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Support to the anti-corruption strategy of Azerbaijan (AZPAC)

Techical paper on
Plea bargaining and issues related to its implementation in Azerbaijan

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I Introduction

Plea bargaining is an agreement between prosecutor and defendants. Based on this agreement defendant for getting the prosecutor's consent for imposing a less severe sentence or dropping the charges pleads guilty for less severe crime or admits one of the charges. The agreement obtained as the result of non formal negotiations is afterwards submitted for approval to the judge. Prosecutor and defendant in exchange of renouncement by the defendant of his right to trial by jury and other right adherent to it agree for less severe punishment provided in the law.

This practice qualified as plea bargaining is the characteristic of US and other common law systems. Nevertheless continental law system benefited from this system and analogues of plea bargaining exist in these systems. However, plea bargaining is not accepted unanimously in these countries. There are numerous supporters and critics of this system.

This document analyses the main characteristics of the procedures of preliminary admission of guilt in US, France, Germany, Italy and Georgia. The document also in the context of experience of the mentioned states examines the possibilities of use of plea bargaining in Azerbaijan and its possible effects.

II Plea bargaining and its analogues in foreign jurisdictions

United States of America

Charging and plea bargaining constitute the core of prosecutors' power in the US. 90 percent of criminal sentences end with plea bargaining. In the US prosecutor for obtaining the plea of the accused may use different tactics. The possibilities of the use of such tactics may derive from the characteristics of American system and their use may be impossible in the continental law systems.

a. Overcharging and charging the defendant with unprovable offenses – prosecutors may file charges for several crimes against accused for committed acts. In the US, prosecutors have unlimited powers to drop charges at later stages of proceeding. Later weak charges may be dropped and prosecutor can go to trial only with charges that are supported by stronger evidence.

In the US criminal justice in the case of multiple offence case multiple consecutive sentences may be imposed. But the continental law systems prohibit the imposition on multiple consecutive sentences in the multiple offence cases. This means that even though an accused is convicted of multiple offences only one sentence for the most serious offence can be imposed.

American law doesn't provide for a full access to the case material. Access to information rules do not require prosecutors to open the entire file on criminal case to the defendant. For this reason the defense may well be kept uninformed as to the true strength of the prosecutor's case against the defendant. Such a limited access right of defendant gives possibilities to a prosecutor to use overcharging and charging for unproved offences as pleading tactics.

b. Charging under penalty enhancing statues. Penalty enhancing statutes authorize enhanced punishments for offenders who have a certain number of prior convictions or

who have committed offenses with certain aggravating circumstances. If a defendant is convicted under these statutes, the defendant cannot escape the minimum mandatory sentences stipulated in the statutes. However, prosecutors, have the discretion to charge a defendant with offenses that would trigger the enhancement. Prosecutors' freedom to charge or not to charge under penalty enhancing statutes therefore provides a powerful leverage to pressure defendants to accept deals desired by prosecutors.

c) Basing on sentencing guidelines at federal and state level. Sentencing guidelines are adopted for restraining discretion of sentencing judges in order to avoid disparity in sentencing. Though they have greatly reduced sentencing judges' discretion, the guidelines have made no attempt to restrict prosecutors' charging decisions. Sentencing guidelines grant prosecutes power to request that defendants be punished for crimes of which they were not convicted. Under most sentencing guidelines, prosecutors are allowed to introduce at the sentencing phase far more serious but unproven crimes in order to enhance defendants' punishment. A tactic that prosecutors may use is to charge defendants with crimes of which they are confident of conviction and to save the weaker but possibly more serious charges to be introduced at the sentencing hearings as aggravating factors to enhance defendants' penalty. Using this tactic, prosecutors in many cases have succeeded in imposing on defendants sentences that are far more severe than the sentences that are stipulated for the crimes of which the defendants were convicted.

d) Charging for federal or state crime. In the past several decades the federal government has become increasingly involved in regulating criminal conduct that was traditionally regarded as matters for states. The federal expansion into the criminal law arena has created a vast area of concurrent federal and state jurisdiction. Generally more severe penalties are provided in federal statutes for similar offenses. Prosecutors enjoy discretion in such cases to charge the defendant under federal or state crimes. Depending on such choice the possible sentence may be severe or lenient.

e) Weak judicial supervision – In the United States judicial supervision over prosecutorial discretion is weak and inconsistent. American law doesn't require prosecutors to provide written reasoning for their decisions. This hinders proper judicial supervision. In continental law countries by contrast prosecutorial discretion in is consistently controlled and judges play more active role in the existing plea bargaining analogues.

Offences subject to plea bargaining

All the offences may be subject to plea bargaining. But some states refused plea bargaining right to persons accused of crimes punished by life imprisonment and who committed especially serious crimes.

Initiative

Defendant or his council may request plea bargaining. But in most cases the prosecutor is the instigator of plea negotiations.

Stage of proceedings

As a rule plea bargaining may occur at all the stages of criminal proceedings, also during the jury deliberation on culpability and even after. In some States defendant may plead guilty until a certain stage of criminal proceeding.

Procedural guarantees

Negotiations following the admission of guilt are conducted in very informal way, but the agreement reached a result should be established in written form and presented to the judge in open court hearing who controls it and approves. The scope of supervision may differ from one State to another even from one court to another. But on Federal level criminal procedure rules define in detail the duties of judges. Under these rules judge should control whether pleading guilty is consistent, be assured that accused is fully aware of all the consequences of pleading guilty and plea is not reached as a result of intimidation, force and promise other than indicated in plea agreement.

The rules applied in different States may differ in some cases. Some States authorize and even oblige judges to participate in the negotiations between prosecutor and the defendant. Whatever may be the form of his participation in plea negotiations, judge is not obliged to accept the terms of the agreement. In most cases judges approve plea agreements, expect in cases where it is especially unjust. Approximately only 10 percent of plea agreements are rejected.

Consequences

With pleading guilty defendant renounce to some of constitutionally guaranteed rights:

- not be obliged to testify against himself;
- right to examine the prosecution witnesses and have their cross examination
- right that illegally obtained evidences be rejected in the determination of culpability
- right to hearing of the case by the jurors

In exchange of pleading guilty accused/defendant may obtain from the prosecutor modification of charges or promise of special recommendations to the judge. Modification of indictment may take several forms:

- dropping of some charges;
- modification of indictments, accused pleads guilty for a less severe crime than it was initially intended.

Modification of indictment is easy to implement, because prosecutor with unlimited discretion decides whether criminal prosecution is appropriate. After the criminal prosecution is started, he can drop or reduce charges.

Prosecutor may also give recommendations of clemency to the judge (conditional sentencing, imposing minimal sentence, modalities of execution of sentence) even agree with him on the sentencing if there is no legal obstacle or the judge keeps the possibility of choice of punishment. Such recommendations are not mandatory for the judge. Federal procedure rule define that such recommendations are neither obligatory for the accused.

Sentence after the preliminary admission of guilt has the same legal consequence if the case were examined by the jury. Nevertheless, sometimes the negotiations on plea bargaining include the abandoning by the accused of the right to appeal against the decision.

France

Prosecutorial discretion in filing charges differs among continental law countries, depending on whether a country follows the "expediency principle" or the "legality principle."[1]

The prosecutorial system in France is classified as following the expediency principle, whereas the systems in Germany and Italy are categorized as following the legality principle.

The law of 9 march on "Conforming the criminal justice to the evolution of criminality" know as "Perben 2 " Act introduces the simplified procedure of "appearance to the court on prior admission of guilt"" (hereafter "procedure"). Procedure is regulated by the articles 495-7, 495-15 and 495-16 of Criminal Procedure Code. The main purpose of the law is to increase the efficiency of criminal procedure and use of resources. The procedure which borrows the elements of anglo-saxon *plea bargaining* gives possibility to offenders to accept the penalty proposed by the prosecutor and thus to get rid of court trial if he\she pleads guilty for charges brought against him.

Persons and offences subject to the Procedure

Procedure may only apply to the adults. Under the article 495-7 the simplified procedure may be applied for misdemeanors punished by a principal penalty of a fine or a prison sentence not exceeding five years. There are several exceptions to this rule. The procedure is not applicable to press misdemeanors, or to misdemeanors of involuntary homicide, political misdemeanors, or to offences for which the prosecution procedure is provided for by a special statute.

Initiative

The procedure may be initiated ex officio by the prosecutor or at the request of the party concerned or his counsel (advocate).

Stages of procedure

a. Prior admission of guilt

Prior admission of guilt is preliminary condition for the application of the simplified procedure. Admission of guilt for the charges is usually in the form of oral statement. The statements in which the person admits the matters of which he is accused are received in the presence of the defense counsel of the party concerned. But in some cases established by the Code admission of guilt takes a written form (section 495-15).

b. Proposal of penalty

Prosecutor maintains wide discretion in this field. He may suggest to the person that he undergo one or more of the main or additional penalties incurred; But the Code

[1] In countries that follow the expediency principle, prosecutors are allowed a high degree of autonomy in making charging decisions; prosecutors have discretion to consider various public interest factors in deciding whether charges should be filed in a particular case. In countries that follow the legality principle, by contrast, prosecutors are required to file charges whenever sufficient evidence exists to support the guilt of the accused; public interest considerations are irrelevant in prosecutors' decision making.

determines the conditions and limits of the penalty or penalties. The nature and quantum of penalties are determined in accordance with the provisions of article 132-24 of the Criminal Code. Thus the individuality of penalties is maintained taking into account personality of the offender and the circumstances of the offence.

Besides, the Code establishes thresholds for the penalties depending on the nature of the offence.

If the penalty suggested is a prison sentence its duration should respond to two conditions. Penalty:

- may not exceed a year.
- or half the prison sentence incurred.

The prosecutor may suggest that it be suspended in part or in whole.

Where the penalty of a fine is proposed, its amount may not exceed the maximum fine applicable to the offence. It may be accompanied by a suspension.

c. Admission or rejection of the suggested penalty

The Code gives several options to the accused after he was suggested penalties. He may also request for a reflection period.

Reflection period

The accused may request to be granted a period of ten days in which to communicate whether he accepts or refuses the penalty or penalties proposed. Prosecutor should notify the accused about the possibility of such an option.

Rejection of the suggested penalty

If the accused reject the suggested penalty, the procedure is stopped at this stage. Afterwards the procedure continues under the common rules.

Acceptance of the suggested penalties

Where, in the presence of his advocate, the person accepts the proposed penalty or penalties, he is immediately brought before the president of the district court or the judge appointed by him, who is seised with the approval request by the prosecutor.

In difference of US system the law doesn't provide the possibility of negotiating penalties between accused and prosecutor. Prosecutor proposes a certain penalty. There is only one alternative afterwards: acceptance or rejection by the accused of the suggested penalty. In the US system during the prior admission of guilt there are real negotiations and agreements between the accused and prosecutor. The outcome of the negotiations is binding for the judge.

Conditions and forms of the procedure

During the procedure there are two main conditions: establishment of the official report and participation of defence counsel.

Official report of the procedure (procès-verbal) – Admission of matters of which the defendant is accused, suggestion by the prosecutor of a penalty, acceptance or rejection – are done as a rule in verbal form. However all the acts during the procedure should be noted in the official report under penalty of nullity of the proceedings (section 495-14).

Participation of defense counsel – the accused is assisted by his defense counsel in all the presences of prosecutor: during the admission of matter for which he is accused,

during the proposal of penalty and admission of penalty. Participation of defense counsel is not facultative, it is mandatory even if the accused opposes to it. Under the section 495-8 the accused may not waive his right to be assisted by an advocate. Besides, the law determines the rights of the defense counsel during the procedure. The counsel has the right to consult the case file immediately. The accused may talk freely with his counsel, without the prosecutor being present.

Appearance to the court

The cases related to the procedure are examined by the president of the district court or the judge appointed by him. The procedure in the court consists of two stages:

- hearing of the accused by the judge
- ruling of a penal order

I. Hearing (audition)

The judge hears not only the accused but also his counsel (advocate). Where the victim of the offence has been identified, he is invited to the hearing accompanied by his advocate. The hearing takes place in an open court session.

II. Ruling of penal order

After the hearing the judge rules the same day by means of a reasoned decision. If he approves the suggested penalty, decision is read in public hearing.

III. Approval of the suggested penalty

a. Object of the approval

Judge doesn't approve the agreement between prosecutor and the accused but the suggested penalty. Thus the penalty takes it legal force not from the bargaining of the parties, but from the judge's ruling.

b. Conditions of the approval

Under the Criminal Procedure Code (section 495-9) the judge may decide to approve the penalties proposed by the district prosecutor, "after checking the truth of the facts and their legal qualification". Under the section 495-11 of the Code an order by which the judge approves the penalty states as its reasons 1) that the person concerned, in the presence of his advocate, has admitted the offences charged, and 2) that these penalties are justified in relation to the circumstances of the offence and the character of its perpetrator.

Minimum conditions of the approval

These conditions are necessary. In their absence the judge refuses the approval. The supervision of the judge on approval covers both the existence of agreement between the prosecutor and the accused and the content of this agreement.

First, he checks whether there is an agreement between the prosecutor and the accused. More specifically, the judge checks the truth and sincerity of the accused person's consent on two elements:

- Admission of matters (acts) of which he is accused – judge should make sure that the accused admitted to be author of the act in free and sincere conditions. The

purpose of this condition is to prevent the risks of pressure typical to such procedures.

- Admission of penalties by the accused – judge should make sure that the accused accepts the suggested penalty as being totally aware of its consequences. That's why the judges check not only reality of accused person's consent but also its sincerity.

Secondly, judge should check not only the existence of the agreement but also its content (substance). For this he should verify three elements of the agreement.

- Reality of the facts – Admission of the facts by the accused in not enough in itself. This doesn't discharge the judge from the duty of checking the reality of the facts by himself. Regardless of the terms of the agreement or admission by the accused the judge should check the material exactitude of the facts.
- Legal qualification of the facts– it is not excluded that the judge has a different appreciation than the prosecutor on this issue and rejects the approval for this reason.
- Reasoning of the suggested penalty – takes place both taking into account circumstances of the offence and the character of its perpetrator. The penalty even if accepted by the accused, is controlled by the judge. The judge should make sure of the appropriateness, proportionality of the penalty, adequacy in regard of the acts and situation of the accused .

If the statements of the victim reveals new elements as to the circumstances of the offence and personality of the offender the judge may refuse to approve the penalty. Judge's refusal may be based also on the differences of interpretation. Judge may replace the parties' appreciation with his own appreciation. He is not bound to accept neither the suggestion of the prosecutor no the fact of acceptance of the penalty by the accused.

That's why the prosecutor suggest to the accused under the supervision of the judge one or several penalties. The text and intention of its authors is quite evident. In the procedure of appearance with prior of admission of guilt "prosecutor proposes" and "the judge disposes".

Additional reasons for the refusal of the penalty

The approval may be refused if it doesn't respond to the minimal requirements. Even if it responds to the requirements, the judge is not bound to accept the penalty. He may refuse the approval based on other motives. The judge may consider that examination of the case in an ordinary court hearing is necessary taking into account the four following elements.

- Nature of the acts – acts may be detected and admitted, but their nature may require examination in an ordinary court procedure.
- Personality of the accused – the suggested penalty may be accepted by the accused, but the personality of the accused may be useful for the examination of the case in an ordinary court hearing.
- Situation of the victims – in this context the word "situation" is broadly interpreted. This includes not only the material interests of the victims, but also their moral interests, even psychological circumstances.

- Interests of the society – Very wide this notion should be interpreted by the judge. This motive allows the judge to refuse approval of the penalty even if the agreement is sincere and correctly established.

In general, in the new procedure the judge plays a central and key role.

IV. Justification of the approval

The decision on approval should include at least two aspects in itself:
Consent of the accused – the decision should clearly indicate that the accused in presence of his advocate confesses the matters of which he is accused and accepts the penalty or penalties proposed by the prosecutor.
The second aspect is connected with the proposed penalty – the judge should indicate that this penalty is justified in view of the circumstances of the offence and personality of the offender.

V. Consequences of the approval and appeal mechanisms.

The decision on approval has the same effect of conviction judgment. It is immediately enforceable if is not subject to appeal. It may be appealed by the convicted person. The public prosecutor may also lodge an appeal under the same conditions. This may look surprising because the agreement was reached by the parties. But it is presented as an additional guarantee against any possible error by the judge.

If an appeal is lodged against the decision, the judge examines the case on the merits. If the appeal is lodged by the accused the court can not impose a penalty more severe that was imposed by the court of the first instance.

VI. Consequences of the refusal

If the judge refuses to approve the penalty proposed by the prosecutor, it will have same legal effect of accused persons' refusal of the penalty proposed by the prosecutor. In this case prosecutor continues criminal proceeding under the ordinary rules. All the acts related to the prior admission of guilt lose their legal effects. Official report (procès-verbal) may not be sent to the investigating or trial court or to the public prosecutor, and neither the parties nor the public prosecutor may make use of any statements made or documents given in the course of the procedure.

Rights of the victims

The situation differs whether the injured party was identified or not.

Where the victim of the offence has been identified, he is immediately informed, using any available means, of these proceedings. He is invited to appear before the judge at the same time as the perpetrator, accompanied, where appropriate, by his advocate, in order to constitute himself a civil party and to request damages for any harm done against him. In such cases the judge rules on civil interests. Under the Code judge rules on the request of the victim. In all the cases the civil party may appeal against the ruling.

Where the victim has not been able to exercise this right, for example he was not identified during the procedure, the injured party may cite the perpetrator directly before the correctional court. In this case, the court rules only on the civil interests. Prosecutor must inform him of his right to summon the perpetrator for a hearing of the correctional court ruling.

Germany

In the German Criminal Procedure Code there is no specific provision on preliminary admission of guilt. German legal system is based on principle of compulsory prosecution of criminal proceeding. This rule of compulsory prosecution is incorporated in section 152 (ii) of the Criminal Procedure Code. The Section provides that prosecutors must "take action against all prosecutable offenses, to the extent that there is sufficient factual basis." The Code, however, contains several exceptions to the rule. These exceptions to the compulsory prosecution rule provided favorable conditions to the development of analogues of plea bargaining.

German analogues of plea bargaining

Diversion bargaining

The main exception is provided in the Section 153 (a). This section, which was added to the Code in 1975, authorizes prosecutors to refrain from prosecuting any minor offenses on the condition that the accused agrees to pay a sum of money to a charitable organization. Since its enactment, Section 153a has opened up the possibility for the prosecutor and the defense to negotiate as to whether a case should be settled.

The proposal of solution of a case under this article may come both from prosecutor and defendant.

b. Penal orders

The penal order is a document prepared by the prosecutor, which contains the accused person's offense and the punishment for the offense. Punishments in the penal order include day fines, a suspended prison sentence of up to one year, suspension of a driving license, and forfeiture of the profits of the crime. The prosecutor must obtain the consent from a judge to make the order legally binding. Once judicial authorization is obtained, the prosecutor dispatches the order to the accused. The accused has 14 days to decide whether to accept the order or to request a trial in court.

The attractiveness of the penal order is the possibility of having less severe penalties compared to the potential sentences that could be imposed if the accused were convicted at trial. In the vast majority of cases, the penalty contained in the penal order is a monetary fine. By paying the fine, the accused avoids embarrassment, publicity, and the costs of trial. But rejection by the accused of the penal order doesn't lead automatically more severe a higher sentence. If the court were to increase the severity of the accused's penalty after a trial, the judge must indicate the reasons for such a decision. Rejection of the penal order alone is not sufficient grounds to increase the severity of the penalty to be imposed on the accused. Therefore it is not real that prosecutors may use the possible higher sentences to pressure the accused to accept a penal order.

c. Bargaining over confessions (*Absprachen*).

In Germany, an accused's confession and guilty plea do not replace the trial. This may only help to shorten the length of the trial. A noticeable distinction between German bargaining over confessions and American plea bargaining is the role of the judge in the bargaining process. Plea bargaining in the United States is typically a negotiation between prosecutor and defense counsel. The judge is not an active participant in the bargaining. In Germany, before a formal charge is filed with the court, the prosecutor plays a major part in negotiating with defense counsel regarding the prospect of an accused's confession; the prosecutor may offer to charge the accused with fewer offenses than the accused is alleged

to have committed or to move for a lenient sentence at trial. Once the charge is filed with the court, however, the judge may become an active participant in the plea negotiation.

A judge may contact defense counsel and inquire whether the accused would be willing to make a confession at the beginning of the trial. To encourage the accused to confess, the judge may indicate an upper sentencing limit that might be imposed. The understanding reached between judge and defense counsel is therefore *dejure* nonbinding.

In most cases, however, if the accused agrees to make a confession, the sentence that the accused eventually receives will be below the upper limit indicated by the judge. Negotiations could also occur during the trial. For instance, defense counsel may agree not to call additional evidence or promise not to bring an appeal in exchange for sentencing concessions from the judge.

German plea bargaining, however, differs in several aspects from the bargaining practice in the United States:

In the German system, defense counsel at the pretrial stage has the right to inspect the prosecutor's file in its entirety. In negotiations with the prosecutor, the defense attorney would have the full knowledge of the strength of the prosecutor's evidence.

German law does not permit the imposition of multiple consecutive sentences. Therefore prosecutors are not in a position to drastically increase the severity of the penalty to be imposed on the accused in multiple-offense cases. It makes it difficult for prosecutors to resort to tactics such as overcharging or charging the accused with offenses that are not supported by evidence.

In Germany, the prosecutor's discretionary power is also constrained by victims. Victims in Germany may take several courses of action to influence prosecutors' charging decisions. If a victim is not satisfied with the prosecutor's decision not to prosecute, the victim may file a formal complaint with a chief prosecutor. The chief prosecutor must internally review the dismissal decision and decide whether a prosecution should be ordered. If the chief prosecutor upholds the decision to dismiss, the victim has the right to request an appellate court judge to review the case.

The victim's right to request judicial review, however, is limited to cases in which the prosecutor's decision to dismiss is made on evidentiary grounds. In those cases, if the judge finds evidence to be sufficient for prosecution, the prosecutor can be ordered to prosecute. The victim has no right to ask the court to review the prosecutor's decision of non-prosecution if the prosecutor's decision rests on policy grounds (for instance, the prosecutor's belief that the public interest does not require prosecution)

The German system imposes more restrictions on the exercise of prosecutorial discretion. One aspect of the German system that may have made German prosecutors more accountable than their American counterparts is the requirement that prosecutors provide written reasons for their disposal of cases. Such requirements undoubtedly encourage prosecutors to consider their decisions more carefully and to rest them on defensible grounds.

Italy

The Italian new Criminal Procedure Code adopted in 1989 introduced analogues of plea bargaining to the Italian criminal justice system. Before the adoption of the new code, Italy was one of the few countries that followed the legality principle in its strictest sense.

The strict adherence to the principle had resulted in a tremendous judicial backlog. Because no trial avoidance mechanisms were available in the Italian procedure, the system relied principally on regularly granted amnesties as a way to alleviate overcrowded courts. The amnesties, however, were far from a solution to the problem. Finding ways to solve the problem of congested courts thus became a primary task of the drafters of the new code. The new code does not use language of plea bargaining, but it contains two trial avoidance procedures that allow imposition of sentences on the accused without a full trial. These special procedures have become known as Italy's plea bargaining analogues.

For simplifying and accelerating examination of cases, the Criminal Procedure Code of 1989 has extended possibilities of application of special procedures.

Some of these procedures aim at avoiding eliminating preliminary hearing. In the circumstances of these procedures the judge who conducted investigation takes a decision of dismissal of case or submitting to the court hearing. They may be applied with consent of accused. On the contrary, the other special procedures, which let to eliminate public hearing et directly render a court ruling. The main special procedures which may be compared to anglo-saxon plea bargaining are:

Party-agreed sentences, which is called in daily language *pattegiamento* (merchandising). Under this procedure the prosecutor and the defense may enter into an agreement as to the appropriate sentence to be imposed on the defendant without going through a trial.

Abbreviated trial- *this procedure* authorizes the judge to take his verdict on the basis of criminal case established by the prosecutor, as the accused renounce to cross examination of the evidences.

Provisions on these special procedures, particularly those on abbreviated trial have been consistently modified, on the one hand because of decisions of the Constitutional Court and on the other hand legislative reforms. Amendments aimed at extending the possibilities of abbreviated trail practices.

Offences

Pattegiamento

This procedure can only be applied to the minor offences: once applied the sentence cannot exceed two years of imprisonment.

Abbreviated trial

The procedure can be applied to all the offences whatever may be their severity.

Initiative

Pattegiamento

The procedure can be initiated both by the accused and prosecutor.

The party which didn't take initiative should give his consent. But if the judge may reject prosecutor's opposition, if considers it unfounded. The party which takes initiative can file a motion for a suspended prison sentence.

In the US prosecutors have total freedom to refuse to offer a deal to a defendant or to stop dealing with the defendant at any time after the initiation of the negotiation. The Italian procedure by contrast has not granted prosecutors the absolute power to deny defendants the opportunity to enter into a deal with the government. In party-agreed sentences, prosecutors' consent is required; there is nevertheless a requirement that prosecutors not withhold consent unreasonably (Code of Penal Procedure, Section. 448[1]). Prosecutors must justify their decision to reject a defendant's request for party-agreed sentences in writing, and the justifications given by prosecutors are subject to judicial evaluation. A prosecutorial rejection to a defendant's request to cut a deal technically will force the case to trial. However, if the judge at trial determines that the prosecutor unreasonably withheld consent to the defendant's request to settle the case, the judge may grant the defendant the reduced sentence that the defendant originally requested.

Abbreviated trial

Abbreviated trial procedure can only be requested by the defendant and After the legislative amendments of 2000 it is not necessary to get the prosecutor's consent.

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In both cases if the procedure is presented during preliminary hearing the request may be formulated in oral. In other cases it is obligatorily in written form.

Although this procedure cannot be initiated by the prosecutor, the prosecutor's consent is required. If the prosecutor gives consent to the defendant's request, the judge will determine whether it is possible to dispose of the case by using the abbreviated trial. If the judge determines that the case can be so disposed, the judge will issue a sentence of conviction. The prosecutor will not withhold consent unreasonably; he should justify its decision. If the judge, however, determines that the prosecutor's dissent is unreasonable, the judge may grant the defendant the one-third sentence reduction in disregard of the prosecutor's dissent.

Stage of procedure

The Criminal Procedure Code allows requesting the application one of the both procedures until the court starts cross examination of case.

Procedural guarantees:

Pattegiamento

Judge control the acceptability of the request, also legal qualification of the offence. Judge verifies whether their no possibility of acquittal.

Judge cannot impose penalty other than agreed upon by the parties. But after the Constitutional Court decision of 1990, judge should check if the penalty is legal and if it is not case he may reject the agreement. In this case normal procedure is applied.

Abreviated trial

Judicial supervision depends on the nature of the request.

- If it is simple it has only a formal character;
- If it is conditional, control will be whether the request has been properly constituted. After the reforms of 2000 the accused have the possibility of

conditioning his request with taking into account of the evidence elements that do not figure in the criminal case constituted by the prosecutor.

Consequences

Pattegiamento

Reduction of penalty is maximum one third of sentence what would have been imposed after a full trial.

Condemned persons are discharged of paying trial costs and no other additional punishment cannot be applied to them.

Sentence in neither published nor registered in the criminal records.

Judge's decision approving agreement between accused and prosecutor can not be appealed to the higher court. If the prosecutor's motion in not taken into account, he can appeal against this decision.

If the condemned doesn't commit any offence during the below mentioned period all the consequences of the offence are eliminated:

- In case of serious or less serious crimes after five years;
- In case of minor offences after two years.

Abbreviated trial

Reduction of sentence is one-third of what would have been imposed after a full trial and the accused who may be sentenced to life imprisonment can only punished with imprisonment sentence up to thirty years.

The appeal possibilities are limited: prosecutor may only appeal against decision which was given on the offences other than those which were not in the indictment.

Georgia

On February 13, 2004 Georgian Parliament passed a new law on plea bargaining that was added to the Criminal Code. In difference of other continental law countries the main purpose of passing such a law was not to lessen the workload of the congested courts but to strengthen the strategy to combat against corruption.

Under this plea bargaining statute in order for plea bargaining to take place a defendant was required to do three things 1)cooperate with the prosecution 2) plead guilty 3) and provide law enforcement true information and/or evidence of serious crimes or crimes committed by public officials. In exchange the prosecutor would agree to dismiss the indictment and file a motion to the court to accept the proposed plea bargaining.

The law requires that the prosecutor consider a number of factors before entering into a plea agreement. These include the will of the accused to assist and cooperate with the investigation. The law granted the prosecutor discretion to "reduce charges or penalties". If the prosecutor concluded that the defendant has provided evidence of an especially grave crime the prosecutor can grant the defendant full immunity from criminal prosecution. But the information provided by the defendant to law enforcement should

"prove to be trustworthy" and "create real conditions for detecting a crime". Otherwise the entire plea bargaining process could be invalidated by the request of the prosecutor and consent of the court.

Under this procedure the judge may deliver a judgment without hearing a case on its merits on the basis of a procedural agreement.

Initiative

Both the accused/defendant and the prosecutor may offer a procedural arrangement.

Procedural guarantees

For entering into a procedural agreement participation of the defense counsel and prior consent of the accused in respect of such agreement is necessary. Defense counsel participates directly in agreement procedure.

A plea agreement can not be reached if it limits the accused person's rights under the Constitution. In signing a procedural agreement, the prosecutor shall warn the accused/defendant that the procedural agreement shall not release him from civil or other responsibility.

Based on a procedural agreement, the prosecutor is entitled to request the commutation of a sentence for the accused/defendant or, in case of a cumulative crime, to decide on the mitigation of or partial release from the charge. In making such a decision the prosecutor takes into account the public interest, the severity of the punishment provided for the crime as well as the gravity of the offence and guilt.

All the terms of the procedural agreement are made in a written agreement and require approval of the superior prosecutor. Accused and the defense counsel have the right of full access to the content of all the criminal case.

Examining of procedural agreement by judge

A procedural agreement made in writing is approved in an open court session. The procedural agreement is reflected in the sentence delivered by court. The court makes sure that the agreement is made without any violence, intimidation, deception or other illegal promise, voluntarily and the accused/defendant has been afforded the opportunity to receive qualified legal assistance.

Prior to the approval of a procedural arrangement, the court shall make sure that the accused is:

- is fully conscious of the nature of offence with which he is being charged;
- is fully conscious of the penalty envisaged for the offence he pleads guilty to;
- is aware of all the requirements with regard to the confession of guilt envisaged by law in connection with a procedural agreement;
- the accused is aware that he has the following constitutional rights:

Before approval of a plea agreement, the court should be assured that there has been no torture, inhuman or degrading treatment to the accused.

Court Decision on Rendering Sentence without Hearing Case on Merits

If the court finds that irrefutable evidence has been produced to prove the guilt of a person and the requested penalty is lawful, it shall deliver the judgment within 15 days after the prosecutor has submitted his petition. Otherwise it refers the case back to the Prosecutor's Office for settling the issue of indictment.

Before referring the case back to the Prosecutor's Office, the court may propose to the parties that they change the conditions of the procedural agreement. The court may make changes in the plea bargain only by consent of the parties.

The accused may at any time prior to adjudication to reject the procedural agreement. The rejection does not require the consent of the defense counsel. It is inadmissible to reject the procedural agreement after the judgment has been delivered.

Admissibility of the Evidence Obtained as a result of a Procedural Agreement

If the court quashes the court judgment on approval of a procedural arrangement or the accused rejects the agreement, the evidence given by the accused shall in no event be used against him.

Within 15 days after delivery of the judgment, the convict may file an appeal with the court of higher instance for dismissal of the judgment on approval of a procedural agreement if:

- the procedural agreement has been made through deception;
- the right of the accused/defendant to defense counsel has been restricted;
- the procedural agreement has been made by compulsion, threat or intimidation;
- essential requirements of the Criminal Procedure Code were ignored.

If the accused has violated the condition of the procedural agreement, within one month after discovery of such violation the prosecutor may file an appeal with a higher court for quashing the court decision on approval of the procedural agreement; If the court judgment on approval of procedural agreement is quashed the court shall refer the case back for preliminary investigation.

A party may appeal against the court's refusal to approve a procedural decision in the court of higher instance within 15 days.

Victim's rights

The prosecutor should notify the victim on conclusion of a procedural arrangement. The victim may appeal against the procedural arrangement. The procedural arrangement does not deprive the victim of the right to file a civil claim.

Full Release of Accused from Punishment

In cases where the cooperation of the accused with the investigative authorities has lead to identification of an official or/and felonious offender and the conditions for detection of such crime were created through the immediate support of the accused, the Prosecutor-General of Georgia may raise a petition before court for full release of the accused from punishment.

III Characteristics and specificities of criminal prosecution in Azerbaijan

In difference of the previous Criminal Procedure Code (hereinafter CPC) of the Republic of Azerbaijan, the new CPC, entered in force in September 1, 2000 gives the the definition of criminal prosecution. According to the Code, "*Criminal prosecution" is criminal procedure designed to establish the criminal act, incriminate the person who committed the offence covered by criminal law, charge that person, pursue that charge in court, sentence the offender and carry out coercive procedural measures where necessary*. CPC defines the preliminary investigator, investigator or prosecutor as "prosecuting authorities".

CPC depending on the nature and severity of the offence, establishes three forms of criminal prosecution: private, semi-public or public.

Law defines exact list of crimes over which criminal prosecution is carried out in private and semi-public forms. Criminal prosecution on all other crimes is carried out in the form of public indictment.

The characteristic feature of private criminal prosecution is that, it takes place only on a complaint by the victim and shall be dismissed in the event of reconciliation between the victim and the accused before the court deliberates. By defining mentioned form of criminal prosecution, legislation enables victim to apply to court for involving accused person into criminal liability, also protect private indictment in case committed criminal acts touch his rights and legal interests. Criminal prosecution in the form of private indictment starts with the application of victim to court. A preliminary investigator, investigator or prosecutor in charge of the procedural aspects of the investigation shall refer such complaints by the victims of offences covered by a private prosecution to the relevant court of first instance. Court on private indictment cases, before making decision on accepting the complaint for proceeding and court hearing, explains to victim, who filed an application his right to reconciliation. But in this case any influence can not be allowed and reconciliation must carry voluntary character. If there is no reconciliation, and if court decides that there are enough grounds for court hearing of the complaint, court makes decision on acceptance of the complaint to proceeding and court hearing at the end of preparatory meeting on case and sends the copy of that decision to the prosecutor and to the person complaint is submitted against. From the time of receiving that decision, the person complaint is submitted against is considered as an accused person. If the victim bringing a private prosecution repeatedly fails to attend the court hearing without good reason or fails to inform the court of the reasons for his absence, he shall be regarded as having dropped the prosecution and is considered by the court as grounds for declining jurisdiction in the complaint with a view to a private prosecution.

The characteristic feature of semi-public criminal prosecution is that it takes place on a complaint by the victim or on the initiative of the prosecutor in the circumstances provided for in legislation and that criminal prosecution can not be dismissed in case of reconciliation of victim and accused except in the circumstances defined in article 73 of the Criminal Code.

As appears, in difference of the private criminal prosecution in case of semi-public criminal prosecution, dismissal of the criminal prosecution may not be possible all the reconciliations between victim and the accused. In case of semi public criminal prosecution reconciliation of victim and the accused can be taken as grounds for dismissal of the criminal case only in circumstances defined in article 73 of the Criminal Code.

Under the current legislation for dismissal of the criminal case existence of the following conditions are necessary

1) committed crime should not represent big public danger;

2) person should commit the crime for the first time;

3) person should be reconciled with the victim;

4) person should compensate the victim and remove caused harm.

It is also important to note that, in the existence of above mentioned terms, releasing from criminal liability of accused person is not defined as an imperative norm in Criminal Code and is defined as discretionary power of preliminary investigator, investigator or prosecutor in charge of the investigation.

Pre-trial proceedings on semi public prosecution cases are carried out in the form of preliminary investigation and prosecution. Preliminary investigation of petty offences and prosecuted in this form is carried out in the simplified pre-trial proceedings. In the case of semi public indictments state interests are protected by the prosecutor, but in these cases victim takes part as a private prosecutor and if the prosecutor refuses to protect the charge he can continue criminal prosecution against accused person.

Finally, criminal prosecution carried out in the form of semi public prosecution does not have differentiating feature, and proceeding on such criminal prosecution is commenced with the decision of preliminary investigator, investigator or prosecutor and state indictment in court is protected by prosecutor.

According to requirements of Criminal Procedure legislation in force the criminal prosecution shall continue until the circumstances which exclude criminal responsibility are elucidated or until the public prosecutor or the victim bringing a private prosecution withdraws the prosecution in accordance with CPC.

Legislation defines exact list of cases of dismissal of criminal prosecution. According to article 39 of the CPC, in these cases a criminal prosecution may not start or shall be dismissed if already started (and the criminal case may not start or proceedings in the criminal case shall be discontinued). As appears, in these cases legislation establish the dismissal of criminal prosecution and discontinuation of already started criminal prosecution as imperative norm.

Article 40 of CPC determines the possibilities where a criminal prosecution may not be commenced and the authority not to commence a criminal case or and dismiss the prosecution are considered as discretionary powers of prosecutor. Thus, under the conditions of the article 72-74 of the Criminal Code a person may be released from criminal liability when:

- the person evinces sincere remorse;
- the person is reconciled with the victim;
- situation has changed;
- time runs out.

But in regard to mentioned cases, it is important to have several conditions for starting or discontinuation of criminal proceedings.

Thus, according to Criminal Code, for release from criminal liability related to active repentance, committed crime should not represent big public danger, crime should be committed for the first time, person committed crime should voluntarily confess the guilt, take active part in disclosing of a crime, must indemnify or otherwise remove the harm caused as a result of a crime.

The person who committed other kinds of crime, at presence of the mentioned conditions can be released from the criminal liability only in the cases directly provided by appropriate articles of the Special part of the Criminal Code.

For release from a criminal liability incase of reconciliation with the victim the committed crime should not represent big public danger, crime should be committed for the first time, the perpetrator should reconcile with the victim and must compensate or remove the harm caused as a result of a crime.

For release from criminal liability in case of change of circumstances, the act committed as result of this change or the person who committed this act should be identified, and such an act should not represent big public danger or be less serious crime and be committed for the first time.

If the Preliminary investigator, investigator or prosecutor at any stage of pre trial proceedings of criminal prosecution discloses circumstances defined in article 39 of the CPC takes a decision on discontinuation of (also discontinuation of proceedings on criminal case) criminal prosecution. If there are no grounds for acquittal the preliminary investigator, investigator or prosecutor may not decide to discontinue the criminal prosecution without the consent of the accused (or suspect). In this case the criminal prosecution shall be continued in the manner provided for in this Code and shall end with a judgment or another court decision.

If the public prosecutor finds circumstances which preclude criminal prosecution in court, he shall withdraw the criminal prosecution of the accused. If the victim bringing a private prosecution continues to uphold the charge, the position of the public prosecutor on exempting the accused from criminal prosecution shall not prevent the criminal case or other prosecution material from being examined in court.

If the court finds circumstances which preclude criminal prosecution before the beginning of the court hearing, it shall suggest that the public prosecutor decide on the question of withdrawing the prosecution of the accused. If the court finds circumstances which preclude criminal prosecution after the beginning of the court hearing, it shall stop the hearing and order an acquittal.

If the public prosecutor ascertains during court hearings circumstances provided for in Article 40 of this Code which allows the criminal prosecution not to take place, he shall have the right to withdraw the criminal prosecution of the accused. The public prosecutor's withdrawal of the prosecution shall not prevent the victim from continuing the criminal proceedings against the accused in the form of private prosecution.

Refusal from the private prosecution depends only from the will of the victim (injured party). In this case the court shall discontinue the proceedings concerning private charges.

IV Prosecutorial discretion (also other law enforcement agencies) in Azerbaijan and its limits

According to Azerbaijan Republic's criminal procedure legislation in force, the prosecuting authorities are preliminary investigation, investigation and prosecution authorities and courts dealing with criminal cases.

Prosecutor – is the person who, in accordance with his powers and with CPC leads the investigation into the criminal case or acts as a public prosecutor upholding public or semi-public charges in court.

Existing criminal-procedure legislation provided several discretionary powers both to prosecutors leading the investigation into the criminal case and acting as a public prosecutor upholding public or semi-public charges in court.

According to CPC, prosecutor leading the preliminary investigation into the criminal case while supervising preliminary investigation and investigation on criminal case executes below rights.

1) to discontinue the criminal prosecution against the accused or refrain from prosecution in circumstances provided in articles 39, 40 of CPC.

Article 39 of CPC gives a strict list of circumstances which exclude beginning of criminal prosecution. In such circumstances the law defines as imperative norm that a criminal prosecution may not start or shall be discontinued (and the criminal case may not be begun or proceedings in the criminal case shall be discontinued).

The article 40 of CPC also defines the circumstances where criminal prosecution may not be started or dismissed. The powers of prosecution under such circumstances are considered his discretionary powers. Thus, in following circumstances defined in articles 72-74 of Criminal Code a person may be released from criminal responsibility when:

- the person evinces sincere remorse;
- the person is reconciled with the victim;
- situation has changed;
- time runs out.

The same powers are given to preliminary investigator and investigator along with prosecutor, under sole condition that, their decision on rejection of criminal prosecution and its discontinuation are agreed with prosecutor.

2) to confirm the indictment and the decisions of the preliminary investigator or investigator in the circumstances provided for in this Code or if not, to refer the criminal case to the investigator with mandatory instructions.

Under the article 290 of CPC, The prosecutor in charge of the procedural aspects of the investigation shall examine the case file received with the indictment to verify among others the following:

- proof of the commission of the offence charged, and the fact that it constitutes a criminal offence;
- proof of the accused's guilt;
- inclusion of all offences committed by the accused in the counts of the indictment;
- inclusion in the proceedings of all known participants in the offence;
- the existence of any grounds for discontinuing the criminal proceedings;
- the correct classification of the offences committed by the accused;
- the thorough, full and objective investigation of the circumstances of the offence etc;

Within 5 (five) days of receiving the case file with the indictment, the prosecutor in charge of the procedural aspects of the investigation shall take one of the following decisions:

- deem that there is sufficient evidence to send the criminal case to court and confirm the indictment;
- on his own responsibility, exclude individual counts from the indictment, alter the classification of the offence to a less serious one in accordance with criminal law, and confirm the indictment with these changes;
- return the case file to the investigator with instructions to conduct an additional investigation or revise the indictment;
- suspend the criminal proceedings;
- discontinue the criminal proceedings.

Besides, the prosecutor in charge of the procedural aspects of the investigation of the criminal case on which the file was received with the indictment shall be entitled to take the following measures on his own initiative:

- to cancel or change the restrictive measure chosen by the investigator;
- if necessary, where a restrictive measure has not been chosen by the investigator, to choose one of these measures or to make submissions to the court concerning the choice of arrest as a restrictive measure.

Also, under the article 297 of CPC after receiving the file on the simplified pre-trial proceedings, the prosecutor in charge of the procedural aspects of the investigation shall take the following measures:

- if the evidence collected and circumstances researched during the preliminary investigation enable charges to be brought, confirm the bringing of charges on the final record drawn up by the preliminary investigator concerning the results of the simplified pre-trial proceedings and send all the material to the court;

- if the evidence collected is not sufficient to bring charges, decide whether to open a criminal case on the basis of the file on the simplified pre-trial proceedings and order the conduct of an investigation by the relevant investigating authority;

- if there are circumstances which rule out a prosecution, decide to discontinue the prosecution of the person who committed an offence under criminal law;

Except in the case of private prosecutions the prosecutor, when taking part in court hearings as public prosecutor, pursuant to the rules provided for in this Code has the right to object criminal prosecution to accused person in cases provided in article 41.3 of the CPC.

If the public prosecutor finds circumstances which preclude criminal prosecution in court, he shall withdraw the criminal prosecution of the accused. If he ascertains in court circumstances provided for in Article 40 of the CPC which allow the criminal prosecution not to take place, he shall have the right to withdraw the criminal prosecution of the accused.

In this area, legislation also provided several discretion powers to courts. Thus, if the court finds circumstances which preclude criminal prosecution before the beginning of the court hearing, it shall suggest that the public prosecutor decide on the question of withdrawing the prosecution of the accused. But if the court finds circumstances which preclude criminal prosecution after the beginning of the court hearing, it shall finish the hearing and order an acquittal.

Court decision on discontinuing criminal prosecution during the trial to accused person is made when the public prosecutor or the victim bringing a private prosecution

withdraws the criminal prosecution and there are circumstances provided for in Articles 39.1.4., 39.1.6.-39.1.11. of the Code.

The question whether a private prosecution is to proceed or not shall depend only on the wishes of the victim. If the victim bringing a private prosecution repeatedly fails to attend the court hearing without good reason or fails to inform the court of the reasons for his absence, he shall be regarded as having dropped the prosecution and in this case the court shall discontinue the proceedings concerning private charges.

During the trial, the court may decide to discontinue the criminal prosecution with the consent of the defense in the circumstances envisaged by Articles 39.1.3, 39.1.5, 39.1.12 and 40.2 of the Code.

V Possibilities of application of plea bargaining in Azerbaijan and its possible consequences

a) Plea bargaining analogues in Azerbaijan

Criminal Procedure legislation of Azerbaijan, does not provide for a plea bargaining institution. Nevertheless, in Criminal Code as an analogue of this institution, if we may call it such, below circumstances - to confess, active actions on disclosing of a crime; exposure of other accomplices of a crime; search and detection of the property extracted as a result of a crime; rendering of medical and other help to the victim after direct commitment of a crime; voluntary compensation or elimination of the material and moral harm, caused as a result of a crime; attempt to come to consent with the victim, and other actions directed elimination of damages, caused to the victim - were defined as circumstances softening punishment.

Also, Criminal Code provides that, the person who has committed a crime for the first time, not representing big public danger, can be released from the criminal liability if he has voluntary pled guilty, actively promoted disclosing of a crime, has indemnified or has otherwise removed the harm caused as a result of a crime. This is defined as one of the bases for releasing from Criminal Liability.

But, analyses of the essence of plea bargaining institution and practice of application in US or other continental countries conclude that application of plea bargaining both from theoretical and practical aspects will result in violation of main principles and terms of criminal proceedings defined with the Constitution and Criminal Procedure Code.

b) Possibilities of plea bargaining in Azerbaijan

According to Criminal Procedure Code in force, objectives of criminal proceedings were defined as - to defend individuals, society and the state against criminal attempts; to defend individuals against abuse of power in connection with the commission of a real or possible offence; to detect offences as early as possible, to investigate all the circumstances thoroughly, completely and objectively; prosecute and to incriminate those who have committed offences; to conduct judicial proceedings in order to punish persons found guilty of committing offences and to acquit those who are not guilty. But, plea bargaining by its essence and nature impedes the realization of these objectives.

Thus, one of the main principles of criminal proceedings is **legality** principle. According to article 10 of the CPC, courts and participants of criminal proceedings shall conform to the Constitution of the Azerbaijan Republic, this Code, and other laws of the Azerbaijan Republic as well as provisions of the international agreements to which

Azerbaijan is a signatory. No one may be incriminated or charged with a view to prosecution as a suspect or accused person, detained, arrested, searched, taken by force or subjected to other coercive procedural measures, nor convicted, punished or subjected to other limitations of rights and liberties other than on the basis of the rules and principles established by the laws of the Azerbaijan Republic which are in force and published.

But in plea bargaining guilt of the person in committing a crime is not proven in accordance with the requirements of CPC. With the confession of guilt, it is proved that, the person is guilty of an offence.

The CPC provides that criminal proceedings in the Azerbaijan Republic shall be **carried out on the basis of the equality of all persons before the law and the courts and the judicial authorities shall observe the human and civil rights and liberties afforded by the Constitution to all participants in criminal proceedings**. In contradiction to these principles victim does not take part in discussion of terms of plea bargaining between the prosecutor and accused person. Opinion of the victim is not taken into account both at agreement stage and its further discussion by court. This results in not restoration of violated rights of victim, creation of unequal conditions for the participants of criminal proceedings and victim feels himself being insulted. Nevertheless, according to article 12 of the CPC, the judicial authorities shall observe the human and civil rights and liberties afforded by the Constitution to all participants in criminal proceedings. The victim of a criminal act shall have the right to demand criminal prosecution, to take part in it as a victim or as a victim bringing a private prosecution and to obtain compensation for non-material, physical and material damage as required by the CPC. Besides article 12.3 of CPC provide that during criminal proceedings everyone shall have the right to defend their rights and liberties as set down by the Constitution in any manner not prohibited by law. According to article 19 of the CPC during the criminal prosecution the preliminary investigator, investigator, prosecutor and court shall take measures to guarantee the right of the victim, the suspect and the accused to proper legal aid. The suspect or the accused may not be forced to give evidence, to give the prosecuting authority any documents or to assist them in any way.

But in case of plea bargaining factually no prosecution is carried out, thus participants of criminal process are deprived from protection and restoration of their violated rights including receiving high quality legal aid.

The right of a person not to testify against himself or his close relatives – are guaranteed in article 66 of the Constitution of the Republic of Azerbaijan and article 20 of the CPC. Under the latter during the investigation or court hearing, person asked to give information which may incriminate him and his close relatives in respect of an offence shall have the right to refuse to incriminate them without fear of negative legal consequences for himself.

But in the case of plea bargaining even though accused may achieve a less severe penalty by confessing crime, it is not excluded that in case of detection of the false information provided by the accused for concealing other committed crimes and hiding the other circumstances of the crime, criminal case will be invalidated and a more severe penalty will be imposed. Thus the accused's right not to testify against himself and his close relatives may be violated.

Plea bargaining results in violation of one of important principles of criminal process, **presumption of innocence**. According to article 21 of CPC any person suspected of committing an offence shall be found innocent if his guilt is not proven in accordance with the Code and if the court has not delivered a final judgment to that effect. Even if

there are reasonable suspicions as to the guilt of the person, this shall not cause the latter to be found guilty. The accused (the suspect) shall receive the benefit of any doubts which cannot be removed in the process of proving the charge in accordance with the provisions of this Code, within the appropriate legal proceedings. He shall likewise receive the benefit of any doubts which are not removed in the application of criminal law and criminal procedure legislation; The accused shall not be obliged to prove his innocence. It shall be for the prosecution to prove the charge or to refute the evidence given in defense of the suspect or the accused. Section 5 of the article 63 of the Constitution provides that nobody may be accused of crime without the verdict of law court.

But in case plea bargaining even before court trial the guilt of the person on committed offence is considered to be proved. Court only, defines the whether confession of the person was voluntary or not during plea bargaining. The guilt of the person is not proved by evidences, only limited to person's confession of guilt.

Article 6 of European Convention on Human Rights defines the **due process** right. At the same time according to article 60 of the Constitution of the Republic of Azerbaijan every citizen's rights and liberties are guaranteed by law court. According to article 22 of the CPC the judicial authorities shall secure the right of everyone to a fair and open court hearing in connection with the charges against them or the coercive procedural measures applied. The right to a court hearing may not be refused for any reason.

But in case of plea bargaining the person's criminal liability issues is solved until court hearing. The court only, expresses its opinion on verifying of already agreed plea bargaining issue. This, in its turn, results in violation of - **criminal trial only by a court – principle.** Thus, criminal trial shall be carried out only by the competent court as part of the court system of the Azerbaijan Republic. No one may be held guilty of an offence or be convicted in the absence of a court judgment. But in case of plea bargaining along with considering person guilty, the future punishment also is known before court's verdict.

Both Constitution and CPC guarantee the **independence of judges and their obedience only to the law**. According to article 25 of the CPC judges and jurors shall not be bound by the conclusions reached the prosecuting authorities during the investigation. Judges shall decide criminal cases and other prosecution matters in accordance with their conscience and legal opinions, on the basis of their examination of the evidence adduced by the parties to the criminal proceedings.

As appears, in application of plea bargaining these requirements of the laws are violated. As plea bargaining being considered to be main proof, the investigation and obtaining of other evidences is not carried out in court trial and thus court issues verdict without considering any evidences. Plea negotiations are carried during pretrial period, and approval of this agreement by court creates conditions for violation of the legislation, which defines that judges shall not be bound by the conclusions reached the prosecuting authorities during the investigation.

In plea bargaining case the objectivity, impartiality and justice principles of court trial are also violated. According to that principle courts shall hear criminal cases and other prosecution matters in accordance with the legal procedures established by this Code, on the basis of the facts and of impartiality and justice. In the course of the proceedings, judges may not express interests other than those of the law. It should be noted that interests of the law cover exactly objective, impartial and just hearing of cases.

But in case of plea bargaining either body carrying out preliminary investigation or court, instead of conducting objective and thorough investigation of issues of whether

accused person is guilty or not, put the forward the aim of solving the case fast, decrease the work burden and the costs related to proceeding. This does not enable the courts to perform following functions in a proper level during the criminal proceedings: ensure that the parties to the proceedings are able to examine thoroughly, fully and objectively all the circumstances relating to the prosecution; take into consideration circumstances which incriminate or exonerate the suspect or accused as well as circumstances which mitigate or aggravate his criminal responsibility; examine applications presented by the suspect or the accused or by their counsel for the defense concerning their innocence or minimal guilt and the availability of evidence which exonerates them or mitigates their responsibility. Contrary to court decision approving plea bargaining between prosecutor and accused person legislation provides that the court decision regarding the guilt of the person charged may not be based on opinion but shall be supported by all the reliable evidence concerning the case. Besides cases, which resulted in persons economically suffered and generally resulted in breach of legal interests of citizens and society can not be acquitted.

One of the main principles in criminal court proceeding is participation of both sides in criminal proceeding. In the Azerbaijan Republic the conduct of criminal proceedings shall be based on the adversarial principle. In order to guarantee participation of both sides in criminal proceedings, each party shall be represented in court, and each party shall have equal rights and opportunities to defend its position.

But the mentioned aspect is not observed in case of application of plea bargaining. As in case of plea bargaining victim's opinion is not taken into account, his participation in defining the terms of agreement is not provided and the fact that confessed person and other participants of the process have the equal rights and opportunities creates doubts. Under these terms, saying that objective and just decisions will be adopted is completely baseless and does not sound convincing. The requirement of adversarial principle on justification of court decision with investigated evidences by providing equal participation to both sides in criminal proceedings is generally not observed.

In plea bargaining case one of important issues is the confession of the person and thus, **voluntarily** accept of his guilt and giving correct statement are very important. Evaluation of those cases, that is, to accept or refute them are not possible. This, leads to unwanted results both for him and other persons. Thus, evidences must be completely investigated in court hearing including hearing of other participants of the crime. Otherwise the threat of confession of crime by person though not committing it and false statement on committing crime by other person will always exist.

Person agreeing on plea bargaining **if gives false statement** and if this is reflected in court judgment related to person who committed an offence, then at this time several contradictions are appeared. Lets consider that, judgment made on investigation of all evidences is legal and fair and there is no grounds for its re hearing. Thus, statement given by same person on same case is considered correct in one judgment and incorrect in another, and this along with violating the requirements of legislation proves that in case of plea bargaining case is not thoroughly investigated.

Plea-bargaining is observed with **broad powers given** to prosecutor. Since the prosecutor chairs the preliminary investigation, the right to have that agreement or refusal will belong to prosecutor. His decision in regard to this will have more subjective character. In this case, it is difficult to talk about objective settlement of the case. Taking into account the important role of plea bargaining in the definition of case's result, it is dangerous to depend on the will of one person – prosecutor, as he, by his decision may have the power to define the rule and result of court hearing of criminal case. Generally, application of plea bargaining rule both in preliminary investigation period and court trial

period may lead to increase in abuse of power and illegal cases. As a result persons committing offence may not be involved into responsibility and those committing may evade this.

According to supporters of plea bargaining, the purpose of having such agreements is to broaden the influence of criminal and criminal procedure legislation on investigations related to criminal groups (organizations) refusing to give statements on their members involved into the crime and in this way struck corruption and organized crime. But it should be taken into account that, such cases not only will weaken the corruption, on the contrary, as mentioned above, in preliminary investigation and court hearing stage will create extra pre-conditions for corruption and abuse of power. Apart from this, if all participants of the crime understand that all of them will be disclosed and still agree to cooperate with investigation then the settlement of the case remain dark. In this case shall priority be given to someone or agreement must be signed with all of them? This institution will completely lose its significance, if there happen to be agreement with all participants.

One of the shortcomings of noted agreement is its possibility to be signed not by accused person but even with suspect. For example, such case is reflected in relevant draft of Russian Legislation. But having such an agreement with suspect precedes the announcement of indictment. Thus, we consider that, plea bargaining with suspect being before its timing creates contradiction with the essence of plea bargaining. Firstly, person is not informed about the crime he is accused up until indictment is officially announced to him. Secondly, having such an agreement with suspect, until indictment is announced, impedes obtaining of his correct confessing statement. In regard to this, we consider that, during application of such agreements, as concrete indictment is lacking, which guilt's confession by suspect does not seem realistic. Thirdly, announcement of indictment make clear which crime is considered to be committed by accused person and provides the issues of involvement into criminal liability. Only in this case, the issues of taking action on plea bargaining voluntarily and consciously can be discussed. As we see, plea bargaining until court trial before announcement of indictment with suspect creates contradictions with the requirements of law. Because in such situation, suspect agrees with the indictment before indictment is made against him by the prosecution. Person who does not know for what he is indicted lacks the possibility of defending himself. At the same time victim can not claim for incurred loses and prosecutor in its turn can not defend state indictment. It is clear that court documents also can not be adopted under these suspicions.

The confession of the guilt by accused person does not give ground to think that he is guilty. **Such confessions may be for different reasons.** In many cases it is done with the purpose - to divert other persons from criminal responsibility, or hide more serious committed crime by confessing less severe crime, to receive certain reward and guarantee in exchange for confession, to protect life and health of himself and his relatives from possible threats. Also confession of guilt happens as a result of application of torture, threats, deceit, torture and other cruel, inhuman or degrading acts during preliminary investigation period, thus confession of the guilt by person if approved by gathering of all evidences on case can be included into the bases of indictment. Evidence on case is not just confession of guilt by person is the actual information indicating that he has committed a crime.

According to article 138 of the CPC **proof** shall consist of obtaining, verification and assessment of evidence in order to establish facts of importance for the lawful, thorough and equitable determination of the criminal charge. The prosecutor shall be responsible for proving the grounds for the criminal responsibility of the accused and whether or not he is guilty. At the same time, it should be noted that during court proceedings both sides have the right to present evidences to the court for settling the case.

Article 139 of the CPC provides that, the connection of the suspect or accused with the criminal act and the guilt of the person in committing the act provided for in criminal law may be determined only on the basis of evidence during prosecution.

According to article 126.6 of the CPC accused person's confession of guilt may be accepted as grounds for the charge against him only if confirmed by the contents of all the evidence on the case.

But in case of plea bargaining these provisions defined in procedural legislation are not observed, bodies responsible for preliminary investigation instead of proving the existence of guilt, try to settle the case faster considering enough the confession of the guilt.

Non approval of the guilt with other evidences, approves that not only the case was not investigated objectively and thoroughly and all evidences were not acquired and fairly evaluated, but also that investigation was carried out in violation of requirements of legislation, constitutional rights and liberties of persons.

Thus, above mentioned indicates that, plea bargaining institution does not allow comprehensive, complete and objective investigation of all circumstances of criminal court proceedings, to prosecute and to incriminate those who have committed offences to conduct judicial proceedings in order to punish persons found guilty of committing offences and to acquit those who are not guilty, and is extra opportunity for abuse of power in preliminary investigation stage, and leads to violation of victims' legal interests, contradiction which is different to eliminate during administering justice and groundless complexities.

Observation of plea bargaining applied in different countries discloses that participants of plea bargaining in many cases are more interested in settling the case according to their interests (fast settlement of the case, decrease in work load and etc) rather than disclosing the real truth.

In plea bargaining process judge controls that accused person understands all the results of confession and that this confession was not obtained as a result of threat, force or other means. With this, not the proof of the guilt of the person but issue of person's understanding of the essence of confession finds its settlement. It needs to be noted that, in plea bargaining process cases of violation of law and the fact that, confession is not confirmed with evidences may lead to a situation where the real perpetrator may escape criminal responsibility and involve an innocent person into criminal liability.

If court or accused person rejects the procedural agreement the case is heard in conventional way and evidences provided by accused person may in no way be used against him. But in case of plea bargaining there is no guarantee that provided evidences, given statements, and disclosing information will be used against the person. At least those evidences and information will influence the creation of internal conviction and formation of certain opinion in persons responsible for preliminary investigation and court hearing and ultimately will affect the final verdict's direction.

As a positive feature of the plea bargaining institution is mentioned, - decreasing of work load of the prosecution and court structures, fast settling and hearing the cases, decrease in financial costs and etc. But in plea bargaining the person committing crime and other features of the case is not proven. Because confession of guilt, in essence, can not be considered as an evidence. In this case the correctness of the statement given by person, his efforts to hide other more severe crime committed by himself, his efforts to evade real persons committing crime, including confessing under force or with the aim of protecting his and his close relatives life and health is not clear. Thus, confession of the guilt should not be considered enough, that confession must be supported with all other evidences. For

this purpose, the investigation should be carried out up to the end, until it's proved who committed the crime. Having such agreements and trying to finish the cases fast, actually damages the states fight against crime and general law enforcement policy. Application of this institute in criminal procedures of different countries arises from peculiarities of legal system of those countries. Apart from this, each country has different legal system and system's development history, and social economic and political state. That is why based on argument that application of some institute yield positive results in one country, and not taking above mentioned factors into account, and applying that in other countries not ready for this may have negative results.

If plea bargaining is applied in one country as an anti corruption measure and yield positive results, the application of the same institution in different country with similar aim may yield opposite results, that is, instead of preventing corruption it may result in wide spread of corruption in law enforcement sector. Above mentioned give the bases for considering that our republic's legal system makes impossible of application of plea bargaining