Towards a Participative Criminal Justice System: Exploring Multilateral Consent in Plea Bargaining Agreements in the Philippines

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I. INTRODUCTION

> *We would have all such offenders so cut off: and we give express charge that, in our marches through the country, there be nothing compelled from the villages, nothing taken but paid for; none of the French upbraided or abused in disdainful language. For when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner.*
>
> — William Shakespeare[1]

Every nation has a sovereign right and responsibility to rid society of criminals.[2] Criminal sanctions are seen as intrinsic mechanisms to deal with localized violence and breaches of peace.[3] It has been stated that "[c]rime and delinquency are potent threats to society's existence."[4] In other words, without domestic peace and security, neither individual nor society will survive.[5] In a world of criminality and lawlessness, the processes of criminal prosecution and punishment are imbued with public interest.[6]

Yet criminal prosecution is not cheap to either the government or the taxpayers. A 2016 study revealed that the economic costs in prosecuting,

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1. WILLIAM SHAKESPEARE, KING HENRY V, act 2, sc. 6.

2. *See* People v. Santiago, 43 Phil. 120, 124 (1922). The Court stated that "each State has the authority, under its police power, to define and punish crimes and to lay down the rules of criminal procedure." *Id.*

3. *See* United States v. Pablo, 35 Phil. 94, 100 (1916). The Court held —

   > The right of prosecution and punishment for a crime is one of the attributes that by a natural law belongs to the sovereign power instinctively charged by the common will of the members of society to look after, guard and defend the interests of the community, the individual and social rights and the liberties of every citizen and the guaranty of the exercise of his rights.

   Id.

4. Manuel G. Co, *The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Philippine Criminal Justice System*, *in* RESOURCE MATERIAL SERIES NO. 81 149 (2010).

5. Harald Hoffding, *State's Authority to Punish Crime*, 2 J. CRIM. L. & CRIMINOLOGY 691, 694 (1912).

6. Seyyed Jafar Es-haghi & Mahdi Sheidaeian, *Public Interest in Criminal Procedure and Its Challenges: An Attitude toward Iranian Criminal Law*, 9 J. POL. & L. 1, 4-5 (2016).

defending, and resolving crimes are steep.[7] For instance, in the United States (U.S.), the cost of prosecuting crimes ranges in the following ballpark figures: U.S.$22,000 to U.S.$44,000 for homicide; U.S.$2,000 to U.S.$5,000 for rape and sexual assault; U.S.$600 to U.S.$1,300 for robbery; U.S.$800 to U.S.$2,100 for aggravated assault, U.S.$200 to U.S.$600 for burglary, U.S.$300 to U.S.$600 for larceny or theft, and U.S.$200 to U.S.$400 for motor vehicle theft.[8] Multiplied with the number of perpetrators and the number of counts per perpetrator, these figures suggest that justice comes with a hefty price tag.[9]

From 1999 to 2000 in England and Wales alone, the estimated economic cost of crime and criminal prosecution amounted to a staggering £60 billion.[10] This cost does not even factor in social costs attributable to criminal behavior, such as fear of crime, descension in quality of life, and overall impact on national security and the business sector's confidence.[11] Consequently, any reasonably well-functioning and organized judicial system will crumble or fall in atrophy when confronted with a deluge of cases filed or pending in its courts.

In the Philippines, the mounting economic and social costs of crime are catching up with the cumulative inefficiency of prosecutorial, judicial, and penal systems to take legal action against and administer the incarceration of criminal offenders.[12] Historically, the yearly clearance rate for all levels of Philippine courts, between 1994 and 1998, fell from 50.7% of pending cases to 45.7%.[13] In a 2017 report by the Supreme Court,[14] case monitoring system data revealed an upward trend of cases filed and backlogs in all stages of the

7. Priscillia Hunt, et al., *The Price of Justice: New National and State-Level Estimates of the Judicial and Legal Costs of Crime to Taxpayers*, 42 AM. J. CRIM. JUST. 231, 250 (2017).

8. *Id*.

9. *See id*.

10. SAM BRAND & RICHARD PRICE, THE ECONOMIC AND SOCIAL COSTS OF CRIME 5 (2000).

11. *See id*. at 17, 23, & 36.

12. *See* Rosemary Hunter, *Reconsidering 'Globalisation': Judicial Reform in the Philippines*, LAW TEXT CULTURE, Volume No. 6, Issue No. 1, at ★5-6 (2002).

13. *Id*. at ★7.

14. Supreme Court, The Judiciary Annual Report 2017, *available at* https://sc.judiciary.gov.ph/files/annual-reports/SC_Annual_17.pdf (last accessed Nov. 30, 2020).

judicial process.[15] Although there is a sharp incidence of clearance and accomplishment rates of old backlogs in lower courts, the fresh inflow of cases negatively influences courts' disposition rates.[16]

Social psychologist Albert Bandura suggests that humans, in the wake of adversity, commit to conscious self-regulation and monitoring in organizational behavior and decision-making when attempting to attain a goal or standard.[17] In criminal prosecution, self-regulation plays a vital role by allowing all parties to assist in the administration of justice by "settling" criminal prosecutions during pre-trial.[18] Olga S. Demko and others posit that the "institute of plea bargain" functions as a feature of legal regulatory development, doctrinally as a "deal with justice," or practically a "deal with the investigation," wherein all parties enter into a "pre-trial cooperation agreement."[19] Indeed, the country's criminal justice system's pattern in resorting to plea bargains is alive and around. For all parties, plea bargaining agreements breed abbreviation of otherwise litigious and lengthy trials, as well as promote acceleration of the correctional or punitive process through more lenient sentences.[20]

Principally, the process of plea bargaining comprises the "exchange of official concessions [in exchange] for [an accused's] act of [confession]."[21] Based on Philippine jurisprudence, 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."[22]

Yet despite the prevalent view that plea bargains are essentially compromises or agreements, the likelihood of a hard and fast interpretation that it must bear the prior consent or conformity of all parties, without the trial court's direct proposition or insistence, leaves much to be desired.

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15. *Id.* at 12-15.

16. *Id.*

17. Albert Bandura, *Social cognitive theory of self-regulation*, 50 ORG. BEHAV. & HUM. DECISION PROCESSES 248, 250 (1991).

18. *See* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 118, § 1 (a).

19. Olga S. Demko et al., *Institute of Plea Bargain: Features of Legal Regulation*, 10 J. POL. & L. 187, 190 (2017).

20. *See* Brady v. United States, 397 U.S. 742, 752 (1970).

21. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3 (1979).

22. *See* Daan v. Sandiganbayan (Fourth Division), G.R. Nos. 163972-77, 550 SCRA 233, 240 (2008).

This Article will discuss the central theme of consent, emanating from all parties, as a primary feature in plea bargaining arrangements. Part II will examine the historical references which laid the progeny for modern-day plea bargaining agreements, emphasizing the role of pre-colonial judicial mechanisms in relation to acts of penance and community-based compromises akin to plea bargains. Part III will discuss how plea bargaining has helped trace the contours of the contemporary justice system, its practicability to criminal prosecution and punishment, and its textural complexions constituting classical and constitutional contracts. Part IV will discuss consent as the dominant feature in these plea discussions, and the significance of prosecutorial discretion and consent in plea bargaining agreements sans the compulsion or coercion of the trial court. Finally, the Article will discuss the importance of consent from the standpoints of the accused, the offended party or victim, and the approval of the trial court. In the end, the Article will conclude that the coupling of pluralistic consents renders plea bargaining as a pragmatic multi-party pre-trial agreement.

II. HISTORICAL UNDERPINNINGS OF PLEA BARGAINING

A. Ancient Religious Texts and Traditions

While Alschuler suggests that the early patterns of plea bargaining began with the inception of common law "prior to the Norman conquest of England[,]"[23] there is mounting evidence that plea bargaining existed earlier than is commonly thought.[24]

Ancient religious literary references reveal plea bargaining as a prehistoric tool of criminal prosecution. For the Christian and Jewish religious persuasions, the concept of plea bargaining was adopted in a narrative as early

23. Alschuler, *supra* note 21, at 7 (citing HENRY ADAMS, ET AL., ESSAYS IN ANGLO-SAXON LAW 285-88 (1876)). During this period, the "confession" was believed to be a method of meriting conviction. Yet, an examination of early common-law treatises reveals no reference of guilty pleas or confessions of guilt, as these were extremely rare during the medieval period. Alschuler, *supra* note 21, at 7 (citing 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO JUDICIAL PRACTICE 260 (1827)).

24. Malcolm M. Feeley, *Perspectives of Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 200 (1979) (citing Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515, 524 (1975); Jay Wishingrad, *The Plea Bargain in Historical Perspective*, 23 BUFF. L. REV. 499, 500 (1974); & Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563 (1978)).

as the book of Genesis, in the story of Cain and Abel.[25] After Cain attacked and murdered his brother Abel in a field, the Lord asked Cain where his brother was, to which the latter retorted, "Am I my brother's keeper?"[26] When prodded, Cain admitted to killing his brother and pleaded for a lighter punishment, urging the Lord to banish him instead and to eternally become a "restless wanderer of the earth," such that anyone who finds him may kill him.[27] Acquiescing to his "plea," the Lord commanded that Cain be banished from Eden and he would eventually live in the land of Nod, east of Eden.[28]

Early Sanskrit texts, such as the *Dharamśāstras,* make reference to modes of penitence and self-purification similar to modern plea bargaining agreements.[29] In the Vedic period, *Prāyaśchitta* was an alternative to incarceration, serving as a corrective measure of self-atonement through the confession of one's guilt.[30] During the post-Vedic Period, plea bargaining became customary specifically in the Mauryan empire, where it was practiced through the conciliation of parties, and in the Mughal empire, where the accused in a homicide or murder situation is required to give recompense or blood money to next of kin of deceased victim.[31]

B. Pre-Hispanic Philippine Judicial System

In pre-colonial Philippine society, judicial structures and rules, albeit unsophisticated in form, were already in place and passed on orally from generation to generation.[32] The pre-Spanish judicial system was largely founded on "customs, usages[,] and tradition."[33] As the social strata of the pre-colonial Filipinos existed within a three-segment totem pole of classes (the

25. *Genesis* 4:1-18 (New International).

26. *Genesis* 4:9.

27. *Genesis* 4:13.

28. *Genesis* 4:16.

29. Harshvardhan Jain & Mayank Rautela, Overview of Plea Bargaining in India, at ⋆3, *available at* http://dx.doi.org/10.2139/ssrn.3151302 (last accessed Nov. 30, 2020).

30. *Id.*

31. *Id.*

32. Supreme Court, History, *available at* http://sc.judiciary.gov.ph/387 (last accessed Nov. 30, 2020).

33. *Id.*

maginoo or *datu*, the *timawa* or freemen, and the *alipin* or slaves),[34] penalties in criminal prosecutions also varied in relation to both the offender's or the offended party's social status.[35] The concepts of sentence bargaining and the downgrading of penalties as alternatives to incarceration have been found to exist in the prosecution of various crimes:

(1) Trespassing into a house, especially that of a village chief at night, carried a tougher penalty than otherwise committed to a person of lower social class.[36] The offender would be "tortured in an attempt to find out if another [local] chief [from another] town sent him."[37] "If he admitted that this was the case, he [would be] enslaved [by his captors] and the person who sent him [would be] condemned to death."[38] Alternatively, payment of fine would release him from enslavement.[39]

(2) In the case of murder, offenders are commonly condemned to death, however, the sentence may be commuted if the offender agrees to be enslaved by the deceased's "father, children or nearest relative[s]."[40] Assuming more than one malefactor committed the crime, commutation would be had if all of the accused pay the deceased's next of kin the price of a slave; and "[i]f they could … not do this, they[,] too, bec[o]me slaves."[41] In Pampanga, when one local village chief is killed in another town, the deceased village "chief's friends and relatives [ ] go to war [with] the offending town."[42] If the local village chief of the town responsible for the murder is killed during the ensuing war,

34. Paul A. Dumol, *Civics and the Law: Building Nationhood*, PHILJA JUD. J., Jan.-June 2007, at 58.

35. Malcolm Mintz, *Crime and Punishment in Pre-Hispanic Philippine Society*, INTERSECTIONS: GENDER, HISTORY AND CULTURE IN THE ASIAN CONTEXT, Aug. 2006, at ⋆31.

36. *Id*. at ⋆20.

37. *Id*.

38. *Id*.

39. *Id*. (citing Miguel de Loarca, *Relación de las Islas Filipinas*, *in* 5 THE PHILIPPINE ISLANDS, 1493-1989 185 (Emma Helen Blair & James Alexander Robertson eds. 1903-1909)).

40. Mintz, *supra* note 35, at ⋆21.

41. *Id*.

42. *Id*.

enmity would end and the conflict "would be considered settled."[43] To end localized warring of tribes, local chiefs of other villages may attempt to reconcile opposing sides, "asking that [ ] large sum[s] of money ... be paid [by the responsible village] as [ ] fine."[44] Half of the proceeds would go to the deceased local village chief's family and half would be shared by the village chief/s "who brokered the [compromise] ... [and] the freemen (*timáwa*) of the [deceased village chief's] village."[45] During the pre-colonial period, the death penalty was a common sentence especially in heinous crimes such as robbery and murder, which, however, was frequently commuted to enslavement, payment of fines, or lashing.[46]

(3) In case of robbery or theft, the value of the items stolen will determine the seriousness of the offense.[47] For petty theft, the offender shall return the stolen item or its value in gold and pay a fine.[48] An unpaid fine could result in enslavement, whipping, or captivity in the pillory or stocks.[49] In case of serious theft, penalties were harsher, sometimes by death.[50] Oftentimes, death penalty was commuted by the enslavement of the offender or his children and household members.[51] Rarely would a chief or *datu* accused of serious theft end up as a slave as he could afford the recompense or fine.[52] When theft is committed by a slave, restitution may be made by his master, or the slave may be delivered to the owner of the offended party to be lashed.[53]

43. *Id.*

44. *Id.*

45. *Id.*

46. Mintz, *supra* note 35, at ⋆21

47. *Id.* at ⋆16.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Mintz, *supra* note 35, at ⋆16-17.

53. *Id.* at ⋆17.

C. Middle Ages

In Europe, perhaps the most notable form of guilty plea occurred when Saint Joan of Arc, after having fought English control late in the Hundred Years' War, conceded to the ecclesiastical court's offer of leniency in exchange of her plea.[54] This concession "demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation."[55] When Joan, however, subsequently retracted her guilty plea, the court ordered that she be burned at the stake.[56]

Renaissance England enacted a statute in 1485, which allowed the State to commence prosecutions on unlawful hunting before the justice of peace.[57] The statute also authorized the justice to adjudge convictions for summary offenses if the accused entered a guilty plea and allowed prosecution if he denied the charge.[58] Prior to the English Civil War, from 1558 to 1625, an estimated 5,000 indictments at the Home Circuit were entered, which allowed confessing defendants to enjoy altered sentences and enabled defendants to enjoy the benefit of clergy (i.e., cases are tried in ecclesiastical courts instead of secular courts).[59]

D. Modern Period

In 1692, guilty pleas took a turn for the worse during the Salem witch trials when persons accused of witchcraft "were told that they would live if they confessed but would be executed if they did not."[60] The witch trial magistrates encouraged guilty pleas, in exchange for information on the identity of other "witches" in the community.[61] By pleading guilty, many of the accused eluded execution.[62] Peculiarly, in modern day Central African Republic,

54. *See* VITA SACKVILLE-WEST, SAINT JOAN OF ARC 319-30 (1936).

55. Alschuler, *supra* note 21, at 41.

56. *Id.*

57. *Id.* at 16.

58. *Id.* (citing JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 70 (2013 ed.)).

59. Alschuler, *supra* note 21, at 16-17 (citing J.S. Cockburn, *Trial By the Book?: Fact and Theory in the Criminal Process, 1558-1625*, *in* LEGAL RECORDS AND THE HISTORIAN (J. Baker ed. 1978)).

60. Jon'a F. Meyer, Plea Bargaining, *available at* https://www.britannica.com/topic/plea-bargaining#ref1251382 (last accessed Nov. 30, 2020).

61. *Id.*

62. *Id.*

witchcraft trials still exist, with a guilty verdict usually carrying a heavy penalty without the possibility of appeal.[63] The judgment, however, may be tempered with a modest sentence upon a guilty plea.[64]

In the early days of common law, English commentaries found a scarcity of guilty pleas in criminal prosecutions.[65] However, in 1743, Stephen Wright, who was prosecuted for robbing a surgeon at gunpoint, expressed during trial his intention to admit guilt to save the court the trouble of conducting trial and pleaded the jury to recommend commutation of death penalty.[66] Subsequently, the trial court informed him that the court could not take notice of his admission of guilt, and the jury could not make such a favorable recommendation on his behalf.[67] As such, Wright agreed to continue with the trial.[68]

In the U.S., "[t]he first recorded evidence of plea bargaining ... dates back to 1749 in colonial Massachusetts, when a prosecutor reduced the initial charge of burglary to a simple theft in return for guilty pleas by [ ] three defendants[.]"[69]

In the 1804 case of *Commonwealth v. Battis*,[70] the Massachusetts Supreme Court passed upon the voluntariness of the guilty plea of an accused who was indicted for raping and killing a 13-year old girl.[71] When the accused retracted his guilty plea, the court directed not to record the same.[72] When the charge was again read to the accused the second time, he again pleaded guilty,

63. Davide Lemmi & Davide Lemmi, *In Pictures: The witch hunts of Bangui*, ALJAZEERA, Mar. 24, 2020, *available at* https://www.aljazeera.com/indepth/inpictures/witch-hunts-bangui-200315083615224.html (last accessed Jan. 4, 2021).

64. Graeme Wood, *Hex Appeal*, ATLANTIC, June 2010, *available at* https://www.theatlantic.com/magazine/archive/2010/06/hex-appeal/308103 (last accessed Nov. 30, 2020).

65. Alschuler, *supra* note 21, at 8 (citing FERDINANDO PULTON, DE PACE REGIS ET REGNI 184 (1609)).

66. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 20 (2003).

67. *Id.*

68. *Id.*

69. ROBERT M. REGOLI & JOHN D. HEWITT, EXPLORING CRIMINAL JUSTICE: THE ESSENTIALS 270 (2008).

70. Commonwealth v. Battis, 1 Mass. 72, 1 Will. 72 (1804) (U.S.).

71. *Id.* at 72-73.

72. *Id.* at 73.

prompting the trial court to "examine[ ], under oath, the sheriff, the jailer, and the justice, ... as to the sanity of the [accused.]"[73] Satisfied, the trial court entered a judgment against the accused.[74]

After the American Civil War, plea bargaining was increasingly seen in appellate court reports.[75] In the 1865 case of *Swang v. State*,[76] the Tennessee Supreme Court ruled that a guilty plea entered through fear and official misrepresentations, and in ignorance of accused's rights, may be reversed, stating that

> [t]he Courts would be slow to disregard the solemn admissions of the guilt of the accused, made in open Court, by plea, or otherwise; but when it appears they were made under a total misapprehension of the prisoner's rights, through official misrepresentation, fear or fraud, it is the duty of the Courts to allow the plea of guilty, and the submission, to be withdrawn, and to grant to the prisoner a fair trial, by an impartial jury.[77]

In *People v. McCrory*,[78] the California Supreme Court weighed in on the silence of the accused when asked about the voluntariness of his guilty plea.[79] On the day of the trial, the accused moved for a continuance due to the absence of the defense's material witness.[80] During the next setting, his material witnesses were absent again.[81] For this reason, the accused's attorneys withdrew his plea of not guilty and moved to enter a guilty plea for second-degree murder.[82] "[T]he [c]ourt, turning to the side of the ... [accused and his attorneys], asked if the [accused consented to the plea,]" to which the defense attorneys replied that he did.[83] The Supreme Court of California, on appeal, ruled that "[a] plea of guilty can in no place be put in, except by the defendant himself, in open [c]ourt[,]"[84] arguing that

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73. *Id.*

74. *Id.*

75. Alschuler, *supra* note 21, at 19.

76. Swang v. State, 42 Tenn. 212 (1865) (U.S.).

77. *Id.* at 214.

78. People v. McCrory, 41 Cal. 458 (1871) (U.S.).

79. *Id.* at 459.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *McCrory*, 41 Cal. at 460.

> when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly, and mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated, the [c]ourt should be indulgent in permitting the plea to be withdrawn.[85]

By the 1920s, data from criminal courts across the U.S. revealed an increasing dependency on guilty pleas in case dispositions.[86] Despite criticism, the practice of plea bargaining had become integral and deeply rooted in criminal justice and administration.[87] In 1925, 90% of criminal convictions were obtained through guilty pleas.[88] By the 1930s, these figures were at 77% of all felony convictions.[89] A decade later, statistics were at 86%.[90]

E. Contemporary Period

Upon the conclusion of World War II, resolutions owing to plea bargains accounted for "80[%] of all criminal cases in [U.S.] federal courts[.]"[91]

By 1965, only 27% of indictments as originally crafted actually proceeded to trial, while the rest were plea bargained.[92]

In 1972, Jerry C. Jolley suggested that plea bargaining had become a "permanent fixture in [the U.S.] legal system to the extent that at present, the courts cannot operate without it."[93] Studies at that time revealed that as much

85. *Id*. at 462.

86. Alschuler, *supra* note 21, at 26.

87. *Id*. at 26–27.

88. *Id*. at 27 (citing AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS PART I 56 (1934)).

89. Alschuler, *supra* note 21, at 33.

90. *Id*. (citing U.S. Department of Commerce Bureau of the Census, Judicial Criminal Statistics (data from 1933 through 1945)).

91. Jeffrey Q. Smith & Grant R. Macqueen, *Going, Going, But Not Quite Gone*, JUDICATURE, Volume No. 101, Issue No. 4, at 28 (citing Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV, Nov. 20, 2014, *available at* https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty (last accessed Nov. 30, 2020)).

92. Alschuler, *supra* note 21, at 33–34 (citing REPORT ON PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 243 tbl. 5 (1966)).

93. Jerry C. Jolley, *Plea Bargaining and Plea Negotiation in the Judicial System*, 8 KAN. J. SOCIO. 65, 65 (1972).

as 75% to 95% of all criminal cases do not proceed to a jury trial as they are settled via plea bargains.[94]

On account of the "passage of federal sentencing guidelines in the mid-1980s," fewer cases in the U.S. stood trial.[95] By 2000, only 6% of all criminal cases went through trial; by 2010, the figures went down to 3%.[96]

As of 2018, plea bargaining in the Philippines finds growing relevance, particularly in drug cases, where almost 25% of the accused's admissions were acquired through guilty pleas from the accused.[97] Clearly, the relative ease, cost-efficiency, and mutuality of advantages available to both parties influence the notoriety and acceptance accorded to plea bargaining as part and parcel of Philippine criminal justice system.

III. CONFESSIONS FOR CONCESSIONS: HOW PLEA BARGAINING INFLUENCES THE CRIMINAL JUSTICE SYSTEM

Fundamentally, a plea bargain agreement must have the following elements: "(1) the defendant's decision not to assert his innocence[,] and (2) a systemwide expectation that such cooperative defendants will ultimately receive less severe sentences than those who demand a formal adversarial determination of guilt."[98]

Plea bargaining denotes informal discussions "looking toward an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favorable sentence recommendation by the prosecutor."[99] Customarily, these deals are completed either through a "brief conversation in the hallways of a courthouse," or through "a series of elaborate

94. *Id.* at 67.

95. Smith & Macqueen, *supra* note 91, at 28.

96. *Id.* (citing Rakoff, *supra* note 91).

97. Dangerous Drugs Board, 2018 Statistics, *available at* https://www.ddb.gov.ph/45-research-and-statistics/434-2018-statistics (last accessed Nov. 30, 2020). The exact figure is 24.89%. *Id.*

98. Thomas W. Church Jr., *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509, 511-12 (1979).

99. Jolley, *supra* note 93, at 66 (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967)).

conferences in the course of weeks in which facts are thoroughly discussed and alternatives carefully explored."[100]

In *Blackledge v. Allison*,[101] the U.S. Supreme Court ruled that "only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades, it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges."[102] While plea bargain negotiations are typically made between the prosecution and defense attorneys at the inception of the case, parties are subsequently required by law to present the terms of the plea bargain to the trial court, such that the latter may determine the voluntariness of the parties to the agreement and approve the same.[103] In doing so, these deals step into the daylight, and its terms and conditions become public record.

Despite the unappealing nature of plea bargaining to onlookers outside the criminal justice system, Robert E. Scott and William J. Stuntz touted the process as a "street bazaar" where the "idea of criminal punishment" is dealt with.[104] Several issues concerning plea bargains include: (1) the practicality afforded to the parties by plea bargaining; (2) the nuances in the "bargaining" activity that shape the adversary criminal process; and, finally, (3) its nature as compromise under both contract and constitutional law.

A. The Practicality in Plea Bargaining

The pragmatism of plea bargains in criminal prosecutions cannot be overemphasized. While critics point out that the system of plea bargaining is flawed, disastrous, and must be outlawed,[105] its champions refer to it as a

100. Jolley, *supra* note 93, at 66 (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 333 (1968)).

101. Blackledge v. Allison, 431 U.S. 63 (1977).

102. *Id.* at 76.

103. Lynch v. Overholser, 369 U.S. 705, 732 (1962) (J. Clark, dissenting opinion).

104. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

105. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1979, 1980 (1992).

"necessary evil."[106] Whatever might be the case, plea bargaining remains a handy fixture in criminal prosecutions as a state-sanctioned judicial practice. Judge G. Thomas Eisle quipped that "without plea bargaining, the wheels of justice would grind to a halt and that efficient administration of the courts requires the use of plea agreements."[107] It has also led Scott and Stuntz to conclude that plea bargaining "is not some adjunct to the criminal justice system; *it is the criminal justice system*."[108]

Although authorities observe that the process of plea bargaining may be comparable to a compromise or a simple contract, Easterbrook admits this analogy is "far from perfect."[109] Prosecutorial and judicial practice exhibit that the so-called mutuality of advantages flows not from a contractual standpoint only, but as a matter of necessity, stating that

> [p]lea bargains are preferable to mandatory litigation — not because the analogy to contract is overpowering, but because compromise is better than conflict. *Settlements of civil cases make both sides better off; settlements of criminal cases do so too*. Defendants have many procedural and substantive rights. By pleading guilty, *they sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered*. Rights that may be sold are more valuable than rights that must be consumed, just as money (which may be used to buy housing, clothing, or food) is more valuable to a poor person than an opportunity to live in public housing.
>
> Defendants can use or exchange their rights, whichever makes them better off. So plea bargaining helps defendants. Forcing them to use their rights at trial means compelling them to take the risk of conviction or acquittal; risk-averse persons prefer a certain but small punishment to a chancy but large one. Defendants also get the process over sooner, and solvent ones save the expense of trial. Compromise also benefits prosecutors and society at large. In purchasing procedural entitlements with lower sentences, prosecutors buy that most valuable commodity, time. With time they can prosecute more criminals.[110]

For the accused, the result is always the same — an entry of a guilty judgment, albeit on a reduced charge and penalty. For the prosecution and

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106. Nancy McDonough, *Plea Bargaining: A Necessary Evil*, 2 U. ARK. LITTLE ROCK L. REV. 381, 381 (1979).

107. *Id*. at 386 (citing United States v. Griffin, 462 F.Supp. 928, 932 (1978)).

108. Scott & Stuntz, *supra* note 104, at 1912 (emphasis supplied).

109. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974 (1992).

110. *Id*. at 1975 (emphases supplied).

the trial court, a guilty plea saves the government the time, costs, risks, and negative externalities of a protracted trial.[111] Meanwhile, plea bargaining also caters to the general peace, as the "public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings."[112] Scott and Stuntz further elucidate on the swapping of concessions in plea bargaining, to wit —

> The parties to these settlements trade various risks and entitlements: the defendant relinquishes the right to go to trial (along with any chance of acquittal), while the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible. The resulting bargains differ predictably from what would have happened had the same cases been taken to trial. Defendants who bargain for a plea serve lower sentences than those who do not. On the other hand, everyone who pleads guilty is, by definition, convicted, while a substantial minority of those who go to trial are acquitted.[113]

The attraction towards plea bargaining as a sensible alternative to post-indictment trial is striking not to the prosecution and trial courts alone, whose case dockets will be substantially reduced, but also to the accused. Church sums up the plight of the accused by examining his situation in a post-indictment scenario where he is faced with wagering chances, thusly —

> Any criminal defendant faces unpleasant alternatives: he can either plead guilty or defend himself at trial. The overriding motivation for most defendants confronting this choice is to minimize post-conviction sanction. In a plea bargaining situation the defendant must weigh the sentence he expects will follow a trial conviction, discounted by the possibility of acquittal, against the sentence expected after a guilty plea. The greater the guilty plea sentence discount, the more attractive that alternative becomes — at least for those defendants with some significant chance of being convicted. ... Criminal trials produce one 'winner' and one 'loser.' As the uncertainty of that result increases, so does the incentive for both sides to find some mutually satisfactory accommodation in which the benefits of success at trial are discounted by the possibility of failure.[114]

As a rule, once a guilty plea has been accepted by both parties and approved by the trial court, the determination of the accused's guilt is deemed final. Exceptionally, an accused may withdraw his guilty plea and instead accept a "conditional" plea bargain, where he or she accepts a guilty plea but

111. Santobello v. New York, 404 U.S. 257, 260-61 (1971).

112. *Blackledge*, 431 U.S. at 71.

113. Scott & Stuntz, *supra* note 104, at 1909.

114. Church, *supra* note 98, at 513-14.

makes a reservation to appeal on a separate legal matter (e.g., violation of right to speedy trial).[115]

Meanwhile, the prominence of plea bargaining in criminal prosecutions inevitably bankrolls the administrative efficiency of prosecutorial, judicial, and correctional systems.[116] In *Santobello v. New York*,[117] it was established that judicial dispositions following plea bargaining negotiations trigger a whittled down timeline, which in normal circumstances are subject to inertia in trial setting and judicial bureaucracy, stating —

> Disposition of charges after plea discussions is not only an essential part of the process, but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.[118]

B. The "Bargaining" in Plea Bargaining

Arguments in favor of plea bargaining may be explained using the Pareto efficiency paradigm in welfare economics, that is, "it is impossible to make one party better off without making someone worse off."[119] Otherwise stated, parties to a plea bargaining agreement tend to benefit one way or another, without necessarily putting another at a disadvantage.[120] After all, these negotiations are unmistakably a "bargain" in itself. As Easterbook earlier said, "[s]ettlements of civil cases make both sides better off; settlements of criminal cases do so too."[121]

If plea bargains are outlawed, the "distributional justice" consistent with the practice of exchanging lawful concessions may be disturbed, such that

115. Doggett v. United States, 505 U.S. 647, 650-52 (1992).

116. *Santobello*, 404 U.S. at 260-61.

117. Santobello v. New York, 404 U.S. 257 (1971).

118. *Id.* at 261.

119. Indranee Dutta, Social Sector Development: Issues of Efficiency and Equity, at 15, *available at* http://dlkkhsou.inflibnet.ac.in/bitstream/123456789/138/1/KN1.pdf (last accessed Nov. 30, 2020).

120. *Blackledge*, 431 U.S. at 71.

121. Easterbrook, *supra* note 109, at 1975.

some criminal defendants may be better off and some may be worse off.[122] If this is the case, prosecutors, with the limited time and resources they have, may tend to choose "bigger fish" to spend more time and energy in prosecuting. Smaller criminals are then subjected to the rigors of trial with haphazard examination and evidence-gathering. Unmistakably, plea bargaining agreements are more than just classical contracts. The substance and principle of plea bargaining transcends its contractual nature as constitutional contracts.

Church warned that this brand of "bargain justice" may very well "result in excessively lenient sentences," especially in courts with swamped court dockets.[123] Similarly, Church poses a policy analysis question whether plea bargaining would dilute the deterrence functions of criminal statues, especially

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122. Scott and Stuntz, *supra* note 104, at 1932. The authors speculate that if plea bargaining is prohibited, the following assumptions are possible —

> *First*, the number of trials would increase sharply. Something in the neighborhood of ninety percent of cases now lead to pleas; if even one third of those are the result of bargaining, prohibiting plea bargaining would quadruple the number of criminal trials.
>
> *Second*, the error rate of trials would rise. This follows from the first assumption. Trials are elaborate and costly affairs. Any reform that involves a several hundred percent increase in their number must necessarily involve economizing on the process, at least as long as one assumes a constant level of expenditures on the system. Reducing the process, in turn, logically implies increasing the rate of error.
>
> *Third*, the total number of convictions would fall, probably substantially. Abolition of plea bargaining would raise the average cost of prosecution because it would increase the percentage of cases that go to trial (and even slimmed-down, cheaper trials will be more expensive than bargained pleas). Given constant resources, this would mean a drop in the number of convictions.
>
> *Fourth*, the average sentence would be both higher than the current average bargained-for sentence and lower than the current average post-trial sentence. This last proposition follows from the fact that the number of convictions would decline.

Id. (citing Thomas Church, Jr., *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y REV. 377, 383 & 390 (1976); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1062-63 & 1083 (1984); & Richard P. Adelstein, The Negotiated Guilty Plea: A Framework for Analysis, 53 N.Y.U. L. REV. 783, 802 (1978)).

123. Church, *supra* note 98, at 519.

when "bargained" sentences are less severe.[124] As a response thereto, Philippine judicial reforms in relation to plea bargains, particularly in drug cases, were rolled out shortly after the ruling in *Estipona v. Lobrigo*,[125] when the Supreme Court adopted a Plea Bargaining Framework in Drugs Cases through A.M. No. 18-03-16-SC.[126] The Court has also cautioned its judges to abide by the framework allowing only "acceptable plea bargain agreements" in drug cases.[127] On the other hand, the Department of Justice (DOJ), in a circular dated 21 November 2017, likewise issued its own guidelines in plea bargaining for drug cases to guide prosecutors.[128]

These pieces of judicial and administrative directives limit prosecutorial consent in entering into plea bargains, as well as curb judicial discretion in approving the same, by specifying the "acceptable plea bargain" according to specific violations under Republic Act No. 9165. Overall, by providing reforms in the plea bargaining agreements, unfettered access to plea bargaining as knee-jerk reactions to all illegal drugs cases may be subdued through an institutional framework that requires it to be sparingly applied according to the guidelines set by the Supreme Court and the DOJ. With these reforms, policymakers and practitioners steer towards a "shepherded" court-sanctioned regulation in criminal justice.

Many critics challenge the legitimacy of plea bargaining, advocating that its practice endangers the adversary process in criminal prosecution.[129] Some say that plea bargaining reduces crime and punishment down to a level of "bureaucratic justice" that "replac[es] combative trial."[130] Feeley, nevertheless, advocates that there is a direct relationship between adversariness

124. *Id.*

125. Estipona v. Lobrigo, G.R. No. 226679, 837 SCRA 160 (2017).

126. *See* Office of the Court Administrator, Plea Bargaining Framework in Drugs Cases, OCA Circular No. 90-2018, at 2 (May 4, 2018).

127. Edu Punay, *SC tells court judges to be prudent on TROs*, PHIL. STAR, July 22, 2019, *available at* https://www.philstar.com/headlines/2019/07/22/1936795/sc-tells-court-judges-be-prudent-tros (last accessed Nov. 30, 2020).

128. *See* Department of Justice, Amended Guidelines on Plea Bargaining for Republic Act No. 9165 Otherwise Known as the "Comprehensive Dangerous Drugs Act of 2002", Department Circular No. 27 (June 26, 2018).

129. Malcolm M. Feeley, *Plea Bargaining at the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 339 (1982).

130. *Id.* at 339-340.

in criminal prosecution and negotiations stemming from plea bargains.[131] One trait is co-dependence with the other, motioning that "[p]lea bargaining is not a cooperative practice that undermines or compromises the adversary process; rather the opportunity for adversariness has expanded in proportion to, and perhaps as a result of, the growth of plea bargaining."[132] On an organizational investigation in the ecosystem of actors in criminal prosecutions, the meteoric rise of plea bargaining in the last few decades has fostered cooperative relationships between defense attorneys and prosecutors, thereby minimizing and economizing, but not eliminating, the adversariness of the process.[133]

Feeley supports the theory that if policymakers and judicial administrators were to "abolish" plea bargains, it will reappear in "slightly different forms" within our judicial system.[134] McDonough also agrees that if the plea bargains are abolished, it will only drive the practice underground.[135] In the end, this would obliterate the oversight and supervisory functions of the trial court judge to make inquiries as to the voluntariness of guilty pleas, a reverse Pareto optimality where one party (i.e., the accused) becomes worse off than the other (i.e., prosecution).

The transactional nature of offering guilty pleas in exchange for testimony against another criminal defendant in the same or separate criminal case has also been heavily criticized. According to Alschuler, "[b]argaining for information may also pose a lesser risk to the accuracy of criminal judgments. When a defendant is offered lenient treatment for testifying against another, [the defendant] may testify falsely to provide the prosecutor with what he wants to hear."[136]

With all due respect to Alschuler, the dangers of perjury in exchange for plea bargains and information about other criminals may prove remote — a tempest brewed in a teacup. It is submitted, however, that should an accused bargain for leniency in exchange for information and decide to perjure himself or herself, the trial court, which ultimately hears his or her testimony, would have to exercise the rigors of the judicial determination of credibility. This is since jurisprudence upholds that the trial court is in the best position "to observe the demeanor of witnesses and ... to discern whether they are telling

131. *Id.* at 340.

132. *Id.*

133. *Id.* at 341.

134. *Id.* at 342.

135. McDonough, *supra* note 106, at 398.

136. Alschuler, *supra* note 21, at 4.

the truth."[137] Moreover, an earlier guilty plea founded on a false statement or information does not excuse the accused from subsequent or separate prosecution for perjury.

Another likely remedy in precluding the chance of offering perjured statements in a criminal prosecution against another defendant is by passing the buck of the "regulatory role" of lawyerly behavior to both prosecutor and the defense counsel. Under Philippine law, the defense counsel and prosecutor are ethically bound to "do no falsehood, nor consent to the doing of any in court;"[138] lest they be held administratively accountable.[139] McMunigal recommends that the defense counsel must dissuade his or her client from offering perjured statements as part of a plea bargain agreement, stressing that it is illegal, immoral, and inimical to his interest.[140] On the other hand, the prosecutor, prompted with information or reasonably convinced that the accused is attempting to offer a false statement in exchange for leniency in his or her case, may withdraw the plea bargain agreement, move that the trial court maintain harsher punitive action or sentence against him or her, and refuse to call him or her as a witness in another criminal case where his or her "cooperative" testimony is requested.[141] "The prosecutor is free to accept or reject [ ] an offer of cooperation[,]"[142] especially so in a situation where he may be likely to abet the commission of perjury.

Another fix to this hypothetical problem was illustrated in *Ricketts v. Adamson*,[143] such that when an accused maintains a perjured statement in open court, contractual deterrents may be drawn beforehand that "should the defendant ... testify untruthfully ... , then [the] entire agreement is null and void and the original charge will be automatically reinstated [against him or her]."[144]

137. People v. Dayaday, G.R. No. 213224, 814 SCRA 414, 422 (2017).

138. *See* CODE OF PROFESSIONAL RESPONSIBILITY, canon 10, rule 10.01.

139. *See id*.

140. Kevin C. McMunigal, *Defense Counsel and Plea Bargain Perjury*, 7 OHIO ST. J. CRIM. L. 653, 657 (2010).

141. *Id*. at 658.

142. *Id*. at 655.

143. Ricketts v. Adamson, 483 U.S. 1 (1987).

144. *Id*. at 4.

C. Plea Bargains as Compromise

1. Plea Bargaining as Classical Contracts

The birth or perfection of a contractual relation starts when the parties agree upon the essential elements of the contract: (1) consent, (2) object, and (3) cause.[145] "[C]onsummation occurs when the parties [accomplish] or perform the terms [and stipulations] agreed upon in the contract, [leading to its] ... extinguishment[.]"[146] Plea bargaining is perfected at the moment the parties come to agree upon its terms and conditions, and thereafter, concur in the essential elements thereof.[147] In this relation, the "contracting parties may establish such stipulations, clauses, terms, and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy."[148]

When interpreting and treating provisions in a plea bargaining agreement, the application of contract law in its construction cannot be set aside.[149] Put differently, both criminal law and contract law behave in interoperable circles when it comes to construing and executing plea bargaining agreements. Ultimately, the choice of all parties to plea bargain is supported by "norms of efficiency and autonomy."[150]

145. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 1318 (1950).

146. Sagun v. ANZ Global Services and Operations (Manila), Inc., G.R. No. 220399, 801 SCRA 243, 252 (2016) (citing C.F. Sharp & Co., Inc. v. Pioneer Insurance & Surety Corporation, 682 Phil. 198, 207 (2012)).

147. *See* CIVIL CODE, art. 1318.

148. CIVIL CODE, art. 1306.

149. *See Blackledge,* 431 U.S. at 75 n. 6.

150. Scott & Stuntz, *supra* note 104, at 1913.

Cicchini opines that for purposes of enforcing plea bargain agreements, the "best and most comprehensive framework" is contract law.[151] In many respects, plea bargains cover one or more promises between the criminal defendant and the government.[152] This application is well supported in *United States v. Robison*[153] and *Hatcher v. United States*,[154] where plea bargaining was classified as "contractual in nature, and subject to standards of contract law."[155] As such, when it comes to the interpretation and enforcement of these contracts, the traditional principles of contract law are at play.[156]

When the terms of a plea bargaining agreement are ambiguous, "their meaning rests on a determination of the intent of the parties which, as a question of fact"[157] is reviewable by the courts.[158] Modern remedial law has also placed a finetune to plea bargains similar to a "contract review" phase in commercial engagements through the oversight and supervisory functions of the trial court in passing upon plea bargain deals.[159]

Plea bargain deals are perfected by mere consent.[160] Parties to plea bargaining agreements consent to receiving concessions in the form of

151. Michael D. Cicchini, *Broken Government Promises: A Contract Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 159 (2008). Note that Cicchini even opines that "contract law is the superior body of law for the enforcement of plea bargains in part because it is broader in scope and offers greater protection than the Constitution." *Id.* at 173 (citing William M. Ejzak, *Plea Bargains and Nonprosecution Agreements: What Interests Should Be Protected When Prosecutors Renege?*, 1991 U. ILL. L. REV. 107, 135 (1991)).

152. *Id.* at 173.

153. United States v. Robison, 924 F.2d 612 (6th Cir. 1991).

154. Hatcher v. United States, Case No. 05-CV-74194, Crim. No. 01-CR-80361 (E.D. Mich. Jun. 28, 2006).

155. *Id.* at 8.

156. United States v. Lukse, 286 F.3d 906, 909 (6th Cir. 2002).

157. United States v. Ricks, Case No. 09-5040, at 4 (6th Cir. 2010) (citing *Lukse*, 286 F.3d at 909).

158. *Id.*

159. *See* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 116, §§ 1-5.

160. *See* Heirs of Fausto C. Ignacio v. Home Bankers Savings and Trust Company, G.R. No. 177783, 689 SCRA 173, 182 (2013) (citing Swedish Match, AB v. Court of Appeals, G.R. No. 128120, 441 SCRA 1, 18 (2004)). *See also* CIVIL CODE, art. 1319.

leniency to sentencing and the abbreviation of criminal prosecution by not going to trial.[161]

The object of plea bargaining does not only relate to the exchange of concessions; plea bargaining is also a form of risk-aversion technique in managing opportunity costs.[162] Scott and Stuntz maintain that

> [a]s with the typical executory contract, the parties to plea bargains do not actually trade the entitlements per se; instead they exchange the risks that future contingencies may materialize *ex post* that will lead one or the other to regret the *ex ante* bargain. Before contracting, the defendant bears the risk of conviction with the maximum sentence while the prosecutor bears the reciprocal risk of a costly trial followed by acquittal. *An enforceable plea bargain reassigns these risks*. Thereafter, the defendant bears the risk that a trial would have resulted in acquittal or a lighter sentence, while the prosecutor bears the risk that she could have obtained the maximum (or at least a greater) sentence if the case had gone to trial. Since it is difficult to know *a priori* which party enjoys the comparative advantage in risk reduction, a policy of contractual autonomy is the only way that parties can reduce the social losses that result from uncertainty and frustrated expectations.[163]

Some critics, however, contend that the parties do not stand on the same footing in plea bargains.[164] Plea bargains have been heavily criticized for pervading prosecution-defense information asymmetry,[165] understandably as the State employs the full plenitude of its resources and authority over criminal defendants. Some commentators intimate that when coming to the

161. *Estipona*, 837 SCRA at 190.

162. Scott and Stuntz, *supra* note 104, at 1914.

163. *Id.* at 1914-15 (citing Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1273 (1980) & Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2007 & 2054 (1987)) (emphasis supplied).

164. *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 70 (2012) (citing Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 749–50 (1983)).

165. Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1988).

negotiation table, criminal defendants often get the short end of the stick[166] and that plea bargains are nothing short of adhesion contracts.[167]

However, it has been sufficiently contradicted that most plea bargain agreements have little to no resemblance to adhesion contracts, as they are "individually dickered" and are not usually filled with complex, legalese terms.[168] Often than not, plea bargains are negotiated between prosecutors and defense lawyers who are habitual "repeat players[.]"[169] As a result, plea bargaining is more susceptible to poor legal representation rather than confusion or error in textual phrasing of agreements.[170]

Another important discussion of the contractual nature of plea bargains is the cause or consideration of the obligation. Under Philippine law, cause or consideration in onerous contracts is "the promise of a thing or service by the other[;]"[171] such that when contracts are entered without a cause or through an unlawful cause, they produce no effect whatsoever.[172] As mentioned earlier, the cause or consideration of plea bargaining is the mutual exchange of advantages for both parties.

It must be noted that the utter lack or absence of a cause or consideration, on one hand, is wholly different from failure of consideration in plea bargaining.[173] The term *failure of consideration* is "the failure to execute a promise, the performance of which has been exchanged for performance by the other party."[174] As such, failure of consideration arises when one or both

166. Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2070 (2000). Blank suggests that "waivers of additional rights as part of the plea agreement have come under fire as 'contracts of adhesion.'" *Id.* (citing United States v. Mezzanatto, 513 U.S. 196, 216 (1995)).

167. Norton Resources and Development Corporation v. All Asia Bank Corporation, G.R. No. 162523, 605 SCRA 370, 380-81 (2009). A contract of adhesion is defined as "one in which one of the parties imposes a ready-made form of contract, which the other party may accept or reject, but which the latter cannot modify." *Id.*

168. Scott and Stuntz, *supra* note 104, at 1923.

169. *Id.* at 1922.

170. *Id.* at 1922-23.

171. CIVIL CODE, art. 1350.

172. *Id.* art. 1352.

173. *See* Benson v. Andrews, 138 Cal. App. 2d 123, 132 (Cal. Ct. App. 1955) (U.S.).

174. Bliss v. California Cooperative Producers, 30 Cal. 2d 242, 248 (1947) (U.S.).

parties commit a willful breach of the prestation or promise.[175] This is similar to the Philippine law concept of "breach of contract."[176] The net effect of failures of consideration or breach in contractual promise in plea bargains was thoroughly discussed in *Puckett v. United States*,[177] where the U.S. Supreme Court ruled that "when the consideration for a [plea bargaining] contract fails — that is, when one of the exchanged promises is not kept — we do not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; we say that the contract was broken."[178] Upon finding of the existence of contractual breach, "the party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely ... ; but that is not the same thing as saying the contract was never validly concluded."[179]

In several instances, courts have applied contract or commercial law concepts into the construction of plea bargains, such as for instance, reciprocal mistake of fact[180] and the doctrine of "frustration of purpose."[181] In several

175. *Id.*

176. *See* Guanio v. Makati Shangri-la Hotel and Resort, Inc., G.R. No. 190601, 641 SCRA 591, 598 (2011) (citing Cathay Pacific Airways, Ltd. v. Spouses Vasquez, G.R. No. 150843, 399 SCRA 207, 219 (2003)). The case defines a breach of contract as "the failure without legal reason to comply with the terms of a contract. It is also defined as the [f]ailure, without legal excuse, to perform any promise which forms the whole or part of the contract." *Id.*

177. Puckett v. United States, 556 U.S. 129 (2009).

178. *Id.* at 137.

179. *Id. See also* Taliaferro v. Davis, 216 Cal. App. 2d 401, 411 (1963) (U.S.). The California Supreme Court ruled that "[f]ailure of consideration does not [ ] vitiate the contract from the beginning; until rescinded or terminated a contract once in effect remains in effect." *Id.* (citing Scheel v. Harr, 27 Cal. App. 2d 345, 352 (1938) (U.S.)).

180. United States v. Bradley, 381 F.3d 641, 648 (7th Cir. 2004).

181. United States v. Bunner, 134 F.3d 1000, 1004 (10th Cir. 1998). In that case, the Court decided that

> [w]hen two parties enter into a contract, each has an object or purpose for which he joins the transaction. ... These purposes form the basis of the agreement, absent which neither party would consent to be bound. Occasionally, however, through no fault of either party, a reasonably unforeseeable event intervenes, destroying the basis of the contract and creating a situation where performance by one party will no longer give the receiving party what induced him to enter into the contract in the first place. Although the supervening event does not render performance

cases, however, courts refused to transport contract law concepts such as promissory estoppel,[182] "severability, impracticability and [the doctrine of] *quantum meruit*"[183] in the construction of plea bargaining agreements. Thus, limitingly, while contract law applies *by analogy* to plea bargaining agreements, it cannot be said that "the panoply of contract law can be appropriately transported, in toto, into criminal law."[184]

2. Plea Bargaining as "Constitutional Contracts"

While plea bargains, by and of themselves, are classical contracts, an accused risks so much more.[185] In commercial contracts, the concessions or benefits that parties trade pertain mainly to property rights. Yet, in plea bargains, the accused gambles his or her liberty and life.

In one case, it has been observed that "[the U.S. Court of Appeals, Ninth Circuit has] frequently analyzed plea bargains on contract principles."[186] When construing and enforcing plea bargain agreements, "the interests at stake and the judicial context in which they are weighed require that something more than contract law be applied."[187] Following *Santobello*, it may

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> impossible, one party's performance becomes virtually worthless to the other. When this occurs, the aggrieved party is discharged from performing under the doctrine of frustration of purpose.

Id.

182. *See* Anderson v. Wainwright, 446 F. Supp. 763, 765 (1978) (U.S.). The District Court for the Middle District of Florida concluded that "a variant of promissory estoppel is not available to prevent an invalid plea proceeding from being a nullity, without legal effect." *Id*.

183. *See* State v. Reed, 75 Wn. App. 742, 744 (Wash. Ct. App. 1994) (U.S.). The Court of Appeals of Washington ruled —

> A defendant who enters into a plea bargain has a right, analogous to a contract right, to require the prosecutor to adhere to the terms of the agreement ... Contract law doctrines such as severability, impracticability and *quantum meruit*, all relied on by Reed, would apply to valid agreements between a defendant and the prosecuting attorney only by analogy, if they have any application at all.

Id.

184. *Id*.

185. *See* Boaz Sangero, *Safety from Plea-Bargains' Hazards*, 38 PACE L. REV. 301, 302 (2018).

186. United States v. Barron, 172 F.3d 1153, 1158 (9th Cir. 1999).

187. *Id*.

be said that the constitutional fiat of "due process [ ] is the source of the defendant's constitutional rights implied in plea agreements."[188] In other words, the due process clause in the Constitution provides a mantle of protection that imports the values in, or builds interoperability of, contract law into the process of plea bargaining.[189]

In *Moore v. Michigan*,[190] the accused, a 17-year old man with limited education, pled guilty to murder.[191] During trial, he expressed that he did not want counsel, and was subsequently sent to solitary confinement at hard labor for life without parole, which is the maximum sentence for his charge.[192] Later, he filed a motion for new trial, claiming that his sentence was null and void as the guilty plea was made without the assistance of counsel.[193] His motion was denied by the trial court and affirmed by the Michigan Supreme Court.[194] On appeal, the U.S. Supreme Court concluded that the accused's "plea of guilty was invalidly accepted as obtained without the benefit of counsel and that he did not waive his right to counsel."[195] The Court further added "[w]here the right to counsel is of such critical importance as to be an element of [d]ue [p]rocess ... , a finding of waiver is not lightly to be made."[196]

188. Julie A. Lumpkin, *The Standard of Proof Necessary to Establish that a Defendant has Materially Breached a Plea Agreement*, 55 FORDHAM L. REV. 1059, 1066-67 (1987) (citing United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986); United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir. 1981); Cooper v. United States, 594 F.2d 12, 18 n.8 (4th Cir. 1979); State v. Yoon, 66 Haw. 342, 347-48, 662 P.2d 1112, 1115 (1983) (U.S.); State v. Rivest, 106 Wis. 2d 406, 413-14, 316 N.W.2d 395, 399 (1982) (U.S.); & Austin v. State, 49 Wis. 2d 727, 736, 183 N.W.2d 56, 61 (1971) (U.S)). *See also* Colin Miller, *Plea Agreements As Constitutional Contracts*, 97 N.C. L. REV. 31, 40 (2018).

189. Miller, *supra* note 188, at 40.

190. Moore v. Michigan, 355 U.S. 155 (1957).

191. *Id.* at 156.

192. *Id.*

193. *Id.*

194. *Id.* at 156-57.

195. *Id.* at 165.

196. *Moore*, 355 U.S. at 161.

The requisite of personal inquiry by judges in ensuring that all guilty pleas were made with voluntariness and understanding of the nature of the plea was tested in *Boykin v. Alabama*.[197] When the accused pled guilty to five counts of common law robbery, the judge did not ask any question concerning the accused's plea, and the accused also was not able to address the court.[198] Under state law, the prosecution had to present its evidence, which it did, and the accused's counsel cross-examined prosecution's witnesses in a rather cursory manner.[199]

Subsequently, the jury found the accused guilty and sentenced him to death for each indictment.[200] Upon automatic appeal, the state supreme court reviewed the sentences and rejected the petitioner's claim that the sentence was cruel and unusual.[201] On appeal to the U.S. Supreme Court, the accused's sentence was reversed, finding that the accused's constitutional rights were violated.[202] The court noted that a "plea of guilty is more than a confession ... it is itself a conviction[.]"[203] As such, when an accused confesses wrongdoing, the judge must have made a "reliable determination on the voluntariness issue that satisfies the constitutional rights of the defendant."[204] Adding to this judicial requirement, the court ruled that the trial court must have "ma[de] sure [the accused] has a full understanding of what the plea connotes and of its consequence."[205]

197. Boykin v. Alabama, 395 U.S. 238 (1969).

198. *Id.* at 239.

199. *Id.* at 240.

200. *Id.*

201. *Id.*

202. *Id.* at 242-43.

203. *Boykin*, 395 U.S. at 242.

204. *Id.* (citing Jackson v. Denno, 378 U.S. 368, 387 (1964)).

205. *Boykin*, 395 U.S. at 244.

Justice William J. Brennan Jr., in his dissenting opinion in *Ricketts v. Adamson*,[206] floated the idea that plea bargaining agreements are more than just classical contracts, they are imbued with a constitutional character, stating that

> [t]his [c]ourt has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. It is also clear, however, that commercial contract law can do no more than this, because *plea agreements are constitutional contracts*. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the [d]ue [p]rocess [c]lause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

206. *Ricketts*, 483 U.S. at 13 (J. Brennan, dissenting opinion). In this case, Adamson was

> charged with first-degree murder in connection with [the] death [of a reporter from Arizona Republic.] Shortly after his trial commenced, ... [Adamson] and the state prosecutor [entered into a plea bargain where the latter agreed for the former] to plead guilty to the charge of second-degree murder[, in exchange for his testimony] against two other individuals — [ ] Dunlap and [ ] Robison — who were [also] allegedly involved in [the] murder [of the reporter.]

Id. at 4 (majority opinion). The plea bargain agreement contained the stipulation that should Adamson fail to testify in any court, the "entire[ty of the] agreement is null and void and the original charge [against him] ... automatically reinstated." Thereafter, Adamson testified against both Dunlap and Robison, who were convicted of first-degree murder. On appeal, Dunlap and Robison's convictions were reversed and remanded for retrial. The state prosecutor sought Adamson's testimony again during retrial. Adamson's lawyer subsequently informed the prosecutor that his client's "obligation to provide testimony under the plea bargain had [already been] terminated [as he] was already sentenced." Believing that Adamson was in breach of the agreement, the prosecutor filed a new information against Adamson for first-degree murder. Adamson filed a motion to quash on the ground of double jeopardy, but was denied by the trial court. The Arizona Supreme Court vacated his earlier conviction and reinstated the original charge, holding that Adamson violated the provisions of the plea bargain. On appeal, the U.S. Supreme Court ruled that the reinstatement of Adamson's original charge for first-degree murder did not violate his right against double jeopardy, since his breach of plea "removed the double jeopardy bar." The court

...

> Of course, far from being a commercial actor, Adamson is an individual whose 'contractual' relation with the State is governed by the Constitution. The determination of Adamson's rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the [d]ue [p]rocess [c]lause.[207]

Not long after *Ricketts*, lower courts began to apply the constitutional contract paradigm in construing plea bargain agreements. In *United States v. Papaleo*,[208] the court held that "a plea bargain, standing alone, is without constitutional significance ... [h]owever, when the court approves a plea of guilty pursuant to a plea agreement, thus depriving a defendant of his or her liberty without a trial, the constitution is implicated."[209]

The court, however, in a bid to tie contract and constitutional law at the hip in construing plea bargains, added that

> [a] contractual approach to plea agreements ensures not only that constitutional rights are respected, but also that the integrity of the criminal process is upheld as plea agreements are respected as 'pledges of public faith' [ ] ... to the extent such an agreement satisfies general requirements of contract law and does not violate constitutional principles, statutes, or public policy[.][210]

In *Unites States v. Van Thournout*,[211] the U.S. Court of Appeals (Eighth Circuit) declared that while plea bargains are basically contractual and are ordinarily governed by contract law, "[they are] more than merely [ ] contract[s] between two parties, however, and must be attended by constitutional safeguards ... ."[212]

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found no merit that Adamson was in good faith, as he "knew that[,] if he breached the agreement[,] he could be retried" and he chose to seek a "construction of the agreement in the [State] Supreme Court," rather than to testify at the retrial." *Id.* at 4-6 & 9-10.

207. *Id.* at 16 & 20-21 (J. Brennan, dissenting opinion) (emphasis supplied).

208. United States v. Papaleo, 853 F.2d 16 (1st Cir. 1988).

209. *Id.* at 18 (citing Mabry v. Johnson, 467 U.S. 504, 507-08 (1984)).

210. *Id.* at 19.

211. United States v. Van Thournout, 100 F.3d 590 (1996).

212. *Id.* at 594 (citing United States v. Britt, 917 F.2d 353, 359 (8th Cir. 1990)).

Plea bargaining, while gaining popularity as a conventional tool in most criminal prosecutions, must be married into the constitutional rights of the accused. In *Missouri v. Frye*,[213] the U.S. Supreme Court emphasized the constitutional right to effective counsel in all "critical" stages of the criminal proceedings, including plea bargaining agreements.[214] The court added that

> the reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.[215]

As such, the failure of the defense counsel to inform his client of the written plea offer from the prosecutor before the deal expired was rendered violative of the accused's right to effective counsel.[216]

Careful consideration, however, must be taken in construing plea bargains as "constitutional contracts." With the acceptance of a guilty plea, the accused sheds some constitutional protections that he or she would have otherwise enjoyed had he or she chosen to go through the route of proving his innocence in a trial.[217]

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his[or her] (1) privilege against compulsory self-incrimination, (2) his[or her] right to trial by jury, and (3) his[or her] right to confront his accusers. For this waiver to be valid under the [d]ue [p]rocess [c]lause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'[218]

IV. PROSECUTORIAL DISCRETION AND CONSENT IN PLEA BARGAINING

Philippine law is an eclectic justice system where east meets west. Its origin, framework, and personality are an amalgamation of both civil and common law systems,[219] as well as a hybrid of Roman, Anglo-American, and Islamic

213. Missouri v. Frye, 132 U.S. 134 (2012).

214. *Id.* at 140.

215. *Id.* at 144.

216. *Id.* at 150.

217. *Boykin*, 295 U.S. at 243 (citing McCarthy v. United States, 394 U.S. 459, 466 (1969)).

218. *Id.*

219. Petra Mahy & Jonathan P. Sale, *Classifying the Legal System of the Philippines: A Preliminary Analysis with Reference to Labor Law*, 32 PHIL. J. LABOR & INDUSTRIAL

law.[220] As a result, some Philippine procedural laws are borrowed concepts shaped by colonial past that continuously meld into native modern Filipino understanding and experience.

A. Bargaining in the Philippines and its American Roots

The present concept of plea bargaining found in the Rules of Court has its roots in American criminal procedure.

In the U.S., the plea of *nolo contendere*[221] appeared in as early as 1926 in *Hudson v. United States*,[222] and was later codified into the U.S. Federal Rules of Criminal Procedure.[223]

RELATIONS 1, 3-4. This intermingling of legal regimes (particularly with the influence of common law) is evident in *United States v. Abiog*, where the Philippine Supreme Court ruled that "what we really have, if we were not too modest to claim it, is a Philippine common law influenced by the English and American common law, the *derecho comun* of Spain, and the customary law of the Islands and builded on case law precedents." United States v. Abiog, 37 Phil. 137, 141 (1917).

220. University of Melbourne, Southeast Asian Legal Research Guide: Introduction to the Philippines & its Legal System, *available at* https://unimelb.libguides.com/c.php?g=402982&p=5443355 (last accessed Nov. 30, 2020).

221. Latin for "I do not wish to contend."

222. Hudson v. United States, 272 U.S. 451 (1926). In this case, the court ruled that —

> Undoubtedly a court may, in its discretion, mitigate the punishment on a plea of *nolo contendere* and feel constrained to do so whenever the plea is accepted with the understanding that only a fine is to be imposed. But such a restriction made mandatory upon the court by positive rule of law would only hamper its discretion and curtail the utility of the plea.

Id. at 457.

223. *See* 1944 U.S. FEDERAL RULES OF CRIMINAL PROCEDURE, rule 11. The provision states:

> (1) *In General*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.
> (2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

The foundations pertaining to modern Philippine procedural law can be traced back to the American influence in our colonial history.[224] In the 1940s, while the Philippines was still a part of the American Commonwealth, the Supreme Court developed its own Rules of Court. As early as the Commonwealth era, consent of the prosecution was already an indispensable requirement to the validity of plea bargains. The 1940 Rules of Court (particularly Section 4, Rule 114 therein) provided clear footing on the necessity of consent from the prosecutor (locally called "fiscal"), the accused or defendant, and the court. Thus, "[t]he defendant, *with the consent* of the court and *of the fiscal*, may plead guilty of any lesser offense than that charged which is necessarily included in the offense charged in the complaint or information."[225]

While the incidences of guilty pleas in our system have made judicial recognition, the frequency of these deals does not ipso facto validate all plea bargains.[226] Yet, in *Brady v. United States*,[227] the U.S. Supreme Court passed

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

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

Id. rule 11 (a).

224. *See* H. Lawrence Noble, *Development of Law and Jurisprudence in the Philippines*, 8 A.B.A. J. 226, 226 (1922), where the author traced the historical revisions in Philippine procedural law during the American colonial period —

> At first the Philippine Commission and after it the Philippine Legislature, were kept busy in passing a multitude of laws necessary to conform to modern conditions and need of reform in a country revolving from monarchial to republican institutions. In recent years the Legislature has been passing fewer and fewer laws, but the end is not yet. The development of the law and jurisprudence has proceeded evenly on its way and carries great interest with it to the student of comparative law. But little of the Civil Code has been touched, no doubt according to the instruction of President McKinley to the Philippine Commission to change the substantive law of the country as little as possible, but to modify the procedure.

Id.

225. 1940 RULES OF COURT, rule 114, § 4 (superseded 1964) (emphasis supplied).

226. Brady v. United States, 397 U.S. 742 (1970).

227. *Id*. at 753-54.

on the constitutional validity of plea bargaining as a practice and poured emphasis on the "mutuality of advantages" available to both prosecution and defense as a result of these agreements, stating that

> [g]uilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious — his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State, there are also advantages — the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment, and, with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that, at present, well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.[228]

While jurisprudence has laid that the accused has a statutory, but not constitutional, right to bargain,[229] a guilty plea, when accepted by all parties and approved by the trial court, has all the necessary safeguards of the Constitution available to all stages of criminal proceedings.[230] However, when the prosecutor believes that he or she has enough evidence to convict the accused, no constitutional right is infringed if the prosecutor decides to withhold consent to the accused's plea bargain offer.[231]

The *Santobello* decision surmised that plea bargain, at its core, must be voluntary and its essence made known to all parties concerned.[232] There is, however, no legal remedy to compel either party to accept plea bargain offers,

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228. *Id.* at 751-52 (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n. 1 (1966)).

229. Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

230. *See id.* at 560.

231. *Id.* at 561.

232. *Santobello*, 404 U.S. at 261-62.

or to compel the trial court to accept the same.[233] The U.S. Supreme Court held —

> The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion.[234]

Additionally, the court in *Santobello*, citing *Kercheval v. United States*,[235] ruled that "unfairly obtained"[236] guilty pleas ought to be vacated, in that "[s]tate convictions founded upon coerced or unfairly induced guilty pleas have also received increased scrutiny as more fundamental rights have been applied to the States."[237] Necessarily, the term "coerced or unfairly induced guilty pleas" does not only cover guilty pleas made by defense counsels without the consent of the accused, but likewise covers guilty pleas made by the accused made without the consent of the prosecutor and/or the offended party.

The broad powers of the prosecutors in assenting to plea bargains, implicit in their power to direct the management of criminal prosecutions, may not be subject of coercion by the trial court to acquiesce to guilty plea offers.[238] In *People v. Harmon*,[239] it was ruled that the prosecution is not obliged to make plea bargain offers or accept one from the accused.[240] Without the prosecutor's consent, the court may not accept the guilty plea from the accused.[241] It was ruled —

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233. *Id.* at 262. (citing Lynch v. Overholser, 369 U.S. 705, 719 (1962)).

234. *Id.*

235. Kercheval v. United States, 274 U. S. 220 (1927).

236. *Santobello*, 404 U.S. at 264 (citing *Kercheval*, 274 U.S. at 224).

237. *Santobello*, 404 U.S. at 265.

238. *See* Nurallaje Sayre y Malampad v. Xenos, et al., G.R. No. 244413, Feb. 18, 2020, at 20, *available at* https://sc.judiciary.gov.ph/12113 (last accessed Nov. 30, 2020) (J. Leonen, concurring opinion). It was opined that "[a] prosecutor's duty is to prosecute the proper offense based on the sufficiency of the evidence. Consent to a plea of guilty to a lower offense is solely within prosecutorial discretion. Courts do not have the discretion to mandate what offense the prosecution should prosecute." *Id.*

239. People v. Harmon, 181 A.D.2d 34 (1992) (U.S.).

240. *Id.* at 38.

241. *Id.* (citing People v. Perez, 156 A.D.2d 7, 11 (1990)).

> That the prosecutor did not offer defendant the opportunity to plead guilty to a misdemeanor does not, of course, signify misconduct. The People, who are not obliged to make any offer in any case, may set the terms and conditions of their consent to a guilty plea to a lesser charge. In fact, without the prosecutor's consent, the court may not accept a guilty plea to less than the entire indictment. In any event, in light of defendant's rearrest in an apartment in the same building, the prosecutor's refusal to offer a misdemeanor plea appears to have been quite reasonable. In that regard, it should be noted, it is not the judiciary, but the District Attorney, who, as a member of the executive branch of State government, is the constitutional officer charged with the responsibility for prosecuting those who commit criminal offenses within his or her jurisdiction; in that undertaking the District Attorney possesses broad discretion.[242]

Further expounding on the requirement of the prosecution's consent to a plea bargaining offer, *United States v. Kelvin Dockery*[243] is instructive when it concluded that the practice of plea bargaining is principally a matter of prosecutorial discretion.[244] This is since the prosecutor is entitled to refuse a plea bargain by the accused, or having made so in the past, to withdraw it at any time.[245]

It may be reasonably inferred that while *Santobello* prescribes that trial courts may reject a plea bargain entered into by and between the accused and the prosecutor in the exercise of its sound judicial discretion, there is nothing therein that would support an argument that trial court judges may force the hand of the prosecution or the accused, to enter into plea bargain agreements despite their opposition.

Based on the abovementioned rulings, the consent of the prosecution has always been held as a touchstone in the conduct and execution of plea bargaining. No amount of judicial restraint or compulsion may be exercised to oblige the prosecution to enter into plea bargaining agreements if it finds that it is necessary to proceed to trial.

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242. *Harmon*, 181 A.D.2d at 38 (citing People v. Esajerre, 35 N.Y.2d 463, 467 (1974) (U.S.); *Perez*, 156 AD2d at 11; Matter of Gold v. Booth, 79 AD2d 691, 693 (1980) (U.S.); & Matter of Holtzman v. Goldman, 71 N.Y.2d 564, 573 (1988) (U.S.)).

243. United States v. Kelvin Dockery, 965 F.2d 1112 (1992).

244. *Id.* at 1116.

245. *Id.*

B. Development of Philippine Criminal Procedure on Plea Bargaining

The rules on plea bargaining, first enshrined in the 1940 Rules of Court, were slightly amended under Section 4, Rule 118 of the 1964 Rules of Court, which reads —

> Section 4. *Plea of guilty of lesser offense.* — The defendant *with the consent* of the court and *of the fiscal*, may plead guilty of any lesser offense than that charged which is necessarily included in the offense charged in the complaint or information.[246]

Later on, the pertinent provision on plea bargaining was again slightly amended under Section 2, Rule 116 of the 1985 Rules of Criminal Procedure, which reads —

> Section 2. *Plea of guilty to a lesser offense.* — The accused, *with the consent of the offended party and the fiscal*, may be allowed by the trial court to plead guilty to a lesser offense, regardless of whether or not it is necessarily included in the crime charged, or is cognizable by a court of lesser jurisdiction than the trial court. No amendment of the complaint or information is necessary.[247]

After some amendments, the provision pertaining to the consent of the prosecution has been replicated in the 2000 Revised Rules of Criminal Procedure, viz. —

> Section 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 lesser offense after withdrawing his plea of not guilty. No amendment of the complaint or information is necessary.[248]

Tracing the evolution and textual history of Section 2, Rule 116 of the Rules of Court draws attention to the requirement of prosecutorial consent in approving plea bargain offers by the accused.[249] As mentioned, as early as

246. 1964 CRIMINAL PROCEDURE, rule 118, § 4 (superseded 1985) (emphasis supplied).

247. 1985 RULES OF CRIMINAL PROCEDURE, rule 116, § 2 (superseded 2000) (emphasis supplied).

248. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2 (emphasis supplied).

249. Prior to *Estipona*, plea bargaining agreements in drug cases were outlawed. *See* An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Act No. 6425, Otherwise Known as the Dangerous Drugs Act of 1972, as

the 1940 Rules of Court, it is already clear that the consent of the prosecution is an essential ingredient in all plea bargain offers.[250] The same requirement was later carried over to the 1964 Rules and down to the 2000 Revised Rules of Criminal Procedure.[251] Resultingly, the plain meaning of the wordings in the 1940, 1964, 1985, and 2000 Rules deserve exacting weight and is controlling. In other words, the requirement of prosecutorial consent in approving plea bargain offers is clear, plain, and free from ambiguity.

Founded on the broad discretion of the public prosecutor to determine the existence of probable cause and whether the case should be filed in court, the discretion to initiate and/or accept plea bargains also fall within his or her set of prerogatives. In *People v. Villarama, Jr.*,[252] the Supreme Court underscored the right and duty of the prosecutor to exercise full control over the prosecution of criminal actions, which necessarily includes the giving or withholding of consent to plea bargain offers, ruling that

> [t]he provision of Section 2, Rule 116 is clear. The consent of both the Fiscal and the offended party is a condition precedent to a valid plea of guilty to a lesser offense. The reason for this is obvious. The Fiscal has full control of the prosecution of criminal actions. Consequently, it is his duty to always prosecute the proper offense, not any lesser or graver one, when the evidence in his hands can only sustain the former.
>
> It would not also be correct to state that there is no offended party in crimes under [Republic Act No.] 6425 as amended. While the acts constituting the crimes are not wrong in themselves, they are made so by law because they infringe upon the rights of others. The threat posed by drugs against human dignity and the integrity of society is malevolent and incessant. Such pernicious effect is felt not only by the addicts themselves but also by their families. As a result, society's survival is endangered because its basic unit, the family, is the ultimate victim of the drug menace. The state is, therefore, the offended party in this case. As guardian of the rights of the people, the government files the criminal action in the name of the People of the Philippines. The Fiscal who represents the government 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. *Viewed in this light,*

Amended, Providing Funds Therefor, and for Other Purposes [Comprehensive Dangerous Drugs Act of 2002], Republic Act No. 9165, § 23 (2002).

250. *See* 1940 RULES OF COURT, rule 114, § 4.

251. *See* 1964 RULES OF COURT, rule 118, § 4.

252. People v. Villarama, Jr., G.R. No. 99287, 210 SCRA 246 (1992).

> *the consent of the offended party, i.e. the state, will have to be secured from the Fiscal who acts in behalf of the government.*[253]

Again, in 2017, the Supreme Court, in *Estipona v. Lobrigo*, upheld this age-old precedent when it ruled that "the acceptance of an offer to plead guilty is not a demandable right but depends on the consent of the offended party and the prosecutor, which is a condition precedent to a valid plea of guilty to a lesser offense that is necessarily included in the offense charged."[254]

In *Nurallaje Sayre y Malampad v. Xenos, et al.*,[255] the Supreme Court weighed upon the significance of prosecutorial discretion and consent when entering into plea bargain deals.[256] In that case, accused Sayre was charged with sale[257] and possession[258] of illegal drugs, as well as possession of drug paraphernalia.[259] The accused subsequently submitted a proposal for plea bargaining for the lesser offense of Section 12 of Republic Act No. 9165, "without prejudice however to the guidelines on plea bargaining yet to be released by the Supreme Court, whichever is most favorable and beneficial to the accused[.]"[260] Later on, the prosecution filed a comment and counter-proposal to accused's proposal.[261] Essentially, the prosecution agreed to downgrade the penalties on the charges pertaining to the possession of illegal drugs and drug paraphernalia, respectively, but rejected his proposal as regards the charge for sale of illegal drugs.[262] As the parties could not agree on the plea bargain for the sale of illegal drugs charge (violation of Section 5, Republic Act No. 9165), the trial court reset the pre-trial "to afford Sayre

253. *Id.* at 253-54 (citing Vda. de Bagatua, et al. v. Revilla, et al., 104 Phil. 393, 395-396 (1958); People v. Ale, G.R. No. 70998, 145 SCRA 50, 58 (1986); & United States v. Samio, 3 Phil. 691, 696 (1904)) (emphasis supplied).

254. *Estipona*, 837 SCRA at 191.

255. Nurallaje Sayre y Malampad v. Xenos, et al., G.R. No. 244413, Feb. 18, 2020, *available at* https://sc.judiciary.gov.ph/12110 (last accessed Nov. 30, 2020).

256. See *id.* at 16-17.

257. *Id.* at 2. *See also* Comprehensive Dangerous Drugs Act of 2002, § 5 (2002).

258. *Nurallaje Sayre y Malampad*, G.R. No. 244413, at 2. *See also* Comprehensive Dangerous Drugs Act of 2002, § 11.

259. *Nurallaje Sayre y Malampad*, G.R. No. 244413, at 2. *See also* Comprehensive Dangerous Drugs Act of 2002, § 12.

260. *Nurallaje Sayre y Malampad*, G.R. No. 244413, at 3.

261. *Id.* at 5.

262. *Id.*

another opportunity to convince the prosecution to accept his proposal."[263] Again, the prosecution rejected Sayre's plea bargain to downgrade the charge for sale of illegal drugs to possession of drug paraphernalia, since "'any plea bargaining outside the DOJ Circular [No. 27] is not acceptable.'"[264] Unsuccessful at seeking a reconsideration from the trial court, Sayre filed a petition for certiorari and prohibition with the Supreme Court, contending, among others, that the trial court gravely abused its discretion when it failed to apply Office of the Court Administrator Circular No. 90-2018,[265] which he claims is now "incorporated in the Rules of Court."[266]

In rejecting accused Sayre's petition, the Supreme Court ruled that the process of plea bargaining, in essence, requires the

> mutual agreement of the parties and remains subject to the approval of the court. The acceptance of an offer to plead guilty to a lesser offense is not demandable by the accused as a matter of right but is a matter addressed entirely to the sound discretion of the trial court.[267]

Stressing the mutuality and autonomy of parties when entering into plea bargain deals, the Supreme Court ruled that "plea bargaining requires the consent of the accused, offended party, and the prosecutor."[268] Considering the continuing objection expressed by the prosecutor to plea bargain, there was no "'mutually satisfactory disposition of the case' that [could have been] submitted for the [trial] court's approval."[269] Ultimately, the trial court correctly ordered the continuation of the criminal case proceedings "because there was no mutual agreement to plea bargain."[270]

In his separate concurring opinion to the *Sayre* decision, Justice Leonen emphasized the premium ascribed to prosecutorial consent and discretion in entering into plea bargains, stating that —

> The exercise of the court's discretion in allowing the plea to a lesser offense *depends on whether the prosecution actually consents*. In other words, the Rules of

263. *Id*. at 11.

264. *Id*. at 12.

265. *See* OCA Circular No. 90-2018.

266. *Nurallaje Sayre y Malampad*, G.R. No. 244413, at 12.

267. *Id*. at 16 (citing Daan v. Sandiganbayan (Fourth Division), G.R. Nos. 163972-77, 550 SCRA 233, 243 (2008)).

268. *Nurallaje Sayre y Malampad*, G.R. No. 244413, at 16.

269. *Id*. at 17.

270. *Id*.

> Court does not state that the prosecution must consent to a plea deal, it merely tasks the courts to exercise its discretion *after* the prosecution consents to the plea deal.
>
> ...
>
> Control over the prosecution offenses is not within judicial discretion. Just as legislative enactments cannot run counter to this Court's procedural rules, so too should judicial interference not be allowed in prosecutorial decisions.
>
> ...
>
> Be that as it may, the matter of consent to consent plea of guilty to a lesser penalty is solely within the prosecution's discretion, with which courts should not interfere absent any grave abuse.[271]

Justice Zalameda, in his concurring opinion, shares the same view, opining that the *Estipona* ruling did not remove the prerequisite of prosecutorial consent when entering into plea bargains, especially in illegal drugs cases.[272] When the parties finally come to agreement, only then will judicial discretion to approve or deny plea bargains be exercised.[273] He states that —

> In reaching this mutual agreement, the prosecution has sufficient authority to give or withhold its consent. Courts will not interfere with this authority considering that the prosecution has full control over criminal prosecutions. However, once the prosecution and the accused reach a mutual agreement, the discretion to approve or deny the plea bargain now falls under the exclusive domain of the courts, dependent on the circumstances of each case.[274]

Thus, the prosecution's consent in plea bargaining is indispensable before the trial court may dispose of said motions. Without the prosecutor's consent, the court would be acting in a capricious, whimsical, arbitrary or despotic manner, ultimately amounting to grave abuse of discretion.[275]

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271. *Id.* at 22; 23; & 25-26 (J. Leonen, concurring opinion).

272. *Nurallaje Sayre y Malampad v. Xenos, et al.,* G.R. No. 244413, Feb. 18, 2020, at 3, *available at* https://sc.judiciary.gov.ph/12122 (last accessed Nov. 30, 2020) (J. Zalameda, concurring opinion) (citing *Estipona*, 837 SCRA).

273. *Nurallaje Sayre y Malampad v. Xenos, et al.*, G.R. No. 244413, at 6 (J. Zalameda, concurring opinion).

274. *Id.* at 7-8.

275. *See Villarama, Jr.*, 210 SCRA at 255.

V. THREE CAN PLAY THE GAME: CRITICAL IMPORT OF PARTICIPATION OF THE VICTIM, THE ACCUSED, AND TRIAL COURT IN PLEA BARGAINING AGREEMENTS

The process of plea bargaining is a multi-party exercise. It is, for all intents and purposes, an interest-based negotiation that stands on the shoulders of substance, relationships, and good faith in bargaining.[276] This Part will discuss the weight of the consent of the other actors in plea bargains — the victim or offended party and the accused — as well as the role of the trial court judge in passing upon motions for plea bargaining.

Pursuant to the Rules of Criminal Procedure, not only is the prosecutor's consent necessary in entering into plea bargains; what completes the process in plea bargaining is the consent emanating from the accused and the offended party, with the approval of the trial court.[277]

A. Victim or Offended Party's Participation

In the local criminal justice system, victims[278] play a role, albeit in the sidelines, when it comes to rendering justice and punishment.[279] Principally, crimes are the "transgression of state authority, and therefore the full force of the law should be bent forcefully to suppress the danger to the state, protect society and its people, treat and correct violators, deter others, and to vindicate absolute right and moral wrong."[280] Yet, in the Philippine jurisdiction, the offended party or the victims come to court as mere witnesses to the crime. Moreover, victims only have a special interest in the civil aspect of the criminal case.[281]

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276. *Estipona*, 837 SCRA at 189 (citing Parker v. North Carolina, 397 U.S. 790, 809 (1970)).

277. *Villarama*, 210 SCRA at 253.

278. REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 12. The victim or the offended party is defined as "the person against whom or against whose property the offense was committed[.]" *Id.*

279. Except for the crimes of adultery, concubinage, seduction, abduction, acts of lasciviousness, or imputation (libel) of the above-mentioned crimes, all criminal actions may be commenced *de oficio* through a complaint or information under the direction and control of the prosecutor. *See id.* rule 110, § 5.

280. Co, *supra* note 4, at 149.

281. *See* Cu v. Ventura, G.R. No. 224567, 881 SCRA 118, 131 (2018). The Supreme Court ruled that

Exceptionally, in plea bargains, the participation of the victim is chief. A reading of the 2000 Rules would reveal that a victim's participation is not merely relegated as subservient to the interests of the State or the People.[282] In fact, the appearance of the victim is "required" during arraignment for purposes of plea bargaining and the determination of civil liability and other matters requiring his/her presence.[283]

A cost-benefit analysis by Welling investigates the need to give victims their own voice in plea bargaining negotiations.[284] Welling describes a two-pronged concept of victim-participation that involves the victim's rights to information and the right to be present during plea bargain hearings and the victim's right to participate in bargaining.[285] The first set of rights are largely insignificant for the following reasons:

(1) To an extent, the public, including the victim, enjoys the freedom of information since the terms of the plea bargaining agreement become public record when presented to the trial court judge for approval; [286] and

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> the party affected by the dismissal of the criminal action is the People and not the petitioners who are mere complaining witnesses. For this reason, the People are deemed as the real parties-in-interest in the criminal case ... In view of the corollary principle that every action must be prosecuted or defended in the name of the real party-in-interest who stands to be benefited or injured by the judgment in the suit, or by the party entitled to the avails of the suit, an appeal of the criminal case not filed by the People as represented by the OSG is perforce dismissible. The private complainant or the offended party may, however, file an appeal without the intervention of the OSG, but only insofar as the civil liability of the accused is concerned.

Id. at 131-32 (citing Malayan Insurance Company, Inc. v. Piccio, 740 Phil. 616, 622 (2016); Jimenez v. Sorongon, 700 Phil. 316, 324-25 (2012); & Villareal v. Aliga, 724 Phil. 47, 57 (2014)).

282. *See* REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

283. *Id.* rule 116, § 1 (f).

284. Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 301, 305 (1987).

285. *Id.*

286. *Id.* at 305-06.

(2) The right to be present is universally enjoyed as all criminal prosecutions are public hearings.[287]

Of all the rights, what is more decisive is the right to participation of the victim, who has a personal stake in the civil aspect of the criminal case.[288] Welling states that the victim's right to participation is further broken down into two segments —

> The victim has two interests in the plea bargain decision. One interest is financial: the victim is interested in restitution being imposed as part of the sentence. Thus[,] in a charge bargain, the victim wants to insure that the defendant pleads to a charge sufficiently serious to allow restitution; and in a sentence bargain, the victim wants to advocate an award of restitution. The victim's second interest is retribution, or revenge: the victim feels he or she has been violated and that the criminal's punishment should be severe. Therefore, in a charge bargain, the victim would want the defendant to plead guilty to a serious charge, and in a sentence bargain, the victim would want a significant sentence imposed. The victim could protect these interests by participation in the plea bargain.[289]

One good thing that comes out when the victim's participation is taken into consideration is that it allows the prosecutorial and judicial branches to function more effectively in prosecuting current and potential criminal defendants. Welling suggests that

> if victims are not consulted regarding the plea bargain and so feel irrelevant and alienated, they will not cooperate in reporting and prosecuting a crime ... Therefore, making victims feel their contribution is critical, regardless of its actual value, will motivate the victim to continue to report crime and cooperate in the investigation and prosecution.[290]

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287. *Id.*

288. *Id.* at 307.

289. *Id.* at 307-08. (citing Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 136-42 (1984); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 529-42 (1982); Robert C. Davis, et al., *Expanding the Victim's Role in the Criminal Court Disposition Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 498 (1984); & Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 91 & n.282 (1983)).

290. Welling, *supra* note 284, at 308-09.

Welling supposes that when victims' interests are strapped into the agenda of plea bargaining agreements, "[m]ore information [ ] results in better decisions."[291]

In the Philippine jurisdiction and in cases of crimes where an offended party exists, the latter's consent is a constitutive element in entering into plea bargaining agreements.[292] However, what happens when the trial court judge approves a more lenient sentence than is necessary, which the victim does not approve? Giving the victim a cause of action to appeal the sentence would be dangerous for the following reasons:

(1) The victim's participation only concerns the civil aspect of the case. Any appeal that may be instituted by the victim should only touch upon the civil aspect.

(2) Allowing the victim to appeal the plea bargain conviction of the accused would work against the accused's right against double jeopardy.[293]

However, not all is lost for the victim. Welling suggests that instead of giving the victim the right to appeal the plea bargain conviction, "the trial court's denial of [his] right to be heard should be deemed a violation of the code of judicial conduct, and the victim could file a grievance against the trial judge with the appropriate commission."[294]

B. Accused's Participation

While it is first argued that the absence of prosecutorial consent in plea bargains cancels the validity of these deals, the other side of the coin is that without the accused's consent, these unconsented deals could also be nefarious.

From the defense's perspective, an uncounseled and non-consensual guilty plea is dangerous and frowned upon. The U.S. Supreme Court, in *Florida v. Nixon*,[295] held that, as a general rule, a defense lawyer cannot plead guilty for his or her client sans the latter's consent.[296] Citing *Boykin v. Alabama*, the court

291. *Id.* at 308.

292. People v. Dawaton, G.R. No. 146247, 389 SCRA 277, 284 (2002) (citing REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2).

293. Welling, *supra* note 284, at 349 (citing U.S. CONST. amend. V).

294. Welling, *supra* note 284, at 349.

295. Florida v. Nixon, 543 U.S. 175 (2004).

296. *Id.* at 187.

ruled that a guilty plea cannot be deduced from the accused's mere silence, as it must be based on his or her express confirmation and made through his or her own volition.[297] *Nixon* magnifies the significance of consent in plea bargaining as a two-way street for both prosecution and the defense, and with the participation of the offended party, as the case may be.

In *Nixon*, the public defender, during trial, practically conceded the guilt of the accused without his express consent, which the Florida Supreme Court referred to as a "functional equivalent of a guilty plea."[298] Instead of proving his innocence, the public defender focused on acquiring a more lenient sentence for Nixon, citing his troubled childhood, history of mental disability, low IQ, and possible brain damage through the presentation of expert testimony.[299] All throughout the criminal prosecution, the accused was silent or at times absent.[300] Eventually, the jury recommended, and the trial court imposed, the death penalty sentence.[301]

The Supreme Court ruled that a "counsel lacks authority to consent to a guilty plea on a client's behalf ... [because] defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid."[302] Despite the concession of guilt made by the public defender, the accused still enjoys rights accorded to every defendant in criminal trials.[303] The prosecution, even with the "admission of guilt" rendered by the defense, still needs to prove all the elements of the offense with which the accused is charged.[304] Moreover, the accused is still entitled to cross-examine the prosecution witnesses and may attempt to present exculpatory or "exclude prejudicial evidence," as the public defender did in *Nixon*.[305] Even with the accused's "concession of guilt," this does not bar the remedy of an appeal.[306]

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297. *Id.* at 186 (citing *Boykin*, 395 U. S. at 242–43).

298. *Nixon*, 543 U.S. at 185 (citing Nixon v. Singletary, 758 So. 2d 618, 622-24 (2000) (U.S.)).

299. *Nixon*, 543 U.S. at 184.

300. *Id.* at 182.

301. *Id.* at 184.

302. *Id.* at 187-88 (citing Brookhart v. Janis, 384 U.S. 1, 6-7 (1966) & Boykin, 395 U.S., at 242).

303. *Nixon*, 543 U.S. at 188.

304. *Id.*

305. *Id.*

306. *Id.*

In *Nixon*, however, the Supreme Court stood by the reasonableness of the public defender's criminal strategy of conceding his client's guilt, despite the lack of the latter's express consent.[307] The court noted the public defender's act of explaining his proposed trial strategy to Nixon even with the latter's uncooperative behavior.[308] To the court's mind, the public defender

> fulfilled his duty ... by informing Nixon of [his] proposed strategy and its potential benefits. Nixon's characteristic silence each time information was conveyed to him, in sum, did not suffice to render unreasonable [the public defender's] decision to concede guilt and to home in, instead, on the life or death penalty issue.[309]

In a bid to temper the strict rule that counsels must acquire the express consent of their clients when conceding guilt, the Supreme Court pronounced that "[w]hen [a] counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent."[310]

But while *Nixon* prescribes a "quiet revolution" where counsel wields "lawyer autonomy" even without client approval, this practice may be deemed "in potential tension with constitutional norms that vicarious waiver should not be permitted."[311] Consequently, the *Nixon* concession is more of an exception than a general rule when approaching criminal defendants' participation in guilty pleas. As such, "[c]onceding guilt without client's permission should be an unusual last resort. But in some cases, [as in *Nixon*,] it will be the best available chance of obtaining a benefit for the client."[312]

C. Trial Court's Participation

When prompted with a guilty plea from the accused, the trial court has the duty to perform a "plea colloquy" with the accused,[313] which consists of

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307. *Id.* at 189.

308. *Id.*

309. *Nixon*, 543 U.S. at 189.

310. *Id.* 543 U.S. at 192.

311. Gabriel J. Chin, *Pleading Guilty Without Client Consent*, 57 WM. & MARY L. REV. 1309, 1336 (2016).

312. *Id.* at 1342.

313. Danielle M. Lang, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability To Bring Successful Padilla Claims*, 121 YALE L.J. 947, 952 (2012).

advisements and inquiries intended to ensure that the plea was entered into knowingly, voluntarily, and intelligently.[314]

The trial court's participation in considering motions for plea bargaining is purely one of oversight and supervision rather than direct intervention and negotiation. This is so since, primarily, much like any contract or agreement, a plea bargaining offer and acceptance must adhere to the "meeting of the minds" principle in contract law.[315] Offer, regardless of origin, and the resulting consent to enter or execute bargain deals, must emanate from all parties without duress or compulsion.[316] This is evident from the plain wordings in Section 2, Rule 116 of the 2000 Rules of Criminal Procedure.[317]

This is not to say, however, that trial courts are relegated to serve as mere stamping pads in deciding motions for plea bargaining entered by and between the accused, the prosecution, and the offended party, as the case may be. As early as 1978, the Supreme Court in *People v. Kayanan*[318] set the yardstick for the trial court's exercise of this discretion. *Kayanan* limited the trial court's discretion in deciding motions for plea bargaining to inquiries over circumstances with which the plea was premised.[319] Necessarily, a delimitation of the trial court's discretion is important to allay fears that the accused may have been tricked or duped to enter into a plea bargaining agreement to his detriment.[320] The Supreme Court ruled that

> [a] plea of guilty for a lighter offense than that actually charged is not supposed to be allowed as a matter of bargaining or compromise [for] the convenience of the accused. The rules allow such a plea only when the prosecution does not have sufficient evidence to establish the guilt of the

314. In the Philippine jurisdiction, however, the requirement of a "searching inquiry into the voluntariness and full comprehension of the consequences of [a guilty] plea" appears to be only applicable when the accused pleads guilty to a capital offense. *See* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 3.

315. *See* CIVIL CODE, art. 1305.

316. *See* First Philippine Holdings Corporation v. Trans Middle East (Phils.) Equities Inc., G.R. No. 179505, 607 SCRA 605, 611 (2009). The Supreme Court held that "consent is essential to the existence of a contract; and where it is wanting, the contract is non-existent." *Id.*

317. When the parties enter into plea bargaining agreements, it is subject to the allowance or approval of the trial court. *See* REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

318. People v. Kayanan, G.R. No. L-30355, 83 SCRA 437 (1978).

319. *Id.* at 450.

320. *Id.*

> crime charged. Indeed, when such an offer is made, the court is duty bound to inquire carefully into the circumstances on which it is premised.[321]

The participation of trial court judges in approving plea bargains is no remedial innovation. First, judicial participation ensures that criminal defendants, when entering into guilty pleas are fully informed of the nature of the plea and what happens if the criminal prosecution proceeds to trial.[322] Second, judicial participation acts as a buffer or check to the wide latitude of prosecutorial powers, which exists owing to the power asymmetry between prosecution and defense.[323] Judicial participation also shields the criminal defendants from receiving poor criminal defense, as "oversight [to] the defense counsel to make sure he or she is prepared and is not falling below the standard of effective assistance."[324] Lastly, the trial court's participation enriches administrative efficiency in that judicial plea bargaining conferences conducted early on during the prosecutorial process can save the government and the parties resources and time, rather than conducting the same at a later time.[325]

VI. CONCLUSION

In several respects, plea bargaining has become a run-of-the-mill remedy in criminal prosecutions. History teaches that plea bargaining has been in existence for centuries, though encased in other monikers and formats of self-expiation, atonement, and restitution. The layout is unchanged, that is, the aversion of stricter sentences and the grant of leniency in exchange for an admission of guilt.

Consent is the predominant force that occupies the fulcrum of the plea bargaining centrifuge where different actors in the world of criminal prosecution — the accused, the offended party or victim, the prosecution, as well as the trial court judge — pivot. By and through consent, individual autonomies and interests move, gravitate and converge to form understandings that create "mutually satisfactory dispositions," which eventually write *finis* to prosecutions and commence the process of punishment and restoration of the wrongdoer. There is no secret to the incontrovertible success of plea bargains

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321. *Id.*

322. Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective* 76 OHIO ST. L.J. 565, 584-85 (2015).

323. *Id.* at 585.

324. *Id.* at 585-86 (citing Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 319-25 (2013)).

325. *Batra*, *supra* note 322, at 586-87.

other than its guarantee to parsimony, promptness, and practicality. Yet, admittedly, the system of plea bargains is far from perfect. In spite of that, the law is alive and evolving, and rightly so.

Estipona already provided a curtain peek into the give-and-take nature of plea bargains and their constitutionality in illegal drugs cases. While *Sayre* established that a trial court judge does not act without or in excess of jurisdiction or with grave abuse of discretion when he orders the continuation of trial proceedings due to the lack of mutual agreement to plea bargain from both the accused and the prosecution,[326] a definitive Philippine ruling that the trial court, on its own proposition or insistence, may not drag any party on its feet to enter into plea bargains, even with their opposition, is well-anticipated.[327] Only then will judicial institutions truly imbibe the meaning of plea bargains as instruments of consensual and participative justice that transpierces the interests of all.

326. *Nurallaje Sayre y Malampad*, G.R. No. 244413, at 17.

327. In his separate concurring opinion to the *Sayre* decision, Justice Zalameda motioned that —

> Courts cannot forcefully insist upon any of the parties to plead in accordance with the Plea Bargaining Framework. To emphasize, when there is no unanimity between the prosecution and the defense, there is also no plea bargaining agreement to speak of. If a party refuses to enter into a plea in conformity with the Plea Bargaining Framework, *the court commits grave abuse of discretion should it unduly impose its will on the parties by approving a plea bargain and issuing a conviction based on the framework*.

Nurallaje Sayre y Malampad, G.R. No. 244413, at 6 (J. Zalameda, concurring opinion) (emphasis omitted and supplied). The abovementioned opinion, however, was not expressed in the majority opinion. *See Nurallaje Sayre y Malampad*, G.R. No. 244413 (majority opinion).