SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 94

PROJECT 73

SIMPLIFICATION OF CRIMINAL PROCEDURE

(SENTENCE AGREEMENTS)

Closing date for comments:

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PREFACE

This discussion paper (which reflects information gathered up to the end of November 2000) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **31 January 2001** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren.

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Madam Justice Y Mokgoro (Chairperson)
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The Honourable Madam Justice L Mailula
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The project leader responsible for this project is the Honourable Mr Justice LTC Harms.

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CHAPTER 1

INTRODUCTORY REMARKS

1.1 During 1989, the then Minister of Justice requested the Commission to investigate the possibility of simplifying criminal procedure, with particular reference to a number of questions, two of which were:

> (a) Whether the existing provisions relating to the procedure of pleading are unnecessarily cumbersome and/or whether they give rise to abuse; (and)
>
> ...
>
> (h) Whether any other provisions relating to criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuse.

1.2 Owing to the extent of the investigation the Commission decided to publish several working papers dealing with different aspects of the investigation. In the first phase of the investigation the Commission published a working paper which addressed appeal procedures and related matters. This part of the investigation was completed and a report submitted to the Minister during 1994. In the next phase of the investigation the Commission published a working paper which addressed the reasons for delays in the completion of criminal trials, abuses of the process, specific provisions of the Criminal Procedure Act that cause delays and problems relating to the administration of the process. This investigation focussed on a possible simplification of the process aimed at the elimination of delays in the completion of criminal trials.

1.3 An interim report which, among others, recommended the introduction of legislation in terms of which provision should be made in the Criminal Procedure Act for the formal recognition of a process of plea negotiations, was finalised and submitted to the Minister on 16 January 1996.

1.4 During 1996, the Select Committee on Justice (Senate) considered a Bill based upon the recommendations contained in the report and adopted the following resolution in respect of the recommendation on plea negotiations:

> The Select Committee on Justice (Senate), having considered the Second Criminal Procedure Amendment Bill, begs to report the Bill with amendments:

The Committee wishes to report that:

A. During its deliberations on the Bill its attention was drawn to the fact that with regard to plea bargaining, the prosecution has limited authority to make concessions favourable to the accused in respect of the sentence to be imposed by the court, and it therefore affects its ability to conclude a plea agreement with the defence. In foreign jurisdictions, where the process of plea bargaining has a significant impact on the ability of the courts to cope with heavy caseloads, for example in the United States, the role and ability of the prosecuting authority to influence the sentence to be considered by the court, differs significantly from the position in South Africa.

The Committee did not find it appropriate to deal with the matter in the Bill before the practicability of the provisions, which are complicated and in essence derived from foreign legislation, have been considered and debated more closely with due regard to the peculiar South African circumstances. The Committee recommends, however, that the Minister of Justice be requested to direct that the necessary attention be given to the possibility of enacting such a procedure in criminal proceedings be considered by the Department of Justice with a view to the submission to Parliament of such amending legislation, if necessary, at the beginning of the 1997 session of Parliament.

1.5 The matter has not subsequently been referred back to the Commission. The researcher allocated to the Commission's investigation was requested to enquire as to what the current position in respect of the Commission's recommendation was, and after inquiries at the Department of Justice a request was received from the Department whereby the Commission was requested to reconsider the issue of plea bargaining as part of its investigation into the simplification of criminal procedure.

1.6 The project committee considered this request at its meeting on 3 September 1999 and resolved that the chapter dealing with plea bargaining should be extracted from the Interim Report, updated and an amended discussion paper should be prepared for distribution for general information and comment.

1.7 Since then the National Director of Public Prosecutions has, after discussion with the Ministers of Justice and of Safety and Security, come out in support of the introduction of a system of plea bargaining.

1.8 The problem raised by the Select Committee, namely that the matter needs further investigation, was addressed by two major studies which have been published since the previous report of the Commission. They are Prof Bekker's *Plea Bargaining in the United States and South Africa* (29) 1996 CILSA 168 and Catherine T Clarke's *Message in a Bottle for Unknowing Defenders: Strategic Plea Negotiations persist in South African Criminal Courts* (32)

1999 CILSA 141. In addition, the Commission has taken the opportunity to reconsider its previous recommendation and to propose a simpler procedure.

CHAPTER 2

PLEA AGREEMENTS

BACKGROUND

2.1 Plea agreements or plea bargaining is a controversial topic and is often subjected to sharp criticism. Despite this, it is an established procedure regulated by statute in the United States of America that plays an important part in reducing the number of cases which go to trial and a countermeasure against overburdened court rolls.[1] There its constitutionality is accepted.

2.2 Elements of plea bargaining are also to be found in many foreign legal systems, although not as clearly defined or often used as in the USA. Because of the wide discretion vested in the prosecution in South Africa, it cannot be doubted that particular forms of plea agreements are fairly common. The study of Clarke[2] provides irrefutable evidence in this regard. In this respect South Africa does not appear to be any different from other Commonwealth countries such as England and Canada.[3]

DEFINITION

2.3 Albert W Alschuler[4] defines plea bargaining as follows:

> **Plea-bargaining consists** of the **exchange of official concessions** for **a defendant's act of self conviction.** Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged, or a variety of other circumstances; . . ..

2.4 The Canadian Law Commission[5] initially defined plea bargaining as follows:

> any agreement by the accused to plead guilty in return for the promise of some benefit.

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1 Compare D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* unpublished LLD thesis Unisa 1980 186; Bekker op cit and the writers cited.

2 Op cit.

3 TH Weigend *Absprachen in auslaendichen Strafverfahren 1990*.

4 "Plea-Bargaining and its History" *Columbia Law Review* (1979) 1.

5 Law Reform Commission of Canada *Criminal Procedure: Control of the Process* Working Paper 15 (1975) at 45.

2.5 In a subsequent working paper[6] that Commission used the more neutral expressions of "plea negotiations" or "plea discussions" since it was considered that the purpose of the process was to reach a satisfactory agreement and not to enable the accused to obtain a "bargain". They therefore substituted the expression "plea agreement" for "plea bargain", and the following definition was then given to the process:[7]

> **. . . any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.**

2.6 N M Isakov and Dirk van Zyl Smit[8], on the other hand, refer to the process as:

> **the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence**.

This definition is much narrower and equates plea bargaining with sentence bargaining.[9]

A COMPARATIVE OVERVIEW

THE USA

2.7 The **US Federal Rules of Criminal Procedure**[10] give statutory effect in federal courts to the practice of plea negotiation and plea agreements on condition that they are disclosed in open court and can be accepted or rejected by the trial judge. Although there are no exact statistics, it is estimated that between 85% to 95% of all federal criminal cases in the USA are disposed of through pleas of guilty. Of these, most are the result of plea negotiations.[11] There is also increasing recognition of the continued existence and effectiveness of the process.

Most, but not all, states recognise the procedure, though often in a varied form.

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6 Law Reform Commission of Canada *Criminal Law: Plea Discussions and Agreements* Working Paper 60 (1989) at 3.

7 Ibid. Cf Bekker op cit 173.

8 *Negotiated Justice and the Legal Context* (1985) *De Rebus* 173.

9 Bekker 174 - 175.

10 *Federal Rules of Criminal Procedure* rule 11(e).

11 See Bekker op cit. *Federal Rules of Criminal Procedure* 42.

2.8 In **Brady v United States**[12] the court stated:

> (W)e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

2.9 Plea negotiation is regarded as an essential element of the criminal justice system and is encouraged.[13] The administration of the criminal system is also dependent on plea negotiation. Although the practice ensures the speedy conclusion of cases, the basis for its recognition is an **effective and just administration of the system of criminal law.**[14] Legitimacy is given to the practice because the plea agreement is disclosed in open court and its propriety is reviewed by the trial judge.

2.10 It has the following advantages: [15]

* the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant;

* granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion which he may not have under the sentencing guidelines, something which does as yet not form part of our legal system;

* a plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of giving evidence;

* a plea agreement may also contribute to the successful prosecution of other

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12 397 U S 742, 752-753, 90 S Ci 1463, 25 L Ed 2d 747 (1970) as cited in *Federal Rules of Criminal Procedure* 42.

13 22 *Corpus Juris Secundum* par 365: "While an accused has no constitutional right to plea bargain and the government has no duty to plea bargain, plea bargaining has become generally accepted, and is to be encouraged."

14 See *Federal Rules of Criminal Procedure* 43 and authorities cited therein.

15 Ibid.

more serious offenders.

2.11 There are objections, theoretical and practical, to the recognition of the process.[16] Some consider it a necessary evil.[17]

2.12 Because of the importance of the USA's experience to this investigation, the full text of the *Federal rules* which legitimised the case law approach to plea bargaining and codified the pre-existing rules into an established set of guidelines, are quoted in full:[18]

> **1. In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
> (C) agree that a specific sentence is the appropriate disposition of the case.
>
> The court shall not participate in any such discussion.
>
> **(2) Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the pre-sentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.
>
> **(3) Acceptance of a Plea Agreement**. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the

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16 For a full discussion, see the papers of the symposium on punishment published in [101] (number 8) (1992) Yale Law Journal.

17 D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* 188.

18 *Federal Rules of Criminal Procedure* 39-40 (rule 11 (e)-(h)).

judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall on the record inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a plea of guilty or plea of nolo contendere the disposition of the case may be less favourable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements**. Except as otherwise provided in this paragraph, evidence of the following is not in any civil or criminal proceeding admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;
(B) a plea of nolo contendere;
(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
(D) any statement made- in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) **Determining Accuracy of Plea**. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) **Record of Proceedings**. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) **Harmless Error.** Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2.13 As pointed out, these rules do not necessarily apply to state and other lower courts. For instance, in some states the court may take part in the discussions, something expressly prohibited by the Federal provision. The relevant general rules are so summarized by the *Corpus Juris Secundum* (vol 22):

> A guilty plea, arising out of a plea agreement, must stand unless induced by misrepresentations, improper promises, threats or coercion, or where the plea bargain is not kept.
>
> A plea bargain is contractual in nature, and the constitutional right to fairness may mandate enforcement of the bargain where accused has detrimentally relied on a prosecutor's promise, even if the classic elements of contract law are not satisfied.
>
> Although there is some authority to the contrary, the general rule is that a judge should not initiate, participate or influence plea agreement discussions or be a party to the negotiations but, to the contrary, he must remain in a position of complete neutrality.
>
> Acceptance or rejection of a plea bargain is within the court's discretion. The terms of the bargain must be disclosed fully prior to acceptance.
>
> Performance of a plea bargain must be mutual, and when executed is binding on both the government and the defendant.

2.14 In Alaska, plea bargaining was prohibited by an order of the Attorney-General during 1975, but it has returned incrementally. However, sentence bargaining is still not permitted. The circumstances in Alaska are somewhat special. It is a fairly rich country with about 0,5m people. Prosecutors are only permitted to prosecute if they are satisfied that they have a case beyond reasonable doubt. Last, in many instances sentences are prescriptive and do not allow for sentence bargaining.[19]

CANADA

2.15 Plea agreements in some form or other are part of the Canadian legal system.[20] However, the Canadian Criminal Code contains no provisions which explicitly deal with plea negotiations between prosecutorial authorities and the accused or his or her representative. One provision which is relevant to plea negotiations is section 606(4) of the Code which provides that where an accused pleads not guilty of the offense charged but guilty of an included or other offense, the court may in its discretion with the consent of the prosecutor accept such plea and, if such plea is accepted, shall find the accused not guilty of the offense charged. This provision provides for a mechanism for plea negotiations, but only informal guidelines are to be found on

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[19] See *A re-evaluation of Alaska's Ban on Plea Bargaining: Executive Summary* (Jan 1991).

[20] TH Weigend op cit p 80.

the topic.[21] In 1972, two years after Rule 11(e) was adopted in the United States, the Ontario Attorney General sent a memorandum to all Crown attorneys concerning conduct of plea negotiations. In doing so the Attorney General informally established certain principles applicable to plea discussions similar to those in Rule 11(e).[22] These principles *inter alia* provide that the proper administration of justice is the paramount consideration in all plea discussions and due regard must be had for the rights of the accused; the Crown Attorney should do nothing to compel a plea of guilty to a lesser number of charges; the Crown Attorney should indict only on those charges on which he intends to proceed to trial; he should not consent to the acceptance of a plea of guilty to an offence which has not been committed; in all discussions the Crown Attorney must maintain his freedom to do his duty; he may state to defence counsel the views he may give if asked by the presiding judge to comment on the matter of sentence; and neither the Crown Attorney nor defence counsel should discuss with the judge matters bearing on the exercise of the judge's discretion. After an investigation of the practice in 1989, the Canadian Law Commission[23] recommended that the procedure be regulated by means of legislation. The recommendations contain detailed guidelines and directives which must be complied with before an agreement may be accepted. These include that:

(a) no accused may be improperly induced to conclude a plea agreement and a plea of guilty may be withdrawn if there was improper inducement;

(b) the judicial officer may not take part therein but may initiate and preside over plea discussions. He may also inform the parties of the advantages of plea discussions;

(c) if the accused has legal representation, the prosecutor must negotiate with the legal representative, and if the accused is unrepresented the prosecutor must comply with specific rules such as informing the accused of the advantages of legal representation.

(d) all accused must receive equal treatment;

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21 H Nasheri *Betrayal of Due Process: A comparative Assessment of Plea Bargaining in the United States and Canada* (1998) at 52.

22 See op cit at 159.

23 Law Reform Commission of Canada *Plea Discussions and Agreements* Working Paper 60 (1989) at 42 et seq.

(e) plea agreements must accurately reflect the accused's criminal behaviour and facts must not be distorted or evidence withheld from the court;

(f) the complainant or victim in the case must be consulted in the conclusion of the agreement.

(g) the contents of the agreement must be disclosed in open court and the court must satisfy itself that the accused was not improperly influenced;

(h) the presiding officer may accept or reject an agreement and must reject it if he has reason to believe that the accused was induced improperly or that the agreement does not reflect the criminal behaviour which can be proved.

These proposals have either been rejected or not acted upon by the Canadian government.

2.16 In 1993 the Ontario Ministry of the Attorney-General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, chaired by the Honourable G Arthur Martin, proposed a number of recommendations for the improvement of the criminal justice system in the province of Ontario.[24] The final set of recommendations stated that resolution discussions (that is plea bargaining) are an essential part of the criminal justice system in Ontario and , when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice. The Martin Committee recommended that Crown Counsel should not accept a plea of guilty where he or she knows that the accused is innocent, that where the Crown knows that the prosecution will never be able to prove a material element of the case it has a duty to disclose this to the defence, the Attorney General should require his or her agents conducting resolution discussions to consider the interests of victims and as a general rule, counsel must honour all agreements reached after resolution discussions. The Committee also stated that a presiding judge at a pre-hearing conference should not be involved in plea bargaining except by expressing an opinion as to whether a proposed sentence is too high, too low, or within an appropriate range, and that it is inappropriate to engage in resolution discussions with the trial judge in chambers. These guidelines represents the most thorough set of recommendations governing plea bargaining in Canada.

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[24] Op cit at 55.

2.17 With regard to sentencing bargaining reference is made to a few cases decided on the issue. In *Attorney General of Canada v Roy*[25] the Crown appealed against a sentence of a fine of $ 150 following the accused's plea of guilty to a charge of unlawfully manufacturing spirits contrary to the Excise Tax Act. The sentence imposed by the summary conviction court had been suggested by counsel who then appeared for the Crown. Upon appeal the Crown sought a fine of $500 instead on the basis that its suggestion at trial was made by mistake and the sentence was inadequate. The appeal raised the issue of the propriety of plea bargaining and of the role of Crown counsel in the fixing of sentences. This case is an example of a sentence negotiated and arrived at by consent prior to the plea, so that it was somewhat predicated upon the prior intimation by counsel for the Crown as to the nature of the penalty which would be sought. The presiding judge pronounced a number of principles concerning plea bargaining, namely that plea bargaining is not to be regarded with favour. In the imposition of sentence the court, whether in the first instance or on appeal, is not bound by the suggestions made by Crown counsel. Where there has been a plea of guilty and Crown counsel recommends sentence, a court, before accepting a plea, should satisfy itself that the accused fully understands that his fate is, within the limits set by law, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of Crown counsel. If the accused does not understand this, the guilty plea ought not to be accepted. In this case the court found that the Crown did not satisfy the foregoing test and dismissed the appeal.

CIVIL LAW SYSTEMS[26]

2.18 Some civil law systems adopt the principle of legality in its strict form. Plea agreements in such systems are not possible. Other countries are more flexible. Italy, for one, introduced during 1991 the possibility of sentence agreements between the prosecution and the defence. Depending upon the nature of the case, the agreement may provide for a material, though limited, reduction in fixed sentences in exchange for a plea of guilty. The court is then obliged to consider the propriety of the agreement and may then enforce it.

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[25] 18 C.R.N.S. 89 (Que.Q.B 1972).

[26] See TH Weigend op cit.

CHAPTER 3

DISCRETION AND POWER OF THE PROSECUTION IN TERMS OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

3.1 It is within the discretion of the prosecutor to decide on which charge to institute or proceed with a prosecution. For instance, a prosecutor may charge an accused who is said to have driven a vehicle recklessly with negligent driving or only with exceeding the speed limit. Such a decision has a material effect upon the ability of the court to sentence the accused because the prescribed maximum sentences differ materially.

3.2 Likewise,[27] upon a plea of guilty, the prosecutor may accept the plea to the charge as it stands, or to an alternative or a lesser competent charge. If a plea on a lesser charge is accepted the main charge falls away.[28] N M Isakov and D van Zyl Smit[29] explain:

> In South Africa the power to prosecute is directly controlled by a professional body of prosecutors and negotiations over charges are allowed to take place prior to trial without

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[27] Sec 6 of the CPA.

[28] *S v Ngubane* 1985 3 SA 677 (A).

[29] The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 *SACC* 10.

> the consent or approval of the judge. Accordingly **the prosecutor may at any stage before trial accept such reduced pleas as he think fit.** [30] (Emphasis added.)

3.3 However, upon a plea of not guilty the court takes over control of the case and the prosecutor may only accept a change in the plea to guilty on a lesser offence if the court permits him to do so. The prosecutor may, however, stop the prosecution, in which event the accused is entitled to an acquittal.

3.4 Section 6 of the Criminal Procedure Act was amended by the Correctional Services and Supervision Matters Amendment Act, 122 of 1991, and provides[31] that the prosecution may at any time before judgment, whether or not an accused has already pleaded to a charge, reconsider the case and upon receipt of a written admission made by the accused in respect of the charge brought against him or a lesser charge, **suspend** the court proceedings and place such person, with his concurrence, under correctional supervision on such conditions and for such period as may be agreed upon. This provision has not yet been put into operation but it will significantly enhance the power of the prosecution to engage in plea negotiations.

3.5 Section 112 (l) (a) of the Act entitles a court to enter a verdict of guilty on a mere plea of guilty - without questioning or evidence - if the presiding officer is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding R1 500. It is self-evident that the court, in exercising its discretion to convict, will be guided by the State. After all, the prosecutor has at his disposal information needed by the court in order to come to its decision. This, in practice, provides for plea agreements because the State can reach an agreement in terms of which the prosecutor recommends to the court that the section be applied, whereby the defence can ensure that the sentence will fall within a limited range.

3.6 If the R1 500 fine appears to be inappropriate, the court, upon a plea of guilty, questions the accused (section 112 (l) (b)), or a written statement explaining the plea may be filed. The accused may state facts that may favour him in regard to sentence[32] and that the State may be prepared to accept or not to dispute the accused's one-sided version as a result of prior plea

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[30] *S v Ngubane* 1985 3 SA 677 (A);*S v Mlangeni* 1976 1 SA 528 (T); *S v Cordanzo* 1975 1 SA 635 (T).

[31] Sec 6 (1) (c) and (2) as introduced.

[32] Compare *S v Hlangothe* 1979 4 SA 199 (B); *S v Russel* 1981 2 SA 21 (C).

negotiations.

3.7 If the prosecutor accepts a plea of guilty to an alternative or lesser charge, it does not amount to a withdrawal or a stoppage in respect of the main charge (section 6 (a) or 6 (b) respectively). The prosecutor reduces the issue between the State and the accused and even if the court records a plea of not guilty, the main charge is not revived and the prosecution proceeds on the charge to which the plea of guilty was originally tendered.[33]

3.8 The newly introduced section 57A provides for an admission of guilt and payment of fine after appearing in court. It provides that if an accused who is alleged to have committed an offence has appeared in court and is -

(a) in custody awaiting trial on that charge and not on another more serious charge;

(b) released on bail; or

(c) released on warning,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding (presently) R 1500,00, hand to the accused a written notice that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again. In this manner a case may be disposed of.

3.9 Section 341 permits of the compounding of certain minor offences, but this applies only to the offences listed in Schedule 3. The Minister may from time to time by notice in the *Gazette* add any offence to the offences mentioned in Schedule 3, or remove therefrom any offence mentioned therein. Schedule 3 is limited to a contravention of a bye-law or regulation made by or for any local authority and certain offences relating to the driving of a motor vehicle.

3.10 So much for the discretion of the prosecutor. In addition, the court has powers which

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[33] Hiemstra *Suid-Afrikaanse Strafproses* 277; *S v Ngubane* 1985 3 SA 677 (A).

may be relevant in this context.

3.11 Section 297 permits of the conditional or unconditional postponement or suspension of a sentence, and caution or reprimand, but only after conviction. The court may in its discretion postpone for a period not exceeding five years the passing of sentence and release the person concerned on one or more conditions, such as to

* compensation,
* the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss,
* the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service) and
* submission to correctional supervision.

3.12 Section 300 allows a court to award compensation where an offence causes damage to or loss of property. This applies only if there is a finding of guilty and there is an application of the injured person or of the prosecutor acting on the instructions of the injured person.

PLEA AGREEMENTS IN PRACTICE

3.13 There is no doubt that plea discussions and plea negotiation, however informal, do take place in South Africa [34] and are considered legal.[35] This is confirmed by a number of studies on the existence of plea agreements.[36] However, there is no statistical study relating to its prevalence or the degree to which the process limits the number of trials in criminal cases and,

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[34] Bekker op cit; Clarke op cit and the authors referred to by them; N M Isakov, Dirk van Zyl Smit "Negotiated Justice and the Legal Context" 1985 De Rebus 173; N M Isakov, D van Zyl Smit "The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 *SASK* 3 et seq.; D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* unpublished LLD thesis Unisa 1980 185 footnote 7; D P van der Merwe "Informele Strafvermindering by Moord" 1982 *THRHR* 141.

[35] Compare Alfred Allen "Plea Negotiations" 1987 *Obiter* 48.

[36] See note 8.

except for the judgment in *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape),*[37] there are few reported judgments in which the process was considered pertinently. [38]

3.14 In the *North Western Dense* case the first applicant, a close corporation, and the second applicant, in his capacity as a member of the first applicant, were charged in a regional court together with Mostert, the production manager of the close corporation. Mostert was charged with culpable homicide only, while the applicants were also arraigned on additional charges. In exchange for Mostert's pleading guilty to the charge of culpable homicide, the State agreed to withdraw all charges against the applicants. It needs to be emphasised that the prosecutor was orally mandated by a senior advocate in the Office of the respondent to accept the deal. Subsequent to this a third party applied for certificate *nolle prosequi* from the respondent. Instead the respondent reinstituted the charges against the applicants, who applied to the High Court for an order interdicting the respondent from proceeding with the prosecution. The Court had to decide whether plea bargaining was an integral part of the law of criminal procedure and, if it was, whether it could and/or should interfere with the decision of the respondent to reinstitute the charges against the applicants.

3.15 With reference to the initial investigation by the Law Commission into the simplification of criminal procedure and the many articles in legal journals (also cited in this discussion paper), the court held that plea bargaining as a means of achieving a settlement of the *lis* between the State and the accused was as much an entrenched, accepted and acceptable part of South African law as were negotiations aimed at achieving a settlement of the *lis* between private citizens in civil dispute. In fact, the court expressed the view that the criminal justice system would probably break down if the procedure were not to be followed. The court held further that although it may need elaboration, an accurate description of a plea agreement is that it is the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence. The court also found that a deal in the sense of a negotiated settlement of the *lis* between the applicants, Mostert and the State had been reached and that deal fell within the definition of a negotiated plea agreement.

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[37] 1999 (2) SACR 669 (C).

[38] But for *S v Blank* 1995 (1) SACR 62 (A) 82 et seq. Cf N M Isakov, Dirk van Zyl Smit "Negotiated Justice and the Legal Context" (1985) *De Rebus* 173.

3.16 The court found further that the Director of Public Prosecutions was not obliged to institute a prosecution whenever a *prima facie* case was made out and a private person demanded a certificate *nolle prosequi*. The Directors of Public Prosecutions were possessed of a discretion and were clothed with the authority to decline to prosecute an accused person, even when a *prima facie* case had been made out against that person. It would therefore be appropriate for the Court to interfere with the decision-making of the respondent if the dictates of justice so demanded. The Court took the view that it would be palpably unfair to allow the respondent to enjoy and to continue to enjoy the benefits of the plea agreement reached, but to be able to avoid doing what it was clearly contemplated he would do when the agreement was reached. Accordingly, the Court held that the respondent had to be held to his part of the bargain, and a basic rule of such procedure should be that a prosecutor should stand by an undertaking solemnly given during the negotiations leading up to a plea settlement. Instances where solemn agreements had been concluded between accused persons and the prosecuting authorities, in terms whereof accused persons gave up certain rights in exchange for an abandonment of prosecution, are therefore instances where a stay of prosecution is the appropriate remedy where the State subsequently appeared to renege on what it had offered as a *quid pro quo*. The court accordingly granted an order permanently staying the prosecution of the applicants.

3.17 According to a study conducted as early as 1983 by D van Zyl Smit and N M Isakov[39] in the Cape Supreme Court, informal plea negotiations are usually initiated by the party who is in a vulnerable position, and depend very much on the personalities of and the mutual trust between the prosecutor and the defence. During discussions with thirteen Cape judges, divergent views were expressed on plea negotiations. The two extreme views were:

> **I refuse to have anything to do with plea negotiation at all.** I have an anathema to the US system because a judge has no knowledge of the case whereas the prosecutor and defence do have. **It is not part of our system for a judge to even suggest a plea.** In my view in no circumstances should a prosecutor approach the judge before trial to ask the judge if it would be appropriate were the prosecutor to accept a plea.

as against:

> I often call in both counsel, and say, go and settle this matter. **I brow-beat them a bit into a plea and say: Surely you don't think this is murder; surely it is culp**

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[39] "*The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters*" 1986 *SACC* 10 et seq.

> **[culpable homicide]**. Such discussion is between myself and both counsel, assessors excluded. I don't think it's important if the accused is found guilty of culp or of murder with extenuating circumstances. He is seemingly punished for the act he committed - no matter what legal label is attached to it.

3.18 The authors[40] came to the conclusion that plea negotiation should be permitted and even be encouraged, since it has the tacit approval of jurists involved, that substantive justice is sometimes a more important consideration than procedural regularity, and that the majority of judges admit that they are involved in plea negotiation in some way or other.

3.19 In a recent publication,[41] the practice of plea negotiations in South African courts was examined by Catherine Clarke. The findings in respect of attitudes towards plea negotiations are of importance and are referred to in some detail:

> As the South African criminal courts evolve to be more efficient and equitable, the problems experienced in the US system can be anticipated and possibly avoided. Indeed, if there is a theoretical bar to plea negotiating in South Africa, it has been largely ignored in more recent years in favour of a more participatory model of justice. A participatory model of criminal justice makes an effort to hear community concerns, victims rights groups and incorporate rehabilitation and restitution programmes such as NICRO.
>
> New visions of the plea negotiation process see it as a process to serve the accused, the system and community. For example, a balanced plea agreement can move minor cases out of the system to make room for more important trials serving efficiency goals. Likewise, a creative plea agreement can mandate a rehabilitative programme for the accused, and establish a restorative justice plan to compensate a victim. Open-minded attitudes held by all parties involved increases the opportunities for just and restorative case dispositions.

3.20 Clarke discussed a number of issues:[42]

Who negotiates?

She found that negotiation on behalf of the State may be by the *trial prosecutor or senior prosecutor, a representative of the Attorney-General's office or the investigating officer:*

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[40] *"The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters*" 1986 *SACC* 18.

[41] 1999 *Cilsa* 141 "*Message in a bottle for unknowing defenders: Strategic plea negotiations persist in South African courts"* Catherine T Clarke.

[42] At 156 *et seq*.

Trial prosecutors usually need approval for a negotiated plea agreement from a senior control prosecutor, especially if a withdrawal of charges is involved.
The negotiations sometimes take the form of a group discussion between the attorney, investigating officer and senior prosecutor. On occasion a magistrate or judge will be present during these informal discussions.

What can a defender negotiate for?

A defence lawyer can negotiate for anything and if the defender is properly prepared, most prosecutors were willing to listen to almost any proposal. . . The burden remains on the defence lawyer to understand the nuances of each case, then be creative in considering alternative dispositions from the pre-trial stage through to the sentencing stage.

What types of plea agreement exist?

There is a wide spectrum of plea agreements. The most important factor distinguishing plea agreements is the question of whether the accused will receive a criminal record at the end of the plea negotiations. . . . .

Charges withdrawn with no community service or other punishment attached

Charges are withdrawn as a result of an agreement between the defence lawyer and prosecutor. The disadvantage for the accused is that the withdrawal of charges is provisional, but an agreed withdrawal usually puts an end to the case. Withdrawal is often motivated by humanitarian grounds or insufficiency of evidence.

Community service or diversion alternatives with a plea of guilt; no record attaches with successful completion of service hours

Diversion alternatives are primarily for juveniles in South Africa, however, some adult cases are diverted. Diversion alternatives in South African trial courts are typically negotiated through formal written representations by an accused. The agreement is usually in the form of a written contract with an NGO (like NICRO) or with the prosecutor's office directly.[43] The contract is concluded between the accused, a supervisor from a placement agency, and a senior public prosecutor. An accused must complete a diversion programme or a designated community service project, otherwise charges will be reinstated. Once the community service hours have been completed the prosecutors sign the docket off so that no record exists. Some prosecutors prefer to postpone a case until all conditions of diversion (eg psychiatric counselling with community service hours) have been completed successfully rather than withdraw the charges altogether from the start.

Negotiate to have charges withdrawn and an admission of guilt fine fixed (section 57 of the Criminal Procedure Act) resulting in no formal criminal record for the accused

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[43] See, eg, the Wynberg prosecutor's 'Pre-trial Community Service Contract' whereby an accused's case *is* withdrawn and community service can be performed in the courthouse.

The prosecutor may agree to accept an 'admission of guilt fine' which is fixed.

Charge bargaining

It is common to negotiate serious charges down to lesser charges, for example, to agree to change the charge to one of culpable homicide on a charge of murder. The issues in the case are thereby reduced.

'Record' pre-trial agreements

There are several types of plea agreements where a defence lawyer negotiates either an oral or written plea of guilt, the client receives a criminal record, and then the type of retribution (and sometimes restitution) imposed varies widely. Those discussed earlier in this report are not repeated.

3.21 Clarke concluded:

> Pre-trial negotiations can improve court efficiency by reducing backlogs of outstanding cases so that the more serious cases proceed to trial and minor cases can be resolved without a full trial. Other creative dispositions like restorative justice, community service, and restitution-based sentencing alternatives can be proposed by defence-lawyers during plea negotiations.

These plea negotiations referred to by Clarke are all permitted - at least by implication - by the Criminal procedure Act.

SENTENCE BARGAINING

3.22 Sentence bargaining is not regulated by the Criminal Procedure Act, and most judicial officers and lawyers would regard it as improper. For example, in S v *Blank* the attorney claimed he thought that the trial judge 'agreed' to a sentence of non-incarceration prior to the court hearing. The trial judge later wrote emphatically: 'I at no stage inferred, nor was it either stated or suggested to me, that I was being asked to give an indication as to whether or not I would consider myself bound, in view of the attitude of the state on sentence, not to impose imprisonment. Had counsel requested any such indication I would have terminated the meeting forthwith.'

3.23 Clarke, nevertheless, found evidence of some agreements:

> **There are many pre-trial negotiations that occur where alternative sentencing options are discussed in exchange for a guilty plea; but final sentencing discretion remains with the magistrate or judge**. Most prosecutors and defence lawyers insist that there is no sentencing bargaining whatsoever in South African

criminal courts because of the deeply entrenched principle of judicial sentencing discretion. Sometimes, however, discussions occur in the chambers of the sentencing magistrate or judge. A judge may give an indication to the defence to plead guilty - usually to a lesser charge or competent verdict - and/or to the prosecutor to accept a guilty plea to such a lesser charge. However, **the defence would ideally like to know what sentence can be expected.** Generally, judges state that although they are prepared to discuss pleas with counsel they would not indicate what sentence would be imposed if a plea of guilty were proffered. Some legal scholars assert that judges are adamant in not indicating what sentence would be imposed. Yet, an outside observer can see that some judges are less removed from the negotiation process and might move along a settlement with some indication of the judge's thinking. **As the pure accusatorial model melts away in many countries judges participate more frequently in pre-trial discussions.**

Negotiate for correctional supervision instead of incarceration

The result of some pre-trial negotiations is that an accused pleads guilty to specific charges and an informal agreement is struck whereby the accused is 'likely' to be sentenced to non-custodial programme such as correctional supervision as a part of a suspended sentence.[44] Again, these types of sentencing agreements are not binding on the sentencing magistrate or judge.

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[44] *CPA* s 276(A) Correctional Supervision ('Trial court to truly consider correctional supervision as a sentencing option'); *CPA* s 276(1)(i) Nature of Punishments ('subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted offence, namely: (i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.').

CHAPTER 4
ASSESSMENT OF PLEA NEGOTIATIONS

4.1 Bekker[45] points out that a number of reasons have been presented to explain why the plea bargaining system - really sentencing agreements - has reached its present proportions in the USA. They are these:

(i) the rise of professional police and prosecutors who develop and select their cases more carefully, so that there are relatively few genuine disputes over guilt or innocence left to be resolved by juries;
(ii) the rise of specialisation and professionalism on the defence side and the broadening of the right to counsel;
(iii) the fact that jury trials have become cumbersome and expensive;
(iv) the due process revolution which places a heavy burden upon the prosecution and gives the accused additional rights which strengthen his bargaining position;
(v) the expansion of substantive criminal law;
(vi) the desire to reach a sentence that fits the accused and the crime and does not fall under a rigid sentencing statute;
(vii) administrative necessity.

4.2 Some of these considerations do not apply to South African conditions. The inducement to reach an agreement differs depending from whose perspective the matter is seen. For the accused it will be to have a degree of certainty about the outcome of the trial, e g, in the light of the wide sentencing discretion of courts, the accused has an interest to know what sentence will be imposed should he be found guilty. On the other hand, there will be no incentive to plead guilty if the accused has reason to believe that the police may have been incompetent in the investigation or that the lack of competence of the prosecution may lead to an acquittal. Bekker[46] points out that US prosecutors are almost always elected public officials. Conviction rates are important for their political future. They consequently do not press charges unless the chances of convicting the accused are good. In South Africa the position appears to be otherwise and often, especially in lower courts, the prosecution does not always consider the probability of a conviction before proceeding with a criminal matter.

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45 Op cit 178-179.

46 Op cit 185-186.

4.3 For the prosecution the main reason to enter into sentence negotiation especially would be to expedite matters and to save time and costs. The most important advantage gained through plea negotiation is the part that it plays in reducing the number of cases that have to go to trial. Statistics in New York City indicated that 85% of all guilty pleas tendered were to less serious charges than those originally brought.[47] In the USA plea negotiation is regarded as a necessity and an important contributing factor in coping with overburdened court rolls. Without plea negotiation the criminal justice system would collapse. The process contributes to the speedy and economical disposal of trials.

4.4 Plea negotiation is not inherently discreditable. The exercise of a discretion by the Director of Prosecutions is an integral part of the criminal justice system, and plea negotiation is able to accommodate various objectives within the system. The improvement of the process is a more realistic end than simply rejecting it. Plea negotiation does not impinge on any constitutional principle. If applied properly, it gives expression to two complementing principles, namely the effective administration of justice and the limitation of sentencing. The principle of effectiveness entails, among other things, that criminal proceedings should accurately and realistically reflect the crime. Consequently, in plea negotiations the general rule should be that the offence to which the accused is willing to plead guilty should realistically reflect his criminal conduct and that the sentence that the prosecutor agrees to accept should be justifiable on recognised principles of punishment.

4.5 An important objection to plea negotiation is the **perception of secrecy**.[48] The argument is that it is better to have an open trial than to settle the case in secret in the prosecutor's office. The public's attitude to private agreements is one of suspicion, and the consequences of secret transactions have a serious impact on the image of the administration of justice. A related one is the **suppression of evidence**. Where the State enters into an agreement with the defence to exclude evidence that may be relevant to sentencing, the State may be in breach of its obligation to the court and the community. At the same time, the court's function of imposing punishment in the exercise of its discretion is reduced to a symbolic approval of the agreement.

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[47] D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* 186.

[48] For a full debate on all the objections, see the papers of the symposium on punishment published in [101] (vol 8) Yale Law Journal.

4.6 These arguments appear to be ill-conceived. Since the agreement must receive the stamp of approval of the court, the degree of secrecy is limited. Sometimes secrecy is preferable, for instance in order to protect the innocent victim or outsiders who have nothing to do with the case. To have everything settled in an open trial is unrealistic and unattainable. The criminal justice system cannot bear the strain and costs, including the costs of defending the indigent. In an accusatorial system such as ours, the court does not control the evidence and the parties are free to "suppress" or limit the scope of the evidence. In any event, the accused has the right to remain silent, and when he speaks, to choose what he wishes to say.

4.7 Plea agreements, depending on how they are structured, may be characterised by the **absence of judicial control** over the negotiation process itself. The terms of an agreement and the process are usually matters for the conscience of the prosecutor and the defence.

4.8 The objection is based in part upon a misconception. The court may not be able to control the negotiations, but it is able and obliged to control the outcome of the negotiations. No court is bound by the agreement reached and because of judicial control, the parties are discouraged to reach an agreement which may not pass judicial muster. As will be indicated, we do not recommend a system whereby the judicial officer is to take part in the negotiations because such participation may be difficult to reconcile with the court's role as impartial administrator of justice. It could create the impression that the judicial officer, as a person in a position of authority, is exerting undue influence to exact a plea of guilty.

4.9 It could be argued that not all plea agreements give rise to voluntary pleas of guilty. There are various ways in which attorneys and public prosecutors could **improperly influence** an accused to plead guilty. A prosecutor could bring charges against an accused that are in no way supported by evidence simply to place himself in a better bargaining position so as to force a settlement. He could also charge an accused with a more serious charge to achieve the same object. An attorney could have ulterior motives in "forcing" an accused into a settlement. Plea negotiations may result in an accused being influenced to plead guilty to a crime of which he is not guilty. Several factors, such as fear of a particular penalty and the publicity of a public trial, may persuade an accused to accept a settlement. Plea agreements could result in the crime to which the accused pleads guilty not being a true reflection of the act which he committed**.** The weaker the State's case, so the argument goes, the greater the possibility that an accused could plead guilty when he or she is not guilty.

4.10 This objection has been dealt with in much detail by Scott and Stuntz, who come to the conclusion that it is baseless.[49] Undue influence is a serious concern which has to be addressed in any legislation. It is nothing new. Under the present system an accused may plead guilty because of undue influence and abuse of the prosecutorial powers. The court's control and the ability of the accused to change the plea or to attack the agreement by way of a review, ought to provide the necessary protection. By introducing the procedure initially on a test basis to certain courts where a higher level of competence is to be expected, abuses may be minimised.

4.11 The opportunity for plea negotiation and the nature of agreements are dependent upon certain factors such as the personalities of prosecutors and legal representatives, the relationship between the State and the defence, the approach of different prosecutors to negotiations and the quality of the discussions. These factors could **potentially promote the unequal treatment of accused** persons, inconsistency in sentencing and general uncertainty.

4.12 It has to be conceded that unequal treatment of accused persons is inherent in human nature. Undefended persons are always at a disadvantage and under the present system have no, or no effective access to the prosecutor to reach any kind of settlement. Statistical analyses in the USA tend to confirm the inequality of treatment.[50] The lack of public defenders and legal aid funds add to the problem. Factors such as the personality of the prosecutor, counsel and the presiding officer are ever-present, and the introduction of formal plea negotiations as an option will not add to the problem. If the prosecutor has an incentive to settle, subject to the court's approval, with the undefended accused, the treatment may in the end be less unequal.

4.13 A question that has to be considered is **the extent to which parties can be held to their agreements.** When can a party repudiate an agreement? Can the agreement be declared invalid if there was deception or if the sentence is totally inappropriate or if public interests demand it? If the matter is formalised, ordinary contractual rules ought to apply. The State will be bound by the agreement, subject to the court's approval. If the court rejects the agreement, the accused's plea of guilty will fall away and the status quo ante will be restored.

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[49] [101] Yale Law Journal 1909.

[50] [Feb 1992] 18 Pretrial Reporter 2-3.

CHAPTER 5

THE COMMISSION'S EVALUATION

THE COMMISSION'S RECOMMENDATION IN THE WORKING PAPER

5.1 In its initial working paper the Commission recommended that statutory provision be made for a procedure of plea negotiation and the conclusion of plea agreements, and that the procedure should be as non-prescriptive as possible.

COMMENT ON THE COMMISSION'S PROPOSAL IN THE WORKING PAPER

5.2 The Commission's proposal elicited support as well as criticism. These are now dated and did not raise any pertinent point not dealt with earlier in this report, and are not repeated.

THE COMMISSION'S EVALUATION IN ITS INTERIM REPORT

5.3 The Commission was of the opinion that the practice of plea negotiation in South Africa could make an important contribution to the acceleration of the process. Statutory measures could be provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established principles.

5.4 The Commission carefully considered the objections raised. The Commission's view was, however, that the practice should be statutorily recognised as this could make an important contribution to the acceleration of proceedings while the objections, which apply equally to the informal practice, could likewise be met by legislation.

THE COMMISSION'S RECOMMENDATION IN THE INTERIM REPORT

5.5 The Commission recommended that legislation be adopted by means of the addition of the Criminal Procedure Act of a new section 106A as follows:

> "106A. Plea discussions and plea agreements. - (1) The prosecutor and the accused or his legal representative may hold discussions with a view to reaching an agreement acceptable to both parties in respect of plea proceedings and the disposal of the case.
>
> (2) Any agreement reached between the parties shall be reduced to writing and shall state fully the terms of the agreement and any admissions made and shall be signed by the prosecutor, the accused, the legal representative and the interpreter, as the case may be.
>
> (3) The contents of such an agreement shall be proved by the mere production

thereof by both parties: Provided that in the case of an agreement concluded with an accused who is not legally represented the court shall satisfy itself that the accused My understands the contents thereof and entered into the agreement voluntarily and without improper influence.

(4) The judicial officer before whom criminal proceedings are pending shall not participate in the discussions contemplated in subsection (1): Provided that he may, before an agreement is reached, be approached by the parties in open court or in chambers regarding the contents of such discussions and he may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

(5) The judicial officer shall before the accused is required to plead in open court or, if he has already pleaded, before judgment is given, be informed that plea discussions are being conducted or are to be conducted or that the parties have reached a plea agreement as contemplated in subsection (1).

(6) If after discussions the parties have concluded a plea agreement and the court has been informed as contemplated in subsection (3), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court: Provided that if the court is for any reason of the opinion that the accused cannot be convicted of the offence with which he is charged or of the offence in respect of which an agreement was reached and to which he pleaded guilty or that the agreement is in conflict with the provisions of section 25 of the Constitution of the Republic of South Africa or with justice, the court shall record a plea of not guilty in respect of such a charge and order that the trial proceed.

(7) No evidence of a plea agreement or of admissions contained therein or of statements relating to such agreement shall be admissible as proof of guilt or credibility in subsequent criminal proceedings."

THE RESOLUTION ADOPTED BY THE PORTFOLIO COMMITTEE ON JUSTICE

5.6 When considering the Commission's recommendations during 1996, the Portfolio Committee on Justice (Senate) concluded that the practicability of the procedure should first be established with regard to the unique South African circumstances in view of significant differences between our criminal justice process and those of other jurisdictions where such procedure is followed. During its deliberations on the Bill its attention was drawn to the fact that with regard to plea bargaining, the prosecution has limited authority to make concessions favourable to the accused in respect of the sentence to be imposed by the court, and this therefore affects its ability to conclude a plea agreement with the defence. In foreign jurisdictions, where the process of plea bargaining has a significant impact on the ability of the courts to cope with heavy caseloads, for example in the United States, the role and ability of the prosecuting authority to influence the sentence to be considered by the court, differs significantly from the position in South Africa. The matter was referred back to the Department of Justice

with a request to re-submit a recommendation to Parliament. Subsequently the Department requested the Law Commission to reconsider the matter afresh in the light of the resolution adopted by the then committee.

THE COMMISSION'S RE-EVALUATION

5.7 **Addressing first the concerns expressed by the portfolio committee** in 1996, the matter of the practicability in the unique circumstances of South Africa have to be addressed. The difficulty of the Committee was in part due to the wide definition proposed by the Commission. This covered all agreements between the State and the accused. As pointed out in this report, the CPA, because it gives a wide discretion to the prosecution, both directly and indirectly, does provide for plea agreements. What is does not cover is sentence agreements. One cannot assess the impact of such agreements simply because without having any opportunity to test the system, it is not possible to evaluate it in practice. However, studies show that plea (and even sentence) negotiation is alive and well and performs an important part in our criminal justice system.

5.8 As has been pointed out, by enacting the amendment to section 6 of the Act, statutory recognition has been given to sentence agreements. For a reason not known to the Commission, the amendments have not been put into operation.

5.9 It is true that our criminal justice system differs from that in the USA in some material respects, but as far as the ability to negotiate a plea is concerned, there are no differences of any note. Our system is capable of handling this if responsibly dealt with. But in order to prevent the unforeseeable, an important limitation is being introduced into the redrawn proposals: **The procedure will only be available on a test basis in certain courts.**

5.10 The Commission also considered the issue of **constitutionality** of the procedure in the light of the qualifications to the application of the proposed procedure to certain courts only. The Commission is satisfied that such a differentiation could be justified on a number of grounds, for example, there is a marked difference in competence of court personnel in lower and higher courts, which would lessen the risk run by an accused in higher courts.

5.11 Another serious matter is the **backlog in courts** and the **inability of the Legal Aid**

Board to finance the defence of the indigent. **It will be easier for practitioners to permit their clients who are guilty to plead guilty if the outcome of the case is predictable**.

5.12 **Protection of the victim** from publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure.

5.13 Since the Commission's recommendation in the interim report, **legislation providing for minimum sentences** in respect of certain offences has been passed by Parliament. The Criminal Law Amendment Act, 105 of 1997, provides for minimum sentences for certain serious offences. It is clear from the provisions of this Act and the circumstances under which minimum sentences are prescribed, that it significantly increases the ability of the prosecution to influence the imposition of sentence by preferring lesser charges or accepting pleas of guilty on lesser charges. The scope for sentence negotiation is, however, in these cases thereby eliminated.

5.14 In view of this development the Commission is of the opinion that the practice of plea negotiation in South Africa could make an important contribution to the acceleration of the process. Statutory measures should be provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established principles.

PRINCIPLES ADOPTED BY THE COMMISSION

5.15 The Commission proposes that the present study be limited to sentence agreements. Other plea agreements are sufficiently provided for in the CPA and do not require regulation. There is no evidence of abuse of these provisions. Out-of-court settlements of criminal cases - for example, as provided for in the amended section 6 - could be the subject of a separate investigation and proposal.

5.16 There are two types of sentencing agreements. The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law (cf *Blank*'s case supra). The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, as does the sentence. There is no reason why this procedure should

be dealt with by way of legislation.

5.17 The second type is the case where the accused agrees with the state to plead guilty provided an agreed sentence is imposed. It is this type of agreement that should be legalised and regulated, subject to what follows.

* The agreement must be reached before the plea. In the US the bargain must be struck before the trial. Otherwise practical problems arise. If the court does not accept the agreement, the trial will have to restart before another court.

* Such an agreement will become binding on both the accused and the prosecution as soon as the plea is entered, but it does not bind the court.

* The agreement must be in writing and must contain a preamble, setting out the relevant rights of the accused which have to be explained to him before the agreement is concluded.

* If the agreement is reached, the accused pleads guilty and the sentence agreement is then disclosed to the court.

* The court, before convicting the accused, has to question the accused to ascertain whether the accused understood his rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, the procedure of sec 112 (1) (b) and (2) comes into operation.

* This, at the same time, enables the court to assess whether the agreed sentence is appropriate or inappropriate.

* The court then accepts or rejects the agreement.

* If it accepts it, the accused is found guilty in terms of the plea and the agreed sentence is imposed.

* If the court is of the view that it would have imposed a lesser sentence than the agreed sentence, it may likewise find the accused guilty but impose the lesser

sentence.

* If it rejects the agreement, the accused is so informed. The accused then has a choice: he may abide by his plea and the matter proceeds as usual. He is, however, entitled to withdraw his plea, in which event the matter has to begin de novo before another judicial officer. No reference may then be made to the plea agreement or the proceedings before the first court.

* The Commission gave consideration to providing victims' input in the negotiations but came to the conclusion that it would be in conflict with the general scheme of the CPA and would be impractical.

* The judicial officer should not instigate or take part in any negotiations. To invite the judge to preside over negotiations appears to be fraught with dangers.

* Once a person is convicted and sentenced in terms of an agreement, he should not have a right of appeal against either. Review would be the proper remedy in the event of undue influence or the like.

RECOMMENDATION

5.18 The Commission recommends that the Criminal Procedure Act be amended to provide for sentence agreements, and the following amendment is submitted for comment:

CHAPTER 16A

PLEA AND SENTENCE AGREEMENTS

Plea agreements in respect of plea of guilty and sentence to be imposed by court

111A. (1) (a) The prosecutor and an accused, or his or her legal adviser, may before the accused pleads to the charge, enter into an agreement in respect of–

(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and

(ii) an appropriate sentence to be imposed by the court if the

accused is convicted of the offence to which he or she intends to plead guilty.

(b) The prosecutor may only enter into an agreement contemplated in paragraph (a) –

(i) after consultation with the police official charged with the investigation of the case and, if reasonably feasible, the complainant; and

(ii) with due regard to the nature of and circumstances relating to the offence, the accused and the interests of the community.

(c) The prosecutor, if reasonably feasible, shall afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding –

(i) the contents of the agreement; and

(ii) the inclusion in the agreement of a compensation order referred to in section 300.

(2) An agreement between the parties contemplated in subsection (1), shall be reduced to writing and shall –

(a) state that, before conclusion of the agreement, the accused has been informed –

(i) that he or she has a right to remain silent;

(ii) of the consequences of not remaining silent;

(iii) that he or she is not obliged to make any confession or admission that could be used in evidence against him or her;

(b) state fully the terms of the agreement and any admissions made; and

(c) be signed by the prosecutor, the accused, the legal adviser and the interpreter, as the case may be.

(3) The presiding judge, regional magistrate or magistrate before whom criminal proceedings are pending, shall not participate in the discussions contemplated in subsection (1): Provided that he or she may be approached by the parties in an open court or in chambers regarding the contents of the discussions and he

or she may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

(4) The presiding judge, regional magistrate or magistrate shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to confirm the correctness thereof personally.

(5) If the parties have concluded an agreement and the court has been informed as contemplated in subsection (4), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court, where after that agreement, subject to the provisions of subsections (6), (7) and (8), binds the prosecutor and the accused.

(6) Where the contents of an agreement has been disclosed in open court, the presiding judge, regional magistrate or magistrate shall question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty and whether he or she entered into the agreement in his or her sound and sober senses freely and voluntarily and without improper influence, and may –

(a) if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence; or

(b) if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has pleaded guilty or that the agreement is in conflict with the accused's rights referred to subsection (2)(a), he or she shall record a plea of not guilty in respect of such charge and order that the trial proceed.

(7) Where an accused has been convicted in terms of subsection (6)(a), the presiding judge, regional magistrate or magistrate shall consider the sentence agreed upon in the agreement and if he or she is –

(a) satisfied that such sentence is an appropriate sentence, impose that sentence;

(b) of the view that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, impose the lesser sentence; or

(c) of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the accused of such heavier sentence he or she considers to be appropriate.

(8) Where the accused has been informed of the heavier sentence as contemplated in subsection (7)(c), the accused may –

(a) abide by his or her plea of guilty as agreed upon in the agreement and agree that, subject to the accused's right to lead evidence and to present argument relevant to sentencing, the presiding judge, regional magistrate or magistrate proceed with the sentencing proceedings; or

(b) withdraw from his or her plea agreement, in which event the trial shall proceed *de novo* before another presiding judge, regional magistrate or magistrate, as the case may be.

(9) Where a trial proceeds as contemplated under subsection 6 (b) *or de novo* before another presiding judge, regional magistrate or magistrate as contemplated in subsection (8)(b) –

(a) no reference shall be made to the agreement;

(b) no admissions contained therein or statements relating thereto shall be admissible against the accused; and

(c) the prosecutor and the accused may not enter into a similar plea and sentence agreement.

(10) A conviction or sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.

REPUBLIC OF SOUTH AFRICA

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CRIMINAL PROCEDURE AMENDMENT BILL

_____

(As introduced)

_____

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B –2000]

REPUBLIEK VAN SUID-AFRIKA

STRAFPROSESWYSIGINGS-WETSONTWERP

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W –2000]

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

{ } Words in bold type in these brackets indicate an alternative proposal.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Procedure Act, 1977, so as provide for a prosecutor and an accused to enter into a plea and sentence agreement; to further regulate plea proceedings and to provide for matters connected therewith.

_____

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:–

Insertion of Chapter 16A in Act 51 of 1977

1. The following Chapter is hereby inserted in the Criminal Procedure Act, 51 of 1977, after section 111:

CHAPTER 16A

PLEA AND SENTENCE AGREEMENTS

Plea agreements in respect of plea of guilty and sentence to be imposed by court

111A. (1) (a) The prosecutor and an accused, or his or her legal adviser, may before the accused pleads to the charge, enter into an agreement in respect of–

(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
(ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.

(b) The prosecutor may only enter into an agreement contemplated in paragraph (a) –

(i) after consultation with the police official charged with the investigation of the case and, if reasonably feasible, the complainant; and
(ii) with due regard to the nature of and circumstances relating to the offence, the accused and the interests of the community.

(c) The prosecutor, if reasonably feasible, shall afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding –

(i) the contents of the agreement; and
(ii) the inclusion in the agreement of a compensation order referred to in section 300.

(2) An agreement between the parties contemplated in subsection (1), shall be reduced to writing and shall –

(a) state that, before conclusion of the agreement, the accused has been informed –

(i) that he or she has a right to remain silent;
(ii) of the consequences of not remaining silent;
(iii) that he or she is not obliged to make any confession or admission that could be used in evidence against him or her;

(b) state fully the terms of the agreement and any admissions made; and

(c) be signed by the prosecutor, the accused, the legal adviser and the interpreter, as the case may be.

(3) The presiding judge, regional magistrate or magistrate before whom criminal proceedings are pending, shall not participate in the discussions contemplated in subsection (1): Provided that he or she may be approached by the parties in an open court or in chambers regarding the contents of the discussions and he or she may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

(4) The presiding judge, regional magistrate or magistrate shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to confirm the correctness thereof personally.

(5) If the parties have concluded an agreement and the court has been informed as contemplated in subsection (4), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court, where after that agreement, subject to the provisions of subsections (6), (7) and (8), binds the prosecutor and the accused.

(6) Where the contents of an agreement has been disclosed in open court, the presiding judge, regional magistrate or magistrate shall question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty and whether he or she entered into the agreement in his or her sound and sober senses freely and voluntarily and without improper influence, and may –

(a) if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence; or

(b) if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has pleaded guilty or that the agreement is in conflict with the accused's rights referred to subsection (2)(a), he or she shall record a plea of not guilty in respect of such charge and order that the trial proceed.

(7) Where an accused has been convicted in terms of subsection (6)(a), the presiding judge, regional magistrate or magistrate shall consider the sentence agreed upon in the agreement and if he or she is –

(a) satisfied that such sentence is an appropriate sentence, impose that sentence;

(b) of the view that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, impose the lesser sentence; or

(c) of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the accused of such heavier sentence he or she considers to be appropriate.

(8) Where the accused has been informed of the heavier sentence as contemplated in subsection (7)(c), the accused may –

(a) abide by his or her plea of guilty as agreed upon in the agreement and agree that, subject to the accused's right to lead evidence and to present argument relevant to sentencing, the presiding judge, regional magistrate or magistrate proceed with the sentencing proceedings; or

(b) withdraw from his or her plea agreement, in which event the trial shall proceed *de novo* before another presiding judge, regional magistrate or magistrate, as the case may be.

(9) Where a trial proceeds as contemplated under subsection 6 (b) *or de novo* before another presiding judge, regional magistrate or magistrate as contemplated in subsection (8)(b) –

(a) no reference shall be made to the agreement;

(b) no admissions contained therein or statements relating thereto shall be admissible against the accused; and

(c) the prosecutor and the accused may not enter into a similar plea and sentence agreement.

(10) A conviction or sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.