On the Intricacies of Plea Bargaining

Oscar Carlo F. Cajucom[★]

I. HISTORY

The rise of plea bargaining can be traced from the nineteenth through the twentieth century.[1] It was after the American Civil War that it became a

★ '12 J.D. cand., Ateneo de Manila University School of Law. Member of the Board of Editors, *Ateneo Law Journal*. He was the Associate Lead Editor for the third issue of the 54th volume. He previously wrote *Plagiarism Within the Legal Profession and Academe*, 55 ATENEO L.J. 787 (2010). The Author is also an Intern at the Ateneo Human Rights Center. The Author would like to acknowledge the assistance of Ma. Mercedes B. Torrijos and Candice Christine O. Tongco in the preparation of this Essay.

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1. Lucian E. Dervan, Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve 9 (An Unpublished Paper), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1664620 (last accessed Feb. 25, 2011) [hereinafter Dervan, Bargained Justice] (citing Lucian E. Dervan, *Plea Bargaining's Survivial: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478 (2007) & Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1978)).

phenomenon in the United States (U.S.).[2] In England, pleas of guilt were unusual and often discouraged before the nineteenth century.[3] Nevertheless, in 1836, defense lawyers began to control plea negotiations when they were given the opportunity to address the jury in criminal cases.[4] Similarly, the U.S. legal system transitioned into a lawyer-dominated one, brought about by the evolution of summary jury trials into adversarial ones.[5] These transitions in the two countries' legal systems — which in turn brought about plea bargaining — could thus be the products of the rise of the legal profession in the said century[6] and the increasing complexity of the jury trial.[7]

In the early twentieth century, the incidence of plea bargaining thrived allegedly because of corrupt practices on the part of judges and prosecutors who accepted bribes in exchange for plea agreements.[8] Thus, political corruption "apparently contributed to a flourishing practice of plea bargaining."[9] Its increasing growth in the broader legal community, however, is said to be brought about by the rise in criminality — thus making it a legal necessity.[10]

It was in the 1960s that plea bargaining was openly recognized by the U.S. Supreme Court.[11] Such recognition was nevertheless bound to happen.

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2. Dervan, Bargained Justice, *supra* note 1, at 10.

3. Penny Darbyshire, *The mischief of plea bargaining and sentencing rewards*, 2000 CRIM. L. REV. 895, 897 (2000) (citing John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) & Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: the Origins of Plea Bargaining*, 31 ISRAEL L. REV. 183 (1997)).

4. Darbyshire, *supra* note 3, at 897.

5. *Id.*

6. *See* Darbyshire, *supra* note 3, at 897-98.

7. Darbyshire, *supra* note 3, at 898. There is thus a conjecture that plea bargaining is most extensive in legal systems whose trial procedures are most elaborate. *Id.* (citing Albert W. Alschuler, *An exchange of concessions*, 142 N.L.J. 937 (1992)).

   Dervan says that there is a general consensus on the argument that plea bargaining became the dominant force that it is today as a result of increasing power and control on the part of the prosecutor in an increasingly more complex criminal justice system. Dervan, Bargained Justice, *supra* note 1, at 12.

8. Dervan, Bargained Justice, *supra* note 1, at 11.

9. *Id.* (citing Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 24 (1979)).

10. *Id.* (citing GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 210 (2003)).

11. HARRY I. SUBIN, ET AL., THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS 131 (1993).

This was because although plea bargaining was initially rejected for being unconstitutional, such practice flourished "in the shadows" and eventually rose from obscurity to prominence.[12] It was after or about that time that the U.S. Court and Congress began to introduce regulatory sanctions "in order to increase its visibility and fairness."[13] And in 1975, plea bargaining was regularized through amendments to Rule 11 of the Federal Rules of Criminal Procedure.

In the Philippines, the Rules of Court (Rules) first incorporated a rule on plea bargaining in 1940. Prior to the adoption of Rule 114, Section 4 in the said Rules, there was no specific provision that governed bargaining or otherwise the entry of a plea of guilt to a lesser offense.[14] Prior to such Rule, when a defendant pleaded guilty to the commission of an offense lesser than that charged, a plea of not guilty was instead entered on his behalf.[15] Moreover, the prosecutor then was not authorized to consent to such a plea bargain without amending the information previously filed.[16] With the adoption of Rule 114, Section 4, the defendant was given the option to plead guilty to a lesser offense which is necessarily included in the offense charged, provided that he obtains the consent of the court and the prosecutor.[17] In the said Rule, the term "plea bargaining" was not explicitly used, but it is apparent that the said Rule pertains almost exactly to plea bargaining as we know it today.[18]

The 1940 Rules were revised in 1961. The revisions took effect in 1964.[19] Rule 114, Section 4 of the 1940 Rules became Rule 118, Section 4 of the 1964 Rules.[20] No modification whatsoever was made.[21] In 1984, the Rules were again revised.[22] The new Rules took effect in 1985.[23] The

12. Dervan, Bargained Justice, *supra* note 1, at 16.

13. SUBIN, ET AL., *supra* note 11, at 131 (citing WAYNE R. LA FAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 20.1 (b) (1984)).

14. VICENTE FRANCISCO, RULES OF COURT OF THE PHILIPPINES ANNOTATED 223 (1941).

15. *Id.*

16. *Id.*

17. 1940 RULES OF COURT OF THE PHILIPPINES (superseded 1964).

18. Jonathan C. Flaminiano, A Closer Look at the Plea Bargaining Process: Proposals for the Amendment of Current Law and Adoption of Uniform Policies and Practices 24 (1997) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

19. *Id.* at 27.

20. *Id.*

21. *Id.*

22. *Id.*

wording of the 1940 Rule on plea bargaining, however, still remained unchanged.[24] The Rule, however, was amended in 1988, marking a change in the said provision after 45 years.[25] Plea bargaining was then recognized as one of the steps taken during pre-trial.[26] Moreover, the amended 1985 Rules allowed the accused to plead guilty "to a lesser offense *regardless of whether or not it is necessarily included* in the crime charged."[27] This leeway was removed by the incumbent 2000 Revised Rules of Criminal Procedure.[28] As the Rule presently stands, the lesser offense pertained to must be that which is *necessarily included* in the offense charged.[29] And an offense is said to be necessarily included in the offense charged when some of the essential elements or ingredients of both coincide.[30] Moreover, the 2000 Revised Rules added the proper time within which the accused may plead guilty to a lesser offense, that is, *at arraignment* or *after arraignment but before trial* and upon withdrawing his plea of not guilty.[31]

II. DEFINITION

Plea bargaining is an arrangement peculiar to criminal prosecution. It is defined as "a process whereby the accused and the prosecution work out a mutually satisfactory disposition of the case subject to court approval."[32] It is thus a means whereby the defendant pleads guilty to the commission of a lesser offense or to only one or some of the counts in the case of multiple-count prosecution in exchange for a lighter penalty.[33] Strictly speaking, plea

23. *Id.*

24. Flaminiano, *supra* note 18, at 27.

25. *Id.*

26. *Id.* at 27-28.

27. 1985 REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2 (superseded 2000) (emphasis supplied).

28. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

29. *Id.*

30. *See* REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 5.

31. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

32. Daan v. Sandiganbayan, 550 SCRA 233, 240 (2008) & BLACK'S LAW DICTIONARY 1037 (5th ed. 1979).

33. People v. Villarama, 210 SCRA 246, 251-52 (1992). *See also* REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2. This Section provides that:

> Sec. 2. *Plea of guilty to a lesser offense.* — At arraignment, the accused, with the consent of the offended party and the prosecutor, may be allowed by the trial court to plead guilty to a lesser offense which is necessarily included in the offense charged. After arraignment but before trial, the accused may still be allowed to plead guilty to said

bargaining should be differentiated from the plea agreement or the plea bargain itself. A plea bargain may be defined as "an agreement between the prosecution and the defense whereby the defendant pleads guilty in exchange for a more lenient sentence[ ] and a full trial is avoided."[34] Plea bargaining is thus the process, while the plea bargain is the agreement itself.

A plea of guilt in a bargaining arrangement is usually bartered for four kinds of concessions — reduced sentence, concurrent sentences/charges, reduced charges, and dropped charges.[35] In Philippine jurisdiction, the subject of plea bargaining sanctioned by the Rules is limited to the reduction of charges by way of conviction of a lesser offense than that originally charged. Such is the only instance when plea bargaining is allowed under Philippine rules of procedure.[36] Sentence-bargaining is not sanctioned and any reduction of penalty brought about by plea bargaining is just the obvious consequence of pleading guilt to a lesser offense.[37] Thus, the Supreme Court held that a trial court judgment convicting a defendant based on his plea of guilt which resulted from bargaining for a lower penalty is null.[38] It appears, however, that there may be instances when the dropping of charges can also be made the subject of plea bargaining.[39]

It is not a duty on the part of the government to enter into a plea bargain.[40] Correspondingly, plea bargaining is not a right accorded to the accused, even by the Constitution.[41] On the contrary, to plea bargain is actually to exercise a waiver of certain rights like, for example, the right against self-incrimination,[42] and the right to be heard by himself and counsel[43] and the right to meet his witnesses face to face[44] (since by entering

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lesser offense after withdrawing his plea of not guilty. No amendment of the complaint or information is necessary.

REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

34. Yehonatan Givati, Plea Bargaining: A Comparative Legal and Economic Analysis 1, *available at* https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=70 (last accessed Feb. 25, 2011).

35. Darbyshire, *supra* note 3, at 896-97 (citing Judge Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 780 (1956)).

36. People v. Magat, 332 SCRA 517, 524 (2000).

37. *Id.*

38. *Id.*

39. *See* People v. Nuelan, 366 SCRA 705, 713-16 (2001).

40. *Villarama*, 210 SCRA at 252. *See also* 22 C.J.S. *Criminal Law* § 486 (Westlaw, 2010).

41. The same is true with the United States. *See* 22 C.J.S. *Criminal Law* § 486.

42. PHIL. CONST. art. 3 § 17.

43. PHIL. CONST. art. 3 § 14.

a plea of guilt the accused opts not to go through trial). It is also not a statutory creature since the Philippine rule on plea bargaining does not find its roots in legislation. Rather, plea bargaining is a relief accorded by Remedial Law.

Generally, in plea bargaining, the prosecutor is in a position with broad discretion, and the decision to plea bargain is a matter within such discretion.[45] Once made, an offer is within the prosecutor's control; he can withdraw it at any time prior to a guilty plea.[46] In the U.S., a district attorney is generally not even bound to obtain the consent of the offended party or such party's family though he may give weight to the damage caused to such parties or otherwise yield to their views when considering whether or not to plea bargain.[47] Nevertheless, if a plea bargain has already been entered into, and its terms had been set, the prosecution must be held to its obligation to comply — even if such terms are not constituted in the written plea agreement.[48] The application of these principles to our jurisdiction, however, remains doubtful.

Since it is the defendant himself who will ultimately enter the plea, his decision on whether or not he should enter into a plea agreement should prevail.[49] Plea bargaining is thus essentially a negotiation between the accused and the prosecution.[50]

Also, plea bargaining may be made subject to a particular form. In the U.S., although a plea agreement is not required to be reduced into writing, such is preferable.[51] In the Philippines, it is warranted that plea bargains made during pre-trial be reduced into writing and signed by the accused and counsel since all pre-trial agreements are required to be in such form.[52]

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44. PHIL. CONST. art. 3 § 14.

45. 22 C.J.S. *Criminal Law* § 486 (citing State v. Moen, 76 P.3d 721, 723 (2003) (U.S.)).

46. *Id.* (citing United States v. Pleasant, 730 F.2d 657, 664 (11th Cir. 1984) (U.S.)).

47. *Id.* (citing Commonwealth v. Latimore, 667 N.E.2d 818, 843 (1996) (U.S.)).

48. *Id.* (citing U.S. v. CFW Construction Company, Inc., 583 F. Supp. 197 (D.S.C. 1984) (U.S.)).

49. *See* 22 C.J.S. *Criminal Law* § 486 (citing Elmore v. State, 684 S.W.2d 263, 264 (1985) (U.S.) & Johnson v. Duckworth, 793 F.2d 898, 899 (7th Cir. 1986) (U.S.)).

50. *Id.*

51. *Id.* (citing United States v. Hilton, 772 F.2d 783, 786 (11th Cir. 1985) (U.S.)).

52. REVISED RULES OF CRIMINAL PROCEDURE, rule 118, § 2.

III. VALIDITY

Under Philippine rules of procedure, a plea bargain may only be valid if consented to by the offended party and the prosecutor, and if the plea of guilt pertains to a lesser offense which is necessarily included in the elements of the offense charged.[53] Such plea of guilt to a lesser offense must be made at or after arraignment but before trial.[54] A plea agreement, however, is always subject to the approval of the trial court.[55]

Moreover, a plea of guilt must be made voluntarily and with full comprehension of its consequences. If the plea of guilt is for a non-capital offense, the trial court has the discretion to receive evidence to determine the penalty to be imposed.[56] And in general, a plea of guilt cannot be refuted or attacked as long as it was made voluntarily and intelligently.[57] On the other hand, if the plea of guilt is for a capital offense, the trial court is required to conduct a searching inquiry into the voluntariness and full comprehension of the consequences of the plea.[58] Moreover, the trial court is also mandated to require the prosecution to prove the defendant's guilt and precise degree of culpability.[59] The defendant may also choose to present evidence on his behalf.[60] Thus, in pleas of guilt for capital offenses, the duty of the trial court is three-fold. It must (1) conduct a searching inquiry on the voluntariness and intelligence of the accused; (2) require the prosecution to present evidence to prove the defendant's guilt and precise degree culpability; and (3) ask the accused if he desires to present evidence and allow him to do so if he does.[61]

A. Judicial Discretion

The wording of the Rule on pleading guilty to a lesser offense is such as to imply a discretionary role on the part of the judge.[62] This affirms the holding

53. *Daan*, 550 SCRA at 242 (citing People v. Dawaton, 389 SCRA 277, 284 (2002) & REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2).

54. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

55. Please refer to the discussion below on Judicial Discretion.

56. JOSE L. SABIO, JR., CRIMINAL PROCEDURE 131 (2006).

57. *Id.*

58. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 3.

59. *Id.*

60. *Id.*

61. *Nuelan*, 366 SCRA at 713 (citing People v. Bello, 316 SCRA 804, 811 (1999) & People v. Camay, 152 SCRA 401, 403 (1987)).

62. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2. The said Rule states in part that "the accused ... *may be allowed* by the trial court." *Id.* (emphasis supplied).

of the Supreme Court in one case that an agreement to plead guilty to a lesser offense "is not supposed to be allowed as a matter of bargaining or compromise for the convenience of the accused."[63] Thus, it was held in the same case that a plea agreement as sanctioned by the Rules is allowed "only when the prosecution does not have sufficient evidence to establish guilt of the crime charged."[64] The judge, therefore, has the mandate of inquiring into the circumstances of the bargaining on which the eventual plea agreement is based[65] and he cannot exercise mere blind reliance on the fact that the prosecutor and the offended party gave their consent. This said discretionary role of the trial court may be inferred from a statement made by the Supreme Court in the more recent case of *Daan v. Sandiganbayan*[66] which involved graft. The Court noted that the rejection of a plea bargaining agreement based on the fact that its approval may "trivialize the seriousness of the charges against [the accused] and send the wrong signal to potential grafters in public office ... thus[ ] setting to naught the deterrent value of the laws intended to curb graft and corruption in government"[67] was valid in terms of reasoning.[68] However, the Court favored the acceptance of the plea agreement based on equity considerations. This was because there was precedent[69] which supported such approval. In the said precedent, Charlie "Atong" Ang was allowed to plead guilty to the lesser offense of indirect bribery instead of the offense actually charged, which was plunder.[70] The Court in *Daan* thus held that this previous approval would prevent the rejection of the plea of guilt to a lesser offense in that case — having been made under the same circumstances as that in *Ang* — since it will result in gross inequity for the accused.[71] It makes one wonder: Does this mean that plea agreements entered into under the circumstances of the *Daan* and *Ang* cases, such as in the case of Maj. Gen. Carlos Garcia,[72] are bound to be accepted?

63. People v. Kayanan, 83 SCRA 437, 450 (1978).

64. *Id.*

65. *Id.*

66. Daan v. Sandiganbayan, 550 SCRA 223 (2008).

67. *Id.*

68. *Id.*

69. People v. Estrada, Sandiganbayan Criminal Case No. 26558, Sep. 12, 2007.

70. *Id.*

71. *See Daan*, 550 SCRA at 244-49.

72. *What went before: Gen. Garcia and family's ill-gotten wealth*, Nov. 11, 2010, PHIL. DAILY INQ., *available at* http://newsinfo.inquirer.net/ inquirerheadlines/ nation/view/20101111-302571/What-went-before-Gen-Garcia-and-familys-ill-gotten-wealth (last accessed Feb. 25, 2011).

Take note also of the imperfection in the language of the Rule on plea bargaining. In one case,[73] the Court admonished a judge for allowing the accused to plead guilty to attempted homicide rather than consummated homicide which was the original charge and which charge was based on the fact that the victim died.[74] Indeed, attempted homicide is a lesser offense necessarily included in the crime of homicide. However, the fact of death of the victim "cannot by simple logic and plain common sense be reconciled with the plea of guilty to the lower offense of attempted homicide."[75]

B. Voluntariness and Intelligence

A voluntary plea is simply that which is not the product or inducement of "coercive threat, fear, persuasion, promise, or deception."[76] It must not be the result of "actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his or her options rationally."[77] Nevertheless, threats of a more severe sentence after trial and promises of leniency if trial is waived have been considered proper and not necessarily vitiated.[78] A plea of guilt resulting from a bargaining arrangement does not necessarily render such plea involuntary.[79]

Also, the plea must be intelligently made.[80] Intelligence means having the mental capacity to enter the plea.[81] By intelligence, it is also meant that the accused understands the consequences of entering a plea of guilty.[82]

Plea bargaining is usually brought about by some realization of the accused that "a guilty plea is in all probability preferable to the result of his standing trial."[83] Often times, the decision to enter a plea of guilt is based on

73. Amatan v. Aujero, 248 SCRA 511, 515 (1995).

74. *Id.*

75. *Id.*

76. 21 Am. Jur. 2d *Criminal Law* § 602 (Westlaw, 2010) (citing Woods v. Rhay, 414 P.2d 601, 605 (1966) (U.S.)).

77. *Id.* (citing Velez v. People of New York, 941 F. Supp. 300, 312 (1996) (U.S.)).

78. SUBIN, ET AL., *supra* note 11, at 132 (citing Brady v. United States, 397 U.S. 742, 750–51 (1970) (U.S.) & Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (U.S.)).

79. 21 Am. Jur. 2d *Criminal Law* § 602 (citing 21 Am. Jur. 2d *Criminal Law* § 636).

80. JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS 528 (1978).

81. *Id.*

82. *Id.*

83. *Id.* at 532.

the defendant's reliance on the prosecution's assurance of fulfilling any condition which may have been promised.[84]

The court trying the case must thus assess the voluntariness and intelligence of a defendant's guilty plea by means available to it. Some factors that may be taken into consideration include statements made by the defendant contemporaneously with the plea, the time given to such defendant in order to consider the plea and other alternatives, the seriousness of the charge, and the underhanded pressures or influences that may have attended the bargaining.[85]

By and large, however, a court's primary means of ensuring that the plea is voluntary is the assistance of counsel when it was made.[86] On this point, the duty of the court before arraignment is four-fold: (1) it must inform the accused of his right to an attorney; (2) it must ask the defendant if he desires the aid of an attorney; (3) if he desires but is unable to employ an attorney, the court must assign a counsel *de oficio* to represent him; and (4) if he desires to procure counsel of his own choice, he must be given reasonable time to do so.[87] Note that the proper representation of a defendant must be ensured in order that a plea bargaining arrangement may be constitutionally valid.[88]

Although there is a marked difference between capital and non-capital pleas of guilt, the requirement of ensuring that the plea was voluntarily and intelligently made should apply equally to both. The trail court must at all times be satisfied with respect to the propriety (i.e., voluntariness and intelligence) of a guilty plea. The only difference that should be made between the two is with respect to the reception of further evidence.[89]

C. Proper Time for Bargaining

Generally, plea bargaining can occur at almost any point in the criminal process.[90] It can occur before charges are filed against an accused.[91] It can

84. *Id.*

85. 21 Am. Jur. 2d *Criminal Law* § 602 (citing Chizen v. Hunter, 809 F.2d 560, 562 (9th Cir. 1986) (U.S.) & State v. Ford, 891 P.2d 712, 715 (1995) (U.S.)).

86. SUBIN, ET AL., *supra* note 11, at 132.

87. SABIO, *supra* note 56, at 133 (citing People v. Holgado, 85 Phil. 752, 756 (1950)).

88. Richard Klein, Due Process Denied: Judicial Coercion in the Plea Bargaining Process 1366 (An Unpublished Paper), *available at* http://www.hofstra.edu/pdf/law_ lawrev_ klein_vol32 no4.pdf. (last accessed Feb. 25, 2011) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985) (U.S.) & Kercheval v. United States, 274 U.S. 220, 223 (1927) (U.S.)).

89. *Compare* REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 3 *with Id.* § 4.

90. SUBIN, ET AL., *supra* note 11, at 131.

happen right before arraignment or immediately after.[92] It may also happen just before trial or during its course. In some cases, plea agreements have even been entered into during deliberation proper by the jury.[93] It is argued that the crucial consideration in deciding when to plea bargain is risk assessment — "the likelihood of a successful outcome at trial versus a conviction and an enhanced sentence."[94] Such assessment is accordingly subject to re-examination throughout the course of the criminal proceeding.[95]

In the Philippines, bargaining ordinarily takes place during the pre-trial stage.[96] The Rules require the trial court to order a pre-trial conference in order to consider plea bargaining, among others.[97] It must be noted that pre-trial is conducted after arraignment and within 30 days after the court acquires jurisdiction over the defendant's person.[98] This period coincides with the period when a plea of guilt to a lesser offense is still allowed.[99] Nevertheless, it was recognized that bargaining may also take place in the course of the trial proper and even after the prosecution has rested its case.[100] This, however, appears to be contrary to Rule 116, Section 2, which now provides that a plea of guilt to a lesser offense may be made at or after arraignment but before trial.[101] In *Daan v. Sandiganbayan*,[102] the Supreme Court, ruling via division, mentioned that

> [plea bargaining] may also be made during the trial proper and even after the prosecution has finished presenting its evidence and rested its case. Thus, the Court has held that it is immaterial that plea bargaining was not made during the pre-trial stage or that it was made only after the prosecution already presented several witnesses.[103]

Comment [mec1]: Insert secs. 1 and 2 of rule 118 here.

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Daan*, 550 SCRA at 241.
97. REVISED RULES OF CRIMINAL PROCEDURE, rule 118, § 1.
98. *Id.*
99. *Id.* rule 116, § 2.
100. *Daan*, 550 SCRA at 242. *See also* People v. Mamarion, 412 SCRA 438, 457 (2003).
101. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.
102. *Daan*, 550 SCRA 233.
103. *Id.* at 242 (citing *Mamarion*, 412 SCRA at 457).

The Court made the above pronouncement by citing *People v. Mamarion*.[104] The reliance appears to be unfounded. First of all, when the defendant in *Mamarion* was allowed to change his plea, the prevailing rule was the old one[105] which did not require a period or time for pleading guilty to a lesser offense. Moreover, the Court there applied the principle that the plea should be allowed "only when the prosecution does not have sufficient evidence to establish the guilt."[106] Thus, it was held that the testimony of the accused who pleaded guilt to the lesser offense was crucial to the prosecution as there was no direct evidence linking the other defendants to the commission of the crime.[107] It would seem that the prosecutor in this case made the bargain with the accused in exchange for the latter's testimony.

The intended change in the Rule is obvious. Whereas before (prior to the revision of the Rules of Criminal Procedure[108] which took effect in 1 December 2000), there was no explicit period or time within which to enter a plea of guilt for a lesser offense, the 2000 Revised Rules,[109] as has been said, already provides specific periods.

Daan, therefore, cannot also anchor its pronouncement on *People v. Villarama*[110] which was decided under the old Rule.

Hypothetically, neither can any reliance on *People v. Besonia*,[111] which was decided under the 2000 Revised Rules, be sustained. In the said case, the defendant initially pleaded not guilty to the charges against him.[112] However, before the start of the trial, his counsel manifested that defendant would enter a plea of guilt to a lesser offense after he undergoes medical operation on his gall bladder.[113] The prosecution was thus ordered to start presenting evidence. The defense, in turn, opted not to present any evidence. The defendant questioned his conviction on the ground that, *inter alia*, the trial court did not act on his manifestation to plead guilty to a lesser

104. People v. Mamarion, 412 SCRA 438 (2003).

105. *Id.* at 456.

106. *Id.* at 457 (citing *Villarama*, 210 SCRA 246).

107. *Id.* at 457-58.

108. The revisions were introduced by the Supreme Court, acting on the letter of the Committee on Revision of the Rules of Criminal Procedure. Supreme Court, Re: Revised Rules of Criminal Procedure, SC Administrative Matter No. 00-5-03-SC [SC A.M. No. 00-5-03-SC] (Dec. 1, 2000).

109. 2000 REVISED RULES OF CRIMINAL PROCEDURE.

110. People v. Villarama, 210 SCRA 246 (1992).

111. People v. Besonia, 422 SCRA 210 (2004).

112. *Id.* at 213.

113. *Id.* at 213-14.

offense before trial started.[114] As such, there was really no occurrence of a plea of guilt for a lesser offense since the intention to make such a plea never materialized due to the defendant's medical condition.[115] The trial court could not afford to hold the trial in abeyance until the defendant is able to make his plea. Furthermore, the required consent of the prosecutor and the offended party was not obtained.[116] Moreover, the approval of a plea bargain is discretionary upon the court.[117] As has been held by the Supreme Court, a plea bargain is not demandable by the defendant as a matter of right.[118]

Note also that under our Rules, the only time when plea bargaining is allowed is when it pertains to a plea of guilt to a lesser offense. Other possible exchanges or promises between the accused and the prosecution are not sanctioned in our jurisdiction by way of exclusion. Thus, there can be no other form of bargaining but that which pertains to a plea of guilt to a lesser offense. Consequently, once the period for entering a plea of guilt to a lesser offense has lapsed, the time for bargaining should be considered as having lapsed, too.

Verily, "[t]he reason why a plea bargain is valid only when executed 'before trial' is to save government resources and time in prosecuting cases."[119] Thus, the "[*raison d'etre* of bargaining] is lost when the prosecution has finished presenting its evidence."[120] Thus, as trial moves on, there will be less and less incentive for the government to enter into a plea bargain.

D. Consent

The Rules require the accused to obtain the consent of the offended party and the prosecutor in order to properly enter into a plea bargain by a plea of guilt to a lesser offense.[121] There is obviously no difficulty in determining who the prosecutor is for purposes of obtaining his consent. But just who is the offended party?

The offended party is said to be "the person actually injured or whose feeling is offended."[122] He is also "the one to whom the offender is also

114. *Id.* at 216.

115. *Id.* at 217.

116. *Id.*

117. *Besonia*, 422 SCRA at 217.

118. *Villarama*, 210 SCRA at 252.

119. Artemio V. Panganiban, *Invalid plea bargain*, Jan. 30, 2011, PHIL. DAILY INQ. *available at* http:// opinion.inquirer.net/ inquireropinion/ columns/ view/ 20110130-317394/Invalid-plea-bargain (last accessed Feb. 21, 2011).

120. *Id.*

121. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

122. SABIO, *supra* note 56, at 15.

civilly liable."[123] In Villarama, the Supreme Court had occasion to rule on who the offended party is for purposes of plea bargaining in a case of illegal possession of dangerous drugs.[124] The Court held that it would be incorrect to say that there is no offended party in such a crime.[125] This was because the pernicious effects of drugs can affect society.[126] The Court, therefore, held that in such a crime, the offended party is the State.[127] The government, in turn, as defender of the rights of the people, initiates the criminal action.[128] Correspondingly, it is the prosecutor, being the representative of the government, who is "duty bound to defend the public interests, threatened by crime, to the point that it is as though he were the person directly injured by the offense."[129] The Court thus concluded that in such a case, it is the prosecutor who must also give consent as representative of the State, which is the offended party.[130]

Based on the reasoning in Villarama, it can be inferred that it is the prosecutor's consent, as representative of the offended party, which must be obtained in cases where there is no particular and identifiable offended party who can feasibly communicate his own consent (in short, where the State is the only offended party, there being no particular private offended party). Thus, in such cases, the prosecutor must give his consent in two capacities — first, in his capacity as prosecutor, and second, in his capacity as representative of the offended party.

Note also that the presence of the private offended party is required during arraignment for purposes of plea bargaining, among others.[131] If such party fails to appear, the court may allow the accused to plead guilty to a lesser offense with only the consent of the prosecutor.[132] It is difficult to fathom how the State, as the offended party, will attend an arraignment for purposes of plea bargaining if not through the prosecutor as its representative.

123. *Id.*

124. *Villarama*, 210 SCRA 246.

125. *Id.* at 254.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Villarama*, 210 SCRA at 254.

131. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 1 (f).

132. *Id.*

IV. ISSUES AND DISCUSSION

A. Acceptability and Desirability

Much of the discourse on plea bargaining centers on its desirability.[133] Calls for its abolition are thus not considered novel.[134] Nevertheless, there are those who argue that bargaining is inevitable.[135] Apparently, there is diversity among different countries concerning its acceptability and desirability.[136] Traditional arguments posit that the divergence may be dissected along civil and common law lines in the sense that "common law countries employ plea bargaining, while civil law countries do not."[137] Plea bargaining thus appears to be prevalent in common law jurisdictions.[138] Thus, whereas in common law the effect of a plea of guilt is to forego trial, in civil law, trial cannot be prevented by such plea.[139] It is also possible to explain the issue of acceptability by examining the preferences and circumstances of different countries.[140]

Consider that there are two social harms which society seeks to avert — "[t]he social harm from punishing an innocent individual, and the social harm from not punishing a guilty individual."[141] Two additional assumptions may also be thrown in — "that individuals vary in their degree of risk aversion, and that the law enforcement agency has limited resources."[142] It is argued that the greater the weight accorded to ensuring that innocent persons are not punished, the lesser the propensity is it to allow the use of plea bargaining.[143] Meanwhile, the higher the rate of crime, the greater is the tendency to desire such bargains.[144] Risk aversion enters the arrangement when innocent individuals who are risk-averse take offers to enter a plea of guilt in order to avoid more severe sentences.[145]

Comment [mec2]: Citing fn 1.

Comment [mec3]: Citing fn 2.

133. Givati, *supra* note 34, at 2.

134. Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 505 (1999).

135. *Id.* at 505.

136. *See generally* Givati, *supra* note 34.

137. *Id.* at 2–3.

138. Darbyshire, *supra* note 3, at 898 (citing Alschuler, *supra* note 7).

139. Givati, *supra* note 34, at 3 (citing JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 130–31 (2d ed. 1985)).

140. *Id.* at 2.

141. *Id.* at 3.

142. *Id.*

143. *Id.* at 4.

144. *Id.*

145. Givati, *supra* note 34, at 3.

B. Efficiency

It is said that the desirability, or even necessity, of plea bargaining may be justified by the fact that it saves time and resources.[146] This may then increase the efficiency of the criminal justice system.[147] Plea bargaining is thus seen as an efficient time and resource-saving means since it provides an opportunity to resolve cases in the early stages, before much costs are incurred.[148] For such arguments, of course, the premise must be that criminal prosecution is to some extent dependent on government resources.[149] Criminal agencies do not always have enough resources to go into a full-blown trial. Thus, a plea bargaining arrangement can be practical and necessary. Otherwise, it is possible that guilty individuals will not be brought to justice.[150] But one view says that plea bargaining may just be another means to reduce work on the part of government officials.[151] Moreover, there are those who argue that there is really nothing impractical about going to trial.[152] The ends of justice may very well weigh heavier than economy of the system.[153]

C. Flexibility and Higher Conviction Rate

Plea bargaining also affords better flexibility in the criminal justice system.[154] By allowing it, the defendant is given the chance to avoid the inconveniences of trial and the possibility of being convicted of a graver offense. By entering into a plea agreement, a defendant may also avoid pre-trial detention.[155] This flexibility also works for the benefit of the prosecutor[156] since plea bargaining entails the cooperation of the defendant.[157] Furthermore, plea bargaining allows the prosecutor the opportunity to obtain a conviction even if evidence is lacking.[158]

Comment [mec4]: Citing fn 50.

Comment [mec5]: Citing fn 57.

Comment [mec6]: Citing fn 59.

146. Nick Vamos, *Please don't call it "plea bargaining,"* 9 CRIM. L. REV. 617, 617 (2009).

147. *Id.*

148. *Id.*

149. *See* Givati, *supra* note 34, at 3-4.

150. *Id.* at 4.

151. Palmer, *supra* note 134, at 514.

152. *See* Palmer, *supra* note 134, at 514.

153. Palmer, *supra* note 134, at 514.

154. *Id.* at 515.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

On the part of the prosecutor, moreover, plea bargains may result in additional time and resources to handle more cases.[159] His conviction rate may also shoot up.[160] Also, by bargaining, the prosecutor is able obtain the cooperation of defendants who may be able to give information necessary to convict other criminals.[161]

Comment [mec7]: Citing fn 7

D. Due Process and Conflicts of Interests

Due process and fair-dealing also play parts in discussions on plea bargaining.[162] A plea of guilt as a result of plea bargaining entails the waiver of constitutional rights such as the rights to trial and confront adverse witnesses and the right against self-incrimination.[163] Undue influence may attend negotiations for the entering of a plea of guilt.[164]

A plea bargaining situation can get even more fragile and complex when the trial court itself actively seeks a plea of guilt in order to avoid a full-blown trial and dispose of cases quickly.[165] This is primarily brought about by the fact that a trial court "generally has broad discretion in deciding what factors to consider in fashioning an appropriate sentence."[166] In some cases, judges may even act in obvious arbitrariness by throwing in extra prison years at a defendant who refuses to enter into a bargain and instead decides to go to trial.[167] These circumstances show the crucial participation of the judiciary in plea bargaining arrangements.[168]

Comment [mec8]: Citing fn 101 and 102.

Nevertheless, it is said that there are also advantages when judges actively participate in plea bargaining.[169] For one, the rights of the accused may be better looked after under the watchful eyes of a judge.[170]

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159. F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 191 (2002).

160. *Id.*

161. *Id.* at 193.

162. *See generally* Klein, *supra* note 88.

163. Palmer, *supra* note 134, at 523.

164. *See* Klein, *supra* note 88, at 1356–57.

165. *Id.* at 1352–53.

166. Kurtis A. Kemper, *Propriety of Sentencing Judge's Imposition of Harsher Sentence than Offered in Connection with Plea Bargain Rejected or Withdrawn Plea by Defendant — State Cases*, 11 A.L.R. 6th 237 § 2 (Westlaw, 2006) (citing 21 Am. Jur. 2d *Criminal Law* § 794 (Westlaw, 2010) (U.S.)).

167. Klein, *supra* note 88, at 1358.

168. *Id.* at 1361.

169. *See* Elvira C. Oquendo, Plea Bargaining, Quality Justice, and the Due Process Requirement of Determining Guilt 87 (1992) (unpublished J.D. thesis, Ateneo

Perhaps the constitutional issues mentioned above can be said to be the result of inherent conflicts in the interests of the actors in plea bargaining.[171] The prosecutor's primary aim is to efficiently obtain a conviction.[172] The defense attorney can sometimes also be interested in avoiding trial and entering into a plea agreement.[173] The judge is interested in clearing his dockets and may also be subject to political pressure.[174] The defendant, meanwhile, seeks to go scot-free, regardless of whether he is innocent or not. The interplay of these interests may cause significant conflicts which may affect the administration of justice.

The possibilities of abuse shown above seem to require courts to exercise better care in instances of plea bargaining. The assistance and presence of counsel during the time of entering plea is thus required.[175] Moreover, counsel must take an active role in the bargaining by studying the relevant law and facts, consulting with the defendant, and recommending a plea of guilt only if in his view, conviction is probable.[176] Too, in the U.S., it is sanctioned that plea negotiations involve only the prosecution and the defense — courts are not allowed to participate.[177] However, this prohibition does not erase the fact that courts exercise broad discretion in sentencing and other matters thereby possessing much influence over any bargaining. Although the court is not allowed to take part in the negotiation itself, it has the ultimate authority to accept or reject the plea depending on its perusal of the propriety of the bargaining.[178]

Thus, towards the 1990s, or even before, the U.S. Congress attempted to introduce regulations involving plea bargaining,[179] presumably to reduce

Comment [mec9]: citing fn 91.

Comment [mec10]: See if this is the same with PHL

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de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

170. *Id.*

171. Palmer, *supra* note 134, at 520.

172. *See* Palmer, *supra* note 134, at 520-21.

173. Palmer, *supra* note 134, at 521. A defense attorney who is paid a flat fee will necessarily be agreeable to disposing of the case more quickly. Otherwise, he is also interested in managing his case load.

174. *Id.*

175. SUBIN, ET AL., *supra* note 11, at 132.

176. *Id.* at 132 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 6.1 (b) (3d ed. 1993)).

177. SUBIN, ET AL., *supra* note 11, at 133 (citing FED. R. CRIM. P. 11 (e) (1) & CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 175.1 (2d ed. 1987)).

178. SUBIN, ET AL., *supra* note 11, at 133.

179. *Id.* at 131.

the inequities existing in the process. For example, the power of judges to employ wide discretion in sentencing was sought to be reduced.[180]

E. Conviction of the Innocent

Logically, the criminal justice system assumes that an innocent defendant will not enter into bargaining and plead guilty; it is assumed that such defendant will be exonerated by the court.[181] Nevertheless, plea bargaining arrangements can actually result in the conviction of an innocent person.[182] This may be due to the elements of coercion present in bargaining, that is, for example, pre-trial detention and overcharging.[183] Moreover, it is possible that an innocent person will sometimes plead guilty because, notwithstanding his innocence, the probability of conviction may be great.[184] This is particularly true with such defendants who are risk-averse.

Comment [mec12]: Citing fn 76, 77.

The fact of the matter is that no trial system is perfect in its objective of ascertaining truth.[185] It can be quite difficult to predict how the trial court will rule on a particular case.[186] The situation can even get worse if the investigation process is also flawed or otherwise corrupted. In short, the imperfections of the criminal justice system make possible the social harm of convicting innocent defendants.

F. Withdrawal

Generally, it is the defendant who has the prerogative of withdrawing his plea of guilt. In a plea bargaining arrangement, however, there are other considerations.

In the U.S., plea bargains are, in general, construed according to the principles of Contract Law.[187] On the side of the government, the plea agreement must be respected to maintain the integrity of the plea.[188] The difference with our Rules is that in the U.S., the prosecution may make promises in a wide variety of matters.[189] This discretion would include

180. *Id.*

181. *See* Hessick & Saujani, *supra* note 159, at 201.

182. *See* Palmer, *supra* note 134, at 519.

183. *Id.*

184. Hessick & Saujani, *supra* note 159, at 201.

185. *Id.*

186. *See* Hessick & Saujani, *supra* note 159, at 201.

187. 27 Am Jur. POF 2d 133 § 1 (Westlaw, 2010) (citing U.S. v. Leniear, 568 F.3d 779 (9th Cir. 2009) (U.S.)).

188. 27 Am Jur. POF 2d 133 § 1 (U.S.) (citing U.S. v. Bullcoming, 579 F.3d 1200 (10th Cir 2009) (U.S.)).

189. *Id.* § 3.

matters of sentencing, ranging from a reduction in prison terms to a promise to recommend that the sentence be served in a specific penal institution.[190] In our jurisdiction, the only promise sanctioned is the allowance of a plea of guilt to a lesser offense. Thus, when the twin consent requirements to such a bargain have been properly obtained, and the trial court approves the defendant's plea of guilt, such court and the prosecution must abide by the agreement, unless of course there is valid ground to hold that the bargain was void or defective, in which case the trial court should have the authority to withdraw its approval and have the accused re-arraigned.

V. CONCLUSION

As was hopefully shown, several issues attend the use of plea bargaining as a vehicle towards an efficient criminal justice system. Nevertheless, our Rules on the matter have not been fully developed.

There is nil statistical data which would show how rampant plea bargaining is being conducted in criminal cases in the Philippines. Studies on the matter have been rather scant, too. But the recent issues on plea bargaining may well have marginally informed the public that it is a legal reality. After all, it is sanctioned by our Rules, however minutely.

It may be time to at least explore the possibility of expanding our Rules on plea bargaining. To the Author's mind, it will be far more disadvantageous to refuse to adopt regulatory sanctions for its use. Any expansion of the plea bargaining rules, however, must be conducted with caution. The interplay of the following must at least be considered: the rights of an accused; the efficiency of our investigative procedures and personnel; criminality rates; government resources; the rights of an offended party; and the right of the State to vindicate wrongs.

190. *Id.*