CHAPTER IV

PLEA BARGAINING: A COMPARATIVE STUDY

Introduction

Plea Bargaining or Resolution Discussion is a foreign concept. Its origin has its roots in America. In India, it is at experimental stage. In America, it started decades ago. The remarkable case of Brady v. US\(^1\), Mc Mann v. R Richardson\(^2\) and Parker v. North California\(^3\) popularly known as Brady Trilogy, have discussed the constitutionality of Plea Bargaining under threat and held the same Unconstitutional. Although, in the first plea bargaining case decided after the Triology, the Court entirely avoided considering whether plea bargaining was voluntary. In Santebello v. New York\(^4\) 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\(^5\) 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. Specifically, the

\(^{1}\) 397 US 742 1970
\(^{2}\) 397 US 759 1970
\(^{3}\) 397 US 790 1970
\(^{4}\) 404 US 257 1971
\(^{5}\) 420 US 283 1975
Court refused to consider the plea bargaining system as a whole, insisting instead that the only question that should be considered was the state of mind of the individual pleading guilty at the time he entered his plea. The end result was not law by reason; it was law by fiat. Since then, the Court has made no substantial progress towards providing reasons. In deciding cases about the constitutional constraints on bargained pleas, the Court has continued to refer back to the Trilogy to provide a foundation for its decisions. However, no foundation is there, and later cases, viewed together, are as unreasoned as the Trilogy and not even as consistent. The search for reasons, for some principled basis that would not only explain or justify existing decisions but also provide guidance for the future, is not an impossible one. The Court will have shirked its duty to us all if, in the future, it fails to provide some explanation and justification for its plea bargaining decisions. To those who cherish the rule of law, it is important that the Court provide reason and explanations. The American criminal process promises extensive safeguards to criminal defendants who plead not guilty and go to trial. But most criminal defendants, in most jurisdictions, never see a trial. The net effect of the Trilogy, and the cases following it, has been to make the plea bargaining process, which determines their fate, a Kafkaesque process entirely ungoverned by the Constitution.

On the contrary, Law of Plea Bargaining has strong variation in European countries. In treating a guilty plea as
conclusive, common law nations depart from the law of most nations on the European continent. In serious cases, these nations do not treat any form of confession as an adequate basis for dispensing with the trial, even if trials are likely to be simpler and to focus mostly on sentencing issues when accused do not confessed their guilt.

Similarly, in Pakistan, Nigeria and Georgia etc. the implications and effects of plea bargaining are different. The Indian system also has a different approach towards the concept of Plea Bargaining. All these states thus, incorporates indifferent approaches towards plea bargaining which shall now be discussed in detail.

4.1 Plea Bargaining in US and Canada

4.1.1 Introduction

The practice of what has come to be known as “plea bargaining” has been the subject of considerable debate over the last few decades. In Canada, the discussion has centered on the exact nature of the practice and on the term by which it should be known. In 1975, the Law Reform Commission of Canada defined “Plea bargaining” as any agreement by the accused to plead guilty in return for the promise of some benefit. But over the years, considerable objections grew against designating the practice in any way that implied that justice could be purchased at the bargaining table. Consequently, there was a movement away from the use of the term “plea bargaining” and toward more neutral expressions such as “Plea Discussions”, “Resolution Discussions”, “Plea Negotiations” and “Plea

6. Milica Potrebic Piccinato (Compiled and Edited by National Judicial Academy, Bhopal).
Agreements”. The use of such expressions marked in evolution in the practice itself, since they implicitly acknowledged it to be much more wide ranging than simple bargaining and to involve the consideration of issue beyond merely that of an accused pleading guilty in exchange for a reduced penalty.

Resolution discussion embrace several practices, including charge discussions, procedural discussions, sentence discussions, agreements as to the facts of the offence and the narrowing of issues in order to expedite the trial. Although they may sometimes involve a judge, these private discussions occur primarily between the prosecutor and the accused and his lawyer.

**Charge Discussion:**

Charge discussions includes the following:

- The reduction of a charge to a lessor or included offence
- The withdrawal or stay of other charges.
- An agreement by the prosecutor not to proceed on a charge.
- An agreement to stay or withdraw charges against third parties.
- An agreement to reduce multiple charges to one all inclusive charge.
- The agreement to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.
Procedural Discussion:

Procedural discussions includes the following:

- An agreement by the prosecutor to proceed by summary conviction instead of by indictment.
- An agreement to dispose of the case at a specified future date if, on the record and in open court, the accused is prepared to waive the right to a trial within a reasonable time.
- An agreement to transfer charges to or from a particular province or territory or to or from a particular jurisdiction in a province or territory.

Sentence Discussion:

Sentence discussions includes the following:

- Any recommendation by a prosecutor or a certain range of sentence or for a specific sentence.
- A joint recommendation by a prosecutor and defence counsel for a range of sentence or for a specific sentence.
- An agreement by a prosecutor not to oppose a sentence recommendation by defence counsel;
- An agreement by a prosecutor not to seek additional optional sanctions, such as prohibition and forfeiture orders;
- An agreement by a prosecutor not to seek more severe punishment;
- An agreement by a prosecutor not to oppose the imposition of an intermittent sentence rather than a continuous sentence.
The type of conditions to be imposed on a conditional sentence.

**Resolution Discussion without Complete Trial:**

When an accused decides to plead guilty, the prosecutor should advise the sentencing court of the facts that could have been proven if the matter had gone to trial. For the court to accept a plea of guilty, the facts alleged by the prosecutor must be accepted by the accused as being substantially accurate, and they must be sufficient in law to constitute an offence. Discussions regarding the facts may include the use of an agreed statement of facts and an agreement by the prosecutor not to include embarrassing facts that are of little or no significance to the charge.

**Resolution Discussion in Trial:**

Discussion may also take place in criminal cases that actually proceed to trial in order to narrow the issues that will be litigated. In Canada, the evidentiary burden rests entirely on the prosecutor to prove a criminal charge beyond a reasonable doubt. There is no obligation on the accused to demonstrate his innocence. As a result, criminal trials can be long and heavy. Resolution discussions may, therefore, include concessions by the defence of certain legal issues in order to reduce the onus on the prosecutor. These may include the defence’s concession of non-contentious issues such as the jurisdiction of the court, the identity of the perpetrator of the crime or the voluntary character of a statement made by the accused to the authorities. In limited cases, the defence may be legally required to prove an assertion, such as in an application to exclude evidence. In
these cases, the prosecutor may also make concessions that are legally sound in order to reduce the burden on the accused during a trial. Finally, discussions may involve identifying witnesses whose evidence may not be necessary, so that they are not needlessly requested to appeal.

4.1.2 Doctrine of Nolo Contendere

Meaning

In U.S., in some jurisdictions the plea of "Nolo Contendere" or 'no contest' is not an 'admission of guilt', but rather a 'willingness to accept declaration of guilt', rather than to go trial. It is treated as a guilty plea to serve one purpose not served by a guilty plea in a subsequent civil suit possibly arising out of same event. Guilty plea is admissible as evidence against the defendant but plea of Nolo Contendere is not.

A judgment of conviction entered on a plea of Nolo Contendere may be used by the accused as the basis of plea of double jeopardy since conviction and punishment, after the nolo plea operate for the protection of the accused against subsequent proceedings, is as full as a formal conviction or acquittal after a plea of guilty or not guilty.

This doctrine is also expressed as an implied confession; a quasi confession of a guilt; a plea of guilty; substantially though not technically a conditional plea of guilty, a substitute for plea of guilty, a formal declaration that the accused will not contend; a query directed to the Court to decide on plea guilt; a promise between the

7. The expression, defendant is used in India in the civil dispute against whom civil action is taken whereas in U.S. this expression is used in criminal trial also and thus the defendant is an accused).
government and the accused, and a government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of particular case.

The accused cannot, by qualifying the plea of Nolo Contendere curtail the Courts discretionary power. The plea of Nolo Contendere is not recognized in any circumstances in some jurisdiction in U.S. The main ground assigned for refusing to recognize this plea is either that there is no provision for the plea in the criminal Law statutes of the State or by implication it is not available to the accused, or that the plea has been outlawed by express statutory provisions. True is the fact that in some jurisdictions, in some of the States, either expressly or by implication, such plea is recognized as a part of their legal system.

In U.S. in celebrated case in Hudson Vs. United States\(^8\), it has been held that in the absence of statute to the contrary, the Court cannot accept a plea of Nolo Contendere for capital offence. In some Courts, this plea is not accepted where imprisonment is mandatory on conviction of the offence charged. Such plea has been accepted in prosecutions for crimes against the persons, against the property, against the public peace, public decency or good morals, public justice and in prosecutions for other offences and statutory violations.

It is well known that arraignment is the event occurring at the general trial Court level that formally initiates the trial process. As such, it is the first official

\(^8\) 363 U.S.807.
occasion at which the accused is given an opportunity to answer the accusation. Hence, at this stage, accused is required to enter a plea. Arraignment is held in open court and generally begins with a formal reading of the indictment or charge by which the accused is again formally advised on the charges against him. In U.S., at this stage, he is again advised of his constitutional guaranteed rights by counsel and protection against self-incrimination. Accused is, therefore, required to answer the charge by entering a plea at this juncture. No doubt, the plea may take one of the several forms.

**Options with accused:**

Once trial has started, accused may plead guilty to the crime as charged or to a lesser offence. A plea of guilty to a lesser offence often results from plea bargain although the defence-attorney can never ethically tell his client how to plead, but he can advise him if it appears that the state’s case against him is so strong that is unlikely he will be found innocent by going to trial; on the original charge against him, he can admit, on behalf of the accused the bargain with the prosecutor to accept a guilty plea in exchange for a reduced charge and save the time and expenses to the State of going to trial. More often than not, the prosecutor will accept the offer because it frees him from more rapidly to proceed with other important trial matters and also save the State from the expenses of a trial. It will be interesting to mention at this stage than in may local Courts, as many as 90% of the case are settled in this way or in such a manner. Once bargained agreement has
been reached, the prosecutor, the defence attorney, and the defendant, will go to the Judge and ask him to accept the plea of guilty to the lesser charge. They must convince the Judge that the defendant, of his own initiative, desired to so plead and that there has been no plea bargaining since the practice is not officially approved of. When the plea is voluntarily made and that no promises have been made out that the sentence would be lighter, though if he is to choose to pursue his constitutional right to trial and was found guilty, if the Judge is satisfied that the plea is voluntary and in accord with the true wishes of the accused, he may accept the plea.

A plea of guilty, even to the crime charged in open Court, need not be accepted by the Judge, if he believes that either the defendant was coerced to plead guilty, if he does not understand the significance of his plea, or if really, he may not be guilty if guilt is accepted, the Judge then sets date and time for sentencing. It should be pointed out that under the law of some States in United States, trial is required and plea to guilty to a capital case may not be accepted. Of course, the case is required to be fixed for trial by the Judge if accused does not plead guilty.

**Recent Trends:**

In recent year, there appears to be renaissance of the doctrine of “Nolo Contendere” in criminal proceedings. It is, particularly, evident in the Federal Courts in the United States, where it is said, thousands of defendants-accused have entered the plea to indictments, notwithstanding that they are violating the entriasted and income-tax laws. The
plea, which raises no issue of law or fact under the accusation, is not one of the pleas, generally or specially, open to the accused in the criminal prosecutions, and is allowable only on leave and acceptance by the Court. It has, also, been interpreted that, as such, it is not a plea in strict sense of the realm of criminal law, but rather to unanimously plead the presence of the defence. By this plea, the accused makes a formal declaration that he is not going to contend with the prosecuting agency under the charge as observed in State Exrel Clark Versus Adams.9

As held in Fox Versus Schedib10 and in State Exrel Clark Versus Adams, the plea of “Nolo Contendere”, sometimes called, also, “Plea of Novult” or “Nolo Contendere” means, in its literal sense, “I do not wish to contend”.

It is thus difficult to define the process and exactly the nature of “Nolo Contendere”, but regardless of the label attached, it appears that for all practical purposes, a plea of “Nolo Contendere” is a plea of guilty and equivalent thereof.

A plea of “Nolo Contendere” is employed by the accused in criminal cases to avoid executing an admission, which could be used as an admission in other judicial litigation. However, it may be noted that in “United States V/s Pannell,11 it has been observed that the plea “Nolo Contendere” was retained in the Federal Criminal Procedure (FCP), Rule 11, to preserve and sometimes useful devised by which a defendant may admit his liability to punishment

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without being importantly raised in other proceedings”. In many jurisdictions in United States, the liability does not support a conditional plea of “Nolo Contendere”. At time, this is used by the accused with a view to avoiding trial to test attending expenses and adverse public suit in the event of conviction, or to protect in certain cases the respectable citizens, who may sometimes become technically guilty of a violation of law, but who should not be subjected to certain penalties, intend to apply to only those, who willfully or maliciously violate the law.

As discussed bove, plea of “Nolo Contendere” is not ipso facto, a matter of right of the accused. It is within the particular discretion of the Court concerned to accept or reject such a plea. However, it the Court accepts such plea, it must do so unqualifiedly. It is, therefore, clear that in such plea once accepted, by the Court, the accused may not be denied, his right to raise such plea. The Court cannot accept such plea having rights of the accused and determination of facts on an questions of law. Of course, the discretion of the Court, if plea is accepted, has to be exercised in light to special facts and circumstances of the given case. It is, also, held at times that such discretion vested in the Court has to be used only when special considerations are present. It is, also, important to mention at this stage that in the absence of statutory provisions to the contrary, consent of the prosecutor is not required as a condition for refusing the plea of “Nolo Contendere” by the Court. And the fact that the prosecutor’s consent is not generally required would not tantamount to non-
consideration of his version or attitude. The Court is required to consider the prosecutor’s version as an important factor in influencing the Court in deciding whether such plea should be accepted or not.

**Procedure if The Courts Accepts the Plea of Accused:**

Upon the acceptance on a plea of “Nolo Contendere” for the purpose of the case in which such a plea is made, it becomes an implied confession of the guilt equivalent to a plea of guilty; i.e. the incidence of plea. So far as a particular criminal action in which the plea is offered is concerned, of course, it is not necessary that there should be adjudication by the Court that the party whose plea is accepted in guilty, but the court may immediately impose sentence. This proposition is very well elucidated in United States Vs. Risfeld\(^2\). However, it may be noted a new dimension was evolved in Lott Vs. United States\(^3\) where the Court, after stating that the plea is tantamount to an admission of a guilt for the purposes of the case, added that the plea itself, does not constitute a conviction and hence, is not\(^4\) a determination of guilt.

The plea of “Nolo Contendere” like a demurer, is admitted for the purpose of the case, all facts, which are well pleaded, and when the plea is accepted by the Court, there would not survive any issue or fact. It, therefore, follows that the Court cannot after having decided to accept such a plea, go on hearing the sentence to decide the fact of the guilt of the accused. No doubt, it is open for the Court

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\(12\) 340 US 914  
\(13\) 367 US 421  
\(14\) 340 US 914
to hear the evidence for a limited purpose of deciding the quantum of sentence upon punishment. Equally true is the fact that the prosecutor has no right to make any agreement or promise as to the sentence, which could bind the Court, and the fact that such a plea has been entered in reliance on an agreement or promise of a prosecutor. As to the sentence that could be imposed, standing alone, does not also restrict the power of the Court to impose sentence in accordance with the law. It will be interesting to note that where the punishment provided for an offence is both, imprisonment, or a fine, a plea of “Nolo Contendere” does not preclude a court from imposing the sentence of imprisonment. There is also restriction on the Court to impose a fine only. However, there are some Courts, which have taken view that when plea is accepted by the Court, the punishment will be limited to fine only and not the imprisonment.

**Status of Accused after Pleading Guilty**

Raising such a plea would also result into waiver of all formal defects and also the right of the accused to go to a trial. Upon entering a plea of “Nolo Contendere”, an accused waives all defences other than that the indictment charges. No offence, as held in *Crolich V/s. United States*\(^{15}\), of such a plea to non-existent crime is not binding and a motion to affect judgment and sentence, obviously, would, therefore, lie. Such a plea, except under extraordinary circumstances, leaves open for review, but for one thing, namely, the sufficiency of an indictment. The principle is also very well

\(^{15}\) 344 US 830
upheld in **United Brother of Carpenters V/s United States**\(^{16}\). An accused, therefore, can raise the objection that the accusatory pleading did not charge a crime despite entering into a plea of “Nolo Contendere” and acceptance thereof by the Court.

**Difference between Nolo Contendere and Plea of Guilty**

There is a fine distinction between a plea of Nolo Contendere and plea of guilty. A plea of guilty has a confession that binds in other proceedings, but the plea of “Nolo Contendere” has no effect except in a particular case, in which it has been raised. Such a plea cannot be utilized against the accused in a civil suit for the same act, and it cannot be used as an admission of a guilt even in any other criminal case. The accused is entitled to raise a plea of double jeopardy, in a case, when conviction is founded upon Nolo Contendere, since both conviction, after the Nolo plea operate for the protection of the accused against subsequent proceedings, is as full as a formal conviction or acquittal or not guilty.

It is, of course, within the discretion of the Court concerned to permit the plea to be withdrawn and replaced by another form of plea or to refuse to permit its withdrawal. Having been accepted by the Court, it is only the discretion of the Court to consider the request for the withdrawal upon the insistence of the accused. A rejection of the withdrawal, if not abused or judicial discretion, obviously, would not violate the constitutional rights of an accused. It would, also be noticed that a Court, that has

\(^{16}\) 330 US 395.
accepted the plea of Nolo Contendere might also set it aside without any request from the accused, if the Court is convinced about the innocence of the accused. In Federal Courts in United States, the extent if Courts in United States, the extent if Courts power in regard to the withdrawal of such a plea is circumscribed by a statutory provision—generally the plea, may be permitted to be withdrawn only before sentence in imposed or imposition of sentence is suspended, but that the Court may permit withdrawal of such a plea even after such a plea is based on suspicion in order to correct latent, patent or manifest-injustice ensued to the accused.

**Withdrawal of Plea of Guilty:**

It will be interesting to refer Rule 32 (d) of Federal Rules of Criminal Procedure, which is applicable to withdrawal of such a plea. After sentencing in a criminal case, in providing with motions to withdraw, a plea of guilty or “Nolo Contendere” may be made only “before sentence is imposed or the imprisonment of sentences is suspended”. However, it provides a qualification that after sentence has been imposed the Court may set aside a judgment of conviction and permit accused to withdraw suitably if so action is required “to get manifest injustice”. The motion to withdraw of a plea of “Nolo Contendere” in this federal rule has to be addressed to the Trial Court’s discretion. The Trial Court, being moved may reverse only if it is satisfied that the discretion was misused or abused. Although the federal rule does not impose a limitation on the withdrawal of plea after sentence, it has to be exercised in the rarest of rare
case and it may be restored to only upon making out of a case of “grave and manifest-injustice”.

4.1.3 Prosecutorial Considerations while Bargaining

Generally speaking, a prosecutor’s typical objective will be to “obtain a plea that is as close to the result that would be obtained if the defendant were convicted as charged.” Accordingly, the following discussion will concentrate on the factors a prosecutor will need to consider in achieving this objective.

4.1.3.1 Fundamental Considerations

The following fundamental consideration should be kept in mind by the prosecution:

One of the most important and initial factors a prosecutor should consider prior to entering into plea negotiations is the strength of the case. The prosecutor must consider whether he/she possesses proof sufficient to satisfy the threshold of proof necessary for a conviction. This is an important consideration because if the case lacks sufficient evidence to convict a suspect or accused, the suspect or accused will not be inclined to engage in plea negotiations. In sum, “the relative strength of the prosecutor’s case, the likelihood of an appealable issue, and the relative trial skills of the defense counsel and the prosecutor” will be imperative factors that should be evaluated prior to the decision of whether to plea bargain with a suspect or accused. An obvious consideration the OTP will need to entertain in deciding whether to plea bargain is the severity of the crime and the nature and extent of the suspect or accused’s participation in the
commission of the offense. There is a great deal of consensus amount international lawyers and policy makers that those persons who are the orchestrators, the military leaders and politicians should be prosecuted to the fullest. Hence, the prosecution should not engage in plea bargaining with the higher-ups no matter how useful their testimony may otherwise be. Rather plea bargaining should be an option reserved exclusively for lower-level suspects and accused persons.

The “background and status” of the suspect and accused should also be considered in determining whether to engage in plea bargaining. Specifically, the age . . . , family circumstances, health, . . , prior criminal record . . . , all should be considered.

“Budgetary and resource constraints” are always a necessary consideration. It is quite clear that the prosecution for the Rwandan Tribunal is constrained by the limited budget, time and personnel. Plea bargaining is one of the most effective mechanisms by which to greatly reduce the depleting to those already scarce resources.

Finally, one of the most important considerations the prosecution will need to consider is the ability of the defendant to assist in the indictment of the higher-level offenders. For example, a suspect or offender who is at the bottom of the hierarchy of offenders and who had little or no contact with any of the higher-ups will have very little to add to what the prosecutor may already know. It would therefore, be of no advantage to engage in plea bargaining with such a suspect or accused. In this connection, the OTP
will also need to assess the trustworthiness and willingness of the suspect or accused to cooperate.

4.1.4 Plea Bargaining Systems in Canada and The United States

The plea bargaining systems of Canada and the United States are being used illustratively in this memo because the roles of the OTP and the Trial Chamber judges are greatly similar to the roles of the prosecutor and judges in these two countries.

Similarity Between the roles of the Prosecutor and Judges in the ICTR and the United States Criminal Justice Systems:

Similar to the OTP, prosecutors in the United States are given tremendous discretion in the exercise of their investigative and prosecutorial powers. A prosecutor in the United States “has broad authority to decide whether to investigate, great immunity, or permit a plea bargain and to determine whether to bring charges, what charges to bring; when to bring charges and where to bring charges.” The prosecutor’s broad discretion is recognized by courts of the United States “in part out of regard for the separation of powers doctrine and in part because the decision to prosecute is particularly ill-suited to judicial review.” This separation of powers doctrine is akin to the OTP which “constitutes the separate and independent organ of the Rwandan Tribunal”

Further, similarity may be observed by comparing the role of the judges in the plea bargaining process. In the ICTR system, the judges does not participate whatsoever in
the pre-indictment plea negotiation/plea bargaining process. Similarly, because plea bargaining often takes place at such an early stage of American Proceedings, the judges in the federal systems are completely prohibited from participating in the plea negotiation. A final similarity between the two systems may be observed in that plea agreements in both the ICTR and United States are ultimately subject to judicial scrutiny.

**Similarity Between the Role of the Judges and Prosecutor in the ICTR and the Canadian Criminal Justice Systems:**

The Canadian plea bargaining system is especially relevant because it is a mechanism that is “not well entrenched” into the criminal justice system. A Canadian commentator states that:

"Bargaining has never been fully recognized as a legitimate practice in Canada, at least not to the same extent as in some American jurisdictions. There is by no means a uniform set of rules governing this process, and the way in which functions dependes primarily on the kinds of relationships that have grown up between magistrates, Crown attorneys and defense counsel in particular parts of the province."

This treatment of plea bargaining is relevant because plea bargaining in the ICTR is similarly commonly accepted practice. Plea bargaining, or “plea negotiation” as it is referred to in Canada, has gained what is described as a “silent acceptance.” This description is used because although Canadian courts “have reluctantly dealt with the
legal entanglements that arise in plea bargaining,” they have nonetheless let it continue.

In contrast to the United States and ICTR, the prosecutor is not the sole individual responsible for investigation of an offense in the Canadian criminal justice system. Notwithstanding this, the prosecutor does engage in plea bargaining once the case has been referred to its office. It appears that this is ordinarily done during a meeting that is held once the accused decides to plead guilty in the Crown Attorney’s Office (CAO). It is at this meeting that the accused accompanied by defense counsel, discusses with the Crown Attorney what would be the appropriate sentence in return for a guilty plea and whether the accused will plead guilty to reduced charges or a lesser included offence.

However, as is the case in the United States in the ICTR, the plea agreement is again ultimately subject to judicial scrutiny. Similar to the United States and the ICTR, the judge does not participate in the plea negotiation but retains the ultimate authority to accept or reject the plea agreement. In the Canadian criminal justice system the judge is not required to inquire into the propriety of the plea agreement entered into, and ordinarily will accept it provided that he is “sufficiently’ informed of the facts upon which the defendant pleads guilty, especially when the charge carries a heavy maximum sentence or the defendant might have good grounds for a defense.” Furthermore, in the Canadian criminal justice system, the judge makes the ultimate determination regarding the sentence to be imposed.
4.1.4.1 Fundamental Observations on Plea Bargaining in the United States

Approximately 90% of all criminal cases are resolved through plea bargaining in the United States. The process of plea bargaining in the United States is guided by three sources of law: (1) the United States Constitution; (2) statutes; and (3) judicial pronouncements found in case law. While plea bargaining on the federal and state level is commonly governed by statute, the focus of the following discussion will be some of the more important and general principles as found in case law before the enactment of Rule 11(e) of the Federal Rules of Criminal Procedure and case law discussing the performance and breach of plea agreements.

Prior to the enactment of Rule 11(e) the focus on plea bargaining revolved around the voluntaries of the guilty plea. The general criteria required for a guilty plea obtained through plea bargaining was that the guilty plea must not have been “induced by promises or threats which deprived [the plea] of a voluntary act.” A plea will not be considered voluntary if it was induced by threats or coercion, was based on unfulfilled or improper promises, or if the defendant was mentally incompetent. In addition, the entry of the plea must be knowledgeable. A court will invalidate the plea itself if it determines that the defendant does not have a full understanding of the plea and of its consequences. American courts will also invalidate a plea if it finds that the prosecutor obtained the plea by threatening the defendant with prosecution, if the defendant refuses to
provide information or testify without first promising to grant some sort of immunity to the defendant.

Issues involving the performance and breach of plea agreements have also been addressed by courts of the United States. These issues have typically been analyzed using traditional contract principles. In general, the United States Supreme Court has stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Therefore, it could be inferred that if the prosecutor withdraws his plea before the defendant enters a guilty plea or before the defendant will ordinarily have no resource, unless perhaps the defendant has waived a constitutional right, or has provided substantial cooperation by providing information.

A promise made by a prosecutor must also be kept by a subsequent prosecutor who is assigned the case. However, a prosecutor is not bound by a promise which is not accepted by and which does not cause the defendant to rely to his detriment on it.

The typical remedy for a defendant in the event the prosecutor has breached the agreement, is specific performance. Thus, if the prosecutor breaches his promise to withdraw certain charges, the defendant may have the agreement judicially enforced and have the charges withdrawn.

The prosecutor is permitted to breach his promise in certain limited instances. Most common is where the
prosecutor learns that the defendant has defrauded the prosecutor, or because the defendant has committed another crime after the prosecutor has made the promise. In contrast, the prosecutor may not breach his promise: (1) because he has had a change of heart; (2) because another prosecutor in the office disagrees with the promise; (3) in the absence of fraud, because of a unilateral mistake or a mutual mistake; or (4) in light of the discovery of new evidence/ facts concerning the seriousness of the defendant’s offence.

4.1.4.2 **Fundamental Observations on Plea Bargaining in Canada**

In contrast to the United States, there are very few cases in which Canadian Courts have expressed a view as to the merits or priority of prosecutorial plea bargaining or have hinted at plea bargaining in any way. In fact the most noteworthy and significant cases concerning plea bargaining did not take place until after 1970. In addition, there are even fewer guidelines governing plea bargaining. The approach applied by the Canadian criminal justice system is cautious. The Canadian courts have not provided a clear stamp of approval to plea bargaining. However courts that have addressed the issue, have been mainly concerned with avoiding unfairness not only to the Magistrate but to the accused. Canadian courts have also attempted to achieve this end even when dealing with issues of breach and performance. As a preliminary matter, judges in the Canadian criminal justice system, who are responsible for determining the appropriate sentence to be imposed on a
defendant, can under no circumstance intimate to a defendant the sentence he will impose if the defendant agrees with the prosecutor to plead guilty nor if the defendant decides to plead not guilty and is convicted. The reason courts prohibit participation by the judge in the plea bargaining process is to provide the defendant complete freedom of choice to plead guilty or not guilty. Thus, it is clear that Canadian courts addressing plea bargaining are primarily concerned with avoiding guilty pleas by defendants who are innocent yet consider pleading guilty because of their uncertainty regarding the ultimate disposition.

Similar to the United States, issues of breach and performance of plea agreements have also been resolved using traditional contract principles. However, the purpose of these decisions has not been to rule on the propriety of plea bargaining, but rather have focused upon the fairness to the defendant who accepts the plea agreement and relies on it to his detriment. Thus, Canadian courts have often simply ignored the entire issue of the propriety of plea agreements, but acknowledged its presence and proceeded to hold the prosecutor to his promise on the contract theory of detrimental reliance. An identical issue was presented to the Quebec Court of Appeals in Attorney General of Canada V. Roy in (1972)\textsuperscript{17} and again the contract theory of detrimental reliance was applied. The court stated:

"The Crown, like any other litigant, ought not to be heard to repudiate before and appellate court the position

\textsuperscript{17} QB 1972 Cr. Reports New Series, Vol. 18, p. 93.
taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate its counsel was somehow misled, or finally, where 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."

One final and extremely important case, though highly exceptional, is **Perkins & Pigeau V. The Queen (1976)**. In this case, the Quebec Court of Appeals addressed a plea agreement that involved a promise by the plaintiff to the defendant for an offense that was less serious and different from the offense for which he had been originally charged. The court rejected such an agreement, stating:

"Either the accused was guilty and must face the mandatory sentence impose by law or he was innocent and must be acquitted. A plea to a lesser offense may be accepted if the Crown doubts its ability to prove a charge, but that was not the case here since the Crown attorney admitted having enough evidence to establish importing." This case, however, is the exception rather than the rule.

19 Amid the furor surrounding the "Due Process Revolution" of the 1960's, comparatively little attention has focused on the plight of the ninety-five percent of all criminal defendants who never enjoy a full adversary proceeding in which rights are asserted and full “due

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18. (1976) 35 CRNS 222 (QCA)
19 Plea Bargaining by JAMES F. PARKET
process” is provided. In the courts, a guilty plea stemming from a plea bargain results in almost certain conviction and offers the defendant only the slimmest hope for later asserting the rights deemed waived by his plea. In the classroom, discussion of the practice is normally relegated to a chapter towards the end of the text. Among lawyers, plea bargaining remains a topic for guarded conversation.

4.1.5 Plea Bargaining Practises

In some sixty-five to ninety-five percent of cases criminal “voluntarily” decide to confess guilt. It does not of course, indicate that remorse overwhelms most accused criminals, nor does it suggest that these men feel a civic duty to preserve community resources by not demanding a time consuming and expensive trial. Instead, pleas of guilty are induced by the favored treatment criminal justice system gives to a confessed wrongdoer. Though plea bargaining may take any of several forms, three major types predominate”.

I). Charge Bargaining:- The best known form of plea agreement is the arrangement in which the prosecutor agrees to press a charge less serious than the one initially filed. A less serious charge normally carries a lower potential maximum sentence. Often, however the potential maximum sentence does not concern the defendant as much as his desire to avoid conviction for a certain unsavory offense. This motivation prevails especially among first offenders with strong ties to “respectable” elements of the community. Thus, an attorney might greatly prefer a jail sentence for a misdemeanor to probation for a felony
conviction. Charge bargaining tends to flourish in jurisdictions with stiff minimum sentences; there the legislative branch has tied the hands of all parties, precluding a sentence appropriate for the less severe varieties of a given offense.

ii). **Sentence bargaining:**

A second form of plea bargaining is sentence bargaining. It is the practice of an on the nose guilty pleas; the exchange of a guilty plea for a promise of prosecutorial leniency. Though the charge may accurately reflect the conduct for which the defendant is charged, the prosecutor normally recommends a lenient sentence. This arrangement works a disadvantage on the accused by placing on the record— for consideration by a parole board, for example – the offense of which he was actually guilty. The prosecutor can only inform the defendant of his recommendation but cannot promise that the court will get along. Successful operation of the Plea Bargaining system thus requires consistent judicial acceptance of the disposition that the prosecutor and defense counsel agree upon.

Most judges have learnt their role well and, feeling the pressure of a backlog of cases, readily accept virtually all plea arrangements. Occasionally, however, a judge will disregard the agreement and impose a stronger sentence. Courts have generally permitted withdrawal of a guilty plea even after imposition of sentence if the plea was entered in

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20 In **People V.Baldridge**, 169 N.E.2d 353 (1960), for example, the court found no denial of due process when the prosecutor recommended as lenient sentence in fulfillment of his part of an agreement and the trial court refused to follow the recommendation.
reliance upon an improper or unfulfilled promise by the prosecutor.

The American Bar Association Projection on Minimum Standards for Criminal Justice proposes that the court allow the accused to withdraw his plea of guilty or nolo contendere whenever the accused, upon timely motion for withdrawal, proves that the plea’s withdrawal is necessary to correct a “Manifest injustice.” A motion for withdrawal is deemed timely if made “with due diligence, considering the nature of the allegations therein and is not necessarily barred because made subsequent to judgment or sentence.” Among the possible manifest injustice the standards seeks to prevent is the failure of the accused to receive the contemplated concession because the prosecuting attorney has failed to fulfill his end of the bargain.

The Practice reveals that the judge do not participate in plea discussions, but he permit the parties to disclose to him the tentative agreement they have reached. He may then indicate whether or not he will concur in the proposed disposition (assuming the information in the presentence report is consistent with representations made to him). If the judge decides not to concur, the Standards provide that before sentence the court in its discretion allow the accused to withdraw his plea “for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the accused’s plea. Even though, trial judge’s concurrence does not bind him in making the final disposition, his opinion is placed in the record and the
accused is given assurance that the judge knows it and generally approves the agreement.

**Fact Bargaining:**

The third major type of plea agreement is the exchange of a guilty plea for dismissal of other charges or potential charges against the accused/defendant. Recognizing the utility of this bargaining tool many prosecutors habitually overcharge Accused/Defendant with a view towards offering to reduce charges during negotiation. This overcharging may be either “horizontal” – making out as many offenses as possible from a single criminal transaction or charging a separate offense for every criminal transaction – or vertical-charging a single offense at a higher level than the circumstances of the case seem to warrant. While the former type of overcharging may be particularly intimidating to the accused and the more timid members of the criminal bar, the shrewd attorney recognizes the limited advantage of a bargain resulting in dismissal of excessive charges. He knows that most courts tend to sentence concurrently or to impose suspended sentences in all but one or two of the multiple charges arising from the same incident.

Though these three major types of plea bargaining are the ones most commonly recognized, and the only three mentioned with approval in the American Bar Association standards, prosecutors employ many other tactics to induce guilty pleas. Indeed, many bargains are struck without a word being spoken. The defendant many accept a tacit bargain by declaring his guilty when he is aware that the court has an established practice of showing leniency to
defendants who do not waste court time by asserting their innocence. A defendant may plead guilty in reliance upon this practice, and almost invariably find his expectation satisfied. The prosecutor may grant numerous other favors to a defendant pleading guilty. He may, for example, promise not to prosecute the defendant’s friends or relatives if the defendant takes the rap. Or, he may see to it that the defendant is sent to a particular prison or tried in juvenile court. The prosecutor may agree to help arrange for the defendant’s case to come before a specified lenient judge. If the defendant is currently on parole, the prosecutor may consent to withhold a recommendation for parole revocation in return for a guilty plea. Though these prosecutorial favours are ostensibly unrelated to the length of sentence or seriousness of the charge, their impact upon the defendant’s punishment is often at least comparable to that produced by the more overt methods of plea bargaining.

4.1.6 The Rationale of Plea Bargaining: A critique

With plea bargaining’s emergence from the shadows of the criminal justice system, advocates have submitted numerous arguments in defense of the practice. The American Bar Association Standards recognize that:

“It is proper for the court grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served”.

The Standards then recite six "considerations’ as guides for balancing the accused's rights against the advantages of judicial efficiency:

1. The defendant has by his plea aided in ensuring the prompt and certain application of correctional measures to him. In view of the slowness with which the criminal justice system now processes defendants pleading not guilty, this rationale is perhaps the most compelling one in support of plea bargaining. If swiftness and certainty of punishment enjoy priority as goals of the system, lengthy sentences many become less necessary. The confessed criminal is separated from society more quickly. He is however, segregated from society for a short period of time. The inducement of a quick trial, moreover, can prove extremely effective in obtaining guilty pleas from jailed men unable to make bail. The individual already in jail is commonly interested as pleading guilty by him may mean immediate release.

2. Defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct. If the first reason listed is the most persuasive defense of plea bargaining, this second one is perhaps the most native. The number of defendants who plead guilty from a true feeling of repentance is impossible to determine, but is undoubtedly miniscule compared to those who plead guilty to obtain benefits more material than a cleansed soul. Rather than expressing remorse, the defendant is merely showing his ability to manipulate the system to his own advantage.
3. Concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent, or other purposes of correctional treatment. Substantial truth supports this contention. Concessions made in return for a guilty plea may maximize the possibilities for individualized justice. A jury faced with the extreme alternatives of guilty and not guilty lacks the opportunity or ability to form an intermediate judgment. Indeed, statutory law may force it to impose a mandatory minimum sentence. Pretrial negotiations, however, permit the prosecutor, defendant, and judge to circumvent statutory encumbrances in arriving at an appropriate punishment. Nevertheless, to require a guilty plea as a prerequisite to individualized justice reflects poorly upon the existing system.

4. Defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in public trial. This consideration may be relevant in cases of rape, for instance where testimony by the victim might be painful and embarrassing, or in cases where an open trial might reveal national security secrets.

5. Defendant may have given cooperation which may have resulted in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct. In most prosecutors office, standard procedure apparently includes giving a “break” to the cooperative defendant whose testimony is needed to convict other.
6. Defendant has aided in avoiding delay in disposition of other cases. This is perhaps the most commonly asserted justification for plea bargaining. Faced with a growing backlog of cases, prosecutors and judges feel the system simply cannot operate unless the great mass of defendants are induced to plead guilty. The contention’s accuracy invites speculation. Even if correct, it still invokes the name of efficient criminal administration to rationalize the tremendous disparity between sentence given who plead guilty and those given defendants who force the prosecution to prove its case. The accused contesting a case incurs no penalty, but that the practice merely rewards defendants who cooperate in conserving the system’s resources. The fact remains, however, that some defendants receive harsher sentences than others merely because the former exercise their constitutional rights.

While the A.B.A. has bestowed a gloss of legitimacy on these six justifications for plea bargaining, still other defenses of the practice enjoy currency. Some commentators have suggested that a guilty defendant who contests the charges against him should incur the penalty for perjury. Others have asserted that the system benefits because the defendant acquires a feeling of participating in the decision rather than having it imposed upon him. In any event maintenance of a high proportion of guilty pleas clearly depends upon offering defendants an inducement to plead guilty.
4.1.7 The Voluntariness Standard

Despite judicial standards requiring the waiver of constitutional rights to a full adjudication of guilt before a jury to be voluntary, knowing, intelligent acts, current standards for judicial acceptance of guilty pleas provide little more than a gloss of legalistic formalism supplying the appearance of justice but failing to meaningfully affect the practices surrounding plea bargaining. Rather than attempting to bring plea bargaining into open with full disclosure of agreements and bargaining tactics, the courts have effectively insulated the guilty plea from subsequent judicial attack and meaningful inquiry, (provided the parties follow the proper formula in the original acceptance of the plea).

The widespread nature of plea bargaining is finally forcing the courts to recognize the practice and deal with it realistically. Thus far their efforts have been largely unsuccessful. Occasionally a court will strike down a bargained guilty plea because the prosecutor utilized tactics beyond the bounds of legitimate bargaining. More commonly, however, the court will consider the defendant bound by his agreement, if it was voluntarily made. Yet, the artificial voluntariness standard adopted by the Supreme Court in Brady Trilogy is a totally inadequate response to the situation and can only serve to perpetuate abuses in the system, for it insulates from judicial scrutiny the guilty plea and the practices of the skilful prosecutor bargainer. The “voluntariness” the Supreme Court requires is, of course, a legal requirement. The actual voluntariness of at least one
A defendant entering a guilty plea waives several important constitutional rights – the right to a jury trial, the right to confront his accusers, and the privilege against self incrimination. The Supreme Court relied on the 1938 case of Johnson v. Zerbst\textsuperscript{21}, for its 1969 ruling in Mc Carthy v. United States\textsuperscript{22} 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

\textsuperscript{21} 304 US 458 (1938).
\textsuperscript{22} 394 US 166 (1969).
trial judge failed to inquire whether defendant understood the nature of the charges against him and the consequences of his plea.

In Brady, Petitioner faced charges of kidnapping and liberating the victim unharmed. To avoid the possible death penalty that could be imposed only by a jury and to avoid the effect of his codefendant’s adverse testimony, he pled guilty. The Court reaffirmed that the Waiver of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. It noted that Brady had competent counsel, full opportunity to assess advantages of a trial and a guilty plea, that his plea was intelligently made, and that the accuracy and reliability of defendant’s admissions remained unquestioned. Furthermore, evidence indicated that Brady had pled guilty largely because he knew his codefendant would testify against him. On this basis, the Court could easily conclude that the trial Court had properly accepted the guilty plea, as Justice Brennan noted in his separate concurring opinion. The Court, however, concluded that a guilty plea is not necessarily compelled and invalid whenever motivated by defendant’s desire to accept the certainty of a lesser penalty rather than face the wider range of possibilities authorized. The Court likened Brady to the defendant who pleads guilty so that the prosecutor will drop other charges or charge him only with a lessor offense. The Court then went even further to hold that even assuming Brady would not have pled

guilty but for the unconstitutional death penalty provision. The statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act. This dictum creates uncertainty whether a court should ever find a plea involuntary absent some procedural error. A more coercive threat than the death penalty does not readily come to mind. Yet the Court seemed to suggest that even if the threat did directly cause the defendant to plead guilty, the plea was not unconstitutionally involuntary.

In *McMann*\(^\text{24}\)*, 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 contestsing 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 by 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.

The McMann Court merely added another formalism. To show that a plea was involuntary, the petitioner must demonstrate that he was represented incompetently by counsel, absent some procedural defect in the acceptance of

\(^{24}\) MC Mann Versus Richardson 397 US 759 (1970).
the guilty plea. The Court thus seems willing to close its eyes to virtually any tactic and prosecutor may use to obtain a guilty plea as long as the case displays a veneer of proper judicial inquiry and representation by competent counsel. As Justice Brennan stated in his dissent, “what is essentially involved is nothing less than the determination of the Court to preserve the sanctity of virtually all judgments obtained by means of guilty pleas.”

In Parker\(^\text{25}\), 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 that the reasoning of Brady\(^\text{26}\) rendered unpersuasive the argument concerning the coerciveness of the death penalty.

In the case of North Carolina V. Alford\(^\text{27}\) 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

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choice among the alternative courses of action open to the defendant, and held that while most pleas of guilty consist of both a waiver of trial and an express admission of guilty, the latter element is not a constitutional requisite to the imposition of a criminal penalty. The Court concluded that a defendant could knowingly and understandingly consent to imposition of a prison sentence even if he were unwilling to admit his participation in the crime.

Thus the Court has restricted its inquiries concerning voluntariness into narrow formalistic areas and consequently has failed to bring the whole of the guilty plea process within the scope of judicial scrutiny. Inadmissible confession upon the guilty plea, the court has failed to apply even the most rudimentary standard of due process concerning for accuracy of the proceedings. Such coercion is not merely a “rough edge” of a judicial process that the courts should consider remedying; it is a serious flaw that renders the courts less likely to reach to an accurate determination of guilt.

The Court’s current willingness to look only at the reformed record lacks the effectiveness of the older approach employed in Pennsylvania ex. Rel. Herman Vs. Clady.28 There the Court found the petitioner entitled to a hearing on his claims that his guilty plea was coerced after physical threats and that he was ordered by the prosecutor in the court to sign his guilty pleas without being apprised permitted consideration of all the circumstances surrounding the plea rather than merely considerations of

the record and competence of counsel. Likewise in *Machibroda Vs. United States*\textsuperscript{29} 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.

The voluntariness standard of the Supreme Court can have no significant effect upon the practices of prosecutors and defense attorneys. Prosecutors are in no way restrained from utilizing improper influences and unconstitutional coercive forces to obtain guilty pleas. Nor can citizens look to public records of plea bargaining for assurance that truly dangerous or habitual criminals who commit low visibility crimes are being dealt with as they should be. By no means are guilty plea defendants who have had their constitutional rights short circuited by plea bargaining the only ones to suffer from the practice’s off the record nature. A prosecutor’s sentencing decisions are often made on nonpenological grounds and can result in unwarranted leniency for hardened offenders willing to plea guilty. Defense attorneys are likewise constrained only by loose standards of “competency.” They may bargain away a client’s rights and even urge the guilty plea upon him, secure in the knowledge that only the most gross error will not fall outside the required range of competence.

\textsuperscript{29} 368 US 487 (1962).
4.1.8 Coercive Tactics of Prosecution

Plea bargaining is not always a gentlemen’s game. **Overcharging** has become standard procedure in many prosecutor offices. This practice lends credibility to the view that our criminal justice system is less an adversary one than a system of brokerage, in which ask and bid quotations are made not in dollars, but in years of men’s lives.

Overcharging is, however, only one tool employed in the prosecutor’s effort to obtain a guilty plea. The zealous District Attorney may use the **threat of future prosecutions** to obtain a guilty plea. In this variation of horizontal overcharging, the prosecutor may agree not to prosecute for additional crimes of a similar nature if the defendant will give him one easy and sure conviction. Or the prosecutor may utilize leverage obtained by an earlier conviction to persuade a defendant to plead guilty in return for only a small additional sentence rather than to risk more severe consequence.

A prosecutor can threaten to **invoke a recidivist statute** if a defendant does not plead guilty. The Supreme Court’s opinion in Brady permits the continued use of the threat of a death penalty even constitutional one to induce a guilty plea.

Perhaps the most severe abuse of plea bargaining is the **covering up of bad evidence**. Since a plea of guilty waives all non-jurisdictional defects in the proceedings, a prosecutor whose case rests upon evidence of dubious admissibility for example, a confession obtained
unconstitutionally or the fruits of an illegal search may seek to avoid a challenge to his evidence by offering the defendant a particularly attractive deal. The defendant may request a motion to suppress, but if he loses he may also lose his bargaining position. Moreover, if the defendant feels that the court ruled erroneously in the suppression hearing, he must choose either to waive the error and plead guilty or to contest the point and lose the advantage of a possible plea bargain. Since prosecutors will, of course, make the best offers, in cases with the weakest evidence, the prevalence of plea bargaining may mean that in the vast majority of criminal cases the exclusionary rule of the Due Process Revolution is replaced with a sliding scale of constitutionality.

While the prosecutor normally has the “upper hand” in plea negotiation because he has resources at his command and because he alone fully knows the strength of his case, the skilful defence attorney is by no means left without tools with which to operate. He may successfully use to his client’s advantage the pressure most prosecutors feel to move cases. The threat of a lengthy and complicated trial may force the prosecutor to make a more favorable offer. And the known ability to win a contested case is of inestimable value to a defense attorney. Many prosecutors will consciously or unconsciously estimate the chances of losing the case in determining whether to improve the offer. Defense Attorneys frequently cultivate friendly relations with the prosecutor’s office in the belief that they may obtain advantages for their clients. While this belief may be
justified in some cases, the practice raises serious ethical question when practiced to excess.

4.1.9 Plea Bargaining Effects on the Criminal Justice System

Obviously, plea bargaining's principle effect on the Criminal justice system is to assure that the vast majority of defendants are convicted without a full adversary proceeding. But plea bargaining may become a tool of coercion and a method of covering up bad cases. As for the legal profession, the practice promoted the image of the lawyer as a broker rather than a legal expert and the acceptance of sloppiness in legal work by both prosecutors and defense attorneys. Plea bargaining, however, may yet have a legitimate place in our criminal justice system. The negotiated plea may provide an efficient settlement for a case in which the accused does not dispute the facts. If guilt is conceded, or only the degree of guilt is in controversy, a negotiated settlement may be as equitable as a judicial determination.

In view of the abuses, the practice has spawned, should plea bargaining be eliminated together to preserve the integrity of the system? Among the more severe abuses has been the use of the bargain by prosecutors to obtain convictions in weak cases. Naturally, the prosecutor offers the best deal to a defendant with the best chance of acquittal. As previously mentioned, this practice induces professional sloppiness and perverts, the principle that the prosecution must show with certainty the defendant's guilty. The possibility that innocent men against whom only
a weak case exists may be induced to plead guilty has been raised and disputed.

With the limited resources currently allocated to the criminal justice system, plea bargaining appears to be a permanent fixture. Indeed had plea bargaining been terminated and all other factors held constant, the resulting chaos might dwarf the current problems stemming from the practice. Prosecutors and court would likely be overwhelmed by the burden. To try all cases with only present judicial resources would undoubtedly result in great professional sloppiness and in longer delays in the dispensation of justice than already exist.

Abolition of plea bargaining, then can take place only as part of an overall revamping of the criminal justice system. Such an undertaking would include substantially reducing the number of felony offenses and eliminating those crimes better dealt with by non-criminal regulation—drug addiction, minor drug offenses, and most crimes without victims. The courts prosecutor’s offices, and the defense bar must have the resources necessary to permit adequate consideration of every case. Additional resources should be allocated to improve the compressive-ness and accuracy of present reports so that judges can have sufficient information to make independent determinations of appropriate sentences. And any attempt to eliminate plea bargaining remains undesirable as long as many criminal offenses carry a legislatively mandated minimum sentence that denies flexibility in the application of the law.
If retention of the plea bargaining system proves desirable or inevitable, inequities in the practice must come under judicial control. Large discrepancies in sentences based upon the plea of the defendants must be eliminated and bargains entered on the record. A better system might result from the total elimination of prosecutorial recommendations in guilty pleas. This system would permit parties to present to the judge in an adversary manner factors relevant to sentencing. It could moreover, preserve the flexibility of a guilty plea while eliminating the bartering inherent in plea negotiation. In any event, as long as the abuses currently associated with plea bargaining continue to flourish, the integrity of the entire criminal justice system remains compromised.

4.1.10 The Principles guiding Resolution Discussions

Resolution discussions can nonetheless be advantageous to all the parties involved in a criminal case—including the prosecution, the defence, the accused, the police and the victim and to the Administration of Justice generally.

The propriety in principle of such discussions flows from the very nature of the criminal justice system in Canada. The adversarial system accords to the parties of a criminal prosecution wide discretion in determining the manner and form of proceedings, and it expects this discretion to be exercised with a high standard of integrity and responsibility. In such a system, there is a corresponding expectation on lawyers to resolve issues
before trial by mutual agreement. Adversarial proceedings must be flexible in order to function.

But practical considerations also make plea bargaining a necessity. The total cost of crime in Canada is estimated to be close to 59 billion dollars per year. The costs of crime include the expenditures required for protection, those incurred by victims and those associated with the functioning of the justice system. Justice system costs alone amount to 20% of the total, or close to 12 billion dollars. These costs include expenditures on police, prosecution, legal aid, courts and prisons. Measures such as resolution discussions can help reduce expenditures. Resolving a criminal case either through a plea of guilty or by reducing the length of a trial alleviates the workload of prosecutors, reduces the need for judicial resources and courtroom facilities and decreases all the other expenses necessitated by a trial.

The reality is that the vast majority of criminal convictions are secured through pleas of guilty. In 1998, a study conducted within the province of Ontario concluded that 91.3% of all criminal cases were resolved without the necessity of a trial. Without the practice of resolution discussions, the administration of justice could not operate efficiently and would in fact grind to a halt. This does not mean however that the public interest in the proper administration of justice should be sacrificed in the interest of expediency.

Prosecutors are vested with a great deal of responsibility in the criminal justice system, for they
represent the public interest in the broad sense of the term and must see that justice is properly done. They have a professional obligation to conduct resolution discussions, and they must execute this duty based on the principles of fairness, openness, accuracy, non-discrimination and the public interest in the effective and consistent enforcement of criminal law. Due to the benefits that flow to the administration of justice from early guilty pleas, prosecutors are obliged to initiate, as well as respond to, plea discussions, and they should make the best offer to the accused as soon as practicable. In cases that proceed to trial, it is also incumbent on prosecutors to attempt to narrow the issues to be litigated as much as possible. Prosecutorial offices often operate with limited resources and have to deal with a heavy workload. In such a context, resolution discussions can provide greater flexibility in the disposition of cases.

Every accused person in Canada has extensive constitutional rights under the Charter of Rights and Freedoms. These rights include the right to be presumed innocent and to have a fair and public trial. Other protections afforded govern the investigative stages of the criminal process. One pivotal right that greatly affects resolution discussions is that of full disclosure. It is a duty of the prosecutor to disclose to the accused, or counsel for the accused, the evidence on which the prosecutor intends to rely at trial, as well as any relevant and non-privileged information that may assist the accused, whether intended to be adduced or not. The purpose of disclosure is two fold:
to ensure that the accused knows the case to be met and is able to make full answer and defence; and to encourage the resolution of facts that are contentious, including, when it is appropriate to enter guilty pleas at any early stage in proceedings. Once an accused is fully informed of the criminal case against him, he may decide to plead guilty. However, the accused must be willing to acknowledge his guilt unequivocally. Finally, the plea of guilty, to be lawful, must always be a free and voluntary act by the accused himself, untainted by any threats or promises to induce the accused to admit that he committed the offence when he does not wish or intend to do so. It is also essential that the accused must be prepared to admit the necessary factual and mental elements of the offence charged at the time when a plea of guilty is entered. A trial judge is not legally bound to conduct in all cases an inquiry into the validity of a guilty plea after it has been entered. It is within the trial judge’s discretion to allow evidence for the purpose of satisfying himself that the charges are well founded or in order to have a factual background prior to imposing sentence. Should the evidence indicate that the accused never intended to admit a fact that is an essential component of the offence, or show that he may has misapprehended the effect of the guilty plea or never intended to plead guilty at all, the judges has the power to direct that a plea of not guilty be entered or permit the accused to withdraw his original plea and enter a new one.

There are a number of benefits that an accused may reap upon deciding to admit criminal liability through an
early guilty plea. In exchange for pleading guilty and avoiding a lengthy trial, an accused may receive sentence concessions by the prosecutor or the reduction, withdrawal or staying of some charges. Moreover, Canadian courts have recognized that a guilty plea generally indicates genuine remorse on the part of the offender, and that it should be considered as a mitigating factor by the court during the sentencing hearing. A guilty plea may also provide an element of certainty which is often absent at trial. In a properly conducted resolution discussion, the prosecutor, the defence counsel and the accused will know the agreement reached and the position of all parties regarding the potential disposition of the criminal charges. It is important to remember, however, that the sentence that will ultimately imposed is entirely within the discretion of the judge assigned to hear the guilty plea. A joint submission or recommendation by the prosecutor and defence counsel regarding the disposition in a criminal case is not binding on the judge. However, judges are legally obligated not to reject a joint submission unless it is contrary to the public interest and the sentence recommended would bring the administration of justice into disrepute. This high threshold is intended to foster confidence in an accused, who has given up his right to a trial that the joint submission obtained in return for a plea of guilty will be respected by the sentencing judge.

In circumstances where a sentencing judge finds that a joint submission would result in an unlawful sentence, the accused will not be allowed to withdraw his guilty plea. To
permit a plea withdrawal at this stage would result in judge acting in the most reprehensible way. The court of Appeal of Ontario has stated in this regard that:

The power of the trial judge to impose sentence cannot be limited to a joint submission, and the joint submission cannot be the basis upon which to seek to escape the sentencing judge when it appears that he chooses to reject the joint submission (...) [A]n accused who could thus withdraw his plea could simply keep doing so until he found a trial judge who would accept a joint submission (...) To permit an accused to withdraw his plea when the sentence does not suit him puts the court in the unseemly position of bargaining with the accused.

This places a heavy onus on the prosecutor and defence counsel to conduct resolution discussions competently and ethically in order to ensure that the accused, who relies on their legal expertise, is not misled regarding what the sentencing judge might do. Among other things, the prosecution and the defence must therefore know the principles of sentencing and the ranges of sentence established by the courts of appeal.

Witnesses and victims may also benefit from resolution discussions. It can be traumatizing for witnesses who have been victimized in extremely brutal crimes, such as sexual assault or domestic violence, to be required to testify in a
public court. Resolution discussions aimed at exploring the possibility of dispensing with the need for their testimony can be advantageous. In this regard, victims can be relieved from the burden of becoming witnesses in a criminal trial. Discussions aimed at resolving substantive trial issues may also lead to the accommodation of the personal schedules of witnesses, and therefore, minimize the inconveniences of testifying at trial. The responsiveness to the personal needs of victims, witnesses and accused persons that these types of discussions may allow can help to maintain a high level of confidence in the administration of justice among those directly affected by its processes.

4.1.11 Bargaining Mechanics

Certain unavoidable, perhaps, immutable, considerations motivate prosecutors in their negotiations to induce guilty pleas. Difficulties with the case, such as lack of proof, missing witnesses, length of a trial and other similar considerations often dictate the decision to bargain. Before making a plea offer, a good prosecutor evaluates the nature of the offense, whether or not any personal injuries were sustained by the victim, and whether any weapons were used in the commission of the crime. Prosecutors normally will not negotiate until they have checked to see if the defendant has any prior transgressions; for this they usually consider convictions and cases that were disposed of in other ways.

Several other factors are also important. For example, the age of the defendant will be a substantial variable in determining whether he will benefit from any rehabilitation
measures which might be arrived at through a guilty plea. The degree of culpability of the defendant is also important. Whether he was the principal or motivating actor in the crime or merely an aider or abetter, whether he acted out of sheer criminality, whether he suffered from a mental disorder at the time the crime was committed whether he has been cooperative with the police, and whether he exhibited a tendency toward contrition or rehabilitation are all elements taken into consideration by the prosecutor in evaluating plea negotiations.

In most instances, the police officer involved in the case will be consulted. The effect of a plea upon the continuing relationship between the prosecutor’s office and the police department is a significant factor to be weighed by the prosecutor. Defense counsel, in some cases, may have greater difficulty in persuading a policeman to ratify a deal than in obtaining the acquiescence of the prosecutor.

With few exceptions, the prosecutor surrenders most in plea bargaining. He recognizes that an overly lenient deal will subject him to subsequent media criticism, possible repudiation from the judge, and accusations by the public that he frustrated society’s interest in seeing prosecution to the fullest extent of the law.

General policy decisions aside, many prosecutors follow basic rules of practice, such as:

1) Never discuss a plea of guilty with defense counsel unless he has signed his appearance for the defendant. If two lawyers represent one defendant, insist on the presence of both.
2) If you do not know counsel, or have no confidence in him, do not discuss the case in the absence of another prosecutor or police officer.

3) Always prepare a memorandum of plea discussions.

4) Where the defense is seeking a reduction of the charge, attempt to have the new charge reflect the essential facts of the case so that the criminal record will be reasonably informative if prosecution for another crime occurs in the future.

5) Always make an assessment of how much of the case to reveal before discussing a plea. To some extent, the degree of revelation will depend on the integrity of defense counsel.

6) Where multiple defendants are involved, speak with counsel for all before entering into an agreement with any one of them. When less than all defendants wish to plead, insist on a stipulation that shows the criminal participation of those defendants, or else defer sentencing.

7) Where one defendant is to stand trial and another is to plead guilty, differences in sentences must be justified, at least in part, by their respective roles in the crime or by their past records. Furthermore, negotiations with one defendant may limit the range of dispositions for the co-defendants.

8) Victims should always be kept informed. They usually accept reasonable explanations for what has happened in their case. Where the crime is against the person, the individual involved, as well as the witnesses, should be consulted personally. Most prosecutors will not
proceed with the plea until the complaining witness has
been notified and has been given an opportunity to be
present. Where the crime is against property, the prosecutor
will probably strive to obtain restitution.

From the defendant’s point of view, an awareness of
these practices is essential. Additionally, the defense lawyer
must have the same grasp on the facts of the case as he
would if the case were to be tried. He must know its
strengths and weaknesses, and he must know where the
prosecution’s case is vulnerable. Counsel must gauge both
the seriousness of the offense and his client’s age and prior
convictions—facts that will be relevant at a sentencing
hearing. The elements of the offense charged and the
potential sentence exposure must also be known.

To be effective, the defense lawyer needs to convince
the prosecutor that he will not be intimidated. He must
convey the feeling that he can and will try the case if
satisfactory plea arrangements cannot be reached. Counsel
should leave the prosecutor with the impression that a plea
will deprive him of the most interesting part of the case— the
trial.

Often counsel is limited in how far he is authorized to
go in a bargain. If so, the government should be made aware
of these limitations in unmistakable terms. As is true with
good prosecutors, defense lawyers should be careful about
how much of their case to reveal during plea negotiations. A
corollary rule is that the attorney must accurately represent
his client’s potential for assistance. When trading
information, he must be careful not to overstate that potential.

Prosecutors are driven to make deals as tough as possible in order to make witnesses seem more credible as well as to sustain their own personal considerations. Like any attorney, he deals out of self-interest, whether it be to close a weak case, to obtain a key witness, or just to make the job easier. Counsel’s task is to identify what the prosecutor is really seeking.

For the defendant, plea bargaining is usually the last alternative, following consideration of two basic variables. First, the decision to plead involves a determination that the case cannot be own under any circumstances. Second, it involves a defendant who seeks the certainty of disposition as soon as possible, rather than face uncertainty for an indefinite period. This is why counsel should obtain the defendant’s consent before any approaches are made to the prosecutors, and why the defendant should be advised every step of the way.

4.2 Plea Bargaining in Victoria

4.2.1 Introduction

Like many common law systems, Victoria’s criminal justice system faces significant problems emanating from a vicious cycle of delay, and reduced public confidence. These long delays, particularly in the intermediate jurisdiction of the County Court have fuelled moves towards the increasing use of efficiency-driven processes; albeit such moves are often promoted as embodying benefits for victims, defendants and the public, rather than merely increasing
court efficiency. The most effective mechanism to increase efficiency in the criminal courts is to eliminate the number of trials which could have resolved by an early guilty plea\(^30\). To increase the number of early guilty pleas, incentives, usually in the form of sentence discounts or prosecutorial concessions on the format of charges and case facts, are offered to defendants with the public justification that shorter criminal proceedings benefit all parties. However, when such incentives are provided, increased pressure can be placed upon defendants to plead guilty, while in the public eye these incentives can be seen to unjustly reward defendants, particularly when a sentence discount is the result. This can in turn lead to victims feeling unfairly treated, which fuels public dissatisfaction and decreased confidence in the administration of justice\(^31\).

Reduced public confidence in this aspect of criminal proceedings is often solely attributed to the incentives associated with what are perceived to be lenient sentences, inappropriate sentence discounts and inadequate judicial decisions\(^32\). However, a key element of this public dissatisfaction that receives less attention, but is potentially more controversial given the lack of control, transparency and accountability surrounding prosecutorial discretion, arises from the concessions offered on the format of charges and case facts. These prosecutorial discretions are more


\(^{31}\) Ashworth, 1994; Tyler, 1984

commonly referred to as plea bargains. Victorian plea bargaining practices involve a Crown prosecutor or solicitor from the Office of Public Prosecutions (OPP) engaging in an informal discussion with defence counsel on the defendant’s likely plea, the possibility of negotiating the charge(s) and/or case facts, and the Crown’s possible sentencing submission. Plea bargaining can involve face-to-face meetings, phone calls, emails or facsimiles, and can occur at any time prior to the trial’s conclusion. The primary aim of plea bargaining is to arrive at a mutually acceptable agreement between the Crown and defence counsel, according to which the defendant pleads guilty. At the very minimum, discussions aim to identify any issues not in dispute, thus reducing the length of subsequent criminal proceedings and limiting the likelihood of later delays—for example, through trial adjournments. Depending on the jurisdiction, this practice is also labelled ‘charge bargaining’, ‘plea negotiations’, ‘pre-trial discussions’ and ‘plea agreements’.

In Victoria, there are no official statistics kept detailing when or why plea bargaining occurs, or how often discussions result in guilty pleas. Importantly, plea bargaining is not recognised in or controlled in any Victorian statute. Thus not only is the process itself not monitored in any statistical or formal sense, but there is also no legal acknowledgement of plea bargaining in Victoria. Instead, it falls under the Crown’s discretionary powers, which means state solely rely upon trusting those

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33 Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995; Samuels, 2002
who engage in discussions to ensure the process, and resulting agreements, uphold the same basic principles and rules of procedure that apply to more transparent proceedings, like the trial. This is particularly concerning given that agreements can alter the seriousness of the conviction and sentence imposed on defendants, and can remove the opportunity for the victim to provide testimony or for the Crown to prove its case within the confines of the contested trial. As it currently operates, plea bargaining undermines the established principle of public and open justice, whereby justice is seen to be done and the public have access to criminal proceedings except in rare cases under exceptional circumstances. In addition, because of this non-transparent way of providing justice, questions can emerge over the Crown's motivations for plea bargaining, particularly given the potential for efficiency gains to be prioritised over victim, defendant and public interests. What is quite significant about this aberration from the principle of open and public justice is the lack of criminological and legal research examining plea bargaining's non-transparency, its potential impact on the relevant parties to proceedings, and on the administration of justice. In particular, there is a prominent gap in criminology scholarship on the potential justifications for whether plea bargaining should, or how it could, be formalised.

The absence of a Victorian-based analysis of plea bargaining's informality and of the lack of accountability surrounding the process was acutely evident following the

34 Ashworth, 1994
35 (2002) VSC 94
Victorian case, R v GAS36; R v SJK, or more specifically the appeal made to the Australian High Court in these cases. The Australian High Court’s ruling in this appeal was the first to provide any official recognition of plea bargaining. The case itself involved two offenders who sexually and physically assaulted a victim, which ultimately resulted in her death (R v GAS; R v SJK)37. Due to forensic difficulties in identifying who was the primary offender, the Crown entered into discussions with both defendants. An agreement was subsequently made whereby both the offender pleaded guilty to manslaughter by an unlawful and dangerous act, on the provision that the Crown’s sentencing submission would state that they should be sentenced as aiders and abettors, meaning they should receive a lesser sentence than if they were charged as a principal offender.

Originally, the defendants were sentenced to six years imprisonment with a non-parole period of four years. The Crown then appealed on the basis that the sentences were manifestly inadequate, and that the judge had failed to consider all relevant issues, including the seriousness of the offence and general and specific deterrence (R v GAS; R v SJK)38. In hearing the appeal, the Victorian Court of Criminal Appeal increased both sentences to nine years imprisonment, with a non-parole period of six years. Two years later, the contents of the plea bargain and the Director of Public Prosecutions’s (DPP) decision to lodge the initial appeal were the focus of a defence appeal to the

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37 [2002] VSC 94
38 [2002] VSCA 131 at 36
Australian High Court. In this case, the lack of control surrounding prosecutorial decision-making in plea bargaining resulted in negative consequences for all parties, particularly the victim’s family and the defendants. Initially, both the plea bargain and prosecutorial conduct were criticised because the victim’s family were not provided with accurate details of the agreement or told that there was any possibility that plea bargaining might occur, until just before the defendants pled guilty\(^\text{39}\). The victim’s family also claimed that the Crown informed them that the defendants would plead guilty to manslaughter because it was too difficult to establish the primary offender beyond all reasonable doubt; however, the family claimed they were further informed that, when pleading, the defendants would state that they murdered the victim. This did not occur. The defendants perceived themselves as victims of the unscrutinised process, because the Crown reneged on the initial agreement to which they entered their guilty pleas. The defendants agreed to plead guilty to manslaughter by an unlawful and dangerous act on the basis that they would be sentenced as aiders and abettors. The defence counsel argued that the DPP’s conduct in seeking a higher penalty by appealing the original sentences broke the agreement because the basis upon which the defendants had pleaded guilty was no longer upheld. Therefore, the increased sentences were perceived to be unjust and non-reflective of the original agreement. The lack of transparency surrounding the agreement and the Crown’s discretion in

\(^{39}\) Hunt & Gardiner, 2002, p. 1
making and changing plea bargain agreements thus became the focus of the defence appeal, which meant for the first time in Victoria’s history a court was required to address plea bargaining issues (*R v GAS; R v SJK*)

Upon hearing the appeal, the Australian High Court predominantly focused on the required roles of the parties within proceedings, including that it is the Crown’s responsibility to determine which charges to proceed with. It is the defendant’s responsibility to decide whether to plead guilty and this decision cannot be made with any foreknowledge of the sentence, other than the advice provided by their representative on what might transpire and it is the judge’s role to determine an appropriate sentence, based on the facts presented to the court. In directly discussing the plea bargain, the court stated that while there may be an understanding between counsel as to what evidence will be provided or what sentencing or legal submissions will be made, this understanding does not bind the judge in determining the sentence, other than in the practical sense that the judge may be limited to the agreed summary of facts presented. The court then noted that any agreement made between counsel ‘which may later be said to be relevant to the defendant’s decision to plead guilty’ should be recorded in writing, and copies maintained by both parties. The court suggested that recording what was agreed, in an agreed form of words, should reduce the scope for misunderstanding what was to be, or had been, agreed. It should serve to focus the minds of counsel, and the

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parties. Most importantly, it enables counsel for both sides to be clear about the instructions to be obtained from their respective clients and the matters about which, and basis on which, counsel should tender advice to their respective clients. There should then be far less room for subsequent debate about the basis on which an accused person chose to enter a plea of guilty. In making this statement, the court provided some recognition of plea bargaining and the potentially negative consequences of its lack of formality. The court also alluded to the need to provide transparency to plea bargaining by suggesting that written records of agreements be maintained. However, the court did not put forward any significant regulation or scrutiny of discussions, despite being given the opportunity to do so. The fact that the comments of the Australian High Court made in 2004 compromised the first, and to date remain the only, instance of a Victorian authority to acknowledge plea bargaining or attempt to provide transparency to the process, demonstrates a significant gap in legal policy which explicitly contradicts the principle of public and open justice. This gap is also concerning given the potential consequences and negative implications that can result from an unscrutinised agreement, as demonstrated by the 2002 case41.

4.2.2 Plea Bargaining- A Means of Filling Gap

While contested cases, particularly jury trials in the higher courts, are often the focus of a good deal of popular attention, the fact of the matter is that the vast majority of

41 R v GAS; R v SJK [2002] VSC 94
people prosecuted for criminal offences plead guilty. Many of them do so after discussions have taken place between the defence and the prosecution about what is the appropriate course to follow. This practice is widespread and regarded as a normal and appropriate aspect of the criminal justice process. Despite its acceptance within the system, the topic has not been subject of detailed empirical research and analysis in Australia\textsuperscript{42}.

Plea bargaining has been a focus of research since the 1960s. However, a large portion of this literature examines plea bargaining within the United States, United Kingdom or Canada\textsuperscript{43}. In Australia, and within Victoria specifically, plea bargaining is a largely under-examined topic. Most existing Australian commentary examines plea bargaining in comparison to the trial, and often in New South Wales or with a broader, national focus\textsuperscript{44}. This has left a significant gap in our understanding of plea bargaining in Victoria, particularly of the impacts of its non-transparency. Common concepts examined within state, federal and global literature include plea bargaining's procedural elements, such as its regularity and content, who is involved, when it occurs and what agreements entail\textsuperscript{45}. The purposes of

\textsuperscript{42} As stated by the Honourable Justice LT Olsson, as cited in Mack & Roach Anleu, 1995
\textsuperscript{43} Acker & Brody, 2004; Alschuler, 1995; Baldwin & McConville, 1977; Buckle & Buckle, 1977; Dumont, 1987; JUSTICE, 1993
\textsuperscript{44} Bishop, 1989; Mack & Roach Anleu, indications (Freiberg & Seifman, 2001; Freiberg & Willis, 2003; Mack & Roach Anleu, 1995; Seifman, 1982; VSAC, 2007a, 2007b, 2007c)
\textsuperscript{45} Acker & Brody, 2004; Andrew, 1994; P. Clark, 1986; Cowdrey, 1996, 2003; Fitzgerald, 1990; Heumann, 1978a; Johns, 2002; Mack & Roach Anleu, 1995; Pizzi, 1999
discussions is also a prominent topic\textsuperscript{46}, as are the increasing prosecutorial obligations to victims when plea bargaining occurs.\textsuperscript{47} This literature is also linked to examinations of criminal justice agencies’ wide discretionary powers. While judicial involvement in plea bargaining is not a major theme of Australian research, because case law restricts judicial involvement in discussions\textsuperscript{48}, where it does feature, a broader definition of plea bargaining is generally used to incorporate judicial sentence indications. Awarding sentence discounts in exchange for guilty pleas is also a feature of plea bargaining which is heavily criticised in the literature for its potential to undermine victim interests and induce defendants into pleading guilty\textsuperscript{49}. The inability of sentence discounts to uphold retributive ideals and the consequent impact on public confidence, particularly when given in combination with a plea bargain is also a principal theme. The extent of delays and the resultant emergence of reform are also well documented in the literature. Often commentary on these issues proposes pre-trial reform on the basis that it encourages early guilty pleas and can increase court efficiency. In Australian literature, these issues are explored with both a national focus. Similar reforms have been addressed internationally, particularly in the UK and Canada. Of most relevance to this research, plea

\textsuperscript{46} Alschuler, 1995; Bishop, 1989; Goldstein, 1981; Heumann & Loftin, 1995; Mack & Roach Anleu, 1995; Moxon, 1988; Pizzi, 1999; S. Walker, 1993
\textsuperscript{47} Cook, David, & Grant, 1999; Dixon, 1996, 1997a; Johns, 2002
\textsuperscript{48} R v Bruce (Unreported, High Court, 21 May 1976)
\textsuperscript{49} Bishop, 1989; McConville, 1998; McConville & Mirsky, 1995; Payne, 2007; VSAC, 2007b, 2007c.
bargaining’s potential formalisation receives attention in some US, Canadian and UK research. These commentaries propose alternatives to plea bargaining or suggestions for improving the existing process, such as abolishing or limiting practices, or introducing judge-supervised pre-trial discussions. Canadian Law Reform Commission. In Australia, however, this area is manifestly under-examined, except for a handful of nationally based studies. This review provides an insight into the existing research and policy analysis on plea bargaining and formalisation issues within a state, federal and global context. Drawing from national and international research, it examines four key themes to highlight the context of this research in addressing similar concerns in a Victorian-based study:

a) Court inefficiency and delays;
b) sentence discounts;
c) the formalisation debate; and
d) formalised initiatives.

Given the recent increase in attributing importance to efficiency-driven reform within Victoria’s criminal justice system, this review further demonstrates the useful addition of a policy based analysis.

4.2.3 Research Analysis of Plea Bargaining in Victoria

There are two Australian projects which motivated the analysis of Plea Bargaining in Victoria. The first conduct by Mack and Roach Anleu (1995) examined Australian guilty plea processes and offered the analysis of Plea Bargaining in

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national context. The 2nd conducted in Victoria by the Victorian Sentencing Advisory Counsel (VSAC) (2007) reported on a specified sentence discounts and sentence indications and provided an extensive examination of sentencing reform and guilty plea issues in Victoria. These two studies are dealt herewith.

4.2.3.1 Study by Mack and Roach

Mack and Roach Anleu (1995) undertook an empirical evaluation of Australian guilty plea processes. Their research explored plea bargaining’s invisibility, the possibility that plea bargaining produces inappropriate outcomes and the potential for improper inducements to be used to encourage defendants to plead guilty. They also explored the possible reformation of guilty plea processes across Australia by introducing internal policies into state OPP, or into statute—for example, a legislated sentence indication scheme. Their analysis defined the prosecutor’s role in the guilty plea and sentencing processes and examined what scrutiny, if any, existed of their conduct in this regard. In addition, Mack and Roach Anleu (1995) examined the importance of the defence counsel’s role in advising defendants on pleading and the resulting ethical considerations confronting counsel, as well as potential reasons why defendants might plead guilty. They also explored the role of the judiciary in the guilty plea process, specifically in relation to whether they should be involved in plea bargaining at all, and whether sentence discounts and sentence indications are likely to encourage early guilty pleas. Based on their analysis, Mack and Roach Anleu
(1995) proposed a number of reforms, including implementing guidelines for both counsel, which officially acknowledge plea bargaining and place controls on their conduct in discussions. They also proposed that all provisions surrounding plea bargaining be incorporated into internal guidelines within state OPP, which they argue would provide encouragement for prosecutors to engage in discussions. They suggested that victims’ rights and needs, including that victims be kept informed of any agreements, be stated within these guidelines and that a record of any agreements be maintained by the prosecution. They further proposed the implementation of additional legal training to encourage plea bargaining and considered providing the judiciary with a more active function in facilitating and encouraging discussions between counsel, without the judiciary themselves having any role in the discussions. Mack and Roach Anleu’s (1995) analysis was the first major Australian study of plea bargaining and the potential reform of guilty plea processes. Some recommendations within their research have since been implemented: for example, s.9 of the Victims’ Charter Act 2006 (Vic) in Victoria and s.20 of the Prosecutorial Guidelines 2007 (NSW) in NSW, both of which require that information be provided to victims on any charge amendments. The national focus of Mack and Roach Anleu’s (1995) research, however, together with the evolving efficiency problems confronting the criminal courts fifteen years after their groundbreaking work was published, to

52 ‘Victims’ Charter 2006 (Vic)
some extent limits the direct applicability of their findings to Victoria today. This thesis thus intends to extend upon their evaluation by specifically focusing on similar issues of prosecutorial discretion and the informal nature of plea bargaining in Victoria, within the current legal climate, and in the context of the contemporary challenges facing the criminal courts.

Another significant study influencing this research was the VSAC final report (2007c) on specified sentence discounts and sentence indications. The VSAC was established in July 2004 under Part 9A of the Sentencing Act 1991 (Vic). According to Freiberg and Moore (2009), the VSAC was established by a ‘reformist government that was keen to project itself as responsive to community concerns...[by] bridging the gap between the community, the courts and government by informing, educating and advising on sentencing issues’ (p.102). Since its creation, the VSAC has advised the Victorian Government on a number of policy changes including suspended sentences, provocation and post-sentence supervision, some of which have been implemented in statute (VSAC 2005a, 2005b, 2007g, 2008b, 2008c). On 22 August 2005, the Victorian Attorney General commissioned the VSAC to determine the desirability and practicality of introducing specified sentence discounts and/or sentence indications. In commissioning the VSAC, the Attorney General (2005)9 See, for example, Road Legislation (Projects and Road Safety) Act 2006 (Vic).24 emphasised the importance of openness within sentencing and the possibility for these reforms to
achieve this by ‘increasing the transparency of judicial
decision-making’ (p. 1). The VSAC released a discussion
paper (2007b) outlining its initial proposal and
considerations in January 2007, and its final report (2007c)
was released in September the same year. The extensive
consultation and interview process employed by the VSAC in
investigating sentencing reform demonstrated the
importance of adopting a multifaceted approach in
examining criminal proceedings. The VSAC report (2007c)
also filled a significant gap in the literature on sentencing
and efficiency-driven law reform, and thus provided a
foundation for my analysis of court delays, efficiency-driven
reform, guilty plea incentives, sentence discounts and plea
bargaining. The significance of the VSAC final report (2007c)
is also evidenced by its recommendations leading to
statutory reform (Criminal Procedure Act 2009 (Vic) s.61,
s.208-s.209; Sentencing Act 1991 (Vic) s.6AAA). The
appropriateness of some of the recommendations are made
in the VSAC report 2007c, particularly in terms of the
ability of some recommendations to uphold judicial
principles and ensure that public, victim and defendant
interests are maintained, is a prominent topic examined in
my research. My analysis thus intends to contribute to the
VSAC final report (2007c), by critically analysing the
potential implications of efficiency-driven reform within an
adversarial context.

4.2.4 Victorian Plea Bargaining Practices

There are many forms of plea bargaining explored in
the literature, including the Crown reducing the seriousness
of charges\textsuperscript{53}, or withdrawing one or more charges in exchange for a guilty plea\textsuperscript{54}. Plea bargaining commonly extends beyond these outcomes to include negotiating the agreed summary of facts on the basis of which the defendant is sentenced by the court, and negotiating the jurisdiction of the offence—for example, having the case heard summarily rather than in an indictable jurisdiction\textsuperscript{55}. Plea bargaining can also involve informal agreements not to proceed with charges against another person, or require the defendant to become a prosecutorial witness\textsuperscript{56}. On occasion, plea bargaining is used simply to reveal the strengths and weaknesses of each side’s case, rather than as a mechanism to resolve matters\textsuperscript{57}. Regardless of the reason for engaging in such discussions, however, Bishop (1989) maintains that both counsel believe ‘plea discussions work fairly [for] both sides...and are very important to the workings of the justice system’. In Victoria, and Australia generally, very little case law regulates or defines plea bargaining. Furthermore, many of the cases which have addressed plea bargaining in the Australian High Court or Victorian Supreme Court have focused on judicial involvement in plea bargaining, as opposed to the discussions that occur between counsel\textsuperscript{58}. The first formal reference to plea bargaining in case law, albeit one that focused on judicial involvement in sentence indications, came from the English Court of Appeal in

\textsuperscript{53} Fox, 2002.  
\textsuperscript{54} Department of Public Prosecutions, 1996, p. 23  
\textsuperscript{55} Andrew, 1994, p. 236  
\textsuperscript{56} Byrne, 1988, p. 801  
\textsuperscript{57} Heumann, 1978a, p. 127  
\textsuperscript{58} R v Bruce (Unreported, High Court, 21 May 1976); R v Marshall [1981] VR 725; R v Tait [1979] 24 ALR (at 473)
R v Turner\textsuperscript{59}, which was adopted in Australia via UK law. This case established four guidelines which outlined:-

1. How defence counsel should advise defendants on pleading;
2. That defendants should maintain freewill in making pleading decisions;
3. That all discussions with the judiciary should involve both counsel; and
4. The judiciary should not provide sentence indications beyond a possible sentence order, such as a community-based order or custodial term.

In addition to focusing on judicial involvement in discussions, much Australian case law merely alludes to plea bargaining, rather than attempting to control or define it\textsuperscript{60}. As Seifman(1982) argues, Australian courts ‘have been reluctant to [discuss] plea discussions, preferring to rectify any misunderstandings on an ad hoc basis’. An example of this was presented in the introductory chapter, in the Australian High Court case, \textbf{R v GAS; R v SJK}. Another example of this is \textbf{R v Maxwell}\textsuperscript{61}, where the Australian High Court established authority for judges to reject guilty pleas, if the factual basis surrounding the charge(s) to which the defendant is pleading guilty does not reflect the available evidence. Without specifically acknowledging plea bargaining, this authority provides some scrutiny of the agreements made between counsel, insofar as the court can reject a plea to amended or negotiated charges if they do not

\textsuperscript{59} [1970] 2 QB 321
\textsuperscript{60} R v GAS; R v SJK (2004) 206 ALR 116; R v Maxwell (1995) 184 CLR 501
\textsuperscript{61} (1995) 184 CLR 501
sufficiently cover the offending behaviour, or the evidence does not substantiate them. Thus, in effect the judge can reject the agreement. This limited reference to plea bargaining in case law is mirrored by an absence of legislation that acknowledges plea bargaining. To date, there is no legislation that acknowledges, sanctions or controls plea bargaining in Victoria. While some legislation alludes to plea bargaining by implementing controls on prosecutorial conduct when charges or facts are amended, no legislation directs the conduct of those involved in discussions or pertains to the plea bargaining process itself\textsuperscript{62}. The only direct reference to plea bargaining or the conduct of the Crown when engaging in these discussions is located within three internal OPP policies\textsuperscript{63}, which are non-legally binding, which describes the importance of conducting ‘prosecutions in an effective, economic and efficient manner’, and S.9 of the Victims’ Charter Act 2006 (Vic), which requires the Crown to keep victims informed of any amendments to the charges laid against the defendant. This research does not support the view that sentence indications are plea bargaining. Thus, while recognising the introduction of a legislated sentence indication scheme for summary and indictable offences, this research does not consider s.61 or s.208-s.209 of the Criminal Procedure Act 2009 (Vic) to constitute statutory acknowledgement of Plea Bargaining.

\textsuperscript{62} Public prosecutions Act 1994 (Vic.) S. 24 (c); victims Charter Act 2006 (MC) S.9.

\textsuperscript{63} Dealing with a Plea other 2006 (Vic.) Directors’ Policy 3.1.2007 (Vic); Resolution Matters & Early Issues Identification 2007 (Vic)
4.2.5 The (perceived) Frequency of Discussions

Due to the absence of official recognition or scrutiny of plea bargaining in legislation or case law, Victorian plea bargaining practices remain informal, and their occurrence officially unrecorded. It is therefore difficult to determine accurately when discussions occur or how often they contribute to case resolution. While there are no official records, much research considers plea bargaining to be a frequently used process: as McConville argues, ‘plea bargaining is a widespread institutional practice and not isolated aberrational behaviour on the part of some maverick lawyers’. This is supported by the earlier work of Baldwin and McConville in the UK, which found that of 122 defendants who pled guilty, almost three-quarters said they did so as a result of plea bargaining. Often the estimates of plea bargaining’s frequency are based on the fact that on average over two-thirds of defendants plead guilty, so it is argued that plea bargains must provide some incentive to encourage these pleas. For example, looking at the stage at which a not guilty plea is changed to a guilty plea as a basis for determination, Johns estimates that approximately 50-60% of all pre-trial guilty pleas result from plea bargaining. Based on their Victorian qualitative study, Freiberg and Seifman maintain that plea bargaining proceeds most regularly in Victoria’s Magistrates’ Court, occurring in almost 60% of cases. They attribute this regularity to the police prosecutor’s discretionary powers in making charging decisions and because Magistrates more actively encourage plea bargaining in summary matters also estimate that a
large portion of plea bargaining discussions that result in guilty pleas, occur in Magistrates’ Courts. In an examination of 1,287 matters heard in Australian Magistrates’ Courts, they estimated that of the one-third (n=416) with adjournment requests, one-fifth (n=91) of these occurred in order for parties to engage in some form of communication, with 8.7% of the requests (n=36) specifically citing plea bargaining as the rationale. In discussing their results, Roach Anleu and Mack (2009) highlighted the importance of adjournments as a tool for encouraging guilty pleas, because they provide an opportunity to ‘speed up negotiations or endorse a particular course that will assist in the production of a guilty plea’. Thus, based on their findings, it is reasonable to assume that at least some of the adjournments which result in a guilty plea in the Victorian Magistrates’ Court pre-trial stream are due to plea bargaining. While there are no records kept of plea bargaining in Victoria, there are detailed records maintained of the number of guilty pleas entered in Australian criminal courts, adjournments which result in a guilty plea in the Victorian Magistrates’ Court pre-trial stream are due to plea bargaining. While there are no records kept of plea bargaining in Victoria, there are detailed records maintained of the number of guilty pleas entered in Australian criminal courts. Between 2005 and 2006, the Australian Bureau of Statistics (ABS) determined that 88% of the 12,914 cases that resulted in a guilty finding in Australian superior courts (intermediate and Supreme) involved the defendants pleading guilty. Over the
same period, they estimated that 73% of defendants in Australian Magistrates’ Courts pled guilty. In Victoria, the Supreme Court Annual Report shows that between 2005 and 2006, 41% of cases were resolved by a guilty plea. A similar finding was evident for the period between June 2006 and June 2007 in Victoria’s County and Supreme Courts, where there was a 9% increase in guilty pleas. This equated to 46% of defendants pleading guilty in the Supreme Court, and 80.3% in the County Court. In the same period, there was an increase of almost 10% in the number of guilty pleas entered prior to trial. Importantly, this was attributed to the Crown’s focus on early resolution, particularly in the County Court, which resulted in a perceived increase in communications between counsel on the possible resolution of matters. In their analysis of plea bargaining in the UK, Baldwin and McConville considered whether plea bargaining is less likely to occur in jurisdictions like Australia and the UK than in the US. They found three potential reasons for this:-

(i) Differences in the sentencing systems;
(ii) Differences in the Crown’s role in sentencing; and
(iii) Non-judicial involvement in discussions in Australia and the UK.

Baldwin and McConville’s study also examined whether plea bargaining may occur more regularly in the US because the minimum sentences imposed for many crimes creates additional pressures on defendants to engage in plea bargaining, in an attempt to have their charges altered. Despite these considerations, Mack and Roach Anleu claim
that discussions occur very regularly in Australian jurisdictions, taking place ‘nearly every day...even right up to the court and sometimes during the court proceedings’. Similarly, Andrew and Seifman claim that plea bargaining is indisputably a regular element of Victorian criminal proceedings. The regularity with which plea bargaining occurs is often associated with the potential benefits it can offer. The following section briefly examines some of the most commonly identified benefits and limitations of plea bargaining, and whether plea bargaining is thus a reasonable option for all crimes.

4.2.6 Appropriate for All Crimes, All the Time?

One of the key justifications for plea bargaining is its potential to increase court efficiency by reducing the duration of criminal proceedings, which can provide resource, financial and emotional benefits. As McConville claims, plea bargaining is ‘defended as an essential weapon in...the quest for cost-effective criminal justice systems’. For defendants, the main benefits of plea bargaining are linked with the charge and sentence concessions offered in exchange for their guilty plea, as well as reduced legal costs. Dubber also argues that ‘plea bargaining strengthens the defendant’s position by permitting her [sic] to shape the proceedings that will settle her [sic] fate’. In terms of public advantages, plea bargaining removes the costly process of a trial, which, as demonstrated by the findings of Samuels’s review of the NSW plea bargaining system, can offer annual savings of up to $15 million. Plea bargaining can also benefit the public by reducing delays and allowing contested
cases to be tried earlier. These perceived advantages are also commonly seen as beneficial to the courts, the Crown and defence counsel, due to the resultant resource and monetary savings that result.

The potential benefits of removing the need for a contested trial through plea bargaining have also been identified as a positive outcome for victims. Douglass claims that victims can benefit from having the matter determined without having to experience the traumatic process of giving evidence or attending court. In addition, as Booth and Carrington assert, the implementation of victims’ charters, such as the Victims’ Charter 2006 (Vic) introduced in Victoria in November 2006, can provide a mechanism to rectify victim concerns, because they require that increased consideration be given to victims as part of the prosecutor’s official duties. Mack and Roach Anleu also maintain that plea bargaining can benefit victims by offering earlier case resolution, while Mather holds that having the defendant acknowledge their guilt advances victims’ emotional restoration.

In contrast, many researchers argue that plea bargaining disadvantages defendants, victims and the public by trading the contested trial, which retains strict rules of procedure, for an informal method of case disposition. UK law reform group JUSTICE (1993) argues that plea bargaining can impact negatively on defendants, pressuring them to plead guilty and thus revoking their right to trial. Similarly, Utz and Morris contend that plea bargaining creates power imbalances between the Crown
and the defendant, because the possible benefits of the agreement will generally far outweigh the potential positive outcome of continuing to contest the case. These concerns are linked to criticisms of the Crown’s unscrutinised discretionary powers. For example, Douglass and Beale argue that overcharging defendants with duplicate and/or alternative offences is a tool used to pressure defendants into accepting plea bargains, while Bishop claims that plea bargaining allows prosecutors to exercise excessive control over defendants. These claims are contested within some studies that support internal mechanisms as working effectively to monitor prosecutorial discretion in the charge decision-making process. Plea bargaining has also been denounced for its potential to undermine judicial principles, including the presumption of innocence and the public’s access to transparent justice. It is also criticised on the basis that victims’ rights are not considered, because the process is focused on the prosecution and the defendant. Consequently, plea bargaining is viewed as offering limited justice to victims and in turn, the public. As Dixon argues, ‘the rights of victims are often a forgotten factor in plea bargaining’. In light of these potential limitations and the seriousness of some cases, much literature argues that plea bargaining is not a reasonable option for all crimes. As Barrowclough (2004) claims, ‘there are many cases where the evidence simply doesn’t allow negotiations of any kind. Similarly, Douglass (1988) argues that ‘undoubtedly there are cases in which the public interest is not well served by...permitting the defendant to plead to a lesser offence’.
This can include cases in which a defendant maintains his/her innocence, or when the seriousness of the offending behaviour would not be represented by charge amendments. Both counsel, therefore, must consider a number of factors when deciding on a case’s suitability for plea bargaining, including the strength of the Crown’s case and the seriousness of the offending behaviour. Mather further claims that the defendant’s criminal record, his/her relationship with the victim, and the type of offence are considered by counsel when determining whether to plea bargain. Whether discussions occur can also depend upon the ‘nature of the charge, the court in which the charge is laid...and the relationship between the prosecuting and defence counsel’. Thus, as P. Clark maintains, ‘it would be undesirable for plea bargaining to become the practice in all matters; [instead it should] be considered on a case-by-case basis’. One of the four main themes that emerges in the literature involves the extent and cause of court inefficiency, and whether plea bargaining is an effective mechanism to alleviate court delays. One of the central issues explored in this context is the late guilty pleas.

4.2.7 Late guilty Pleas

Late guilty pleas constitute one of the main contributors to court delays\textsuperscript{64}. Late guilty pleas generally refer to pleas that; are entered on the day of, or up to two days before the commencement of a trial. These pleas cause immense delays by extending and thus wasting counsel preparation time and resources, and disrupting court

\textsuperscript{64} (Payne, 2007; Pedley, 1998; VSAC, 2007c)
schedules, resulting in ‘the court remaining empty while cases pile up outside the door’. Late guilty pleas in Australia have been a source of investigation since the 1980s. In 1982, the Flanagan Committee reported on the ineffectiveness of the courts in encouraging early guilty pleas, determining that between 1970 and 1982, between 43 and 45% of defendants who pled not guilty at the Committal Hearing entered late guilty pleas. In Weatherburn and Baker’s evaluation of NSW District Courts, late guilty pleas (35%) were identified as a major contributing factor to the 23% increase in trial delays between 1996 and 1999. Specifically, they estimated that between 1996 and 1999, only 6% of guilty pleas were entered between the time the trial date was set and the start of the trial, while approximately 60% were entered on the first day of the trial. Similarly, in the most recent national report to examine court delays conducted by the Australian Institute of Criminology (AIC), it was determined that approximately two-thirds of trials fail to proceed on their scheduled day, 50% of which are delayed as a result of late guilty pleas. Late guilty pleas occur for many reasons. In the VSAC final report (2007c) on specified sentence discounts and sentence indications, most late guilty pleas were attributed to the defendant not having early access to legal counsel. Weatherburn and Baker cited the four most common reasons for late guilty pleas as:-

- Delayed decisions by the Crown to accept plea bargains;
• Defence counsel not receiving early instructions to plea bargain;
• Lack of early communication or disclosure between counsel; and
• Ineffective incentives offered in exchange for early pleas.

The three main reasons for late pleas identified in the AIC report (Payne, 2007) also relate to these plea bargaining and transparency issues:-
(1) Delayed plea bargaining;
(2) Defendants being unaware of or uninterested in the effects of a late plea; and
(3) Defendants not being advised by counsel to plead guilty.

The impacts of late guilty pleas and the resulting efficiency concerns have been the focus of numerous commissions, reports and reviews across Australia. In October 1993, the Australian Commonwealth Attorney General commissioned the Access to Justice Advisory Committee (AJAC) to make recommendations for reform across Australian criminal jurisdictions, ‘in order to enhance access to justice and to render the [justice] system fairer, more efficient and more effective’. Chan and Barnes also examined the causes and impact of lengthy criminal trials and delays in Australia in the mid 1990s. In the late 1990s, the Standing Committee of Attorneys General (SCAG) reported on the consequences of delays, and identified a clear need for reforms aimed at encouraging early guilty pleas. The SCAG then released a second report in June
2000 outlining possible reforms focused primarily on issues that prevent trials from commencing on schedule. One of the key themes to emerge from the nationally based research on court delays is that greater support should be given to mechanisms that reduce inefficiency and encourage early pleas. A consistent recommendation has been made to promote plea bargaining and encourage greater pre-trial preparation and disclosure claim, in order to reduce delays there must be a shift towards early case management and communication between counsel. Chan and Barnes also identified plea bargaining as a mechanism to reduce the delays resulting from late guilty pleas. Similarly, Corns's analysis of trial delays in Australia in the mid 1990s identified plea bargaining as a positive mechanism for reducing delay. He claimed that 'considerable amounts of trial time can be saved by effective pre-trial communications and negotiations between counsel'. Ten years later, the AIC report also cited plea bargaining as a positive mechanism for delay reduction. At a state level, particularly in NSW and Victoria, court inefficiency has been a prominent topic in research and a basis for law reform. In 1988, Coopers and Lybran were commissioned by the NSW Attorney General to investigate trial delays. The Coopers-Lybrand report found that the mean delay in Sydney's District Court between a Committal Hearing and trial, during the period October 1988 to May 1989, was approximately fourteen months for defendants in custody, and at least 26 months for those on bail. A number of reforms were recommended to minimise

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65 (AJAC, 1994; Chan & Barnes, 1995; SCAG, 1999, 2000)
these delays, a significant number of which were implemented, including the appointment of additional judges and longer sitting blocks. Other efficiency-driven reforms implemented in NSW between 1992 and 1996 included the implementation of a Criminal Listing Director, responsible for determining the readiness of cases to proceed to trial; an indictable sentence indication scheme; strict adjournment policies; set time restrictions on cases proceeding to trial within 112 days; and increases in the number of indictable offences that could be tried summarily. In Victoria, court inefficiency has been a focus of government and non-government reports since the 1980s, with the establishment of the Flanagan Committee and the Victorian Shorter Trials Committee. The Victorian Shorter Trials Committee was established in 1982 to ‘consider and make recommendations concerning methods of shortening criminal committals and trials and of rendering such proceedings less expensive’. It released a report recommending 105 reforms to reduce delays. Court inefficiency was also a dominant topic in the Justice Statement initiative released in May 2004 by the Victorian Attorney General’s Department. The Justice Statement outlined a ten-year plan aimed at increasing the efficiency of Victoria’s criminal justice system and identified the encouragement of early guilty pleas as a primary means of reducing delay. It proposed multiple projects for the 2004 to 2014 period, including: evaluations of possible efficiency-driven law reform; focusing the attention of the judiciary and both counsel on more active case management and
preparation; creating a more efficient and transparent justice system; and improving public access to courts. One of the key recommendations for increasing court inefficiency identified in the Justice Statement was to expand the criminal jurisdiction of the Magistrates’ Court to remove some of the County Court’s workload, a move that was implemented in 2006. Court inefficiency is also a major problem confronting common law systems internationally. Concerns relating to a lack of pre-trial disclosure, preparation and communication between counsel have been identified as primary contributing factors to delay, resulting in law reforms which have themselves been the subject of reviews. Two such reviews were undertaken in the early to mid 2000s in the UK and Canada. In 2002, the Scottish Executive undertook an extensive review of the practices and procedures of the Scottish High Court of Justiciary. The review proposed extensive recommendations aimed at addressing the perceived inadequacies of the Court in achieving efficient justice, which were then implemented as pilot trials. The effectiveness of these reforms was evaluated in 2003 by Samuel and Clark, who found that the implementation of efficiency-driven reforms resulted in reductions in the number of trials proceeding and the number of case adjournments, while also increasing the incidence of early guilty pleas. They also found that these reforms significantly limited late guilty pleas, with less than 7% of guilty pleas being entered at trial, in contrast to the situation prior to the enactment of the reforms, where almost 90% were late guilty pleas. A second evaluation
conducted by Chalmers et al. in 2007 supported Samuel and Clark’s earlier findings, with estimates that over 93% of guilty pleas were entered before trial, 48% of which were finalised early in the pre-trial process. In 2005, the Mainstreet Criminal Procedure Committee produced a report evaluating reforms that had been implemented in the Vancouver Adult Criminal Court in response to problems caused by the significant backlog of cases. The reforms attempted to refocus criminal proceedings through the establishment of a front-end system that shifted the focus of the system and its agencies from the trial to the pre-trial process and early communication between counsel. The reforms included a ‘front-end team’ of four prosecutors, who managed all arraignment procedures to enable consistency in the handling of cases and to encourage plea bargaining. A mandatory pre-trial conference, held outside regular court hours in the judge’s chambers, was also introduced for cases where the estimated trial length exceeded eight days. These conferences allowed the parties to identify any matters not in dispute, thereby potentially reducing trial lengths. Overall, the evaluation found that the front-end approach, particularly the pre-trial conference, saved approximately 246 trial days. Thus it was deemed a positive mechanism for addressing inefficiency by reducing the number of late guilty pleas and encouraging early communication between counsel. Another focus of the literature is on sentence discounts, whereby a discount is given in exchange for a defendant’s guilty plea. The following section examines the main concepts emerging from
this literature in relation to sentence discounts and plea bargaining.

4.2.8 Lack of Transparency

Plea bargaining and sentencing are inextricably intertwined. This is because, among other prosecutorial concessions given in a plea bargain, defendants receive a sentence discount in exchange for their guilty plea. Although the discount itself is not part of the plea bargain, it is often used as a tool to substantiate the benefit of discussions. This is one of the most contentious aspects of plea bargaining because of concerns over due process and its potential impact on victim and public interests, and has thus attracted significant attention in the literature. The practice of awarding sentence discounts was established in Victoria by the Supreme Court in R v Gray66, wherein the court determined that guilty pleas should attract leniency when the plea furthers the public interest. In this instance, public interest was said to include sparing vulnerable witnesses from testifying and saving costs. This authority was revised in R v Morton67, in the Victorian Court of Criminal Appeal, where it was determined that ‘a plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse...even [if the plea] is solely motivated by self interest’. The sentence discount is also subject to legislative authority in the Sentencing Act 1991 (Vic) s.5(e), which states that ‘in sentencing an offender, a court must have regard to whether the offender pleaded

66 [1977] VR 147
67 [1986] VR 863
guilty to the offence, and if so, the stage in the proceedings
at which the offender did so or indicated an intention to do
so’. Although the sentence discount is an established
practice in Victoria, prior to 1 July 2008 the ‘doctrine of
intuitive and instinctive synthesis’ prevented judges from
quantifying the specific discount amount applied in
exchange for the pragmatic benefits of the plea. The
doctrine of intuitive and instinctive synthesis requires a
judge to consider all relevant factors and sentencing
principles in making a sentencing decision, without
attributing mathematical or numerical values. Instead, they
use their innate knowledge and experience to determine the
sentence. The value of the doctrine has been identified in a
number of Victorian Court of Criminal Appeal and
Australian High Court cases. In R v Storey, for instance,
the Victorian Court of Criminal. Appeal stated that:
Sentencing is not a mechanical process. It requires the
exercise of a discretion. There is no single right answer
which can be determined by the application of principle.
Different minds will attribute different weight to various
facts in arriving at the instinctive synthesis which takes
account of the various purposes for which sentences are
imposed. In addition to supporting the doctrine, Victorian
courts have also warned against the adoption of
mathematical and/or automated approaches to sentencing.

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68 (R v Mohyuddin (1997) VSCA, at 7; R v Storey [1998] 1 VR 359, at 336; R v Wong (2001) 207 CLR 584, at 75)
69 (R v Mohyuddin (1997) VSCA; R v Storey (1998) 1 VR 359; R v Wong (2001) 207 CLR 584)
70 (1998) 1 VR 359
In *R v Mohyuddin*71 the Victorian Court of Criminal Appeal stated that ‘a mathematical dissection of any sentence is not a particularly helpful exercise. Different factors are weighted differently depending upon the facts of the particular case’. Similarly, in *R v Wong*72, the Australian High Court condemned mechanical approaches to sentencing, stating that intuitive synthesis ‘is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which...balances many different and conflicting features’. Despite its perceived value, a consequence of the doctrine is that the sentence discount offered to defendants is non-transparent, and lacks a degree of certainty. This in turn impacts on plea bargaining by removing a clear sentencing incentive for defendants to engage in discussions. Consequently, increasing clarity around the sentence discount amount has been the basis of a number of recommendations across Australian jurisdictions, with the most recent being the VSAC final report on specified sentence discounts and sentence indications. The key concern to emerge from the VSAC final report involving the then sentence discount process was the lack of transparency surrounding the amount awarded or how that amount was determined. As Payne holds, the lack of clarity over the sentence discount contributes to a defendant’s reluctance to plead guilty because a ‘lack of appropriate information, clarity and consistency in the sentencing regimes of judicial

71. (1997) VSCA.  
72 (2001) 207 CLR 584
officers...[results in] the defendant never being able to accurately assess the likely outcome of their case'. This absence of clarity is recognised as a primary limitation of the sentence discount, because it is impossible to determine the likely discount with any accuracy, or whether it is significantly higher than the amount that would be given for a late plea. This issue was noted by the Australian High Court in *Rv Cameron*\(^73\), where the court stated that:

"There [is] a danger that the lack of transparency, effectively concealed by judicial instinct, will render it impossible to know whether proper sentencing principles have been applied... If the prisoner and the prisoner’s legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in proper cases."

Weatherburn and Baker’s evaluation of NSW District Courts demonstrates the danger of having limited transparency in the sentence discounting process. They found that the median prison sentence when a guilty plea was entered for assault offences at the pre-trial Committal Hearing was 24 months, as opposed to fourteen months for a plea entered after the hearing. Similarly, the median sentence for fraud-related offences was 24 months when a guilty plea was entered at the Committal, as opposed to eighteen months when entered after the hearing; and the median sentence for a guilty plea entered for drug-related offences at the Committal was 30 months, as opposed to 25

\(^73\) (2002) 187 ALR 65
months for a plea entered after the hearing. These findings reveal that some offences received a significantly lower average sentence when the defendant plead guilty after the Committal Hearing, compared to the sentences given to those defendants who plead at or before the hearing. Thus, not only is the sentence discount amount not transparent, but its very existence appears to be questionable. In response to these types of concerns, some research promotes the use of specified sentence discounts to ensure the defendant can be guaranteed of the benefits of an early plea. The Pegasus Taskforce explored this concept in Victoria, and recommended that discounts be 36 specified. The Taskforce proposed that a guilty plea entered before or during the Committal Hearing receive a 30% reduction, a plea entered before the trial receive a 20% reduction, and a plea entered at the trial receive a 10% reduction. These recommendations were not implemented in Victoria. However, in 2007, to address the lack of transparency in sentence discounts, and in an attempt to combat increasing numbers of late guilty pleas, the VSAC final report determined that ‘it is in the best interests of the participants in criminal proceedings, the efficient administration of justice and the wider community...in making this aspect of the court process transparent and reviewable’. The VSAC recommended that in order to provide transparency, consistency and certainty to the sentence discount process: The Sentencing Act 1991 (Vic)...be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the
sentence has been reduced for that reason, and if so, the sentence that would have been imposed but for the guilty plea. This proposed reform was officially implemented in s.6AAA of the Sentencing Act 1991 (Vic) on 1 July 2008. Since its implementation, however, it has been criticised by both the media and judiciary for its limited impact in attracting early guilty pleas and for encroaching upon the doctrine of intuitive and instinctive synthesis, by requiring that a somewhat mathematical calculation be undertaken in this one aspect of the complex sentencing process. Although sentence discounts occur in most common law jurisdictions, debate exists over the justification for awarding them merely in exchange for a guilty plea. These debates are particularly relevant in the context of Victoria, because despite the legislative changes to s.6AAA of the Sentencing Act 1991 (Vic), no specified discount amounts are applied. Thus, the doctrine of intuitive and instinctive synthesis remains the only sentencing practice applied in the sentence discounting decision, in contrast to jurisdictions like NSW where specified discount amounts exist\(^{74}\). Using arguments drawn from the existing research, the following section examines the justifications for awarding sentence discounts and discusses the perceived benefits and limitations of this practice, particularly when combined with plea bargaining concessions.

4.2.9 **Sentencing Discounts whether Sufficient**

The justification for awarding sentence discounts, regardless of the motivations behind a defendant’s decision

\(^{74}\) (R v Thomas and Houlton [2000] NSWCCA 309, at 72)
to plead guilty, is because the plea, at the very minimum, offers a utilitarian benefit by saving on the resources and costs involved in running a trial. Thus, the sentence discount has, however undesirably, become an integral mechanism in the criminal justice process. Much of the literature demonstrates that sentence discounts are widely supported within the legal community, particularly in combination with plea bargaining. Indeed, the sentence discount is sometimes referred to as a vital element of plea bargaining because it provides additional encouragement for defendants to plead guilty. There is, however, significant criticism arising from perspectives outside the legal environment of sentence discounts. These criticisms are particularly aimed at jurisdictions like Victoria, where the main factor taken into account in applying the discount is the timing of the plea, as opposed to whether it is indicative of remorse. Sentence discounts are therefore labelled as unjustly rewarding defendants at the expense of victims, because the discount undermines the punitive ideals of the justice system, particularly the sentencing principles of retribution, deterrence and punishment. Similar perspectives are reflected in the literature that explores public perceptions of sentence discounts, which reveals that the public perceives these discounts as ‘letting the defendant off without punishment’. This view was also reflected in a Western Australian Law Reform Commission (WALRC) report, which found the public perception of sentence discounts, particularly when in combination with plea bargaining, was that ‘justice is for sale and offenders
get off too lightly’. Sentence discounts are also criticised for their potential to place pressures upon defendants to revoke their entitlement to a contested trial. As Pincus states, ‘people are being punished for insisting on a trial, at least in the sense that they may receive a longer sentence if they plead not guilty than they would if they plead guilty’. Henry supports this contention, claiming that ‘given the presumption of innocence, the trial should not be part of the punishment’. These concerns were also explored within the VSAC final report, in which the VSAC stated that any discount awarded in exchange for a guilty plea should ‘operate by way of encouragement and not by way of prescription’. The contradiction between rewarding a defendant for saving court resources and punishing a defendant for exercising his/her right to trial is highlighted within case law itself. In R v Cameron75, the Australian High Court stated that:

"Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction."

The court went on to note that:

"A person who pleads guilty at the earliest possible time almost always obtains a shorter

75 (2002) 187 ALR 65
sentence than a person who pleads not guilty and is convicted... The courts maintain that the accused who pleads not guilty is not being punished and given an increased sentence for pleading not guilty. Rather, the accused who pleads guilty merely gets a lighter sentence than he or she otherwise deserves. The subtlety of this scholastic argument has not escaped criticism."

In addition to these comments, there is a breadth of case law outlining the seemingly conflicting elements judges must consider when applying sentence discounts in Victoria, which creates confusion, particularly for the public, in understanding the sentence discounting process. In *R v Hall*76, for example, the Victorian Court of Criminal Appeal determined that a defendant’s entitlement to a sentence discount should not be negated by the aggravating factors of the offence; rather, the judge should focus only on the timing of the plea and its utilitarian worth. However, in *R v Ferman & Stoforo*77, the Victorian Court of Criminal Appeal determined that a guilty plea should justify only a small discount where the Crown’s case is strong, thereby bringing the worth of the plea into account. This issue was also considered in *R v Donnelly*78, where the Victorian Court of Criminal Appeal stated that a discount for pleading guilty should be higher for more serious offences. The underlying premise of the sentence discount, as established by case law and statute, remains that the discount be

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76 (1994) 76 A Crim R 454
77 (1999) VSCA 76
78 (1998) 1 VR 645
applied based on the time at which the plea is entered. Therefore, in Victoria the utilitarian benefits of a guilty plea have a stronger impact on a sentence discount than a plea entered to demonstrate remorse. As discussed by Baldwin and McConville, this type of situation means 'the operation of the discount system has...little to do with justice, [rather] it exists primarily because of administrative expediency'. This has been an object of significant criticism in research examining sentence discounts, particularly in cases where a guilty plea is entered after plea bargaining. This is because if a defendant pleads guilty as part of a plea bargain and in addition they receive a sentence discount, they are effectively rewarded twice with both sentencing and prosecutorial concessions. This is quite significant given that in most plea bargains there will be an agreement reached that involves concessions on the charges being entered, on the agreed summary of facts and, often, on the Crown’s sentencing submission. The utilitarian benefits of the guilty plea may still be present, but the defendant has received additional concessions, which casts doubt on the legitimacy of their receipt of an additional benefit in their sentence and can raise questions over the legitimacy of plea bargaining in general. The potentially negative repercussions of plea bargaining concessions being combined with sentence discounts are exacerbated by the absence of formality surrounding plea bargaining, and by the Crown’s discretion in making these agreements. The

79 (R v Cameron (2002) 187 ALR 65; Sentencing Act 1991 (Vic) s.5(e))
next section examines the debate located in the literature surrounding plea bargaining’s formalisation.

4.3 Plea Bargaining in Georgia

Plea bargaining arrived in Georgia as part of a sweeping anti-corruption drive by Georgia’s newly elected government in 2004. The aim, in addition to providing a means to effectively solve corruption cases, was to streamline the Georgian legal system, making it faster and more effective without sacrificing fairness. Five years on, it is unclear whether this target has been met. While plea bargaining has undoubtedly made the legal process faster, many feel that it has done this at the expense of the effective protection of basic legal rights. Trust in the system is still low. A June 2009 opinion poll by IRI showed that 50% of respondents had a negative view of courts, compared to just 30% who saw the courts in a favourable light. Many lawyers say that the practical implementation of plea bargaining in Georgia has contributed to this state of affairs. The lack of transparency inherent in the system as well as the government revenue the system provides contributes to the perception that plea bargaining has become a means of fund raising, not a tool for the improvement of the legal system. Matters are made worse by the lack of easily accessible information on the financial flows involved in the system.

In short, plea bargaining is no less controversial now then it was in 2004. It is subject to few rules and regulations and has arguably strengthened the role of state prosecutors at the expense of judges and lawyers. It has
not, as of yet, won the faith of the Georgian public and, in a system where around 99% of prosecutions end in conviction, it is seen as the only recourse for suspected criminals to avoid prison, whether they be innocent or guilty. Plea bargaining has been enshrined in Georgian law since 2004. The following objectives have been outlined by the Georgian government: (1) achieving fast and effective justice, (2) fighting corruption, (3) reducing the pressure on Georgia’s penitentiary system, (4) reducing judicial caseload. Supporters of plea bargaining say that its’ use is vital to ensure a efficient criminal justice system, detractors of the practice argue that it undermines the basic right to a fair trial and strengthens prosecutors at the expense of judges. Many critics also argue that pressure is often applied on defendants to admit to crimes they did not commit as part of a plea bargain.

Plea bargaining is a somewhat informal process. Previous research conducted by TI Georgia revealed certain general trends in prosecutorial practice during plea bargaining negotiations. For example, it was revealed that the vast majority of plea bargains in Georgia are conducted in exchange for the payment of a fine by the defendant.

4.4 Plea Bargaining In Nigeria

Until recently, most Nigerians were not familiar with the legal term “plea bargain” as it was not part of Nigeria’s history. The term became known and applied with the establishment of the Economic and Financial Crimes Commission (EFCC) following increased level of corruption.
The judiciary then began to apply the process in justice administration particularly in high profile cases prosecuted by the EFCC.

Some cases so far resolved through plea bargain include the case of misuse of depositors’ funds preferred against a former Chief Executive Officer of the Oceanic Bank, Mrs Cecelia Ibru. The prosecution and the defence agreed under plea bargain that Mrs. Ibru should forfeit 199 assets and funds worth about 190 billion and be sentenced to only six months’ imprisonment. Also, the money laundering case against former former Bayelsa State Diepriye Alamieseiya was disposed of through plea bargain which required him to forfeit some assets and to escape stiff penalty.

Former Governor Lucky Igbinedion of Edo State also had his money-laundering case determined through plea bargain.

Many Nigerians, including lawyers, have criticised the application of this process in the nation’s legal system. Some argue that plea bargain is not part of Nigeria’s history and others say that its application will fuel corruption since it allows less punishment for corrupt people.

The immediate past Chief Justice of Nigeria (CJN), Justice Dahiru Musdapher, is a major critic of plea bargain which, he describes, as dubious.

Musdapher made the submission at an Alternative Dispute Resolution summit organised by the Negotiation and Conflict Management Group and the National Judicial Institute.
An eminent lawyer and university lecturer, Prof. Adedokun Adeyemi, explains that plea bargain was not specifically provided for under any Nigerian federal legislation, and that the nearest to plea bargain was Section 14(2) of the EFCC Act. He accused the EFCC of employing the section to make defendants to make restitution in derogation of Section 29 (2) of the Evidence Act. Section 29(2) of the Act reads as under:

According to the don, the Evidence Act provided that confessions are inadmissible if obtained by oppression, but that the EFCC has been employing Section 14(2) of its Act to persuade defendants to make restitution “with promises made by the commission’s agents”. The section, Prof Adeyemi argued, empowers the commission to compound any offence punishable under the Act, by accepting money as it deems it, notwithstanding the amount to which the accused would have been liable if convicted. Adeyemi noted that the concept is being abused in Nigeria’s criminal jurisprudence.

He, however, notes that plea bargain expedites the conclusion of the criminal process without the need for a formal trial, thereby reducing congestion of the cause lists of courts.

The professor said that plea bargain reduces cost of prosecution, noting that in the United States (U.S.), more than 90 per cent of criminal cases was being settled through plea bargain.
A social critic and lawyer, Mr Bamidele Aturu, described plea bargaining as an embarrassment to Nigeria’s judicial system.

He said the concept encourages people who unlawfully enriched themselves with public funds to escape long sentences, giving the impression that only the poor will serve the long-term punishment under the law.

Aturu said: “It leads to corruption, and corruption has reduced our moral values.”

Another lawyer, Mr Spurgeon Ataene, also argued that plea bargain favours only the rich and influential, adding that it has caused some controversies in the judicial system “because those who looted public funds don’t want to be punished”.

He advocated that the concept should also be applied in cases involving the poor so that they can take its advantage.

Another SAN, Mr Vincent Ohaneri, described plea bargain as a well thought-out initiative but would not thrive in Nigeria’s political, judicial and socio-economic milieu.

According to him, the concept will not augur well in because most political “big wigs” have seized the opportunity of plea bargain get away with serious offences that required criminal prosecution.

He said:

"A handful of our elites in the country have used plea bargain to run away from just
punishment for criminal acts. The concept should be completely abrogated from our judicial system. I say this because Nigeria as a nation is already faced with too many cases of corruption and financial malpractice. These culprits should be made to face the wrath of the law, rather than romancing with them in the name of plea bargain."

Mr. Mike Agbamuche, a former Attorney-General and Minister of Justice, has belief plea bargain enables individuals to get away with their wrong doings. He said that financially-enhanced individuals, who enter into plea bargain, do not feel the brunt of punishment because they merely refunded a specified amount. Agbamuche said: "I do not see the justice in plea bargain as that is a door left open for abuse. When a crime is committed against a society, there should be deterring punishments, and to my mind, plea bargain is not one of such deterrents."

He, therefore urged abolition of the practice. Mr Onyekachi Ubani, the Ikeja branch Chairman of the Nigeria Bar Association (NBA), Ikeja branch, also describes plea bargain as unhealthy to the judicial system.

“The manner and mode of application of plea bargain is questionable,” Ubani argued, adding that the process is clearly a recipe for impunity in corruption cases.
However, Mr Chris Uche, (SAN), viewed the system from a different perspective, as according to him, plea bargain is a good initiative since it quickens disposal of cases.

The senior advocate said: "Plea bargain is a good concept in criminal prosecution, which has been successfully experimented abroad. But like every other thing in Nigeria, the concept is abused, particularly when utilised in prosecution of criminal cases."

Also Prof. Itse Sagay (SAN), said that the advantages of plea bargain surpasses its disadvantages because it makes room for conviction, sentence or sanction with resources saved.

"As long as it is carried out in an honest manner— without any underhand arrangements— it has more of advantages than disadvantages."

Mr Emmanuel Oche Ochai, also a lawyer, agreed that plea bargain, though new to Nigeria’s legal system, saves the time and cost of litigation.

Ochai expressed satisfaction that the process requires the defendant to pay part of his loot and get less punishment.

He said where the law provides for maximum sentence, the judge has discretion to give the minimum sentence. Ochai says.
The Chairman of the EFCC, Mr. Ibrahim Lamorde, is satisfied that the EFCC has been able to use plea bargain to conclude some high profile cases.

4.5 Plea Bargaining in India

4.6 Plea Bargaining in Other Countries of the World

In Pakistan, Plea bargain as a formal legal provision was introduced by the National Accountability Ordinance 1999, an anti-corruption law. A special feature of this plea bargain is that the accused applies for it, accepting guilt, and offers to return the proceeds of corruption as determined by investigators/prosecutors. After an endorsement by the Chairman National Accountability Bureau, the request is presented before the court, which decides whether it should be accepted or not. If the request for plea bargain is accepted by the court, the accused stands convicted but neither is sentenced if in trial nor undergoes any sentence previously pronounced by a lower court if in appeal. The accused is disqualified to take part in elections, hold any public office, or obtain a loan from any bank; the accused is also dismissed from service if a government official. In other cases, formal plea bargains in Pakistan are limited, but the prosecutor has the authority to drop a case or a charge in a case and, in practice, often does so, in return for a defendant pleading guilty on some lesser charge. No bargaining takes place over the penalty, which is the court's sole privilege.

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80 See chapter 3 supra
The introduction of a limited form of plea bargaining in 2004 was highly controversial in France. In this system, the public prosecutor could propose to suspects of relatively minor crimes a penalty not exceeding one year in prison; the deal, if accepted, had to be accepted by a judge. Opponents, usually lawyers and leftist political parties, argued that plea bargaining would greatly infringe on the rights of defense, the long-standing constitutional right of presumption of innocence, the rights of suspects in police custody, and the right to a fair trial.

For instance, Robert Badinter argued that plea bargaining would give too much power to the public prosecutor and would encourage defendants to accept a sentence only to avoid the risk of a bigger sentence in a trial, even if they did not really deserve it. Only a minority of criminal cases are settled by that method: in 2009, 77,500 out of the 673,700 or 11.5% of the decisions by the correctional courts.

Poland also adopted a limited form of plea bargaining, which is applicable only to minor felonies (punishable by no more than 10 years of imprisonment). The procedure is called “voluntary submission to a penalty” and allows the court to pass an agreed sentence without reviewing the evidence, what significantly shortens the trial. There are some specific conditions that have to be simultaneously met:
• the defendant pleads guilty and proposes a penalty,
• the prosecutor agrees,
• the victim agrees,
• the court agrees.

However, the court may object to the terms of proposed plea agreement (even if already agreed between the defendant, victim and prosecutor) and suggest changes (not specific but rather general). If the defendant accepts these suggestions and changes his penalty proposition, the court approves it and passes the verdict according to the plea agreement. In spite of the agreement, all the parties of the trial: prosecution, defendant and the victim as an auxiliary prosecutor (in Poland, the victim may declare that he wants to act as an "auxiliary prosecutor" and consequently gains the rights similar to official prosecutor) - have the right to appeal.