to trust, in it.

c. Fairness and trust

The recent BGH case (2011) *NStZ* 107 dealt with the question of whether a court may be bound to an agreement that actually never came into existence. The accused in the case claimed that he had trusted in the negotiations, although a formal settlement of an agreement never took place. The BGH denied any binding effect of the procedure. This view of the case can – as will be shown – be opposed for good reason. It will be shown that the constitutional principle of trust has a huge impact on our view on informal agreements.

The factual basis of the trial at first instance was as follows: In the case, the legal representative of the accused and the presiding judge spoke over telephone at a pre-trial stage, i.e., at the stage of s 199 seqq. of the StPO, which is in German law an interim

857 BGH court order of 4 August 2010 − 2 StR 205/10 = (2011) *NStZ* 107.
858 SK-*Velten*, StPO, s 257c, para 32; BGH (2010) *BeckRS* 28284.
859 *S v Martin* 1996 (1) SACR 172 (W) at 174b-h.

procedure on the decision concerning the opening of the main proceedings. The presiding judge announced as a possible subject to an agreement a suspended sentence of two years of imprisonment in exchange for a confession. As a consequence, the main hearing would be shortened to two days' length and some witnesses would not be summoned. The prosecution gave its consent to the proposal. The presiding judge 'F' then became ill. The subsequent main proceeding then took place with the new judge 'B' that replaced the ill judge 'F'. The main hearing lasted two days and some witnesses were, as initially planned, not summoned. But other than expected by the accused, Judge 'B' now refused to enter into a formal s 257c agreement, due to the fact that the evidence was good.[860] At the beginning of the main hearing the judge put down in the record that discussions between the legal representative of the accused and the presiding judge 'F' had taken place. He further declared to the record, that 'F' had declared that an agreement (with the abovementioned content) is possible. The record further contained that in the main proceedings the judge 'B' had thought about entering into a s 257c agreement on the present basis. The final decision however was abstain from entering into an agreement. The accused then only partly confessed. The judge 'B' then recalled the accused, on the grounds that a full confession could help the accused to get a suspension on the sentence. He spoke of the 'desired suspended sentence'. That motivated the accused to fully confess. The judge then recorded once again that an agreement had not been settled. At the end of the hearing the judge asked the accused how much he would be able to pay monthly (which is a condition of a suspension in respect of s 56b StGB). Finally, the prosecution pleaded for a suspended sentence of two years' imprisonment.[861] The defence pleaded accordingly. The court then convicted the accused - surprisingly - to a two year, nine month custodial sentence without a suspension. The appeal against this judgment before the BGH, as the 'German Supreme Court of appeal,' was not successful.

The BGH held that a violation of the provision of s 257c as complained by the accused did not occur. The reason was that a formal agreement in respect of s 257c had not been settled. The conclusion of an informal agreement in the case appeared to be possible but was not proven. However, an informal bargain would not generate a binding effect as prescribed for statutory bargains in s 257c (3) 4 and (4) StPO. A formal agreement, that has to be recorded, obviously did not come into existence.

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860 He already made this clear prior to the main hearing in a phone call to the legal representative of the accused.

861 In German Criminal Procedure a kind of 'plea', which is more of a proposal of each participant in regard of certain sentence takes place at the very end of the main proceeding, briefly before the court final decision on the case.

The BGH then examined a possible violation of the principle of a fair trial. Such a violation requires behaviour on the part of the court that would be misleading and unclear. The accused has to be confused in a way that he cannot figure out how his own procedural conduct will affect the further outcome of the proceeding and whether it harms him. This requires proof that the court gave the accused the impression that it considers itself bound by the negotiations – here, with the ill judge 'F' – and that the accused can trust in a settled agreement. Here, the BGH held that the court of first instance was right not to consider itself bound to the informal pre-trial discussion and the 'offer' of Judge 'F'. Then Judge 'B' had no other possibility than to simply state that he would not accept the so far undertaken negotiations and to clearly state so in the record. He did so at the beginning of the main hearing and once again at the end. In the eyes of the BGH there was not further or more far-reaching possibility to state that the court considers itself as not being bound and that the accused had no right to trust in the pre-trial proposal.[862]

Meyer strongly opposes the decision of the BGH on that case.[863] He admits that the BGH was right when stating that informal agreements generally do not bind the court. This already conforms to pre-statutory case law.[864] Actual case law confirms this understanding.[865] *Meyer* however stated that the question of whether agreements bind the court cannot be put on a level with the protection of trust.[866] The constitutional principle that trust is protected could not be cleared away simply because of a lack of formal requirements or the inadmissibility of an agreement.[867] The fact that the agreement in the case did not bind the court had not effect on the principle of trust. The trust of the accused has to be protected even though an agreement was inadmissible only if trust had been generated through particular conduct during the proceedings.[868] In the opinion of *Meyer* – which can be supported − the principle of a fair trial, as contained in Article 6 of the ECHR, was not well enough considered by the BGH.[869] The appeal decision did not focus sharply enough on the court's conduct during the proceeding.[870] BGH only held that it was

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862 It has to annotated that the BGH also referred to a lack of presentation of facts by the accsued that would further prove his trust; BGH (2011) *NStZ* 107 at 108.

863 Meyer (2011) *HRRS* 17.

864 Meyer (2011) *HRRS* 17 at 18; Compare BGHSt 43, 195 at 205 seq., 210 seq.; (2001) *NStZ* 555 at 556; (2009) *NStZ-RR* 1 = only recorded formal agreements bind the court.

865 Meyer (2011) *HRRS* 17 at 18; Graumann, *Vertrauensschutz und strafprozessuale Absprachen*, p. 456 seqq.

866 Meyer (2011) *HRRS* 17 at 18 opposing to BGH (2005) *NJW* 445 at 446; (2004) *NStZ* 338 at 339.

867 Meyer (2011) *HRRS* 17 at 18; Meyer, Willensmängel des Angeklagten beim Rechtmittelverzicht im Strafverfahren (2003) p 104seqq.

868 Compare Meyer (2011) *HRRS* 17 at 18.

869 Meyer (2011) *HRRS* 17 at 19.

870 Meyer (2011) *HRRS* 17 at 19.

essential that the recorded statements at the beginning and towards the end of the main hearing had declared that a formal agreement had not taken place. What should have been reflected by the BGH instead was the whole conduct of the court of first instance and the influence it had on the accused in between.[871]

Meyer reveals two aspects that should have been scrutinized by the BGH more deeply.[872] First, he mentions that trust in the agreement is not solely destroyed by the court's recordings stating that no agreement had been disclosed.[873] One should rather take into consideration the judge's behaviour as a whole, especially during the hearing of the accused. Second, in the case there had been other possibilities – which the BGH does not admit – to further state that the court considers itself not bound by the informal agreement, i.e., to further clarify that there was no right to trust in the proposal of judge 'F', who later became ill.[874] The court could have stated more clearly that it was still considering convicting the accused and imposing a non-suspended sentence.[875] Instead, the judge gave the impression that he would stick to the negotiated terms. To destroy any trust on the part of the accused, the court could have stated that the chance for a suspended sentence is factually not exaggerated, instead of encouraging the accused to fully confess and recalling the 'desired suspended sentence' that the accused could achieve.[876] Finally, the court had conducted the proceedings as if the informal agreement was in force. There were only two days planned for the main hearing and some witnesses were not summoned, which conformed to the presumptions of the initial negotiations.

Summing all these facts and possible alternative actions up, it cannot be regarded as evident that the accused had no reasonto trust in what had been discussed at a pre-trial stage. To be more specific, trust was not caused by the pre-trial discussions and judge 'F''s proposal for an agreement. Trust and confidence in the final outcome of the trial was rather encouraged through the later conduct of the main proceeding in which judge 'B' largely referred to negotiated terms, even while pretending that he did not consider himself bound to the negotiations anymore.

The case shows that the principle of a fair trial plays an important role in bargain procedures that are informal. The principle can be referred to the rule of law and to Article

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871 Meyer (2011) *HRRS* 17 at 19.
872 Meyer (2011) *HRRS* 17 at 19.
873 Meyer (2011) *HRRS* 17 at 19.
874 Meyer (2011) *HRRS* 17 at 19.
875 Meyer (2011) *HRRS* 17 at 19.
876 Meyer (2011) *HRRS* 17 at 19.

6 of the ECHR for Germans and to s 35 (3) of the South African Constitution. BGH however interpreted these principles too strictly. Whenever the accused has a legitimate reason to presume certain behaviour, he can trust in such an outcome and consequently the court and prosecutor are bound to their indications.

d. Concluding remark

Statutory agreements in both countries do indeed bind the participants. On the contrary, informal bargains have no binding effect. The conclusion of an informal agreement in South Africa can generally be compared to the German bargain procedure. The reason therefore is that the German law does not know specific formalities and rules concerning the act of agreeing to the agreement. Rather, it can be described as a mutual process of consenting. Both South African and German informal bargain procedures, although not binding, have to comply with the rule of law and the principle of a fair trial. Consequently, the courts are not free to choose the informal bargain procedure and to thereby throw overboard the accused's fundamental rights by fostering trust in a reasonable and predictable conduct of the trial. It cannot be right that the accused is influenced by subtle indications and secret offers and on the other hand has no right to claim the performance that has been imposed on him.[877] The courts in such a scenario would have free rein to communicate nonformally and to use subtle indications which could under no circumstances become binding to them.[878]

10. Non-compliance and withdrawal

Oftentimes the parties intend to comply with formal prerequisites but accidently fail to do so or even willingly circumvent such prerequisites. The consequences of this are difficult to ascertain. It is apparent that not every formal fault transforms a formal bargain procedure into informal negotiations. Thus, there have to be legal consequences that are applied if the parties fail to comply with formal prerequisites. What consequences results where a party decides to resile from a concluded agreement is of much interest to this discussion.

a. Non-compliance

Both in Germany and South Africa statutory law knows several provisions establishing

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877 Compare Meyer (2011) *HRRS* 17 at 21.
878 Compare Meyer (2011) *HRRS* 17 at 21-22.

formal prerequisites that must be considered in the bargain procedure.[879] It shall be examined which provisions cause a major irregularitiy and which failures in the proceedings can be cured.

In the *Solomons* case, the Cape High Court had to deal with the consequences of judicial noncompliance.[880] The court had to deal with three irregularities that had occurred in the proceedings. The first was that the accused only repeated his admissions instead of confirming the facts upon which those admissions are based, as contemplated in s 105A (6) (a) (ii).[881] Second, the fulfilment of s 105A (6) (a) (iii) had not been documented, i.e., the accused had entered into the agreement freely and voluntarily in his sound and sober senses without having been unduly influenced.[882] The third was that the record of the proceedings did not disclose what sentence the presiding officer regarded as 'just' before convicting the accused and imposing the sentence.[883] It appeared that the presiding officer was of the opinion that the agreed upon sentence was not an appropriate one.[884] He did however proceed to impose the sentence which he regarded as just. [885] The purpose of making such information known is to enable the parties to make an informed choice whether to abide by the plea bargaining process or to resile there from.[886]

S 105A provides for consequences of noncompliance by the negotiating parties, but it does not state any consequences of judicial noncompliance. However, the High Court held, that, as a consequence, the magistrate violated s 105A (9) (a).[887] Moosa J did not further explain his conclusion. The procedure laid down in s 105A (9) however offers the prosecutor and the accused the possibility to decide whether they abide by the agreement under the terms of the sentence that the court imposes to be just or, alternatively, to withdraw therefrom, s 105A (9) (b)-(d). It can be assumed that the non-indication of the just sentence violates the right of the parties to decide whether to proceed with the agreement under the modified terms on the sentence or to start a trial *de novo*. The Cape High Court consequently set aside the conviction and sentence and remitted the matter to the magistrate's court for hearing *de novo* before another presiding officer.[888]

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879 It can be remarked that German rules on pre-trial discussions in terms of s 160b, 202a, 212 only know the duty to document the essential contetn in ther court record.
880 Rodgers (2010) *SACJ* 239 at 260 at 254; S v *Solomons* 2005 (2) SACR 432 (C).
881 Rodgers (2010) *SACJ* 239 at 260 at 254; S v *Solomons* 2005 (2) SACR 432 (C) at 435h.
882 S v *Solomons* 2005 (2) SACR 432 (C) at 435h..
883 S v *Solomons* 2005 (2) SACR 432 (C) at 436a.
884 S v *Solomons* 2005 (2) SACR 432 (C) at 436b.
885 S v *Solomons* 2005 (2) SACR 432 (C) at 436b.
886 S v *Solomons* 2005 (2) SACR 432 (C) at 436d-e.
887 S v *Solomons* 2005 (2) SACR 432 (C) at 436e.
888 S v *Solomons* 2005 (2) SACR 432 (C) at 436h.

Unfortunately, the High Court failed to state whether the failure of the magistrate to state whether he considers the sentence to be just was of relevance. Furthermore, the court failed to indicate whether any single irregularity, or the cumulative effect of irregularities, motivated its decision.[889] Considering that s 105A (9) (a) is one of the core provisions of s 105A, noncompliance in this instance causes a major irregularity.[890] *Rodgers* sums up that it is possible to set aside a conviction based upon judicial noncompliance with a single core provision of s 105A such as subsection (9).[891] There is however a question as to which formal provisions are to be interpreted as core provisions – *Rodgers* also names them 'material' provisions[892] – and which are not. For instance, Rodgers holds that a nonfulfilment of s 105A (6) (a) (iii), whereby the court should ask the accused whether he freely consents, should be of no further relevance if the overall documentation is clear on the point that such will of the accused was given.[893] Thus, one has to distinguish between provisions that only contain formal prerequisites that intend to lead through the bargain and provisions that enshrine material rights. In the present case, s 105A (9) (a) was violated because the court's indication that it considered the agreed sentence as unjust would have given the parties further opportunities to react. To name one more example of an insufficient irregularity: it can be assumed that if the parties fail to fulfil all formal requirements in terms of s 105A (2) (b), they have failed to fully state the terms of the agreement and this should not cause a major irregularity as long as the content can be proved by other means.

German law also refers to the rationale of the procedural provision that has been violated.[894] The legal consequences of such violations are however as unregulated as in South African law.[895] Thus, is has to be judged whether the violated rule serves the public interest or not. For instance, the rule in s 257c (5), which states that the defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to that subsection, only serves the interests of the accused. Thus, the agreement remains effective even if this information had not been given.[896] A problem arises if the court unilaterally violates provisions that serve public interest. The accused in these cases may have to be protected in his trust in the

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889 Rodgers (2010) *SACJ* 239 at 255.
890 Rodgers (2010) *SACJ* 239 at 255.
891 Rodgers (2010) *SACJ* 239 at 255.
892 Rodgers (2010) *SACJ* 239 at 255.
893 Rodgers (2010) *SACJ* 239 at 255.
894 SK-*Velten*, StPO, s 257c, para 32.
895 SK-*Velten*, StPO, s 257c, para 32.
896 SK-*Velten*, StPO, s 257c, para 32.

proceedings. An example of a rule that serves public interest is the obligation to document the bargain proceedings in terms of s 273 (1) 2 and (1a).[897] It is however held that the trust of the accused in these cases does not predominate the public interest. Thus, the agreement does not become effective. The accused however is protected in various other ways. The unilateral non-use of formal prerequisites by the courts usually indicates the judge's bias in cases in which it seems obvious that the court misuses his position to force the accused into certain conditions of an agreement.[898] Moreover, it can be assumed that the court oftentimes violates the principle of a fair trial.[899] Finally, the confession will not be used where s 136a (5) 2 is applied, such that statements obtained under application of prohibited methods may not be used even if the accused consents to their use.[900]

Thus, it can be summed up that only the breach of declaratory rules not serving any public interest possibly do not cause legal consequences. Others usually let the agreement become ineffective. The accused may be protected by rights such as the one to a fair trial.

b. Claim for performance

The accused in cases of noncompliance may even have a right to 'claim for performance.' Although this is a civil law term, it may serve to describe the accused's position in the plea bargain procedure. There are two situations imaginable. The first is the case of formal noncompliance as described beforehand. The second is the case where all formal requirements have been met but a party refuses to fulfil its part of the agreement. In the latter case, it has to be distinguished between the refusing parties. It can be stated that the accused generally is entitled to claim for performance.[901] However, the rule of law affords that once the accused fails to perform, the state or the court cannot claim fulfilment. Moreover, the consequence is that the latter parties cease to be bound by the agreement.[902] The right to claim depends on the point in time in which the agreement binds the parties. Under South African law it can be assumed that once the plea of guilty is accepted the agreement becomes binding and constitutionally enforceable.[903] In the case of the nonfulfilment by the court of formal prerequisites that serve public interests, the

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897 SK-*Velten*, StPO, s 257c, para 32.
898 SK-*Velten*, StPO, s 257c, para 32; Compare once again BGH court order of 4 August 2010 − 2 StR 205/10 = (2011) *NStZ* 107.
899 SK-*Velten*, StPO, s 257c, para 32.
900 SK-*Velten*, StPO, s 257c, para 32.
901 Heller, Die gescheiterte Urteilsabsprache, p. 61-94.
902 Compare Bekker (1996) 19 (1) *CILSA* 168 at 206 with reference to U.S. law.
903 Compare Bekker (1996) 19 (1) *CILSA* 168 at 206 with reference to U.S. law.

accused has no right to claim performance.[904] The rationale is that otherwise the interests of the public could be undermined by the accused.[905]

c. Court's withdrawal

In German and South African law the court ceases to be bound by the agreement in different situations.

South African s 105A (10) (a) states that an agreement shall be null and void in the event that a trial starts *de novo* as contemplated in subsection (6) (c) or (9) (d). The main purpose of that provision is to encourage the prosecution and defence to negotiate by means of giving the assurance that their statements in the negotiation process cannot be used against them where a trial starts *de novo*.[906] According to subsection (6) (c), the reason can be that: the court recorded a plea of guilty because it is not satisfied of the accused's guilt (s 105A (6) (b) (i)), the accused does not admit the facts to which he had pleaded guilty (s 105A (6) (b) (ii)) or for another reason the court is of the opinion that the plea of guilty should not stand (s 105A (6) (b) (iii)). By the terms of subsection (9) (b) (ii), the trial starts *de novo* due to the prosecutors or the accused's withdrawal from the agreement, which will be the case if they dissent from the court's proposal for an alternative sentence which the judge considers to be just. It has to be emphasized that subsection (10) (a) (i) to (iii), dealing with the legal consequences, does not distinguish between the two possible reasons for a trial to start *de novo*.[907] Although there is no reference in s 105A (10) (a) to the situation where the prosecutor and the accused negotiated but failed to reach a plea and sentence agreement, it is submitted that all statements are inadmissible evidence at the subsequent trial.[908] Trollpi JA in *Naidoo v Marine and Trade Insurance Co Ltd* pointed out that it serves public policy if the participants negotiate amicably without the fear that, if the negotiations fail, any admissions made by them will be used against them.[909] *S v Forbes* case already dealt with the problem of excluding evidence in respect of 'considerations of public policy'.[910] To sum it up, s 105A (10) (b) helps avoiding successive unsuccessful plea and sentence agreements by stating that prosecutor and the accused may not enter into another agreement in the trial *de novo*. Furthermore, it encourages the participants to agree on a

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904 SK-*Velten*, StPO, s 257c, para 32.
905 SK-*Velten*, StPO, s 257c, para 32.
906 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-21.
907 Compare Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-21.
908 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-21.
909 *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677c.
910 *S v Forbes* 1970 (2) SA 594 (C) at 599.

viable and realistic agreement as there is only a single opportunity to do so. Nevertheless, where a trial starts *de novo*, the participants will oftentimes continue informal negotiation despite s 105A.[911]

The German statutory provisions on plea bargaining, inserted into the StPO in 2009, eased the court's withdrawal from the agreement as compared to the former case law of the BGH.[912] Former case law bound the court to the pronounced upper sentence limit unless the further outcome of the trial revealed so far unknown and grave new facts concerning the accused's guilt.[913] The BGH's Grand Criminal Panel later in addition permitted deviations from the indicated upper sentence limit if the facts existing during the negotiations later proved to be wrong.[914] The presented case law has been further restricted by s 257c (4) 1, which states that the indicated sentence limits in addition have to appear inappropriate when compared to the accused's guilt and the crime he committed. The section reads as follows: 'the court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt.' What eases the withdrawal now is that the possible carelessness of the court can form a ground to withdraw. If the court for instance did not read the file closely enough, he might in terms of the section 'overlook' substantial facts and base the proceedings on his insufficient knowledge of the case. If later the parties enter into an agreement this simple fact would provide grounds to withdraw. However, the legislature's intention was to promote just convictions.[915] The provision is similar to the South African s 105A (9). The provision of 257c (4) 1 aims for a just conviction. Other than in South African law, however, the rule not only allows withdrawal if the court is of the opinion that the sentence agreement is unjust, but rather it also provides for withdrawal where the court has failed to ensure its own proper information. Furthermore, s 257c (4) 2 provides for another interesting grounds for withdrawal. That provision refers to the situation where the 'conduct' of the accused does not correspond to the court's prediction. 'Conduct' used in this context does not mean the appearance before the bench and the shown behaviour during the trial but instead means

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911 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 244 (Chapter 14, 3.2); Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-22.

912 Meyer-Goßner, StPO, s 257c, para 26; former case law compare BGH 43, 19.

913 Compare Meyer-Goßner, StPO, Introduction para 119f.

914 Compare Meyer-Goßner, StPO, Introduction para 119g.

915 Meyer-Goßner, StPO, para 26; BT-Drucks 16/11736 p. 18.

the accused's use of procedural rights.[916] This basically means that the accused waives the right to make motions to admit evidence.[917] Thereby, the court's obligation to establish the truth, i. e. the duty to search for the substantial facts of the matter, is affected. Without information from the participants, the court's investigation is a limited one. In particular, the indication of a upper sentence limit, which most likely indicates the specific sentence the court is aiming for in exchange for adjusted and pleasant 'conduct,' appears questionable.[918] If the court ceases to be bound by the agreement due to unexpected conduct, this opens the possibility of misuse and inappropriate pressure toward the use of procedural rights. However, there is not much case law in the field on this section. Legal practice will have to show if the relatively young provisions will be applied in an inappropriate way or not.

d. Legal consequences

Having presented the different grounds for withdrawal, the further proceedings in both legal systems shall be reviewed. The legal consequence in South Africa is prescribed by s 105A (10), stating that a trial takes place *de novo*. A trial *de novo* is a 'new' trial. S 105A (6) (c) and (9) (d) state that the trial starts *de novo* before another presiding judge. Usually an appeals court will order such a new trial. Nevertheless, s 105A provides for such a consequence already at first instance. Where a trial starts *de novo* as contemplated in subsection (6) (c) (or as contemplated in subsection (9) (d) as well), the agreement shall be null and void and no regard shall be given or reference made to any negotiations which preceded the formation of the agreement or to any record of the agreement in any proceedings relating thereto. The only exception is where the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto, and any admission so recorded shall stand as proof of such admission (s 105A (10)). The prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts. Furthermore, the prosecutor may proceed on any charge. The purpose of these provisions is to encourage the prosecution and the accused to negotiate and reach an agreement by giving them both a statutory guarantee that their admissions and concessions made in regard to the agreement cannot be used against them when a trial start *de novo*.

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916 Meyer-Goßner, StPO, s 257c, para 14.
917 Meyer-Goßner, StPO, s 257c, para 14.
918 Compare also Strate (2010) *NStZ* 362 at 365; although he holds that the lower sentence limit indicated usually corresponds to the later sentence.

In Germany, however, the same trial continues even though the parties have withdrawn from the agreement or substantial irregularities have occurred. The legal consequences are nevertheless comparable to those under South African law. S 257 (4) 3 states that the accused's confession may not be used. This provision is necessary due to the fact that the accused in most cases has made a confession that generally remains usable evidence. The use of the confession after the withdrawal however would violate the principle of a fair trial.[919] In civil law terms the accused has the right to a *condictio* of his confession.[920]

Another point asks for comparison. There is no German rule that a trial continued after a failed agreement has to be taken before another presiding officer, as South African s 105A (10) prescribes as a general rule. The same consequence can however result out of the general provision. The judge may be challenged for bias under the terms of s 24 (1) of the StPO. Subsection (2) describes that 'a challenge for fear of bias may be brought where there is reason to doubt the impartiality of a judge'. The failure of an agreement results in an increased judge's workload. This already could indicate a lack of impartiality.[921] Another reason might be that the confession the accused made in first place, although it is not usable as evidence, might have already formed the basis of court's opinion.[922] Others however trust in the judge's independence and deny such grounds for bias.[923]

Interestingly, South African law in s 105A (10) (b) forbids any further agreements based on a charge arising out of the same facts. The question of whether a failed agreement can be followed by a second, subsequent agreement has not yet been considered in the German controversy.[924] The rationale of prohibiting a second agreement is that in the interest of justice finality must be reached.[925] Successive unsuccessful agreements could greatly delay the proceedings.[926] It can be held that the main benefit of plea bargaining, to shorten the trial, cannot be achieved anymore once an agreement has failed. In that case each subsequent agreement will cause great uncertainty. Nevertheless, the parties that already have been opposed in a first agreement proceeding will already be infected by what has

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919 SK-*Velten*, StPO, s 257c, para 46; Graumann, *Vertrauensschutz und strafprozessuale Absprachen*, p. 507.

920 SK-*Velten*, StPO, s 257c, para 46.

921 SK-*Velten*, StPO, s 257c, para 47.

922 SK-*Velten*, StPO, s 257c, para 47; Frister in Grünwald-FS, 169.

923 SK-*Velten*, StPO, s 257c, para 47; Weigend in Maiwald-FS, 829 at 843 seq.

924 It could be held that the German law on plea bargaing does not of the structure for such a problem; it is hard to imagine that the agreement 'fails' at first instance and the court considers a second as it is the court who guides the conclusion of the agreement. However the situation in which the court is ceased to be bound to the agreement in terms of s 257c (4) 1 allows to discuss the issue anyhow.

925 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-21.

926 Compare Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-21.

been discussed earlier. Thus, even though the parties do not intend or simply are not entitled to proceed with a second formal bargain, they will however informally negotiate on the case. It can be assumed that it is the prosecutor's and the accused's will to fix the failure of the first agreement procedure. The German court is entitled and, due to the inadmissibility of informal bargaining, is forced to conduct a secondary formal agreement. The judge will however have a simultaneous interest in terminating the proceedings in relatively short time. Thus the German judge, as the formal initiator of the bargain procedure, will only enter into a second bargain if they see opportunity for a quick conclusion of the procedure. This will depend on whether the first agreement failed due to formal irregularities or rather whether it showed misuse, grave dissent or even unwillingness. It can be summed up that there are good reasons for a general prohibition of successive bargains though, as they may have little chance to actually shorten the trial and also may conflict with the rule of law.

e. Concluding remark

Noncompliance to formal prerequisites is of relevance where the public interest is touched. The non-use of the procedural achievements after an agreement has failed against the will of the accused in South Africa is enshrined in s 105A (10) (a), whereas in Germany it is an unwritten principle. An agreement in both laws is constitutionally enforceable by the accused. The withdrawal from an agreement in Germany is only ruled with regard to certain aspects but has not yet raised greater concerns. The grounds for withdrawal are in essence very similar to the corresponding South African provisions. If one assumes that the primary legal consequence of a bargain is the accused's claim for performance, the secondary legal consequence then describes what happens if the agreement is not further upheld or if the court withdrew from it. South African law provides for a trial *de novo* before another presiding officer. German law on the other hand considers the confession as not usable evidence and proceeds with the present trial in the usual manner. German law, unlike South African s 105A (10) (b), does not prohibit successive agreements. Nevertheless, in practice they will not occur very often due to the immanent uncertainty of such a second bargain procedure.

11. Remedies

A key issue surrounding plea bargaining is the question of whether and to what extent convictions based on agreements are appealable. The question of whether one party is

entitled to appeal against the conviction or the sentence is connected to the question of whether a party is entitled to resile from the agreement.[927] Furthermore, it will be discussed as an issue of particular interest.

Waivers that form part of agreements were controversial for a long time in Germany until the statutory amendment finally straightened the issue. Until the statutory amendment in 2009, German case law accepted the waiver of the right to appeal as a part of the agreement. This was even considered to be one of the main benefits of plea bargaining. Until a crucial decision of the BGH in 2005 that set up requirements for a waiver,[928] the legal practice had made extensive use of this instrument. Surprisingly, the newly inserted 2009 main provision on plea bargaining was accompanied – amongst others – by a s 302 (1) 2 StPO. This provision strictly forbids any waiver of the right to appeal that forms part of an agreement. This was a major caesura in the history of plea bargaining in Germany to that date. The waiver of the right to appeal in connection with agreements does not seem to have been a major issue in the controversy surrounding plea bargaining in South Africa so far.

a. General system

To understand the legal practice in both countries, it first has to be taken a look at the general provision on the right to appeal.

Remedies in terms of South African criminal law can be subdivided into review and appeal. S 35 (3) (o) guarantees, as part of the right to a fair trial, every accused person's right of review or appeal by a court of higher instance.[929] A minimum of this right is 'the opportunity for an adequate reappraisal of every case and an informed decision on it'.[930] Thus the principle of a fair trial is not restricted by written law and legal standards.[931] It is moreover a question of whether justice has been served or not.[932] S 25 (3) and s 35 (3) of the South African Constitution enshrine and even extend this principle. It should not only be asked if

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927 *S v Armugga & others* 2005 (2) SACR 259 (N) at 263b.

928 Compare BGHSt 50, 40.

929 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 352 (Chapter 20, 1.1.1).

930 *Ntuli* 1996 (1) *SACR* 94 (CC) at 101d-e; Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 352 (Chapter 20, 1.1.1).

931 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

932 Compare Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

a 'failure in justice' occurred but also if the trial was fairly regarded as whole.[933] Consequently, the trial must not only be conducted in compliance with previous requirements and standards;[934] it must also match to the concept of substantive fairness and justice.[935] To sum it up, appeal and review are constitutional rights.

Review is the best way to seek redress in the event that a party should feel aggrieved about an irregularity involved in arriving the conviction.[936] An accused who challenges the correctness of his conviction or sentence should however appeal against such conviction or sentence.[937] The reason therefore is that the evidence is not considered as carefully upon appeal and the same weight is not attached to technical points in the procedure, since the review is only concerned with the question of whether the proceedings accord with the demands of justice.[938] Furthermore, it has to be distinguished between an appeal on facts and an appeal on a question of law. The former unlimited or absolute right to appeal to a court of higher instance against a decision or order of a lower court was amended in favour of a limited right to appeal when the Criminal Procedure Amendment Act 76 of 1997 came into operation on 28 May 1999.[939]

German law does not establish the institution of review. Each court of every instance comes to a final decision without the need of an approval of another court of higher instance. The South African law provides that sentences of magistrate's courts have to be reviewed by a provincial or local division of the High Courts, even if the accused does not request it ('automatic review'[940]).[941] This is considered a benefit because by such means the High Court constantly controls the administration of justice in the magistrate's courts.[942] Such an 'automatic' control is not provided for in German law. Apart from that the

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933 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

934 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

935 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

936 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 360 (Chapter 20, 2).

937 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

938 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 360 (Chapter 20, 2); Butler 1947 (2) SA 935 (C).

939 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1) and p. 353 (Chapter 20, 1.1.3).

940 Practice uses this term to describe such a procedure; Geldenhuys/Joubert/Swanepoel/Ter-blanche/van der Merwe, *Criminal Procedure Handbook*, p. 362 (Chapter 20, 3.1.1).

941 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 362 (Chapter 20, 3.1.1).

942 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 362 (Chapter 20, 3.1.1).

provisions concerning the appeal are similar to South African law. German law allows appeal on points of fact and law (*Berufung*) by the terms of s 312 and allows appeal on points of law only (*Revision*) in s 33. An appeal on points of fact and law is, by the terms of s 312, only admissible against judgments of the criminal court judge and of the court with lay judges, which are comparable to the magistrate courts as the lower courts of first instance. The appeal on points of fact initiates a full trial at the court of second instance. Evidence is retaken and witnesses have to testify again. The rationale behind the fact that only lower court decisions are appealable on points of fact is that these courts are only made up of a single professional judge and that there might be less extensive fact-finding. Thus, one considers the possibility to initiate a second evidence-taking by means of an appeal on points of fact as necessary. If the court of first instance is a higher court, the initial evidence-taking of the first instance cannot be repeated. According to German ss 333, 335 of the StPO, generally decisions of all courts are appealable on points of law only.

There may exist similarities between the South African review and the German appeal on points of facts. As the function of both institutions differs, i.e. review as a means to control the magistrate's court versus appeal as an accused's right, they cannot be considered comparable.

b. Appeal against agreements

Mismang J held in the *S v Armugga & others* case that the right of appeal would be a limited one in cases in which the accused was convicted in terms or his plea and sentence agreement.[943] Relief can only be granted under exceptional circumstances.[944] The wording in the *S v Taylor* decision might also reveal that the accused based his decision to review on the grounds, amongst others, that the magistrate had 'failed to ensure that the applicant was adequately represented and fully and correctly informed of the consequences of the s 105A agreement, including the loss of any right to appeal against the sentence imposed in terms thereof'.[945] As this latter example illustrates, South African practice might even regard the right to appeal to be set aside by a settled plea and sentence agreement under the terms of s 105A.

To learn more about the abovementioned result, one has to take a closer look at the *S v Armugga* case. In that case, a number of accused appeared before the court of first

943 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264d.
944 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264e.
945 *S v Taylor* 2006 (1) SACR 51 (C) at 54i.

instance charged with offences of conspiracy and fraud, each one of them represented by one attorney.[946] All accused entered into written plea and sentence agreements with the prosecution by the terms of s 105A. The agreements contained, in addition to the circumstances of the crime and the particular role of each accused the consent, that the accused was guilty.[947] Each agreement was signed by the respective accused, his attorney and the prosecutor.[948] Thereafter, the magistrate's court convicted the accused. The sentencing was carried out in accordance with each agreement. The magistrate stated that it complied with certain provisions such as and s 105A (6) (a), which contain that the court satisfies itself that: the agreement was concluded by the accused freely and voluntarily, in his sound and sober senses, without having been unduly influenced; that the accused confirms the facts and admissions set out in the agreement and that he has indeed agreed to plead guilty.[949] Fourteen accused then appealed against their convictions. The appeals were solely directed against the sentence imposed by the court of first instance. They argued that, because of a lack of a further inquiry, the sentence imposed was not just and the court had therefore not complied with the provisions of s 105A (8). The section provides that the court has to satisfy itself that the sentence agreement is just before informing the prosecutor and finally convicting and sentencing the accused.[950] They pointed out that the facts in the agreements were limited. The court should have conducted a more in-depth inquiry, examining the personal circumstances of the accused.[951] Especially, they focused on subsequent convictions which were − to their minds − less severe. As a result, the imposed sentence appeared to them as a shock.[952]

The appeal court then scrutinized the effect of an agreement upon the contracting parties and questioned if one can, after having concluded the agreement, unilaterally resile from the same or later appeal against a conviction.[953] The court therefore recapitulated the development toward s 105A under aspects of appeal, as described in the following.

The South African Law Commission that helped to draft s 105A had already taken notice of the issue. Subsection (10) had been planned stating that 'a conviction or sentence imposed by any court in terms of an agreement under this section shall not be subject to

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946 *S v Armugga & others* 2005 (2) SACR 259 (N) at 261e.
947 *S v Armugga & others* 2005 (2) SACR 259 (N) at 261f.
948 *S v Armugga & others* 2005 (2) SACR 259 (N) at 261h.
949 *S v Armugga & others* 2005 (2) SACR 259 (N) at 262a.
950 *S v Armugga & others* 2005 (2) SACR 259 (N) at 262b.
951 *S v Armugga & others* 2005 (2) SACR 259 (N) at 262d
952 *S v Armugga & others* 2005 (2) SACR 259 (N) at 262d.
953 *S v Armugga & others* 2005 (2) SACR 259 (N) at 263b.

appeal'.[954] The Commission later commented that it 'remains of the view that the right to appeal should be limited'.[955] In the discussion paper, the commission was of the view that review should be the appropriate remedy. The Commission adheres to the view that 'it makes no sense to permit someone who pleads guilty and agrees to a sentence to appeal' and that 'it may, however, occur that the agreed facts do not constitute the offence. In such a case, an appeal would be justified.'[956] The planned subsection (10) thereafter did not become statutory however. The right of appeal for those convicted and sentenced pursuant to plea bargaining agreements as a consequence was generally fully preserved.[957]

Msimang J nevertheless sought to restrain the right to appeal for cases that have been plea bargained. He drew a comparison to Canadian law. A Canadian law commission once stated that where an accused has pleaded guilty there should be no right to appeal unless it was shown that the prosecutor, in the course of plea discussions, was wilfully misled by the accused in some material respect or that the court, in passing sentence, was wilfully misled in some material respect.[958] He concluded that the right to appeal has to be a limited one. A comparison could be made to the position of an appellant who is convicted on his plea of guilty and afterwards appeals against this conviction. Just like in cases of plea bargaining, only in exceptional cases will the accused who has been convicted subsequent to and in accordance with his plea of guilty be granted relief on appeal.[959] Msimang J held that 'the position can be equated with the position of an appellant who is convicted on his plea of "guilty" and thereafter appeals against the very same conviction.' In such cases, case law provided the prerequisite of exceptional circumstances.[960] Msimang J then only said that exceptional circumstances were not revealed in the present appeals, without giving a more detailed explanation or a further analysis of the case.[961] Furthermore Msimang J emphasized that sentencing was not an exact science with uniform standards.[962] Instead the sentencing court had to decide in each particular case

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954 South African Law Reform Commission, Project 73 (2001) at 4.18.
955 South African Law Reform Commission, Project 73 (2001) at 6.112.
956 South African Law Reform Commission, Project 73 (2001) at 6.112.
957 *S v Armugga & others* 2005 (2) SACR 259 (N) at 263g.
958 Law Reform Commission of Canada, Working Paper 60 (1989) at 33; *S v Armugga & others* 2005 (2) SACR 259 (N) at 264c.
959 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264f.
960 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264e.
961 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264f.
962 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264f.

what weight to give to the single elements of the triad.[963] Msimang J finally held that enough of the relevant information had been placed before the court, which enabled the judge to decide upon an appropriate sentence.[964] There were no signs that the sentences were unjust, which was why he dismissed the appeals and confirmed the convictions and sentences of first instance.[965]

Another case, *S v De Koker*, confirms this view.[966] With regard to the court's sentencing discretion, Breitenbach AJ explained that 'the test for interference by an appeal court in a sentence imposed by a trial court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection, or, even in the absence of misdirection, whether the sentence is disturbingly inappropriate in the sense that the appeal court is satisfied that the trial court did not exercise its discretion reasonably and imposed a sentence which was not appropriate.'[967] In the case, Breitenbach AJ stated that the regional magistrate had explained to the appellant the implications of sentence and especially the minimum-sentence provisions, about which the appellant later complained. Furthermore, the agreement had stated that the parties 'were agreed that, in the appellant's case, there were no substantial and compelling circumstances which justified imposing a lesser sentence than the prescribed minima.' [968] Consequently the appeal was dismissed.

As presented, South African law generally limits the appeal against agreements. In German law the question whether an appeal against a conviction and sentence achieved by an agreement is admissible has long been discussed. Latest case law confirms that s 257c does not provide for any restriction concerning the appeal on convictions and sentences that have been based on agreements.[969] It was the legislature's intention not to restrict that right.[970] Even the prosecution is entitled to appeal; an appeal is even admissible if all formal requirements of the agreement procedure have been fulfilled and

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963 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264f. with reference to *S v Dzukuda and Others*; *S v Tshilo* 2000 (2) SACR 443 (CC) at 464b-d.

964 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264g.

965 *S v Armugga & others* 2005 (2) SACR 259 (N) at 264g.

966 *S v De Koker* 2010 (2) SACR 196 (WCC).

967 *S v De Koker* 2010 (2) SACR 196 (WCC) at 205d with reference to Director of Public Prosecutions, *KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA), 2006 (3) SA 515; 2006 (1) All SA 446 para 10, with citation on *S v Rabie* 1975 (4) SA 855 (A) at 857d-f and referring to *S v Pillay* 1977 (4) SA 531 (A); *S v Pieters* 1987 (3) SA 717 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); and *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).

968 *S v De Koker* 2010 (2) SACR 196 (WCC) at 205f-h.

969 BGH (2012) *NJW* 468; OLG Düsseldorf (2011) *StV* 80 with consenting annotation of Moldenhauer/Wenske (2012) *NStZ* 184 at 184.

970 BGH (2010) *NStZ* 289 at 290; BT-Drucks 16/11736, p.7.

the prosecution points towards material grounds.[971] This is opposite of the practice in South Africa, which regards the right to appeal to be – apart from cases with exceptional circumstances – set aside by the agreement.[972] In Germany, appeals on points of fact and law, as well as appeals on points of law only, are preserved.[973] This is considered to be of substantial importance due to the fact that statutory law on agreements exceeds the scope of plea and sentence agreements against former jurisdiction.[974] The unrestricted appeal therefore lends the accused the opportunity to fully control the plea bargain procedure.[975] An early BGH decision raised the question of whether certain grounds of appeal, such as the obligation to establish the truth, should be excluded because they would reveal contradictory behaviour.[976] Limiting the remedies against agreement-based judgments to the appeal on point of law only was proposed in order to underscore the binding character of the agreement.[977] The statutory amendment set these thoughts aside and clarified that the judgment generally is appealable.[978] However, there is a need for a certain restriction of the right to appeal or at least a clarification as to which grounds of appeals ought to be successful. It is obvious that a totally unlimited right to appeal, for instance a right of the prosecution to challenge the sentence although it had agreed to a certain upper limit, would violate the very essence of bargaining. The individual directions an appeal can aim for have to be distinguished. The accused's appeal is successful against the court's withdrawal from features the judge had accepted.[979] The violation of the procedure laid down in s 257c can also be challenged by appeal.[980] It even has been held that the fact that the bargain was informal entitles a successful remedy.[981] Highly problematic is the fact that it can be assumed that abusive agreement procedures are not documented.[982] This makes it difficult for the appellant to prove failures. The major issue, however, is how the accused is protected from appeals made by the prosecution. As presented earlier, the accused might have a right to trust in the bargain procedure and its outcome. An appeal of the prosecution could destroy this trust and violate the principle of a fair trial in the terms of Article 6 of the ECHR. The prosecution, although having concluded an agreement,

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971 Moldenhauer/Wenske (2012) *NStZ* 184 at 184.
972 Compare above mentioned case *S v Armugga & others* 2005 (2) SACR 259 (N) at 264ef.
973 Meyer-Goßner, StPO, s 257c, para 32a.
974 Meyer-Goßner, StPO, s 257c, para 32a.
975 Meyer-Goßner, StPO, s 257c, para 32a.
976 Meyer-Goßner, StPO, s 257c, para 32a; BGH 50, 40 at 52.
977 Weßlau in Müller-FS, 779 at 782.
978 BGH (2012) *NJW* 468; OLG Düsseldorf (2011) *StV* 80; Moldenhauer/Wenske (2012) *NStZ* 184 at 184.
979 BGH (2008) *NStZ* 620.
980 BGH (2010) *StV* 227.
981 Meyer-Goßner, StPO, s 257c, para 32a; Meyer (2011) *HRRS* 17 at 17..
982 Haller/Conzen, *Das Strafverfahren*, para 638 with reference to BGH (2007) *NStZ* 245.

generally remains entitled to challenge the conviction and sentencing by remedies.[983] The remedy against particular terms of the agreement upon which the accused was allowed to trust and that came part of the conviction and sentence is a breach of trust.[984] German case law accepts this fact. The offered solution, however, surprises. The appeal of the prosecution violates the principle of a *venire contra factum proprium*.[985] Such behaviour does not affect procedural declarations such as the agreement though.[986] It remains in force. Also, Article 6 of the ECHR and the fair trial maxim do not touch the agreement itself. German courts apply this general rule in cases where a party resiles from the agreement. The provision of s 257c (4) 1, regulating the situation in which the court ceases to be bound to the agreement, is used by analogy.[987] The confession loses its quality as usable evidence.[988] The principle that once one party resiles from the agreement then the other party, in this case the accused, is not bound to the terms of the agreement anymore is adapted to the situation of the prosecution's remedy. Consequently, the appeals court would have to weigh the case again and could not use the accused's confession. This however opposes the purposes of plea bargaining, i.e., finding a consensual solution that brings the trial to an end such the accused can trust in it. [989] It is therefore necessary that, in cases in which the prosecution appeals against the declared terms of the agreement, the accused can claim that the agreement remains effective and that his confession remains usable evidence.[990] With the present case law the accused's trust in the agreement is not fully protected. Courts ignore the fact that it not only affords a protection of the accused against the use of his confession in case 'things go wrong'. Rather the accused's interest is to be protected against 'contractual breach' of the terms of the agreement by the prosecution or even the court.

c. Review of agreements

In a lower court, an accused person not satisfied with the outcome of a criminal trial may choose either appeal or else a review to bring the matter before a High court having jurisdiction.[991] Generally, where the correctness of the conviction or sentence is

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983 OLG Düsseldorf (2011) *StV* 80; Moldenhauer/Wenske (2012) *NStZ* 184 at 184.
984 Compare Moldenhauer/Wenske (2012) *NStZ* 184 at 187.
985 Moldenhauer/Wenske (2012) *NStZ* 184 at 185.
986 Meyer-Goßner, StPO, Introduction, para 11.
987 BGH (2011) *JR* 167; (2011) *StV* 337.
988 OLG Düsseldorf (2011) *StV* 80.
989 Compare Moldenhauer/Wenske (2012) *NStZ* 184 at 187.
990 Suggested by Moldenhauer/Wenske (2012) *NStZ* 184 at 187.
991 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

challenged, it is best to choose an appeal.[992] If the accused believes that the irregularities took place in the proceedings, he should seek relief by way of review.[993] In specific cases both means can be apposite.[994]

There exist various categories of review procedures. Statutory provisions provide for automatic review in terms of s 301, extraordinary review in terms of s 304 (4), review of proceedings before sentencing in terms of s 304A and the procedure in which the accused may set down case for argument in terms of s 306.[995] A second category, acknowledged in s 173 of the Constitution, is of common law origin and contains the High Court's common law inherent jurisdiction on review.[996] The Supreme Court has no common law jurisdiction to review High court decisions.[997] A third category of review is based on 'other legislation.'[998] Clearly, this jurisdiction of review is far wider than the above mentioned ones and even embraces reviews related to violations of constitutional rules and principles. The latter effect may however not have been intended.[999] Nevertheless, such a review is applicable. The provision of s 302 of the Criminal Procedure Act provides for reviewability. The section contains that certain sentences imposed by a magistrate's court, such as for instance a sentence of imprisonment exceeding a period of three months under specified circumstances, has to be subject to review in the ordinary course by a judge of the provincial or local division having jurisdiction. The review in terms of s 304 examines whether the proceedings were conducted in accordance with justice. As will be shown, the statutory provisions on the review are not the only rules that are applicable. Especially in the case that formal requirements have been fully met, it must be asked which section might form the guideline for a review that is based on nonformal aspects, such as the question of whether the judge had ignored certain aspects or facts of the case. In *S v Taylor*, such review was not possible.[1000] The case contained a plea and sentence

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992 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

993 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

994 Compare *S v Mwambazi* 1991 (2) SACR 149 (Nm); Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 353 (Chapter 20, 1.1.1).

995 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 354 (Chapter 20, 1.1.3).

996 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 354 (Chapter 20, 1.1.3).

997 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 355 (Chapter 20, 1.1.3).

998 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 355 (Chapter 20, 1.1.3).

999 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 355 (Chapter 20, 1.1.3).

1000 *S v Taylor* 2006 (1) SACR 51 (C).

agreement that gave rise to various questions surrounding the reviewability of agreements and thus shows how plea bargaining can be approached under the aspect of review. An accused who was legally represented throughout the agreement procedure applied for a review and sought relief of his conviction. The grounds upon which the accused sought to have the proceedings reviewed were, amongst others, that the magistrate failed to ensure and to protect his constitutional and legal rights and failed to ensure due and proper process and procedure.[1001] Furthermore, he claimed that the judge had failed to make certain that the procedure at the trial was just, fair, reasonable and that it complied with all the accepted principles of justice and equity.[1002] He pointed out that the judge had failed to ensure that the accused was fully informed of all his rights and of the consequences – in particular with regard to the loss of any right to appeal against the sentence imposed – of the s 105A agreement he had entered into prior to the conviction and sentence.[1003] He mentioned finally that proper legal representation had not been guaranteed throughout the agreement procedure and that thus he was not protected against misleading advice given by his legal representative, particularly concerning the consequences of a s 105A agreement.[1004] Yekiso J held in the case that the proposed review was not a review as contemplated in s 302 because the accused was – formally – legally represented.[1005] Nor, he stated, was it a case of s 304 (1) due to the fact that it had not been a magistrate who presided at the trial of first instance.[1006] The irregularities that had motivated the accused to propose a review could not be certified. The agreement was signed by all necessary parties, including the legal representative of the accused.[1007] In affidavits the prosecution officials disputed that any irregularities either in the conclusion of the agreement itself or in the proceedings themselves had occurred.[1008] The record of the trial confirms that the requirements of s 105A (6) (a) and (8) were met. The accused was adequately legally represented, signed all relevant documents, was satisfied with the terms and conditions of the agreement and, finally, had stated that he was unduly influenced.[1009] It can only be remarked that, as can be drawn from the record, the accused answered all imposed questions with 'Yes your worship'.[1010] This could indicate that the trial situation − which the

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1001 *S v Taylor* 2006 (1) SACR 51 (C) at 54g.
1002 *S v Taylor* 2006 (1) SACR 51 (C) at 54h.
1003 *S v Taylor* 2006 (1) SACR 51 (C) at 54h.
1004 *S v Taylor* 2006 (1) SACR 51 (C) at 54i.
1005 *S v Taylor* 2006 (1) SACR 51 (C) at 54e.
1006 *S v Taylor* 2006 (1) SACR 51 (C) at 54f.
1007 *S v Taylor* 2006 (1) SACR 51 (C) at 55f.
1008 *S v Taylor* 2006 (1) SACR 51 (C) at 55g.
1009 *S v Taylor* 2006 (1) SACR 51 (C) at 59d-e.
1010 *S v Taylor* 2006 (1) SACR 51 (C) at 56h-57c.

review court did not consider − was not freely conducted. An accused giving monotone answers to questions does not give the impression of a full application of all rights that are intended to secure his legal position in a trial. This shall only be mentioned and not examined further. Yekiso J posed himself the question of which grounds for review could be given: if the matter was neither reviewable under s 302 nor reviewable under s 304 (1).[1011] Yekiso J remarked that, if a matter was not reviewable in terms of the Criminal Procedure Act, s 24 of the Supreme Court Act could serve as an alternative ground for review.[1012] The section states that 'the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.'[1013] Yekiso J pointed out that 'the approach suggested in s 173 of the Constitution is indeed comprehensive, for it allows the exercise of the Courts' inherent power, taking into account the interests of justice, without being subjected to any form of statutory constraint.'[1014] In the case however, Yekiso J concluded: that the magistrate at the court of first instance followed the prescribed procedure by the time that the plea and sentence agreement were disclosed, that the accused was adequately legally represented and that the record did not reveal any irregularities in the proceedings.[1015] Thus, in Yekiso J's eyes no irregularity had occurred and fair trial rights were not violated.[1016]

Another case that deals with review is *S v Salie*.[1017] In that case, the accused was convicted based on a plea and sentence agreement and sentenced for robbery with aggravating circumstances.[1018] The accomplices were convicted in a separate trial, the *S v Isaacs & another* case,[1019] and received on appeal a conviction of robbery *simpliciter*. The magistrate, presiding officer at the trial of the three accomplices, sought to initiate a review of the trial of the accused.[1020] He justified this step with the fact that the conviction and sentence of the accused was based on the same facts and circumstances.[1021] Thus, he held that consequently the accused was also entitled to claim the benefit of a less serious

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1011 *S v Taylor* 2006 (1) SACR 51 (C) at 56h-57e.
1012 *S v Taylor* 2006 (1) SACR 51 (C) at 58b.
1013 *S v Taylor* 2006 (1) SACR 51 (C) at 58c.
1014 *S v Taylor* 2006 (1) SACR 51 (C) at 58d.
1015 *S v Taylor* 2006 (1) SACR 51 (C) at 59f.
1016 *S v Taylor* 2006 (1) SACR 51 (C) at 59e.
1017 *S v Salie* 2007 (1) SACR 55 (C).
1018 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-26B.
1019 *S v Isaacs & another* 2007 (1) SACR 43 (C).
1020 *S v Salie* 2007 (1) SACR 55 (C) at 56b.
1021 *S v Salie* 2007 (1) SACR 55 (C) at 56b.

conviction and sentence.[1022] Yekiso J, again engaged in the *S v Salie* case as the reviewing judge, posed three questions: '(a) whether the magistrate had *locus standi* to initiate the proposed review; (b) whether the proceedings culminating in the plea and sentence agreement were reviewable in principle; and, (c) if so, whether there was any basis upon which to interfere with those proceedings'.[1023] After answering the first question in the affirmative, Yekiso J focused on the subsequent questions. Again, he stated that s 302 was not applicable due to the fact that the accused was represented at the trial. Reviewability under the other statutory provision was negated.[1024] A review was however considered possible under the general provision of s 173 of the South African Constitution.[1025] Then Yekiso J pointed out that the accused had pleaded guilty to robbery with aggravating circumstances and that he had at all times been represented by an experienced attorney.[1026] Yekiso J held that 'the fact that uncertainty had arisen regarding the presence or otherwise of aggravating circumstances in the trial of his accomplices was not a basis upon which to fault the proceedings against the accused' and that 'there was accordingly no reason to interfere with the decision of the trial court'.[1027] The accused himself had admitted to having used a knife as a means to threaten the victim with bodily harm.[1028]

To sum it up, it can be safely said that reviewability of a formally correct agreement is possible based on s 173 of the South African Constitution. There are good reasons for a full reviewability of the bargain procedure. This is proven by *Bennun*'s reservations in that s 105A (6) empowers the court to strike down the agreement for reasons other than justice or the public interest.[1029] The review is only successful if aggravating circumstances have not been recognized at first instance. In all other cases s 302 and 304 are applicable.

d. Waiver of the right to appeal

Waivers of the right to appeal were common practice in Germany before the statutory amendment in 2009.[1030] The reason is that waiver of the right to appeal allows the judge under the terms of s 267 (4) StPO to write shorter judgements and protects from

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1022 *S v Salie* 2007 (1) SACR 55 (C) at 56b.
1023 *S v Salie* 2007 (1) SACR 55 (C) at 56c.
1024 *S v Salie* 2007 (1) SACR 55 (C) at 56f.
1025 *S v Salie* 2007 (1) SACR 55 (C) at 56f.
1026 *S v Salie* 2007 (1) SACR 55 (C) at 56g.
1027 *S v Salie* 2007 (1) SACR 55 (C) at 56h.
1028 *S v Salie* 2007 (1) SACR 55 (C) at 56i.
1029 Bennun (2007) *SACJ* 17 at 36-37.
1030 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105 in footnote 52.

uncertainty surrounding the further outcome of the trial.[1031] One should note that writing a full judgment is a very time-consuming task for a German judge.[1032] Thus, agreements with such waivers provided courts the opportunity to achieve a conviction in a relatively short time span while also ensuring that the judge's conviction and sentence were not questioned by a higher court. This was considered a major benefit for the courts of first instance to lessen their workload without having to fear remedies. The new law on agreements however brought striking changes into this field of law.

Ever since plea agreements came into existence, the waiver of remedies has always been an important but also a controversial issue in Germany.[1033] Historic BGH decisions set out several requirements that had to be fulfilled before an accused could waive his or her right to appeal as part of an agreement.[1034] The waiver makes the conviction unappealable, which many presiding judges may have considered as a major benefit of the plea bargaining procedure. With the new German law on agreements and the advent of s 302 (1) 2 of the StPO containing such a rule, any waiver of the right to appeal that is related to a plea or sentence agreement is now inadmissible. The legislature's intention was to prevent abuse of this instrument. Former case law, however, accepted the waiver of the right to appeal as a part of the agreement. BGH's Grand Criminal Panel in BGH 50, 40 only made it compulsory for the court to 'instruct qualified', i.e., to inform the accused that the agreement upon which conviction is based does not hinder him to appeal against the judgment. This instruction was necessary regardless of whether a waiver of the right to appeal formed part of the agreement or not. Without a 'qualified instruction' of that sort, the waiver would be ineffective. Waivers declared before the statutory amendment on 29 July 2009 and on basis of the former case law remain admissible and in force.[1035] The total interdiction of any option to waive the right to appeal subsequent to an agreement surprises. To the mind of some scholars, the provisions are too stern. As s 257c (3) 4 sets up the requirement that accused and prosecution have to consent to the court's proposal of an agreement, there is no evident reason for forbidding the accused the ability to waive his right to appeal.[1036] On the contrary, the total banning of the right to waive offers the

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1031 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105 in footnote 52; compare Julius/Gercke/Kurth/Lemke/Pollähne/Rautenberg/Temming/Woynar/Zöller-*Julius*, StPO, s 267, para 28; Pfeiffer, StPO, s 267, para 22.

1032 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105 in footnote 52.

1033 See Dahs (2005) *NStZ* 580 at 580.

1034 Such as BGH 50, 40; see also Meyer-Goßner, StPO, Introduction, para 119g.

1035 BGH court order of 29 September 2009 – 1 StR 376/09; BGHSt 54, 167 = (2010) *NJW* 310.

1036 Meyer-Goßner, StPO, s 302, para 26c.

advantage that agreements more often will be checked by appeals courts.[1037] But still, this gives the impression of what *Meyer-Goßner* calls a 'paradox.'[1038] An accused in a conventional trial with unpredictable outcome is given the possibility to waive his right to appeal while at the same time an accused, who negotiated on a certain amount of sentence that he now expects, cannot waive.[1039] It has been proposed that a total interdiction of any waiver for all kinds of procedures or perhaps a delay of at least one day to opt for a waiver would comply better with the current system.[1040] As summed up, the strict decision of the legislature can only be explained by its intention to stop the pre-2009 common practice of making a waiver of the right to appeal part of the agreement.

e. Concluding remark

It can be summed up that South African law generally regards the right to appeal in cases of plea bargaining as a limited one and furthermore that relief can only be granted in exceptional cases. German law formally recognizes a full right to appeal that is not restricted by the fact that the judgment is based on an agreement. Nevertheless, an appeal will be successful only if substantive failures have occurred. A waiver of the right to appeal since the advent of the statutory provisions is no longer admissible under German law, and thus the new law ends a common practice that had developed in legal practice. As the right to appeal was immediately regarded as a very limited right in the context of plea bargaining in South Africa, the discussion as to whether the accused may or even should be obligated to waive his right to appeal has never been an significant issue. Even though German law generally provides for an unrestricted right to appeal, an appeal will – following the general rules – only be successful in cases in which a grave failure occurred. However, the fact that the German legislature put an end to waivers and formally recognizes an unlimited right to appeal reveals a slight mistrust in bargained proceedings. Appeal is regarded as a major means to control the bargain and to prevent the courtroom from becoming a 'marketplace.'[1041] Even though a remedy against the negotiated terms is admissible and leads to a process of winding up the agreement (i.e. the non-use of the confession as evidence and a new conviction and sentence), the accused's trust however affords more protective solutions that should be developed against the present case law.

1037 Meyer-Goßner, StPO, s 302, para 26c.
1038 Meyer-Goßner, StPO, s 302, para 26d.
1039 Meyer-Goßner, StPO, s 302, para 26d.
1040 Meyer-Goßner, StPO, s 302, para 26d.
1041 Compare *Meyer-Goßner* who states in Meyer-Goßner, StPO, s 357c, para 32a that there is a risk of a too extensive application of the new provisions on plea bargaining in Germany and that he is concerned about spreading agreements with inadmissible content what makes control through appeal necessary.

12. Comparable summary procedures

Summary trials have a common basis and are very similar to the plea bargaining procedure. Summary trial procedure pushes aside that the commission of the offence has to be proved as well as the *nemo tenetur* principle that contains that no one is obligated to testify against him- or herself.[1042] Elements of summary procedure might serve as an alternative or could be applied in addition to the statutory provisions on plea bargaining. This issue shall be presented, mainly focusing on the South African provision of s 112 dealing with the plea of guilty at summary trials.[1043]

a. General application of s 112

Despite the inserted s 105A, s 112 could have been compatible with the plea bargaining procedure.[1044] Even today, some jurisdictional divisions prefer to make use of s 112 rather than 105A due to the fact that s 112 proceedings are less burdensome and time consuming, as will be shown later.[1045] Nevertheless, and regardless of s 112, plea negotiations and agreements were never given explicit statutory recognition until the advent of s 105A.[1046] Advocate *Schutte* stated in a 2006 letter to *Steyn* that 'the plea bargaining concept is still quite new to the prosecution as well as to the defence. The impact of plea and sentence agreements is being influenced by various factors, such as: Some divisions do not follow the route of s 105A of the Criminal Procedure Act, as they rather follow s 112 of the Criminal Procedure Act which is not so time consuming. Complainants and investigating officers must be consulted before the prosecutor may accept a plea agreement.'[1047] Even before the advent of s 105A in 2001, courts have thought of s 112 as an alternative to explicit statutory provisions on plea bargaining.[1048] The two mentioned examples show that s 112 was and is seen as a possible alternative to statutory plea bargaining. This raises the questions of what kind of proceedings s 112 regulates and whether bargains based on s 112 can coexist apart from the s 105A procedure.

1042 Hiemstra's, *Criminal Procedure,* p. 17-1.
1043 For other potential alternatives to plea bargaining see South African Law Reform Commission, Project 73 (2001) p. 36 seqq.
1044 South African Law Reform Commission, Project 73 (2001) at 5.10.
1045 Lubbe/Ferreira (2008) *SACJ* 151 at 163.
1046 South African Law Reform Commission, Project 73 (2001) at 5.10.
1047 Steyn (2007) *SACJ* 206 at 216 with reference to a letter of advocate J Schutte addressed to her, dated 25 August 2006.
1048 Compare *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677b.

S 112 provides for a special plea procedure, i.e., a procedure for pleas of guilty in summary trials.[1049] The provisions of s 112 and s 115 were major procedural innovations when inserted into the Criminal Procedure Act 51 of 1977. They introduced elements which did not comply with the traditional accusatorial trial procedure.[1050] Nevertheless, s 112 (1) (b) and s 115 are not limited to summary trials.[1051] The sections are also applicable to various other stages of the criminal process.[1052] The procedure contemplated in s 112 breaches with important principles. The first is the requirement that, except for petty crimes, matters in which the accused pleads guilty must also be proved by evidence.[1053] The second aspect touched upon is the fact that the inquisitorial plea process is changed into an accusatorial system.[1054] The principles of that the offence has to be proved, and the principle that no one is obligated to testify against him- or herself is set aside.[1055] It should always be kept in mind that a plea of guilty waives fundamental rights such as the presumption of innocence, the right to remain silent and the right not to be compelled to give self-incriminating evidence.[1056] Against this background, s 112 provides for further requirements the court and the parties have to comply with when an accused pleads guilty.[1057] Generally, s 112 can be seen as a safeguard for constitutional rights.[1058]

S 112 (1) (a) for minor offences reads as follows: '(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea− (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette [R 1,500[1059]], convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice

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1049 Compare Hiemstra's, *Criminal Procedure*, p. 17-1.
1050 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. V (preface).
1051 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 9.
1052 van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 9.
1053 Hiemstra's, *Criminal Procedure*, p. 17-1.
1054 Hiemstra's, *Criminal Procedure*, p. 17-1; *S v Ntlakoe* 1995 (1) SACR 629 (O) at 633b-d.
1055 Hiemstra's, *Criminal Procedure*, p. 17-1.
1056 Hiemstra's, *Criminal Procedure*, p. 17-1.
1057 Hiemstra's, *Criminal Procedure*, p. 17-1.
1058 Compare Hiemstra's, *Criminal Procedure*, p. 17-1.
1059 GN R239 in *GG* 24393 of 14 February 2003.

in the Gazette [R 1,500[1060]]; or (ii) deal with the accused otherwise in accordance with law.' Thus, s 112 (1) (a) allows the judge to convict on the mere plea of guilty and leaves out the taking of evidence. Due to the fact that evidence is not considered, it is obvious that the procedure is only applicable to lower levels of conviction, i.e., to convictions that at present include a fine of R 1,500 and no sentence of imprisonment.[1061] S 112 (1) (b) states for more serious offences that 'the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette [R 1,500[1062]], or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.' Thus, s 112 (1) (b) adds for cases of more serious offences, i.e. where a fine of more than R 1,500 or a sentence of imprisonment is justified or alternatively the prosecutor directs a request to the court, that the court has to question the accused about alleged facts.[1063] By that means, S 112 (1) (b) inserts inquisitorial elements into the criminal procedure.[1064] This is regarded as a safety measure against injustice caused by an unjustified plea of guilty.[1065] As the questioning is pointed to the accsused's guilt and to a lesser extent to the question of whether the offence was committed, the procedure is time-saving manoeuvre.[1066] The purpose of the procedure for the court is to approve whether the accused admits the allegations brought against him or her and to convince itself that the accused is factually guilty.[1067] The questioning might not be necessary in any case, e.g., where the court is convinced of the guilt, it appears superfluous.[1068]

b. Plea bargain potential of s 112

Two aspects, aside the functions shown above, draw attention to s 112. The first is the fact

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1060 GN R239 in *GG* 24393 of 14 February 2003.
1061 Hiemstra's, *Criminal Procedure*, p. 17-2.
1062 GN R239 in *GG* 24393 of 14 February 2003.
1063 Hiemstra's, *Criminal Procedure*, p. 17-3.
1064 Du Toit et al, *Commentary on the Criminal Procedure Act*, 17-1; *S v Ntlakoe* 1995 (1) SACR 629 (O) 633b-c; *S v Williams* 2008 (1) SACR 65 (C) at [20].
1065 Hiemstra's, *Criminal Procedure*, p. 17-3.
1066 Hiemstra's, *Criminal Procedure*, p. 17-3.
1067 Hiemstra's, *Criminal Procedure*, p. 17-3.
1068 Compare Hiemstra's, *Criminal Procedure*, p. 17-4.

that subsection (2) provides for a written statement. The second, which shall be referred to later, is that the accused will oftentimes achieve leniency in sentencing if s 112 is applied.

If the legal representative takes action, a written form is required due to the fact that the accused's legal representative cannot make an oral statement on behalf of his client.[1069] The main purpose of the written statement is to set out the admissions of the accused and the facts his or her plea of guilty is based upon.[1070] In *S v Sellars and Six Other Cases*'s case,[1071] the court discussed the formal requirements of such a written statement as contemplated in s 112 (2) and even drafted a standard form making provision for a series of admissions.[1072] This approach of a written formalised statement comes very close to the well known plea and sentence agreements. The provision of s 112 (2) states that 'if an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement'. The provision of s 112 (1) (b) contains that 'the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette [*R 1,500*[1073]], or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence'. To emphasise it again: if there is no written statement, the accused may still by him- or herself bring this fact to the court's attention.[1074] The written statement is only required if the legal representative makes admissions or state facts on behalf of the accused.

1069 Hiemstra's, *Criminal Procedure*, p. 17-10.
1070 Du Toit et al, *Commentary on the Criminal Procedure Act*, 17-11; *S v Hlangothe* 1979 (4) SA 199 (B) at 201b.
1071 *S v Sellars and Six Other Cases* 1991 (1) SACR 491 (N).
1072 Hiemstra's, *Criminal Procedure*, p. 17-10.
1073 South African Law Reform Commission, Project 73 (2001) at 3.5.
1074 Hiemstra's, *Criminal Procedure*, p. 17-10.

The second aspect that suggests the application of s 112 for plea bargaining is that the provision offers the possibility to achieve a lenient sentence. The usual manner of conduct in terms of s 112 is that the accused pleads guilty to the charge brought against him. In accusatorial terms, in this case there arises no dispute over the guilt of the accused.[1075] A 'voluntary' guilty plea may motivate the presiding officer to see this as a mitigating factor and thus lessen the sentence. However, the case of greater interest is the one in which the accused pleads guilty to another offence and the prosecutor accepts such plea.[1076] The prosecutor's acceptance in this case has the consequence that the main charge falls away and the accused cannot be convicted of it.[1077] This can also occur in the following manner: an accused pleads guilty to a charge but then makes admissions during his questioning which only can be brought in accordance with a lesser offence[1078] upon which a conviction on the charge cannot be based.[1079] This is because the situation leads either to the recording of a plea of not guilty under s 113 or the court asking the accused whether his admissions could be taken as a plea of guilty to a lesser offence, which the prosecutor has to accept as well.[1080]

Further focus on the mentioned aspect of the prosecutor acceptance to the plea of guilty to a lesser offence, which can also be considered as a leniency in the sentence, will enrich this discussion. In the case of *S v Ngubane*, the court held that such acceptance was a *sui generis* act by which the prosecutor limited the ambit of the *lis* between the state and the accused in accordance with the accused's plea.[1081] It further has to be distinguished at which stage the plea is accepted by the prosecutor, i.e., before or after the beginning of the trial.[1082] Before the beginning of the trial, at the stage of the plea, the prosecutor is *dominus litis* and has the power to accept the plea of the accused and thereby to limit the *lis* between prosecution and accused.[1083] With the beginning of the trial, the court takes on the function of adjudicator. Thus, the limitation of the charge, declared and accepted by way of the prosecutor's consent to the guilty plea, also requires the court's consent.[1084]

1075 Hiemstra's, *Criminal Procedure*, p. 17-2.
1076 Hiemstra's, *Criminal Procedure*, p. 17-2.
1077 Hiemstra's, *Criminal Procedure*, p. 17-12; *S v Ngubane* 1985 (3) SA 677 (A) at 683.
1078 Hiemstra's, *Criminal Procedure*, p. 17-6.
1079 Hiemstra's, *Criminal Procedure*, p. 17-6.
1080 Hiemstra's, *Criminal Procedure*, p. 17-6.
1081 Hiemstra's, *Criminal Procedure*, p. 17-12; *S v Ngubane* 1985 (3) SA 677 (A) at 683e.
1082 Hiemstra's, *Criminal Procedure*, p. 17-12; Compare *S v Sethoga and Others* 1990 (1) SA 270 (A) at 274i-275g.
1083 Hiemstra's, *Criminal Procedure*, p. 17-12.
1084 Hiemstra's, *Criminal Procedure*, p. 17-12.

The court may declare its consent either expressly or implicitly.[1085] It should finally be noted that ceasing prosecution by the terms of s 6 (b) requires the authorization of the DPP.[1086] The provision of 6 (b), regulating the power to stop prosecution, states that 'an attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may (...) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto'.

Thus, s 112 provides for a procedure in which a conviction is based on a written statement and a plea of guilty. The accused will oftentimes state facts that may contribute to a lenient sentence.[1087] The prosecution possibly will not dispute against this unilateral presentation of facts due to preceding plea negotiations.[1088] The section does not explicitly provide for a mutual agreement. But the pleading based upon on a specific factual basis – if accepted – binds the prosecutor regarding the facts and terms upon which the 'agreement' has been reached.[1089] Even the court is limited to convict and sentence the accused on the basis of those facts.[1090] It can be said that s 112 (2) procedure involves a compromise between various conflicting interests.[1091] The benefit of the s 112 (2) statement is that it presents 'a mild and unemotive version of the facts without disclosing unnecessary incriminating facts.'[1092] Nevertheless, the prosecution has to be convinced that the presented facts are not inaccurate.[1093] There are no formal requirements contained in s 112 (2) despite the necessity of a written statement, which is only required if the accused does not by him- or herself, without a legal representative, bring facts to the court's attention.[1094]

1085 Hiemstra's, *Criminal Procedure*, p. 17-12; *R v Komo* 1947 (2) SA 508 (N).
1086 Hiemstra's, *Criminal Procedure*, p. 17-12.
1087 South African Law Reform Commission, Project 73 (2001) at 3.6; *S v Hlangothe* 1979 4 *SA* 199 (B); *S v Russel* 1981 (2) SA 21 (C).
1088 South African Law Reform Commission, Project 73 (2001) at 3.6.
1089 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677b.
1090 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677b; *S v D Swarts* 1983 (3) SA 261 (C); *S v Moorcroft* 1994 (1) SACR 317 (T); *S v Faber* 1979 (1) SA 710 (NC).
1091 Allen (1987) *Obiter* 46 at 57.
1092 Allen (1987) *Obiter* 46 at 57.
1093 Allen (1987) *Obiter* 46 at 57.
1094 Compare Allen (1987) *Obiter* 46 at 57; Hiemstra's, *Criminal Procedure*, p. 17-10.

The mentioned facts reveal the dimension and potential of s 112 as an alternative plea and sentence agreement procedure. A written statement in terms of s 112 (2), which will set out facts upon which the accused pleads guilty to a lesser charge that is accepted and therefore become binding, has the full shape of a plea and sentence agreement. In contrast to s 105A, the provision of s 112 (2) does not require any formalities which the statement needs to satisfy other than that is must be in writing if the statement is given by the legal representative.[1095] S 112 is a time-saving mechanism as it does not place an obligation on the prosecutor to consult with victims. On the contrary, s 105A requires such a consultation where it is reasonable to do so.[1096] Thus, s 112 could be regarded as an 'easier way' of plea bargaining.

c. Legislature's decision against the use of s 112

It can be said that in practice s 112 does in fact provide for agreements, as the defence is able to ensure that the sentence does not exceed a certain amount and the prosecutor is able to recommend to the court to apply the section.[1097] Some have held, for instance Ujis AJ in *North Western Dense Concrete CC* case, that the provision of s 112 was virtually tailormade for plea negotiations.[1098] Uijs AJ reports that in 1999, courts almost interpreted the provisions of the section as if they related directly to the plea bargaining procedure.[1099] Opposed to others, Uijs AJ held that legislation on plea bargaining was not necessary as the institute could be governed by the existing s 112.[1100] The later advent of s 105A proved that the legislature did not share this opinion. Consequently, s 112 should be inapplicable as a plea bargain procedure. Directive 1 issued by the NDPP clarifies that 'the procedure enacted in s 105A does not supplant the standard procedure for pleas of guilty under the terms of s 112 of the Act'.

d. Applicability after advent of s 105A

There could remain a field of application for s 112-procedure as a bargain procedure. If the accused is not legally represented, for instance because he cannot afford an attorney, s 105A is not applicable. S 105A (1) (a) clearly limits the procedure to the 'accused who is

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1095 Allen (1987) *Obiter* 46 at 58; *S v Calitz* 1979 2 SA 576 (SWA) at 577c-f.
1096 Lubbe/Ferreira (2008) *SACJ* 151 at 163.
1097 South African Law Reform Commission, Project 73 (2001) at 3.5.
1098 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677b.
1099 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677b.
1100 *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)* 1999 (2) *SACR* 669 (C) at 677e.

legally represented'. Nevertheless, the unrepresented accused might favour to profit from bargain features rather than to go through the conventional trial procedure. Even courts and prosecutor may have an interest to plea bargain a case although the accused is not legally represented. Clearly there is always the possibility of a public defender and legal aid. But in cases of less serious offences or an obvious factual basis this might be regarded as exaggerated, too time-consuming and, regarding the case numbers before courts, too cost-intensive. In fact, it can be assumed that s 112 is used as an alternative means to plea bargaining in terms of s 105A or at least fills the gap that is left for unrepresented accused.[1101] As shown, s 112 provides for a procedure that to a great extent is comparable to the usual plea bargaining procedure as contained in s 105A. The use as a plea bargain alternative raises the question of in what way does the bargain-related conduct of s 112 differ from the plea and sentence agreement of s 105A. The major aspect will be the lack of a binding effect. Furthermore, generally it can be said that as strictly interpreted s 112 does not provide for elements of mutual consent. The accused is free to plead to a lesser offence and the prosecutor − and after the beginning of the trial also the court − might consent to it or not. If the parties however mutually consent to a specific application of s 112, i.e., if they negotiate and agree upfront that the accused will plead guilty to a lesser charge, s 112-procedure is accompanied by an agreement. As it is not an agreement in terms of s 105A, it can be regarded as an informal agreement with all its legal consequences. As already has been said, in South Africa informal agreements remain admissible even in light of the advent of s 105A. To sum it up, plea bargaining under application of s 112 is a usual s 112 procedure combined with informal plea and sentence bargaining. Even if a s 112 plea of guilty might not be accompanied by an informal agreement, the accused might benefit from a leniency in the sentence: if the accused pleads to the charge an unqualified guilty plea, i.e., a plea of guilty without the negotiated reduction in the sentence, this may also be understood as a sign of remorse which saves the state time and the expense of a lengthy trial, which the presiding officer may take into account as a mitigating factor and thus sentence less severely.[1102] Given that, the question arises whether this is a circumvention of the requirements of s 105A. At this point, almost all legal questions surrounding plea bargaining, and especially the question of compliance with constitutional rights, arise as well. The issue has apparently not been discussed so far in South Africa. To answer, it can be generally referred to the

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[1101] The author learned this in an interview with Mr. Bruce Langa, Acting Regional Court President (Western Cape), which took place on January 24th, 2012.

[1102] Lubbe/Ferreira (2008) *SACJ* 151 at 163.

admissibility of informal agreements.[1103] The fact that an informal agreement is combined with admissible legal procedural measures such as s 112 does not change the nature of the informal agreement. Finally, it should be annotated that the agreement whereby the prosecutor undertakes to recommend a specific sentence or agrees not to oppose the proposal of the defence – other than the agreement that the accused plead guilty on the condition that an agreed sentence is in fact proposed by the court – generally is made possible by s 112 (3) in combination with an informal agreement.[1104] It can be assumed that this procedure was not regulated by s 105A, as the prosecution only consents to propose or else not offend a specific sentence. Nevertheless, that implies the idea of a bargain.

e. German provisions on summary procedure

There are no provisions in German law that could be directly compared to s 112, as the German criminal procedure does not know a formal plea. Comparable to a plea only is a procedural option of the accused in which he confesses his guilt at the very beginning of the trial and signals that he is willing to cooperate. A confession shortens the need for further evidence-taking. Nevertheless, a confession does not modify the conduct of the conventional trial procedure in essence. German law, however, despite its inquisitorial tradition with the fundamental principle of a full investigation of the facts in terms of s 244 (2), contains a summary procedure. It is contained in the s 407 seqq. regulating the penal order. The provision of s 407 (1) provides that, in proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offence may, in the case of misdemeanours, be imposed, upon written application by the public prosecution office, in a written penal order without a main hearing. By the terms of s 407 (2), the legal consequences of a penal order are limited to the following: fine, warning with sentence reserved, driving ban, forfeiture, confiscation, destruction, making something unusable, announcement of the decision, and imposition of a regulatory fine against a legal person or an association, withdrawal of permission to drive where the bar does not exceed two years, as well as dispensing with punishment. The judge is obligated to scrutinize the penal order regarding if there are sufficient grounds for suspecting the indicted accused. It has to be emphasized that the court only examines whether the accused is suspicious, not whether he is guilty.[1105] In practice, even this

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[1103] See above.
[1104] Rodgers (2010) *SACJ* 239 at 244; South African Law Reform Commission, Project 73 (2001) para 4.15.
[1105] Meyer-Goßner, StPO, Introduction to s 407, para 1.

scrutiny of the question on suspicion however almost never takes place. The prosecution fully prepares the penal order, which the judge only has to sign. The legal consequences of a penal order are nevertheless severe. If the accused does not make objections to the penal order in time, the order in terms of s 410 (3) of the StPO becomes equivalent to a judgment that has entered into force. The penal order is the ideal means to circumvent a public trial that causes attention and to rapidly achieve a conviction. That is why the procedure is popular with cases in which for instance celebrities are involved. The penal order can be applied without any consensual elements. It is upon the public prosecution office to decide whether to impose a penal order which the court might confirm. If the accused does not react at all to this procedure, the order becomes enforceable and is equal to a judgment, as mentioned. However, the penal order might alternatively also be used as a procedure to be followed after the parties have entered into an agreement.[1106] The penal order can be applied as a bargain instrument as s 257c does not prohibit the initiation of the bargain by the prosecution.[1107] As the penal order replaces the trial, the bargain can be qualified as pre-trial negotiations in terms of 160b. [1108] The rules on documentation duties have to be applied.[1109] The penal order contains a specific sentence. The prosecution is allowed to promise to apply for such a specific sentence; the court however is only entitled to indicate an upper sentence limit.[1110] General rules, such as s 257c (4) 1 warranting that the verdict of guilt is not violated, have to be complied with. The accused cannot agree to waive his right to make objections under the terms of s 410 (1).[1111]

If one takes a closer look at the form of the penal order, an interesting parallel can be drawn to South African law on plea bargaining. By the terms of s 407 (1), the penal order is written. S 409 (1) describes the content of a penal order; which is the following: ‘1. the personal identification data of the defendant and of any other persons involved; 2. the name of the defence counsel; 3. the designation of the offence the defendant is charged with, time and place of commission and designation of the statutory elements of the criminal offence; 4. the applicable provisions by section, subsection, number, letter and designation of the statute; 5. the evidence; 6. the legal consequences imposed; 7.

1106 Generally Kleinknecht/Müller/Reitberger-*Metzger*, StPO, Introduction to s 407, para 28 seqq.
1107 Kleinknecht/Müller/Reitberger-*Metzger*, StPO, Introduction to s 407, para 31.
1108 Kleinknecht/Müller/Reitberger-*Metzger*, StPO, Introduction to s 407, para 31.
1109 Kleinknecht/Müller/Reitberger-*Metzger*, StPO, Introduction to s 407, para 31; Meyer-Goßner, StPO, s 160b, para 8; Kleinknecht/Müller/Reitberger-*Metzger*, StPO, s 160b, para 6.
1110 Kleinknecht/Müller/Reitberger-*Metzger*, StPO, Introduction to s 407, para 31.
1111 Compare s 302 (1) 2 of the StPO.

information on the possibility of filing an objection and the relevant time limit and form of objection, as well as an indication that the penal order shall become effective and executable unless an objection is lodged against it pursuant to s 410.' Thus, the penal order can be compared with the written agreement in terms of s 105A. However it has to be kept in mind that the penal order is issued by the court and not signed by the parties. The agreement that might accompany the penal order is concluded in a bargain procedure by the terms of s 160b, and its content is documented in the prosecution file. It is surprising that the German legislature did not implement a written agreement into the provisions on plea bargaining since such procedure is already used by the penal order procedure. This can only be explained with the intention of the German legislature to avoid giving plea bargaining a contractual appearance. As will be presented later, there are however good reasons for a written agreement in Germany.

f. Concluding remark

It can be summarized that in both South Africa and Germany summary procedure exists that can be applied as an alternative to the statutory bargain procedure. However, it must be pointed out that the South African legislature's aim was to maintain the standard procedure of guilty pleas which can – despite not being binding – comprehend consensual elements. These consensual elements, that might even form an agreement comprising mutual consent, are conducted informally and accompany the application of the statutory procedure under the terms of s 112. However, in German law the penal order under the terms of s 407 might be applied as a means to fulfil bargained terms. However, the bargaining has to be strictly different from the penal order procedure. The penal order is solely issued by the court. Nevertheless, there might have been formal pre-trial bargaining according to the terms of s 160b that prepared for the penal order. The bargain in these cases also has to comply with certain rules of s 257c. The South African plea of guilty under the terms of s 112 and the German penal order under the terms of s 407 might nevertheless be used to circumvent statutory rules, as the bargain accompanying the use of these instruments is frequently not obvious and might even be veiled by the parties. Consequently, the duty to fulfil prerequisites, such as for instance mandatory legal representation, can be avoided. In addition, both procedures naturally imply a smaller material basis and widely suppress judicial approval, which makes them tailormade for 'efficient' bargaining.

13. Type of crimes

There is no statutory provision in Germany that limits plea bargaining to particular offenses,[1112] nor does such a rule exist in South Africa. Thus, the matter of which type of crimes are most likely dealt with by way of plea bargaining is of interest in regard to its impact on legal practice. Therefore the empirical data shall be cited and analysed. In Germany, there are several inquiries available.[1113] In South Africa though, empirical data is rather rare.

a. Scope of statutory provisions

In both legal systems plea bargaining is not limited to certain type of crimes.[1114] Formerly, plea bargaining in Germany had been mostly used for white collar crime and drug trafficking offences.[1115] Today the scope is wider.[1116] South African plea bargain procedure is not limited to a certain type of crimes either. For instance, the provision of s 105A of the Criminal Procedure Act is even applicable for criminal offences like rape and murder.[1117] Interestingly, in other countries plea bargaining is not permitted in cases that carry a severe penalty.[1118] For instance in Chile it is only permitted for crimes carrying a penalty of less than 5 years of imprisonment.[1119] In Italy only crimes carrying a sentence less than 7 ½ years imprisonment can be negotiated.[1120]

b. Statistics

A closer look on the percentage of offences that plea bargaining is used for will show that there are crimes that are more often subject to plea bargaining than others. Compared to the discussion that surrounds plea bargaining, and even though there are several inquiries available in Germany, it can be held that comprehensive empirical examinations are surprisingly rare.[1121] The majority of earlier inquiries were focused on business crime.[1122]

1112 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105.
1113 Hassemer/Hippler (1986) *StV* 360 seqq.; Schünemann, *Gutachten B*; Lüdemann/Bußmann (1989) *KrimJ* 54; Siolek, *Verständigung in der Hauptverhandlung*, p. 31 seqq.; Altenhain/Hagemeier/Haimerl (2007) *NStZ* 71 seqq.; Schöch, *Urteilsabsprachen in der Strafrechtspraxis*, p. 127 seqq.; Pankiewicz, *Absprachen im Jugendstrafrecht*, p. 293 seqq.; Niemz, *Urteilsabsprachen und Opferinteressen*, p. 96 seqq.; Heller, *Das Gesetz zur Regelung der Verständigung*, p. 295 seqq.
1114 See for South Africa Directive 12 issued by the NDPP and for Germany Meyer-Goßner, StPO, Introduction, para 119g.
1115 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105.
1116 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105.
1117 Steyn (2007) *SACJ* 206 at 207.
1118 Steyn (2007) *SACJ* 206 at 209.
1119 Steyn (2007) *SACJ* 206 at 209 in footnote 15.
1120 Steyn (2007) *SACJ* 206 at 209 in footnote 15.
1121 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 39.

Recent studies have improved this situation.[1123]

The comparison of the type of offences that plea bargaining is used for is based on the following three inquiries, amongst which two deal with the situation in Germany and one with the situation in South Africa. *Schöch*'s study of 2007 examines the reality of plea bargaining in German courts and therefore *Schöch* surveyed every different type of crime. Her method was to arrange interview sessions with practitioners from Munich. The table below shows the percentage of cases that have been plea bargained out of a total 100% of all cases of a particular type of offence.[1124] *Heller*'s inquiry of 2012 took place after the amendment of the statutory provisions in 2009, between August and December 2010.[1125] *Heller* sent questionnaires to judges and prosecutors in the city of Hamburg and the Federal State of Schleswig-Holstein.[1126] South African scholar *Steyn* publicised statistics of the National Prosecuting Services of the years 2005/2006.[1127]

The following statistics show the share of each field of offence of a total 100% of all bargain cases.

[1122] Niemz, *Urteilsabsprachen und Opferinteressen*, p. 39 for example: Altenhain/Hagemeier/Haimerl/Stammen, *Die Praxis der Absprachen in Wirtschaftsstafsachen*, p. 53 seqq.

[1123] Schöch, *Urteilsabsprachen in der Strafrechtspraxis*, p.127 seqq.; Niemz, *Urteilsabsprachen und Opferinteressen*, p. 96 seqq.; Heller, *Das Gesetz zur Regelung der Verständigung*, p. 295 seqq.

[1124] Schöch, *Urteilsabsprachen in der Strafrechtspraxis*, p. 130; important note: the original data of *Schöch* showed (from top to bottom): 17,9 % / 48, 7 % / 23,1 % / 15,4 % / 35,9 % / 10,3 % which makes a total sum of 151,3 % (due to the fact that multiple choice had been possible); the author converted the data into proportional parts out of a total sum of 100%.

[1125] Heller, *Das Gesetz zur Regelung der Verständigung*, p. 295.

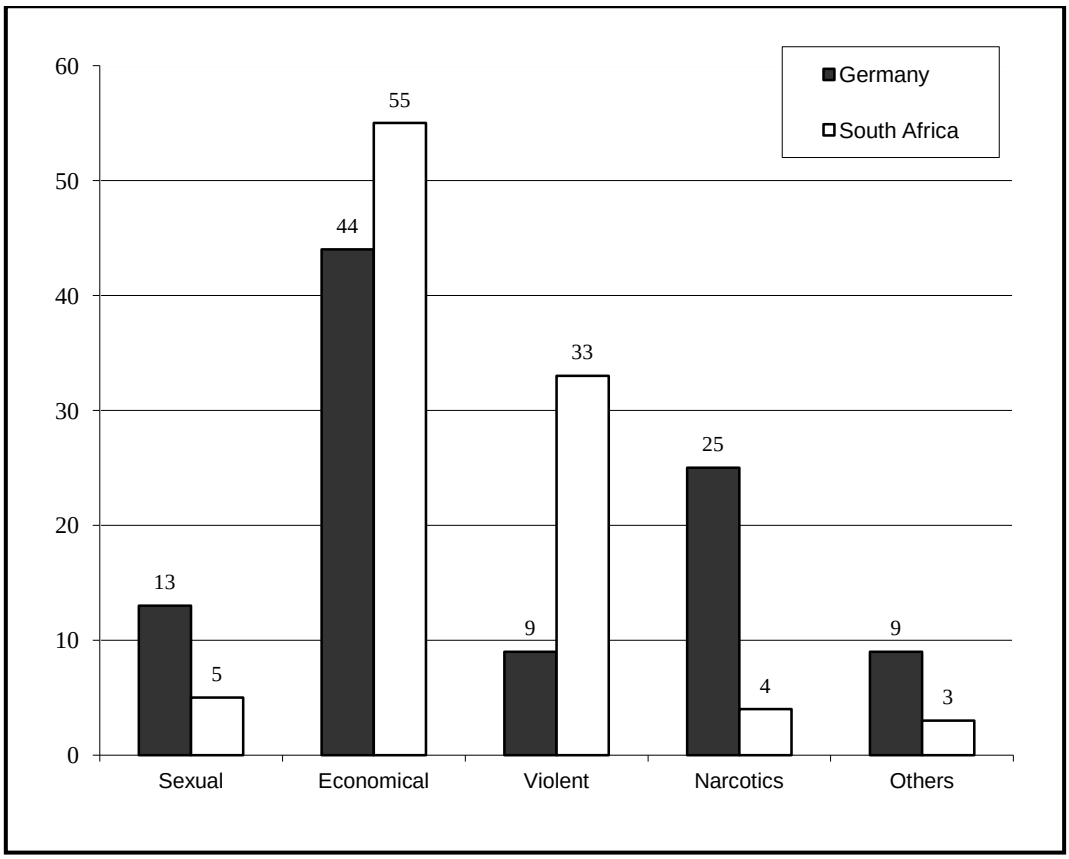
[1126] Heller, *Das Gesetz zur Regelung der Verständigung*, p. 295.

[1127] Steyn (2007) *SACJ* 206 at 215; in footnote 34 it is stated that the statistics are kept by the Prosecution Service in all oft he jurisdictional divisons and that these documents could only be viewed due tot he help of a prosecutor.

	Germany				South Africa
Statistics: Year:[1128]	Schöch[1129] (2007)	Heller[1130] (2012)	= Ø[1131]	[1132]	Steyn[1133] (2005/2006)
Sexual	12 %	15 %	13 %	13 %	5 %
Economical	32 %	24 %	28 %	44 %	55 %
Property and assets	15 %	16 %	16 %		
Violent	10 %	8 %	9 %	9 %	33 %
Narcotics	24 %	26 %	25 %	25 %	4 %
Others	7 %	11 %	9 %	9 %	3 %
	100 %	100 %	100 %	100 %	100 %

[1128] Year of publication.
[1129] Schöch, *Urteilsabsprachen in der Strafrechtspraxis*, p. 130; also see the importan note in op cit 1124.
[1130] Heller, *Das Gesetz zur Regelung der Verständigung*, p. 300; it hast to be annotated that is it not quite clear if *Heller's* numbers represent the % of bargains out of the total of cases within one crime group or if the represent their share out of a total of all bargained cases; the author assumed that the figure shows the latter interpretation.
[1131] Shows the average of *Schöch's* and *Heller's* statistics.
[1132] Merges the group of 'economical' with 'Property and assets' in order to better compare it to *Steyn's* data who did not distinguish these two groups but rather grouped them in one 'econonmical' array.
[1133] Steyn (2007) *SACJ* 206 at 216.

(Graphic version of the table)



c. Analysis

The data shows that in both countries agreements are mostly conducted in cases of economic or property related crimes. The percentage in both countries is very similar and lies around 50 %. The statistics reveal three major divergences in the field of sexual offences and cases of violence and narcotics.

The divergences in the field of narcotics might exist due to the differing total number of offences. A number of 150,673 drug-related crimes in one year in South Africa[1134] is opposed by 236,478 cases in Germany.[1135] However, it has to be noted that the total number of crimes also differs.[1136] The German State generally tends to pursue narcotics very strictly. In addition, cases involving drug offences have become a major field of application of the plea bargain procedure over the last decade in Germany, and it might have become routine to bargain these cases. Many bargains will also be motivated by achieving the accused's consent to become a state witness against drug dealers.

Furthermore, the difference concerning violence is significant. It can be assumed that, as

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1134 South African Police Service Annual Report 2010/2011, Annexure A, p.4 (www.saps.gov.za).
1135 Statistics of German Police of 2011, Polizeiliche Kriminalstatistik PKS 2011, summary (www.bmi.bund.de); Drug crime have a share of 3,9 % of all crime.
1136 Germany: ~ 6 Million (op cit 1135); South Africa: ~ 2,1 Million (op cit 1134 on p. 2.)

is typical for a European country, violence in Germany is a lesser problem than in South Africa. Murder cases alone, numbering 2,174 in Germany,[1137] have to be compared to 15,940 cases in South Africa.[1138] Also, the share of bargain cases in the field of violent offences differs from 9 % in Germany to 33 % in South Africa amongst all bargained cases.

In Germany plea bargaining is used surprisingly often in rape cases, which shall be examined in more detail. For cases of sexual offence, 13 % are plea bargained in Germany as compared with 5 % in South Africa. The total number of rape and sexual assault cases in South Africa is drastically higher than in Germany. According to 2011 statistics, 7,539 cases of rape and sexual offence in Germany[1139] face a number of 66,196 in South Africa.[1140] Thus, the number in South Africa is almost ten times higher.[1141] The differing numbers of plea bargained cases in the field of sexual offences might be the only area in which one can clearly state that there is an obvious difference. There is no reason that comes immediately to mind that might explain this difference in the practice of plea bargaining. In fact, South Africa could have a greater need to plea bargain sexual offences considering the massive case load, which puts into question even more why the bargain procedure is not applied more widely. A possible explanation might be a special conscience of German legal practice to protect victims. In Germany, the bargain is often used in rape cases on the theory that it can spare the victim the trauma of having to testify to details of the crime.[1142] This shall be further explained.

Sexual offences are characterized by the fact that the victim is heavily affected by the crime.[1143] In more than 90% of all cases, the victim is female.[1144] The initial victimization is followed by the subsequent victimization that occurs through the participation of the victim in the process.[1145] A German study further examined the role of the victim, especially in cases of sexual offences.[1146] Victims of sexual offences encounter their testimony as a

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1137 Statistics of German Police of 2011, Polizeiliche Kriminalstatistik PKS 2011, summary (www.bmi.bund.de).
1138 South African Police Service Annual Report 2010/2011, Annexure A, p.4 (www.saps.gov.za).
1139 Statistics of German Police of 2011, Polizeiliche Kriminalstatistik PKS 2011, summary (www.bmi.bund.de).
1140 South African Police Service Annual Report 2010/2011, Annexure A, p.3, (www.saps.gov.za).
1141 Not even taken into account that the population in South Africa is around 49 Million and Germany's aroung 82 Million (www.wikipedia.org).
1142 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105.
1143 Compare Niemz, *Urteilsabsprachen und Opferinteressen*, p. 67.
1144 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 70; Goedelt, *Vergewaltigung und sexuelle Nötigung*, p. 24 seqq.; it can be assumed that the satistics for South Africa are similar.
1145 Steyn (2007) *SACJ* 206 at 212.
1146 Richter, *Opfer krimineller Gewalttaten*, p. 1 seqq.

witness negatively.[1147] They almost never experience the proceeding in a positive way.[1148] Although 49 % of the victims stated that they were satisfied by the way the process was conducted, only 35 % were satisfied with the outcome thereof.[1149] Two thirds of the victims stated that the process negatively affected their feelings; the other one third stated that their lives taken as a whole were negatively affected.[1150] 82 % are of the opinion that the victimization was the worst thing that had happened to them in life.[1151] 60.4 % of the victims see their belief in justice diminished.[1152] It can be safely stated against the shown figures that the victim's interest and personality is heavily affected in a rape or sexual assault process.

It has to be asked, however, why German courts make relatively more often use of the bargain procedure. One reason might be that German criminal procedure traditionally is very focused and concerned about victim protection, i.e., the individual rights of the victim. Plea bargaining in Germany is commonly seen as a means of sparing a witness from having to testify and appear before the bench. These factors might motivate a more extensive use of the bargain procedure. Furthermore, especially concerning the offence of rape, German legal practitioners might not regard such an offence as a common offence due to the relatively low case numbers. Thus, they might more likely than South African legal practice tend to consider a bargain procedure, even though the prosecutor holds good evidence, just in the interest of protecting the victim. Another factor might be that s 177 (2) of the StGB, the material provision on rape, allows a two year minimum sentence for rape. At the same time, that is exactly the length of sentence that still allows a suspension of the sentence in terms of s 56 (2) of the StGB. This motivates many representatives to initiate a bargain procedure with the aim of ensuring that their client still receives a suspended prison sentence. Finally, an explanation might be given by the German procedure in terms of s 257c. As presented, the German court formally initiates the bargain procedure and thus also might consider where plea bargaining might contribute. Victim protection usually is not an aim of the accused and his representative.

1147 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 68; Richter, *Opfer krimineller Gewalttaten*, p. 142 seqq.

1148 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 68; Richter, *Opfer krimineller Gewalttaten*, p. 142 seqq.

1149 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 68; Richter, *Opfer krimineller Gewalttaten*, p. 149 seq., 223.

1150 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 68 seq.; Richter, *Opfer krimineller Gewalttaten*, p. 156 seq., 224.

1151 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 69; Richter, *Opfer krimineller Gewalttaten*, p. 175.

1152 Niemz, *Urteilsabsprachen und Opferinteressen*, p. 69; Richter, *Opfer krimineller Gewalttaten*, p. 152 seq..

Prosecutors might regard it as important but will not be motivated if the evidence they hold is strong. However, the court might initiate the bargain in order to ensure that the victim is spared from having to testify, which he cannot achieve in the conventional trial as all substantial evidence has to be heard. This may serve as an example of where inquisitorial traditions make plea bargaining more likely to succeed.

d. Concluding remark

Statistics show that plea bargaining is mostly used in cases of economic crime. In South Africa, offences of violence are second. In Germany, however, second place is drug-related crimes and sexual offences. Especially the latter fact surprises. The share of bargains dealing with sexual assaults and rape in South Africa is very low, whereas in Germany it is relatively high. A possible explanation is that the German legal practice's attention might be tuned particulary to the issue of victim protection.

14. Prevention from abuse

Plea bargaining offers various benefits.[1153] However, the procedure might offer so many of them to each and every participant that the demands of justice are possibly undercut by the extensive use of the instrument. Regarding the strong implications on fundamental principles of criminal procedure, one has to ask by what means the procedure is prevented from being abused.

a. False motivation of the actors

Plea bargaining is an ideal means for speeding up the criminal justice process. Each participant may favour an agreement due to different motivations. It is commonly agreed upon that an agreement should not be the product of improper influence and instead should be based on the accused's free and voluntary decision.[1154] There may however exist driving forces that are inappropriate. All the participating actors of the negotiation process have their own interest in forcing a usual proceeding to enter into a bargaining procedure.[1155] This results in a mutual interest to enter into negotiations. In one sentence the benefits can be summed up as follows: 'the practical effects of a plea bargain flow fairly equally on four directions: to the defendant, a reduction in sentence; to the prosecution, the certainty of a conviction; to the court, an immense saving of time, and to

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[1153] Compare Chapter II.4.
[1154] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-17.
[1155] Compare Chapter II.4.

the public purse, the cost of a trial.'[1156] If all parties have a mutual interest to enter into an agreement, the question is how the application of plea bargaining is controlled and regulated. It is a commonly accepted principle that whether an offence is prosecuted and punished cannot entirely rely on the will of the actors involved already due to the general prevention of crime.

b. Coercion of the accused

Commonly the accused's participation in the bargain procedure is considered to be based on his free will. However, the spread of the practice might also have some disadvantages to the accused and might diminish his liberty to choose whether to enter into negations toward an agreement. It has been held that there is no choice whether to plead guilty and that the element of coercion is implicit in the plea bargain itself.[1157] South African scholars *Lubbe* and *Ferreira* raised the objection that an accused, even if innocent, might plead guilty and accept a lesser sentence for fear of taking the risk of being convicted and sentenced harshly.[1158] Such a legal development may conflict with fundamental principles such as the right to remain silent and the principle of *nemo tenetur*. The title of a U.S.-American dissertation reads as follows: 'Pleading guilty for life: an exploration of plea bargaining in the face of death.'[1159] Already the title is impressive and strikes upon the key issue. The example of a threatening death penalty might be extreme, but there are cases imaginable in which the legal consequences are grave enough that an accused will do anything, or at least will have a strong tendency, to avoid them. In the usual case an accused will always consider entering into a bargain procedure if it appears to him to be the less threatening option. The safeguard against improper pressure on the accused can only be achieved by substantial judicial scrutiny, which will be referred to once again. Another solution might be excluding cases of heavy offences, such as murder, from plea bargaining or limiting the procedure to a certain upper sentence. This would for instance help to prevent from the situation that innocent accused consent to agreements just to avoid grave sentences.

c. Prosecutional discretion

A case that illustrates the significance of the so called demands of justice and how they infect the plea bargaining procedure is *S v Esterhuizen*. In that case, Els J held that the

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1156 Trichardt/Krull (1987) *THRHR* 428 at 443.
1157 Erhard, *Pleading guilty for life*, p. 25 with reference to Litrell.
1158 Lubbe/Ferreira (2008) *SACJ* 151 at 163.
1159 Erhard, *Pleading guilty for life*.

judge 'must be satisfied that the sentence agreed upon is just.'[1160] Els J furthermore stated that there were some factors that the Court must bear in mind. [1161] It was clear 'that in the give and take of negotiations with regard to a guilty plea and in an appropriate sentence there is substantial room left open in the negotiation process for both the State and the defence to achieve a settled result, nevertheless negotiating with each other as adversaries under an adversarial system.' [1162] He further stated that is was 'clear that in order to contemplate a plea and sentence agreement in the first place it is envisaged that there will not always be simply an abject pleading of guilty by the accused to all the counts put forward by the State coupled with imposition by a court of such a sentence as it deems appropriate'.[1163] To the mind of Els J 'it must be so that the court, in considering the "justness" or "unjustness" of a sentence agreement cannot simply decide for itself *in vacuo* what sentence it would have imposed for crimes to which the accused is pleading guilty.'[1164] In the case, Els J reports that was not be able to find that the sentence as agreed on in this matter is 'just' nor could he state that he would have probably imposed a much heavier sentence under the circumstances.[1165] In addition, Els J said the following: 'In return for the concession of a plea of guilty to a charge difficult to prove, it must be so that the Legislature has envisaged that the bargaining mechanism would bring home a result which satisfies the interests of justice. These would be that where a crime has been committed a conviction has been achieved. The price may be that the sentence which would normally flow from the commission of such a crime is lower than might otherwise have been imposed.'[1166] Els J pointed out that 'this does not mean that justice has not been achieved.'[1167]

Els J is right with his words regarding the sentencing itself, i.e., his statement is true that a lenient sentence does not necessarily violate the justness of the sentence. What was accidently ignored by Els J is a substantial feature of what can be regarded – as *Bennun*[1168] calls it – as the ethics of plea bargaining: the fact that the charge has been regarded as 'difficult to prove.'[1169] This is an aspect of highest interest. *Bennun* made it clear that this implies that the decision was taken to continue on s 105A procedure even

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1160 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 493g.
1161 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 493g.
1162 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 493i.
1163 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494ab.
1164 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494b.
1165 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494c.
1166 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494g-h.
1167 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494h.
1168 Compare Bennun (2007) *SACJ* 17 at 31.
1169 *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 494g.

though the prosecutor obviously did not consider that there was a realistic prospect of success.[1170] He also sees a collision with the principle that prosecutors should be of the opinion that a suspect is guilty before charging him.[1171] *Bennun* considers it to be a 'disturbing effect (...) that accused who insist on claiming their full rights to a fair trial may be penalised by incurring heavier sentences if they are convicted, than they otherwise might have done if they had come to the aid of the prosecution by negotiating their guilt'.[1172] He finally comes to the conclusion that 'it cannot be right that the smell of the marketplace should permeate the criminal court' and that 'it cannot be right for the prosecution to rely on the accused's cooperation in order to secure a conviction at all.'[1173] It can be learned from that case that in South African Law *de lege lata*, no provision successfully holds back the prosecution from plea bargaining cases that otherwise would not lead to a conviction. As a consequence, benefits for the prosecution, as implied by a s 105A procedure, do not encounter an adequate means to prevent abuse. *Bennun* states that it cannot be right to use s 105A as a strategy to conceal or to repair weaknesses in the prosecution's case.[1174] He criticises *Du Toit et al*, who regard practical aspects as sufficient in order to initiate the plea bargain procedure.[1175] They state that 'in practice much will depend on each party's assessment of the probable outcome of the case and the bargaining power available to him or her.'[1176] *Bennun* considers the ethical duties of the prosecution to be violated. It was not the function of the prosecution in an accusatorial system to obtain a conviction at all costs and in every case; rather it was to present that what it must submit is sufficient admissible and incriminating evidence to satisfy the trial court that the accused is guilty beyond all reasonable doubt.[1177] It must however be admitted with *Lubbe* and *Ferreira* that it is not reasonable to generalise toward those who act in good faith.[1178] Furthermore, they argue that there may also be cases in which the accused pleads guilty to a charge of which he is indeed guilty but which would have been difficult to prove and to achieve a conviction for the state.[1179] This is correct from the point of view that there are indeed many bargains, especially in large-scale white collar crimes which are very difficult to fully prove and in which the accused is more or less obviously

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1170 Bennun (2007) *SACJ* 17 at 33.
1171 Bennun (2007) *SACJ* 17 at 33.
1172 Bennun (2007) *SACJ* 17 at 33.
1173 Bennun (2007) *SACJ* 17 at 33, 45.
1174 Bennun (2007) *SACJ* 17 at 32.
1175 Bennun (2007) *SACJ* 17 at 32.
1176 Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-10.
1177 Bennun (2007) *SACJ* 17 at 32 with further references.
1178 Lubbe/Ferreira (2008) *SACJ* 151 at 164.
1179 Lubbe/Ferreira (2008) *SACJ* 151 at 164 with reference to *S v Esterhuizen & others* 2005 (1) *SACR* 490 (T) at 493h-494h.

guilty. These cases may even represent the vast majority. However, it has to be held that the strong possibility of abuse cannot be justified by the argument that in most cases the conviction appears just solely due to the fact that the accused is actually guilty. In Germany, the problem is the same. The prosecution will also tend to bargain cases which are difficult to prove and in practice oftentimes will not intensively scrutinize the chances that the accused is in fact guilty. To sum it up, one can state that in both legal systems the 'autonomy' of the prosecution to determine the conduct of the process in view of the agreement procedure is not valuably restricted.

Control may be granted internally, i.e., the prosecutorial actions have to be authorised and need to be controlled. Under s 105A (1) (a), the prosecutor must have a written authorisation issued by the National Director of Public Prosecutions in order to enter into a plea and sentence agreement. Furthermore, Directive 6 issued by the NDPP states that the prosecutor in addition depends on a specific authorisation in the case that the relevant Office of the NDPP has instructed that the accused is prosecuted. If these requirements are not fulfilled, the agreement is null and void.[1180] With respect to these provisions, agreements usually contain the sentence that 'the prosecutor is duly authorized to conduct proceedings in court on behalf of the state in connection with this agreement, after it has been duly entered into.'[1181] It is not clear whether the written authorisation issued by the NDPP is an essential prerequisite. Some have held that the authorisation functions as a proof of the prosecutor's authorisation and thus is essential.[1182] Others have opposed this view. The requirement that the prosecutor be authorised to negotiate and enter into a plea agreement should in their eyes not be handled unnecessarily strictly.[1183]Although the wording of s 105A (1) (a) clearly states the requirement of a written authorisation, *Watney* states that 'it is submitted that the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* (presumption of regularity) will operate in favour of the prosecution.'[1184] As a consequence it is regarded as unnecessary to prove for example a delegated authority on the part of the judge as a prerequisite for the prosecutor to take part in the agreement.[1185] Under German law, the prosecution does not require any official authorisation in writing. According to s 146 of the GVG, the officials of the public

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[1180] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-9.
[1181] Compare annexed case at p. 214 seqq.
[1182] Du Toit et al, *Commentary on the Criminal Procedure Act*, 15-9; *S v Sassin & others* (2003) 4 All SA 506 (NC) at [10].
[1183] Watney 2006 *TSAR* 224 at 225.
[1184] Watney 2006 *TSAR* 224 at 225.
[1185] Watney 2006 *TSAR* 224 at 225; *S v Van der Sandt* 1997 (2) SACR 116 (W); *S v Thornhill* 1997 (2) SACR 626 (C); *S v Cornelissen*; *Cornelissen v Zeelie* 1994 (2) SACR 41 (W).

prosecution office must comply with the official instructions of their superiors. The prosecutor involved in a plea bargaining procedure hence is bound by instruction. Nevertheless, he shall be deemed to be authorised to enter into an agreement. Unless a higher-ranked official of the public prosecution does not instruct the prosecutor in a certain way, he is free to choose whether to participate in the plea bargaining procedure.

It can be assumed that the rules on the prosecutor's authorisation in South Africa are stricter due to the fact that, on the basis of adversarial tradition, the prosecutor to a greater degree can influence and determine the further conduct of the trial and especially which facts and evidence are to be placed before the court. In Germany, on the other hand, the single prosecutor can decide whether to enter into an agreement without the need for a special permit. Nevertheless the prosecutor has to justify his actions internally in the Prosecutional Department.

Another safeguard against abuse by the prosecution, who may file charges and enter into plea bargain procedure even though the case is difficult or even impossible to prove, is the judicial scrutiny of substantial facts. This already discussed topic will be referred to once again in the subsequent chapter.

d. Role of the judge

In the conventional trial, the judge is the safeguard for just and appropriate convictions. The plea bargaining system, however, may undermine this system. The judge's role is transformed. As the opposing parties enter into a mutual bargain instead of attending the court and following the conventional trial procedure, the position of the presiding officer is affected. Within the South African system, due to its adversarial tradition, it seems more usual than in the German system that parties have at their disposal what evidence and facts are to be placed before the court. However, there might nevertheless be a certain need to guarantee judicial control in the plea bargain procedure.

German law gives the judge a more active role and provides the judge with more comprehensive information on the case than South African law does.[1186] It has been presented already that the German court has substantial control over the process. German judges are provided with efficient tools to fulfil their duty to investigate the evidence.[1187] The file they hold is more complete than the one South African judges have in their

[1186] Compare Chapter II.6.a and IV.3.a.
[1187] Turner/Chodosh, *Plea Bargaining Across Borders*, p. 116.

possession.[1188] This is also the case because the police and prosecution by the terms of s 160 (2) have the duty to investigate and gather both incriminating and exonerating evidence. The judge holds the entire file before meeting with the parties for negotiations.[1189] As is typical for a continental law system, a significant feature of the German criminal procedure is the judicial inquiry.[1190] This role is emphasised in the plea bargain procedure through the fact that the court already initiates the bargain and takes part in the negotiations. In contrast to the plea bargaining procedure in South Africa – and as well the United States and many other jurisdictions –plea bargaining in Germany generally involves the court and not just accused, the legal representative and the prosecutor.[1191] S 257c provides for such participation from the court. German law tries to avoid the situation of inappropriate intentions leading towards negotiations by letting the court be the one to initiate the agreement and by limiting to the participants the opportunity to make submissions. Under German law, by the terms of s 257c (1) 1 of the StPO, the court has the role of judging whether negotiations toward an agreement have been initiated.[1192] The prosecution formally is limited to the function of agreeing to the proposed agreement, as stated in s 257c (3) 4 StPO. This could prevent the prosecution from acting 'selfish' in a way that only its own benefits are relevant to the decision to plea bargain. In practice, however, the defence may negotiate solely with the prosecution and later simply seek the court's approval of the negotiated agreement.[1193]

Nevertheless, the court's strong position, which is enshrined in the law, has its effect on the negotiating parties. What could appear as a protection against abuse might also raise concerns. The notion of a consensual agreement practice has already, prior to the statutory amendment in 2009, been long seen to conflict with the judge's role in the German proceedings.[1194] South Africa, however, strictly prohibits the judge's participation in the process of negotiations, as explicitly contained in s 105A (3) of the Criminal Procedure Act. Underscoring the rationale behind the prohibition of judicial participation in the plea bargain is the concern that otherwise the judges may compromise impartiality.[1195] Thus, the South African system limits the judge to reviewing the validity of the agreement. In Germany, the participation of the judge is seen as a major means of ensuring a fair and

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1188 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 116.
1189 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 116.
1190 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 77.
1191 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 104.
1192 Compare chapter on essential differences / role of the court.
1193 Compare Turner/Chodosh, *Plea Bargaining Across Borders*, p. 104.
1194 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 77.
1195 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 23.

just outcome of the bargain procedure. South African law, however, opposes the participation of the judge in the bargain with similar arguments. Interestingly, South African scholar *Bennun* states that the accused's rights demand the implicit assumption within s 105A that the prosecution should not initiate negotiations, which is very close to the presumptions of the German legislature.[1196] It cannot be judged which view is the proper one. These different positions mainly can be referred to the differing inquisitorial and accusatorial understanding of the trial. Thus, there is no right or wrong. It however has to be admitted that the objection that the judge might be negatively affected by his participation has a true core − especially regarding the widespread tendency of courts in civil-law cases to favour settlements rather than to conduct trials in order to lessen their workload. If this mentality spreads to the criminal trial, there are good reasons to limit the court to a scrutiny of agreements rather than to let the judge participate, initiate or even steer the bargain. The more the judge is empowered to influence the bargain's success, the more he might be frustrated if the conclusion of the agreement fails. Thus, as 'judges are the ultimate arbiters of the punishment the defendant will receive, their participation in the negotiations would raise concerns about coercion of the defendant's plea decision.'[1197] The accused would have to fear the court's disappointment if he does not participate in a bargain led or even proposed by the court.

German law might also imply some structural safeguards against judicial abuse. Plea negotiations so far have not occurred in extensively high numbers, although the number of bargained cases is increasing.[1198] It is still around 50 %, which is significantly lower than the for instance 90 % bargained cases in the U.S.A. On the other hand, these structural features are simulated by the judges' right to initiate and participate in the bargain.[1199] A reason for a lower level of coerciveness caused by the judge in Germany might be the relative mildness of the expected sentence and the smaller discounts given to accused who confess in comparison to other jurisdictions.[1200] However, the possible suspension of a sentence that possibly contains imprisonment can be a substantial discount achieved by way of plea bargaining.[1201] Another safeguard against judicial abuse of the procedure may be the participation of lay judges. However, although BGH has stated that lay judges must

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1196 Bennun (2007) *SACJ* 17 at 32.
1197 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 23 with further references.
1198 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 118.
1199 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 120.
1200 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 119.
1201 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 119.

be involved in the bargain procedure, this rarely occurs in practice.[1202] Usually lay judges are absent when negotiations are initiated.[1203] For that reason their role in the trial is too weak to effectively control the professional judges.[1204]

Another point of interest is the field of application in which plea bargaining is admissible. South African law tries to limit the use of s 105A procedure through Directive 2.[1205] It reads as follows: 'Section 105A is to be utilized for those matters of some substance, the disposal of which will actually serve the purpose of decongesting or reducing the court rolls without sacrificing the demands of justice and/or the public interest.' German law also recognizes the restriction in s 257 (1) 1, which states that plea bargaining shall only be applied in 'suitable cases.' The terms 'some substance' and 'suitable' do not however imply clear restrictions. Therefore, they cannot serve as an effective means of limiting the scope of plea bargaining. Generally, there is a high potential for judicial abuse where the court bargains on an informal basis and denies the existence of agreed terms. This problem can only be solved by the use of remedies and a scrutiny if the acting judge has violated fair trial principles.[1206]

The court's scrutiny of substantial facts – whether as a part of the bargain process as in Germany or subsequent to the agreement as in South Africa – might be a safeguard to ensure just and appropriate convictions and sentences. South African s 105A (6) and (7) provide for a scrutiny. So does s 257c (1) 2, stating that the obligation to establish the truth remains unaffected by the plea bargain procedure. S 261of the StGB moreover contains the principle of free evaluation of evidence. It states that the court shall decide on the result of the evidence taken and according to its free conviction gained from the hearing as a whole. The question strongly correlates to the judge's independence, enshrined in Article 97 of the German Constitution and the oft mentioned s 244 (2) containing the obligation to establish the truth. It is the judge's duty to convict the accused based on his personal view.

It seems lost out of sight that the court is not bypassed by the agreement procedure but rather is in the position of ultimately proving the content of the agreement.[1207] However, there remains the the question of how intensive the court's scrutiny is. It has been presented earlier that the court's approval of the agreement is rather limited. The scrutiny

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1202 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105 in footnote 10.
1203 Turner/Chodosh, *Plea Bargaining Across Borders*, p. 105.
1204 Compare Chapter V.4.d.
1205 Directives issued by the National Director of Public Prosecutions on 14 March 2002.
1206 Compare Chapters V.9.c and V.11.
1207 Lubbe/Ferreira (2008) *SACJ* 151 at 164.

of formal requirements may still be warranted. The factual basis, however, is not scrutinized in depth.[1208] Thus, the conventional role of the judge is modified in essence by the bargain procedure.

e. Solutions de lege ferenda

The presentations above show that the present statutory law raises concerns regarding a possible abuse of the plea bargain procedure. Although a very small number of bargains will be affected by inappropriate motives, there may however be means to further improve the law on plea bargaining in both countries to diminish the possibility of abuse. The main concerns in both countries are very similar.[1209]

A solution de lege ferenda in both countries could be to formally limit cases that can be plea bargained or alternatively to limit admissible sentences. Such restrictions are already known in other procedures such as the penal order in German law.[1210] Restrictions would have the advantage that the accused is relieved from pressure. If the court is formally restricted to accept the bargain on certain offences or on certain sentences, the accused in the excluded cases of heavy guilt did not have to fear suffering disadvantages simply due to his refusal to bargain. However, there might be a problem that the benefit of plea bargaining to solving large-scale, difficult cases may wane. It can be stated however that the main scope of plea bargaining would not be lost out of sight. The ‘flood’ of usual cases with offences of light to medium severity still could be bargained. Both presented aspects could be served by a general and unlimited permit to bargain economic crime (which is the vast majority of all plea bargain cases[1211]) while at the same time limiting the admissible height of sentence to a certain degree, for instance five years of imprisonment. It has to be remarked that any restriction on the sentence would exclude murder cases from being bargained. However this might be the price for a modification of the present procedure on plea bargaining. The accused’s substantial rights would be better warranted. The proposed restrictions would form a compromise between the need for an effective functioning criminal justice system and the threat of coercion of the accused into the bargain procedure. Lastly, the proposal might not be effective due to the fact that participants in cases that could not be bargained anymore would take refuge with the

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1208 Compare Chapter V.6.
1209 Compare the enumerated ‘disadvantages‘ in Lubbe/Ferreira (2008) *SACJ* 151 at 164 and SK-*Velten*, StPO, Introduction to ss 257b-257c seqq., para 15 seqq.
1210 Compare s 407 (2) of the StPO that limits the possible legal consequences that can be achieved by way of a penal order.
1211 Compare Chapter V.13.b.

informal bargain procedure. Informal bargaining however serves the rule of law even less. Nonetheless, it has to be annotated that the improvement of statutory law cannot be denied by the possibility of its circumvention.

Concerning victim protection, it is surprising that the present legal position of complainants is very weak.[1212] It could be held that it is anyhow not stronger in the conventional trial. However especially in rape cases, which involve the gravest bodily and psychological harm, it appears unjust and unreasonable not to give the victim a strong position. Plea bargaining in cases of rape could be limited by a victim's right to veto. This would not erode the benefit of plea bargaining in these cases. It has to be recalled that the significance of a bargained rape case is – other than the usual case in other cases – not primarily a lack of evidence. Rather it is the motive to spare the victim from having to testify as a witness. Thus, if the victim vetoes the bargain of the case, the main motive of the bargain is not violated. The victim would waive the opportunity of being spared from having to testify due to his willingness to make a testimony in order to secure in his eyes a 'just' conviction. This especially gives rise to criticism in Germany, where the material law on rape with s 177 (2) of the StGB allows the accused to bargain to a minimum sentence of two years' imprisonment. Two years of imprisonment is at the same time the maximum that still allows to suspend the sentence in terms of s 56 (2) of the StGB. By that means, plea bargaining offers the possibility to achieve a suspension in cases in which usually there is no such possibility as judges – where there are no exceptional mitigating circumstances given – do not sentence to the minimum. Consequentely, there are good reasons to allow the victim to demand a judicial decision on the sentence rather than having the parties negotiate on the leniency of the sentence. The accused's willingness to bargain and to admit the offence is not entirely ignored. The court still can judge the plea of guilty or the confession of the accused as a mitigating factor.

Another possible means for the improvement of the provisions on plea bargaining in both countries would be the insertion of an enforceable requirement to minimum investigations of the court. South African law with s 105A (7) only provides for a scrutiny of evidence and facts if the facts that have been placed before the judge by the parties give raise to doubt. The scrutiny is moreover only undertaken to be able to consider the negotiated sentence. The conviction is only proven based on the statements of the accused, as according to s 105A (6). German law provides for a scrutiny by fully standing by the obligation to establish the truth, as with s 257c (1) 1 and s 244 (2). However, in practice judicial

[1212] Compare Chapter V.5.

approval where the substantial facts are complete and can be proven is as poor as in South Africa.[1213] Thus, it is impossible for the court to consider whether there might be other motives for an agreement and whether public interest might rather favour a trial.[1214] *Bennun* suggests, as a simple solution *de lege ferenda* to the problem of lacking control through the court, setting up a minimum requirement for the statements of the witnesses on whom the prosecution would have relied or other evidence to be laid before the court to form the basis on which it can satisfy itself that the agreement is a proper one.[1215] This proposal would improve the law on plea bargaining without having to fear that the benefits are diminished. The duty must be to present at least one striking piece of evidence besides the statements of the accused in order to prove the factual basis of the conviction. This should not be a problem: the prosecution usually holds other evidence. The problem that motivates plea bargaining is only that it is uncertain whether the case can be fully proven. The formal prerequisite of having to present minimum evidence and the court's duty to its scrutiny would prevent cases of heavy abuse. At the same time the public will more likely accept that justice is done.

Finally, it can be discussed whether German law should adopt the requirement of a written form of the agreement. The legislature might not have thought of such a rule because he tried to avoid the impression that the prosecution and accused enter into a 'contract,' which is foreign to the criminal procedure. However, S 273 (1a) does provide for a documentation of the bargain. It contains that the record must also indicate, in essence, the course and content as well as the outcome of a negotiated agreement in terms of s 105A. In practice however the documentation oftentimes is done very briefly or not even at all.[1216] In the inquiry of *Schöch*, half of the professional participants asked admitted to either not documenting or else not exactly fulfiling the requirement.[1217]

f. Concluding remark

Most of the discussed issues might appear as 'academic problems.' What can problematic in theory possibly only has a limited effect in practice.[1218] However, statutory law should always be improved. Especially the situation of coercion of the accused to participate in the bargain should be avoided. As presented, for instance a formal limitation of the

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1213 Compare empirical data in Chapter V.6.c.
1214 Compare Bennun (2007) *SACJ* 17 at 45.
1215 Bennun (2007) *SACJ* 17 at 45.
1216 Siolek in Riess-FS, 563 at 580.
1217 Schöch, *Urteilsabsprachen in der Strafrechtspraxis*, p. 158.
1218 Lubbe/Ferreira (2008) *SACJ* 151 at 165.

offences or sentences that are negotiable would help to prevent abuse. A veto right of complainants that are victims of sexual offences might help to ensure that the mutuality of the benefits to all the other participants does not lead towards a circumvention of victim interests. Finally, the requirement of a written form of the agreement in German law would improve the transparency of the process.

15. Procedural nature of the bargain

A major question deals with the question of whether statutory law on agreements as regulated in ss 105A of the Criminal Procedure Act and 257c of the StPO still provides a procedure that complies with the criminal procedure or whether it implies a new procedure of its own that could be marked as consensual or negotiated justice.[1219] Tracing back the history of the criminal procedure, it is also important to distinguish the two basic models of procedure: the inquisitorial and the accusatorial.[1220] Especially the inquisitorial tradition implies conflicts concerning the implementation of a bargain procedure, as such elements are substantially foreign to its principles. Generally, it can be asked whether plea bargaining can be used to improve the efficiency of the contemporary criminal justice system while at the same time maintaining established legal principles.[1221] It has to be kept in mind that consensual elements always offer a possibility for abuse and that plea bargaining might be used as such a tactic.[1222]

a. Concepts of plea bargaining

There are general model concepts which can describe a bargain process before a criminal court. The first is the general idea of a compromise. Thereafter plea bargaining in its pure form places the criminal proceeding, fact-finding, legal consequences and even legal judgment at the party's disposal.[1223] The parties conclude a contract that is placed before the court for approval. The accused's bargaining power, regardless of whether he decides to demand for a lengthy trial, opposes the prosecution's discretion and the sentencing discretion of the court.[1224]

Second and alternatively, plea bargaining could be seen as an impetus to cooperation.

1219 Compare Weigend in Maiwald-FS, 829; Rodgers (2010) *SACJ* 239 at 239 uses the term 'negotiated justice' to describe plea and sentence negotiations, as well as plea and sentence agreements.
1220 Compare Clarke (1999) *CILSA* 141 at 148.
1221 Compare De Villers (2004) *De Jure* 244 at 253.
1222 For bargain tactics generally compare Herman, *Plea Bargaining*, p. 65 seqq. (§6).
1223 SK-*Velten*, StPO, s 257c, para 3.
1224 SK-*Velten*, StPO, s 257c, para 3.

The process of negotiations and agreements might undermine the opposing positions of power that the criminal procedure assigns to the participants.[1225] The accused is given the opportunity and power to participate in the proceedings.[1226] One has to bear in mind that the accused is not obligated to take an active part in the process.[1227] There is no duty to the accused to cooperate.[1228] As opposed to the inquisitorial system, the accused is not forced to assist in and to support the proceedings.[1229] One of the fundamental principles of modern criminal procedure is the accused's right to remain silent. The court's right to advise the accused to confess in order to thereby receive, for example, a reduction of sentence remains unaffected.[1230] Participation and cooperation in modern criminal procedure is thus only an obligation and never a duty of the accused.[1231] The shown model is turned upside-down in the concept of plea bargaining if the procedure is understood as a cooperation of the accused with the other participants of the trial.[1232] Another aspect that stands out is the danger of false confessions.[1233] Empiric studies in an experiment revealed that the percentage of false confessions amounted to 7 % in regular trials to 43 % in simulated cases of plea bargaining.[1234]

Third, plea bargaining could be described as consent to a new summary procedure. The bargain is seen as a shortening of the proceedings by seeking undisputed facts of the case.[1235] All other facts upon which the parties cannot agree lead to the regular trial proceedings.[1236] The agreed facts lead to the new procedure of plea bargaining.[1237] The court's obligation to establish the truth is reduced.[1238] Instead, the judge checks the plausibility of the substantial facts.[1239] If there are no hints for a false confession, no more evidence is taken.[1240] The procedure is consensual. Part of the responsibility for the accuracy of the judgment is put on the accused and the prosecution. [1241]

The fourth idea of plea bargaining is the aim of de-escalation and the removal of

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1225 SK-*Velten*, StPO, s 257c, para 4.
1226 SK-*Velten*, StPO, s 257c, para 4.
1227 SK-*Velten*, StPO, s 257c, para 4.
1228 SK-*Velten*, StPO, s 257c, para 4.
1229 SK-*Velten*, StPO, s 257c, para 4.
1230 SK-*Velten*, StPO, s 257c, para 4.
1231 SK-*Velten*, StPO, s 257c, para 4.
1232 SK-*Velten*, StPO, s 257c, para 4.
1233 SK-*Velten*, StPO, s 257c, para 4.
1234 SK-*Velten*, StPO, s 257c, para 4; Fischer (2009) *StraFo* 177 at 183.
1235 SK-*Velten*, StPO, s 257c, para 5.
1236 SK-*Velten*, StPO, s 257c, para 5.
1237 SK-*Velten*, StPO, s 257c, para 5.
1238 SK-*Velten*, StPO, s 257c, para 5.
1239 Schünemann (2009) ZRP 204 at 106.
1240 SK-*Velten*, StPO, s 257c, para 5.
1241 SK-*Velten*, StPO, s 257c, para 5.

uncertainty. It is the most restrictive concept of plea bargaining. Negotiations towards an agreement only serve the function of revealing the necessity of defence and the extent to which the accused has to parry the charges. [1242] The aim of the accused is thereafter to remove uncertainty about the court's findings and later judgment.[1243] Oftentimes the procedural conduct of the defence does not correspond to the inner attitude of the judge towards the case which can result in tactical disadvantages.[1244] The procedure contributes to de-escalation, because the accused gains more certainty as to the procedural conduct of the court.[1245] Threat-potential is reduced and excessive defence measures therefore are no longer necessary, which in the procedure of bargaining might also generate mutual trust.[1246] The binding effect of plea and sentence agreements is not based on the principle *pacta sunt servanda*. Rather, the agreement binds because of mutual consent to a certain form of communication and mutual respect.[1247] The procedure should prevent a tactical outwitting of the opponent.[1248] The different presented conceps help to form a guideline to examine which concept the present statutory provisions on plea bargaining in both countries represent.

b. Procedural term 'truth'

Another annotation shall be made regarding a general approach to the term 'truth'. Plea bargaining is often criticized for circumventing the finding of facts and the material truth. However, it has to be carefully weighed what the truth-seeking function of the criminal procedure really comprehends. One cannot doubt that there is not only society's understanding of the term 'truth' but also a juridical one.[1249] For example, in a taking of evidence the judge can only rely on the plausibility of testimonies − despite scientific provable facts such as blood alcohol concentration.[1250] Plausibility is a strong indicator for truth. Also, plausibility generates a truth in the criminal procedure. If the judge decides that the conduct of the actions follows a realistic plot, then the single set of facts becomes official 'truth'.[1251] The Anglo-American juridical system distinguishes 'fact-finding' from

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[1242] Compare SK-*Velten*, StPO, s 257c, para 6.
[1243] SK-*Velten*, StPO, s 257c, para 6.
[1244] Compare SK-*Velten*, StPO, s 257c, para 6.
[1245] SK-*Velten*, StPO, s 257c, para 6.
[1246] SK-*Velten*, StPO, s 257c, para 6.
[1247] SK-*Velten*, StPO, s 257c, para 6.
[1248] SK-*Velten*, StPO, s 257c, para 6.
[1249] Volk in Salger-FS, 411 at 415; compare generally Turner/Chodosh, *Plea Bargaining Across Borders*, p. 118.
[1250] Volk in Salger-FS, 411 at 415.
[1251] Volk in Salger-FS, 411 at 415.

'decision-making.'[1252] German scholar *Volk* points out, that in this context it does not matter if the procedure to be followed was adversarial or inquisitorial;[1253] the shown distinction is a fundamental principle that fits to all kinds of procedures.[1254] *Volk* thinks that the trial has to be prevented from becoming a marketplace in which justice can be traded.[1255] German scholars widely regard truth to be the fundamental principle of justice.[1256] To their minds, the main proceeding guarantees to uncover the truth and to generate a just judgment.[1257] The Anglo-American justice system follows a totally different approach. Scholars there presume that the inquisitorial system solely serves the establishment of truth, whereas the adversarial system more likely establishes justice rather than truth.[1258] Thus, in plea bargaining procedure, the stage of fact-finding is skipped.[1259] The decision-making can be based exclusively on the bargain of the parties, which ensures a just outcome. The conviction is solely based on the plea of guilty and the other bargained terms. This does not comply with the German justice system that regards truth as a substantial step towards justice.[1260] The bargain between prosecutor and accused without judicial participation is consequently only regarded to form a formal truth that is less worthy.[1261] *Volk* speaks of a false understanding that German scholars had and argues that there was no reason to consider the outcome of a bargained case to be less just.[1262] He further argues that truth in a trial is always something different than truth is in the eyes of society.[1263] Procedural truth depends on the quality of the process,[1264] even if in a conventional trial truth is modified due to procedural requirements and limitations.[1265] *Volk* finally states that German scholars overrate truth as a guarantee for justice.[1266] In the end, it would not matter if the judge bases his judgment on factual or formal truth: both outcomes of a process can be regarded as just.[1267] *Weßlau* supports this view. He recently

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1252 Volk in Salger-FS, 411 at 415.
1253 Volk in Salger-FS, 411 at 415.
1254 Volk in Salger-FS, 411 at 416.
1255 Volk in Salger-FS, 411 at 416.
1256 Volk in Salger-FS, 411 at 416.
1257 Volk in Salger-FS, 411 at 416.
1258 Volk in Salger-FS, 411 at 416.
1259 Volk in Salger-FS, 411 at 416; German system is different at that point; so this can only be said about the South African System of plea bargaining.
1260 Volk in Salger-FS, 411 at 416.
1261 Volk in Salger-FS, 411 at 416.
1262 Volk in Salger-FS, 411 at 416.
1263 Compare Volk in Salger-FS, 411 at 417.
1264 Volk in Salger-FS, 411 at 417.
1265 Volk in Salger-FS, 411 at 417.
1266 Volk in Salger-FS, 411 at 417.
1267 Compare Volk in Salger-FS, 411 at 417.

stated that plea bargaining complies with the principle of material truth.[1268] The judge may also be able to convince himself of the relevant facts solely on the basis of a confession.[1269] There was no reason to assume a violation of the principle of material truth. Agreements were no threat to the criminal justice system.[1270] In fact, German scholars so far may have been too solid in their opinion on what is just. On the other hand – as *Bennun* states – there could be seen 'a great deal to be uneasy about concerning plea bargaining generally in an accusatorial system, for it involves bypassing the finder of fact (whether judge alone or with assessors or the jury).'[1271] It can be summed up that the questions of how 'truth' has to be defined and to what extent plea bargaining possibly has to be accepted as an alternative approach to the truth-finding have not yet been part of the controversy in Germany. This will also be presented in the following chapter.

c. Conflicts with the German inquisitorial system

The principle that the court has to establish the truth as contained in s 244 (2) of the StPO is a major inquisitorial principle of the German law on criminal procedure. That is why the legislature intended not to breach with this principle while implementing plea bargaining into the Code. The German legislature decided to use the term 'Verständigung,' which means, as explained before, 'agreement' in the sense of a convergence of minds.[1272] The appearance of a contract is thus avoided. Some German scholars already before the advent of s 257c however argued that the implementation of agreements into the statutory law was not possible without the creation of a new consensual procedure that should have been implemented instead of s 257c StPO.[1273] The legislature instead decided to implement the law on agreements into the existing conventional criminal system.[1274] It was said that a new and then-unknown consensual procedure was not desirable.[1275] This was justified with the argument that otherwise the role of the court and especially the obligation to establish the truth would have been diminished.[1276] To clarify, it was further stated that

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1268 Weßlau in Müller-FS, 779 at 781.
1269 Weßlau in Müller-FS, 779 at 781.
1270 Weßlau in Müller-FS, 779 at 781.
1271 Bennun (2007) *SACJ* 17 at 44.
1272 SK-*Velten*, StPO, s 257c, para 2.
1273 Altenhain/Haimerl (2010) *JZ* 239 at 337; Wohlers (2010) *NJW*, 2470 at 2473.
1274 Weßlau in Müller-FS, 779 at 788; Compare RefE p. 12 seq. (www.brak.de/seiten/pdf/Stellungnahmen/2005/Stn25_05.pdf).
1275 Weßlau in Müller-FS, 779 at 788; Compare RefE p. 12 seq. (www.brak.de/seiten/pdf/Stellungnahmen/2005/Stn25_05.pdf).
1276 Weßlau in Müller-FS, 779 at 788; Compare RefE p. 12 seq. (www.brak.de/seiten/pdf/Stellungnahmen/2005/Stn25_05.pdf).

all principles of criminal procedure do persist.[1277]

As mentioned before, the goal has clearly not been achieved. The drafters of the German statutory law verbally wanted to conform to the basic principles of the criminal procedure, such as the obligation to establish the truth and other principles on the taking of evidence. In fact, the statutory provisions suspend these principles.[1278] The present system of plea bargaining does not provide for a full inquisitorial inquiry. Rather, it can be held with *Velten* that the new provisions, such as s 257 (1) 2 stating that the obligation to establish the truth in terms of s 244 (2) remains unaffected, do solely need to be considered as instruction or guidance for the court practice. The complete fulfilment of these inquisitorial rules would anyhow be impossible in a bargain case. Consequently, *Velten* rather regards them as a means to control in that the obligation to establish the truth still plays a significant role, for instance if an appeal court searches for substantial failures in the court's analysis of the case.[1279] Nevertheless, it has to be stated that s 257c's statement that s 244 (2), the core of all inquisitorial scrutiny, remains unaffected is not accurate. In fact, s 257c installs consensual elements and limits inquisitorial elements to a procedure of approval. The factual state of the provisions and the application thereof supports the legal opinion of those who already prior to the advent of s 257c held that a consensual procedure had to be established.[1280] The legislature consequently would first have had to modify all the provisions that contain basic principles and make them facilitative instead of keeping them compulsory.[1281] *Weßlau* even considers the establishment of a consensual procedure as impossible.[1282] The German legislature did not come up with a clear decision that would have erased the controversy that already had been around for a long time before the advent of s 257c of the StPO in 2009. He did not take the side of one of the opponents that clash about the question of which procedural nature agreements have. To use an uncouth term, the German legislature installed a 'hybrid' that tends to adapt to both the long-known fundamental principles of criminal procedure and the practical need for rapid and simplified procedures.[1283] The 'hybrid system' however does − as the term might successfully suggest − fuse both aspects. The picture of a fusion to a hybrid might however be euphemistic. The implementation of agreements in the German criminal procedure implies

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1277 Weßlau in Müller-FS, 779 at 788; Compare RefE p. 12seq. (www.brak.de/seiten/pdf/Stellungnahmen/2005/Stn25_05.pdf).
1278 Weßlau in Müller-FS, 779 at 789.
1279 SK-*Velten*, StPO, s 257c, para 1.
1280 Weßlau in Müller-FS, 779 at 789.
1281 Weßlau in Müller-FS, 779 at 789.
1282 Weßlau in Müller-FS, 779 at 789.
1283 Compare Chapter II.6.c.

a constant breach with fundamental principles. One could demand a 'second StPO' which explicitly provides for consensual procedure.[1284] It has even been proposed that German law should adopt the guilty plea system.[1285] No matter which opinion may be right, one also has to consider that the present StPO already contains elements that serve the function of effective and short trials, as did the penal order (*Strafbefehl*) prior to the advent of s 257c. The ideal of 'material truth' as a guarantee for justice is rated highly in Germany. Thus, the tendency is to preserve the established principles. As it is commonly accepted that plea bargaining needs to be controlled, the procedure is neither strictly accusatorial nor is it dominated by inquisitorial principles. Thus, no matter if regulated in an inquisitorial law system or ruled by a 'second' and entirely new procedure, the agreement procedure will always imply elements of both legal traditions. The solution of the legislature to formally preserve the inquisitorial principles while at the same time modifying the StPO by the implementation of new elements could be a reasonable solution. Furthermore, it has to be considered that no matter how plea bargaining is regulated, parties mutually willing to enter into an agreement will always find a way to achieve their common aim.[1286] Consequently, the preservation of inquisitorial guidelines has its advantages. Thus, the present system of plea bargaining in Germany can be seen as a hybrid, a formally inquisitorial system which accepts consensual elements but formally does not recognize them. The present system of a hybrid – having accepted the implementation of plea bargaining into the StPO without establishing an entirely new consensual procedure of its own − nevertheless might be open to improvements, as will be presented immediately after having taken a view at the nature of plea bargaining in South African law.[1287]

d. Implementation into South African law

Plea bargaining in South Africa as in other common law systems is a special procedure within the plea system. The mechanisms of s 105A, right behind the general provisions on the plea, document the role of plea bargaining. The South African law on criminal procedure is basically accusatorial, although it contains certain inquisitorial elements as for instance the procedure of questioning that may take place under s 115 or as part of s 112.[1288] Plea bargaining is descended from adversarial legal systems and thus the

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1284 Zschockelt in Salger-FS, 435 at 436.
1285 *Meyer-Goßner* (1992) *NStZ* 167 seqq.
1286 Weigend (1999) *NStZ* 57 at 63.
1287 See Chapter V.15.e
1288 Geldenhuys/Joubert/Swanepoel/Terblanche/van der Merwe, *Criminal Procedure Handbook*, p. 22 (Chapter 1, 4); van der Merwe/Barton/Kemp, *Plea Procedures in Summary Criminal Trials*, p. 15; also compare Chapter II.6.b.

adoption of a bargain procedure into the South African law generally is less problematic than in Germany. Nevertheless the question could be raised whether an alternative procedure has been established through the advent of s 105A. Considering the South African provision of s 105A, *Steyn* states that plea bargaining could be seen as a type of alternative dispute resolution.[1289] In contrast to *Steyn*'s statement, Els J said in the *S v Esterhuizen & others* case that regardless of how much room was left open in the negotiation process to achieve a settled result, state and defence were still negotiating with each other as adversaries under an adversarial system.[1290] *Bennun* again declares plea bargaining to be exceptional and not the normal procedure.[1291] Against the background of these statements, it can be said that there does not exist a clear common academic opinion on how plea bargaining should be judged. Directive No. 1 issued by the NDPP however reads as follows: 'the procedure enacted in s 105A does not supplant the standard procedure for pleas of guilty in terms of s 112 of the Act. The established practice of accepting initial pleas of guilty on the basis of bona fide consensus reached, remains applicable. Section 105A is a complementary disposal mechanism.' It can be interpreted that s 105A contains a procedure of its own that is related to the guilty plea.

The content and procedure of the bargain can be marked as mostly consensual. In the accusatorial tradition it is widely up to the parties upon which terms and conditions they agree and which facts and evidence are to be placed before the court. The court does not participate in the bargain as contemplated in s 105A (3). Instead, the judge is limited to the scrutiny of the agreement in terms of s 105A (6) and (7) that the parties had entered into before. These are inquisitorial elements however.[1292] It can be summed up that the bargain procedure in South Africa is a basically consensual procedure which is accompanied by inquisitorial duties of scrutiny. It is not a great effort for the parties to mutually work towards the formal fulfilment of the requirements of subsection (6) and (7).[1293] Thus, the inquisitorial scrutiny is a very limited one.

e. Future prospects

It is a general tendency in the criminal procedure over the last decades to make use of consensual elements in order to enhance the effectiveness of criminal trials. It can be assumed that the procedure in South Africa will not substantially change over the next

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1289 Steyn (2007) *SACJ* 206 at 208.
1290 *S v Esterhuizen & others* 2005 (1) SACR 490 (T) at 493i.
1291 Bennun (2007) *SACJ* 17 at 45.
1292 See Chapter V.6.b.
1293 Compare Chapter V.6.

years. In Germany the situation is unpredictable as plea bargaining might be an even more controversial issue due to the inquisitorial implications. As already shown, German scholars have suggested and suggest again to officially adopt a consensual procedure.[1294] They imagine the conduct of the bargain to be as following: after the decision to open the main proceedings and the accused having admitted the offence the taking of evidence could be omitted. The range of sentence would be diminished.[1295] The acceptance of the charge against him on points of guilt by the accused corresponds to the existing special procedure of a penal order by the terms of s 407 seqq. StPO. In the procedure of a penal order the accused in addition accepts a specific sentence.[1296] To my mind, the consensual procedure would have to form part of Part Six of the StPO that contains several other special types of procedure. Instead, the legislature chose to implement the bargain process into the conventional trial procedure. There is no clear explanation for this decision. The judicial investigation and truth-seeking that the present system seeks to warrant could also be observed by another type of procedure. The regulation of bargaining as a formally exceptional procedure would also have the advantage of a more detailed regulation on the procedure. For instance, the comparable penal order is regulated in eight provisions reaching from s 407 to s 412 of the StPO.[1297] Plea bargaining during the main proceedings in essence only is regulated in the single provision of s 257c. To sum it up, the half-hearted formal acknowledgement of plea bargaining as in its core a consensual procedure in Germany could provide an impetus to further reforms of the German provisions.

f. Concluding remark

The procedural natures of plea bargaining in South Africa and Germany slightly differ. In Germany, plea bargaining is implemented into the conventional trial system, whereas in South Africa the bargain procedure is attached to the plea system and implemented as a special procedure. The material content also differs. German bargain procedure can be marked as a summary procedure under the court's inquisitorial regime. In South Africa, the procedure can be marked as consensual. Certain inquisitorial prerequisites are weak as the court is mainly limited to a formal approval of what the parties have negotiated before. The statutory regulation of the procedure in South Africa seems to stand firm, whereas in

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1294 Meyer-Goßner, StPO, Introduction, para 119k; Meyer-Goßner (1992) *NStZ* 167; Meyer-Goßner (2007) 425 at 431.
1295 Compare Meyer-Goßner, StPO, Introduction, para 119k with further references.
1296 Meyer-Goßner, StPO, Introduction, para 119k.
1297 Compare Meyer-Goßner (2007) NStZ 425 at 430.

Germany one could imagine that further regulations might follow. The present regulation of plea bargaining is not conclusive regarding the fact that it in the legislature's eyes obviously was supposed to leave basic inquisitorial principles untouched, which it in fact cannot grant.

VI. Conclusion

South African law with s 105A established a consensual procedure that limits the court to the approval of an agreement that had been concluded before in between prosecution and accused. Plea bargaining fits relatively easily with the existing legal framework, as it is based on accusatorial common law traditions. The scope of statutory bargains is limited to plea and sentence agreements regarding the main proceedings. For the rest, informal bargaining remains applicable. Plea bargaining replaces the conventional trial procedure with a written agreement.

German law with s 160b, 202a, 212, 257c contains provisions for all stages of bargaining. Informal bargaining is inadmissible. The scope of possible subjects is unlimited. In accordance with the inquisitorial law tradition of German criminal procedure, agreements do not replace a conventional trial. Nevertheless, they greatly shorten it. The law provides for a greater authority of the judge, who initiates the bargain procedure and is involved in the negotiations. Also, the judge's obligation for truth-seeking is emphasised and is aimed at warranting a strong factual basis. Parties enter into the agreement after a stage of mutual discussion which implies at the same the court's scrutiny. Throughout the bargain procedure the judge has a comprehensive knowledge of the file and has the power to further investigate the case. Subsequently, the court builds his conventional conviction and sentence upon the outcome of the bargain. Although the procedure differs and implies characteristics of an inquisitorial trial procedure, in essence the pressure for greater efficiency lets inquisitorial elements step back. Nevertheless, the more active role of the judge remains a significant feature of bargaining in Germany.

It has to be obeyed that plea bargaining bypasses the fundamental function of the criminal trial in both legal systems. The court's function, either limited to the function of approval or to moderating the bargain, is drastically modified. The parallel interests of both the court and the prosecution to lessen their workload can result in coercion. Accused who refuse to bargain might fear suffering disadvantages. This problem can only be solved by transparency of the bargain process and a serious application of the principle of a fair trial.

South African law seems to have achieved a higher transparency through the requirement of an agreement in writing. However, this is opposed by almost no judicial approval of the substantial facts. The main focus of the judge's scrutiny lies upon whether formal prerequisites have been fulfilled and whether the accused has entered into the agreement voluntarily. The basis of this practice is the accusatorial law tradition. In comparison, plea bargaining in Germany appears as a 'hybrid' of accusatorial and inquisitorial principles. The German law on agreements is the regulation of a procedure that informally developed in an inquisitorial system. The German legislature, however, did not ever make up its mind whether to establish a consensual procedure of bargaining. The consensual elements have been implemented into the criminal procedure half-heartedly. The future will show if the legislature will decide to emancipate agreements as a consensual procedure of its own. The factual state however suffers enormous implications within the inquisitorial framework of the criminal procedure which cannot be bypassed. The regulation of bargains as a special procedure, as it has been done with the penal order in Part Six of the German Code of Criminal Procedure, would add to the transparency and credibility of the procedure.

Generally both legal systems suffer a fundamental problem. Once one decides to allow, or even to simply not strictly suppress, consensual procedures in the criminal justice system, the mutual interests of the participants generates momentum. The dynamic of bargains will circumvent almost every attempt to formally limit or regulate the procedure. The prevention of abuse through legislation due to the very nature and essence of bargaining cannot be fully achieved. However bargaining has become a worldwide reality, and it seems impossible to turn the clock back. Consequently, fundamental principles such as the transparency of the criminal trial, prevention of crime through the deterrence of penalty and the accused's right to a fair trial can only be warranted through severe control of the public participants in the bargain, i.e., the court and the prosecution office.

ANNEX

German Provisions on Plea Bargaining

GERMAN CODE OF CRIMINAL PROCEDURE

Strafprozessordnung (StPO) [1298]

PART TWO: PROCEEDINGS AT FIRST INSTANCE [1299]

CHAPTER II

PREPARATION OF THE PUBLIC CHARGES

Section 160b

[Discussion of the Status of Proceedings]

[1]The public prosecution office may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings. [2]The essential content of this discussion shall be documented.

CHAPTER IV

DECISION CONCERNING THE OPENING OF THE MAIN PROCEEDINGS

Section 202a

[Discussion of the Status of Proceedings]

[1]Where the court is considering the opening of main proceedings, it may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings. [2]The essential content of this discussion shall be documented.

CHAPTER V

PREPARATION OF THE MAIN HEARING

[1298] Translated by German Federal Ministry of Justice in cooperation with juris GmbH, author: *Kathleen Müller-Rostin,* 2011.

[1299] All following sections form part of Part Two of the German Criminal Code of Criminal Procedure and are cited with their specific chapter-heading.

Section 212
[Applicability of Section 202a]

Section 202a shall apply mutatis mutandis after the opening of the main proceedings.

CHAPTER VI
MAIN HEARING

Section 257b
[Discussion of the Status of Proceedings]

At the main hearing the court may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings.

Section 257c
[Negotiated Agreement]

(1) [1]In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. [2]Section 244 subsection (2) shall remain unaffected.

(2) [1]The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. [2]A confession shall be an integral part of any negotiated agreement. [3]The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.

(3) [1] The court shall announce what content the negotiated[1300] agreement could have. [2]It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. [3]The participants shall be

[1300] To the mind of the author the presented translation at that point is not precise; the orginial text only uses the term ‘Verständigung’ and does not add that is already had been negotiated; it is a significant feature of the German law that the agreement is concluded not until the end of the bargain procedure.

given the opportunity to make submissions. [4]The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal.

(4) [1]The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. [2]The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. [3]The defendant's confession may not be used in such cases. [4]The court shall notify any deviation without delay.

(5) The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4)

South African Provisions on Plea Bargaining

Criminal Procedure Act No. 51 of 1977

CHAPTER 15

THE PLEA

Section 105A

Plea and sentence agreements

(1) (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of—

(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and

(ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty—

(*aa*) a just sentence to be imposed by the court; or

(*bb*) the postponement of the passing of sentence in terms of section 297 (1) (a); or

(*cc*) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297 (1) (b); and

(*dd*) if applicable, an award for compensation as contemplated in section 300.

(b) The prosecutor may enter into an agreement contemplated in paragraph (a)—

(i) after consultation with the person charged with the investigation of the case;

(ii) with due regard to, at least, the—

(*aa*) nature of and circumstances relating to the offence;

(*bb*) personal circumstances of the accused;

(*cc*) previous convictions of the accused, if any; and

(*dd*) interests of the community, and

(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—

(*aa*) the contents of the agreement; and

(*bb*) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

(c) The requirements of paragraph (b) (i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could—

(i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and

(ii) affect the administration of justice adversely.

(2) An agreement contemplated in subsection (1) shall be in writing and shall at least—

(a) state that the accused, before entering into the agreement, has been informed that he

or

she has the right—

(i) to be presumed innocent until proved guilty beyond reasonable doubt;

(ii) to remain silent and not to testify during the proceedings; and

(iii) not to be compelled to give self-incriminating evidence;

(b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;

(c) be signed by the prosecutor, the accused and his or her legal representative; and

(d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement.

(3) The court shall not participate in the negotiations contemplated in subsection (1).

(4) (a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then—

(i) require the accused to confirm that such an agreement has been entered into; and

(ii) satisfy itself that the requirements of subsection (1) (b) (i) and (iii) have been complied with.

(b) If the court is not satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall—

(i) inform the prosecutor and the accused of the reasons for noncompliance; and

(ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.

(5) If the court is satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.

(6) (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether—

(i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;

(ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and

(iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.

(b) After an inquiry has been conducted in terms of paragraph (a), the court shall, if—

(i) the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or

(ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or

(iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand, record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.

(c) If the court has recorded a plea of not guilty, the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.

(b) For purposes of paragraph (a), the court—

(i) may—

(*aa*) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and

(*bb*) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and

(ii) must, if the offence concerned is an offence—

(*aa*) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997); or

(*bb*) for which a minimum penalty is prescribed in the law creating the offence, have due regard to the provisions of that Act or law.

(8) If the court is satisfied that the sentence agreement is just, the court shall inform the

prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.

(9) (a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.

(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may—

(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or

(ii) withdraw from the agreement.

(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph

(b) (i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.

(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b) (ii), the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(10) Where a trial starts *de novo* as contemplated in subsection (6) (c) or (9) (d)—

(a) the agreement shall be null and void and no regard shall be had or reference made to—

(i) any negotiations which preceded the entering into the agreement;

(ii) the agreement; or

(iii) any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admission so recorded shall stand as proof of such admission;

(b) the prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts; and

(c) the prosecutor may proceed on any charge.

(11) (a) The National Director of Public Prosecutions, in consultation with the Minister,

shall issue Directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any Directive so issued shall be observed in the application of this section.

(b) The Directives contemplated in paragraph (a)—

(i) must prescribe the procedures to be followed in the application of this section relating to—

(*aa*) any offence referred to in the Schedule to the Criminal Law Amendment Act, 1997, or any other offence for which a minimum penalty is prescribed in the law creating the offence;

(*bb*) any offence in respect of which a court has the power or is required to conduct a specific enquiry, whether before or after convicting or sentencing the accused; and

(*cc*) any offence in respect of which a court has the power or is required to make a specific order upon conviction of the accused;

(ii) may prescribe the procedures to be followed in the application of this section relating to any other offence in respect of which the National Director of Public Prosecutions deems it necessary or expedient to prescribe specific procedures;

(iii) must ensure that adequate disciplinary steps shall be taken against a prosecutor who fails to comply with any Directive; and

(iv) must ensure that comprehensive records and statistics relating to the implementation and application of this section are kept by the prosecuting authority.

(c) The National Director of Public Prosecutions shall submit Directives issued under this subsection to Parliament before those Directives take effect, and the first Directives so issued, must be submitted to Parliament within four months of the commencement of this section.

(d) Any Directive issued under this subsection may be amended or withdrawn in like manner.

(12) The National Director of Public Prosecutions shall at least once every year submit the records and statistics referred to in subsection (11) (b) (iv) to Parliament.

(13) In this section “sentence agreement” means an agreement contemplated in

subsection

(1) (a) (ii).

Typical content of an agreement in South Africa

According to *Hiemstra's Criminal Procedure* a typical agreement will include the following headings:

'A. Parties to the agreement (state and accused).

B. Authority (of the prosecutor to be attached).

C. Legal representation (of accused).

D. Investigating officer (stating that he or she has been consulted).

E. The complainant's attitude.

F. The accused's rights (stating that the accused has been informed of his or her fundamental rights – including the right to be presumed innocent, the right to silence, the right against self-incrimination – and that the accused is aware that the court is not obliged to accept the agreement).

G. The charges (per the charge sheet).

H Proposed plea of the accused on all charges (guilty, not guilty, or withdrawn).

I. Factual background to charges and plea, referring to events, the actions of the accused, the victim's role, the offence.

J. Aggravating circumstances.

K. Mitigating circumstances.

L. Sentence agreement (setting out the sentence of the accused).'[1301]

Original example of a South African agreement in terms of s 105A

**********ORIGINAL TEXT**********

IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF THE WESTERN CAPE, HELD AT WYNBERG

[1301] As shown in Hiemstra's, Criminal Procedure 15-8.

Case No: [redacted]

In the matter between

The State

And

[redacted] **THE ACCUSED**

AGREEMENT IN TERMS OF SECTION 105A OF ACT 51 OF 1977 (AS AMENDED)

A PREAMBLE

WHEREAS

1 The accused is charged with

1.1 MURDER
1.2 ATTEMPTED MURDER
1.3 POSSESSION of FIREARM
1.4 POSSESSION of AMMUNITION

2 The Senior Public Prosecutor, Mr [redacted], has been duly authorized in writing by the National Director of Public Prosecutions, as required by Section 105A of Act 51/77, to negotiate and enter into an agreement with the accused.

3 The prosecutor is duly authorized to conduct proceedings in court on behalf of the State in connection with this agreement, after it has been duly entered into.

4 The Senior Public Prosecutor and the accused, who is represented herein by Ms [redacted] have negotiated and entered into the agreement in respect of a plea of guilty by the accused to the offences of which he may be convicted on the charges as well as a sentence to be imposed by this Honorable Court.

5 The accused has been informed of the following of his rights referred to in Section 105 A (2)(a) of Act 51 of 1977:

(a) To be presumed innocent until proven guilty beyond reasonable doubt.

(b) To remain silent and not to testify during the proceedings and

(c) Not to be compelled to give self incriminating evidence.

6 The Senior Public Prosecutor has duly complied with the requirements of Section 105A (1) (b) of Act 51 of 1977;

(a) The investigating officer, Inspector INSPECTOR, has been consulted. He is satisfied with the terms of the agreement, including the sentence.

(b) Due regard has been had to the circumstances prescribed in Section 105 A (b) (ii) of Act 51 of 1977.

(c) The prosecutor has consulted with SISTER OF DEC, the sister of the deceased. She has been given reasonable means to make representations to the prosecutor regarding the contents of the agreement and is satisfied with the agreement and sentence.

7 The accused admits guilt in respect of the charges, as mentioned above, and pleads guilty thereto on the basis set out below.

8 The Senior Public Prosecutor is prepared to accept such plea of guilty.

NOW THEREFORE the Senior Public Prosecutor and the accused agree as follows in respect of

B PLEA OF GUILTY AND ADMISSIONS

1. The accused pleads guilty to the following charges and makes the following admissions.

2. That he understands the charges against him as set out in the charge sheet and freely, voluntarily and without any influence pleads guilty to the charges as follows:

Count 1

2.1 The accused pleads guilty to the offence of murder in that upon or about 18/10/09 and at or near [redacted] in the Regional Division of the Western Cape, he

did wrongfully and intentionally shot [redacted] a female person by shooting her with a firearm and did thereby inflict certain mortal injuries as a result of which the said Winifred Williams died on [redacted] at [redacted] in the Regional Division of the Western Cape and thus the accused did intentionally kill and murder the deceased.

2.2 **Count 2**

The accused pleads guilty to the offence of Attempted Murder in that upon or about [redacted] and at or near [redacted], in the Regional Division of the Western Cape, he did unlawfully and intentionally attempt to kill [redacted] a male person by shooting him on the upper leg.

2.3 **Count 3**

The accused pleads guilty to the offence of contravening the provisions of Section 3 read with Sections 1, 103, 117, 120(1)(a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000, and further read with Section 250 of the Criminal Procedure Act, 51 of 1977 – Possession of a firearm.

In that on or about [redacted] and at or near [redacted] in the Regional Division of the Western Cape I unlawfully had in my possession a .38 Special revolver without holding a license, permit or authorization issued in term of the Act to possess that firearm.

2.4 **Count 4**

The accused pleads guilty to the offence of contravening the provisions of Section 90 read with Sections 1,103,117,120(1)(a), Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act, 60 of 2000 and further read with Section 250 of the Criminal Procedure Act, 51 of 1977 – Possession of ammunition.

In that on or about [redacted] and at or near [redacted] in the Regional Division of the Western Cape, I did unlawfully have in my possession ammunition, to wit 2 x live .38 Special caliber rounds of ammunition without being (a) the holder of a license in respect of a firearm capable of discharging that ammunition; (b) a permit to possess ammunition; (c) a dealer's license manufacturer's license, gunsmith's license, import, export or in-transit permit or transporter's permit issued in terms of this Act; (d) or is otherwise authorized to do so.

3 In amplification of the accused's plea of guilty to these charges the following facts are admitted by him:

Admissions re counts 1 to 4

3.1 I admit that on the [redacted], I was at [redacted], within the jurisdiction of this honorable court.

3.2 I admit that I was with the deceased and friends drinking alcohol.

3.3 I admit that there was an argument between me and the deceased, Winifred Williams.

3.4 I admit that I took out a firearm that was in the fridge, and pointed the deceased with it.

3.5 I admit that I pulled the trigger of the firearm and shots went off hitting the deceased and a child, [redacted], that the deceased held in her arms .

3.6 I admit that I shot the deceased in the chest and the child in the leg.

Admissions re count 1

3.7 I admit that the deceased died on the scene.

3.8 I admit that the deceased sustained no further injuries after the shooting.

3.9 I admit that the content of the post mortem report is correct.

3.10 I admit the identity of the deceased as [redacted].

3.11 I admit that I intentionally and unlawfully shot the deceased whereby the deceased sustained injuries resulting in her death.

3.12 I admit that I had no right or permission to shoot the deceased.

3.13 At all material times I foresaw that the assault on the deceased could lead to the death of the deceased. I reconciled myself with the possible outcome.

Admissions re count 2

3.14 I admit that I did foresee the possibility that the complainant, [redacted], could sustain serious injuries due to my actions which could lead to her death and I reconciled myself with this.

3.15 I admit that the complainant sustained serious injuries on her leg which resulted in her being disabled.

3.16 I admit that the complainant was held in the arms of the deceased when I shot at the deceased.

3.17 I admit that I had no right or permission to act in this manner;

Admissions re count 3 and 4

3.18 I admit that I was in possession of the firearm, to wit 38 Special revolver

whilst not in possession of a license, permit or authorization issued in terms of the Act to possess the firearm;

3.19 I admit that I was in possession of 2 x live 38 Special revolver caliber rounds of ammunition without being the holder of the mentioned authorization in terms of this Act;

3.20 The ballistic report has been explained to me by my legal representative and I understand and admit the contents thereof.

3.21 I admit that I believed at all material times that it a firearm and ammunition that was in working order;

3.22 I admit that I had no right or permission to have the firearm in my possession without a valid license.

3.23 I admit that I had no right or permission to have ammunition in my possession without the valid authorization;

Admissions re counts 1 to 4

3.24 I admit that at all material times I knew that my actions, as per counts one to four, were wrongful and unlawful and that I could be punished by a court of law;

NOW THEREFORE the accused admits that he is guilty of the charges as mentioned in the charge sheet.

C AGREEMENT IN RESPECT OF A JUST SENTENCE

It is agreed that the following is a just sentence in the circumstances of the charges mentioned above.

The agreed sentence:

COUNT 1

15 (Fifteen) years imprisonment of which 3 (Three) years imprisonment is suspended for 5 (Five) years on following conditions:

That the accused is not found guilty of murder, attempted murder, assault or assault with intentions to do grievous bodily harm committed during the period of suspension.

Count 2

7 (Seven) years imprisonment of which 3 (Three) years imprisonment is suspended for 5 (Five) years on following conditions:

That the accused is not found guilty of attempted murder, assault or assault with intentions to do grievous bodily harm committed during the period of suspension.

Count 3

5 (Five) years imprisonment wholly suspended for a period of 5(Five) years on the following condition.

That the accused is not convicted of contravening Section 3 of Act 60 of 2000 committed during the period of suspension.

Count 4

3 (Three) years imprisonment wholly suspended for a period of 5 (Five) years on the following condition:

That the accused is not convicted of contravening Section 90 of Act 60 of 2000 committed during the period of suspension.

No order is made in terms of section 103 of Act 60 of 2000. The accused is therefore unfit to possess a fire-arm.

In terms of section 120(4)(a) of the Children's Act, Act 38 of 2005, the accused is found unsuitable to work with children

D SUBSTANTIAL AND OTHER RELEVANT FACTORS

The gravity of the offences, the interest of the community and the personal circumstances of the accused have duly been considered and taken into account by both parties.

1. The aggravating factors are as follows:
   - 1.1 The actions of the accused caused the death of another human being;
   - 1.2 The incidence of offences such as the present is increasing in our community and has grave consequences;
   - 1.3 The offence committed is of serious nature.
   - 1.4 The accused has previous convictions.
   - 1.5 The minor child has been disabled by the shooting.

2. The mitigating factors are as follows:
   - 2.1 The accused is 24 years old.
   - 2.2 The accused is single.
   - 2.3 The accused has one child.
   - 2.4 The accused resides at [redacted];

3. The substantial and compelling circumstances in terms of Section 51(3) (a) of the Criminal Law Amendment Act No105 of 1997, which justify a sentence less than the prescribed minimum sentence are as follows:
   - 3.1 The accused pleaded guilty.

3.2 The conclusion of this matter by way of section 105A of Act 51 of 1977 has spared the state the expense and inconvenience of a Trial.

SIGNED AND DATED AT WYNBERG ON THIS [redacted]st DAY OF [redacted].

_____ _____

Mr [redacted] [redacted]

Senior Public Prosecutor **Accused**

_____

Ms [redacted]

Attorney of the Accused

**********ANNEXURE**********

S v [redacted]

ANNEXURE " "

Case no: [redacted]

COUNT 1

15 (Fifteen) years imprisonment of which 3 (Three) years imprisonment is suspended for 5 (Five) years on following conditions:

That the accused is not found guilty of murder, attempted murder, assault or assault with intentions to do grievous bodily harm committed during the period of suspension.

Count 2

7 (Seven) years imprisonment of which 3 (Three) years imprisonment is suspended for 5 (Five) years on following conditions:

That the accused is not found guilty of attempted murder, assault or assault with intentions to do grievous bodily harm committed during the period of suspension.

Count 3

5 (Five) years imprisonment wholly suspended for a period of 5(Five) years on the following condition.

That the accused is not convicted of contravening Section 3 of Act 60 of 2000 committed during the period of suspension.

Count 4

3 (Three) years imprisonment wholly suspended for a period of 5 (Five) years on the following condition:

That the accused is not convicted of contravening Section 90 of Act 60 of 2000 committed during the period of suspension.

No order is made in terms of section 103 of Act 60 of 2000. The accused is therefore unfit to possess a fire-arm.

In terms of section 120(4)(a) of the Children's Act, Act 38 of 2005, the accused is found unsuitable to work with children

_____ _____

Regional Magistrate Date

**********END OF ORIGINAL TEXT**********

LIST OF ABBREVIATIONS

=	citation can also be found in
AJ	Acting Judge
All SA	All South African Law Reports (1996-present)
BayObLG	Bayerisches Oberstes Landesgericht (Bavarian Supreme Court)
BCLR	British Columbian Law Reports
BeckRS	Beck-Rechtsprechung (journal)
BGBl.	Bundesgesetzblatt (German Federal Law Gazette)
BGH	Bundesgerichtshof (German Federal Supreme Court for civil and criminal cases)
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen (Decisions by the German Federal Supreme Court in criminal cases)
BR-Drucks.	Bundesrat Drucksachen (German Federal Council Journal)
BT-Drucks.	Bundestag Drucksachen (German Federal Parliament Journal)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgericht (decisions of the Federal Consitutional Court)
CC	Court Case
CILSA	Comparative and International Law Journal of Southern Africa
DRiZ	Deutsche Richterzeitung (journal)
ECHR	European Convention on Human Rights

EMRK	Europäische Menschenrechtskonvention (German for ECHR)
Einl.	Einleitung (introduction)
FS	Festschrift (commemorative publication)
GG	Grundgesetz (Basic Law, Constitution of the Federal Republic of Germany)
GSSt	Großer Senat in Strafsachen BGH (Grand Criminal Panel of the BGH)
GVG	Gerichtsverfassungsgesetz (Courts Constitution Act)
HanseLR	Hanse Law Review (journal)
HRRS	Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht (journal)
JR	Juristische Rundschau (journal)
JZ	Juristische Zeitung (journal)
KG	Kammergericht (Regional Court Berlin)
KrimJ	Kriminologisches Journal (journal)
MDR	Monatsschrift für Deutsches Recht (journal)
NDPP	National Director of Public Prosecutions
NJW	Neue Juristische Wochenschrift (journal)
NStZ	Neue Zeitschrift für Strafrecht (journal)
NStZ-RR	Neue Zeitschrift für Strafrecht – Rechtsprechungsreport (journal)
p.	page
para	paragraph
R	Sount Afican rand, currency
RefE	Referentenentwurf (ministerial draft bill)
RiStBV	Richtlinien für das Strafverfahren und das Bußgeldverfahren (Directives for Criminal Procedure and Fine Procedure)
s	section
ss	sections
SA	South African Law Reports (1947-present)
SACC	South African Journal of Criminal Law & Criminology (continued by SACJ)
SACJ	South African Journal of Criminal Justice
SACR	South African Criminal Law Reports (1990-present)
seq.	sequens (following page)
seqq.	sequentes (following pages)
StPO	Strafprozessordnung (German Code of Criminal Procedure)
StrafFo	Strafverteidiger Forum (journal)
StV	Strafverteidiger (journal)

U.S.	United States (of America)
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (journal)
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir die Suid Afrikaanse Reg
Vol.	Volume
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik (journal)
ZRP	Zeitschrift für Rechtspolitik (journal)

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Note:

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