

# PLEA BARGAIN

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AGREEMENT BETWEEN PROSECUTOR AND DEFENDANT PLEADING GUILTY TO A LESSER CHARGE



# Plea Bargaining

Georgia • Indonesia • Malaysia • Nigeria  
Russian Federation • Singapore

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# Comparative Summary

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## I. Introduction

This report examines laws and practices related to plea bargaining in six countries: Georgia, Indonesia, Malaysia, Nigeria, Russia, and Singapore. Of these countries, three (Georgia, Malaysia, and Nigeria) have formalized both charge and sentence bargaining procedures in legislation. Russian legislation provides for a “special trial procedure” for defendants who plead guilty, and “special path” provisions based on Russia’s approach are currently being considered as part of criminal procedure reforms in Indonesia. Russia has also implemented provisions on “pretrial cooperation agreements” aimed at providing incentives for individuals involved in organized crime to cooperate with authorities in exchange for a reduced sentence. Georgia also provides for “agreements on special cooperation.” In Singapore, there are no current or proposed plea bargaining provisions in legislation. However, two programs have been implemented that enable alternative case resolution processes to be applied.

Several of the countries studied introduced the relevant provisions or procedures in an effort to increase efficiency and relieve congestion in the courts. This appears to have been the main reason for the introduction of provisions in Malaysia in 2010 and in Nigeria in 2004 (financial crimes) and 2015 (all federal crimes), and for the establishment of a criminal case resolution program in Singapore in 2011. Enhancing efficiency has also been cited as a reason for the proposed “special path” provisions in Indonesia. In Georgia, the introduction of “procedural agreements” in 2004 related to attempts to address police corruption and the influence of organized criminal groups.

## II. Summary of Approaches

Some of the differences in the approaches taken by the countries studied can be seen to relate to distinctions in the principles underlying criminal procedures in inquisitorial and adversarial systems of justice. In Russia and Indonesia, which apply the inquisitorial model, guilty pleas may be assessed by the court as part of the totality of evidence in a trial, rather than being the determinative factor. However, Georgia, which also applies the inquisitorial model, has taken a much more liberalized approach to plea bargaining and modeled its laws on those in countries that apply an adversarial approach.

Under the Georgian Code of Civil Procedure, either the accused or the prosecutor may propose a procedural agreement, or the court may suggest this approach. The agreement involves the accused confessing to the charged crime, with the prosecutor then able to request a reduction of punishment or a reduction of charges. The prosecutor must consult with the victim and notify him or her of the conclusion of the agreement. An agreement must be certified by the court, which must first assure itself that the agreement was concluded voluntarily. The court may make changes to the agreement only upon the consent of both parties. Sentences applied pursuant to an agreement cannot be appealed unless the accused violates a condition of the agreement.

An “agreement on special cooperation” is a specialized type of procedural agreement in Georgia. These may be entered into prior to or following a conviction and involve situations where solving a different crime depends on the cooperation of the accused/convict.

In Malaysia, where informal charge bargaining practices occurred prior to amendments to the Criminal Procedure Code being made in 2010, the accused may submit a request for plea bargaining to the court. Once an agreement on the charges and/or sentence has been reached by the prosecutor and accused, the court may dispose of the case, provided that the agreement was entered into voluntarily, the sentence is within the acceptable range in the Code and is accepted by the court, and the offense involved is not one that cannot be the subject of an agreement. The accused may appeal the extent and legality of the sentence imposed by the court.

Under the plea bargaining provisions of broad application in Nigeria, enacted in 2015, the prosecution may offer or accept a plea agreement from a defendant, provided that certain conditions are present in the relevant case. Agreements may be entered into before, during, or after the presentation of the prosecution’s evidence. The prosecution must consult the police who investigated the case, consider public-interest factors, and obtain the victim’s consent to enter into plea bargaining. The court reviews the agreement, including ascertaining that the defendant entered into it voluntarily. The court may approve the agreed sentence or impose a lesser sentence. If the court thinks that it would have imposed a heavier sentence, the defendant may abide by his or her guilty plea and agree that the judge proceed to sentencing, or may withdraw from the agreement and have the case proceed to trial before a different judge. Where a lesser sentence is imposed than that in the plea agreement, the prosecution may appeal the sentence. The defendant is unable to appeal the conviction and sentence unless fraud is alleged.

Russia’s “special trial procedure” provisions, introduced in 2001, do not involve charge or sentencing bargaining between the prosecution and defendant. Instead, a defendant may agree to the charges and request sentencing without trial. The procedure is only available for crimes subject to punishments of up to 10 years of imprisonment. The judgments rendered in such cases cannot be appealed on the grounds of inconsistency between the findings of the court and the merits of the case. In addition to this procedure, “pretrial cooperation agreements,” introduced in 2009, may be utilized in cases involving organized crime. Such agreements are submitted to the court as part of the trial, and the court may accept the agreement as evidence. If the court finds the defendant guilty it may then impose a sentence of no more than half of the possible maximum sentence for the crime.

The “special path” procedure included in a criminal procedure reform bill currently before Indonesia’s parliament would, similar to the Russian procedure, enable shortened hearings and reduced sentences where a defendant admits guilt and requests the application of the provisions. The procedure would also only apply in cases involving less serious crimes, being those subject to up to seven years of imprisonment. The judge would determine the application of the provisions, rather than there being an agreement between the prosecution and defendant. The court would be able to sentence the defendant to no more than two-thirds of the maximum sentence for the charge.

Singapore’s criminal case resolution program, which was initiated by the subordinate courts, provides a neutral forum, facilitated by a judge, for parties to explore alternatives to trials in

criminal cases. The accused may decide whether to plead guilty or seek a trial. The program is not intended to actively encourage guilty pleas. The judge may consider giving a sentence indication if this is sought by the accused. If the accused decides to plead guilty, the judge may, with the consent of both parties, accept the plea and pass sentence. If the case does go to trial, a different judge hears the case and the prior discussions remain confidential.

### **III. Outcomes and Concerns**

In Georgia, a majority of cases are reportedly now settled by plea agreements. Concerns have been raised, however, about the absence of an effective witness protection program for those who cooperate under an agreement and also about the use of high fines as punishments in the deals, which leads to economic discrimination.

Malaysia has resolved its court backlog in the past decade following the passage of criminal procedure reforms, but it is unclear the extent to which this can be attributed to the application of the plea bargaining provisions. Commentators have raised concerns about the interpretation and application of the provisions by judges, the removal of judicial discretion in sentencing, the risk of corruption and abuse, and protections for victims in the process.

It appears that plea bargaining processes in Nigeria have predominantly been applied in cases involving financial crimes. In that context, concerns have been raised about corrupt officials receiving light sentences pursuant to plea agreements. The extent of the impact of the 2015 provisions on reducing court congestion is not yet known.

Some commentators in Russia have argued that the “special trial procedure” violates several principles of criminal procedure and impedes the finding of the truth. However, it is now widely applied, being used in more than half of all criminal cases.

Discussions regarding the proposed “special path” procedure in Indonesia have noted that the provisions do not allow for agreements on sentences between prosecutors and defendants, and that this was due to concerns about corruption. Commentators have called for the development of standards by which judges can assess guilty pleas and appropriate supervision of the procedure’s implementation to protect against corruption.

The courts in Singapore have indicated that the pretrial case resolution program has resulted in fewer and shorter trials. A criminal lawyer has raised concerns about the potential for overcharging. The Attorney-General has denied that the prosecution seeks excessive or inadequate sentences as part of the process.

# Georgia

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**SUMMARY** Plea bargaining was *de jure* nonexistent in Georgia until the beginning of the comprehensive reform program introduced by the “young reformer” President Mikheil Saakashvili. The success of the fight against organized crime strongly depended upon the readiness of delinquents to cooperate with the investigation. For that reason national criminal procedural legislation was promptly amended after Saakashvili became president, and a new procedure called the “procedural agreement” was introduced. Later, this procedure was supplemented with a special type of procedural agreement—the agreement on special cooperation.

## I. Introduction

The introduction of plea bargaining in Georgia came in a package of criminal justice and law enforcement reforms initiated by President Mikheil Saakashvili in 2004. The reformers faced two major challenges: notorious corruption in the police force and close ties between police and the leaders of the organized crime. A World Bank report noted that “[c]orruption was at the core of Georgia’s policing system.”<sup>1</sup> At the time that reforms were initiated, highly organized and disciplined criminal groups controlled so many aspects of the state that many believed they were more powerful than the government itself.<sup>2</sup> In order for the government to gain credibility and for the reformed police to combat organized crime, new criminal and procedural laws were introduced. These laws were modeled on the US Racketeer Influenced and Corrupt Organizations (RICO) Act, New Zealand law on harassment and criminal association, and British conspiracy law.<sup>3</sup> Plea bargaining was introduced to encourage apprehended mafia bosses and underlings to “roll.”<sup>4</sup>

## II. Legislation and Procedure

Chapter XXI of the Georgian Code of Criminal Procedure<sup>5</sup> outlines the plea bargain procedure or, as it is called by the Code, the “procedural agreement.” A procedural agreement is based on an agreement concerning guilt or punishment concluded between the accused and the prosecutor.

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<sup>1</sup> The World Bank, *Fighting Corruption in Public Services: Chronicling Georgia’s Reforms* 13 (2012), <https://perma.cc/HJ97-K3CH>.

<sup>2</sup> Gavin Slade, *No Country for Made Men: The Decline of the Mafia in Post-Soviet Georgia*, 46(3) L. & Soc. Rev. 623–49, 626 (2012).

<sup>3</sup> The World Bank, *supra* note 1.

<sup>4</sup> Slade, *supra* note 2, at 35, 627.

<sup>5</sup> Code of Criminal Procedure of Georgia, Law No. 1772 of October 9, 2009, <https://perma.cc/5VHW-MEP4> (official publication, in Russian).

Both the accused and the prosecutor have the right to propose a procedural agreement. While adjudicating a case, the court may also suggest that the parties conclude a procedural agreement.<sup>6</sup> If an agreement on punishment is concluded, the accused does not object to the charges and agrees with the prosecutor on the form and/or duration of punishment. In the case of a procedural agreement on guilt, the accused confesses to the charged crime.<sup>7</sup> While concluding a procedural agreement, the prosecutor must warn the accused that the procedural agreement will not exempt him or her from civil or other liability.<sup>8</sup> Procedural agreements must be concluded on the basis of a preliminary written agreement with a higher-ranking prosecutor. Based on the procedural agreement, the prosecutor is eligible to request a reduction of punishment or, in the event of cumulative offenses, to make a decision on a reduction of the charges. While doing this, the prosecutor must take into consideration the public interest, the severity of punishment established for the crime committed, the nature of the crime, and the extent of guilt.<sup>9</sup>

Procedural agreements must be executed in writing, certified by the court and reflected in the sentence. The court must assure itself that a procedural agreement was concluded voluntarily in the absence of violence, threat, fraud, or any other illegal promise, and that the accused had a chance to receive professional legal aid.<sup>10</sup> The court may make changes to the procedural agreement only upon the consent of the parties.

The accused is eligible to withdraw from a procedural agreement at any time before the court delivers a sentence without a hearing on the merits. Such withdrawal does not require a defense attorney's consent; withdrawal from the procedural agreement after the pronouncement of the sentence is not allowed, however. The parties may also modify the terms of a procedural agreement before the court delivers a sentence without a hearing on the merits.<sup>11</sup>

Sentences in such cases cannot be appealed and come into force immediately at the moment of pronouncement. The only exception is that envisaged by article 215(4) of the Criminal Procedural Code, which states that if the accused violates a condition of the procedural agreement, the prosecutor may submit a complaint to the higher court within one month requesting repeal of the sentence on approval of the procedural agreement. Before conclusion of the procedural agreement, the prosecutor must consult with the victim and notify him or her of the conclusion of the procedural agreement. The victim is not entitled to appeal the procedural agreement but may file a civil lawsuit.<sup>12</sup>

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<sup>6</sup> Id. art. 209(1), (2).

<sup>7</sup> Id. art. 209(4).

<sup>8</sup> Id.

<sup>9</sup> Id. art. 210(1), (2), (3).

<sup>10</sup> Id. art. 212(1), (2).

<sup>11</sup> Id. art. 213(6), (7), (8).

<sup>12</sup> Id. art. 217(1), (2), (3).

### III. Specifics of Application

A procedure called the “agreement on special cooperation” constitutes a specialized type of procedural agreement that may be used when the cooperation of the accused or convicted person results in establishing the identity of an official who has committed a crime, or informing the authorities about the name of an individual who committed a grave or especially grave crime. Such agreements are initiated upon the petition of the Chief Prosecutor of Georgia to the court requesting a complete release of the accused from liability or punishment, or requesting judicial review of the punishment.

A procedural agreement on special cooperation concluded between the accused/convict and the Chief Prosecutor of Georgia serves as a basis for this petition. While concluding such an agreement, the Chief Prosecutor of Georgia must take into consideration the public interest, the gravity of the crime committed by the accused/convict, and the degree of his or her guilt. The unserved part of a convict’s criminal sentence must be additionally taken into consideration.

Such an agreement may only be concluded if solving a crime directly depends on the aforementioned cooperation, and the public interest in solving the crime outweighs holding the individual liable, sentencing him or her, or having him or her serve a sentence.<sup>13</sup>

An agreement on special cooperation must be signed by the accused/convict, the defense attorney, and the Chief Prosecutor of Georgia. It must clearly indicate that if the accused/convict fails to cooperate with the investigation, the agreement will be declared void.<sup>14</sup>

### IV. Implementation of the Reform

The introduction of plea bargaining, which is almost unlimited and much more liberalized than in other countries with an inquisitorial model of justice,<sup>15</sup> played an important role in reforming Georgia’s criminal procedure and has been widely praised as success. Reportedly, the majority of criminal cases in the country are settled by plea agreements.<sup>16</sup> Some commentators, however, have observed that while the conclusion of special procedural agreements remains highly popular and useful in prosecuting criminals, their role in fighting organized crime remains unclear. Some say that plea bargaining’s potential is undermined by the absence of an effective witness protection system in Georgia.<sup>17</sup> Georgia’s plea bargaining system has also been criticized for the fact that most of these deals are concluded in exchange for fines, which are sometimes irrationally high. As reported by Transparency International, revenues from plea bargaining

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<sup>13</sup> Id. art. 218(1), (2), (3).

<sup>14</sup> Id. art. 218(4), (5).

<sup>15</sup> Transparency International Georgia, *Plea Bargaining in Georgia* 1 (Feb. 2010), <https://perma.cc/6K24-NGH9>.

<sup>16</sup> Criminal Law Working Group, Coalition for Independent and Transparent Judiciary, *Application of Plea Bargaining in Georgia* 1 (Dec. 10, 2013), <https://perma.cc/4S6R-7F4M>.

<sup>17</sup> Transparency International Georgia, *supra* note 15, at 7.

constitute up to 1% of the national budget. This “cash for freedom” approach leads to economic discrimination and allows rich criminals to obtain lighter sentences.<sup>18</sup>

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<sup>18</sup> Id. at 8.

# Indonesia

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**SUMMARY** A bill to replace the Criminal Procedure Code, currently before the Indonesian parliament, contains a provision that allows a defendant to enter a guilty plea before a judge and have the case set down for a short hearing, with the sentence to be imposed subsequently reduced to no more than two-thirds of the maximum sentence for the offense. The “special path” procedure would only be available for offenses that carry a maximum sentence of imprisonment for less than seven years. It represents a shift in approach to guilty pleas in Indonesia’s criminal justice system, which is based on civil law traditions, but is different from a plea bargain that is negotiated between the prosecution and defense. Several academic articles have undertaken a comparative analysis of the proposed provision, examining approaches to plea bargains in other countries, including the United States. Some commentators have raised concerns about protections for the rights of the accused, the need for standards in assessing guilty pleas, and the need for supervision of the application of the new procedures. No information was located regarding the implementation process for the new Criminal Procedure Code, should it be passed, although it is likely that some form of regulatory guidance will be issued by the government.

## I. Introduction

Indonesian law does not currently contain processes or rules for plea bargaining of charges or sentences. The Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP),<sup>1</sup> which was enacted in 1981, has been the subject of reform proposals for a number of years. A drafting team was established in 2000, and an academic draft of a new KUHAP was published in late 2007.<sup>2</sup> The Ministry of Law and Human Rights published a formal draft bill in 2010.<sup>3</sup> The bill (*rancangan undang-undang*, RUU) remains before the House of Representatives (*Dewan Perwakilan Rakyat*, DPR), being listed on the national legislation program for 2019 and carried over to the 2020-2024 program, along with a bill to replace the existing Criminal Code (*Kitab Undang-Undang*

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\* At present there are no Law Library of Congress research staff members versed in Indonesian. This report has been prepared by the author’s reliance on practiced legal research methods and on the basis of relevant legal resources, chiefly in English, currently available in the Law Library and online.

<sup>1</sup> Undang-Undang Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana [Law No. 8 of 1981 concerning the Law of Criminal Procedure], <https://perma.cc/JM6B-57PH> (Indonesian), <https://perma.cc/3L6E-PRQS> (English translation).

<sup>2</sup> Choky R. Ramadhan, *Plead Guilty, Without Bargaining: Learning from China’s “Summary Procedure” Before Enacting Indonesia’s “Special Procedure” in Criminal Procedure*, 32(1) *Pac. Basin L. J.* 77, 90-92 (2014), <https://perma.cc/ED6Z-CH7B>.

<sup>3</sup> *Artikel Hukum [Umum – General]: Daftar Rancangan Undang-Undang*, Direktorat Jenderal Peraturan Perundang-undangan, Kementerian Hukum dan Hak Asasi Manusia, <https://perma.cc/D4FR-9XHP>.

*Hukum Pidana*, KUHP).<sup>4</sup> However, it appears that both bills continue to be the subject of discussion and revision. According to reports, in September 2019 the President of Indonesia ordered that the passage of the RUU KUHP be postponed in order for the public to be given the opportunity to provide input.<sup>5</sup> Furthermore, the RUU KUHAP was not included in the top 50 priority proposals to be considered by the DPR in 2020.<sup>6</sup>

The RUU KUHAP contains, in article 199, a new procedure that has been compared to plea bargaining processes in other countries, including the United States. The “special path” (*jalur khusus*) procedure enables a defendant to enter a guilty plea in front of a judge and have the case set down for a short hearing, with the sentence to be imposed subsequently reduced to no more than two-thirds of the maximum sentence for the offense. The process is restricted to offenses that are subject to imprisonment for up to seven years.

## II. Special Path in Criminal Procedure Bill

Article 199 of the RUU KUHAP, as published on the website of the Directorate General of Legislation within the Ministry of Law and Human Rights, provides as follows:

- (1) When the public prosecutor reads the indictment, the defendant acknowledges all acts that have been charged and pleads guilty to a criminal offense that is punishable by no more than 7 (seven) years’ imprisonment, the public prosecutor can delegate the case to a brief hearing.
- (2) The defendant’s confession is stated in the minutes signed by the defendant and the public prosecutor.
- (3) Judges must:
  - a. notify the defendant of the rights he has released by giving the confession referred to in paragraph (2);
  - b. notify the defendant of the duration of the sentence that is likely to be imposed; and
  - c. ask whether the confession referred to in paragraph (2) is given voluntarily.
- (4) The judge may reject the confession referred to in paragraph (2) if the judge doubts the truth of the defendant’s confession.
- (5) Except for Article 198 paragraph (5) [allowing a sentence of no more than three years of imprisonment for offenses tried using a brief examination procedure], the imposition of a sentence against a defendant as referred to in paragraph (1) may not exceed 2/3 of the maximum criminal offense charged.<sup>7</sup>

A 2008 article regarding the KUHAP reforms by the resident legal adviser in the United States embassy in Indonesia notes the following with respect to article 199 as contained in the academic draft of the KUHAP bill completed by the drafting team:

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<sup>4</sup> *Program Legislasi Nasional*, Dewan Perwakilan Rakyat (DPR), <https://perma.cc/5DWS-7UQB>; *Program Legislasi Nasional*, DPR, <https://perma.cc/YNY3-UBZS>.

<sup>5</sup> ICJR *Ingatkan Kembali Urgensi Pembahasan RKUHP, RCUHAP dan Revisi UU Narkotika* [ICJR Reminds Urgency of RKUHP, RCUHAP Discussion and Revision of Narcotics Law], Inst. for Crim. Just. Reform (Nov. 28, 2019), <https://perma.cc/D63U-S2S6>.

<sup>6</sup> *Id.*

<sup>7</sup> Rancangan Undang-Undang Hukum Acara Pidana, art. 199, <https://perma.cc/AG3Y-Y7KP>.

Although the current KUHAP recognized the possibility of dismissal of cases not in the public interest, usually all criminal cases, even petty prosecutions, were brought to court. The draft KUHAP specifically authorizes the prosecutor, if in the public interest, to dismiss minor cases, particularly where there has been reconciliation between the perpetrator and the victim.

The Working Group also adopted guilty plea provisions for the resolution of more serious cases. While the current KUHAP recognizes the need to consider “mitigating circumstances” at sentencing, a trial is still required. The Working Group adopted a procedure to permit a defendant to plead guilty and avoid a trial altogether. Rather than adopt a U.S.-style plea bargaining between the parties, the Working Group chose instead to follow the recently-reformed Russian criminal procedure code. Like the new Russian code, the Draft KUHAP’s guilty plea provision is not available for the most serious crimes – it can only be used by defendants facing charges punishable by less than seven years’ imprisonment. The plea will take place before a judge and the defendant enjoys certain procedural protections during the proceeding. The judge must inform the defendant of the rights he is giving up by pleading guilty and the penalties he faces. The court must also ensure that the defendant’s plea is voluntary and supported by the facts. If the court is not satisfied, the judge also retains the power to reject the plea. Following the Russian model, defendants who choose to plead guilty receive a sentence of no more than two-thirds of the maximum statutory sentence.<sup>8</sup>

The article further explains that

the inquisitorial system traditionally did not recognize a “guilty plea” as a reason to stop the determination of guilt or innocence by the court, rather it was simply a courtroom confession that the court could weigh in the same manner it evaluated a post-arrest confession in determining the defendant’s guilt. However, many civil law jurisdictions have moved towards adopting such consensual resolution procedures in part to respond to their own growing crime rates. Civil law countries adopted these provisions later than common law countries only because their existing trial system had proven more efficient in resolving cases quickly.

Interestingly, however, the Working Group members did not articulate a need for dismissal of minor cases and guilty pleas for more serious one [sic] in order to relieve the burden on the courts. Instead, they relied upon a deeper Islamic cultural value in building group harmony through restorative justice (diat) – the consensual resolution of a criminal case. The particular plea model the Working Group has chosen, the Russian Criminal Procedure Code, makes sense for Indonesia, a country also plagued by corruption and suspicion of the Attorney General’s Office. Under the Draft KUHAP, there is no negotiated secret sentencing deal between the prosecutor and defendant facing a very lengthy jail sentence if convicted at trial. Rather, the Working Group adopted a simplified and more transparent proceeding where the judge continues to have an active truth-corroborating role and where the judge and the code, not the prosecutor, determine the maximum benefit the defendant shall receive.

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<sup>8</sup> Robert R. Strang, “More Adversarial, But Not Completely Adversarial”: *Reformasi of the Indonesian Criminal Procedure Code*, 32(1) *Fordham Int’l L.J.* 186, 221-22, <https://perma.cc/L34L-5A6L>.

Similarly, the provisions do not fundamentally change the role of or balance of power between the different judicial actors. The judge maintains his position atop the hierarchy, while case processing is expedited. The prosecutor is not empowered to strike a bargain with the defendant – rather the new KUHAP seems to envision that the defendant will simply plead “straight up” to the charges without any agreement. At this stage, there is no bargain between the parties; the defendant continues to seek a mitigated sentence from a judge, but with a defined benefit set forth by the code, not given by the prosecutor. The adoption of the idea of guilty pleas may develop into “charge bargaining” in the future.<sup>9</sup>

### III. Discussion Regarding Proposed Provision

The RUU KUHAP (and the RUU KUHP) has been the subject of wide-ranging discussions among experts, criminal justice reform groups, and government officials for a number of years. During that time, there have been several academic articles and studies published regarding the proposed new “special path” in article 199 of the draft bill.

In one article, a legal academic discusses the need for increased efficiency in the Indonesian criminal justice system, compares the special path mechanism in the RUU KUHAP with plea bargaining in the United States, and recommends refinements to the mechanism.<sup>10</sup> He says that it is “undeniable” that United States plea bargaining inspired the drafting team in formulating the draft provision. However, he also states that the approaches are different, with the special path in the RUU KUHAP being better described as “pleas without bargains” or “admission of guilt without negotiation.”<sup>11</sup> He notes that the drafting team closes off the opportunity of agreement on sentences between the prosecutor and defendant, and that this was due to concerns about corruption. Instead, the process would take place in open court with the judge imposing the sentence on the defendant.<sup>12</sup> Also different from the US approach, the special path provision closes off its availability for cases involving serious crimes.<sup>13</sup> Having considered some ambiguities and concerns in relation to the provision as currently drafted, the author concludes that the

[s]pecial [path] offers an efficient procedure, as the defendant pleads to be guilty [sic] shall be prosecuted and put on trial in a short examination procedure. Short examination with one of the judges will maximize other judges to settle other cases. By elimination some evidentiary process [sic], [the] special [path] is considered to accelerate case handling, so that it can realize a fast, low cost and simple justice.

However, [the] special [path] setup using [a] short investigation procedure still needs to (1) eliminate ambiguity of procedures, (2) maximum [sic] threshold of punishment, and (3)

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<sup>9</sup> *Id.* at 229-30.

<sup>10</sup> Choky R. Ramadhan, *Peningkatan Efisiensi Peradilan Melalui Mekanisme Jalur Khusus dalam RUU KUHAP*, 1 Teropong 132 (Aug. 2014), <https://perma.cc/KZS6-4SF4>; Choky R. Ramadhan, *Justice Efficiency Improvement Through Special Line Mechanism in the Draft of Indonesian Criminal Procedure Law (RUU KUHAP)*, 2 Teropong (English edition) 87 (July-Dec. 2014), <https://perma.cc/Z7ZZ-GQTN>.

<sup>11</sup> *Id.* (English edition) at 93.

<sup>12</sup> *Id.* at 96.

<sup>13</sup> *Id.* at 97.

re-apply the provisions on evidence. Therefore criminal procedure law going forward may provide human rights protection as well as building justice efficiency.<sup>14</sup>

The same author published another article in which he describes several lessons from China's experience with implementing a "summary procedure," which the special path in the RUU KUHAP resembles.<sup>15</sup> He states that

[t]his special procedure was designed to alleviate great backlogs in Indonesian courts, where criminal procedure is normally cumbersome, there are few court resources, and there is minimal support for defendants. This special procedure will potentially increase efficiency because it is conducted by a single judge in a short trial procedure; however, the vagueness of its provision under the bill will also potentially create "latent regulations" or hidden systems that evade the law.<sup>16</sup>

In terms of the comparison with the Chinese summary procedure approach, the author notes that there are cultural similarities in the two countries as well as similarities between the two provisions, which justifies the need for Indonesian lawmakers to consider the approach and outcomes in China. He argues that "[w]hile the Chinese law increased efficiency in China, it lacked sufficient protections for defendants, and it resulted in an increased risk of false confessions and a reduction in access to defense counsel."<sup>17</sup> He therefore states that lawmakers should "advocate for a budget that provides for defense counsel, especially for poor defendants," and that the law should protect the right to a lawyer in the pretrial stage of a case.<sup>18</sup> Furthermore, he argues for the relevant provisions to be amended so that the RUU KUHAP clearly provides for "(1) strict time limitations that ensure increased efficiency for defendants; (2) a provision that makes the use of torture to gather evidence inadmissible; and (3) removal of legislative barriers to leniency in punishment."<sup>19</sup>

Another author also takes a comparative approach to the proposed special path provisions, examining plea bargaining concepts and procedures in the United States, Canada, England and Wales, India, Pakistan, Estonia, France, Georgia, Russia, Italy, and Poland.<sup>20</sup> In a separate article, he provides information regarding the shifting treatment of confessions or guilty pleas under the Dutch criminal law that applied in Indonesia and the 1981 KUHAP, as well as

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<sup>14</sup> *Id.* at 100.

<sup>15</sup> Ramadhan, *supra* note 2.

<sup>16</sup> *Id.* at 78-79.

<sup>17</sup> *Id.* at 81.

<sup>18</sup> *Id.* at 104.

<sup>19</sup> *Id.*

<sup>20</sup> Aby Maulana, *Konsep Pengakuan Bersalah Terdakwa Pada "Jalur Khusus" Menurut RUU KUHAP dan Perbandingannya Dengan Praktek Plea Bargaining Di Beberapa Negara [The Concept of Confession of Guilty by Defendant on the "Special Path" According to the Draft RUU KUHAP and Comparison with Practice of Plea Bargaining in Some Countries]*, 3(1) *Jurnal Cita Hukum* 39 (2015), <https://perma.cc/YK8G-2MZT>.

perspectives from Islamic law, and analyzes the proposed approach under article 199 of the RUU KUHAP in this context.<sup>21</sup>

In a thesis focused on prosecution rules and practices in Australia and Indonesia, a doctoral candidate also examines the special path proposal in the RUU KUHAP and compares it to plea bargaining in both common and civil law countries. He also recommends improvements to the proposed provisions, stating that

[t]he Indonesian current reform can be enhanced by ruling that prosecutor and accused discussions which have led to a guilty plea might potentially happen and the court needs to be fully informed about the discussions between them in order to enhance transparency. By doing this, the trial judge can examine a detailed report of the discussions between a prosecutor and an accused and be satisfied that a guilty plea has been made voluntarily. Furthermore, a trial judge should be able to properly assess the nature of the guilty plea so as to ensure that the innocent is not coerced into pleading guilty with the reward of lenient sentence.<sup>22</sup>

Another thesis examines article 199 in the RUU KUHAP in detail, including the concepts reflected in the proposed provision and the potential application of the new special path in the Indonesian criminal justice system.<sup>23</sup> It argues that the application of the system must be balanced with guaranteed protection of the rights of the accused, and that there is a need to develop standards by which judges assess the truth of defendants' guilty pleas.<sup>24</sup>

One commentator suggests that, in order to avoid acts of arbitrariness by law enforcement in the use of the special path mechanism, the implementation of the mechanism could be supervised by the head of the court and a special oversight body.<sup>25</sup> Another commentator also raises concerns about protections against involuntary confessions.<sup>26</sup> Similarly, a different article argues for supervision by the head of the district prosecutor's office, head of the high prosecutor's office, the

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<sup>21</sup> Aby Maulana, *Pengakuan Bersalah Terdakwa Dalam Perkembangan Pembuktian Peradilan Pidana Indonesia* [Recognition of the Guilty Defendant in the Development of Proof in Indonesian Criminal Justice], 13(2) *Varia Justia* 65 (Oct. 2017), <https://perma.cc/YK8G-2MZT>.

<sup>22</sup> Taufik Rachman, *Can the Indonesian Criminal Justice System be Enhanced by Replacing the Mandatory Prosecution System with a Discretionary One, Like That Used in Australia?* 190 (Mar. 2016) (Ph.D. thesis, Victoria University), <https://perma.cc/JY44-LDRJ>.

<sup>23</sup> Intan Khoirun Nisa', *Analisis Terhadap Penerapan Sistem Jalur Khusus (Plea Bargaining System) Dalam Sistem Peradilan Pidana Indonesia (Studi Terhadap Pasal 199 RUU KUHAP)* [Analysis of the Implementation of the Special Path System (Plea Bargaining System) in the Indonesian Criminal Justice System (Study on Article 199 RUU KUHAP)] 9-10 (2017) (Law Faculty, Universitas Muhammadiyah Malang), <https://perma.cc/78TT-RANE> (full thesis information available at Universitas Muhammadiyah Malang Institutional Repository, <https://perma.cc/32U8-UP3Y>).

<sup>24</sup> *Id.* at 105, <https://perma.cc/5UAX-ZMJS>.

<sup>25</sup> Rahmat Abdullah, *Politik Hukum Pidana Penerapan Jalur Khusus Dalam RUU KUHAP* [Politics of Criminal Law for the Application of the Special Path in the Draft RUU KUHAP], [rahmathajiabdullah.blogspot.com](http://rahmathajiabdullah.blogspot.com) (Oct. 24, 2015), <https://perma.cc/A2BV-R65M>.

<sup>26</sup> Ichsan Zikry, *Gagasan Plea Bargaining System Dalam RRUHAP dan Penerapan di Berbagai Negara* [The Idea of Plea Bargaining System in RRUHAP and Application in Various Countries], Lembaga Bantuan Hukum Jakarta, <https://perma.cc/2SNL-YQ3B>.

Attorney General, by nongovernmental organizations, and by communities (especially families of victims) in order to protect against corruption in the application of the new provisions.<sup>27</sup>

#### IV. Implementation Process

No information was located regarding plans or proposals with respect to the implementation of the RUU KUHAP, should it be passed by the DPR, such as training programs for actors in the criminal justice system or educating the public in relation to the new law. Government officials did give some indications in 2018 about approaches to implementing the RUU KUHP, including dissemination of the new code to law enforcement authorities, civil organizations, and the public during a proposed three-year transition period.<sup>28</sup> There was no specific reference to the inclusion of the RUU KUHAP in such processes.

The current KUHAP is accompanied by guidance in the form of a 1983 government regulation concerning its implementation, which was amended in 2010 and 2015.<sup>29</sup> It seems likely that similar regulatory guidance will be issued with respect to the new KUHAP, including the special path available under article 199.

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<sup>27</sup> Yunizar Wahyu Trisanto, *Tinjauan Yuridis Penerapan Plea Bargaining Untuk Meningkatkan Efisiensi Peradilan di Indonesia* [Judicial Review of the Application of Plea Bargaining to Improve Judicial Efficiency in Indonesia], 6(2) AHKAM 411, 433 (Nov. 2018), <https://perma.cc/J3YY-BTK5>.

<sup>28</sup> *Exclusive: 'We Are Not a Liberal Country', Says Head KUHP Drafter*, Jakarta Post (Mar. 17, 2018), <https://perma.cc/2GRN-LZNY>.

<sup>29</sup> *See Pelaksanaan Kitab Undang-Undang Hukum Acara Pidana*, Database Peraturan, JDIH BPK RI, <https://perma.cc/V6J8-MCPY>.

# Malaysia

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**SUMMARY** A formal plea bargaining process was added to Malaysia's Criminal Procedure Code in 2010, with the provisions coming into force in mid-2012. Prior to this, it appears that charge bargaining occurred in an unregulated manner. Under the current provisions, a defendant must submit a request for plea bargaining to the court using the form provided in the Code. Following a brief court appearance, the prosecution and defense can proceed to agree upon a satisfactory disposition of the case. This can include plea bargaining of the charge or of the sentence. The court will then consider the agreement and dispose of the case in accordance with the relevant provision in the Code, which includes the ability to sentence the defendant to not more than half of the maximum punishment of imprisonment for the offense. Such a sentence is not available, however, where the case involves a sexually related offense, an offense that is subject to life imprisonment, an offense committed against a child under twelve years old, or where, in the case of a serious offense, the defendant has had a previous conviction for a similar offense.

The 2010 provisions were intended to assist in addressing the backlog of cases before Malaysian courts and to enhance the efficiency of the criminal justice system. In addition to the amendments, the chief justice had previously instituted various judicial reforms, including the introduction of automated case management and tracking systems. In recent years, the court backlog has largely been eliminated. However, there are no statistics or studies available that show how the plea bargaining provisions have impacted this or improved efficiencies more broadly.

Some commentators have raised concerns about the potential negative impact of the provisions in terms of the rights of the accused and the protection of victims' interests. In addition, one study found that judges may be underutilizing the provisions, possibly due to a lack of understanding, or may be reverting to previous practices with respect to plea bargaining.

## I. Introduction

Malaysia introduced a formal plea bargaining process into its Criminal Procedure Code (CPC) through amendments passed in 2010, which also included other pretrial processes.<sup>1</sup> The relevant provisions came into force in June 2012.<sup>2</sup> Prior to these amendments, it appears that some form

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<sup>1</sup> Criminal Procedure Code (Amendment) Act 2010 (Act A1378), copy of relevant bill at <https://perma.cc/36ZK-AAPY>, amended by Criminal Procedure Code (Amendment) Act 2010 (Amendment) 2012 (Act A1422), <https://perma.cc/2D8P-ZFW5>. See also Connie Johnson, *Malaysia: New Provisions on Plea Bargaining to Come into Force*, *Global Legal Monitor* (Dec. 23, 2010), <https://perma.cc/BXW3-ZGWB>.

<sup>2</sup> Criminal Procedure Code (Act 593), at 345, <https://perma.cc/M3QY-SMFZ>.

of plea bargaining, namely charge bargaining, did take place in Malaysia. One commentator stated that this practice was quite common in drug cases, where a defendant's lawyer would write a letter to the Attorney General's office seeking a reduction of the charge, to which the defendant would plead guilty.<sup>3</sup> The judge in the case would not know that a plea bargain had taken place.<sup>4</sup> Other authors also note that plea bargaining "had taken place since the early introduction of the civil court system, yet without proper guidelines and procedures."<sup>5</sup>

A leading case prior to the amendments was *New Tuck Shen v. Public Prosecutor* (1982), in which the judge stated that

[t]his court does not consider it bound by the private bargaining between the prosecution and the defence in respect of which bargaining it is not a party and in which it has been judicially prohibited to participate. The right to impose punishment on a guilty party is absolutely the discretion of the court. It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right.

An agreement between the prosecution and the defence as to the nature of sentence to be imposed on the accused creates no obligation on the court and is good only for pricking the conscience of the defaulting party.<sup>6</sup>

One legal commentator states that the 2010 amendments

embody Parliament's spirit of resolving the backlog of cases and promoting speedy trials in line with the Malaysian Government Transformation Programme. Further, the 2010 Amendments were also spurred by the then Chief Justice Tun Zaki Azmi's initiative to deliver justice more expeditiously.<sup>7</sup>

The 2016 yearbook of the Malaysian Judiciary states that

[t]he plea bargaining process was introduced to speed up the disposal of criminal cases. Both the accused and the prosecution could resolve their case the best way possible without the need to having a lengthy trial. On the same note, criminal trial [sic] could be expedited with the introduction of pre-trial conference and case management. Through

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<sup>3</sup> Srimurugan, *Importing the Concept of Plea Bargaining into the Criminal Procedure Code in Malaysia*, 5 CLJ xxix, xl (2010), <https://perma.cc/7TPW-ZHBU>.

<sup>4</sup> Abdul Razak Bin Haji Mohamad Hassan, *The Administration of Criminal Justice in Malaysia: The Role and Function of the Prosecution* 254 (U.N. Asia and Far East Inst., 107th Int. Training Course, Resource Material Series No. 53, 1997), <https://perma.cc/3RLY-9FSU>.

<sup>5</sup> Siti Nuramani binti Abdul Manab et al., *Plea Bargaining Process in Malaysia* 261 (Eur. Proc. of Soc. & Behav. Sci., UUMILC 2017), <https://perma.cc/Y675-XNBH>.

<sup>6</sup> *New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27; [1982] CLJ 38 (HC), quoted in Roger Tan, *A Bargain for Justice*, Loyar Burok (Dec. 19, 2010), <https://perma.cc/3L9H-Z4TP>.

<sup>7</sup> Rachel Ng Li Hui, *The Inception of Pre-Trial Processes: Closing Legal Loopholes or Opening Pandora's Box*, Lex; In Breve, UMLR (Oct. 23, 2018), <https://perma.cc/H7C8-6B6A>.

these procedures, commonly used in civil proceedings, the factual and legal issues could be agreed upon by the parties before the commencement of the trial.<sup>8</sup>

## II. Plea Bargaining Provisions in the Criminal Procedure Code

The plea bargaining provisions in the amended CPC, primarily contained in sections 172C and 172D, include both charge bargaining and sentence bargaining. The provisions state as follows:

### **Plea bargaining**

172C. (1) An accused charged with an offence and claims to be tried may make an application for plea bargaining in the Court in which the offence is to be tried.

(2) The application under subsection (1) shall be in Form 28A of the Second Schedule and shall contain –

- (a) a brief description of the offence that the accused is charged with;
- (b) a declaration by the accused stating that the application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and
- (c) information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.

(3) Upon receiving an application made under subsection (1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.

(4) When the Public Prosecutor and the accused appear on the date fixed for the hearing of the application under subsection (3), the Court shall examine the accused in camera –

- (a) where the accused is unrepresented, in the absence of the Public Prosecutor; or
- (b) where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor, as to whether the accused has made the application voluntarily.

(5) Upon the Court being satisfied that the accused has made the application voluntarily, the Public Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.

(6) If the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.

(7) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.

(8) In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with the provisions of the Code.

(9) In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.

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<sup>8</sup> The Malaysian Judiciary, *Yearbook 2016*, at 149 (2016), <https://perma.cc/9AYT-5HTV>.

### Disposal of the case

172D. (1) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor under section 172C, the Court shall, in accordance with law, dispose of the case in the following manner:

- (a) make any order under section 426; and
- (b) where the satisfactory disposition is in relation to a plea bargaining of the charge, find the accused guilty on the charge agreed upon in the satisfactory disposition and sentence the accused accordingly; or
- (c) where the satisfactory disposition is in relation to a plea bargaining of the sentence, find the accused guilty on the charge and –
  - (i) deal with the accused under section 293 or 294; or
  - (ii) Subject to subsections (2) and (3), sentence the accused to not more than half of the maximum punishment of imprisonment provided under the law for the offence for which the accused has been convicted.

(2) Where there is a minimum term of imprisonment provided under the law for the offence, no accused shall be sentenced to a lesser term of imprisonment than that of the minimum term.

(3) Subparagraph (1)(c)(ii) shall not apply where –

- (a) in the case of a serious offence, the accused has a previous conviction for a related or same offence; or
- (b) where the offence for which the accused is charged with falls within the following:
  - (i) an offence for which the punishment provided under the law is fine only;
  - (ii) an offence for which the punishment provided under the law is imprisonment for natural life;
  - (iii) any sexual related offence;
  - (iv) any offence committed against a child who is below twelve years of age; or
  - (v) any other offence as may be specified by the Public Prosecutor by order published in the Gazette.

(4) For the purpose of paragraph (3)(a), “serious offence” means an offence where the maximum term of imprisonment that can be imposed is not less than ten years, and includes any attempt or abetment to commit such offence.<sup>9</sup>

In addition, section 172E provides that where an accused has pleaded guilty and been convicted under section 172D, “there shall be no appeal except to the extent and legality of the sentence.”

The provisions referred to in subsection 172D(1) relate to orders for the payment of the costs of prosecution and of victim compensation (section 426), and to the treatment of youthful offenders (section 293) and first offenders (section 294).

As indicated in subsection 172C(2), the CPC contains, in its second schedule, a form (Form 28A) that must be completed by the accused in order to apply for plea bargaining. The form is submitted to the court and the prosecutor is informed of the application.

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<sup>9</sup> Criminal Procedure Code (Act 593), ss 172C & 172D.

### III. Development and Implementation of the Provisions

#### A. Reform Programs

In 2008, with the appointment of a new chief justice, the Malaysian judiciary commenced a reform program aimed at reducing case backlogs and increasing the efficiency of the country's courts. This involved the introduction of various tools and approaches within the court system, including automated case management and tracking systems and the creation of specialized courts.<sup>10</sup> Additional reform programs aimed at enhancing efficiency in the justice system, initiated by the government, involved crime prevention initiatives and corruption reduction efforts.<sup>11</sup> At the same time, a government working committee was considering the introduction of plea bargaining and other pretrial processes through amendments to the CPC. The committee included representatives from the Attorney General's Office, courts, Insolvency Department, Legal Aid Bureau, Finance Ministry, and Bar Council.<sup>12</sup>

According to a news article published in 2012, the Bar Council president stated that the Attorney General had proposed the date of June 1 that year for the implementation of the 2010 CPC amendments (and amendments to the Evidence Act), "subject to confirmation from the Bar and the judiciary that all systems are go for the implementation of the amended CPC."<sup>13</sup> He stated that the Bar was ready for the amendments to come into force and that the process of consultation in developing the amendments was thorough, "with all stakeholders given ample time to draft, discuss and debate the proposals."<sup>14</sup>

However, according to one lawyer who wrote about the 2010 amendments in early 2011, the public had not been informed of the passage of the legislation and

must be shocked on learning the fact that the Bar Council had been negotiating or debating about the plea bargaining and was a party to it long before the amendments were introduced in Parliament and duly approved. It is rather odd that such an innovation had been kept away from the scrutiny of the public; for, had it been made public, there would have been representations on the pros and cons on the amendment as it is the public who are directly affected by the crimes that are committed, and they have an interest in the matter of punishment – whether it be severe or lenient.<sup>15</sup>

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<sup>10</sup> World Bank, *Poverty Reduction and Economic Management Sector Unit East Asia and Pacific Region, Malaysia: Court Backlog and Delay Reduction Program – A Progress Report ii-iii* (Aug. 2011), <https://perma.cc/V8HQ-R44A>. See also Speech, Inst. of Advanced Legal Stud., Justice Azahar bin Mohamed, *Court Reform Programmes: The Malaysian Experience* (Dec. 1, 2015), <https://perma.cc/JC65-VWUH>; Malaysian Judiciary, *supra* note 8, at 149.

<sup>11</sup> World Bank, *supra* note 10, at v.

<sup>12</sup> Malia Afzan, *The Case for Plea Bargaining in Malaysia*, Asian-Counsel (date unknown), <https://perma.cc/P8FX-KCN6>; *Government Ready to Consider Plea Bargaining in Criminal Cases*, Bernama (Oct. 23, 2008), <https://perma.cc/EC5J-EQX4>.

<sup>13</sup> Pauline Wong, *Half Time for Crimes*, Sun Daily (Apr. 2, 2012), <https://perma.cc/E3HJ-8GSR>.

<sup>14</sup> *Id.*

<sup>15</sup> K. Sildass, *Plea Bargaining and the Hidden Dangers*, Lim Kit Siang (Jan. 14, 2011), <https://perma.cc/7SNQ-632B>.

## B. Judicial Guidance

In a judgment delivered following the passage of the 2010 amendments, but before they came into force, the Court of Appeal set out guidelines for the participation of trial judges in the plea bargaining process.<sup>16</sup> The chief justice stated that,

[i]n England, public policy has over the years departed from *R v. Turner* and shifted towards accepting plea bargaining. In Malaysia, public policy on plea bargaining has also shifted towards the same direction. The recent amendments to the Criminal Procedure Code indicates Parliament's intention in respect of plea bargaining. The new ss. 172C to 172F of the Criminal Procedure Code (Amendment) Act 2010, though yet to be put into force, clearly seeks to formalize the process of plea bargaining in this country.

The time has come for our courts to depart from *New Tuck Shen v. PP*. Consequently, and subject to proper guidelines, the presiding judge or magistrate should now be free to indicate the maximum sentence he is minded to impose where the accused person or his counsel sought an indication of his current view of the sentence which would be imposed on the accused.<sup>17</sup>

The principles to be applied in light of the amendments were set out as being the following:

1. Request for plea bargaining must come from the accused person;
2. If the application is made by a counsel representing an accused, the counsel must obtain a written authority signed by the accused affirming that the accused wishes to plea bargain on the sentence;
3. The prosecution must promptly react to the request, and the plea bargaining agreement must state the minimum and maximum sentence acceptable to them;
4. The plea bargaining agreement must be placed before the court so that the court will impose a sentence within the acceptable range;
5. If the court disagrees with the sentence proposed, it must so inform the parties, and the parties may decide on the next move; and
6. The process must be done transparently and be recorded, and the notes will form a part of the notes of proceedings.<sup>18</sup>

It appears that these guidelines have subsequently been applied by Malaysian courts when considering plea bargaining cases.<sup>19</sup>

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<sup>16</sup> V. Anbalagan, *New Rules for Judges to Have Say in Plea Bargain*, *New Straits Times* (Oct. 1, 2011), <https://perma.cc/5J8X-D9G7>.

<sup>17</sup> *Public Prosecutor v. Manimaran Manickam* [2011] 6 MLJ 534; [2011] 8 CLJ 439 (CA), para. 3, quoted in CLJ Bull. (July 12, 2013), <https://perma.cc/PWZ7-HXY8>.

<sup>18</sup> Ng Li Hui, *supra* note 7. See also Norjihhan Ab Aziz et al., *Enhancing Plea Bargaining Through Mediation*, 3(7) *Int'l e-J. of Advances in Soc. Sci.* 306, 309 (Apr. 2017), <https://perma.cc/6GRV-KJS5>.

<sup>19</sup> See, e.g., *Public Prosecutor v. Azizol bin Aisha*, Crim. App. No. K-05(S)-107-04/2015 (CA), <https://perma.cc/JH5B-3PB6>; *Tan Hooi Chang v. Prosecutors*, Crim. App. No. W-09-102-04/2012 (CA), <https://perma.cc/4Z4J-NDUH>.

### C. Use of the Provisions in Practice

A 2019 paper on a study that examined “the reality of the role of judges in the plea-bargaining process at the pre-trial stage” included the following findings:

- Judges perceived the law that introduced the new plea bargaining process as being a positive change and stated that the need for a well-regulated plea bargaining process was imperative.
  - Judges perceived that the courts have limited power in controlling the new procedures related to the plea bargaining application by a defendant. They believed that it is up to the parties to decide whether to use the old practice or the new procedures.
  - Judges were aware that the law now places restrictions on the court in terms of the outcome of the plea bargaining process, primarily in terms of imposing sentences that judges see fit. They also felt that the CPC limits the possibilities of imposing alternative sentences, such as bonds of good behavior and community service, compared to the old processes.
  - Judges are not concerned about the use of the old practices with respect to plea bargaining, and in fact some perceive such practices to be speedier than the new procedures in the CPC.
  - Some judges have actively encouraged prosecutors and defense lawyers to plea bargain.<sup>20</sup>
- The authors of the study state that “[i]t seems that judges might have misinterpreted the CPC provisions which consequently led to the preference for the old practice and the under-utilisation of the new procedures.”<sup>21</sup> They concluded that

the findings of this study indicate that in administering justice to the parties in this pre-trial process, several issues confront the judiciary. Judges face problems stemming from their own perception and misunderstanding of the law and their sentencing powers under the CPC, which makes the new plea-bargaining process unappealing to them. Consequently, judges have either reverted to the old practice or imposed on the parties their terms of disposing of the case through judge-prompted plea-bargain. These findings have significant implications for the judiciary who should evaluate their existing role in dealing with any plea-bargaining application.<sup>22</sup>

### IV. Impact of the Provisions

According to one article, published in 2018,

[w]ith the advent of the 2010 Amendments, criminal trials were shown to be conducted more expediently. For instance, the 2010 Amendments have rendered the disposal of the backlog of pre-2010 criminal cases across Malaysian Courts to almost 100%, that is, from 3414 cases to two cases.<sup>[23]</sup> Nonetheless, the implementation of the 2010 Amendments were

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<sup>20</sup> Zaiton Hamin & Ahmad Ridhwan Abd Rani, *Negotiating for Justice: Judge’s Perception of the Plea-Bargaining Process in Malaysia*, 7(1) *Global J. Bus. Soc. Sci. Rev.* 27, 29-30 (2019), <https://perma.cc/JNF7-98VA>.

<sup>21</sup> *Id.* at 30.

<sup>22</sup> *Id.* at 31.

<sup>23</sup> See Qishin Tariq, *CJ: Disposal of Backlog Cases “Largely Encouraging,”* Star Online (June 11, 2014), <https://perma.cc/6DEL-98PK>.

not spared from questions and scrutiny. Does having a seemingly more efficient criminal justice system chisel away the rights of the accused and the victims? Does the formalisation of pre-trial processes inadvertently calcify some harms to the Parties Concerned? Even worse, do the 2010 Amendments instead cause more problems to the Parties Concerned as compared to the pre-2010 era?<sup>24</sup>

However, it is unclear what share of the impact the CPC amendments, including plea bargaining and other pretrial processes, have had with respect to backlog reduction and speeding up court processes as compared to the judicial reform initiative and other government reform efforts referred to above. A 2017 news article stated that, under the judicial reform initiative, “up to 95 per cent of the backlog of criminal and civil cases nationwide were cleared within a 9-to-12-month period set by the Justice Ministry.”<sup>25</sup> The chief justice stated that this was achieved following “a directive given to the courts to settle at least 90 backlog cases per month.”<sup>26</sup> No specific statistics were located with respect to the use of plea bargaining and no studies have assessed the impact of the 2010 changes to the CPC.<sup>27</sup>

As indicated in the above quotation, some academics have raised questions about the potential negative impacts of the plea bargaining provisions. For example, one commentator, who wrote about the provisions following their passage but prior to their coming into force, identified concerns with respect to the removal of judicial discretion in sentencing and the possibility that sentencing under the provisions may be too lenient, as well as the risk of corruption or abuse, such as where an innocent accused cannot afford a lawyer or does not want to risk a longer term of imprisonment.<sup>28</sup>

Another commentator, writing in 2018, identified both the advantages and disadvantages of the new provisions and the pre-2010 approach. She concluded that, despite concerns about the rights of the accused and disproportionate punishments, the plea bargaining provisions in the CPC offer greater benefits to those involved in the criminal justice system (including courts, defendants, and victims) as compared to the prior situation.<sup>29</sup>

One group of authors has concluded that certain weaknesses in the plea bargaining system could be overcome by utilizing mediation in the pretrial processes, such as occurs under the criminal case resolution process in Singapore. They consider that

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<sup>24</sup> Ng Li Hui, *supra* note 7.

<sup>25</sup> Embum Majid, *Judiciary Reform Initiative Has Cleared Criminal, Civil Case Backlog: Chief Justice*, New Straits Times (May 25, 2017), <https://perma.cc/Q3X4-GAFA>.

<sup>26</sup> *Id.*

<sup>27</sup> For example, statistics with respect to how cases are disposed of, including the use of plea bargaining, are not included in the judiciary’s monthly case statistics. *Statistics*, Office of the Chief Registrar, Federal Court of Malaysia, <https://perma.cc/AW2Z-TSH5>. Such figures are also not included in the judiciary’s yearbooks. *Annual Report of Judiciary*, Office of the Chief Registrar, Federal Court of Malaysia, <https://perma.cc/QSA8-HNB6>.

<sup>28</sup> Tan, *supra* note 6.

<sup>29</sup> Ng Li Hui, *supra* note 7.

[i]f the case cannot be resolved in the plea bargaining process, a mediator can hear the fact of the case, the disputed issues and facilitate the prosecutor and the accused to reach an agreement by giving a sentence indication or sentence the accused within the range agreed with the prosecutor and the accused. Hence, if the power of the Court in Malaysia is extended to act as a mediator, so that criminal cases, if unable to be resolved at plea bargaining process shall be referred to the mediator before proceeding to another Court for trial. However, litigation is still necessary if other criminal dispute resolution mechanisms do not resolve the criminal case.<sup>30</sup>

Another group of academics has produced papers related to protections for victims in the context of plea bargaining in Malaysia, with a specific focus on female crime victims. They conclude that

[i]t is apparent that the legal protection for victims of crimes within the plea-bargaining process in Malaysia is rather non-existent. Despite certain advantages of the process to the prosecutors and the offenders, the same may not be the case for the victims of crimes. The plea-bargaining process has completely taken the victims away from the criminal justice system and would seem to trample on the very interests that the criminal justice system aims to protect, which is public interest and the interests of crime victims. The impact of the plea bargaining process on female victims of crimes is even worse as the process is deemed to neglect the interests of such victims. Such a case may occur in sexual offences in which female victims would most likely be physically hurt, psychologically traumatized and emotionally abused. In reforming the said process, it is recommended that such changes should significantly support such victims to heal and seek solace as well as reconciliation. Finally, such reform should create a legal culture that revolves around restorative justice, which seeks not only to restore the gendered harm to such victims but also to give voice to these marginalized victims through the ethos of victim reparation, offender responsibility, and communities of care. The experiences in other jurisdictions such as the USA, the UK and Australia on the plea-bargaining process and victims' protection in such process might prove to be invaluable lessons for Malaysia to learn. Future research on the similar legal positions to protect victims' rights in Malaysia and those jurisdictions would be vital to shine a light on such issue.<sup>31</sup>

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<sup>30</sup> Norjihhan Ab Aziz et al., *supra* note 18.

<sup>31</sup> Zaiton Hamin et al., *Whither the Protection for Crime Victims in the Negotiated Justice Process?* 569 (Eur. Proc. of Soc. & Behav. Sci., UUMILC 2017), <https://perma.cc/MM3P-CMCY>. See also Zaiton Hamin et al., *Negotiated Justice and the Female Victims of Crime, Whither the Protection?* 241-51 (1st Int. Conf. on Women & Children: Legal & Soc. Issues, Oct. 17-18, 2016), <https://perma.cc/WYM7-JAKY>.

# Nigeria

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**SUMMARY** In Nigeria, the federal and state governments share legislative competence relating to criminal justice issues. Plea bargaining was initially introduced through federal legislation, the Economic and Financial Crime Commission (Establishment) Act of 2004 (EFCC Act). The inclusion of the provision on plea bargaining was largely billed as an attempt to relieve congestion in the courts.

The use of plea bargaining was limited to crimes charged under the EFCC Act. The implementation of the practice, particularly immediately after enactment of the 2004 EFCC Act, was unpopular in Nigeria. This was largely due to the fact that it accorded the Financial Crimes Commission wide discretion to use the practice without much guidance, and this led to its use almost exclusively to deal with high-profile corruption cases in which offenders were given sentences that, at least in the perception of the public, were not commensurate with the crimes they allegedly committed. In addition, the conviction rate of cases prosecuted by the Commission remained very small and presumably not enough to help relieve courts from congestion.

In 2010, Nigeria sought to improve the implementation of the practice by issuing regulations curbing the discretion of prosecutors and providing guidance on the implementation of the practice. It is unclear how effective this adjustment was in improving the efficiency of the Commission or in swaying public opinion.

In 2015, the federal government enacted the Administration of Criminal Justice Act, authorizing a broad use of plea bargaining for all crimes charged under federal law. The Act provides strict rules limiting the powers of prosecutors to conclude plea bargain agreements, accords defendants protection against the violation of their constitutional rights, and guarantees victims a seat at the plea bargaining table. To ensure adherence to its provisions, the Act makes all plea bargain agreements subject to judicial review. While the 2015 Act sought to correct many of the shortcomings of the EFCC Act, its initial application, much like the EFCC Act, reportedly focused heavily on high-profile corruption cases.

At the subnational level, Lagos was the first to introduce the practice of plea bargaining through the enactment of the 2007 Administration of Criminal Justice Law. Since then, at least nine other states in the Federation are said to have enacted similar law or are in the process of doing so. This report does not cover state-level initiatives to implement plea bargaining; it is limited to the adoption and implementation of the practice at the federal level.

## I. Introduction

With an estimated population of around 187 million, Nigeria is by far the most populous country in Africa.<sup>1</sup> A federation, Nigeria has a three-tiered government structure that includes the federal government, 36 states,<sup>2</sup> and a federal capital (Abuja), as well as 768 local government areas within the states.<sup>3</sup> Legislative power is shared by the federal and state governments. The Constitution accords legislative authority to the federal National Assembly and state Houses of Assembly on various issues and defines this power by providing a list of exclusive and shared legislative competencies.<sup>4</sup> Issues relating to matters of criminal justice are not an exclusive competence of the federal government; states may enact laws on criminal justice matters, including on plea bargaining.<sup>5</sup>

The practice of plea-bargaining appears to be gaining traction in Nigeria both at the federal and state levels. Plea bargaining is relatively new to the Nigerian criminal justice system. The practice was, as Nigeria's former Chief Justice of the Supreme Court put it, "surreptitiously smuggled into" Nigeria in 2004 through federal legislation, the Economic and Financial Crimes Commission (Establishment) Act (EFCC Act) (see Part IV below).<sup>6</sup> More recently, the Nigerian government introduced a broader application of the practice of plea bargaining at the federal level through the enactment of the Administration of the Criminal Justice Act of 2015.

At the subnational level, Lagos State became the first of the 36 states in the Federation to import the practice in 2007, through enactment of its Administration of Criminal Justice Law.<sup>7</sup> By 2017,

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<sup>1</sup> Nigeria, United Nations Data, <https://perma.cc/MS99-FFJC>.

<sup>2</sup> These are: Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe, and Zamfara. Constitution of Nigeria (1999), § 3(1), available on the International Centre for Nigerian Law (ICFNL) website, <https://perma.cc/8UMY-M47D>.

<sup>3</sup> Id.

<sup>4</sup> Id. § 4.

<sup>5</sup> Constitution of Nigeria § 4; Bayo Adetomiwa, *Nigeria: The Concept of Plea Bargaining in Nigeria* (Nov. 9, 2018), <https://perma.cc/Q9DH-GKY6>.

<sup>6</sup> Oguce Samuel, *Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination against Punishment or Mere Expediency?*, in *Plea Bargaining in Nigeria: Law and Practice* 87, 120 (Epihany Azinge & Laura Ani eds., 2012); Chinwe A. Mordi, *The Use of Plea Bargain in Nigerian Criminal Law*, 9 Beijing L. Rev. 153 (2018), <https://perma.cc/3KZ8-5TB3>.

<sup>7</sup> Samuel, *supra* note 6, at 120; Administration of Criminal Justice Law No. 10 of 2007, 41(21) Supplement to Lagos State of Nigeria Official Gazette Extraordinary (Mar. 20, 2008). This Law was later repealed and replaced by the Administration of Criminal Justice (Repeal and Re-enactment) Law No. 10 of 2011, § 370, 44(32) Lagos State of Nigeria Official Gazette (Aug. 17, 2011).

at least nine of the 36 states in the union had adopted or were in the process of adopting the Lagos State or the federal model.<sup>8</sup>

This report focuses on the incorporation of the practice of plea bargaining at the federal level.

## II. Economic and Financial Crimes Commission (Establishment, etc.) Act

As noted above, the concept of plea bargaining was first introduced in Nigeria through the 2004 EFCC Act, the relevant provision of which stated as follows:

Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any persons in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, [not] exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.<sup>9</sup>

Although limited in application to an offense charged under the provisions of the EFCC Act, this provision permitted the Commission to “let go of the offence or put more succinctly may agree to drop the charges if the accused is prepared to give up such sums of money as the Commission may deem fit in accordance with the Act.”<sup>10</sup>

One of the key criticisms of the above provision was that it failed to provide guidelines, and this accorded the Commission too much discretion. One source described this challenge as follows:

First, it does not provide any definite guidelines as to the basis for adopting the procedure under section 14(2) of the EFCC Act. It is left at the discretion of the Commission. It is submitted that the discretion is too wide and could be open to abuse [sic]. Second, the aspect of the same provision which empowers the commission to accept any sum of money “As it thinks fits, not exceeding the maximum amount to which that person would have been liable if he had been convicted under the Act” is a blanket cheque to the officers for so much stolen in exchange of secret gratifications.<sup>11</sup>

By 2010, Nigeria sought to tighten plea-bargaining rules and provide general guidance. In September of that year, Mohammed Bello Adoke, the country’s Attorney-General and Minister of Justice, issued the Economic and Financial Crimes Commission (Enforcement) Regulations. Part VII of the Regulations deals with plea bargaining. The Regulations bar members of the Commission from engaging in plea-bargain discussions and agreements with defendants without

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<sup>8</sup> Fatima Waziri Azi, *Compliance to the Administration of Criminal Justice Act, 2015 in Prosecuting High Profile Corruption Cases in Nigeria* (2015 – 2017), 5(2) J. L. Crim. Just. 113, 114 (Dec. 2017), <https://perma.cc/YAT4-N9MP>.

<sup>9</sup> Economic and Financial Crimes Commission (Establishment, etc.) Act No. 1 of 2004 (June 4, 2004), <https://perma.cc/H4VJ-BZL5>.

<sup>10</sup> Samuel, *supra* note 6, at 121.

<sup>11</sup> Ted. C. Eze & Eze Amaka G., *A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria*, 3(4) Global J. Pol. & L. Res. 33, 38 (2015), <https://perma.cc/2BTG-K3ZF>.

the prior knowledge and subsequent approval of the country's Attorney-General.<sup>12</sup> If a defendant in a criminal matter is likely to agree to a plea deal on a lesser charge, the Commission must, before commencing a plea bargain agreement,

- a. Be satisfied that the plea bargain will enable the court to pass a sentence that matches the seriousness of the offence taking into account other aggravating features; [and]
- b. Consider the public interest and in particular the interest of the victim of the offence, if any.<sup>13</sup>

The Regulations also provide that a plea bargain agreement must be in writing and must be signed by both parties.<sup>14</sup> In addition, it must list all the charges and include a statement of all the facts, as well as a signed declaration of the defendant stipulating to the facts and admitting guilt.<sup>15</sup> When the Commission sends a draft plea agreement to the Attorney-General's office for approval, the package must include

- (a) the signed plea agreement;
- (b) a joint submission as to the sentence and sentencing considerations;
- (c) any relevant sentencing guidelines or authorities;
- (d) all of the material provide by the Commission to the accused in the course of the plea discussions;
- (e) any material provided by the accused to the Commission; and
- (f) the minutes of any meetings between the parties and any correspondence generated in the plea discussions.<sup>16</sup>

### III. Administration of Criminal Justice Act

In 2015, Nigeria adopted a law for broader application of the concept of plea bargaining. Under the new law, a plea bargain is defined as

the process in criminal proceedings whereby the defendant and the prosecution work out a mutually acceptable disposition of the case; including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformity with other conditions imposed by the prosecution, in return for a lighter sentence than that for the higher charge subject to the Court's approval.<sup>17</sup>

The Act authorizes the prosecution to offer or accept a plea agreement from a defendant facing any criminal charges, so long as "the Prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent

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<sup>12</sup> Economic and Financial Crimes Commission (Enforcement) Regulations, S.I. No. 39 of 2010, § 22 (Sept. 20, 2010).

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Administration of Criminal Justice Act § 494(1) (May 13, 2015), <https://perma.cc/AH2P-EFA2>.

abuse of legal process.”<sup>18</sup> The prosecutor may enter into a plea agreement before, during, or after “the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence.”<sup>19</sup>

The prosecution’s power to negotiate and conclude a plea-bargain agreement is by no means a blank check. The authority to engage in plea bargaining is limited to instances where all the following conditions are met:

- (a) the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt;
- (b) where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative, or
- (c) where the defendant in a case of conspiracy has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders.<sup>20</sup>

In addition, the prosecution may negotiate and conclude a plea-bargain agreement only after having consulted the police who investigated the case and giving “due regard to the nature of and circumstances relating to the offence, the defendant and public interest.”<sup>21</sup> In determining whether a plea-bargain agreement is in the public interest, the prosecutor must consider all relevant factors, including

- (i) the defendant’s willingness to cooperate in the investigation or prosecution of others;
- (ii) the defendant’s history with respect to criminal activity;
- (iii) the defendant’s remorse or contrition and his willingness to assume responsibility for his conduct;
- (iv) the desirability of prompt and certain disposition of the case;
- (v) the likelihood of obtaining a conviction at trial and the probable effect on witnesses;
- (vi) the probable sentence or other consequences if the defendant is convicted;
- (vii) the need to avoid delay in the disposition of other pending cases; . . .
- (viii) the expense of trial and appeal[; and]
- (ix) the defendant’s willingness to make restitution or pay compensation to the victim where appropriate.<sup>22</sup>

The Act accords the victim of the crime an important place in the discussion, conclusion, and execution of a plea-bargain agreement, stating that the “prosecution may enter into plea bargaining with the defendant, with the consent of the victim.”<sup>23</sup> While the victim’s consent may not be a condition precedent to the process, prior consultation with the victim is a mandatory

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<sup>18</sup> Id. § 270(1) & (3); Waziri Azi, *supra* note 8, at 117.

<sup>19</sup> Administration of Criminal Justice Act § 270(2) & (4).

<sup>20</sup> Id.

<sup>21</sup> Id. § 270(5).

<sup>22</sup> Id.

<sup>23</sup> Id. § 270(2).

element of executing a valid plea agreement.<sup>24</sup> Specifically, the prosecution must allow the victim to make representations relating to “the content of the agreement . . . and . . . the inclusion in the agreement of a compensation or restitution order.”<sup>25</sup> As noted above, the defendant’s willingness to make restitution to the victim is also mandatory. Once the court has approved a plea agreement, it must issue an order “that any money, asset or property agreed to be forfeited under the plea bargain shall be transferred to and vest in the victim or his representative or any other person as may be appropriate or reasonably feasible.”<sup>26</sup> The prosecutor must take reasonable steps to ensure that any money, assets, or property agreed to be forfeited or returned by the offender under a plea bargain are transferred to or vested in the victim, his representative, or other person lawfully entitled to it.<sup>27</sup>

The Act provides that the terms of the plea agreement may include a sentencing recommendation:

The prosecutor and the defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of:

- (a) the term of the plea bargain which may include the sentence recommended within the appropriate range of punishment stipulated for the offence or a plea of guilty by the defendant to the offence(s) charged or a lesser offence of which he may be convicted on the charge; and
- (b) an appropriate sentence to be imposed by the court where the defendant is convicted of the offence to which he intends to plead guilty.<sup>28</sup>

The plea agreement must be in writing and must include certain key points. It must include express language stating that the defendant has been informed of his rights—specifically, the right to remain silent and the significance of failing to do so, and the right against self-incrimination.<sup>29</sup> It must also fully incorporate all the terms of the agreement and all admissions made by the defendant.<sup>30</sup> In addition, it must be signed by both parties to the agreement and the defendant’s counsel or interpreter, if any.<sup>31</sup> Further, a copy of the agreement must be submitted to the office of the Attorney-General of the Federation.<sup>32</sup>

Once concluded, a plea bargain is subject to judicial review to verify that the agreement does not violate the rights of the defendant. The court before which the charges against the defendant are pending does not play a role in the conclusion of the plea agreement.<sup>33</sup> However, once an

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<sup>24</sup> Id. § 270(5).

<sup>25</sup> Id. § 270(6).

<sup>26</sup> Id. § 270(12).

<sup>27</sup> Id. § 270(13).

<sup>28</sup> Id. § 270(4).

<sup>29</sup> Id. § 270(7).

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id. § 270(8).

agreement is reached, the prosecution is required to inform the court, at which point the court must confirm the terms of the agreement. Specifically,

[t]he presiding judge or magistrate shall ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether he entered into the agreement voluntarily and without undue influence and may where:

- (a) satisfied that the defendant is guilty of the offence to which he has pleaded guilty, convict the defendant on his plea of guilty to that offence, and shall award the compensation to the victim in accordance with the term of the agreement . . . ; or
- (b) he is for any reason of the opinion that the defendant cannot be convicted of the offence in respect of which the agreement was reached and to which the defendant has pleaded guilty or that the agreement is in conflict with the defendant's right . . . , he shall record a plea of not guilty in respect of such charge and order that the trial proceed.<sup>34</sup>

If the court approves the plea agreement and convicts the defendant, it must impose a sentence according to the terms of the plea agreement if it is satisfied that the agreed sentence is appropriate.<sup>35</sup> If the court is of the opinion that it would have imposed a lesser sentence than that recommended in the plea agreement, it must impose a lesser sentence.<sup>36</sup> It appears that the prosecution may appeal to a high court a decision of a magistrates' court including on the basis "that the sentence passed on conviction is . . . in-adequate, unless the sentence is one fixed by law."<sup>37</sup> If a defendant is convicted and sentenced by the court on the basis of a plea agreement, the court's judgment is final and not subject to appeal unless fraud is alleged,<sup>38</sup> and the defendant may not be charged again for the same facts.<sup>39</sup>

However, if the court is of the view that it would have imposed a heavier sentence, it "shall inform the defendant of such heavier sentence [it] considers to be appropriate,"<sup>40</sup> in which case the defendant has one of two options:

- (a) abide by his plea of guilty as agreed upon and agree that, subject to the defendant's right to lead evidence and to present argument relevant to sentencing, the presiding judge or magistrate proceed with the sentencing; or
- (b) withdraw from his plea agreement, in which event the trial shall proceed de novo before another presiding judge or magistrate, as the case may be.<sup>41</sup>

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<sup>34</sup> Id. §§ 270(9)&(10).

<sup>35</sup> Id. § 270(11).

<sup>36</sup> Id.

<sup>37</sup> Id. § 485(8)(i).

<sup>38</sup> Id. § 270(18).

<sup>39</sup> Id. § 270(17).

<sup>40</sup> Id.

<sup>41</sup> Id. § 270(15).

If the defendant opts to withdraw the plea, he or she will be tried before a different judge for the alleged offence, in which case

- (a) no references shall be made to the agreement;
- (b) no admission contained therein or statements relating thereto shall be admissible against the defendant; and
- (c) the prosecutor and the defendant may not enter into a similar plea and sentence agreement.<sup>42</sup>

The Act makes it an offense for anyone to prevent the return of assets or property acquired as part of the crime or as restitution of the victim, stating that “[a]ny person who willfully and without just cause obstructs or impedes the vesting or transfer of any money, asset or property under this Act shall be guilty of an offence and liable to imprisonment for 7 years without an option of fine.”<sup>43</sup>

#### IV. Implementation Process

The implementation of the practice of plea bargaining, particularly the initial introduction of the practice through the application of the EFCC Act, appears to be unpopular. According to one source, “the [m]ajority of Nigerians (home and abroad) are vehemently opposed to the practice of plea bargain because it sharply contradicts what they perceive to be fair and just.”<sup>44</sup> This is in large part due to the fact that plea bargain agreements that received a great deal of public attention mostly involved cases of high-profile defendants and large sums of money.<sup>45</sup> One author described the practice as “becoming an escape route to corrupt government officials.”<sup>46</sup> Perhaps the toughest criticism of the practice came from Justice Dahiru Musdapher, the then Chief Justice of the Nigerian Supreme Court, who in a 2011 speech to the Nigerian Bar Association said

[t]he concept of plea bargain is not only obnoxious as I once described it, but you will see that it has never been part of the history of our legal system.

It was surreptitiously smuggled into our statutory laws with the creation of EFCC.

And so when I described the concept as of dubious origin I was not referring to the original *raison d’être* or juridical motive behind its conception way back either in the U.S. or England in the early 19th century.

I was referring to the sneaky motive if not behind its introduction into our legal system, then evidently in its fraudulent application.

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<sup>42</sup> Id. § 270(16).

<sup>43</sup> Id. § 270(14).

<sup>44</sup> Chris Wigwe, *The Law and Morality of Plea Bargaining*, 5(1) Port Harcourt L.J. 1, 5 (Nov. 1, 2013), <https://perma.cc/25GQ-NC7C>.

<sup>45</sup> Bright Bazuaye & Desmond Oriakhogba, *Combating Corruption and the Role of the Judiciary in Nigeria: Beyond Rhetoric and Crassness*, 42(1) Commonwealth L. Bull. 125, 136, 137, 140 (2016).

<sup>46</sup> Yekini Abubakari Olakulehin, *The Practice of Plea Bargaining and its Effects on the Anti-Corruption Crusade in Nigeria* 10 (Oct. 1, 2008), <https://perma.cc/L677-S956>.

You will learn that plea bargain is not only condemnation without adjudication as John Langbein described it, it is as some other critics say a triumph of administrative and organisational interests over justice.<sup>47</sup>

Justice Musdapher further noted that the practice was imported into Nigeria “to provide [a] soft landing to high profile criminals who loot the treasury entrusted to them.”<sup>48</sup> Also highly critical of the practice was Prince Bola Ajibola, former Minister of Justice and former Justice of the International Court at the Hague, who predicted that the introduction of plea bargaining in Nigeria “will make a mockery of the entire process of dealing with corruption.”<sup>49</sup>

The reason behind the introduction of the practice in Nigeria may have been noble. According to one source, “[t]he delay in the administration of justice and the need to decongest the prisons have informed the introduction of the concept.”<sup>50</sup> However, the practice did little to accomplish this effort. Ten years after its establishment, the Commission is reported to have secured 400 convictions—forty per year.<sup>51</sup> It is unclear how many of these convictions were secured through plea-bargain agreements. Its record relating to high-profile offenders is even worse. In the eight years since its establishment, the EFCC has managed four high-profile convictions, three of which were obtained through a plea-bargain agreement.<sup>52</sup>

Following are summaries of two cases featured in a 2011 Human Rights Watch report that the EFCC attempted to resolve using plea bargaining:

Tafa Balogun was the EFCC’s first conviction of a nationally prominent political figure. Charged to court in April 2005, just months after being forced to retire as Nigeria’s inspector general of police, Balogun ultimately pleaded guilty of failing to declare his assets, and his front companies were convicted of eight counts of money laundering. In December 2005 he was sentenced to six months in prison and the court ordered the seizure of his assets – reportedly worth in excess of \$150 million. The sentence struck many as light given the severity of the allegations—he stood accused of financial crimes allegedly committed at a time when he was serving as Nigeria’s chief law enforcement officer. Nonetheless, Balogun’s conviction was a profoundly important moment – the sight of such a prominent public official being hauled before a court in handcuffs to answer for corruption was something many Nigerians had thought impossible. Balogun has since reportedly retired to a luxury home in a high-end Lagos neighborhood.<sup>53</sup>

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<sup>47</sup> *Nigeria: Plea Bargain System is Obnoxious – Dahiru Musdapher*, Leadership Africa (Mar. 5, 2012), <https://perma.cc/A66V-T7ZA>.

<sup>48</sup> Ikechukwu Nnochiri, *CJN Abolishes Plea Bargain*, Vanguard (Nov. 16, 2011), <https://perma.cc/C3TS-VMHV>.

<sup>49</sup> Eze & Amaka, *supra* note 11, at 42.

<sup>50</sup> Akintunde Adebayo, *A Review of Plea Bargain Concept in the Anti-Corruption War in Nigeria*, 5(1) Brawijaya L.J. 1, 9 (Apr. 26, 2018), <https://perma.cc/NS7B-HL4T>.

<sup>51</sup> Emilia Onyema et al., *The Economic and Financial Crimes Commission and Politics of (in) Effective Implementation of Nigeria’s Anti-Corruption Policy 7-8* (ACE SOAS Consortium, Working Paper 007, Nov. 2018), <https://perma.cc/MH5E-9SEU>.

<sup>52</sup> Human Rights Watch, *Corruption on Trial?: The Record of Nigeria’s Economic and Financial Crimes Commission 22* (2011), <https://perma.cc/58R9-NWFS>.

<sup>53</sup> *Id.* at 22.

Another high profile case involving a former government of a state resulted in the defendant getting a very light sentence due to the interference of the court to change the plea-agreement:

Former Edo State governor Lucky Igbinedion was charged by EFCC prosecutors in January 2008 with siphoning off more than \$25 million of public funds. He ultimately pleaded guilty in December 2008 to failing to declare his assets and his front company was convicted on 27 counts of money laundering. But the trial judge in the case, Abdullahi Kafarati, deviated from the terms of the plea agreement and handed down a very light sentence that included no jail time. . . . Igbinedion paid the equivalent of a \$25,000 fine, agreed to forfeit some of his property, and walked free on the spot. The EFCC appealed the light sentence. In early 2011, the EFCC raided two of his palatial homes in Abuja and filed new criminal charges against the former governor. But in May 2011 the court dismissed the case, ruling that the new charges would amount to double jeopardy.<sup>54</sup>

The Criminal Administration Act of 2015 has not only broadened the application of the practice, but also introduced “some stringent measures to ensure efficient and effective application of the concept.”<sup>55</sup> However, it appears that its initial application has remained restricted to financial crimes.<sup>56</sup> Therefore, its success in reducing court congestion and building good will in the eyes of the public will primarily depend on how widely and efficiently it is implemented.

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<sup>54</sup> Id. at 24.

<sup>55</sup> Adebayo, *supra* note 50, at 12.

<sup>56</sup> Sule Peter Echewijam, *Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique*, 3(2) IAFOR J. Ethics, Religion & Phil. 35, 41 (Autumn 2017), <https://perma.cc/N2R6-F8LV>.

# Russian Federation

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**SUMMARY** In the 1860s, a procedure called “summary proceedings” was introduced in the Russian Empire as an alternative to full-fledged trials. Unlike many other legal institutions, it survived the Bolshevik revolution and legally existed in the Union of Soviet Socialist Republics (USSR) for several decades. New criminal procedural legislation of the 1960s did not provide for a procedure similar to plea bargaining; however, unofficially it was often used in the USSR. In the post-Soviet Russia, a process called a “special trial procedure” was added to the new Code of Criminal Procedure several years after the Code was enacted. Though not all the members of the Russian legal community welcomed this new procedural development, it proved to be efficient and rapidly gained popularity among legal practitioners.

## I. Historic Background

Precursors of plea bargaining in Russia were introduced in the mid-nineteenth century, when Russian law equated admission of guilt to other types of evidence subject to evaluation “according to the inner judges’ belief based on the totality of circumstances discovered in the course of investigation and trial.”<sup>1</sup> That was the time of the Great Reforms of Tsar Alexander II, when jury trials were introduced in the Russian Empire. Article 681 of the Statute of Criminal Procedure of 1864 established a possibility of summary proceedings as an alternative to full-fledged judicial hearings. These provisions were later replicated in the first Soviet Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic (RSFSR) of 1922 and in its later version of 1923.

Changes in the mid-1950s and early 1960s resulted in new codification of criminal procedural legislation. The new Code of Criminal Procedure of the RSFSR adopted in 1960 did not envisage a possibility of summary proceedings. However, despite the strong negative attitude toward the idea of a “plot” between public authorities and the accused, sometimes plea bargaining unofficially took place. Alexander Chashin, a Russian legal practitioner with many years of experience, points out that it was often “initiated by investigators or prosecutors in the most complicated criminal cases when they came to understanding that at some point they can suffer total defeat from the defense attorney and his client or by defense attorneys, who realized that their client has an ace up his sleeve, and this ace can be traded to the prosecutor for something, which is not specified in the law, or by judges, who could easily understand these reasons and take them into consideration.”<sup>2</sup> Chashin argues that there were unofficial cases of plea bargaining

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<sup>1</sup> Statute of Criminal Procedure (Nov. 20, 1864). *Anthology of History of State and Law of the USSR, Pre-October Period* 414 (Y. Titov & O. Chistyakov eds., 1990) (in Russian).

<sup>2</sup> A. N. Chashin, *Predvaritel'noe Rassledovanie: Suchnost', Formy i Obschie Usloviia* [Preliminary Investigation: Essence, Forms, and General Conditions] 16 (2011) (in Russian).

in the Soviet Union. Usually, they came in the form of a verbal arrangement between the defense attorney and the investigator on easing the restrictive pretrial conditions on the suspect in exchange for information on the criminal case in question. Such “gentlemen’s agreements” were most popular in criminal cases concerning the purchase of drugs for personal use.<sup>3</sup>

## II. Current Statutes

The Code of Criminal Procedure (CCP) of the Russian Federation (RF) currently in force was adopted in 2001.<sup>4</sup> For the first time, the new Code included an entire chapter – Chapter 40 – to regulate the institution of a new special trial procedure where the defendant agrees with the charges brought against him.

Commenting on Chapter 40, some scholars compared the emerging Russian model of plea bargaining to the US model. Although the Russian special trial procedure and plea bargaining in the United States look similar, they differ substantially.<sup>5</sup> Under Russian law, a defendant’s express consent to the charges brought against him is a declarative statement. The special procedure does not provide for any negotiations between the parties involving the judge where some charges could be dropped.<sup>6</sup> If the state prosecutor or the victim (in a private prosecution where the victim has submitted a complaint directly to the court and acts as a prosecutor) agree, the defendant can give his consent to the charges and request sentencing without a trial.<sup>7</sup> Also, the special procedure defined in Chapter 40 of the CCP applies only to crimes punishable by imprisonment not exceeding a 10-year term. The judgment rendered in the special procedure cannot be appealed on the grounds of inconsistency between the findings of the court and the merits of the case. Apparently, there is similarity between the Russian special trial procedure and the US *nolo contendere* procedure, in which a defendant does not contest the charges and gives his consent for the proposed sentence.<sup>8</sup>

Many Russian legal scholars have pointed out that this new procedure polarized the Russian legal community and was heatedly debated by its supporters and opponents. Some experts noted that the special procedure violates several fundamental principles of criminal procedure.<sup>9</sup> I.A. Piskalov asserts that the special procedure contradicts both the principles of criminal procedure

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<sup>3</sup> Id.

<sup>4</sup> Code of Criminal Procedure of the RF, Law No. 174-FZ of Dec. 18, 2001, Rossiiskaia Gazeta [Official Gazette] (Dec. 22, 2001) (in Russian), English translation at <https://perma.cc/SF4N-X7XA>.

<sup>5</sup> M.R. Kel’biiev, *Comparative Legal Analysis of American Plea Bargaining and Special Trial Procedure in Russian Criminal Procedure*, in 4 Vestnik Rossiyskogo Universiteta Druzhby Narodov, Yuridicheskiye Nauki [Bull. of Russian People’s Friendship Univ., Legal Sci.] 62 (2010) (in Russian).

<sup>6</sup> Id.

<sup>7</sup> Code of Criminal Procedure of the RF, art. 314(1).

<sup>8</sup> Olga Schwartz, *Recent Judicial Reforms in Russia: Justice or Efficiency?*, Comp. Const. L. Rev. (2020) (forthcoming publication) (manuscript at page no. 6).

<sup>9</sup> See, e.g., Olga Schwartz, id.; I.L. Petrukhin, *Special Trial Procedure*, in 7 Rossiyskaya Justitsiia 6 (2005), <http://base.garant.ru/5174731/#friends> (in Russian) (by subscription); Dmitrii Velikii, *Special Trial Procedure: Theory and Practice*, <https://perma.cc/WK8Q-JLGG> (in Russian).

and the Constitution of Russia, and proposes removing Chapter 40 from the Code of Criminal Procedure of the RF. In particular, this discrepancy is manifested in the absence of judicial autonomy in evaluation of evidence and a defendant's formal consent to the charges without their corroboration by incriminating evidence.<sup>10</sup> Igor Petrukhin points out that Chapter 40 was adopted in an atmosphere of strong antagonism against its opponents; he asserts that this is why the wording of the chapter is far from perfect.<sup>11</sup> M.R. Kel'biiev argues that, in the special procedure, the defendant plays the key role, whereas the opinions of the prosecutor and the victim(s) possess secondary importance, and the defense attorney performs mainly consultative functions.<sup>12</sup>

It is also not clear how the presumption of innocence applies in the special procedure. No departures from this principle are provided for by the legislation. So, formally, it should be observed even in the special procedure. Notably, even some judges question the application of this principle to the special procedure.<sup>13</sup> There is also a view that simplification of the criminal procedure impedes the finding of the truth, as it is not possible to establish all the circumstances of the case without an extensive examination of the evidence.<sup>14</sup>

In any case, the special procedure quickly gained popularity among legal practitioners. While in 2002 only 10,400 (0.9%) criminal cases were handled under the special procedure, by 2017 (the latest data available) this figure had increased to 65.4%, i.e., more than half of all criminal cases were concluded without a full-fledged trial.<sup>15</sup>

In 2009, in consultation with prosecutors from the United States, the Russian legislature amended the Code of Criminal Procedure to provide for an additional form of plea bargaining called a pretrial cooperation agreement. A new Chapter 40-1 provided for the possibility of entering into a pretrial cooperation agreement between the prosecution and the defense.<sup>16</sup> Such agreements usually facilitate cooperation from members of criminal gangs in exchange for significant reductions in sentences or a chance to be placed in the witness protection program.<sup>17</sup>

### III. Application of Existing Procedure

Professor William Burnham points out that, consistent with the civil law's concern about prosecutorial discretion, the new procedure was carefully circumscribed to assure judicial

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<sup>10</sup> I.A. Piskalov, *Special Trial Procedure, Contemporary Problems of Russian Law and Law of the CIS Countries: Materials of the IX International Research and Practice Conference (Chelyabinsk) 300-01 (2007)* (in Russian).

<sup>11</sup> I.L. Petrukhin, *supra* note 9.

<sup>12</sup> M.R. Kel'biiev, *supra* note 5.

<sup>13</sup> Nikolai Redkin, *Special Trial Procedure in the Russian Criminal Procedural System (2007)* (Ph.D. dissertation, Kuban State University), <https://perma.cc/GG4Q-V79A> (in Russian).

<sup>14</sup> Olga Schwartz, *supra* note 8.

<sup>15</sup> *Court Statistics*, Jud. Dep't under RF Sup. Ct., <https://perma.cc/55LR-KA9W> (in Russian).

<sup>16</sup> Chapter 40-1 Special Procedure of Rendering Judgment in Case of Pretrial Cooperation Agreement, Federal Law No. 141-FZ on Introduction of Amendments to the RF Criminal and Criminal Procedure Codes of June 29, 2009. For the full text, see Code of Criminal Procedure of the RF, *supra* note 4.

<sup>17</sup> Olga Schwartz, *supra* note 8.

involvement in approval of the agreement. During the investigation stage, the accused and his or her counsel have the right to present to the prosecutor, through the investigator, a request for an agreement of cooperation, indicating what actions he or she proposes to take in order to assist in the investigation, to incriminate others involved in the crime, and to recover any property that was taken as a result of the crime. If the defendant does not have a lawyer, then the investigator must assign counsel.<sup>18</sup> The prosecutor then decides whether to conclude an agreement.

If the prosecutor decides to conclude an agreement, it is drafted by the prosecutor together with the defendant and the defendant's counsel and must be signed by all three. The agreement must include "the actions that the suspect or accused is obligated to perform in his or her fulfillment of the conditions set out in the agreement" and "the mitigating circumstances and provisions of the criminal law that could be applied with respect to [the] suspect or accused upon his or her complying with the conditions and fulfilling the obligations set out in in the pretrial agreement on cooperation."<sup>19</sup> The preliminary investigation is then completed, and the formal charges against the defendant are approved by the prosecutor. The police or investigators then act on the information provided in the agreement.

After this, the prosecutor drafts a presentation (*predstavlenie*) for the court with the agreement attached.<sup>20</sup> The presentation must set out exactly what the cooperative acts of the defendant were, including specific reference to crimes that were discovered or criminal cases that were initiated as a result. The prosecutor must also assess the significance of the cooperation and the degree of the threat to the defendant's or his relatives' safety that was involved.<sup>21</sup> In addition, the prosecutor must confirm the accuracy of the information given by the accused under the agreement. The positions of the accused and counsel are then to be heard.

To approve the agreement, the court must determine that the accused person entered into the agreement voluntarily, and the agreement has been concluded with the assistance of defense counsel. The prosecutor shall confirm the active cooperation of the accused. If these findings cannot be confirmed, then the case is set for an ordinary trial.<sup>22</sup>

The rest of the hearing is for the purpose of entering a judgment of guilt and imposing a sentence. The legislation in force directs that this be done in the same manner as the hearing involved in acceptance of a regular guilty plea. If the court finds that the accused has fulfilled all the conditions of the agreement, the court may sentence the accused to no more than one-half the maximum sentence for the crime charged.<sup>23</sup> The court may also sentence the accused to a lighter punishment than that if the circumstances set out in the Criminal Code call for that, or even to a conditional sentence or suspended sentence.<sup>24</sup> If, at any time after the sentence is imposed, it is

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<sup>18</sup> William Burnham et al., *Law and Legal System of the Russian Federation* 502 (3rd ed. 2004).

<sup>19</sup> Code of Criminal Procedure of the RF, art. 317.3(6)-(7).

<sup>20</sup> Id. art. 317.5.

<sup>21</sup> Id. art. 317.5(1), paras. (1)-(4).

<sup>22</sup> Id. art. 317.6.

<sup>23</sup> Criminal Code of the RF, art. 62(2), <https://perma.cc/R55C-BXNF> (in Russian).

<sup>24</sup> Code of Criminal Procedure of the RF, art. 317.7(5).

revealed that the accused intentionally gave false information or hid material information from the investigation, the sentence can be reexamined and changed to a more severe one.<sup>25</sup> In considering the new sentence, the court is prohibited from providing any of the sentencing benefits that accompany a plea agreement.<sup>26</sup> In addition, it cannot give a sentence below the minimum – something a court could have done had there been no agreement – even if there are exceptional mitigating circumstances.

Chapter 40-1 also provides for security measures to be taken to protect the accused informer, his or her close relatives, and other relatives and persons close to him or her.<sup>27</sup> Similarly, all state protection measures for victims, witnesses, and other participants in criminal proceedings apply to those suspects and accused who have entered into a pretrial cooperation agreement.<sup>28</sup>

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<sup>25</sup> Id. art. 317.8.

<sup>26</sup> Code of Criminal Procedure of the RF, art. 317.9.

<sup>27</sup> Id.

<sup>28</sup> Federal Law No 119-FZ on State Protection of Victims, Witnesses, and Other Participants in Criminal Proceedings, Aug. 20, 2004, <https://perma.cc/66EK-WJQJ> (in Russian).

# Singapore

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**SUMMARY** Plea bargaining has not been formalized in Singapore’s criminal justice system. Currently, negotiations between the prosecution and the defense for consensual case disposal are typically done under two programs: the Criminal Case Management Scheme (CCMS) of the Attorney-General’s Chambers and the Criminal Case Resolution (CCR) program in the State Court.

Early criminal case resolution efforts generally begin with an informal plea negotiation process, i.e., CCMS, between the prosecution and the defense. The program allows prosecutors and defense counsel to engage in a frank and open discussion of the case. During the CCMS meetings, they may discuss the merits of a guilty plea in addition to narrowing the issues in dispute. No judge is involved in CCMS meetings.

CCR was implemented on October 10, 2011, with the aim of providing a neutral forum facilitated by a judge for parties to discuss and explore the possibility of early resolution of criminal cases without a trial. If a case remains unresolved at CCR and proceeds to trial, the CCR judge will not be assigned to hear the case as the trial judge. The role of the judge in CCR sessions is facilitative but not evaluative.

The judge facilitating the CCR sessions may consider giving a sentence indication in an appropriate case. However, in order to avoid any perception of the accused person being coerced or pressured to plead guilty, a sentence indication would only be considered if such indication is sought by the accused person.

## I. Introduction

In Singapore, negotiation between the prosecution and the defense for consensual case disposal is an established practice, but the practice has not been formalized in the criminal justice system through legislation.<sup>1</sup> Under the current system, negotiations are typically done under the following two programs:

- Criminal Case Management Scheme (CCMS), introduced by the Attorney-General’s Chambers (AGC) around 2003-04; and
- Criminal Case Resolution (CCR), implemented by the Subordinate Courts in 2011.<sup>2</sup>

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<sup>1</sup> Selina Lum, *Plea Bargaining, Singapore Style*, The Straits Times (Mar. 15, 2017), <https://perma.cc/5PEK-NEKK>.

<sup>2</sup> Id.; Hock Lai Ho, *Criminal Justice and the Exclusion of Incriminating Statements in Singapore*, in *Do Exclusionary Rules Ensure a Fair Trial?* 216-17 (Sabine Gless & Thomas Richter eds., Springer 2019), <https://perma.cc/4BP4-9E8F>.

A key challenge in the courts of Singapore has been to reduce the occurrence of “cracked” trials. According to a Subordinate Courts judge, a cracked trial occurs where the accused person elects to be tried and hearing dates are allocated for the trial, but the case is resolved on the first day of the trial or soon thereafter, either by a guilty plea by the accused person or withdrawal of the charges by the prosecution.<sup>3</sup> In January 2010, the rate of cracked trials in Singapore Subordinate Courts stood at about 43%.<sup>4</sup> “A high incidence of cracked trials is undesirable,” the judge pointed out, “as it means that judicial resources are not being used optimally. It also represents wasted trial preparation by the parties, and unnecessary stress and inconvenience for the victims and other witnesses called to testify.”<sup>5</sup>

Aiming to reduce wastage of resources due to cracked trials, Singapore started to pilot the CCR program in the Subordinate Courts in 2009, under which suitable criminal cases could be referred for voluntary mediation facilitated by a senior judge.<sup>6</sup> The program was fully implemented on October 10, 2011, in view of the success of the pilot project.<sup>7</sup>

In 2014, the Subordinate Courts were renamed the State Courts.<sup>8</sup>

## II. Efforts on Formalizing Plea Bargaining

In 2011, the Chief Justice reportedly invited the Attorney-General (AG) to look into plea bargaining, which he said he would endorse, provided there are enough safeguards to protect the integrity of the criminal justice system.<sup>9</sup> In a speech made in 2013, the AG said the AGC had prepared a framework, including a draft bill, for plea bargaining, as a result of meetings with stakeholders and study trips overseas. The framework was under the consideration of the Ministry of Law.<sup>10</sup>

In 2014, the Minister for Foreign Affairs and Law stated that the Ministry of Law was working with the AGC to study a formalized framework of negotiations between the prosecution and the defense to encourage early case resolution.<sup>11</sup> In March 2017, however, the Ministry of Law

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<sup>3</sup> Kessler Soh, “Criminal Case Resolution” in the Subordinate Courts of Singapore, J. Commw. Crim. L. 209 (Nov. 2011), <https://perma.cc/RMZ8-82EA>.

<sup>4</sup> Id. at 209-10.

<sup>5</sup> Id.

<sup>6</sup> Id. at 210.

<sup>7</sup> *Facilitating Early Resolution of Criminal Cases: Objectives and Highlights of Criminal Case Resolution*, 4 SubCourts News 9 (June 2012), <https://perma.cc/55F6-KXAK>.

<sup>8</sup> *History of State Courts*, State Courts Singapore (Nov. 7, 2019), <https://perma.cc/T296-SV2V>.

<sup>9</sup> Lum, *supra* note 1.

<sup>10</sup> Press Release, AGC, Opening of the Legal Year 2013 Speech of Attorney-General Steven Chong S.C. (Jan. 4, 2013), <https://perma.cc/E8FU-HHXK>.

<sup>11</sup> Minister for Foreign Affairs and Law K. Shanmugam, Speech at the Criminal Law Conference 2014, Singapore Ministry of Law (Jan. 16, 2014), <https://perma.cc/7TGS-MXQS>.

announced that its review concluded that no major changes to the system in place were desirable or necessary.<sup>12</sup>

### III. Criminal Case Management Scheme

Early criminal case resolution efforts generally begin with an informal plea negotiation process, i.e., CCMS, between the prosecution and the defense. The program allows prosecutors and defense counsel to engage in a frank and open discussion of the case.<sup>13</sup> During the CCMS meetings, they may discuss the merits of a guilty plea in addition to narrowing the issues in dispute. No judge is involved in CCMS meetings.<sup>14</sup>

In 2013, the AGC and the Law Society of Singapore jointly issued *The Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence (Code of Practice)*, which includes CCMS as part of the best practices in pretrial proceedings.<sup>15</sup> Although it is not legally binding, the *Code of Practice* sets out best practices guidelines in the conduct of criminal proceedings by the prosecution and the defense.<sup>16</sup>

According to the *Code of Practice*, prosecutors and defense counsel should attend any CCMS meeting to narrow the issues in dispute and resolve disputes in an effective and timely manner.<sup>17</sup> The accused person should be allowed complete freedom of choice whether to plead guilty or demand a trial during the process.<sup>18</sup>

### IV. Criminal Case Resolution

#### A. Purpose

According to the Registrar's Circular No. 4 of 2011 (Registrar's Circular), the Subordinate Courts document that implemented the CCR, the aim of the program is to provide a neutral forum facilitated by a judge for parties to discuss and explore the possibility of early resolution of criminal cases without a trial. According to the Circular,

This reduces wastage of valuable resources due to "cracked" trials where the accused person pleads guilty on the day of the trial or after the trial has commenced. For cases

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<sup>12</sup> Id.

<sup>13</sup> Soh, *supra* note 3.

<sup>14</sup> *Plea Bargaining in Singapore: All You Need to Know*, Singapore Legal Advice (Mar. 31, 2017), <https://perma.cc/YQ9F-YWTN>.

<sup>15</sup> AGC, *The Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence* (2013), <https://perma.cc/BQ46-8MVG>.

<sup>16</sup> Id. §§ 1 & 2.

<sup>17</sup> Id. § 10.

<sup>18</sup> Id. § 11.

where a trial is necessary, CCR process will assist parties to identify the material triable issues and thereby utilise allocated trial dates in a more focused and efficient manner.<sup>19</sup>

It is worth noting that, according to a Singaporean law professor, the purpose of Singapore's CCR program is not to reduce the number of trials by actively encouraging pleas of guilty. Rather, the purpose is to ascertain whether there are alternative options to trial that may not have been fully and adequately explored.<sup>20</sup>

## **B. Referral for CCR**

A criminal case generally goes through CCMS prior to CCR. If the case is unresolved after CCMS, it may be referred for CCR, if all parties voluntarily agree.<sup>21</sup> CCR generally is considered only for cases that have a reasonable prospect of early resolution.<sup>22</sup>

## **C. Judge Facilitation**

In contrast to CCMS, CCR is facilitated by a senior and experienced judge and conducted in the judge's chambers.<sup>23</sup> If the case remains unresolved at CCR and proceeds to trial, the CCR judge will not be assigned to hear the case as the trial judge.<sup>24</sup>

The role of the judge in CCR sessions is facilitative but not evaluative. According to the Registrar's Circular, the judge would not give any indicative assessment of the relative merits of the case for the prosecution and the defense, although the judge may comment on specific aspects of evidence, possible inferences, or legal issues as appropriate.<sup>25</sup>

## **D. Conduct of CCR**

Depending on the complexity of the case and other relevant factors, the number of CCR sessions per case may vary but would ordinarily be not more than two sessions in one case.<sup>26</sup>

The judge facilitating the CCR sessions may consider giving a sentence indication in an appropriate case. However, in order to avoid any perception of the accused person being coerced or pressured to plead guilty, a sentence indication would only be considered if such indication is sought by the accused person.<sup>27</sup> Sufficient information should be provided to the

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<sup>19</sup> Subordinate Courts of the Republic of Singapore, Registrar's Circular No. 4 of 2011, Criminal Case Resolution (CCR) (Oct. 3, 2011) (Registrar's Circular) § 2, <https://perma.cc/67V8-PXWT>.

<sup>20</sup> Ho, *supra* note 2.

<sup>21</sup> Registrar's Circular § 4.

<sup>22</sup> Id. § 3.

<sup>23</sup> Id. § 5.

<sup>24</sup> Id. § 10.

<sup>25</sup> Id. § 6.

<sup>26</sup> Id.

<sup>27</sup> Id. § 7.

CCR judge for a proper assessment to be made. Such information includes a summary of the facts by the prosecution, the accused person's antecedent records, and mitigating factors, if any. Both the prosecution and the defense are asked to provide their input prior to a sentence indication being given.<sup>28</sup>

### E. Case Closure

If the accused person decides to plead guilty in the course of CCR, the CCR judge could, with the consent of the parties, proceed to accept the plea and pass sentence. The plea may alternatively be dealt with by another judge.<sup>29</sup>

When an unresolved case proceeds to trial, any notes taken by the CCR judge are not included in the case file and are inaccessible by the trial judge. All discussions at the CCR sessions are confidential and without prejudice. Nothing said by any party during the CCR sessions may be tendered in evidence in court.<sup>30</sup>

### V. Impact and Difficulties

In 2011, then Chief Justice of Singapore Chan Sek Keong acclaimed CCR as having saved trial dates and judicial resources. For the remaining CCR cases that proceeded to trial, the Chief Justice said, the CCR process assisted the parties "to narrow and focus on the key issues or areas of dispute," which enabled the parties to focus on the contentious issues and hence shorten the trials.<sup>31</sup>

According to the Subordinate Courts, as of March 6, 2012, 119 cases had gone through the CCR process, and 75 cases had been resolved since the start of the CCR pilot in 2009. A total of 139 hearing days had been saved.<sup>32</sup> In a speech made in 2014, the Minister for Foreign Affairs and Law stated that more than 80% of the cases referred for CCR were successfully resolved in 2013.<sup>33</sup>

However, a criminal lawyer in Singapore pointed out that some judges do not like to be told that the prosecution and defense have come to an agreement on the sentence.<sup>34</sup> There have also been criticisms that plea bargaining is compromising justice, which can lead to overcharging, i.e., the prosecution brings a more serious charge in anticipation of it being bargained down. The Deputy Attorney-General reportedly responded to the criticisms in 2016, stressing that the prosecution presses charges based on the evidence and seeks sentences based on the facts and sentencing

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<sup>28</sup> Id.

<sup>29</sup> Id. § 8.

<sup>30</sup> Id. § 10.

<sup>31</sup> Chief Justice Chan Sek Keong, *Keynote Address by the Honourable the Chief Justice Chan Sek Keong*, in *The Subordinate Courts Workplan 2011* (Feb. 18, 2011), <https://perma.cc/T5V3-JK3V>.

<sup>32</sup> SubCourts News, *supra* note 7.

<sup>33</sup> Shanmugam, *supra* note 11.

<sup>34</sup> Lum, *supra* note 1.

precedents. According to him, the prosecution also does not intentionally ask for excessive sentences or seek inadequate sentences as part of plea bargains.<sup>35</sup>

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<sup>35</sup> Id.