CHAPTER V

CONTROLS ON PLEA BARGAINING

Introduction

Whenever a law is enacted, it is executed by the executive and enforced by the judiciary. However, the job of judiciary is not only to enforce the laws but also to keep a check upon the laws so that the people of the nation may be able to know the right and the wrong. Plea bargaining has been executed and courts are applying the same. There are two major checks upon it; firstly, the legislative enactment itself and secondly, the courts. These two are the controls on it and are now dealt in detail.

5.1 Legislative Controls

Legislative controls donot only mean the legislation itself but it also includes the other legislations, rules of executives or the policies framed by the government.

5.1.1 Australia

The conduct of prosecutors and Courts is governed by statute and case laws. In Australia, there is no legislation which refers to plea bargaining or regulates prosecutorial conduct in discussions. Some sections of legislation controlling prosecutorial conduct in criminal proceedings can indirectly impact on prosecutors’ actions when plea bargaining. For example, s.24(c) of the Public Prosecutions Act 1994 (Vic), a statute which outlines the main responsibilities of prosecutors, alludes to plea bargaining by describing the importance of conducting ‘prosecutions in an
effective, economic and efficient manner. Public Prosecutions Act 1994, section 24 reads as under:

“24. Matters to which Director must have regard

In the performance of his or her functions the Director must have regard to-

(a) Considerations of justice and fairness; and

(b) The need to conduct prosecutions in an effective, economic and efficient manner; and

(c) The need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime.”

In addition, specifically referring to Plea Bargaining, s.9 of the Victims’ Charter Act 2006 (Vic) which imposes statutory requirements on prosecutorial conduct following discussions, by requiring that prosecutors keep victims informed of any alterations to charges. These two pieces of legislation are the only statutory controls, however limited, of prosecutorial discretion when plea bargaining in Victoria.

The plea bargain itself is to some extent subject to scrutiny in the courts. As part of a plea bargain, counsel determine an agreed summary of facts which may leave out certain factual elements of the crime in order to warrant a guilty plea to the altered charges. This summary forms the basis upon which the defendant is sentenced. To provide some scrutiny of these factual alterations, the Australian High Court established in *R v Maxwell (1995)* \(^1\) that a judge cannot be forced to sentence an offender on a factual basis and the judge cannot consciously accept. The trial judge

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\(^1\) 184 CLR 501
has a residual discretion to reject the plea. It is impossible to define the circumstances in which it is appropriate for such discretion to be exercised more closely than by saying it is to be exercised where the interests of justice so require.

Therefore, in effect the judge can reject a guilty plea resulting from an inappropriate plea bargain, if the plea does not sufficiently cover the offending behaviour or the evidence does not substantiate the altered charges. This decision was upheld in the Victorian Supreme Court of Criminal Appeal in *R v Duong*[^2], during which the court stated that a judge is not bound to accept the version of facts agreed by counsel as the sentencing basis if the facts are inconsistent with the evidence. Based on her own experiences, Defence Counsel also pointed to the court’s power as a safeguard on plea bargaining, claiming that: “In this case I did” the judge said, he had doubts when the accused entered his plea of guilty as to whether or not the evidence actually could prove beyond reasonable doubt that the offence had occurred. So he expressed his concern and told the accused to go away and rethink his plea. Defence Counsel also identified the judge’s discretion in determining sentences as a safeguard on plea bargaining, claiming because the judge is not involved in plea bargaining. Whatever agreements are made between parties doesn’t bind the judge in sentencing. So prosecutor and defence can agree for the defendant to plead guilty and it is for the prosecutor to stand up and say, a non-custodial sentence is within range, sending a clear message that if the defendant

[^2]: [1998] 4 VR 68
gets a non-jail sentence they would not appeal, but the judge can go ahead and jail the defendant anyway. Judges are not bound by any statement from bar or table. The judge has absolute discretion to sentence.

The Australian High Court case *R v GAS and R v SJK*[^3] also loosely recognised plea bargaining by suggesting that both counsel maintain written copies of any agreement that may have influenced the defendant’s pleading decision, particularly if it might impact on the likely sentence. While the circumstances of the plea bargain in this case demonstrated the potential consequences of unscrutinised agreements, the court did not attempt to define or acknowledge the practice of plea bargaining or provide any significant scrutiny of the process itself.

**5.1.1.1 Internal Office of Public Prosecutions Policies**

Within the office of public prosecution, the guidance on plea bargaining is detailed within two Practice Guides and one Director’s Policy. Director’s Policies are considered official policies in so far as they should be upheld whenever possible. However, there are no penalties applied for deviation, and no mechanisms exist to monitor whether the requirements of the Director’s Policies are followed. Practice Guides form part of an internal database within the OPP, and offer guidance on prosecutorial conduct in criminal proceedings. These guidelines are considered less official than the Director’s Policies. However, the Director of Public Prosecutions (DPP) recommends that prosecutors avoid deviating from them whenever possible (Prosecutor). The

Director's Policies and the Practice Guides are used in conjunction with each other.

5.1.1.2 Director's Policy

The Director’s Policy provides guidance on prosecutorial discretion when accepting plea bargains. The policy states that the decision to prosecute is the most important step in the prosecution process and Crown representatives should prosecute wherever it appears in the public interest. When there is a sufficient evidentiary and public interest basis for prosecuting, the policy requires Crown representatives to assess whether it is in the public interests to resolve, or to try the case. In making such determinations, the policy details the benefits of obtaining early guilty pleas and provides guidance to Crown representatives in assessing whether plea bargaining is in the public interest, particularly in terms of ensuring whether any charge alterations will maintain public confidence in the OPP’s ability to fairly administer justice.

5.1.1.3 Practice Guides

The two Practice Guides, Resolution of Matters & Early Issue Identification 2007 (Vic) and Dealing with a Plea Offer 2006 (Vic), provide more extensive guidance on prosecutorial conduct when bargaining, at two different stages of the process. The 2006 Practice Guide provides guidance on the Crown’s obligations to victims and on potential factors to consider before plea bargaining. In particular, it offers guidance on the type of information that

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4 Section 1.2
5 Section 1.2
6 Section 1.6
7 Section 2.6.6
should be provided to enable victims to form proper views of the plea bargain. This may include advising them that there will be no trial or need to testify and, where applicable, that a plea bargain may result in fewer convictions being recorded than what may otherwise have occurred. The 2007 Practice Guide outlines the main stages of criminal proceedings during which early resolution should be considered, and how to identify suitable cases for plea bargaining. Predictably, given the early resolution focus of many pre-trial hearings, the pre-trial process is cited as the primary stage at which plea bargains should be sought. However, the policy also suggests that Prior to the formal commencement of any trial, the instructing solicitor should reiterate to the defence representatives any previously discussed basis upon which the matter might resolve, and should ensure that the defence is aware of the basis, if any, upon which the Crown would be prepared to resolve the matter as a plea of guilty. Both Practice Guides outline informal safeguards to scrutinise the conduct of Crown representatives when plea bargaining. To uphold their public interest roles, Crown solicitors are discouraged by the 2007 Practice Guide from initiating plea bargaining in cases involving a fatality, without obtaining approval from a Crown prosecutor or the DPP. Initiation of discussions is also discouraged in cases involving intentionally causing serious injury. The policy also suggests that approval from the DPP be sought before accepting a plea bargain in these cases. With a similar intention, the 2006 Practice Guide suggests that Crown solicitors seek approval from a senior
prosecutor before making any changes to the agreed summary of facts, in order to ensure that the defendant’s criminality is still reflected.

In line with the Director’s Policy 2007 (Vic) s.2.2.6 of the 2007 Practice Guide also discourages Crown representatives from approaching unrepresented defendants to engage in discussions. As both policies state, whilst plea negotiations are pursued out of court they remain part of an adversarial legal process requiring considerable legal expertise and tactical experience. To seek to conduct them with an unrepresented accused is patently unfair. However, and somewhat in contrast, both policies allow the Crown to accept an offer to plead guilty from an unrepresented defendant in exchange for selected prosecutorial concessions.

5.1.1.4 **Section C(6): A big Change**

The most contentious element of the Guidelines, due to its potential to encroach upon judicial independence in sentencing and to significantly control prosecutorial pre-trial preparation, is s.C6. S.C6 was implemented in the Guidelines in June 2007, in response to the Lord Chief Justice’s comments in *R v Cain and Others*\(^\text{10}\), where he criticised the lack of guidance presented to sentencing judges by prosecutors. S.C6 thus obliges prosecutors to prepare a Plea and Sentence Document, seven days prior to the Plea and Case Management Hearing in the Crown Court, regardless of whether there is a perceived likelihood of the

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8 Section 2.6.6
9 Section 2.6.6
10 [2006] EWCA Crim 3233
defendant pleading guilty. The Plea and Sentence Document requires prosecutors to commit to writing:-

1. The aggravating and mitigating factors of the offence(s);
2. Any statutory provisions relevant to the offender or the offence(s), including relevant sentencing guidelines and guideline cases;
3. The Victim Personal Statement(s) (VPS);
4. Evidence of the impact of the offence on the community; and
5. Any intentions of the Crown to apply for ancillary orders S.C6 requires prosecutors to then use this material to determine qualitative and quantitative sentencing range (for example, a custodial sentence between three and five years) that would be acceptable from the Crown’s perspective if the defendant were to plead guilty at the plea and case management hearing. The justification for requiring that this document be completed at such an early stage of proceedings is that if the defendant pleads guilty at the hearing, the prosecutor has sufficient information to address the court immediately on sentencing, and thereby the sentence can be determined without the need to adjourn the hearing and risk delaying finalisation of the case.

S.C6’s official purpose is cited as being to further enhance the role of the prosecutor in the sentencing process by ensuring there is an accurate record of the basis on which a case is brought and that the court has the
necessary assistance in sentencing. It is also claimed that it offers ‘greater consistency and accuracy in the judge’s sentencing decision. In line with the Guidelines’ overall aims. It is also further maintained that s.C6 reiterates the importance the UK Government and criminal justice system places upon upholding confidence with restrictions on discretion...and greater guidance is provided to plea [bargaining] and sentencing processes. While some Victorian participants responded positively to the Guidelines, generally on the basis that it is just formalising an informal process really, s.C6 was not supported by any Victorian participant, largely due to the potential for it to encroach upon judicial independence in sentencings. As Judiciary claimed that it is important that prosecutors understand that the court is independent of them, just as Court must understand that their prosecuting decisions are independent of prosecution. Prosecutor similarly maintained that it is not their role to provide that information. They can point out the authorities and the precedents and even suggest perhaps a rough custodial or non-custodial, but that should be it. Otherwise, Court run the risk of hindering them from making a decision, because they know there will be a basis for a Crown appeal if it doesn’t fit. The majority of prosecutorial (fifteen out of nineteen) and defence counsel (eight out of eleven) also criticised s.C6 for its potential to hinder the process of plea bargaining before the Plea and Sentence Document had been prepared. Prosecutor argued that once Court started to formalise such processes, it will have a hampering impact on the whole notion of plea
bargaining. Similarly, Prosecutor claimed that requiring this type of prosecutorial preparation extends beyond the prosecutor’s historical duty to the public and [the] court, and would in all likelihood hinder them from thinking about early resolutions. These arguments were based largely on prosecutors having to shift their focus towards written advocacy and sentencing issues, and away from the possibility of case resolution. As Prosecutor stated that the more they seem to generate paperwork, the more they seem to spend on the paperwork rather than actually spending time analysing the case and trying to assess it. Prosecutor similarly maintained that there has been a preoccupation with people having to file forms on time, and that’s become the primary focus of everyone, and people don’t talk anymore and none can resolve things if they don’t talk’ In contrast to these views it is Advisor explained that sentencing is complex and a lot of erroneous sentences tend to be made which get to the Court of Appeal. To make sure the appropriate sentence is then passed, it is right that the prosecutors with their public interest role, play a role in assisting the court to make sure the sentence is right. In effect, what is said is that prosecutors always need to stand up to the mark in sentencing, which means they have to play a part in the sentencing process. It is also claimed that judicial independence is not hindered by a prosecutorial sentencing range because it is not determinative. The judge can still make a decision independent of their [the prosecutor’s] statement. In addition, in line with s.C6’s main aims, it is argued that the prosecutor’s involvement in
sentencing would reduce the likelihood of an appeal against the manifest inadequacy of the sentence and would provide the judge with a framework upon which to base his/her sentence, so it would accurately correspond with all mandatory sentencing regulations. It is maintained that prosecutors are not advocating and will never advocate what the sentence should be.

5.1.2 India

In India, the concept of Plea Bargaining was held not only unconstitutional but illegal\textsuperscript{11}. However, like other western countries, India adopted this concept with the Criminal Law Amendment Act, 2005. The Criminal procedure Code was accordingly amended to this effect.

5.1.2.1 Legislative Enactment

The Criminal Law Amendment Act, 2005 brought this significant law into operation by putting the same as Chapter XXIA of the Criminal Procedure Code. The main highlights of the chapter are as under:

**265-A. Application of the Chapter** -(1) This Chapter shall apply in respect of an accused against whom (a) the report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

(b) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, issued the process under section 204, but does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman, or a child below the age of fourteen years.

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

265-B. Application for plea bargaining. - (1) A person accused of, an offence may file application for plea bargaining in the Court in which such offence is pending for trial.

(2) The application under sub-section (1) shall contain a brief description of the case relating to which the application is filed including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.
(3) After receiving the application under sub-section (1), the Court shall issue notice to the Public Prosecutor or the complainant of the case, as the case may be, and to the accused to appear on the date fixed for the case.

(4) When the Public Prosecutor or the complainant of the case, as the case may be, and the accused appear on the date fixed under sub-section (3), the Court shall examine the accused in camera, where the other party in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily and where;

(a) the Court is satisfied that the application has been filed by the accused, voluntarily, it shall provide time to the Public Prosecutor or the complainant of the case, as the case may be, and the accused to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing of the case;

(b) the Court finds that the application has been filed involuntarily by the accused or he has previously been convicted by a Court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provisions of this Code from the stage such application has been filed under sub-section (1).

265-C. Guidelines for mutually satisfactory disposition. - In working out a mutually satisfactory disposition under clause (a) of sub-Section (4) of section 265-B, the Court shall follow the following procedure, namely:
(a) in a case instituted on a police report, the Court shall issue notice to the Public Prosecutor, the police officer who has investigated the case, the accused and the victim of the case to participate in the meeting to work out a satisfactory disposition of the case:

Provided that throughout such process of working out a satisfactory disposition of the case, it shall be the duty of the Court to ensure that the entire process is completed voluntarily by the parties participating in the meeting:

Provided further that the accused, if he so desires, may participate in such meeting with his pleader, if any, engaged in the case.

(b) in a case instituted otherwise than on police report, the Court shall issue notice to the accused and the victim of the case to participate in a meeting to work out a satisfactory disposition of the case:

Provided that it shall be the duty of the Court to ensure, throughout such process of working out a satisfactory disposition of the case, that it is completed voluntarily by the parties participating in the meeting:

Provided further that if the victim of the case or the accused, as the case may be, so desires, he may participate in such meeting with his pleader engaged in the case.

265-D. Report of the mutually satisfactory disposition to be submitted before the Court. - Where in a meeting under section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated
in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of Section 265-B has been filed in such case.

**265-E. Disposal of the case.** - Where a satisfactory disposition of the case has been worked out under section 265-D, the Court shall dispose of the case in the following manner, namely:

(a) the Court shall award the compensation to the victim in accordance with the disposition under Section 265-D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under Section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused;

(b) after hearing the parties under clause (a), if the Court is of the view that Section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provide the benefit of any such law, as the case may be;

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;
d) in case after hearing the parties under clause (b), the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

265-F. Judgment of the Court. - The Court shall deliver its judgment in terms of Section 265-E in the open Court and the same shall be signed by the presiding officer of the Court.

265-G. Finality of the judgment. - The judgment delivered by the Court under Section 265-G shall be final and no appeal (except the special leave petition under Article 136 and writ petition under Articles 226 and 227 of the Constitution) shall lie in any Court against such judgment.

265-H. Power of the Court in plea bargaining. - A Court shall have, for the purposes of discharging its functions under this Chapter, all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under this Code.

265-I. Period of detention undergone by the accused to be set off against the sentence of imprisonment. - The provisions of Section 428 shall apply, for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this Chapter, in the same manner as they apply in respect of the imprisonment under other provisions of this Code.

265-J. Savings. - The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith
contained in any other provisions of this Code and nothing in such other provisions shall be construed to constrain the meaning of any provision of this Chapter.

Explanation. - For the purposes of this Chapter, the 'expression "Public Prosecutor" has the meaning assigned to it under clause (u) of Section 2 and includes an Assistant Public Prosecutor appointed under Section 25.

265-K. Statements of accused not to be used. - Notwithstanding anything contained in any law for the time being in force, the statements or facts stated by an accused in an application for plea bargaining file under Section 265-B shall not be used for any other purpose except for the purpose of this Chapter.

265-L. Non-application of the Chapter. - Nothing in this Chapter shall apply to any Juvenile or Child as defined in sub-clause (k) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).

5.1.2.2 United States

In United States, the Federal Rules of Criminal Procedure and in specific Rule 11(e) and the United States Sentencing Guidelines are followed in federal cases of plea bargaining. Rule 11 reads as under-

"(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of
a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties’ views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government’s right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-
incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).
Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Plea Agreement Procedure.

In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.
(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.
(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.”
5.2 Judicial Controls

Judicial control is the most effective control as it not only enforces the law but also acts as a saviour of people from illegal and unconstitutional laws. It not only appreciates the intentions of the law makers and the spirit behind the laws but also watches the interest of the people. It does so through the case laws or the judgments delivered by it.

5.2.1 India

5.2.2 United States

In order to study the judicial control over plea bargaining in United States, role of judiciary and the prosecutors have to be studied first.

5.2.2.1 Role of Judiciary

Most resolution discussions occur solely between the prosecutor and defence counsel. The judge does not generally take part in this process. Resolution discussions are often most effective when they can be conducted informally, in private and at the convenience of the lawyers involved. It is important to ensure that the courtroom proceedings should verify the propriety of the discussions and enhance the public’s understanding of both the nature and limits of the latter. Counsels are required to advise the court that a resolution agreement has been made, and the circumstances that led to it must almost always be fully disclosed in open court. Except in rare and compelling situations, it is not acceptable for the lawyers to discuss a resolution agreement privately with the trial judge in

\[12\] Discussed in detail in chapter 3 of the thesis.
advance of the hearing to determine the court’s reaction to it. This restriction, however, does not prevent lawyers from participating in a judicially supervised resolution discussion conducted pursuant to legislation. Such a system of judicially supervised discussions does exist: it is known as the pre-trial conference. A pre-trial conference is defined as an informal meeting conducted in judge’s office at which a full and free discussion of the issues raised may occur without prejudice to the rights of the parties in any proceedings thereafter taking place. The Criminal Code of Canada provides that a pre-trial conference between a prosecutor and the accused or defence counsel that is presided over by a judge may take place in order to consider any matters that would promote a fair and expeditious hearing.

A pre trial conference may be held with the accused or the court. In the case of jury trials these pre trial conferences are mandatory.

The role of the judge during a pre-trial conference is to remain fair and impartial. It is inappropriate for the judge to become involved in plea bargaining, in the sense of bartering to determine the ultimate sentence, or in pressuring any counsel to change his position. The inherent dangers of this practice have been acknowledged:

The appearance of justice is part of the substance of justice and it will not do if a prisoner of the general public derive the impression that it is possible, either openly in a pre-trial review or by private discussion between counsel and judge, to achieve a bargain with the Court.
The presiding judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low or within an appropriate range. As a neutral guide, the judge may also be of great assistance in helping the parties identify their differences, and, where appropriate, reconcile them. For example, a judge may draw out salient points, ensure that they are fully explored, direct the discussion to important issues, and keep matters on the topic. It should be noted that the pre-trial conference judge will not preside over subsequent substantive courtroom proceedings related to the matter without the consent of both parties. The purpose of this principle is to ensure that the resolution discussions that take place at the pre-trial conference are wide-ranging, informal and without prejudice to the parties, and to preserve judicial impartiality in the courtroom.

5.2.2.2 Role of Prosecutors

The prosecutor holds a very special place in the administration of justice of Canada. Prosecutors are not considered simply as advocates but also as officers of justice. The role of prosecutor excludes any notion of winning or losing. The prosecution function is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Prosecutors are vested with very substantial discretionary powers, and they must exercise their discretion fairly, impartially, in good faith and according to the highest ethical standards. This requirement is especially relevant where decisions are made outside the public forum,
such as during resolution discussions, as these decisions may have a far greater practical effect on the administration of justice than the public conduct of counsel in court. There is a general obligation on prosecutors to honour resolution agreements. These agreements are analogous to undertakings and must be strictly and scrupulously carried out. In addition to being ethically imperative, the honouring of resolution agreements is a practical necessity. These agreements dispose of the majority of the contentious issues that arise during criminal prosecutions. Accordingly, if they are not binding and therefore cannot be relied upon, then the corresponding benefits that resolution discussions can produce are rendered unattainable.

It is extremely rare for a prosecutor to attempt to repudiate a resolution agreement. Moreover, the court will not allow a prosecutor on appeal to repudiate the position taken at trial except for the gravest possible reasons, such, as the sentence imposed was illegal, the prosecutor at trial was misled or it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence. The seriousness of the obligation to keep an agreement may be illustrated through an examination of prosecution of one of the most dangerous criminals in Canada and his accomplice wife.

Between May 1987 and December 1992, Paul Bernardo, a diagnosed psychopathic sexual sadist, murdered three women and sexually assaulted at least eighteen. During that period, the authorities did not have
any admissible evidence identifying Bernardo as the perpetrator of these crimes. On 1 February 1993, the first clue was discovered. The Centre of Forensic Sciences advised the police that there was a match between Bernardo’s DNA and some of the rapes. However this was not enough to connect Bernardo to the three murders. There was only one way: through his wife Karla Homolka. Homolka was both a victim of her husband’s abuse and an accomplice to his crimes. On 11 February 1993, Homolka retained a lawyer who negotiated with the prosecutor on her behalf. She had invaluable information that would assist the police apprehending Bernardo, but she wanted to deal. The prosecutor and police faced a serious dilemma. They had a strong case against Homolka but nothing to convict Bernardo. The authorities were faced with the unpleasant fact that if Bernardo was to be prosecuted for the murders, it was essential that they have Homolka’s evidence and cooperation. On 14 May 1993, the prosecutor entered into an agreement with Homolka after months of discussions with her lawyer. In exchange for her cooperation and testimony against Bernardo, she would plead guilty to two counts of manslaughter and receive a sentence of 12 years imprisonment. Homolka was sentenced on 6 July 1993. Over one year later, the community at large was shocked by the discovery of critical new evidence. On 22 September 1994, videotapes made by Bernardo were discovered by the police. These videotapes captured the vicious sexual assaults that were perpetrated by both Bernardo and Homolka against a number of victims, including the deceased young
women. Consequently, Homolka’s deal with the prosecutor came under heavy public scrutiny as she no longer could be portrayed as the abused wife who was manipulated by a sadistic killer: rather, she was now seen as a willing participant to the crimes. Had the authorities been in possession of the tapes on 14 May 1993, the prosecutor would never have entered into the resolution agreement with Homolka. On 1 September 1995, Bernardo was convicted of two counts of first degree murder and sentenced to life imprisonment without eligibility for parole for 25 years. He was also found to be a dangerous offender and sentenced to be detained in a penitentiary for an indefinite period of time.

Due to a profound and widely felt sense of public outrage at the fact that Homolka was only sentenced to 12 years for her part in the commission of horrific offences, the Attorney General of Ontario established an inquiry. The inquiry examined the propriety of the decisions made by the prosecutors respecting Homolka. The 14 May 1993 resolution agreement and the prosecutor’s decision not to charge Homolka with murder after the discovery of the crucial videotaps were reviewed. The result of the inquiry was that the conduct of counsel on the both sides was professional and responsible and that the process surrounding the resolution agreement was unassailable:

“It is my firm conclusion that, distasteful as it always is to negotiate with an accomplice, the Crown had no alternative
but to do so in this case. The Crown has a positive obligation to prosecute murderers. It is (…) often the “lesser of two evils” to deal with an accomplice rather than to be left in a situation where a violent and dangerous offender cannot be prosecuted.”

The inquiry also concluded that the appropriate criminal sanction for Homolka’s involvement was in the range of ten to fifteen years of imprisonment. Therefore, the sentence of 12 years was held to be adequate.

In respect of the prosecutor’s decision not to charge Homolka with murder after the videotaps were discovered, the inquiry held that it was not feasible for the prosecutor to charge Homolka. Such action would have violated the terms of the resolution agreement and is barred by the Criminal Code of Canada. Homolka had not committed a fraud upon the Crown or the Court that sentenced her. From the very beginning, she had advised the authorities that the videotaps existed but that she did not know where Bernardo had hidden them. Homolka made full complete and truthful disclosure of all the criminal activity in which she participated or of which she had knowledge. She had lived up to her end of the resolution agreement. Finally, the inquiry found that this was not one of those very rare cases where the prosecutor would be entitled to repudiate the resolution agreement. It stated that to set aside which arrangements so long after the fact was more likely to bring the administration of justice into disrepute than uphold it.
This notorious and unusual case illustrates the tremendous obligation on the prosecutor to honour resolution agreements.

5.2.2.3 The Brady Triology

The Court spoke squarely to the practice of plea bargaining in three cases handed down the same spring day in 1970\(^\text{13}\). The Court concluded that plea bargaining in general was without constitutional flaw. What is remarkable about these opinions is not the result they reached; rather, it is the essential lawlessness of the opinions themselves.

In upholding the legitimacy of plea bargaining, the Court did not rely on any prior cases, interpreted or reinterpreted, to support the conclusion it set forth. Precedent was referred to only to demonstrate its irrelevance to the problem at hand. In the Court's view, it was called upon to make law in a vacuum. With the air thus cleared for decision, the Court announced its conclusions. It did not in any significant sense attempt to explain or justify those conclusions, except perhaps by inferences that might be drawn from the phrasing and examples which the opinions contain. At critical points throughout the opinions, the Court simply puts the question presented, announces its answer, and explains that answer by nothing more than a statement that it is not persuaded that a different answer

would be correct. On occasion, even this explanation is omitted.

In Santebello v. New York\textsuperscript{14} although the opinion stated that guilty plea must be voluntary and knowing, the court did not hold the plea involuntary or unknowing. Similarly, in Lefkowitz v. Newsome\textsuperscript{15} the court upheld the federal Habeas Corpus relief to a defendant who had pleaded guilty without finding the plea either involuntary or unintelligent. Thus, in totality, it can be safely said for American System of Plea Bargaining that in “upholding Plea Bargaining in the 1970 Brady Trilogy, the Supreme Court concluded that plea bargaining was a process sui generis, wholly divorced from the body of constitutional law previously developed in other contexts.

The Supreme Court relied on the 1938 case of Johnson V.Zerbst\textsuperscript{16}, for its 1969 ruling in Mc Carthy V.United States\textsuperscript{17} that such waivers of constitutional rights are valid under the due process clause, only if they constitute “an intentional relinquishment or abandonment of a known right or privilege.” The Court in McCarthy purportedly based its decision upon the breach of Rule 11 of the Federal Rules of Criminal Procedure occurring when the trial judge failed to inquire whether defendant understood the nature of the charges against him and the consequences of his plea.

\textsuperscript{14} 404 US 257 1971
\textsuperscript{15} 420 US 283 1975
\textsuperscript{16} 304 US 458 (1938)
\textsuperscript{17} 394 US 166 (1969).
In *McMann*\(^\text{18}\), petitioners asserted that their guilty pleas were the illegal products of coerced confessions. The Court, however, contended that the defendants should have challenged the admissibility of the confessions by contesting their guilt at trial. In ruling that petitioners received effective assistance of counsel the Court formulated as the standard for satisfactory attorney performance, “whether the advice given by counsel was within the range of competence demanded of attorneys in criminal cases”. Since the petitioners could not show “gross error on the part of counsel,” their pleas were deemed “voluntary and intelligent acts. The Court, then, would not allow attacks upon guilty pleas motivated by coerced confessions unless the defendants were incompetently advised by counsel.

In *Parker*\(^\text{19}\), the petitioner claimed that his plea was the product of a coerced confession, since he had conceded his guilt only to take advantage of North Carolina statues allowing a defendant to escape the possibility of a death penalty by pleading guilty. The Court ruled that the plea was not necessarily invalid even if the confession was involuntary. The Court dismissed the question by holding that if the petitioner thought his confession inadmissible he should have gone to trial and since he chose not to do so, the presence of “competent” counsel rescued the confession from charges of unconstitutionality. The Court further held

\(^{18}\) *MC Mann Versus Richardson 397 US 759 (1970).*

\(^{19}\) *Parker Versus North California 397 US 790 (1970)*
that the reasoning of Brady\textsuperscript{20} rendered unpersuasive the argument concerning the coerciveness of the death penalty.

In the case of North Carolina V. Alford\textsuperscript{21}, the trial court accepted the petitioner's plea of guilty to a second degree murder charge. He testified before the trial judges that he had not committed the murder but was pleading guilty because he feared the death penalty if he did not do so. The Court reaffirmed the standard of a voluntary and intelligent choice among the alternative courses of action open to the defendant.

In Machibroda Vs. United States\textsuperscript{22} the Court ruled that a guilty plea might not be voluntary if induced by promises or threats. While still couched in the formalistic language of voluntariness the decision seemingly left room for consideration of coercive factors that may causally affect a guilty plea.

Hence, it can be said that the United States' courts are more concerned with the voluntary character of the plea and the due process of law to be followed by the court and the prosecution.

\textbf{5.2.3 Australia}

\textbf{5.2.3.1 Due Process}

In the context of law reform, there are two main perspectives. The due process perspective, which upholds offender-focused ideals and is commonly supported by

\begin{itemize}
\item Brady Versus U.S. 397 US 742 (1970).
\item 400 US L5 (1970).
\item 368 US 487 (1967)
\end{itemize}
human rights groups. This perspective focuses on providing legal protections to defendants to ensure equality; and The crime control perspective, which upholds victim-focused ideals and is generally supported by the media and government. This perspective focuses on controlling and preventing crime and achieving justice through punitive measures.

The underlying principle of due process is equality for all who come before the law—that is, impartial treatment which ensures justice is fair and accessible regardless of financial means or factors such as race, religion, gender, age or sexuality. Due process perspectives uphold the rule of law ideal, which encompasses four aspects:-

1. that the law and all surrounding processes are transparent, reliable and consistent;
2. that legal remedies and sanctions are consistently and fairly applied and accessible;
3. that legal institutions remain independent from the government; and (4) that legal institutions are in accordance with the recommendations of the Victorian Law Reform Commission’s (VLRC) final report (2004) and the sexual offences implementation report (VLRC, 2006), Committal Hearings involving sexual offences must be heard within three months of the defendant’s arraignment and sexual offence trials must be held within three months of the Committal Hearing or, if no Committal Hearing is held, within three months of the defendant’s arraignment. Appropriately scrutinised and publicly supported. As such,
due process perspectives favour traditional adversarial values whereby criminal proceedings are a contest between the state and the defendant, and a number of rules of evidence and procedure exist to protect defendant rights. These rights include the presumption of innocence; the right to challenge the prosecution’s case; the prosecution holding the burden of proof; proceedings being conducted in open court; the right to remain silent; the right to a jury trial; the right to a speedy resolution; the right to legal representation; and that only legally admissible evidence which complies with complex rules of evidence can be introduced. Many of these rights are enshrined within case law23 while some are recognised globally (International Covenant on Civil and Political Rights 1966; Universal Declaration of Human Rights 1948). Due process perspectives have provided motivations for a range of law reform. In particular, due process frameworks underlie the formalisation of previously unregulated processes to ensure equality and consistency, and to safeguard defendants’ interests. An example of a due process-inspired reform in Victoria is the Human Rights Charter 2006 (Vic), enacted on 1 January 2007. This is somewhat revolutionary statutory recognition of due process rights and provides scrutiny on the actions of the government when making law, and enshrines the rights of all Victorian citizens with a

23 (R v Cameron (2002) 209 CLR 339; R v Dietrich (1992) 177 CLR 292),
particular focus on criminal proceedings. For example, s.25 dictates that:

"Any person charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law...[and] any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law." 24

In addition, under s.26 'a person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with the law'. In a similar vein to s.22 1(a) of the Victims' Charter 2006 (Vic) however, the Human Rights Charter 2006 (Vic) can be criticised for its potential to be somewhat more symbolic than real. This is because s.36(5)(b) restricts individuals from undertaking legal action if the principles of the Human Rights Charter 2006 (Vic) are not upheld. Similarly, s.39(3) states that 'a person is not entitled to be awarded any damages because of a breach of this Charter'. As such, although the Human Rights Charter 2006 (Vic) offers significant recognition of defendant interests, it tends towards being symbolic and thus limited in its ability to protect or ensure that its due process ideals are upheld. Nonetheless, the significance of the statute in legally acknowledging due process rights, particularly in the

24 S.25(1); S.25(4)
context of an increasingly punitive system of justice, must be recognised.

5.3 Existing Controls Whether Sufficient to Control or Offer Scrutiny of Plea Bargaining

Plea bargaining was only considered in cases where there was some justification for doing so—for example, due to ‘weak evidence’; ‘the victim’s/informant’s opinion’; ‘the sentence is likely to be the same regardless’; ‘saving resources’; and ‘avoiding prolonging proceedings’. In addition, prosecutorial participants were consistently observed to be seeking victim and informant opinions, as well as an authoritative opinion, before making a decision to plea bargain. For example, during one observation of Prosecutor, after examining the evidence she rang Defence Counsel, ‘just to have a bit of a chat about whether their client has indicated which way they want to go, you know, if they [the defendant] might plead guilty’. Defence Counsel indicated that a guilty plea might be possible if an appropriate arrangement could be agreed upon.

Following this conversation, Prosecutor contacted the informant to discuss the case and ascertain his opinion, and those of the victim. Prosecutor then spoke with the Crown Prosecutor (Prosecutor) about a possible plea bargain offer, outlining her recommendations and the opinions she had obtained. Crown Prosecutor and Prosecutor then determined a possible plea bargain which they proposed to Defence Counsel. When asked about this process, Prosecutor explained that at all stages before they decide
whether they would go with a resolution they speak with a Crown prosecutor and then there is a bit of bargaining down there of what they both want and what they think is appropriate and what the informant thinks is appropriate, and what the victim thinks, and often this can be quite different because the informant knows the witnesses and may want to get rid of the brief because it is difficult for them, whereas the Crown prosecutor has to look more to what is in the interests of justice in terms of what the victim wants and what’s going to be appropriate in terms of the law.

When engaging in discussions, the Crown can be trusted to consider victim, public and defendant interests, and not to make deals purely for efficiency motivations. When questioned as to how the Crown could be ‘trusted’ to perform this role without any formal scrutiny, participants claimed that their public interest roles and status within the criminal justice process provide a sufficient basis for engendering trust. As Defence Counsel claimed that they, have to put some degree of faith in legal counsel to do their job in that regard. Similar views were also expressed in Mack and Roach Anleu’s (2001) Research, whereby the implicit claim by defence and prosecution lawyers is that such discussions and resulting agreement are not coercive, but proper and ethical.

The fact that the observations did not demonstrate any overt prosecutorial misconduct in plea bargaining and that the legal participants themselves believed the Crown can be
‘trusted’ to appropriately engage in discussions, however, does little to redress the potential consequences of plea bargaining’s non-transparency. These concerns exist because when plea bargaining occurs or a prosecutorial decision is made involving plea bargaining, there is no public transparency or accountability in this process or in prosecutorial discretion in making these significant decisions\textsuperscript{25}. Justice is not seen to be done. Plea bargaining’s lack of formality beyond the internal policies can thus impact on public perceptions of discussions and their legitimacy, and potentially hinder public confidence in, and understanding of, plea bargaining\textsuperscript{26}.

Therefore, if plea bargaining is going to continue to be used as a criminal justice process, maintaining only three internal policies that offer informal and non-binding guidance to prosecutors is not adequate, because this does not uphold established judicial and public interest principles, particularly those of public and open justice\textsuperscript{27}.

As Cole (2001) claims Compared to the openness of plea negotiations in the US, one gets the impression that Australian lawyers prefer to frame the practice in neutral, technical legalisms, thus shielding the dynamics of bargaining from public view. They seem to validate these discussions in terms of getting the charges and facts right. Although the practice maintains [the] boundaries of the

\textsuperscript{25} Huff, Rattner, & Saragin, 1996; Newman, 1966
\textsuperscript{26} Cohen & Doob, 1989; Freiberg, 2003; VCCAV, 1997; VSAC, 2006
\textsuperscript{27} Ashworth, 1994; Kirby, 1998; Spigelman, 1999
legal community, questions must be asked. The mere
perception that misconduct or impropriety could occur
during the process of plea bargaining in itself constitutes a
substantive reason for implementing scrutiny and
authorisation to plea bargaining through statutory
formalisation.