Designing Trial Avoidance Procedures for Post-Conflict, Civil Law Countries: Is German Absprachen an Appropriate Model for Efficient Criminal Justice in Afghanistan?

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Designing Trial Avoidance Procedures for Post-Conflict, Civil Law Countries: Is German Absprachen an Appropriate Model for Efficient Criminal Justice in Afghanistan?

Nasiruddin Nezaami

Abstract

In Afghanistan, overflow of court dockets and lengthy trials persist despite recent reforms effected through a new Criminal Procedure Code. The new Code has solved some of the problems that existed prior to its ratification; however, it has failed to establish adequate trial avoidance procedures. This problem is further compounded by the dissatisfaction of parties with trial outcomes. This article suggests that Afghanistan could address both issues by adopting a mechanism similar to German Absprachen as an appropriate case disposing procedure, enabling party consensus, helping courts decrease their dockets, and reducing the length of trials. This analysis is not only essential to reform efforts in Afghanistan, but may also be valuable to other post-conflict, civil law countries struggling with the same issues, countries that could also benefit from implementing a system like Absprachen.
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I. INTRODUCTION

In Afghanistan, persistence of several problems has caused inefficiency in its criminal procedure. These problems from institutional to lack of professional personnel to prolonged procedure have prevented Afghan criminal procedure from adequately addressing cases. A noticeable problem is the Afghan Criminal Procedure Codes’ failure to deal with court backlogs and trial length. To reach a final verdict, cases go through time consuming procedures that lengthen the case disposing procedure and thus making the trial costly to the government and also the defendant, a typical problem for post-conflict countries suffering from inefficient systems of criminal procedure. Notwithstanding many reforms focus on eradication of these problems in criminal justice of countries such as Afghanistan, little development seems to be made in establishing case disposing procedures.

Afghanistan recently adopted Criminal Procedure Code which has solved many problems that existed before its enactment. However, it fails to adequately address court backlogs and unnecessary lengthy trials. This paper argues that these backlogs persist because of the absence of adequate trial avoidance procedures in the new Code, and that the problem has been intensifies by the dissatisfaction of the parties about trial outcomes. To increase efficiency, this paper suggests that Afghanistan could adopt German Absprachen as a case disposing procedure entailing party consensus while keeping the ex proprio motu investigation obligation (the truth finding obligation) of courts intact. This observation and recommendation could also be valuable to other post-conflict civil law countries looking for solutions to delay and backlogs in their own criminal justice systems.
Establishment of such an institution promises to harmonize the criminal procedure with the general tendency to base procedural institutions on “procedural economy.” While once deemed unfavorable, recently these instruments have gained popularity in reform efforts to reduce trial length and cost. For example, several European countries have begun to establish discretionary powers and out-of-court procedures to increase efficiency of their criminal procedures. And with this same goal, even international criminal tribunals have instituted trial avoidance procedures.

One of the important benefits of trial avoidance procedures like Absprachen is that they yield different benefits to the parties. Abprachen provides the defendant with an opportunity to interact with the court in a “harmonious atmosphere,” and it accords that defendant a degree of control having psychological benefits. The prosecution’s interest in obtaining a conviction is also protected. In addition, these procedures save courts’ time and significantly reduce their caseloads; thus, they save the public money, putting less stress on the “public purse.” In sum, they are time and cost efficient.

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2 Id.
3 For more information about recent trends and procedures either precluding or abbreviating full trials see Stephen C. Thaman, *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial* in WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF FULL CRIMINAL TRIAL 331-396 (STEPHEN C. THAMAN ed. 2010).
4 For more about the international criminal tribunals and plea agreements see JENIA, L. TURNER, PLEA BARGAINING ACROSS BORDERS 213-65 (2009).
5 REGINA ROUXLOH, PLEA BARGAINING IN NATIONAL AND INTERNATIONAL LAW 95(2012).
8 Id
9 For brief descriptions of the benefits of negotiated agreements see, e.g., ROUXLOH, supra note 5, at 83-94; Richard Adelstein & Thomas J. Miceli, Toward a comparative economics of plea bargaining, 11 EUROPEAN JOURNAL OF LAW AND ECONOMICS 47, 47-67 (2001).
The second section of the paper will explain the current principles of the criminal procedure in Afghanistan, explaining that the absence of adequate case disposing procedures in the new Code has caused a significant increase in court dockets as well as duration of cases. The third section will explain Germany’s history and current practice of Absprachen (negotiated agreements). Subsequently, the fourth section examines the adoption of the negotiated agreements in Afghanistan. This section includes short description of adjustments that would be needed for negotiated agreements to succeed in the Afghan context, and it anticipates possible criticism and potential challenges to the application of these agreements. The paper concludes by depicting final thoughts and concluding remarks.

II. CONSENSUAL ELEMENTS IN THE CURRENT CRIMINAL PROCEDURE OF AFGHANISTAN

This section gives an overview of criminal procedure in Afghanistan, discussing consensual elements that exist in the criminal codes, current problems caused by the lack of adequate consensual elements in the criminal procedure, and similarities between Afghan and the German criminal procedure.

a. General Overview of the Criminal Procedure in Afghanistan

In Afghanistan, criminal procedure rules are mainly found in three codes. These codes are the Criminal Procedure Code, the Law on the Organization and Jurisdiction of the Judiciary Brach of the Islamic Republic of Afghanistan [hereinafter, the Law on the organization of Courts], and the Law of the Structure and Authority of Attorney General Office [hereinafter, the

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10 In this paper, discussions about the criminal procedure only include the formal justice system of Afghanistan, neither the informal justice system nor courts established by Taliban. In Afghanistan, the informal justice system, though not firmly institutionalized, has prominent role in adjudicating criminal conflicts in some areas. These procedures called Jergas mostly base their decisions on tradition in both substantive and procedural part. In courts established by Taliban, though, personal attitudes of the person in charge of adjudication (mostly the commander), the tradition, and in some parts Islamic law are determinative.
Law on the Organization of Prosecution]. Of these laws, the Criminal Procedure Code contains the majority of the procedural principles, and it is descriptive and detailed in its nature. These principles apply to any party involved in criminal proceedings. In contrast, the Law on the Organization of Courts ordains principles that only bind courts, and the Law on the Organization of Prosecution applies to only the Attorney General Office.

Criminal cases in Afghanistan go through three phases, starting from the detection phase and continuing on to the investigation and adjudication phases. Each of these phases is handled by a specific agency or branch of government. Article 134 of the Constitution gives to the police the responsibility for detecting crimes and to the prosecution the responsibility for investigating and pursuing the case in courts.\textsuperscript{11} The Judiciary has been granted the power to adjudicate all disputes by Article 120 of the Constitution.\textsuperscript{12} Despite the clear autonomy of each entity in its responsibilities, a system of “checks and balances” has been created to prevent misuses of power by these entities. The Criminal Procedure Code authorizes the prosecution to be present during the detection process and to supervise activities of the police in the preliminary stages of the case.\textsuperscript{13}

Likewise, if documents submitted by the police are incomplete or contain ambiguities, the prosecutor can reject admitted files or can ask the police to carry out further investigation.\textsuperscript{14} Besides this, the Law on the Organization of Prosecution asserts that the prosecution is obligated

\begin{footnotesize}
\begin{enumerate}
\item QANUNI ASSASSI AFGHANISTAN \textit{[The Constitution of Afghanistan]} 1383 [2003], art 134 [hereinafter, The Afghan Constitution]
\item This article reads, “The authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law.”
\item \textit{Id.} arts 89 & 90; QANUNI TASHKIL WA SALAHIATI LOY SARANWALII \textit{[Law of the Organization and Authority of General Attorney Office]} Kabul 1392 [2013] art 13(1)(3) (Afg.) [hereinafter, Law on the Organization of Prosecution]
\end{enumerate}
\end{footnotesize}
to insure fair application of related laws by detective and investigative entities. The prosecution’s activities, however, are supervised by courts. This supervision is carried out in different ways. For instance, courts can ask prosecutors for further investigation and clarification. Similarly, they retain the power to stamp on some of the prosecutors’ decisions during the investigation phase, such as extension of a suspect’s detention period.

As mentioned above, criminal proceeding starts with the detection phase, which is carried out by the police. When the police learn about a crime, they are responsible for collecting the evidence that proves the occurrence of the crime. Once proven, the police can proceed to arrest the suspect and further the interrogations. However, except in flagrante dilicto, the power to arrest is confined within certain circumstances specified by the law. If these circumstances do exist and the suspect is in custody, the police are obligated to complete the preliminary investigation and interrogations within seventy-two hours and refer the case to the prosecution; otherwise, the suspect will be released and the police can continue their proceedings.

When a case is referred to the prosecution, the second phase begins. The Attorney General Office (Loy Saranwali) is the only entity authorized to investigate criminal cases. Although under the administrative supervision of the Executive branch, Attorney General Office is fully independent in its activities. The structure of the Attorney General Office is completely parallel to that of courts. In other words, following the judiciary branch’s structure, Attorney General Office also has three department levels, the primary prosecution (Saranwali

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15 Law on the Organization of Prosecution, art 15.
16 The Afghan Criminal Procedure Code, art 177
17 Id. art 100; Law on the Organization of Prosecution, art 13(1)(7).
18 The Afghan Criminal Procedure Code, art 80(1)
19 Id. art 80(2)
20 Article 81 of the Afghan Criminal Procedure Code asserts that police can arrest only in two occasions, flagrant dilicto or when there is fear that the suspect may escape.
21 Id. art 87.
22 The Afghan Constitution, art 134; Law on the Organization of Prosecution, art 6.
Ebtedayah), the appellate prosecution (Saranwali Estinaf), and the Supreme Court prosecution (Saranwali Tamiz). Each of these levels pursues cases in their equivalent court and has the same structure and divisions as their equivalent courts do.23

The investigation phase is accomplished by two prosecutors, the investigative prosecutor (Saranwali Tahqiq) and the trial prosecutor (Saranwali Ta’qibi Qazayi).24 Investigations are carried out by the former one. When the investigation is completed, investigative prosecutor prepares the letter of charge sheet (Etihammamah) and refers the case to the prosecutor who will then file the case to the court and pursue it thereafter.25 If the submitted documents have gaps or ambiguities; or if it is incomplete, the Trial prosecutor can ask for further clarification and investigation or reject to accept the file.26

The adjudication phase begins when the indictment (Sorati dawa)27 is filed to the court. In Afghanistan, the Judiciary is the only entity authorized to adjudicate conflicts.28 By the same token, specific courts and divisions within the Judiciary structure are competent to adjudicate criminal cases.29 The Judiciary is composed of three levels of courts.30 The first level or consists of primary courts. These courts constitute the vast majority of the judicial branch. Every province has one criminal primary court in the center of the province and a district primary court.

23 See Law on the Organization of Prosecution, arts 25, 19 & 17.
24 See Id. arts 26 & 20.
25 The Afghan Criminal Procedure Code, arts 163-167
26 Id. art 168.
27 The letter of charge sheet (Etihammamah) and Sorati dawa are different official letters. The first is prepared by the investigative prosecutor and submitted to the Trial prosecutor indicating that there is enough evidence incriminating the suspect. In contrast, Sorati dawa is a letter submitted to the court by the Trial prosecutor by which he/she specifies the crimes, introduces the evidence, and asks for punishment. The Afghan Criminal Procedure Code, art 4 (14) & (15).
29 The Afghan Criminal Procedure Code, art 178.
30 The Afghan Constitution, art 116; Afghan Courts’ Law, art 5(1)
in each district.\textsuperscript{31} It is worth noting that if the accused is in the custody, the primary court has to adjudicate the case within thirty day; otherwise, the suspect will be released and the court can resume its proceedings.\textsuperscript{32}

Within twenty days after the court’s declaration of the judgment, \textsuperscript{33} parties have the right to appeal the decision on grounds of error in law or based on factual error.\textsuperscript{34} None of the parties can waive his/her right to appeal in any case. However, there exist certain circumstances under which parties are not allowed to appeal.\textsuperscript{35} The petition to appeal can be filed in both the primary court that rendered the judgment or the competent appellate court, and the petition can be oral or written.\textsuperscript{36}

Appellate courts are the second level of the judiciary constituents. Each province has one appellate court,\textsuperscript{37} except Kabul.\textsuperscript{38} Each appellate court has been divided into 5 divisions.\textsuperscript{39} Of them, two deal with the criminal cases, the Criminal Division and the Public Security Division. Each division is composed of at most six judges, and a panel of three judges reviews the case.\textsuperscript{40} Decisions of the appellate courts can be reviewed only for error of law, and appeals to the Supreme Court must be filed within thirty days after the declaration of the appellate court’s judgment.\textsuperscript{41}

\textsuperscript{31} Afghan Courts’ Law, arts 61, 62 & 68.
\textsuperscript{32} The Afghan Criminal Procedure Code, art 101.
\textsuperscript{33} Id. art 253 (2)
\textsuperscript{34} Id. art 246.
\textsuperscript{35} For instance, in obscenities and misdemeanors carrying just fine, primary courts’ decisions are final. Afghan Courts’ Law, art 72 (4).
\textsuperscript{36} The Afghan Criminal Procedure Code, arts 246 & 252.
\textsuperscript{37} Afghan Courts’ Law, art 52.
\textsuperscript{38} Since the population in Kabul is boosting, and there is overwhelming outburst of cases, Kabul has been divided into four judicial districts and each district has its own appellate court. Added to this is the appellate level of special courts.
\textsuperscript{39} Afghan Courts’ Law, art 53.
\textsuperscript{40} Id. arts 10 & 53.
\textsuperscript{41} The Afghan Criminal Procedure Code, art 270 & 273 (2).
The Supreme Court of Afghanistan is the highest adjudicative entity in the country.\textsuperscript{42} It is called “the court of law” because it only reviews cases for error of law. It is composed of nine Justices, nominated by the president and thereafter elected by the House of Representatives,\textsuperscript{43} and councilors.\textsuperscript{44} The Supreme Court has five divisions, each competent to review special subject matter cases under its jurisdiction.\textsuperscript{45} Of these divisions, three have subject matter jurisdiction over criminal cases, the Criminal division, the Public Security Division, and the Martial, Military Crimes, and Crimes against Internal and External Security Division. Unlike the U.S. Supreme Court, the highest court of Afghanistan does not have a discretionary power to refrain from entertaining cases appealed to it; except for petty offenses, the Supreme Court accepts any case appealed on the matter of law.\textsuperscript{46}

In addition to these courts, there are special courts authorized to adjudicate counter narcotics, anti-corruption, and juvenile criminal cases, at both the primary and appellate level. They also have a parallel specialized investigative and trial prosecution department. The Supreme Court reviews their decisions for errors of law.

Notably, criminal cases do not end with the final decision of the Supreme Court. Under certain circumstances, parties can ask the High council of the Supreme Court to revise any final decision,\textsuperscript{47} even a decision of the Supreme Court.\textsuperscript{48} If within 3 month after a decision’s finality,\textsuperscript{49}

\textsuperscript{42} The Afghan Constitution, art 116; Afghan Courts’ Law, art 23. Afghanistan follows a centralized judiciary system. The highest entity in the judicial arena is the Supreme Court. There exists no other constitutional or administrative equivalent court to it.
\textsuperscript{43} The Afghan Constitution, art 117; Courts law, art 23.
\textsuperscript{44} Afghan Courts’ Law, art 44.
\textsuperscript{45} Id. art 42.
\textsuperscript{46} See The Afghan Criminal Procedure Code, arts 7, 270 & 273.
\textsuperscript{47} According to the article 10 of the Afghan Penal Code and in accordance with the articles 55 & 72 of the Criminal Procedure Code, if parties declare their satisfaction to the lower courts judgment or they fail to appeal within the time limits, the judgment of the lower court is finalized and parties cannot appeal; however, they can ask for the revision.
\textsuperscript{48} Afghan Courts’ Law, arts 31(1) & 34; The Afghan Criminal Procedure Code, art 282.
new exonerating evidence surfaces in a criminal case, both the prosecutor and the defendant can ask the Council to revise (Tajdidi Nazar) final decisions.

b. Consensual Elements, and the Trial Avoidance Procedures in Afghanistan

Generally, Afghan criminal procedure lacks consensual elements and trial avoidance procedures. While the new Criminal Procedure Code solves many problems that existed before its coming into force, it fails to relieve the dockets for courts and prosecution. Even more, in coordination with the Law on the Organization of the GAO and the Law on the Organization of Courts, the new Code worsens the situation. This is primarily because Afghanistan has, similar to other civil law countries, subscribed to the principle of mandatory prosecution. According to this principle, once the case is brought to the prosecution’s attention and sufficient evidence incriminates the suspect, the prosecution is obligated to prepare the charge sheet and file the case to the court. This principle leaves no space for the prosecutor to negotiate with the defendant, nor does it give the prosecutor the authority to dispose of the case.

1. Current Procedures

The Criminal Procedure Code identifies certain circumstances under which the prosecutor can dispose of a case, regardless of incriminating evidence. Article 171 (3) of the Criminal Procedure Code asserts that if “perpetrators culpability and the outcome of the action is insignificant” and there is no public interest in prosecuting the crime, the trial prosecutor “shall” refrain from its prosecution. The victim has the right to object to the decision of the

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49 Afghan Court’s Law, art 36.
50 The Afghan Criminal Procedure Code, art 282.
51 Afghan Courts’ Law, art 31(1).
52 See The Afghan Criminal Procedure Code, art 171 in accordance with art. 175.
53 Id. art 171 (3) (emphasis added).
prosecutor. If the appellate prosecutor confirms the order, the objection must be submitted to the court. Likewise, under Article 203 (1) of the Criminal Procedure Code, the court may also dispose a case when the crime is “minor and not punishable.”

Although the prosecutor has the power to dispose of cases based on public interest, these disposals differ from the so-called diversion procedure. “Diversion” orders a substitute for the punishment—for instance, payment to a charity organization; however, the Afghan Criminal Procedure Code does not authorize the prosecutor to use this approach. This lack of a substitute in Afghan context can make negotiations for the disposition of cases inefficient. However, it is worth noting that there has not been any research indicating whether or not negotiations take place between the prosecutor (or the court) and the defendant at all.

Interestingly, while consensual elements to disposing of cases are considerably insufficient in the investigation phase, the Criminal Procedure Code accords the court with the power to suspend the trial in certain crimes. Article 204 (1) of the Criminal Procedure Code asserts that in obscenity cases, the court can suspend the trial of the defendant for one year provided the accused does not commit any crime within the suspended period. These suspensions are potential circumstances under which the court and the defendant can negotiate terms of the suspension. Likewise, they can provoke negotiation between the prosecutor and the defendant. An easy hypothesis can be agreeing that defendant will confess and the prosecutor will ask for trial suspension. Still, the fact that enough research has not been done on the issue

54 Id. art 170.
55 Id.
56 Id. art 203 (1).
57 Obscenity is a crime carrying sentence no more than three months and fine no more than three thousand Afghanis. QANUNI JAZA [PENAL CODE] Kabul 1355 [1976] art 26 (Afg.) [hereinafter, Afghan Penal Code].
58 The Afghan Criminal Procedure Code, art 204 (1).
and the Judiciary’s Reports also fails to address it incapacitates us to provide exact details on this trial suspension procedure or at least it happenstance.

In addition to these new institutions introduced by the Criminal Procedure code in 2014, some conventional elements exist that provoke possible consensus between the prosecutor (or the court) and the defendant on further proceedings of the case. Article 52 (2) of the Penal Code asserts that in cases of “alliance in crimes” 59 (Etifaq dar Jurm), if a defendant provides information leading to the arrest of his/her other allies (Mutafeqin) who were not previously known to the prosecution, the defendant will be exempt from punishment.60

In addition, other elements also exist that encourage informal negotiations between the prosecution (or the court) and the defendant. For instance, article 105 of the Criminal Procedure Code authorizes the prosecution and the court to release the defendant on or without bail regardless of available evidence.61 Similarly, some other substantive criminal organic codes contain some elements that give the prosecutor and the defendant some space to negotiate and discuss the outcome of a trial, for instance in drug trafficking crimes.62 However, these discussions are informal, non-binding, and only occasional. Despite their occurrence in some cases, these negotiations are surrounded by doubt, which in turn leads to their failure or misuse. The most prominent doubt is whether the court approves of this agreement.

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59 Article 49 of the Afghan Penal Code provides that alliance in crimes is the regular and continues joining status of two or more person in order to commit a felony or a misdemeanor or in other equipping, facilitating or supplementing parts. It should be noted that alliance in crime takes place before the crime has taken place. Once the crime takes place, perpetrators will be punished based on the actual crime as either principle or accomplice.
60 Afghan Penal Code, art 52(2).
61 The Afghan Criminal Procedure Code, art 105.
62 To the knowledge and experience of the author, these negotiations mostly happen where the prosecutor agrees to ask for lighter punishment if the defendant agrees to give information about the group he or she is working for. Since there is lack of research in this area, it is hard to amount the extent of these agreements.
2. Insufficiency of the Existing Procedures

The preceding section showed that existing consensual elements and trial avoidance procedures in Afghanistan are inadequate to solve the outburst of the courts’ dockets. This conclusion is supported by the growing number of appeals in the country, a result of the legal culture where most cases are appealed to higher courts. In addition, parties keep prolonging trial procedure for various reasons. If the defendant is guilty, he hopes for a lenient punishment; if he innocent, he aims to receive an exonerating verdict. Prosecutors also have some incentives to disagreeing with the primary or appellate courts’ decisions.

There are two main reasons that parties do not agree to decisions by lower courts—especially primary courts. The first reason is the overwhelming bureaucratic requirement of the Criminal Procedure Code that the prosecutors’ agreement to the courts’ decision requires. Article 23 (2) of the Law on the Organization of GAO provides that the appellate prosecutor has the power to either approve or reject the primary prosecutor agreement to the primary courts judgment.63 If the appellate prosecutor does not agree, he/she will appeal. However, if the appellate prosecutor also agrees to the primary courts judgment and the alleged crime is felony*, article 24 (1) assert that the case still needs to be sent to the Supreme Court prosecution for further approval.64 If the Supreme Court prosecutor does not agree, the case will be sent back to the appellate prosecutor to appeal. Likewise, the appellate prosecutor’s contentment to the appellate courts’ decision will be sent to the Supreme Court prosecution.65

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63 Law on the Organization of Prosecution, art 23 (2).
64 Law on the Organization of Prosecution, art 24 (1).
65 Id. art 22(2)

* According to the article 24 of the Afghan Penal Code, felony is a crime carrying death penalty, or incarceration from five year up to twenty years. Felonies do not carry fines. It is also worth noting that the maximum punishment imposed on a crime in Afghanistan is twenty years. See Afghan Penal Code, art 99.
prosecution does not agree, he/she will appeal.\textsuperscript{66} If the Supreme Court prosecutor also agrees to the appellate prosecutor’s decision and the alleged crime is felony, the case must to be sent to the attorney general.\textsuperscript{67} The attorney general or his trial deputy can disagree with the Supreme Court prosecutor and appeal the case to the Supreme Court.\textsuperscript{68}

The requirement above, at first prolongs the process of finalizing prosecutors’ satisfaction to lower courts’ judgments. It also causes an immediate appeal to the extent that lower prosecutors fear that their decisions will be rejected by one of the higher prosecutors. In addition, prosecutors are reluctant to be criticized for their unreasonable agreement with the trial court’s decision (the one rejected by a higher prosecution) insofar as every prosecutor’s promotion depends on the positive evaluation of his/her achievements by the head of the department. This reluctance is also influenced by the fact that prosecutors do not want their personality and professionalism questioned before co-workers and counterparts with unreasonable decisions as the decision may appear after being rejected by the higher prosecutor.

The second reason for the large number of appeals is the punishing tradition of courts. Unlike some other countries where there might be some kind of informal custom for specifying the amount of punishment, this manner has been left completely unbridled in Afghanistan. There is no specific custom on what can be the fair punishment between what the prosecutor asks for and what the defendant invokes. This absence of a certain custom leads to either excess or wastage. Two possibilities do exist. First, the court orders a punishment closer to what the prosecutor has asked for, and far from what defendant had sought, so the defendant appeals.

\begin{flushright}
\textit{Id.} art 18 (2)  \\
\textit{Id.} art 24(2)  \\
\textit{Id.}
\end{flushright}
Second, the court’s specified punishment is close to what the defendant had demanded and far from what prosecutor had asked for, a case in which the prosecutor appeals.

The possibilities above are not the most egregious. The fact is that once one party appeals, the second also appeals for the sake of the “risk aversion.” This is because the Criminal Procedure Code provides that if only the defendant appeals, the appellate court can either mitigate the punishment or confirm the primary court’s decision; it cannot increase the punishment. 69 However, if only the prosecutor or both parties appeal, the appellate court can decrease or increase the amount of punishment, confirm the lower court’s decision, or overrule it. 70 In light of these options, if the defendant appeals, the prosecutor also appeals; and if the prosecutor appeals, the defendant favors appealing in order to present mitigating factors and reasons. It does not appear rational for the defendant to leave the appellate court be deceived by the prosecutor.

3. The Judiciary Reports

As support for these points about efficiency of courts, this paper analyzes the Supreme Court quarterly reports. 71 These reports include a brief description of the proceedings of all three-level courts in that specific quarter. Since the current Criminal Procedure Code came into force on May 5, 2014, two recent quarterly reports of the Supreme

69 The Afghan Criminal Procedure Code, art 261.
70 Id. art 260.
71 Considering the lack of adequate sources and researches in the area, we inevitably have only relied on the Supreme Courts report in this research. These reports are the only sources for research on cases’ statics in different procedural stages. Although these reports have some gaps and inconsistencies, they do not affect the parts this paper has depended on. The author has attempted to avoid depending on those parts of these reports which are unreliable due to inconsistencies and some other ambiguities.
Court will be discussed here.\textsuperscript{72} For the sake of comparison, it also discusses two other prior quarterly reports from October 2013 through March 2014.\textsuperscript{*}

According to the last two Judiciary reports, 16,387 cases were submitted to the primary courts all over the country during first six months (April-September) of the application of the new Code.\textsuperscript{73} During that period, those courts decided only 14,717 cases (71\% of their dockets).\textsuperscript{74} Likewise, during these first six months, 11,441 cases were appealed to the appellate courts all over the country.\textsuperscript{75} This means that nearly 77\% of the cases decided by the primary courts during these months were appealed to the appellate courts. These newly appealed cases constituted 67\% of appellate courts’ dockets.\textsuperscript{76} The appeal rate was approximately 82\% during the six months before the application of the new Code (October 2013- March 2014).\textsuperscript{77}

\textsuperscript{72} Two last quarterly reports of the Supreme Court have been published in its official website. These reports belong to the first six months of the Afghani calendar, equivalent to April through September 2014. The Supreme Court has not published reports of the last six month of Afghani calendar, starting from October 2014 to March 2015.

\textsuperscript{*} Notably, the Attorney General’s Office reports are not generally available to the public. It has not published them in hard copy nor has it published them electronically (offering them on the official website or otherwise). One of the found copies of its three pages official report of 1392 (April 2013-March 2014) to the President Office is so brief, incomplete and vague that cannot be depended on.


\textsuperscript{74} See The 1933 First Quarter Report, at 22-26 & 29-32; The 1393 Second Quarter Report, at 19-22 & 25-27.

\textsuperscript{75} See The 1933 First Quarter Report, at 7-11 & 14-17; The 1393 Second Quarter Report, at 6-9 & 11-14.

\textsuperscript{76} According to these reports, total dockets of appellate courts reached 17017 cases, which include previously remained cases as well. See The 1933 First Quarter Report, at 7-11 & 14-17; The 1393 Second Quarter Report, at 6-9 & 11-14.

Likewise, while appellate courts had decided 10,578 cases (62% of their dockets) during first six months of the application of the new Code, 6,470 cases were appealed to the Supreme Court. In light of that number, approximately 61% of cases decided by the appellate courts were appealed to the Supreme Court. During the last six months before the application of the new Code, the appeals rate to the Supreme Court was approximately 52%. These newly appealed cases constituted 56% of the Supreme Court’s docket. The Supreme Court decided 7,083 cases (57% of its docket) during the period.

Notably, the docket clearance rates differ from one court with a specific subject matter jurisdiction to another. For instance, while the Criminal Division of the Supreme Court cleared approximately 87% of its docket, the Martial, Military Crimes, and Crimes against the internal and External Security Division cleared only 40% of its docket. This number is likely explained by the fact that some of the crimes under the competence of these divisions are cumbersome in nature, such as drug crimes and abduction. Not only is the prosecution unable to investigate them within the time limits, but courts have also been struggling with these crimes. Specifically, the amount of procedures gets overwhelming when these crimes are repeatedly appealed. For instance, while 3,567 (approximately 71% of their docket) cases were decided by the Public Security Divisions of primary courts all over the country during the first six months of the
application of the new Code,\textsuperscript{86} 3,504 cases (almost all cases decided by the Public Security Divisions of primary Courts)\textsuperscript{87} were appealed to the Public Security Divisions of appellate courts.\textsuperscript{88}

High conviction rate is another catalyst to the outburst of these appeals. Although the exact percentage of conviction rate in Afghanistan is not clear yet, an in-depth analysis of the Judiciary’s reports gives some perspective on it. According to these reports, the conviction rate in first instance courts was approximately 82\% during the first six months of the application of the new Code (April-September 2014).\textsuperscript{89} Likewise, the conviction rate in appellate courts was approximately 84\% during this period.\textsuperscript{90} In contrast, while the conviction rate was approximately 79 \% in primary courts during last six months before the application of the new Code (October 2013-March 2014),\textsuperscript{91} it reached about 83\% in appellate courts.\textsuperscript{92} These rates clearly indicate the potential of appeals by defendants. Almost all convicted defendants appeal to higher courts. Considering Articles 260 and 261 of the Law on Organization of GAO,\textsuperscript{93} once the defendant

\textsuperscript{86}The 1933 First Quarter Report, at 23; The 1393 Second Quarter Report, at 20.
\textsuperscript{87}This is the same situation in the last six months before application of the new Code (October 2013-March 2014). According to the Judiciary reports, almost all cases decided by the Public Security Division of primary courts had been appealed to the Public Security Division of appellate courts. \textit{See} The 1392 Third Quarter Report, at 8 & 24; The 1392 Fourth Quarter Report, at 8 & 23.
\textsuperscript{88}The 1933 First Quarter Report, at 8; The 1393 Second Quarter Report, at 7.
\textsuperscript{89} \textit{See} The 1933 First Quarter Report, at 22-26; The 1393 Second Quarter Report, at 19-22. These conviction rates have been collected by the author. To estimate these rates, courts with the most consistent and comprehensive data and dockets were chosen, namely the Criminal Division, the Public Security Division, and the Crimes against Internal and External Security Division of the primary courts. These sums are the results of the total reported convictions and exonerations of each of the above mentioned courts. Admittedly, this sum does not give us the exact conviction rate, but the exact rate does not significantly differ from what this sum results.
\textsuperscript{90} \textit{See} The 1393 First Quarter Report, at 7-11 & 14-15; The 1393 Second Quarter Report, at 6-9 & 12-13. Courts chosen among appellate courts were the Criminal Division, the Public Security Division, the Crime against Internal and External Security Division of appellate courts, and the Anti-corruption Appellate Courts.
\textsuperscript{91} \textit{See} The 1392 Third Quarter Report, at 22-26; The 1392 Fourth Quarter Report, at 21-25. The same first instance divisions have been chosen here as well.
\textsuperscript{92} \textit{See} The 1392 Third Quarter Report, at 7-11 & 15-16; The 1392 Fourth Quarter Report, at 7-11 & 15-16. Likewise, the same appellate court and divisions have been chosen here.
\textsuperscript{93} As mentioned before, article 260 asserts that if only the prosecutor appeals, or if both the prosecutor and the defendant appeal, the appellate court has the power to decrease or to increase the punishment specified by the lower court. In contrast, article 261 stipulates that if the appellant is just the defendant, the court can either confirms the lower court’s judgment or it can decrease the punishment specified by the lower court, it cannot increase it.
appeals, the prosecutor follows the path immediately. Sometimes, this situation is most similar to the so-called prisoner’s dilemma for both parties.

Afghanistan is not the only country dealing with these dockets. Most of the recent changes in the criminal procedures of other civil law countries have also been inspired by the fact that their traditional institutions were unable to solve problems created by different factors such as increases in the amount of crimes and the emergence of complicated crimes. These countries have been able to establish (either invent or transplant) some institutions to confront these problems. The next section discusses some of these institutions and tries to find a suitable solution to this problem in Afghanistan.

4. Possible Solutions

Generally, unlike their common law counterparts, civil law countries do not accord prosecutors with the enough discretion to dispose of cases;\(^\text{94}\) the principle of prosecutorial discretion is barely known to these countries. This peculiarity stems from two aspects of criminal procedure in civil law countries: (1) the principle of legality, which in turn results to the mandatory prosecution principle, in some countries, and (2) the existence of investigating magistrates in others.\(^\text{95}\) It should not be assumed, however, that the principle of expediency is also not valued by these countries.\(^\text{96}\) On certain occasions, even in civil law countries, the law identifies conditions under which a prosecutor has discretion to dispose of cases.\(^\text{97}\) It should be noted, nevertheless, that these countries differ significantly as to the extent that they use the

\(^{92}\) For an in depth discussion on differences between the prosecutorial discretion in civil law and that of common law countries see Erik Luna & Marianne Wade, Prosecutorial Power: a Transnational Symposium: Prosecutor and Judges, 67 WASH & LEE L. REV. 1413 (2010).
\(^{95}\) Id. at 1432.
\(^{96}\) Id. at 1430.
\(^{97}\) Thaman, supra note 1, at 3
expediency principle. Some countries, such as France, accord the prosecutor with a fair amount of autonomy in deciding which case should be filed and which should not, while others do not intend to make the prosecutor “Jack of all trades.” In the latter ones, judges are involved one way or the other in disposing procedures. Regardless of how much power the prosecutor has been accorded, these procedures are used as either trial or at least full trial avoidance procedures. the following discussion elaborates on some of them.

In civil law countries, one of these discretionary procedures to avoid the trial completely is the so-called diversion or “public interest drop” where the prosecutor refrains from filing the case in exchange for certain conditions imposed on the defendant, which vary from restitution to different types of payments, to mandatory treatments.

For instance in Germany, if the committed crime is a misdemeanor carrying a sentence of less than one year, and there is no public interest in following the case, both the judge and the prosecutor have the discretion dismiss it. This is applicable on both absolute and relative petty crimes. While the former, gives the prosecutor unconditional discretion, a prosecutor’s decision will depend on the court’s approval in the latter one. In these cases, the defendant will be held to do some particular actions such as paying a specific sum of money to a charity

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99 For more about dismissals see, e.g., Luna & Wade, supra note 94, at 1453-61; Thaman, supra note 3, 331-335
100 Thaman, supra note 1, at 13.
101 For more about the consensual element in German law see Folker Bittmann & Dessau–Roblau, Consensual Elements in German Criminal Procedural Law, 15 GERMAN L. J. 15 (2014).
103 Bittmann & Roblau, supra note 101, at 17.
organization in exchange.\textsuperscript{105} Notwithstanding disposing of the case, the action will be recorded in the crime record sheet of the person.\textsuperscript{106}

A penal order is another procedure that is used to avoid trial in some civil law countries. A penal order gives the prosecutor the authority to dispose of cases after the court’s confirmation and before the case is filed.\textsuperscript{107} For instance, in Germany, in accordance with the section 407 of the German Code of Criminal Procedure (StPO), prosecutor can ask the court a specific amount punishment, mostly a fine or probation,\textsuperscript{108} to be imposed on the defendant without a trial being held.\textsuperscript{109} In general, penal orders are imposed in cases of \textit{flagrant dilicto}, or in cases with solid evidence, or sometimes in cases where the defendant has already confessed.\textsuperscript{110} After the court’s acceptance of the prosecutor’s suggestion, if the defendant does not appeal to the penal order during specific amount of time defined by law, the order becomes final and the trial will not be held.\textsuperscript{111} It should be noted, though, that the order will have the status of criminal judgment.\textsuperscript{112}

Negotiated agreements, which do not avoid the trial completely but do avoid full trial, are another procedure used in some civil law countries.\textsuperscript{113} In these agreements, after an abbreviated trial hearing with judicial participation in some countries such as Germany and judicial neutrality in other such as Italy, the prosecution and the defendant agree on specific waiver of the rights by

\textsuperscript{105} See, e.g., Rouxloh, \textit{supra} note 102, at 305; Thomas Weigend & Jenia L. Turner, \textit{the Constitutionality of Negotiated Criminal Judgments in Germany}, 15 GERMAN L. J. 81, 84 (2014).
\textsuperscript{106} See Luna & Wade, \textit{supra} note 94, at 1443
\textsuperscript{107} For more about penal order See, e.g., Luna & Wade, \textit{supra} note 94, at 1453-61; Thaman, \textit{supra} note 3, at 339-342
\textsuperscript{108} Bittmann & Roblau, \textit{supra} note 101, at 17
\textsuperscript{109} See STRAPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDES GESETZ BLATT, TEIL I [BGBL. I] 1074, § 407 (Ger.).
\textsuperscript{110} Thaman, \textit{supra} note 1, at 18.
\textsuperscript{111} See, e.g., \textit{Id.} at 17; Ma, \textit{supra} note 98, at 37
\textsuperscript{113} Luna & Wade, \textit{supra} note 94, at 1449.
the defendant in exchange with certain concession in the prosecution’s part. This procedure, compared to others, is mostly based on the consensus and satisfaction of parties, the prosecution and the defendant, before the trial. This procedure will be discussed more fully in Section III.

There are also other procedures to avoid full-blown trials. Some instances can be the German Beschleunigtes Verfahren\textsuperscript{114} and the French Comparution immediate,\textsuperscript{115} which give the prosecutor the authority to expedite the trial process especially in flagrant dilicto. The French correctionalization, where the prosecutor gets the authority to decrease the charge prior to filing it to the court;\textsuperscript{116} and Italian patteggiamento, which allows the prosecutor to dispose of the case with solely approval or rejection power of the court,\textsuperscript{117} are other types of this semi-discretionary procedures in civil law countries.

Notably, any of these procedures could be considered as possible models for Afghanistan. However, to the extent that this paper deals with the dissatisfaction of parties, which causes lengthy and costly trials resulting overwhelming court dockets, a better solution would demand satisfaction between them; thus, negotiated agreements seem to have more to offer. Prior to discussing the essence these agreements as a solution, it is worth explaining why we chose the Germany as an appropriate model. This lies in fundamental similarities between the criminal procedures in these two systems, which be discussed in the following section.

\textbf{c. Similarities Between Criminal Procedure in Afghanistan and Germany}

As mentioned, various civil law countries have trial avoidance procedures that could serve as models for Afghanistan. Law students consistently learn that Afghanistan follows the

\footnotesize{\textsuperscript{114} Carduck, \textit{ supra} note 112, at 11.}
\footnotesize{\textsuperscript{115} Ma, \textit{ supra} note 98, at 35.}
\footnotesize{\textsuperscript{116} Id. at 32.}
\footnotesize{\textsuperscript{117} Maike Frommann, \textit{Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?}, 5 HANSE L./REV. 197, 211 (2009).}
codification model followed by France; and in most discussions about legal institutions, France is usually deemed the very best model. Nonetheless, there are significant differences in criminal procedures of France (and some other civil law countries) and those of Afghanistan, differences that make it difficult to choose them as potential model. For instance, France follows the expediency principle in criminal procedure and has investigative magistrates carrying out inquiries aside from the prosecutor’s investigations, none of which is followed by Afghanistan.

In contrast, Germany’s framework and principles of criminal procedure are much more compatible with those in Afghanistan. Considering the fact that full-blown comparison between the criminal procedures of these two countries go beyond the scope of discussion here, this next section attempts to illustrate the similarities that might affect the transplantation of negotiated agreements into the Afghan context.

Nullum Crimen Sine Lege (the Principle of Legality)

The very first similarity between these two countries can be found in their adherence to the principle of legality. In Germany, article 103 (2) of the Basic Law (Grundgesetz) and section 1 of the Penal Code (Strafgesetzbuch) asserts that no act can be punished unless clearly prohibited by the law prior to its perpetration. In same way, Afghanistan has subscribed to the principle of legality. The Afghan Constitution and the Penal Code state that criminal acts should be asserted in the law and punishments should be declared prior to perpetration of the criminal act.

While this principle appears to be simple and straight forward in its implication, this is not the case. The legality principle has several other ancillary minutiae. For example, in both

118 GRANDGESETZ FUR DIE BUNDESREPUBLIC DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I art 103 (2) (Ger.); STRAFGEBETZBUCH [STGB] [PENAL CODE] 1871 BUNDESGESETZBLATT [BGBL]. § 1 (Ger.).
119 The Afghan Constitution, art 27; Afghan Penal Code, art 2 & 3.
Germany and Afghanistan, the principle of finding the material truth is one of these branches. In accordance with this principle, not only are investigative authorities obligated to submit all evidence they have gathered against and in favor the accused, but also if the court finds the evidence doubtful, it can conduct further investigations, seek more evidence, and question the witness during the trial, among other actions.\(^\text{120}\)

This principle, called the inquisitorial principle, places judges as the substantial truth finders. Article 244(2) of the StPO requires that “[i]n order to establish the truth, the court shall, \textit{proprio motu}, extend the taking of evidence to all facts and means of proof relevant to the decision.”\(^\text{121}\) Likewise, article 155(2) of the StPO declares that courts are independent in their investigations.\(^\text{122}\) In Afghanistan, as is in Germany, this principle is one of the most fundamental principles of criminal procedure. Article 19 of the Law on the Organization of Courts asserts that courts satisfaction to the all evidence submitted to it is necessary for the judgment it renders.\(^\text{123}\) Similarly, article 227 (2) of the Criminal Procedure Code obligates the court to consider and discuss all of the evidence submitted by the prosecutor, defendant, and other parties (litigants of civil remedy).\(^\text{124}\)

Ancillary to the legality principle in both countries is the mandatory prosecution principle. Article 152 (2) of the StPO provides that unless otherwise required by law, when “sufficient factual indications” exist, the prosecutor is “obligated to take action” against suspected criminals.\(^\text{125}\) Likewise, although not clearly stated in the law, Afghanistan follows the mandatory

\(^{120}\) Bittmann & Roblau, \textit{supra} note 101, at 16
\(^{121}\) StPO, § 244(2).
\(^{122}\) This article reads, “[t]he courts shall be authorized and obligated to act \textit{independently}; in particular, they shall not be bound by the parties’ applications when applying a penal norm.” (emphasis added).
\(^{123}\) Afghan Courts’ Law, art 19.
\(^{124}\) The Afghan Criminal Procedure Code, art 227 (2).
\(^{125}\) StPO, § 152(2).
prosecution principle as well. Article 171 of the Criminal Procedure Code provides instances where the prosecutor can refrain from filing the case to the court.\textsuperscript{126} *Argumentum a contrario*, if the circumstances set forth by this article do not manifest, the prosecutor is obligated to file the case in the court. By the same token, article 175 of the same code provides that if the prosecutor confirms the charge sheet prepared by the investigative prosecutor, he/she has to file the case.\textsuperscript{127} That stated, both countries substantially limit the prosecutor’s authority to withdraw from filing a charge against a defendant when sufficient evidence surfaces. This is in contrast to some other civil law jurisdictions (as in France) that follow the immediacy principle, giving the prosecutor broader competence to dispose of cases prior to filing charges.

Germany and Afghanistan’s procedures are also similar as to the prosecution’s obligation to consider both inculpatory and exculpatory evidence during the proceedings. In both countries, a prosecutor is expected to act as a neutral party,\textsuperscript{128} rather than as a hostile, which is the more conventional role of prosecutors in the common law world. Article 160 (2) of the StPO obligates the public prosecutor to consider both “incriminating and exonerating circumstance” during the investigations.\textsuperscript{129} Similarly, the last sentence of Article 145 (3) of the Afghan Criminal Procedure Code requires prosecutors to collect evidence both in favor and against the defendant.\textsuperscript{130} This is the reason that “prosecutor,” *Khasmi sharif*, means “noble hostile” or “noble opponent” in Afghan criminal law literature.

**Defendant’s Access to Dossier**

\textsuperscript{126} This article reads: “The prosecutor shall issue an order to dismiss a case for the following conditions: (1) if the crime hasn’t been committed, (2) if the instigation of criminal case depends upon victims complaint and he/she withdraws the complaint, (3) if the perpetrator’s culpability and the outcome of the action are insignificant and its prosecution is not in the public interest, (4) [when there is lack incriminating evidence], and (5) [if there exist instance for projection of the case such as defendant death]” (Translated by JSSP)

\textsuperscript{127} The Afghan Criminal Procedure Code, art 175.

\textsuperscript{128} Boyne, supra note 104, at 1302 (stated in relation with the German prosecutors’ neutrality).

\textsuperscript{129} StPO, § 160(2).

\textsuperscript{130} The Afghan Criminal Procedure Code, art 145 (3).
A defendant’s right to have access to all files and documents prepared by the prosecution regarding defendant’s case is another shared aspect of the criminal procedure in both countries. This pretrial investigation’s document (dossier in Germany and dossiah in Afghanistan) is exposed to the broad scrutiny of the court and the defendant in both countries. Article 147 (1) of the StPO gives the defense counsel the authority to “inspect” the document submitted to the court and the evidence.\(^{131}\) Likewise, according to Articles 6 (5), 7 (11), 163 (2) of the Afghan Criminal Procedure Code, the defendant has the power to inquire the dossiah and be present during the examination of evidence and question witnesses in investigation process.\(^ {132}\) The existence of this right significantly matters to the defendant when an agreement is to be discussed.

*Court Structure*

Lastly, both countries follow the conventional civil law tradition of having two courts deciding facts, both the primary and the appellate, and a Supreme Court reviewing lower courts’ decision on ground of error in law. StPO accepts appeals on fact and on law to high regional court, while appeal to the German Federal Court of Justice is admissible only on ground error in law.\(^ {133}\) In Afghanistan, the Law on the Organization of Courts asserts that primary and appellate courts will consider cases according to their “nature, quality and content,” and the Supreme Court ensures only that there has been no error in the application of the law. This means that parties can seek appellate remedies on factual grounds in the appellate court,\(^ {134}\) but the Supreme

\(^{131}\) This article reads, “Defense counsel shall have authority to inspect those files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence.”StPO, § 147.

\(^{132}\) The Afghan Criminal Procedure Code, arts 6 (5), 7 (11), 163 (2)

\(^{133}\) StPO, sec. 312 & 333; see also Michael Bohlander, *Plea Bargaining: Waiver of Right to Appeal*, 69 J. CRIM. L. 499, 499 (2005).

\(^{134}\) The Afghan Criminal Procedure Code, arts 246-47.
Court will accept the case only if parties contend that the lower court misapplied the law in a way that substantially affected the decision.\textsuperscript{135}

III. \textit{Absprachen (Negotiated Agreements): The German Model}

This part discusses the procedure of negotiated agreements in Germany,\textsuperscript{136} including how these agreements developed, the way they were finally formalized, the statutory and case law rules governing the agreements procedure, and other relevant sections of the German Code of Criminal Procedure (\textit{Strafprozessordnung}, StPO).

a. History of the Negotiated Agreements in Germany

The fact that disposition of the cases conflict the \textit{ex proprio motu} obligation of courts are of the ancient opinions in civil law countries.\textsuperscript{137} Nonetheless, civil law countries have recently left their strict adherence to the inquisitorial principle in favor of some consensual procedures in order to maintain procedural efficiency.\textsuperscript{138} Except for the Spanish \textit{conformidad}, the first formal trend toward introduction of plea agreements in civil law countries started with the suggestion of the Council of Europe in 1987 and the introduction of Italian \textit{patteggiamento} in 1988.\textsuperscript{139}

In Germany, practitioners started using informal agreements without any statutory or case law basis for it.\textsuperscript{140} However, its evolution is grateful to so-called judicial activism.\textsuperscript{141} Around the

\textsuperscript{135}\textit{Id.} art 270
\textsuperscript{136}German law has used two terms that refer to proceedings covering these agreements, \textit{Erörterung} (meaning discussions) and \textit{Verständigung} (meaning understanding). \textit{Absprachen} (meaning agreement) and negotiated agreements are terms used to refer to the negotiations’ outcome in the scholarly pieces of both German and non-German writers. In this piece, in order to maintain a single term throughout the piece and for the purposes of this piece’s convergence with other articles, the term \textit{Absprachen} and negotiated agreements have been used.
\textsuperscript{137}Thaman, \textit{supra} note 3, at 345.
\textsuperscript{138}See generally Frommann, \textit{supra} note 117; Ma, \textit{supra} note 98 (discussing recent change in continental Europe).
\textsuperscript{139}Thaman, \textit{supra} note 3, at 345-46.
\textsuperscript{140}Weigend & Turner, \textit{supra} note 105, at 87.
\textsuperscript{141}See Carduck, \textit{supra} note 112, 4-5.
1970s, Germany was deemed a “land without plea bargaining”. Soon after, a German lawyer, who used the pseudonym, Detlef Deal, published an article uncovering the behind the scene practices of informal agreements in Germany. Yet, the exact starting date of informal agreements in Germany is still unclear. In Germany, unlike some other civil law countries where this practice was started to deal with minor crimes, informal agreements were aimed at dealing with more complex and cumbersome cases such as white collar crimes; later, it was extended to drug crimes, financial crimes, tax evasion, environmental crimes, and so on as well.

The shift to using this procedure has been attributed to various factors, including the increase in the court docket and crimes overall, a shortage of judicial personnel, a change in substantive law while procedural laws had remained the same; changes in theories of punishment; changes in the relationship between the State and citizen; and prior changes and consensual elements as path pavers.

After this fact was revealed, practitioners not only did not deny practicing such agreements, but they also insisted on continued practice of these agreements for various reasons. Consequently, practitioners as proponents and academics as opponents began

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143 RAUXLOH, supra note 5, at 67.
144 Carduck, supra note 112, at 4.
145 See, e.g., Rouxloh, supra note 102, at 298; Weigend & Turner, supra note 105, at 86; Mathias Boll, Plea Bargaining and Agreement in the Criminal Process: A Comparison Between Australia, England and Germany, 48-9 (2009).
146 Rouxloh, supra note 102, at 301.
147 Michael Bohtander, Principles of German Criminal Procedure, 120 (2012).
148 Rouxloh, supra note 102, at 299.
149 Id. at 301-03.
150 Boll, supra note 145, at 39.
151 In her article, Formalization of Plea Bargaining in Germany Will the New Legislation Be Able to Square the Circle, Rouxloh asserts reasons posed by the practitioners. For instance, that the practice was not forbidden in the StPO; that some sections of the StPO allowed negotiations, namely 153a; that it handed over mutually acceptable
debating whether these agreements fit under the umbrella of the German criminal procedure principles. Nonetheless, the practice continued until 1987 when the constitutionality of these agreements was challenged in front of the German Federal Constitutional Court for the first time. There, the Court upheld the constitutionality of these agreements stating that as long as the law was respected, no constitutional right was impinged. Some of the early requirements asserted by this court concerned the principle of proportionality, thorough assessment of facts, and full consideration of the law and facts.

After the judgment of the constitutional court, some inconsistent judgments were made by different chambers of the German Federal Court of Justice during 1990s. However, the Fourth chamber of German Federal Court of Justice in its landmark decision from 1997 sealed on the compatibility of these agreements with the principles of German criminal procedures. Besides accepting the practice, this Chamber ordained some restrictions on the practice. For instance, it prohibited charge bargaining and the waiver of the right to appeal, required informing all parties to the trial about the negotiations, prohibited offering a specific amount of punishment, among other measures. These limitations posed by the Fourth Chamber appear to have acted as important guidelines for courts for a long time. In 2005, the Grand Chamber of the German Federal Court of Justice was asked to once again reconsider whether these agreements could include the waiver of the right to appeal, and the Court held that the right to appeal cannot be...
waived as part the agreement.\textsuperscript{157} In addition, the Court asked the legislature to formalize the practice.\textsuperscript{158}

Following this suggestion, several drafts were presented by interest groups.\textsuperscript{159} In 2009, the legislature, by adding five new sections to the StPO and amending some others,\textsuperscript{160} for the first time, accepted the practice of negotiated agreements. For these agreements, the legislature adopted the prior guidelines developed by the German Federal Court of Justice into the law.\textsuperscript{161} This was not the end of the opponents struggle though. In 2013, the constitutionality of the legislation permitting negotiated agreements was challenged before the Federal Constitutional Court. There, the Court held that despite of the fact that there were certain deviations from the existing rules and restrictions on the practice; negotiated agreements, \textit{per se}, were not unconstitutional.\textsuperscript{162} Nonetheless, the controversy continues over the compatibility of these agreements with the principles of criminal procedure in Germany.

b. Negotiations, Agreements, and Procedure: Process of the \textit{Absprachen}

Generally, negotiations start during the preliminary investigations between prosecutor and the defendant, and they continue through the main hearings of the court where the actual negotiations take place. The process of the negotiated agreements in Germany can be divided into two stages, the preliminary stage and the final stage.\textsuperscript{163} The preliminary stage starts from the

\textsuperscript{157} Rouxloh, \textit{supra} note 102, at 320
\textsuperscript{158} Schemmel et. Al., \textit{supra} note 6, at 45.
\textsuperscript{159} Frommann, \textit{supra} note 117, at 202; Kerscher, \textit{supra} note 7, at 42.
\textsuperscript{160} See, e.g., Carduck, \textit{supra} note 112, at 17; Kerscher, \textit{supra} note 7, at 42.
\textsuperscript{161} Carduck, \textit{supra} note 112, at 6; RAUXLOH, \textit{supra} note 5, at 100.
\textsuperscript{162} For in depth discussion of German Federal Constitutional Court’s 2013\textsuperscript{th} decision see, e.g., Andreas Mosbacher, \textit{The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements}, 15 GERMAN L. J. 5, 5-14 (2014); Schemmel et. Al., supra note 6, at 48-53; Weigend & Turner, supra note 105, at 94-105.
\textsuperscript{163} It is worth noting that, unlike some writers’ use of the term plea bargaining, the plea bargaining notion is actually unknown to the civil law countries. In civil law countries, the line between the public law and private law has been clearly drawn. Public law deals with the relation between private persons and the government, for example, tax law. Here, the government acts the patron of the public interest and there is no chance for parties to compromise unless
investigation process and continues through the mean hearing. The final stage covers the period in which the court starts actual negotiations with the parties during the mean hearing.  

1. Preliminary Stage

As mentioned above, preliminary discussions for agreements start during the investigation process. Section 160b asserts that “[t]he public prosecution office may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings. The essential content of this discussion shall be documented.” This section clearly depicts the non-binding nature of the negotiations’ process during the preliminary investigations. The term discussion here indicates that the legislature did not intend to accord the prosecutor with the power to enter into agreement. “Participants” in this article covers the defendant and also some cases the victim. Although the law itself is not clear on whether

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164 For the difference compare StPO, §§ 160b, 202a, 212, 256b, and 257c (especially, 257b and 257c).

165 The German term used in this section is Erörterung meaning discussion.

166 StPO, § 160b (emphasis added)

167 Bittmann & Roblau, supra note 101, at 25 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 29, 2011, Case No. 1 StR 287/11 Rn. 12).

168 See Kerscher, supra note 7, at 71.
these negations will find their way to the court, the German Federal Court of Justice’s decision of 2011 confirms that every negotiation ought to be disclosed in front of the court.\textsuperscript{169}

This process raises several concerns and leaves several issues unanswered. First, it is not clear which party can initiate the discussion. It is unclear whether the defendant can start discussing the matter or whether he or she should wait for the prosecution. Second, there is no binding result stemming from these discussions, which, in addition to creating a misusing chance of these discussions by the prosecution, makes the defendant reluctant to start the negotiation. Both of these concerns can lead to trivializing the agreement process in the investigation period. Third, it is not clear whether when parties fail to reach to an agreement, statements made in this discussion or evidence collected as the result of this discussion will be excluded as the fruits of poisonous tree. Moreover, lack of directives in the investigation process compounds each of these concerns.\textsuperscript{170}

Likewise, this preliminary stage continues with its non-binding nature from starting of the preparation for the hearing through the mean hearing. Section 202a asserts, “Where the court is considering the opening of main proceedings, it may discuss the status of the proceedings with the participants … [and] [t]he essential content of this discussion shall be documented.”\textsuperscript{171} Similarly, section 212 states that “[s]ection 202a shall apply mutatis mutandis after the opening of the main proceedings.”\textsuperscript{172} These two sections, like section 160b, reiterate the non-binding nature of the negotiations, and there seem to be no significant change in the status of discussion during the preliminary hearings. Although section 243(4) requires the presiding judge of the

\textsuperscript{169} Bittmann & Roblau, \textit{supra} note 101, at 25 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 29, 2011, Case No. 1 StR 287/11 Rn. 13).
\textsuperscript{170} Kerscher, \textit{supra} note 7, at 63.
\textsuperscript{171} StPO, § 202a (emphasis added).
\textsuperscript{172} StPO, § 212.
main hearing to make sure whether there have been negotiations pursuant to sections 202a and 212, the Federal Court of Justice has ruled that these negotiations still have no binding effect. However, one promising change with respect to discussions pursuant to sections 202a and 212 is the Federal Court of Justice’s ruling indicating when section 243(4) applies, the deciding court shall consider the fact that who was the initiator of the discussions and which resolutions were given by parties. This precedent paves the first and final path for the defendant of initiating negotiations during the preliminary hearing in case he or she intends to enter into an agreement.

Section 257b also accords the court the authority to “discuss the status of the proceeding” with the “participants.” This section has a mere preparatory status, because the constitutional court has upheld the non-binding nature of the discussion under this section. Some scholars are of the opinion that this section has been inserted to the Code for the purpose of promoting open communication between the judge and parties so that the later negotiations will run smoothly and the parties will be clear about the effect of the agreement; although they admit that due to restrictions posed by the German criminal procedure principles generally, it does not seem practically possible to discuss the outcomes of the agreements openly. This does not mean that there is not any informal way to discuss the outcomes, but it does mean that formally it is impossible. This is because although the Federal Court of Justice allows discussion

173 StPO, § 243(4).
174 Bittmann & Roblau, supra note 101, at 25 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Jul. 12, 2011, Case No. 1 StR 274/11 Rn. 3).
175 Schemmel et. Al., supra note 6, at 58.
176 StPO, § 257b.
177 Kerscher, supra note 7, at 72.
179 Id. at 69.
surrounding the penalty in the discussion under section 257b, section 257c (3) proves that even during the mean negotiations, courts are not allowed to demonstrate the actual amount of the penalty.  

2. Final Stage

The second stage of the negotiations begins when the court, according to preliminary discussions, concludes that the case is suitable for negotiation and initiates the agreement process. As a matter of fact, this is the only stage in which the results will bind the parties to the negotiations when and if an agreement is reached. As mentioned above, section 257c of the StPO is the only section which comprises the most comprehensive part of the negotiated agreements’ rules, and it is the central section to this Final stage. This section clearly asserts the process, the structure, and the boundaries of the negotiated agreements.

Its first subsection reads, “In suitable cases the court may [, according to subsequent subsections,] reach an agreement with the participants on the further course and outcome of the proceedings.” It adds, “Section 244 subsection (2) shall remain unaffected.” This subsection clearly designates the court as the initiator of the negotiations; however, in practice, both the prosecution and the defendant can suggest initiating the negotiation process. This requirement, judges as the initiator of negotiations, is due to the fact the legislature intended to adjust the negotiated agreements with the general principles of the German Criminal

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180 Bittmann & Roblau, supra note 101, at 26, (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 14, 2011, Case No. 4 StR 571/10 Rn. 11).
181 This section in part asserts that the court only can offer the upper and lower limits of the penalty it intends to apply, not the exact amount.
182 The German term used in this section is Verständigung.
183 StPO, § 257c(1) (emphasis added).
184 StPO, § 257c(1).
185 Weigend & Turner, supra note 105, at 91.
186 Kerscher, supra note 7, at 57.
procedure.\textsuperscript{187} Whatever the purpose, this requirement creates a unidirectional initiation environment,\textsuperscript{188} which puts the main beneficiary of the agreement, namely the defendant, in a weaker position. Besides this conceptual flaw, other deficiencies of this section include its failure to define “suitable case.”\textsuperscript{189} It should be cautioned that the world “participant” here only covers the prosecution and the defendant, not the victim.\textsuperscript{190} However, the victim can give his opinion on the agreement, which will not in any way obligate the court to comply.\textsuperscript{191}

Giving private parties the power to compromise on the outcome of criminal proceedings would violate the inquisitorial aspects of the German criminal procedure. Thus, by stipulating that “section 244(2) remains unaffected,” the legislature has affirmed that the negotiations’ process will not affect the substantial truth finding obligation of the court. Section 244(2) asserts that “[i]n order to establish the truth, the court shall, \textit{proprio motu}, extend the taking of evidence to all facts and means of proof relevant to the decision,” which is called the \textit{ex proprio motu} investigation obligation of courts.\textsuperscript{192} On the judicial investigation duty of court in negotiated agreements, the German Federal Constitutional Court has asserted that if parties agreed upon facts do not happen to be real, the conviction will be unconstitutional.\textsuperscript{193} Thus, this principle requires judges to independently examine all facts and circumstances of the case, which decrease the importance of the so-called slim confession.\textsuperscript{194}

\textit{Contents of Negotiated Agreements}

\textsuperscript{187}Carduck, \textit{supra} note 112, at 19.
\textsuperscript{188}See Konig & Harrendorf, \textit{supra} note 178, at 68
\textsuperscript{189}Carduck, \textit{supra} note 112, at 20
\textsuperscript{190}BOHLANDER, \textit{supra} note 147, at 120.
\textsuperscript{191}Id.
\textsuperscript{192}StPO, § 244(2).
\textsuperscript{193}Konig & Harrendorf, \textit{supra} note 178, at 77.
\textsuperscript{194}See Weigend & Turner, \textit{supra} note 105, at 91.
As to the contents of these agreements, section 257c (2) is of particular value. In addition to demonstrating permissible types and subject matters of negotiated agreements, it restricts bargaining on some specific issues. The restriction is mainly for the purposes of compliance with other procedural principles, namely the principle of guilt. This subsection reads:

The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.\textsuperscript{195}

First sentence of this subsection clearly prohibits “charge bargaining” under StPO.\textsuperscript{196} Sentence bargaining remains the only permissible type of negotiated agreement. It, however, should be cautioned that unlimited sentence bargaining is also not permitted. The German Federal Constitutional court has ruled that unrestricted sentence bargaining is not permitted; shift in the sentence range must be compatible with the “wrongfulness” of the defendant.\textsuperscript{197}

This subsection is comprehensive in its other implications. It permits the court and parties to negotiate on punishment; some procedural requirements that relate to the main proceedings such as undertaking to pay the court costs, or indemnification payments, or waiving to request compensation;\textsuperscript{198} and other procedural measures such as release from custody.\textsuperscript{199}

Some other possible contents of the agreement are confiscation of the property, early parole, and

\textsuperscript{195} StPO, § 257c (2).
\textsuperscript{196} BOHLANDER, supra note 147, at 121; Bittmann & Roblau, supra note 101, at 30 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 28, 2010, Case No. 3 StR 359/10).
\textsuperscript{197} Schemmel et. Al., supra note 6, at 56.
\textsuperscript{198} Rouxloh, supra note 102, at 310.
\textsuperscript{199} Rouxloh, in her article Formalization of Plea Bargaining in Germany Will the New Legislation Be Able to Square the Circle?, asserts that another procedural measures used was excluding the public from the trial. Since excluding the public from the trial is on permissible in certain cases indicated by law, and consent of the defendant is not part of them; in practice, courts exclude the public in plea agreements by holding the court’s session late afternoon or avoid passing the information regarding the court session to the judicial press service. Id. at 313.
work release.\textsuperscript{200} It is worth mentioning that the Federal Constitutional Court has asserted that stipulating “underlying proceedings” in this section conveys that parties are not permitted to negotiate on other proceedings that do not relate to the main proceedings of the crime under negotiations.\textsuperscript{201} For instance, a prosecutor is not permitted to dismiss other pending charges in exchange for a defendant’s confession.\textsuperscript{202}

In addition to the general exclusionary exception demonstrated by the German Federal Constitutional Court, other courts have also recognized some exceptions to the procedural contents of bargaining. It is impermissible to substitute financial penalty with custodial sentence.\textsuperscript{203} Parties to the negotiations are not permitted to agree on the delay of the proceedings; it violates due process.\textsuperscript{204} Agreements on the extradition part of Section 456\textsuperscript{a}\textsuperscript{205} are not allowed.\textsuperscript{206}

Under this subsection, one of the permissible contents of negotiated agreements, which might be slightly confusing as well, is the “conduct of the participants during the trial.” Conduct of participants in this subsection stands for specific actions of the defendant concerning the evidence, for instance submitting motions to introduce new evidence\textsuperscript{207} or challenging prosecutor’s evidence.\textsuperscript{208} StPO authorizes the defendant to submit new evidence or suppress

\textsuperscript{200} Altenhain, \textit{supra} note 156, at 161.
\textsuperscript{201} Schemmel et. Al., \textit{supra} note 6, at 56.
\textsuperscript{202} \textit{Id}.
\textsuperscript{203} Bittmann & Roblau, \textit{supra} note 101, at 29 (citing Kammergericht [KG – Superior Court of Berlin], Case No. 121 Ss 34/12 (28/12) Rn. 3 (Apr. 23, 2012)).
\textsuperscript{204} \textit{Id}. at 29 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 6, 2010, Case No. 2 StR 354/10).
\textsuperscript{205} This section reads: “1) The executing authority may dispense with execution of a prison sentence, default imprisonment or a measure of reform and prevention if the convicted person is to be extradited to a foreign government for another offence, or transferred to an international criminal court of justice, or if he is expelled from the territorial scope of this Federal statute. (2) Execution may take place subsequently if the extradited or expelled person returns…”
\textsuperscript{206} Bittmann & Roblau, \textit{supra} note 101, at 31 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 17, 2011, Case No. 3 StR 426/10, paras. 3 and 7).
\textsuperscript{207} Rouxloh, \textit{supra} note 102, at 313, Konig & Harrendorf, \textit{supra} note 178, at 67.
\textsuperscript{208} See Rouxloh, \textit{supra} note 102, at 312.
evidence introduced by the prosecution.\textsuperscript{209} Contrary to its conventional implication that the right to submit evidence benefits the defendant with introduction of evidence in his or her favor at any time during the trial, this principle has often been misused by defendants causing delay and complexity in some complicated cases.\textsuperscript{210} To solve this problem, the legislature accepts that courts can negotiate on the waiver of this right in exchange with concessions from the courts’ side. The admissibility of the waiver of this right complies with the general principle that defendant can waive his right at any time except prohibited by law.

Confusion persists surrounding the inclusion of confession in negotiated agreements. Although the law asserts that “confession shall be an integral part of negotiated agreements,” some agreements do not necessarily need a confession.\textsuperscript{211} For instance, in cases in which the defendant agrees to waive his or her right to submit new evidence, the defendant does not confess anything.

In addition, a confession cannot act as the versatile evidence in negotiated agreements; it should further be supported by concrete evidence.\textsuperscript{212} This notion has further been clarified by section 257c (2) stating that negotiations do not affect the substantial truth finding obligation of the court; “free appraisal of evidence principle”\textsuperscript{213} still governs as the basis of the court’s decision.\textsuperscript{214} As to the evaluation method, the German Federal Constitutional Court clarified that judges can accomplish their duty to examine confession’s conformity to the facts of the case in

\textsuperscript{209} See, e.g., StPO, §§ 219 & 246(2).
\textsuperscript{210} Rouxloh, supra note 102, at 309.
\textsuperscript{211} Kerscher, supra note 7, at 58.
\textsuperscript{212} See Konig & Harrendorf, supra note 178, at 71; Jara, supra note 163, at 9.
\textsuperscript{213} Section 261 asserts: “The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.”
\textsuperscript{214} Bittmann & Roblau, supra note 101, at 30 (citing different case from Federal Court of Justice).
two ways, Selbstleseverfahren and Vorhalt.\textsuperscript{215} Selbstleseverfahren, the “read-it-yourself process,” means that the responsible judge will independently study the dossier and assess the existing evidence and its reliability.\textsuperscript{216} In contrast, Vorhalt means that during the trial, judges can thoroughly examine defendant’s confession and statement by questioning him and confronting him to his prior statements. \textsuperscript{217} The latter method, in turn, is a safeguard to avoid false confessions of the defendant with the hope of sentence reductions.\textsuperscript{218}

Although there is disagreement over what affect the confession can have on mitigating the punishment,\textsuperscript{219} integrating the confessions can be viewed as serving two important purposes. First, since the mere notion of agreement implies consensus, there needs to be an indication that the defendant has accepted the agreement on his fee will. Second, where courts carry the material truth finding burden,\textsuperscript{220} on the one hand, and the proceeding in summarized to an evidentiary hearing, on the other, confession gives the court a powerful tool to evaluate the reliability of the prosecutor’s evidence and the accuracy of the court’s conclusion. Meaning that, the court can get a chance to conform the defendant’s confession and narration of the facts to the prosecutions assertion of the facts and evidence provided.

The last sentence of this subsection gives a more compelling part of the law. There, the legislature seeks to keep the public aspects of the offence out of the negotiations. \textsuperscript{221} This sentence excludes certain subject matters, namely the “verdict of guilt,” to the extent that the crime has disrupted the public order. It also excludes “measures of reform and prevention,” since

\textsuperscript{215} Weigend & Turner, supra note 105, at 98.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} See Mosbacher, supra note 162, at 8.
\textsuperscript{219} For a brief discussion regarding this subject see Rouxloh, supra note 102, at 310-11.
\textsuperscript{220} See StPO, §§ 257c (1) & 244 (2).
\textsuperscript{221} BOHLANDER, supra note 147, at 121.
there is fear of losing evidence, for example. Notably, restriction on these disciplinary and detention measures had not been addressed prior to the adoption of this section.\textsuperscript{222}

\textit{Sentence Consideration and Parties role}

Over the course of negotiations, courts are not allowed to promise a specific (amount of) sentence to the defendant in exchange of the agreement. Section 257c (3) states that “[t]he court shall announce [the agreement’s] content … [and] indicate an upper and lower sentence limit.” This flexibility of the sentence is aimed at its compliance with the circumstances and fact that may change in during the evidentiary hearing.\textsuperscript{223} Moreover, judges should be obligated to consider due diligence as they would in normal proceedings.\textsuperscript{224} Emphasizing this point, the Federal Court of Justice states that this flexibility enables the courts to come up with a “described penalty range.”\textsuperscript{225}

A specific degree of concession concerning the sentence range has not been specified either by law or courts. Not specifying a general leniency range and case by case evaluation method serves two purposes. First, courts decide on sentence range considering certain circumstances; namely the defendant’s guilt, circumstances in favor and against him, and circumstances that are statutorily defined.\textsuperscript{226} These circumstances significantly differ from one case to another. Second, Section 267 (3) of StPO obligates the court to identify as why the ordered sentence is appropriate.\textsuperscript{227} Added to this complexity is the proportionality requirement.

\textsuperscript{222} \textit{See} Schemmel et. Al., supra note 6, at 47.
\textsuperscript{223} \textit{See}, e.g., BOLL, supra note 145, at 52; Bittmann & Roblau, supra note 101, at 28.
\textsuperscript{224} Bittmann & Roblau, supra note 101, at 28.
\textsuperscript{225} \textit{Id.} at 28 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Jul. 27, 2010, Case No. 1 StR 345/10; Bundesgerichtshof [BGH] [Federal Court of Justice], May 23, 2012, Case No. 1 StR 208/12).
\textsuperscript{226} Kerscher, \textit{supra} note 7, at 112.
\textsuperscript{227} This subsection in part reads: “The criminal judgment shall further specify in its reasons the penal norm which was applied and shall set out the circumstances which were decisive in assessing the penalty.”
As discussed before, regarding section 160b, neither the prosecution nor the defendant is permitted to ask the court for a specific sentence before the main hearing is conducted. Section 257c (3) states that “[t]he participants shall be given the opportunity to make submissions,” after the court’s declaration of the higher and lower limits of the sentence. 228 Parties can use this chance to submit their agreed upon sentence range to the court in this stage; however, the court is not obligated to adopt it. Notably, the term “participants” in this section covers the defendant, not the victim.229

Conclusion of Negotiated Agreements

Negotiated agreements conclude at the end of the hearing before the judicial deliberation.230 The last sentence of the section 257c (3) asserts that “[t]he negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court’s proposal.” 231 This subsection renders parties’ acceptance as indispensable part of the conclusion;232 however, the manner for this acceptance is not expressly stated. Since Germany draws a clear line between public law and private law, parties are avoided to sign the proposal on grounds that criminal law is part of the public law. In other words, if parties sign the proposal, it gets the status of a contract, which is a private law matter.233 It is worth mentioning here that the Federal court of Justice has ruled that if the court fails to get the prosecutors agreement to its proposal, despite that fact that they are not bound by the proposal, the court is not prohibited to

228 StPO, § 257c (3).
229 BOHLANDER, supra note 147, at 120.
230 See Kerscher, supra note 7, at 56.
231 StPO, § 257c (3).
232 Schemmel et. Al., supra note 6, at 47.
233 See Kerscher, supra note 7, at 57.
act as promised, insofar as it has reached this conclusion after a thorough examination of all facts of the case. It can be neither considered informal nor a so-called “gentleman’s agreement.”

Binding Effects of the Agreements

The Federal Court of Justice has ruled that only agreements resulting from the main trial and accordingly recorded will have effect, and that the binding effects of these agreements will not end unless by a “constitutive decision” of the court. It is not within the competence of the parties to the agreement to cease being bound by it. However, grounds exist based on which the party court can deviate from its promises. Asserting these grounds, section 257c (4) reads:

The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court’s prediction was based. The defendant’s confession may not be used in such cases. The court shall notify any deviation without delay.

The first sentence of this subsection suggests that if the court is convinced that the principle of proportionality is affected, it can break its previous promise. With respect to the

234 Bittmann & Roblau, supra note 101, at 29 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 14, 2011, Case No. 4 StR 571/10 Rn. 12).
235 Id.
236 Id. (citing related cases of Federal Court of Justice)
237 Id. (citing related cases of Federal Court of Justice)
238 Id., § 257c (4).
second sentence, it is important to note that “conduct of the defendant” in this section does not refer to the defendant’s behavior in the court; rather it means that if the court and the defendant agree on defendant’s waiver of the right to submit new evidence or suppress prosecutor’s evidence, defendants’ disloyalty to this waiver will induce the court’s departure from its promise. However, giving this opportunity to the court may undermine the defendant’s trust in some cases.

As to the safeguards against the courts’ possible deviation, certain rules exist in StPO and also in courts’ opinions. First, there are safeguards for confessions made during the negotiations. The same subsection asserts that if the deciding court deviates from the agreement, “[t]he defendant’s confession may not be used” in subsequent proceedings. Fortifying this sentence, the German Federal Court of Justice has asserted that any other statement stemming from negotiations that constitutes the basis of the conviction is also subject to exclusion. Notably, these safeguards apply to inadmissible and “faulty” agreements mutatis mutandis.

Despite the fact that nullification of confession avoids possible misuse of these negotiations and enhances defendant’s trust, it seems unrealistic to assume that a confession once deemed credible will then be assumed null when new facts rise making the court more confident and the crime more serious. Besides this, another problem that carries a heavy weight of prejudice is the lack of safeguards against the judge who has served in these negotiations.

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240 Id.
241 Bittmann & Roblau, supra note 101, at 32 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 15, 2011, Case No. 1 StR 33/11, para. 4 ff).
242 Id. (citing cases from Federal Court of Justice).
243 Rouxloh, supra note 102, at 322.
244 Weigend & Turner, supra note 105, at 92.
Neither StPO nor courts mandate compulsory exclusion of these judges. However, the defendant can challenge the judge on the ground of bias under section 24(1).  

The duty to notification and instruction is another safeguard in the cases of deviation. The last sentence of the aforementioned subsection states that “[t]he court shall notify any deviation without delay.” Likewise, section 257c (5) states that “[t]he defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4).” The German Federal Court of Justice has ruled that these instructions to the defendant should be given prior to his decision concerning the court proposal. The instruction duty, besides ensuring defendant’s rights, is aimed at avoiding “utilization” of the agreement by the court. It also helps the defendant, in advance, to predict his or her conduct that could affect a court’s decision and the extent to which he or she should be cautious.

3. Procedural Requirements

A. Waiver of the Rights

The German Federal Court of Justice has withheld the waiver of the right to appeal as a component of negotiated agreements since 1997. Nonetheless, a long period of time, the waiver constituted a large part of the agreements’ content. In 2009, in addition to formalizing

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245 This section reads: “A judge may be challenged both where he has been barred by law from exercising judicial office and for fear of bias.” Subsection 2 adds that “[a] challenge for fear of bias may be brought where there is reason to doubt the impartiality of a judge.”

246 StPO, § 257c (4).

247 StPO, § 257c(5).

248 Bittmann & Roblau, supra note 101, at 34 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Aug. 19, 2010, Case No. 3 StR 226/10, para. 4).

249 Id. (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Aug. 19, 2010, Case No. 3 StR 226/10).

250 Kerscher, supra note 7, at 41.

251 BOHLANDER, supra note 147, at 121.
the process, the legislature prohibited this waiver by amending Sections 35a and 302(1). Section 302 (1) asserts that “[w]ithdrawal of an appellate remedy … take[s] effect before [the expiration] of [its] time limit [, but] if a negotiated agreement (Section 257c) has preceded the judgment, a waiver shall be excluded.” Likewise, section 35a asserts that the defendant can always seek appellate remedy. This is also true for the prosecutor. According to the first sentence of the § 358 (2), if an appellate court decides to revoke an agreement, the appellate court is bound by the upper limit of the sentence which was proposed by the first instance court and accepted by the defendant in the course of negotiations. However, if the prosecutor appeals the sentence range, this restriction does not apply.

B. Duty to Record

StPO pays specific attention to the record duty of all officials involved in the negotiations process. Although all of the relating sections emphasize the duty of recording the negotiation’s process one way or other, section 273 is the most significant in this regard. This section asserts that courts are obligated to record the course and the results of the negotiations in details. This subsection requires that even if no negotiation has taken place, the court would need to record

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252 Carduck, supra note 112, at 25.
253 The last sentence of this section reads: “Where a negotiated agreement (Section 257c) has preceded a judgment, the person concerned shall also be informed that he is in any case free in his decision to seek an appellate remedy.”
254 Frommann, supra note 117, at 204; Bittmann & Roblau, supra note 101, at 37 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], June 10, 2010, Case No. 4 StR 73/10).
255 This section in part reads: “(2) The contested judgment, insofar as it relates to the type and degree of the legal consequences of the offence, may not be amended to the defendant’s detriment where only the defendant or his statutory representative filed the appeal on law or the public prosecution office appealed on law in his favor.”
256 Bittmann & Roblau, supra note 101, at 33 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 24, 2010, Case No. 5 StR 38/10).
257 Id. (citing OLG Düsseldorf [Higher Regional Court of Düsseldorf], Oct. 6, 2010, Case No. III-4 RVs 60/10, paras. 12-14).
258 See StPO, §§ 160b, 202a, 212, and 257b.
259 This subsection (1)(a) reads: “The record must also indicate, in essence, the course and content as well as the outcome of a negotiated agreement pursuant to Section 257c. The same shall apply to the observance of the information and instruction requirements set out in Section 243 subsection (4), Section 257c subsection (4), fourth sentence, and Section 257 subsection (5). If no agreement was negotiated, this shall also be noted in the record.”
this fact. If the court fails to record the agreement properly, or if the agreement was not included in the record, it will not bind any of the parties.260

In the beginning of the mean hearing, the presiding judge announces whether there has been any prior negotiation.261 Section 243(4) asserts this duty to disclosure of the prior negotiations. This section obligates the presiding judge to declare whether any negotiations have taken place before the main hearing, and to demonstrate the negotiations contents.262 Considering this section, in the beginning of the main hearing, the presiding judge states if there has happened any prior negotiations, and then it is entered into the record.263 In its 2013th decision, the German Constitutional Court also devoted a large part of its consideration to this issue. There, considering the factual data received from various researches, one of the solutions that this court posed was its emphasis on the application of the section this subsection.264 The reasoned that this section is a complementary part of the “obligation of transparency and notification” imbedded in 337(1) StPO.265 The Court also stated that all parts of the agreement are in an “indispensable unity,” and even waiving the requirement of section 243 (4) leads to the abrogation of the agreement.266 The court also gave a broader definition of this subsection, and stated that it covers all of the content, for instance who initiated and which position was taken by whom.267 In practice, however, the judgment of the court does not cover all the details of the agreement, rather it states the outline of it and more detailed information can be found in the court record.268

C. Additional case law

260 BOHLANDER, supra note 147, at 122.
261 Kerscher, supra note 7, at 57.
262 StPO, § 243(4).
263 Kerscher, supra note 7, at 57.
264 Mosbacher, supra note 162, at 11-12.
265 Id.
266 Id. at 12.
267 Id. at 11.
268 Kerscher, supra note 7, at 57.
Another area of concern is the cases in which more than one defendant is involved. In these cases, fear of bias results from these negotiations, where one of the defendants enters into the agreement and the rest do not. Although statutory provisions are silent, the German Court of Justice has posed a simple solution,\textsuperscript{269} though not particularly helpful. The Court has emphasized that any negotiation with one defendant should be disclosed to the other parties (co-defendants).\textsuperscript{270} The court has also asserted that one defendant’s confession, in these cases, does not put the other(s) in pressure or coercion.\textsuperscript{271}

Finally, besides the discussed StPO rules, case-law also adds some requirements to the agreement’s process. These requirements are as follows: all participants have to be informed,\textsuperscript{272} both parties should be present in the court,\textsuperscript{273} the amount of the punishment has to conform to the degree the guilt,\textsuperscript{274} treats or undue promises are forbidden,\textsuperscript{275} package deals are prohibited,\textsuperscript{276} and agreements need to be included in the reasoned judgment of the court asserting the facts of the case.\textsuperscript{277}

IV. NEGOTIATED AGREEMENTS IN THE AFGHAN CONTEXT

This section introduces some changes that would be necessary for Afghanistan to adopt a system of negotiated agreements like Absprachen, and it anticipates some criticism that negotiated agreements might face. It also covers some challenges to the implementation of such agreements.

\textsuperscript{269} Bittmann & Roblau, supra note 101, at 26-27.
\textsuperscript{270} Id. at 27.
\textsuperscript{271} Id. (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Jul. 21, 2011, Case No. 5 StR 176/11 Rn. 22).
\textsuperscript{272} Schemmel et. Al., supra note 6, at 45; Rouxloh, supra note 102, at 319.
\textsuperscript{273} See Weigend & Turner, supra note 105, at 88.
\textsuperscript{274} Schemmel et. Al., supra note 6, at 45.
\textsuperscript{275} Id.
\textsuperscript{276} Weigend & Turner, supra note 105, at 96.
\textsuperscript{277} Bittmann & Roblau, supra note 101, at 36 (citing cases of the Federal Court of Justice).
a. Necessary Changes

The sections above explained the procedure of German Absprachen which is significantly different from the U.S. plea bargaining institution. In fact, every legal institution established in a country carries peculiar aspect of that country’s legal system. Even when countries have similar legal systems, other social, political, cultural, or economic factors exist that significantly affect the way one institution functions in one country compared to others. Because of these variations and differences, transplantation of legal institutions usually requires some alterations in light of the context of the adopting country. Accordingly, Afghanistan cannot simply transplant Absprachen without making adjustments according to the Afghan context. This article’s proposed changes attempt to harmonize German Absprachen with the legal system of Afghanistan, and it tends to eliminate some of the inherent shortcomings of Absprachen which exist despite its relative success in Germany.

1. Prosecutor and Defendant Should be Able to Initiate an Agreement

278 German Absprachen differs from U.S plea bargaining. While pleas are meant to avoid further court proceedings in the U.S., confession in the German system only shortens court proceedings. Similarly, unlike U.S. plea bargaining, Germany does not recognize pleas of nolo contendere, where defendant refrains from admitting guilt, but waives the right to trial in exchange for a lenient sentence. Likewise, German judges have an ex proprio motu investigation duty that enables them to participate in the negotiation process and specify the terms of the agreement. In contrast, U.S. judges are excluded from the plea bargaining process, authorized only to review and approve or reject the agreement reached by the prosecutor and the defendant, but not to the change the conditions. In the U.S., agreements reached by parties are deemed contracts. Civil law remedies, namely abrogation of the contract or seeking performance, apply if parties deviate from the contract. In contrast, agreements reached in Germany are embedded in court judgments, and they are treated as a matter of public law. The only remedy against a possible violation of Absprachen is the right to appeal. In addition, procedural rights subject to the waiver are broader in U.S. plea bargaining procedure compared to German Absprachen. Although certain procedural rights can be waived as the contents of the negotiations in the German system, waiver of the right to appeal is impermissible under any circumstances. In the U.S, however, a defendant can waive wider range of rights: right to appeal, the right to jury trial, the right to confront adverse witness, the right to representation in the plea hearing, and so on. For more information see the following sources: StPO, § 302; Brady v. U.S., 397 U.S. 742 (1970); North Carolina v. Alford, 400 U.S. 25 (1970); Santobello v. New York, 404 U.S. 260 (1971); U.S. v. Bruce, 976 F.2d 552, 557-58 (9th Cir. 1992); Fed. R. crim. Pro. (11)(b)(1)(M) & (11)(c)(1)(B), & (11)(c)(3)(A); TURNER, supra note 4, at 9-29 & 30-37; Thomas Weigend, Should We Search for the Truth, and Who Should Do It?, 36 N.C. J. INT’L L. & COM. REG. 389,395-97 (2011).
First, this paper recommends that Afghanistan strengthen involvement of the prosecutor and defendant in the agreement procedure. This empowerment could be achieved by a few additions to the agreement procedure. First, the prosecutor and the defendants’ roles should be enhanced during the investigation. Meaning that, unlike German *Absprachen*, negotiations conducted during the investigation phase should not be assumed as mere discussions. These negotiations should further as formal negotiations between the prosecutor and defendant, and they should be recorded thoroughly. Second, conflicting parties should also have the ability to reach an agreement. This agreement will be presented to the court as the parties’ proposal. Third, to enhance this capacity, the prosecutor and the defendant should be accorded the power to initiate negotiations in the court. This takes as to the general pattern of plea agreements where the defendant confesses and the court vows to show lenience.\(^{279}\)

These changes, in addition to improving parties’ positions in the agreement procedure, assure parties of the outcome of the procedure; and they decrease the chances of mistrust by the defendant and misuse by the prosecution. Moreover, if courts appear to be the only initiators of negotiated agreements, there is a risk of coercion. Specifically, if the court proposes the agreement in the first place, the defendant might feel more pressure in favor of admission and risk to more severe punishment if rejected.\(^{280}\) Further terms of how binding the prosecutor and defendant agreement should be, what subjects they can negotiate on, what the contents the proposal can have, how the parties can initiate the court negotiations, and some other necessary terms can be specified by the law.

2. *The Victim’s Participation in the Procedure Should Be Enhanced*

\(^{279}\) Boll, *supra* note 145, at 40
Besides enhancing conflicting parties’ position in the agreement procedure, unlike the weak participation of the victim in Absprachen,\(^{281}\) the victim’s role should also be strengthened in serious cases such as rape and sexual assault. Although every crime occurring against individuals harms the victim, in some cases the degree of these harms is more serious in both physical and psychological terms. Considering this fact, recent changes in codes aim at penalizing these act with more severe punishment compared to their homological acts. For instance, the struggle to ratification of the Elimination of Violation against Women Act in Afghanistan is a better instance of the issue. To harmonize the plea agreement procedure with these trends and to ensure that the victim’s rights have not been impinged because of the compromise between the prosecutor and the defendant; victim’s position in the plea agreement procedure should be improved during negotiation in the court. Besides this, one aspect of the victim participation in the agreement procedure can be the fact that it converges to the public interest and justice,\(^{282}\) as long as it can avoid unjustified agreements.

For this purpose, the victim can be accorded the opportunity to comment on the proposal, especially the amount of punishment. Additionally, the victim should be accorded the power to appeal the primary prosecutors’ decision to the appellate prosecutor. Likewise, this right can be further protected by the victims’ power to appeal the primary court’s decision to the appellate court subject to discretionary power of the appellate court.\(^{283}\) The reason behind according the appellate court the discretion to accept or reject this appeal would be the fact that despite the seriousness of the harm to the victim, criminal lawsuit is (still) society’s right. In fact, victim’s

\(^{281}\) Weigend & Turner, supra note 105, at 99.

\(^{282}\) Kerscher, supra note 7, at 92.

\(^{283}\) We have similar rights for the victim in certain circumstances. For instance, article 170 of the Criminal Procedure Code gives the victim the right to appeal the primary prosecutor’s decision of issuing order not to file the case. This appeal will be file first to the higher prosecutor and the court if the higher prosecutor agreed to the order. likewise, if the court issues the order not the further pursue the case, the victim can appeal to the appellate court. The Afghan Criminal Procedure Code, art 203(2).
power to influence the decision but not negate it creates a balance between the severely impinged right of the individual and the right to of the society to restore the order. In addition, this approach would be compatible with principles of criminal procedure in Afghanistan as well. Certain similar rights have been accorded to victims through the Criminal Procedure Code, including the right to ask for disqualification of the prosecutor, the right to ask disqualification of judges, the right to have access to the Dossiah, the right to object prosecutor’s decision to dismiss the criminal case, and the right to object the primary court’s decision to dismiss the case.

3. More Safeguards Should be Added if the Agreement is Negated Later

Another important change would involve adding more safeguards in cases of possible deviation from the plea agreement. Although exclusion of the confession is one of the most important elements here (which applies in Absprachen as well), exclusion of fruit of poisonous tree could also function as a safeguard. In addition to excluding the confession of the defendant given in the course of negotiations, all of the related statements of the defendant (in and out of the court), and other evidence collected as the result of the confession or these agreements should also be excluded in subsequent procedures. Additionally, if the agreement is abrogated and the trial starts over, judges involved in the previous agreement should also be excluded from the subsequent trial. This rule is weak in German Absprachen, however. Proposed exclusionary

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284 The Afghan Criminal Procedure Code, art 15.
285 Id. art 17 (1).
286 Id. art 163 (2).
287 Id. art 170 (2).
288 Id. art 203(2).
289 In Germany, some courts have ruled that in the case of abrogation, confession is admissible the appellate court. The confession is inadmissible only in the court that has reached the agreement. Bittmann & Roblau, supra note 101, at 37-38.
290 Judges are not automatically excluded from the panel. However, they can be question for bias under the article 24(1) of the StPO.
rules, besides enhancing defendants' trust, are aimed at decreasing the fair of bias and the overall unfairness of the subsequent trial.

4. *If Some Co-defendants Negotiate and Others Do Not, Their Cases Should be Separated*

While *Absprachen* lacks serious safeguards when cases involve multiple defendants, Afghanistan could decrease the fear of bias and ensure fair trials by separating co-defendants' cases in which some of them enter into the negotiations and others do not. In fact, Afghanistan already has the legal authority to do this. For example, Article 155 (2) of the CPC articulates circumstances where co-defendants' case can be separated. While overall expedition of the proceedings is the main focus of this article, by adding one clause asserting separation of co-defendants’ cases in negotiated agreements in this situation attains the purpose of fair trial.

5. *The Degree of Sentence Deduction Should be Specified*

To ensure sentence certainty,291 a common criticism of *Absprachen*,292 Afghanistan should specify the degree of sentence deduction in negotiated agreements. This specification would also help to reduce the risk of coercion,293 and it would eliminate the concept of “just is what is fair in bargain.”294 This deduction can be quarter or one-third of the punishment of the actual crime. To handle this issue, two approaches can solve the problem. First, the legislature can specify the amount of deduction within the act establishing negotiated agreements. This approach would ensure that the legality principle would not be undermined. Second, courts could be given the duty to specify a proper sentence deduction. In other words, case law could address this issue. The case law approach, besides having the benefit of flexibility, maintains the legality

291 For risk of uncertainty see Turner, supra note 280, at 207-10.
292 Weigend & Turner, supra note 105, at 99.
293 Jara, supra note 163, at 10.
294 BOLL, supra note 145, at 50.
principle (as long as the law accords the duty of imposing just punishment after the full investigation of the case to the court).

6. Mandatory Representation Should be Required in Absprachen

Another necessary change would be the implementation of mandatory representation. In Absprachen, mandatory representation is not required unless the case appears in front of the Regional Court. The legislature should require mandatory representation in cases where a defendant agrees to enter into an agreement with a prosecutor. This mandatory representation could be required not only during the trial, but also during the investigation. To the extent that indigent defendants are the concern, the Afghan Constitution has already addressed the problem by requiring the in charged prosecutor and the court to introduce a legal representative to the indigent defendant. These legal representatives are introduced from the Legal Aid Office of the Ministry of Justice.

7. Some Exception to Negotiations Should be Adopted

Finally, this paper recommends that the legislature introduce some exceptions to the agreements. The first would be to exclude Hodud, Qesas and Diyat from agreements. These Crimes are also excluded from the Afghan Penal Code because of their religious nature. Certain verses of the Holly Qur’an and certain sayings of the Prophet Mohammad (Peace be Upon Him) prohibit any deal and compromise on these Shar’ia crimes. According to Shar’ia law,

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295 Kerscher, supra note 7, at 57.
296 The Afghan Constitution, art 31 sent. 3.
297 Hodud and Qesas are Shar’ia crimes. Definition of these crimes, their punishments, and ways to prove them are specified either by holly Qur’an or Hadith (orders and sayings of Prophet Mohammad “Peace be Upon him”).
298 Article 1 of the Afghan Penal Code also asserts that the Penal Code only sets out non-Shar’ia crimes (Ta’zirat), and the Shar’ia crimes will be handled by the Hanafi Fiqah (Shar’ia scholars’ interpretation of Qur’an and Hadith).
society has no power to compromise on these crimes since they are defined and prohibited by Shar’ia, and their punishments and the way to prove them have also been stated in Shar’ia.

Likewise, two other exceptions are also necessary for the purposes of justice. First, if the deducted sentence falls below two years, the defendant should not be able to use the suspension of sentence clause. This will be unlike the Absprachen procedure in which the defendant can use both institutions at once. The change this paper proposes is aimed at decreasing the chance of misuses of the agreements. In addition, accepting suspension of the punishment upon agreements undoubtedly averts Turner’s “risk aversion” theory into reality. Second, repeated criminals should not be able to benefit from the negotiated agreements. The reason behind this is the character of the defendant and the potential danger he or she puts the society in.

b. Criticism

Similar to some of its civil law counterparts, the principle of prosecutorial discretion to dispose of cases is unfamiliar to the Afghan legal community, and its introduction will inevitably face some criticism. This section anticipates some of these concerns and explains how they can be overcome.

1. Mandatory Prosecution Principle

Critics may argue that negotiated agreements undermine the principle of compulsory prosecution, a principle strictly followed by Afghanistan. However, adopting such an institution by no means implies that the prosecution can withdraw from filing charges;

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299 Article 161 of the Afghan Penal Code asserts that if the defendant is convicted of up to two years imprisonment or up to 24000 Afghanis, considering the character of the defendant and circumstances of the crime, the court can suspend imposition of the sentence for three years. This suspension is subject to abrogation if the defendant commits another crime during these three years. Afghan Penal Code, arts 161-163.

300 See Schemmel et. Al., supra note 6, at 47.

301 For a discussion in this regard see ROUXLOH, supra note 5, at 96-7

302 See The Afghan Criminal Procedure Code, arts 171 & 175.
agreements are only aimed at bringing consensus between the prosecutor and the defendant (and to some extent the court) to expedite case proceedings. Contrary to the claim that negotiated agreements will diminish the mandatory prosecution principle, these agreements expedite the process of filing charges. In fact, these agreements provide the prosecutor with sufficient, reliable evidence that ensure the outcome of the trial – and for the prosecution, that is the conviction of the defendant. More importantly, the mandatory prosecution principle has not been adhered without exceptions in Afghanistan. Some exceptions to this principle exist. As mentioned before, article 171 (3) of the Criminal Procedure Code authorizes the prosecution to cease from filing a case if the “perpetrators culpability and the outcome of the crime is insignificant” and there is no public interest in pursuing that case. This exception implies the possibility of the adoption of some other exceptions as well, exceptions like negotiated agreements.

Further, criminal procedures of civil law countries are trending toward adopting efficient aspects of the immediacy principle rather than strictly adhering the mandatory prosecution principle. This trend is caused by the emergence of complex crimes such as various financial crimes and white-collar crimes, increase in the amount of crimes per se, and growth in population, on the one hand, and the shortage of enough investigative and adjudicative stuff and the time consuming and costly nature of today’s trials, on the other. Thus, countries such as Germany, Italy, Netherlands, and so on have moved to adopt such expediting elements. Furthermore, the main purpose of mandatory prosecution is to ensure that criminal activities are properly handled, and that criminals are not able to circumvent punishment. Insofar as these

303 Id. art 171 (3).
304 For more about the current trends see WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF FULL CRIMINAL TRIAL 331-396 (STEPHEN C. THAMAN ed. 2010).
goals are maintained with negotiated agreements, there is little cause to question them on this basis.

2. Risk of Coercion

Another concern about negotiated agreements is that they increase the risk of coercion in different ways, from “risk aversion” theory of Turner\textsuperscript{305} to torture to undue promises and warning imposition of harsh punishments. This concern is also not valid as long as there are certain safeguards ensuring fairness of the process. The first safeguard here is the legality principle, limiting prosecutors’ authority in specifying the amount of punishment. Likewise, several bulwarks exist against the use of coercion during the investigation, for instance inadmissibility of evidence collected under coercion.\textsuperscript{306} Moreover, the \textit{ex proprio motu} investigation obligation of the court is another significant safeguard. Judges involvement, \textit{per se}, has its positive effect on what prosecutor thinks he will face later during the trial.\textsuperscript{307}

Furthermore, unlike common law plea bargaining where a prosecutor is “Jack of all trades” with no duty to consider exonerating evidence,\textsuperscript{308} under to article 145(3) of the Afghan Criminal Procedure Code, a prosecutor is obligated to consider both exculpatory and inculpatory evidence during the investigation.\textsuperscript{309} This obligation in turn dramatically decreases the risk of coercion since the aim of prosecution is not to convict, but rather to reach the truth. Finally, the defendant’s right to have access to the \textit{dossiaih} and be present during the examination of evident and even question witnesses also plays its part in decreasing the risk of coercion. This right is

\textsuperscript{305} For the “risk aversion theory” see Turner, \textit{supra} note 280, at 207.
\textsuperscript{306} The Afghan Criminal Procedure Code, arts 21, 22 & 150 (3)
\textsuperscript{307} See Turner, \textit{supra} note 280, at 212-13 (“Reconsidering Judicial Involvement in Plea Bargaining”).
\textsuperscript{308} For more information about the analysis of risk of coercion see Turner, \textit{supra} note 280, at 204-06.
\textsuperscript{309} This article reads: “[T]he prosecutor shall collect and analyze both incriminating and exculpatory evidence equally.”
further enhanced with the legal representation of the defendant. Even for indigent defendants, prosecutor and courts are obligated to introduce a public defender. 310

To the extent that judges’ dominance might be a concern, a well articulated decision of the German Constitutional Court solves the problem. This court has accorded the prosecution the role of “guardians of law” in a sense that they will avoid entering into an illegal agreement. 311 Meaning that, the ex proprio motu investigation obligation of courts and the obligation of prosecution to ensure application of the law creates an enter-correlated system of checks and balances. This in turn ensures the fairness of the process and leads to a just result.

3. Supplanting the Court

One of the concerns regarding the agreements is that they supplant the court. 312 While it might be true about some procedures such as French comparution sur reconnaissancede culpabilitate presented by Hodgson, 313 it is not accurate concern about negotiated agreements where courts still retain significant power in determining the outcome of the trial. As note 282 clarifies, distinction between U.S plea bargaining and Absprachen, there are significant differences between these two institutions. Considering the trial avoidance nature of the U.S plea bargaining and the fact that a vast majority (almost ninety-five percent) of cases is solved by guilty pleas, this concern is of significant importance. In contrast, the fact that courts still retain significant amount of discretion (and that is assuring that the accusation is accurate and

310 The Afghan Constitution, art. 31 sent. 3.
311 Weigend & Turner, supra note 105, at 96.
313 Id.
ascertaining the punishment) in the negotiated agreements proposal, it diminishes the importance of supplanting concern.

4. Presumption of Innocence and the Privilege against Self incrimination

The concern that negotiated agreements undermine the presumption of innocence\textsuperscript{314} and the privilege against self incrimination, thus questioning the fairness of the trial seems valid to the extent that a trial begins with the assumption of defendant’s guilt.\textsuperscript{315} This fact, in turn, may affect the judgment of the court. However, to the extent that maintaining presumption of innocence relates to judges, plea agreements will not impair the presumption of innocence inasmuch as the determining factor during the trial is not the agreement between the prosecutor and the defendant, but the \textit{ex proprio motu} investigation obligation of the court.\textsuperscript{316} Second, Article 23 of the Criminal Procedure Code obligates the court to evaluate both incriminating and exonerating evidence and base its judgment on the “strength and weakness” of the evidence provided.\textsuperscript{317} Article 129 of the Constitution and Article 12 of the Law on the organization of Courts assert that the court has to give reasons for its judgment.\textsuperscript{318} These articles ensure that judges cannot issue judgments based on weak evidence corroborated by the presumption of guilt or their own assumptions.

Regarding the right against self incrimination, it is worth noting that the right to be silent is a procedural right and always subject to the waiver. At any trial, the defendant is able to waive this procedural right and confess commission of the alleged crime.\textsuperscript{319} To retain waiving any right

\textsuperscript{314} Carduck, \textit{supra} note 112, at 15.
\textsuperscript{315} For more about this concern see ROUXLOH, \textit{supra} note 5, at 95-6.
\textsuperscript{316} Weigend & Turner, \textit{supra} note 105, at 85
\textsuperscript{317} The Afghan Criminal Procedure Code, art 23.
\textsuperscript{318} The Afghan Constitution, art 129; Afghan Courts’ Law, art 12.
\textsuperscript{319} Weigend & Turner, \textit{supra} note 105, at 84.
is under the full discretion of the defendant. Article 156 of the Criminal Procedure Code asserts that the prosecutor may ask the suspect regarding the crime and that the defendant can choose to remain silent or to give statement.\textsuperscript{320} In negotiated agreements, similar to the conventional trials where the defendant waives this right by confessing the alleged crime, the defendant does nothing but waives his right to be silent. Furthermore, this right is basically aimed at limiting the prosecution authority in forcefully calling up defendant’s confession. In other words, this right is a safeguard to the misuses of the power by the prosecution and elimination of the torture in invoking confession. Taking this in mind, defendants willful confession in negotiated agreements does not affect the validity of the right against self incrimination.

5. \textit{Fairness of the Trial and Confession}

Others may express concern that abbreviated trials may raise the risk of unfair judgments; however, it should not be expected that in full-blown trial, there will always be “more truth” and “more justice” compared to expedited ones.\textsuperscript{321} Courts can perform their obligation to search the material truth as long as they take all of the important evidence; it is not necessary for the court to take all the evidence related to the case.\textsuperscript{322} It should be noted that the confinement to just taking important and material evidence in these cases does free the court from considering exculpatory evidence.\textsuperscript{323}

\textsuperscript{320} This article reads: “The prosecutor is obligated to ask the suspect in the beginning to state his/her role in the crime. If he/she confesses to the material element of the crime or to a part of it, or provides information with respect to the issue, the prosecutor shall request him/her to provide further details as to how the criminal action was committed.”

\textsuperscript{321} Thaman, \textit{supra} note 1, at 11.

\textsuperscript{322} Kerscher, \textit{supra} note 7, at 101.

\textsuperscript{323} \textit{Id.}
Finally, there would likely be concerns about the role of confession in negotiated agreements. Confession has historically been deemed as a punishment mitigating factor. However, the reasons may differ from indicating that the defendant is remorseful to the fact that it quenches the victim’s emotions in certain cases. Considering that the general purpose of punishment is deterrence beside compensation (and rather than retribution), confession is a good indicator of the fact the defendant will not commit any crime again inasmuch as confession indicates defendant’s remorse which is crucial to deterrence. However, some scholars doubt whether a defendant’s confession in negotiated agreements will reflect his or her actual remorse. Others believe that based on the principle of in dubio pro reo, we cannot completely waive the impact of remorse. Others, such as Regina, referring to what Widmaier calls the “ethical effort” state that the moral attempt of the defendant to challenge his or her instinct not to blame him/herself publicly should be appreciated as a mitigating factor.

Another concern about negotiated agreements is that if parties cease being bound by the agreement, the confession cannot be neutralized in spite of its annulment. Despite the philosophical credibility of this concern, several practical safeguards exist that mitigate the effects of such a confession. Specifically, once the primary courts’ proceedings start over, the facts that the panel of judges should differ from that involved in the agreement process, and that the prosecutor needs to submit a new indictment have their effects.

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324 Thaman, supra note 1, at 41
325 See Boll, supra note 145, at 40.
326 Carduck, supra note 112, at 14.
327 Rouxluh, supra note 5, at 77.
328 Id.
c. Potential Challenges to the application of Negotiated Agreements in Afghanistan

One of the greatest barriers to the establishment of negotiated agreements in Afghanistan will be the persistent and widespread corruption in the country. In 2013 Transparency International’s Corruption Index, Afghanistan ranked 175 out of 177 countries, and later in 2014, it ranked 172 out of 175.\(^{329}\) As for the judicial system, corruption is one of primary causes judicial distrust, and as a result many citizens turn to informal justice mechanisms to handle their disputes.\(^{330}\) Despite some changes in the salaries of court officials, the situation has not changed much in recent years. Asking for bribes in both rural and urban areas is one of the most shameful characteristics of the prosecution and courts.\(^{331}\) Widespread corruption indeed can impair the main purpose of the negotiated agreements’ establishment in two ways. First, in a system where pervasive corruption, namely bribery, is the norm, there is no doubt that these agreements will submit a propitious tool to boosting bribery business of prosecutors and judges. Misuses of power, intimidation, and unlawful detention and custodies become inevitable in such a system.

Second, corruption is also likely to be used in favor of some defendants in an unlawful manner. In a corrupt system, legal institutions widening the space and opportunity to bribe an official are in favor of the defendant because defendants can easily mitigate their punishment. While bribing the prosecutor to ask for lower punishment has the risk of being refused by the court, and paying both entities is expensive, a well-articulated agreement between the prosecutor

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\(^{331}\) Kara Jensen, Note, Obstacles to Accessing the State Justice System in Rural Afghanistan, 18 IND. J. GLOBAL LEGAL STUD. 929, 945 (2011).
and the defendant with courts serious enthusiasm to expedited case adjudication is favorable to everyone in the scene.

Another important challenge to the application of negotiated agreements is the so-called “court elite” constitution and the anti-defendant mentality of judges. Although sufficient research on this issue is not currently available, there is a prosecutor-judge friendship in the judicial system of Afghanistan. This prosecution favoritism by judges is accompanied by a negative mentality against defendants. And in many cases, defendants brought to the court are deemed guilty. This fact is evident in Afghanistan’s high conviction rates. In the last twelve months, the conviction rate in primary court was approximately 80%, and this rate was nearly 83% in appellate courts (see infra part II, section (b), “the Judiciary report”, paragraph four). When judges are asked about these high conviction rates, they consistently state that suspects would not be in court unless they had done something wrong. This mentality can affect negotiated agreements because of the ex proprio motu investigation obligation of courts. Based on this mentality, unexpected results can ensue according judges with the competence to summarize the procedure, especially taking of evidence, especially when defendants tend to wrap up the conviction as soon as possible.

While these are serious concerns, they should not prevent Afghanistan from developing its criminal procedure. They would not affect negotiated agreements any more than they already affect other aspect of the judicial system of Afghanistan, so they should not be viewed as a barrier to implementation of these agreements. Instead of avoiding implementation of negotiated agreements, the government should focus its efforts on fighting these problems. This article does

332 Most of the data presented in this section has come from the author’s practical work as a defense attorney in Afghanistan since 2012.
not attempt to propose any specific recommendation as to how to deal with aforementioned problem since that topic falls outside of the narrow topic of negotiated agreements and requires a whole set of new research. Nevertheless, this paper emphasizes that the overall combating corruption policies should be taken serious and corrupt official should be brought to the justice, and that specific emphasis should be paid to the ethical and religious responsibilities of judges.

One effective measure, specifically with respect to corruption, could include requiring asset and income disclosure of members of the judiciary. These forms should be returned on time, scrutinized seriously, and violators should be subject to enforcement and consequences. In addition, with respect to the second problem, special seminars and conferences could be held for judicial sector actors emphasizing on judges and prosecutors duty to implement justice. These conferences could stress that prosecutors are obligated to find the truth over seeking a defendants’ conviction; similarly, judges are supposed to be third party neutrals whose job is to ensure the occurrence of crime and perpetrator culpability rather than supporting the prosecution. These principles can and should be emphasized in law schools, special training programs conduct by these schools and the Judiciary Stage.

While according to recent data, the overall illiteracy rate in Afghanistan remains just under fifty percent,\textsuperscript{333} the situation is not much different in the judiciary as studies of the judicial sector in 2007 indicated that one-third of judges lacked higher education.\textsuperscript{334} This truth has neither changed a lot nor is different among prosecutors. Such unprofessionalism among judges and prosecutors can harm the integrity of negotiated agreements; in the same manner as it has affected the judicial system as a whole. Court actors’ incompetence in utilizing negotiated


\textsuperscript{334} Jensen, \textit{supra} note 331, at 937.
agreements can paralyze the efficiency of these agreements generally. This problem appears to be more severe especially in the first period of institutionalizing negotiated agreements in Afghanistan. One way, however, to reduce this risk is to conduct training programs on negotiated agreements for judges, prosecutors, and defense attorneys. The role of the Afghanistan Independent Bar Association and other NGOs that are active in the judicial sector are vital for advocating for negotiated agreements and educating defense attorneys.

d. Institutionalizing Negotiated Agreements in Afghanistan

Defects of the new Criminal Procedure Code of Afghanistan seem to make its amendment inevitable. Interestingly, this Code was amended after right after its ratification by the Parliament and before the President signed it.\textsuperscript{335} Court actors are continually attacking this Code for lack of some provisions that existed in previous criminal procedure codes. Despite these attacks, and despite the fact that court actors repeatedly request amendments to the code, no action has been taken. This inaction might be explained by attitudes at the Ministry of Justice, where its members may feel reluctant to tamper with the new law, especially if doing so suggests unprofessionalism of its staff. Despite this reluctance, the code cannot continue to function without amendment.

This paper proposes that during the course of amending the Code, the Ministry of Justice should consider incorporating negotiated agreements into the Code as a solution to the current situation of the prolonged and costly trials. The Ministry of Justice can either create a new section for negotiated agreements, laying out its procedures, or it can duplicate the German law structure by entering specific rules about negotiated agreements under each chapter of the law. For instance, rules relating to the investigation stage could be incorporated under the chapter on

\textsuperscript{335} See the Feb. 22, 2014 amendment to the article 26 of the Afghan Criminal Procedure Code.
investigations, and rules relating to primary court proceedings will be entered under the primary court chapter, and so on.

The previous structure of putting all roles under one chapter has the benefit that rules can be easily found, especially when agreements are on the table. In contrast, the second way enables a more contextualized practice, where rules for these agreements fall under the specific chapter that regulates the legal actions of that specific actor. Moreover, the second way seems more helpful for adapting these agreements in the normal proceedings. Furthermore, creating a new section may create a sense of separation between these agreements and normal proceedings, and this detachment could be harmful to the success of negotiated agreements.

In addition to incorporating negotiated agreements into the law, another important issue is the awareness of current judges, prosecutors, and defense attorneys. This article recommends more training programs, seminars, and conferences, which will be needed to educate these court actors about these agreements. Ministry of Justice, The Supreme Court, and NGO’s working on rule of law and justice reform in Afghanistan can take the initiative for educating court actors. In addition, the Afghanistan Independent Bas Association (AIBA) can conduct training programs for lawyers and its defense attorneys. It can also include teaching the process of these agreements in its one year defense attorney skills course, a course which every defense attorney newly submitted to the AIBA has to go through. Likewise, the Attorney General Office can also conduct trainings and include these agreements in the one-year prosecutorial skills course taken by any newly submitted prosecutor. The Supreme Court, of course, is in a better position in institutionalizing negotiated agreements. In addition to conducting training programs, conferences, and seminars to judges, this Court can include teaching negotiated agreements in the Judiciary Stage.
In addition to these directly related institutions, law schools are other institutions that can achieve an important role in the institutionalizing of negotiated agreements. Law schools can incorporate these agreements into the criminal procedure course syllabuses. This will help future court actors learn about negotiated agreements during their primary legal education. Law schools may be the best institutions to work on further development of negotiated agreements in Afghanistan. Incorporating negotiated agreement in the syllabuses of law schools paves the way to more researches by pros and cons of these agreements, by professors and by students. This research will further enhance this newly born institution to adapt the unique aspects of the legal culture of Afghanistan.

e. **Institutionalizing Absprachen in other post-conflict, civil law countries**

Other post conflict, civil law countries can also benefit from establishing negotiated agreements. Countries intending to address their court dockets and trials length by adopting Absprachen will need to go through the same processes that this article recommends to Afghanistan. Certainly, the country will first need to examine whether the establishment of such an institution is compatible with its constitutional and statutory procedural requirements. If such compromise does not exist, the country will first need to accommodate necessary changes in its procedural requirements, paving the way to the adoptions of Absprachen. Additionally, in civil law countries where the principle of prosecutorial discretion is barely known, according prosecutors and courts with the power to dispose of cases in compromise with the defendants can result in many unexpected consequences. For this reason, any country adopting negotiated agreements will need to insure the existence of necessary safeguards protecting defendants’ rights against possible misuses of power by court actors. For instance, if the court ceases to apply
the agreement, defendants’ right to ask recusal of judges who were part of the agreement must be protected in subsequent proceedings.

Likewise, the host country will also need to bring necessary changes to *Absprachen* in order to make the agreements compatible with its general and indispensable procedural principles and the legal culture of the country. Neither the exact German *Abrachen* nor the proposed model by this article can fully accommodate with the legal culture of other countries interested in adopting negotiated agreements, regardless of the supposed close similarity between procedural rules of both countries. Arguably, because other factors exist that directly or indirectly affect the legal culture and the legal institutions of each country differently. The existence of such differences will necessitate certain changes in *Absprachen* in order to make it possible for the new institution to adapt the legal culture of the host country. Finally, the host country will also need to take necessary steps to institutionalize the new institution in its legal culture and criminal procedure. As recommended to Afghanistan, certain institutions will need to take the initiative of educating and informing court actors and interest groups of the nature, processes, benefits, and necessity of having such case disposing procedures such as *Absprachen*.

V. Conclusion

Eliminating dissatisfaction of parties with trial outcomes invokes bringing party consensus to the decisions of courts, which will lead us to a considerable reduced trial length. German practitioners designed *Absprachen* to deal with this issue. While Germany strictly adheres to the compulsory prosecution principle, recent changes, namely the concept of efficiency, led the country to adopt significant changes to its procedure, especially as to
prosecutorial discretion. One of these changes is the formalization of *Absprachen*. Considering the inquisitorial nature of the German criminal procedure, this institution actually resembles to a summary trial where the evidentiary hearing and finding material truth stems from the *ex proprio motu* examination of the facts, so-called judicial investigation obligation. However, parties still maintain a degree of control over the outcomes of the trial. In fact, the role of judges in such a procedure can be summarized to a party and a supervisor to negotiations.

Given the success of these negotiated agreements in Germany and other civil law countries that use them, this article suggests that Afghanistan and other post-conflict civil law countries may benefit from establishing a similar institution to address their problems with overloaded court dockets. Because of the lack of case disposing procedures, managing caseloads is one of the primary tensions of judges and prosecutors in these countries. In fact, the mandatory prosecution principle and the inquisitorial nature of the criminal procedure of these countries barricade according the prosecutors with a wide clearance power, namely autonomous case disposing of authority. Establishment of negotiated agreements will eliminate these concerns insofar as it maintains both of these opposing benefits. Additionally, these agreements have the benefit of incorporating party consensus to the trial outcomes, thus significantly lessening amount of appeals.

In addition, these agreements can help the prosecution with rapid filling of cases and eliminating the waste of time on less significant side issues. Similarly, primary courts will also benefit as long as a full-blown trial will be substituted with a brief evidentiary hearing, thus saving the time spent on other non-conflicting issues. This summary procedure does not mean

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337 Mosbacher, *supra* note 162, at 7.
338 Turner, *supra* note 280, at 221.
infringing individuals’ rights or putting them into pressure. On the contrary, a defendant who knows through obvious evidence and “competent advice” that he will be convicted definitely seeks short proceedings,\textsuperscript{339} and better in exchange of lenient punishment.

Admittedly, as one commenter articulates, these agreements are not “panacea” to the all problems of criminal law and “ burgeoning” court docket in any country\textsuperscript{340}; regardless, they undeniably address the issue of dissatisfaction of parties and result in efficient case disposing procedure.\textsuperscript{341} Negotiated agreements will not create a parallel structure or supplant the criminal adjudication competence of courts; rather, they will streamline criminal processes and create consensus to avoid further unnecessary proceeding and expenses for both the government and individuals.

\begin{itemize}
\item \textsuperscript{339} Bittmann & Roblau, \textit{supra} note 101, at 18.
\item \textsuperscript{340} Jara, \textit{supra} note 163, at 13.
\item \textsuperscript{341} Hodgson, \textit{supra} note 312, at 2.
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