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A Comparative Empirical Study of Negotiation in Criminal Proceedings Between Brazil and the United States of America

Ricardo Gueiros Bernardes Dias¹

ABSTRACT: The present research aims to understand the law in regards to the types of negotiations performed under the law of criminal procedure and to understand how the discursive practice of lawyers can organize social practices from a comparative empirical perspective of Brazil and the United States of America. Thus, the research comparatively investigates the institutional processes for the establishment of truth before the bodies of the judicial branch in Brazil (metropolitan region of Vitória, ES-Brazil) and in the U.S. (California, San Francisco) and focuses on their differences in their criminal negotiation in the special criminal courts and the institution of plea bargaining, which is widely used in the U.S. judicial system.

KEYWORDS: law, plea; bargaining; negotiation; process; criminal; empirical

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INTRODUCTION

Scholars appear to be increasingly convinced that they must interpret any law, court order, or legal doctrine by considering the position of the executive and legislative branches, the context of the judicial culture, and the actions of the juridical agents that permeate the field of law. The interests of society diversely affect different fields of law. Therefore, the concern addressed in the present study is to understand the law from a comparative empirical perspective, primarily in Brazil and the United States, and to understand how the discursive practice of lawyers might organize social practices, particularly in regards to the forms of negotiation used in criminal justice in the context of individual rights at the same time.

The distinction between theory and practice is the cornerstone of legal interpretation. The ideas behind theory and practice lead toward two different roads at different speeds. It has been said that it is commonplace to talk about human rights; however, little has been achieved in terms of the effectiveness of turning aspirations into factual rights.² The prevalent methodology is qualitative, consisting of fieldwork, participant observations, and comparisons between the systems in question. This observation was made in person in the courts of first instance, both in Brazil and the United States, and achieved effective participation of those who will receive the adjudication simply by being there.

Participant observations, open interviews, and other methods of fieldwork were performed in direct and unabated contact for a considerable period of time with the involved actors. The dialogue justifies why it is necessary to incorporate the reasons of the actors within the environment in which the researcher starts to act. Fieldwork involves an inter-subjective relation in which there is no neutrality, but rather an interest to incorporate the environment. It is essential to know what the interlocutors think. Consequently, it is necessary to contextualize the collected data within an academic culture. In fact, good science requires fieldwork, as information is extracted from the actors that participate in the process.³

2. NORBERTO BOBBIO, *A ERA DOS DIREITOS*, 67 (1992).

3. ROBERTO KANT DE LIMA, *A ANTROPOLOGIA DA ACADEMIA: QUANDO OS INDIOS SOMOS NOS* 16 (1997).

There is no intention to assert that traditional rituals never work; the ancient custom of praying in Latin, which is performed by the priest, reaches its goal of maintaining the ignorance of the faithful. However, the claim made here is part of the communication inclusion.

FIELDWORK ON PLEA BARGAINING IN THE U.S.

If it were possible to choose a basic premise to contextualize the criminal justice system in the United States, it would be the following: “controlling the coexistence with impurity and crime, and not purifying it or banishing it.”⁴

According to the same author, this would be the same as affirming that crime in the United States has a relationship with sin. In other words, crime is a voluntary choice of the perpetrator.⁵ There is a clear division between those who obey these consensual rules and those who deliberately and explicitly defy these rules.⁶ In addition, this has an immediate and direct relationship with the form of production of truth in the adversarial model, which is based on a constant search for consensus.⁷ Unlike Brazil, the United States judicial system’s search for consensus is essential for the recognition of self-knowledge.⁸

In Brazil, there is no intention to reach a consensus—i.e., to establish such facts—nor to agree upon the evidence to be brought to trial.⁹ The process calls for consensus, but often fails due to the nature of the facts, which often contradict each other. After hearing the opposing arguments, the judge makes a ruling on a particular conviction, a decision which is often contaminated by several variables, according to empirical research.¹⁰

4. ROBERTO KANT DE LIMA, *ENSAIOS DE ANTROPOLOGIA E DE DIREITO: ACESSO À JUSTIÇA E PROCESSOS INSTITUCIONAIS DE ADMINISTRAÇÃO DE CONFLITOS E PRODUÇÃO DA VERDADE JURÍDICA EM UMA PERSPECTIVA COMPARADA* (2008).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. ROBERTO KANT DE LIMA, *SENSIBILIDADES JURÍDICAS, DEFINIÇÕES DE JUSTIÇA E PROCESSO PENAL* (2012).

a. The First Contact

“This is the best thing that I can do for him.” This was one of the first phrases I heard at an informal hearing of plea bargaining that took place in the chamber¹¹ of the Hall of Justice in San Francisco. The following individuals were present: the District Attorney, the defendant’s lawyer, and the judge. The words of the District Attorney were addressed—in front of the judge—to the lawyer of the defendant. These words were related to a proposal that had just been presented to allow the defendant to avoid a trial. In other words, the acceptance of the offer by the defendant would represent the end of the dispute and, as a consequence, the resolution of the conflict. The sentence would then be imposed not from a procedure that targets the search for the “truth” of the facts but from an agreement with the purpose, among others, to avoid trial. The lawyer—waiting for the judge’s reaction (who remained inert) —decided to accept the proposal.

The scene above describes not only what is observed in everyday life in American criminal courts, but also is much more than that: it is, in fact, the core of the “ritual” of almost all defendants accused of having committed a crime. The cinematic image of the American judgments performed in the presence of the jury only occurs in a small number of cases, as will be observed. On average, almost 96% of the criminal cases before U.S. courts are resolved through a negotiation called plea bargaining.¹²

As one who comes from a civil culture, it was initially a natural curiosity to discover the juridical rules that regulate plea bargaining. After all, if almost all of the cases are assessed according to this rule, it would be expected that a detailed formal procedure of the entire legal ritual in use is available.

The first attempt was to use the index of the California Penal Code,¹³ which resulted in the identification of the first obstacle. The initial impressions from the common law dated back to an idea of a

11. Chamber is the term assigned to the office used by the judges within the court.

12. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 113 (Cornell Law Faculty Working Papers 2014), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1116&context=clsops_papers.

13. CAL. PENAL CODE INDEX (West).

small number of written rules and a wide use of legal precedents.¹⁴ In other words, there was a notion that customary law had its roots in solving its disputes in the tradition of previous trials. This is what is generally taught in the law courses in Brazil. Note that there was a complete lack of formal legal rules, but their existence was imagined to be limited to the formulation of general rules and the characterization of a reasonable number of crimes. The very principled, generic conception of the U.S. Constitution provided this first notion.

There was, however, a Code¹⁵ of over 34,370 sections in California, notwithstanding the existing extravagant criminal legislation.¹⁶ In contrast, the combined number of articles of the Brazilian penal code and criminal procedure code is 1,172 (361 articles of the penal code and 811 of the criminal procedure code).¹⁷ In addition, the subdivisions of the sections of the California Penal Code can be extremely long, as they are sometimes written in an informal language with a highly explicative intention. For example, California Penal Code § 830 with its subdivisions fills twenty-three pages of the Code.¹⁸ We must remember in advance that there is no separate or distinct criminal procedure code in the state of California. All procedural rules are embedded in the actual California Penal Code. In fact, contrary to what we have in Brazil, there is no academic concern associated with conducting a detailed study on the nature of the procedure as a mere instrument for conflict resolution or as a true autonomous figure. In-

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14. *The Common Law and Civil Law Traditions*, U.C. (March 8, 2016), <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.
 15. CAL. CODE. REGS. (2016). In fact, this is more a compilation of rules than a code (as it is known in Brazil). In the U.S., the Member State may legislate on criminal matters. In fact, there is no penal code with national coverage. There is – in truth – the Model Penal Code, which is a document written mostly by scholars as an attempt to homogenize the state penal law. Therefore, it is not a law in the strict sense due to its non-obligatory aspect. Nevertheless, the adherence to this text is widely applied in approximately two-thirds of the American states. However, these rules are commonly used at the federal level and do not make any reference to plea bargaining. It is important to highlight the existence of the “Federal Rules of Criminal Procedure”, which are rules issued by the U.S. Supreme Court and sent to Congress for “approval.” Rule 11 expressly provides the figure of plea agreement, which is essentially the same institution that is known as plea bargaining. However, these norms are also limited to the sphere of federal crimes. FED. R. CRIM. P. 11.
 16. CAL. PENAL CODE INDEX (West).
 17. BRAZIL.C.C.; BRAZIL C.P.P.
 18. CAL. PENAL CODE § 830-830.15 (West 2016).

cidentally, when pursuing the criminal procedure discipline in the literature used in the universities, the primary focus is on the constitutional principles of criminal procedure.

First I searched for a systematic index in which the formulation of the discipline of plea bargaining rules could be found. There was no exclusive section for plea bargaining in the index. I then performed a quick reading of the 639 sections associated with the rules of criminal procedure of the state of California. This search was also in vain. Despite some scarce retrievals of the term “plead guilty” throughout the code, there were no plea bargaining regulations. Moreover, there was not even the impression that it would be possible to use this procedure. A simple reading of the code led to the belief that the trial, either by a jury or by the judge himself (in the form of a bench trial), was the most common destination of the cases to be examined by the judiciary branch.

Before investigating the legal literature that would be the pillar of the legal institution of plea bargaining, I decided to search for answers from actual practitioners of law. In other words, I decided to research the common notion among those who used it more. When I posed this inquiry to a former public defender, he replied, “I believe there is no special section of the disciplinary code for this theme. It is more of a procedure established by decisions.”¹⁹ In this answer, we can see an uncertainty related to the non-existence of formal laws on the subject. This uncertainty in itself already indicated something: even if there was a regulation, it would not be the main parameter of the operators of law. If this is not the case, the public defender would at least declare its existence, even if he did not know its contents).

When Judge “J” from the Hall of Justice was asked this intriguing question, he replied evasively without facing the problem directly:

This is an interesting question. I believe there are some sections of the code that do not “advise” plea bargaining in some situations. Well, I do not know ... I have been a judge for only 3 years. Before this period, I was a public defender for nearly 30 years. Throughout this period of 30 years, I participated in several plea bargaining hearings in San Fran-

19. Interview with former Pub. Def., in Cal.

cisco and in many other Counties. And each site uses a different type of procedure. Only in counties with higher crime rates you will find plea bargaining as you find it in San Francisco. In counties where there is no high index of crimes of greater offensive potential, you do not even notice the participation of the judge in the negotiations. The District Attorney will make an offer and it is done! And it has an explanation in my view. A greater number of crimes obviously results in a greater number of cases.²⁰

It is perhaps for this reason that this theme captured so much of my attention. Upon arriving in the U.S., there was no precise delimitation of the subject to be investigated. There was a desire to investigate the models of the production of truth in the American process. In addition, at first sight there was no production of truth to be actually “found” but rather negotiated in a system of dispute settlement that has a huge legal standardization. This however is apparently used only for cases that are brought to trial. In other words, the solution to almost all of the disputes brought to court is based on a procedure performed backstage of the courtroom and that has as its premise a procedure that is not formally legislated.

The California Penal Code was primarily mentioned by the actors of the process as will be shown later to verify a possible legal classification of the criminal conducts.²¹ Thus, the widespread use of this ritual, which dictates almost all prosecutions, and the ritual that follows the recent tradition were the main reasons for the thematic delimitation. In fact, plea bargaining has become the “talk of the town.” It is rare to find someone even outside of the legal field that is unfamiliar and does not have his own opinion on the subject. This is not a procedural technicality. In Brazil, these discussions are limited to the defendants, and in most cases to their representatives.

b. The Judge’s Participation In The Bargaining

Even though there is no legal provision under state law or in Title 18 of the U.S. Code the Federal Rules of Criminal Procedure (rules issued by the Supreme Court and approved by the Congress)

20. Interview with Judge “J”, Cal. Hall of Justice.

21. *Id.*

they do however define plea agreement, which is, in essence, the same as plea bargaining.²² Despite being also limited to the sphere of federal crimes, such rules serve only as a legal basis or doctrinal foundation. In fact, there is a manifest rule to prohibit the participation of the judge in the negotiation. “The court must not participate in these discussions.”²³ However, in practice, the participation of the judge is unambiguous with respect to the cases resolved at the state level.

From this informal negotiation, only two situations may occur:

1) **There is consensus on the proposal:** In this case, the defender consults the defendant (who is usually under arrest in the same building and waiting in a nearby room) or, if free on bond, out in the hallway or a conference room to determine whether he agrees to the presented conditions. If the defendant agrees, then the formal right (in a hearing to be held afterwards) of pleading guilty will take place.

2) **There is no consensus on the proposal:** Strictly, dissent marks the beginning of the instruction of the legal process for further judgment. However, plea bargaining is the ultimate destination for almost all of the cases that are brought before the court. A lack of agreement is usually only in practice a postponement for a supervening negotiation. Plea bargaining can recur at any time, even during the jury trial.

In the early stage of my fieldwork, the judge received me with great kindness and said “if plea bargaining is what you are looking for, this is the right place.”²⁴ While we were sitting in his chambers, the judge pulled a chair and placed it next to him. After a few minutes, he initiated the possibility of negotiations, which were presented by the prosecutor. First, he introduced me to all of the assistant district attorneys and defenders present, highlighting my position as observer. After the completion of the backstage negotiations and a

22. See, FED. R. CRIM. PRO. 11.

23. FED. R. CRIM. PRO. 11.

24. Interview with Judge “J”, Cal. Hall of Justice.

brief pause granted by the judge, all of the participants headed to the courtroom. Strictly, all of the defenders had already consulted their clients regarding the proposals prior.

The courtroom proceedings were nothing more than the formal approval of the negotiation; in some cases there was an agreement, but for the others, there was a postponement.²⁵ The judge called the defendants (one by one) to warn and inquire as to whether the defendant was aware of the consequences of the declaration of guilt. The judge pronounced the sentence before the formal acceptance.

c. Common Sense and the Plea Bargain

The nationally known journalist, Morley Safer, who leads the television program *60 Minutes* interviewed the Attorney General of Rhode Island, Arlene Violet.²⁶ Promptly, the interviewer introduced his idea about the system, which, according to him, would be common sense: “One of the blots on the legal landscape in the USA is plea bargaining.”²⁷

At this moment, he simulated in a monologue a conversation between a District Attorney and a defender:

I know that my client spanked his partner, who was 50 years old, during the last 6 weeks. However, if my client chooses to declare that he is not guilty and to take the case to trial, we will have at least 6 weeks of your time (in addition of your entire team). However, if he declares guilty, he will obtain a lighter indictment. Let us reach an agreement. Give him three months [in prison]. [...] Is this not what happens in most cases?²⁸

In turn, Arlene Violet rebated without hesitation:

25. The (re)scheduling of the hearings drew attention due to its transparency and informality. Everything was done by consensus (the consent of all participants was indispensable).

26. See CANDACE MCCOY, *POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 129* (1993) (Interview by Morley Safer with Arlene Violet, Attorney General of Rhode Island).

27. *Id.*

28. *Id.*

No! Plea bargaining is just a blot that ignores the quality of justice: there is no balance between plea bargaining and what actually happened in the case. If you bring me a case and if you are honest, you will sit down and say, ‘Arlene, here is the proof that I have for my case, and here are my weaknesses. And the role of the data is such and such.’ I will look deep in your eyes and say, ‘I disagree with you on this, this, and this. We have this body of evidence.’ Thus, we will try to obtain what justice does in these cases. That is what plea bargaining does.²⁹

The dialogue in the interview portrays the tension between the opinions from “those of the outside” and “those of the inside.”³⁰ From the external perception, something is notorious: negotiation, in practice, sacrifices quality for quantity, i.e., for justice to demonstrate, in absolute numbers, its efficiency. In contrast, the ones involved in the process see plea bargaining as a legal and ethical process that is well-structured according to the known methods that will lead to negotiation.³¹

It is worth mentioning that the biggest problem, in the words of the Attorney General, is “ignoring the fact that negotiations are rarely performed by clearing things up.”³² In fact, the opposite normally occurs. In this study, the connection between plea bargaining and the trial itself remains clear. In the beginning, some of the strategies that would be eventually released in the trial are anticipated. This interlacing shows my assertion. To clear up a matter during the negotiation phase would anticipate what you have on hand for a future judgment, which would be suicide for any party. Thus, the opposite is observed. In the field, what we often see is a game of “bluffs” because one attempts to show strength and thus hides some cards up one’s sleeve.

29. *Id.*

30. *Id.*

31. MCCOY, *supra* note 26, at 129-30.

32. *Id.*

d. Plea Bargaining and Juridical-Religious Culture in the U.S.

The admission of guilt from an accused person has been around since ancient times. What seems to be something more recent, at least in the context of law in the U.S., is the wide use of the declaration of guilt by the accused to avoid a trial, which allows immediate punishment. Although it has existed since the Middle Ages in England (and, consequently, in the American colonial period),³³ its wide use appears to be precocious.

The idea of confession, regret, and forgiveness appears to always be linked to local religious rituals.³⁴ Consequently, it would be difficult to say that the religious traces in a given society would be separated from the way the society addresses the adjustment of local law.³⁵ In the U.S., which is a nation with a very striking Protestant tradition, it is not difficult to notice the intermingling between these issues. Vincent Crapanzano performed interesting fieldwork in his investigation of the connection between the courtroom and the pulpit ritual,³⁶ more specifically the relationship between the bench and the pulpit. Crapanzano, as the very title of his study suggests, focuses on the attachment to the word literalism and denotes the transparency in the two forms of ritual, i.e. legal and religious.³⁷ Moreover, this transparency³⁸ gives legitimacy to the process.

33. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 43 (1979).

34. See VINCENT CRAPANZANO, *SERVING THE WORD: LITERALISM IN AMERICA FROM THE PULPIT TO THE BENCH* (2000).

35. *Id.*

36. It is interesting to note the differentiation in the treatment given by the ethnographer to both environments: “The reader must have noticed the discrepancy between my chapters on Fundamentalism and those on Law. I treat Fundamentalists in a more gentle way compared to lawyers and judges, with whom I am engaged in a more heated argument. [.] I find that Fundamentalists have, for their salvation, sacrificed and condemned aspects of social and cultural life from which I gain a sense of meaning, satisfaction, and pleasure. [.] I liked many of the Fundamentalists I came to know. I did not really become friends with any of them—I couldn’t.” *Id.* at 324, 328.

37. *Id.*

38. *Id.* at 238. “Transparency” must not be confused with the public character of the process, as occurs in Brazil. The important thing is to know how the negotiation is publicized. The publication in the Official Gazette (Diário Oficial) does not grant transparency to the legal practices. The document is public, but there is no transparency.

This link is found, for example, in the most important symbols of both rituals: the Constitution and the Bible.³⁹ Many Americans construct a relationship between the Constitution and the Bible as divine providence.⁴⁰ The American president Abraham Lincoln used to ask the Americans to embrace the principle of “reverence to the laws” as the “political religion of the nation.”⁴¹ A judge of the Supreme Court of the United States in the 1920’s faithfully believed that the Constitution, as well as the Sacred Scripture, was a “legal instrument that was divinely inspired.”⁴² There are those who believe that there is a representation of the Bible’s holy trinity in the symbols of the American nation: 1) the Constitution, 2) the Declaration of Independence, and 3) the Flag of the U.S.⁴³ According to Professor Vincent Crapanzano, the symbolism of these issues is clear:

Moreover, American political and social understanding is continually articulated in and through religious, primarily Christian, symbols. That these symbols should be taken at face value, as indicative of heartfelt belief rather than rhetorically, as potentially moving conventions of oratory, is itself symptomatic of the literalism I am trying to delineate in this book.⁴⁴

The civil religion has become an emblem of the social identity of the American people, which is rooted in the social ideology.⁴⁵

Moreover, at the heart of this religious reality, the delineating principles of the declaration of guilt of the accused are inserted. Unlike Catholicism, in which the confession is secretive and performed before the religious leader (the representative of God), pleading guilty one sees a need of making the regret public, through the representation of the testimony, before the society, that the criminal act to which one is charged is worthy of a punitive response.⁴⁶ Neverthe-

39. CRAPANZANO, *supra* note 34, at 230.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. CRAPANZANO, *supra* note 34, at 230-31.

45. *Id.* at 231.

46. *Id.* at 70.

less, precisely because of this regret, the punishment is mitigated with another typical symbolism of religious tradition—forgiveness.⁴⁷

This is a nodal point of this system. It is as if there was a pre-stipulated condition for the negotiation. Similar to how there is a need of regret (which, in itself, is already a penitence) for the effectiveness of prayer to reach God, in the legal ambit there exists the need for the declaration of guilt to possess the postulating ability for bargaining, i.e., of remission of punishment (whether partial or total remission).⁴⁸ One of the differences with respect to this point is that the confession—at the juridical level—is independent of the moral value of honesty and sincerity because it is the society itself that does not appear to give “sacred” relevance to such values.⁴⁹

Contrary to what occurs in the United States, the maintenance of order in Brazil comes from the concealment of the conflict.⁵⁰ In American law, the negotiation, as observed in the institute of plea bargaining, is made public (regarding the forms of guilt and truth).⁵¹ Hence, it is necessary to make the comparison through confrontation and not similarity because mixing a system of consensus with a system of dissent is the heart of the problem, whether it is accusatory (where charges are public) or inquisitorial (where charges are written and secretive).⁵²

e. The Non-Existence of a Legal Basis for Plea Bargaining

It would be difficult to understand plea bargaining without understanding a little-studied phenomenon (even in the legal literature in the U.S.): the figure of the prosecutor. As we will find, its genesis does not have any similarity with what the Brazilian legal culture un-

47. *Id.* at 73.

48. *Id.*

49. Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AMER. L. ECON. REV. 227 (2002),

http://www.law.harvard.edu/faculty/shavell/pdf/4_Amer_Law_Econ_Rev_227.pdf.

50. Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1601, 1618 (Oct. 1996).

51. *How Courts Work*, ABA (2016),

http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html.

52. *Civil Law vs. Criminal Law*, DIFFEN (2015),

http://www.diffen.com/difference/Civil_Law_vs_Criminal_LAW.

derstands as public ministry. In a controversial, but well accepted, study, Allen Steinberg⁵³ intended to demonstrate that the image of a public prosecutor, which is a representative of the people, has been around since 1920.⁵⁴ He stressed that the majority of Americans, when thinking about the operation of the prosecution (District Attorney), already have in mind a public figure that represents an independent power and has a high power of discretion, which leads many authors to state that prosecutors have more power than the judges themselves.⁵⁵

In contrast, he stated that this public representative has mysterious origins with very few notes prior to the year 1880. In a previous period, the figure of the private prosecutor prevailed because a citizen always initiated criminal causes.⁵⁶ During the greater part of the nineteenth century, the criminal system had, as a root, a relationship of voluntarism among the citizen (pursuer) and the judiciary.⁵⁷ In addition, this volunteerism means nothing more than the discretion involved due to the private nature of this relationship.⁵⁸

Therefore, on the question of private prosecution, the important thing is to realize through the study that this discretion is “transferred” to the current figure of the District Attorney.⁵⁹ Proof of this transference is that the District Attorney is elected.⁶⁰ In Brazil, due to the principle of obligation, this discretion does not exist. Even in those cases in which the principle of obligation does not exist anymore, this does not occur in the same manner. Moreover, it is precisely because they are elected that these individuals should be held ac-

53. Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, CRIME & DELINQUENCY 568, 592 (1984).

54. Howard S. Gans, *The Public Prosecutor: His Powers, Temptations, and Limitations*, AM. ACAD. POL. & SOC. SCI. 120, 132 (May 1973).

55. Steinberg, *supra* note 53.

56. John Lea, *Courts and Prosecution In Nineteenth Century* (2003), <http://www.bunker8.pwp.blueyonder.co.uk/history/36807.htm>.

57. *Unraveling the Concept of Volunteer Policing*, UNIV. PITTSBURGH PRESS 1, 5 (2005).

58. *Id.* at 12.

59. *Are There Limits to Prosecutorial Discretion*, S. POVERTY L. CTR. (Jan. 1, 2003), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/are-there-limits-prosecutorial-discretion>.

60. As a matter of fact, some Attorney Generals become governors but these are people who hold state-wide office, usually not the local District Attorney or State’s Attorney who is elected at the local (i.e. county) level.

countable for their actions; the understanding of the institution of accountability is paramount to the understanding of the main differences between the two systems.

In this sense, Vera Ribeiro de Almeida authoritatively observes the following:

Even if one defends that the negotiation was imported from this model, as among us there is no mechanism of accountability, our prosecutors keep acting in accordance with the authority that each one judges having, without such choices being permitted by law or any concern about the future responsibility of such choices.⁶¹

In Brazil, the state is the one who holds justice in its hands. The King is the Emperor. These differences in origin demonstrate how these systems are anchored in different places. Therefore, it is no coincidence that the identification of plea bargaining is linked to this feature of discretion, which does not occur in Brazil.

Even though the declaration of guilt had already appeared in the American colonial period, its effects were very diverse. The literature suggests that these declarations were relatively rare and treated with suspicion. The declaration of guilt, notably with felony crimes that deserved more severe punishment, often led to the execution of the accused; as a result judges themselves were suspicious that the accused acted as a result of coercion or of misinformation. For this reason, the judges prompted the defendants to exercise their rights associated with trial proceedings.

The concept of plea bargaining—the negotiation between the prosecution and the defenders with the purpose of promoting the declaration of guilt aimed at bargaining—was an unknown practice in the U.S. until the nineteenth century.⁶² Before this period, cases tried by jury were generally decided more quickly, without significant regard for formal evidence examination and procedure.⁶³ It was common for lawyers to represent both parties in the same dispute. More-

61. Vera Ribeiro de Almeida, *Transação Penal e Penas Alternativas: Uma Pesquisa Empírica nos Juizados Especiais Criminais no Rio de Janeiro* (2012) (unpublished dissertation, Universidade Gama Filho) (on file with author).

62. Steinberg, *supra* note 53, at 584-85.

63. Steinberg, *supra* note 53.

over, no catalysts existed to promote the development of a plea bargaining system before the nineteenth century.⁶⁴ The change in these characteristics led to the first movements in favor of such an institution. In the second half of the nineteenth century, the U.S. was faced with a sudden change from a system of trials to a plea bargaining system, which was already the most widely used method of conflict resolution.⁶⁵

In this analysis, we return to the initial idea of plea bargaining regulation. This transformation was neither the result of an introduction of, or changes in, the legislation, nor the result of a formal creation of rules by the judiciary itself—something usually observed in the U.S., notably by the Supreme Court.⁶⁶ According to legal scholars, the adoption of this transformation originated in large part from the response of the prosecutor to the excess of cases submitted to the judicial branch.⁶⁷

The increase in its use occurred especially because of the usual (and expected) causes present in the modification of the rituals of the judiciary in various parts of the world. In other words, the increases in both the population and the crime rates spurred the increase.⁶⁸ In addition, the increase in the complexity of trials by jury and the professionalization of criminal justice favored the rise in the use of plea bargaining. Plea bargaining became the D.A.'s first attempt at a solution to legal disputes, because the D.A. did not have enough time and resources to monitor every case that went to trial.⁶⁹

It is remarkable that, through field research, I was able to observe that plea bargaining is a necessity for many practitioners as a condition on the sound functioning of justice. As soon as I approached one of the operators, and showed my interest in performing a comparative research study about the system, the burning question on their minds was, "How does plea bargaining work in Brazil?"

My reply was ready and immediate: "We have not, in Brazilian criminal proceedings, an institution that has a similarity plausible to

64. *Id.*

65. *Id.* at 584.

66. *Id.* at 585.

67. *Id.*

68. *Id.* at 572.

69. Steinberg, *supra* note 53, at 585.

the point to finding similar categories; we have, only, figures with links that may bring about a confronting research.” Later in the conversation, I only made a brief reference to our penal negotiation—even though the two systems share more differences than similarities. However, the following inquiry—loaded with an obvious strangeness/irony—arises: “However, how do you, then, judge all the cases?”

In principle, this question brings forth a twofold analysis: (1) who are the subjects that reveal this inquiry/strangeness; and (2) what this question informs us in the foreground. With regards to the first analysis I can state that to my surprise, I noticed this inquiry in all sectors of society, including outside the milieu of legal practitioners. This question was the main area of interest for the vast majority of judges, defenders, engineers, and civil servants. This first point of analysis lends itself to the second point of examination. The question, and therefore the perception, of plea bargaining is not limited to actors in the legal system. Generally, it is common knowledge that the existence of plea bargaining arose from pragmatic concerns. In principle, it is not better or worse, but rather the solution that was found, either if it is palliative or already definitive in U.S. society. It was as if my American interlocutor wanted to ask me, “How does your model work without the existence of plea bargaining?” Some of the interviewed individuals even came to their own immediate conclusions: “I suppose that the number of judges in Brazil is large.”

Of course, the absence of an immediate solution to cope with this method is not the only reason for the “success” of this powerful procedure for penal prosecution. Several other reasons corroborate this situation, which incidentally, was one of the main objects of study in my research. Without prejudice to the subsequent detailed analysis, I have recently heard of an academic who appeared at the university in which I was doing my research, who stated a phrase that introduced another characteristic of great relevance in the U.S., and is also one of the fundamental aspects of plea bargaining: the adversarial system.

The idea of a solution to the dispute as part of a game between opposite opponents, which have a thirst for victory, lead the above-mentioned scholar to allude to the words of a famous football coach

speaking on victory: “Winning is not everything; it is the only thing.”⁷⁰

Victory, game, opponent, and defeat are expressions that denote not only a relationship—as could be seen at first—with the solution to the disputes found in trials, but also to the negotiation of plea bargaining. The bargain is also negotiated in a behind the scenes arena, which is typical of the adversarial system. For this reason, I asked Judge “J” what he would alter in the institution of plea bargaining. Showing surprise, he replied:

Well, I had never thought about it ... Well, I believe that the reason for the existence of plea bargaining - and I think that you have already realized this - is that, with 15,000 arrests (for felonies) per year in San Francisco, we would only be able to judge [referring to trial] approximately 700 per year. That is, we must eliminate these cases in some way. If this did not happen ... well, you must be aware through the newspapers of the budget cuts to our court. Well, even in our best [financial] season, it would be impossible for us to take the majority of the cases to trial. It is necessary to have plea bargaining... or there would not be a criminal system ... particularly in San Francisco. Theoretically speaking, the aim of the institution is to punish the accused. The other purpose is to ‘clean the agenda’ to allow the trial of those cases that are really necessary. Thus, bearing in mind that the purpose is to reduce the number of cases, if I could change the law, I would amend it to enable plea bargaining during trials. But, as I have already said, this only happens in San Francisco. Another change that I would make is the following: I believe that, in the negotiations that occur before the preliminary hearing (only between the parties), only two or three experienced District Attorneys should be chosen for all cases. They should not be very strict and conservative Attorneys.⁷¹

70. Beau Dure, *Winning Isn't Everything; It's the Only Thing. Right?*, GUARDIAN (Sep. 24, 2015, 5:00 PM), <http://www.theguardian.com/sport/2015/sep/24/winning-everything-sports>.

71. Interview with Judge “J”, Cal. Hall of Justice (May 25, 2012).

f. Pleading Guilty and the Path to the Bargain Discretion

It is important to notice, in advance, that the approval of plea bargaining by the Supreme Court of the United States did not introduce any innovation in relation to plead guilty in itself, i.e., with regards to the statement of guilt.⁷² It always existed and had (and still has) its various functions within the American judicial model.⁷³ The innovative and formal approval by the Supreme Court stressed that the American Constitution does not impose an obstacle to plea bargaining.⁷⁴ In other words, what took place was the formal cementing of one more facet of pleading guilty. It would also be the “bargaining chip” for plea bargaining. The accused must declare himself/herself guilty as a *sine qua non* condition to have the opportunity to bargain. The bargain is not only limited to the intention of reducing the penalty to be imposed, as might appear through a first analysis. It goes well beyond this. From the moment in which the accused declares himself/herself guilty, the negotiating parties (here, as will be observed hereafter, we can include the judge) establish the highest degree of discretion.⁷⁵

I also asked Judge “J” about this discretion, especially its limits, and obtained the following answer:

Yes, the District Attorney has full discretion with regards to the accusation. In addition, once indictment is formulated, it can be modified at any time. In fact, I remember that, at the time when I was a defender, I participated in an interesting case in which the defendant was accused of murder and I lead a negotiation for modifying the indictment to disturbing the peace, which is a low-relevance crime. And I think that this happened for a reason. Often the police do not have conviction that the accused actually committed the crime. When the District Attorney realizes that he will not

72. Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 501, 567 (2006).

73. *See id.*

74. *Id.*

75. I avoid using the Portuguese term “discricionariade” and prefer the term discretion to more accurately denote the broad contrast that we found in this area if we compare the Brazilian system with that of the USA.

obtain conviction of the criminal practice even by frightening the defendant, he needs to give some type of answer. Thus, he eventually chooses the crime which, in my view, would be the “minor” existing offense [disturbing the peace].⁷⁶

However, when I asked about the mythicizing of the judge’s neutrality in this process, he said:

The judge fully has the final word. Well, there are different philosophies among judges, but clearly, if the judge does not like the offer, he can just not accept it. For example, the judge who preceded me often left aside the negotiations that would occur previously. In all these years, I have only done this once. I have another philosophy. If the District Attorney and the public defender arrived at an agreement [...] They are well aware of the case. The defender knows well what is best for the accused, and the District Attorney is aware of what would be the best option for society.⁷⁷

Moreover, we can see one of the most striking characteristics of plea bargaining in this statement. In one of my first visits to the judge’s chamber (where the prior negotiation occurred, in the manner described at the beginning of this work), I realized that, when the prosecutor, the lawyer, and the judge start the negotiation (assuming that there was a possibility of a declaration of guilt), there was a large opening regarding the “destination” of the accused. I realized that it was very common to “choose” the legal classification of the committed crime. In other words, even if they were all certain that there was a crime of drug trafficking, it would be possible to stipulate that the defendant would be charged with the crime of possession of drugs and, therefore, receive a punishment that was compatible and proportional with the stipulated practice (and not performed!). The prosecution, therefore, will be formulated by a symbolic fact, which is “created” by means of a negotiation. Indeed, a German judge said the following in an interview: “[P]lea bargaining can weaken the duty of

76. Interview with Judge “J”, Cal. Hall of Justice (May 25, 2012).

77. Interview with Judge “J”, Cal. Hall of Justice (May 25, 2012).

the judge to investigate the ‘truth of the facts’ [...] the judge has a smaller chance of checking the basis of the [facts].”⁷⁸

On the negotiating table, the penal code does not serve as a parameter for the suitability of the practiced conduct but as a range of options that serves as a helm for the choice (pick up) of the punishment to be applied.

Conversely, in Brazil, the first steps in the theory of criminal law already show us that one of the basic principles of the law (it is not just about the criminal sphere) is the legality.⁷⁹ Both the Constitution and the penal code stipulate that there will be no crime if the law does not previously set the conduct that is eventually practiced; in addition, there will be no punishment without prior legal application.⁸⁰ This is a principle under which various decisions are made.

I was once struck with an interesting comparison: the idea of plea bargaining is the same as that of “grade bargaining,” i.e., a negotiation between a teacher and a student. Let us suppose that a school assignment has been submitted to the teacher and, after a brief look at the first page, the teacher tells the student that, if he would carefully read the entire work and apply his usual strict rules, he would most likely decide to grant it a “D” grade. However, if the student relinquished his right to have his work meticulously examined and conscientiously criticized, the professor would agree to grant it a “B” grade. Considering that the student gives precedence for the general average of grades—and less precedence to learning and the justice of the grade—the satisfied student accepts the “B” grade, and the teacher is satisfied with the reduction in their workload.⁸¹

Although the illustration is interesting, it does not correspond faithfully to what occurs in plea bargaining, particularly in relation to one of its premises. First, in the illustration, the professor would have a dual role, which is to say, prosecutor and judge. Second, in the example given, the teacher already predetermines that a well-

78. Turner, *supra* note 72, at 225.

79. Andrey B. de Mendonca, *The Criminal Justice System in Brazil: A Brief Account*, RESOURCE MATERIAL SERIES NO. 63, 92, http://www.unafei.or.jp/english/pages/RMS/No92_07PA_Andrey2.pdf (last visited Apr. 9, 2016).

80. *Id.*

81. Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 104-05 (1976).

established analysis (i.e., a trial) would imply a lower grade (i.e., a high/rigorous penalty). This predetermination (at least in the manner of this illustration), however, does not exist in plea bargaining, especially if we bear in mind that, although the punishment is stipulated by the judge, it will be the task of the jury (which is not included in the negotiation) to “tell the ‘truth’ of the facts.”⁸²

In the academic seats of university degree courses in Law, we have already learned the old adage (formalized in the Constitution) according to which the citizen might do (or fail to do) everything that the law does not prohibit, whereas the public man can only achieve what is expressly defined by the rule of law. In the U.S., we observe something quite different. The idea of discretion by the police officer is commonplace in American society, which accepts it (to a certain extent).⁸³ One academically⁸⁴ learns that discretion may imply the ignoring of minor offenses (expressly provided by the law). In a core work of the American criminal system, I have expressly read that “the lower the severity of the offense, the greater the freedom that the police has to ignore it.”⁸⁵ In addition, George Cole adds that even politeness can be a determining factor in discretion: “[. . .] a suspect that demonstrates respect for the officer has a lower probability of being arrested than he who in the opposite manner.”⁸⁶ Or, as said by Benjamin Franklin: “Laws too gentle are seldom obeyed; too severe, sel-

82. *Id.*

83. On the reasonableness of this measure (in fact, on the control of this measure), it is worth referring to the article by Sanford Kadish, who mentions the principle of legality. He says that “In terms of fact, of course, the practice reduces this ideal to a myth, and the need to preserve the existence of the ideal in these mythological terms has tended to divert attention from the nature of the problem presented: Is it subversive of the principle of legality that the police in fact exercise a wide discretion (.)?” Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1961).

84. In this, one could read, for example, the following statement: “It implies that the police might decide not to make an arrest even in those situations in which a crime has just been committed, when the accused and the evidence are “at hand.” This tends to portray the police as something other than an automated machine, as men whose judgment-discernment is essential in determining whether it is reasonable or not to invoke penal prosecution.” Herman Goldstein, *Police Discretion: The Ideal versus the Real*, 23 PUB. ADMIN. REV. 140, 141 (1963).

85. GEORGE F. COLE, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 187 (2012).

86. *Id.*

dom executed.”⁸⁷ I would like to emphasize that this is not, therefore, a “corrupt” act of the local authority. The explicit nature of such practices is a consequence of the natural social acceptance of the acts. Moreover, it is also true that this social acceptance strengthens the character of transparency.

In the normative field, one also sees this transparency: the expression discretion appears seventy-seven times in the California Penal Code, which regulates a great diversity of subjects.⁸⁸ In the same line of reasoning, plea bargaining also represents the portrait of this possibility of resolving the dispute without being tied to the rules of legal application. I began this section with the phrase “This is the best thing I can do for him.”⁸⁹ It is with the same transparency and informality that “plea bargain” negotiations are held.

FIELD WORK IN BRAZILIAN CRIMINAL SYSTEM (CRIMINAL NEGOTIATION)

As I have repeatedly noted, our aim is to understand the functioning of the bodies of the judiciary branch in both countries, starting from the premise that they are universes with substantial differentiation in their juridical cultures. Therefore, it is essential to conduct the proper contextualization of each one of these situations. Only with the contradictions, the dissents, and the consensus (appropriately contextualized) will it be possible to perform a comparison of the differences because, when we talk about comparison, we are thinking about the differences between the institutions of each system, which uses the comparative method by contrasts. This sets apart the possibility of conducting a comparison by similarity, which would lead to the erroneous conclusion that the institution of the most diverse legal cultures are equal and differentiated only by subtle characteristics.

87. BUCKNER F. MELTON, JR., *THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS FROM THE MEN AND WOMEN WHO CREATED AMERICA* 161 (2004).

88. *See*, CAL. PENAL CODE INDEX (West).

89. *See supra* Section II.a.

a. The Necessary Contextualization of Brazilian Juridical Culture and Criminal Negotiation

Contrary to the U.S. system, we find that the Brazilian legal culture arises from and follows a significantly different path. Prior to analyzing these topics in more depth, it is relevant to describe the remarkable characteristics associated with the mistaken legal theory tradition about the topic in Brazil. First, the Brazilian juridical literature considers that the due process of law has an identity between the two countries, which consequently forces us to arise from a mistaken premise of the theme.⁹⁰ Second, the juridical theory in Brazil asserts that the negotiation brings the unequivocal and strong heritage of law practiced in the U.S. regarding the institute of plea bargaining.⁹¹

We do not mean to make a value judgment of the objects that are being compared. There will not be a value analysis toward which law is better or worse. However, it is important to make it clear that the two systems have characteristics that are substantially different as a direct result of belonging to different juridical systems and according to the culture of the States to which they belong. For this reason, in an equivocal way, one of these systems is segmented into parts such that these are incorporated into our or any other system with the purpose of supposedly ‘improving’ one of them. However, the effects of this transplantation become unpredictable and results in little enlightening for the undertaken comparison.

b. The Field Working Space

Unlike in the U.S., Brazil’s legislation regarding the subject is federal and, therefore, enjoys validity throughout the national territory. It is important to clarify this point, having in mind that my obser-

90. The theme discusses the interesting research in which the decontextualization sets aside the attempt to make the comparison through similarities between the mentioned institutions. MARCO AURÉLIO GONÇALVES, *DEVIDO PROCESSO LEGAL: UM ESTUDO COMPARADO* (2004).

91. Although the author does not make a direct assertion, he does not fail in assuring that “in the assessment of the impact of the principle of opportunity, the starting point must be the North American Law, whose model of Criminal Justice, based on the generalization of negotiated statements of guilt as a mode of rapid resolution of conflicts, has been the source of inspiration for the legislative reform in many countries affected by the collapse of its courts.” Soon after this affirmation, the author refers to plea bargaining. MÁRCIO FRANKLIN NOGUEIRA, *TRANSAÇÃO PENAL* 68 (Malheiros, 2003).

vation on American courts only involved the judicial practices of the State of California.

As discussed in the previous section, each state creates its own legislation in criminal matters and thus leaves the responsibility of disciplining a few crimes (and their respective procedures) of national repercussion to the federal sphere.⁹² In contrast, I remember that the institution of plea-bargaining is used in a very similar way in the more diverse areas of the country. In Brazil, the matter is governed in a generic way by the Federal Constitution in Article 98(I), which discusses the creation of “special courts, filled by magisterial judges, or magistrates and lay people, competent for the conciliation, trial, and execution of civil causes of lower complexity and penal offenses of minor offensive potential, by means of oral and abbreviated procedures, allowed, in the cases provided by law, the negotiation and the trial of resources by groups of judges of first degree.”⁹³

However, the Law 9.099/95 is the only regulation that institutes conciliation and criminal negotiation.⁹⁴ Therefore, this legislation is applied throughout the national territory. The scope of my observation, however, was limited to Special Criminal Courts of the Metropolitan Region of Vitória-ES, where I observed conciliation and criminal negotiation hearings and conducted some interviews with the actors involved in this process.

c. Two Distinct and Poorly Understood Moments: Conciliation and Criminal Negotiation

I must preliminarily highlight that the objective of this work is not to perform a review of the legislation that regulates the Special Criminal Courts; it is a matter of fieldwork in two judicial systems to perform a comparison exercise. The intentions are to ascertain the differences between negotiations in the criminal ambit made in Brazil

92. See *supra* Section II.e.

93. CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 98(I) (Braz.).

94. Cynthia Cristina de Carvalho e Silva, *The Role of the Victim in the Criminal Process & The Use of Restorative Justice Practices in Brazil: Problems and Challenges in Search of Principles and National Guidelines*, UNITED NATIONS ASIA & FAR EAST INST., http://www.unafei.or.jp/english/pdf/RS_No93/No93_PA_Silva.pdf (last visited Mar. 15, 2016).

and in the U.S. and, mainly, to identify the disparities between what the law says and what actually occurs in practice.

As outlined in the previous section, there is a legal-specific discipline regarding plea-bargaining. It is an explicitly informal practice and a quality that the practitioners of law do not make any issue in denying. The following are characteristics of this practice in the U.S.: (1) There is no predefined time for its occurrence; (2) there is no specific location for the negotiation (except for its ratification); (3) the judge does not necessarily participate in the negotiation (this will depend on each judge); (4) it can be applied, virtually, for all crimes; (5) it generally requires an admission of guilt by the accused; and (6) there is an incomparable discretion on the part of the District Attorney.⁹⁵

In contrast, in Brazil, the matter is governed by law and contains several details. Within the framework of this research, two points are crucial: (1) To establish the main differences between both systems and (2) to verify whether the judicial practices correspond to what is regulated by the law. It is thus necessary to first acknowledge that there are two distinct and sometimes poorly understood specific points in time (during the process), especially in informal practices.

In Article 72, the statute 9.099/95, which addresses the mixing of the civil and criminal fields, establishes the possibility of having a negotiation regarding damages (civil sphere) in criminal proceedings.⁹⁶ Until the advent of Special Criminal Courts, these two spheres never communicated (except for the purposes of binding decisions, in certain cases).⁹⁷ At this point, there is an apparent difference to plea-bargaining, through which we are not considering civil matters (at least as a general rule).

It should therefore be clear that the term conciliation is limited to the possible legal settlement (regarding civil damages). It is important to stress this because Article 73 of the statute states that the judge or the conciliator shall conduct the hearing.⁹⁸ Throughout my field observations, I never observed a judge conducting a conciliation. More-

95. *See supra* Section II.

96. CONSTITUÇAO FEDERAL [C.F.] [CONSTITUTION] art. 72 (Braz.).

97. CONSTITUÇAO FEDERAL [C.F.] [CONSTITUTION] art. 98(I) (Braz.); Edilenice Passos, *Doing Legal Research in Brazil*, HAUSER GLOBAL L. SCH. (Feb. 2005).

98. CONSTITUÇAO FEDERAL [C.F.] [CONSTITUTION] art. 74 (Braz.).

over, at this point, a problem arises: Article 74 states that, in cases of private criminal action or conditional to representation, the agreement (in other words, the civil settlement) entails a waiver in the criminal sphere.⁹⁹

In other words, in judicial practice, the judge does not participate in these cases. In one of my comments, I sought to determine the significance of the expression “under her guidance” in the view of the judge. In response to my inquiry, she replied: “I never let a conciliation occur without my presence.”¹⁰⁰ However, she made it explicitly clear that her presence in practice means being in the same court because reconciliations occur in another room, without any supervision.

Still in the same court, when I insisted on the procedure, the prosecutor said the following:

The conciliator is a lay judge and, therefore, an appendix of the magistrate. He only does a hearing to attempt a conciliation, but all the resolutions taken at such hearings need to subsequently pass through the sieve of the judge and the Public Ministry. No conciliation passes outside of these offices [except, of course, in the hypothesis that the presence of a member of the D.A. is not required].¹⁰¹

I realized, however, that the practice was very different. After the conciliation hearing, the conciliator was limited to the minutes signed by the judge.

When interviewing a conciliator, I heard the following statement: “I act as prosecutor.”¹⁰² In practice, as realized through my field research, conciliation plays a significant role in the large and vast majority of cases (in both private criminal action and conditional to representation) and, therefore, could cause an extinction of punishment. In other words, contrary to what the law provides, the “solu-

99. There are no “private criminal actions” in the U.S. All criminal matters have to be brought by the government, either state or federal prosecutors; although some may require a complaint signed by the victim. CONSTITUÇAO FEDERAL [C.F.] [CONSTITUTION] art. 73 (Braz.).

100. Interview with Judge, Special Criminal Court, Braz.

101. Interview with Prosecutor, Braz.

102. Interview with Conciliator, Special Criminal Court, Braz.

tion” given by the criminal sphere occurred without the presence of the judge and the public prosecutor.

Let us see another facet of history. The purpose of this statute was the resolution of criminal issues through legal civil settlements (what we could call “civilization” of the criminal procedure).¹⁰³ During the field observation, I noticed that, in almost all cases, there is no actual civil agreement regarding damages. Instead, there is an interference of the conciliator that points out that the best solution is to “forget everything.” Statistically, this is of great value to the courts. Even the judge did not have knowledge of this process, but the result will still be considered as a “solved lawsuit.”

During the course of this field observation, there were rare moments, which I observed the conciliator proposing a legal settlement regarding civil damages. In these cases, the conciliator functioned as a mediator by stating that the best result would be “a change in behavior” and always emphasized that it was a criminal court not a rendering to a “process of knowledge” with respect to any debts. In a conversation with one of the conciliators, she made it clear that she operates more as a psychologist than as an individual who dictates statute 9.099/95. She added that, in the recent months, she had reached a 100% success rate regarding the agreements. She then explained the reason for this success and said that, in fact, what the victim wants, at least, is to see the accused be obliged to attend the hearing “to suffer as he deserves,” as stated one of the victims.

In another hearing¹⁰⁴ in which I participated, the woman who was accompanying the threatened party said the following: “Does he end up in jail?” and the conciliatory replied: “No, in Brazil, he does not end up in jail.” She also mentioned the following: “This means that if a person does not pay the other, [he] does not end up in jail.”

Every factor indicated that they were there for much more than a debt. The companion of the threatened party thought that criminal judgment would be competent to examine all of the issues involved in the matter, including the non-payment of any severance payment. For them, it was a single thing. They expected that the accused would be arrested due to the debt owed as well as the threat made.

103. CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 74 (Braz.); 9.099/95 de CÓDIGO PENAL (Brazilian Penal Code); Silva, *supra* note 94.

104. This was an indictment of threatening and personal injury.

According to the conciliator, almost 100% of the people who participate reach an agreement, which indicates that people are satisfied with simply the presence of the accused in the conciliation hearing and/or that the victim does not know what will happen if there is no will to reach an agreement. Nevertheless, I repeat that the term “waiver” is rarely used during hearings because the conciliator is limited to affirming that the best solution is to “forget everything such that everyone may live in peace.”

I asked this same conciliator whether the solution could be through a manifest waiver. She denied and said that what happens is a real conciliation. In all the minutes she drafted, however, the waiver was expressively provided in Article 107 of the Brazilian Penal Code.¹⁰⁵

We have addressed cases of conciliation for the civil settlement which, in practice, leads to the extinction of the process. However, I have realized that the judicial practices in criminal negotiations also differ from what the law stipulates. Moreover, I recall that the participation of the conciliator, according to the law, is confined to the stage of legal settlement regarding civil damages, not in the criminal negotiation stage.

In the interlude of one of the conciliations, I asked one of conciliators if she also participated in the criminal negotiation. Her answer was the following: “I participate. I do it. However, now I want to stop doing it because I eventually do everything alone.”¹⁰⁶

In other words, all of the hearings, whether conciliations or criminal negotiations, are conducted exclusively by the conciliator. Judges and prosecutors only sign the minutes. In practice, according to my observation, the judge participates only in cases in which the negotiation was frustrated (which is extremely rare) and if evidentiary and judgment hearing are necessary.

d. The Problem of Consensus

Before the already demonstrated paradox, in which our criminal proceedings are ruled by inquisitorial characteristics, it is noticeable that part of the doctrine addresses the criminal negotiation as an insti-

105. CÓDIGO PENAL (Brazilian Penal Code) art. 107.

106. Interview with Conciliator, Special Criminal Court, Braz.

tution derived from plea bargaining and that, above all, includes the concept of consensus. Lets look at an example of the Brazilian doctrine:

Various European juridical systems, inspired by the US system of plea bargaining, have adopted innovative solutions with the aim of reaching a quicker and more effective Criminal Justice in answer to the concerns of the community. (...). The Brazilian legislator, with the publication of Law 9,099, introduced, for the first time in our criminal systematics, Special Criminal Courts with important innovations, such as the conditional suspension of the proceedings and the criminal negotiation, thereby fulfilling the precept of art. 98 I of the Federal Constitution of 1988, and eventually engaged in the formulation of a consensual Criminal Justice, slackening that highly repressive characteristic in relation to offenses of small and medium severity; thus, it put into practice one of the most advanced programs of depenalization in the world (which must not be confused with decriminalization).¹⁰⁷

Contrary to what it may seem, our model does not have characteristics of consensus. The whole process is conducted in such a manner to converge the powers in the hands of the judge. Brazilian law does not have the desire to achieve consensus on the facts by establishing, for example, which facts would be undisputed.¹⁰⁸ What occurs is a dissent that has no end, at least, in the context of the parties. The dissent is only dissipated when the figure of the judge arises and, using his “free conviction,” opts for those facts or evidence that lead to an unusual real truth (observed in the exposition of motives of the Code of Criminal Procedure itself).

Even though it is impossible to completely deny the characteristics of consensus on a criminal negotiation, it cannot be stated that the criminal negotiation is guided by a new consensual bias in Brazilian law. Within a hierarchical society, in which the contradictory is the master line of the process, there is still no space for this consen-

107. MÁRCIO FRANKLIN NOGUEIRA, *TRANSAÇÃO PENAL* 22 (2003).

108. *Id.*

sus. Unlike plea bargaining in the U.S., where there really is a consensus between the parties. As we know, the D.A. initiates legal proceedings against the defendant. However, D.A., in practice, is situated in the upper hierarchy. This is because, in Brazil, when one thinks of the public, one thinks of the State, hence the hierarchization

Why? Because, strictly speaking, we have not, in this perspective, an accusatory system but an inquisitorial one. In the American system, there is the figure of the State (judge) and the District Attorney, who is supposed to be the representative of the People. In Brazil, both are figures of the State.¹⁰⁹ Prosecutors are state tutors of the society with public individual interests, although official.¹¹⁰

In one of the hearings I attended, I heard the following statement from a judge (addressing the accused): “Sometimes, it depends on the Dr. X [prosecutor] or depends on me [judge]. I think that you Sir have to accept it because otherwise it will be worse for you.” In addition, I have noticed through field research that the agreements are not consensual because the parties do not know the real purpose of each hearing. The conciliators—the real holders of “power”—want to “get rid” of the process. Moreover, to achieve this, they take advantage of a rule that is already known in Brazilian legal culture: that the process is a problem that one should eliminate. Therefore, in the field observations, it remains clear that the negotiation is not a result of the consensus between the parties but, above all, is a result of the conduct by the magistrate that aims primarily to end the process regardless of the costs.

Thus, contrary to what occurs in the adversarial system where the consensus is a remarkable factor, in the Brazilian case we find that the negotiation enjoys a masked inquisitorial characteristic.¹¹¹

It is distinguished, thus, from the forms of expression of opposing logics of the production of truth, which are dominant in academic and scientific areas and founded in the quest for points of provisional consensus on facts that are built through reflection and making the different perspectives of those involved explicit in a process of

109. *Id.*

110. *Id.*

111. ROBERTO KANT DE LIMA, SENSIBILIDADES JURÍDICAS, SABER E PODER: BASES CULTURAIS DE ALGUNS ASPECTOS DO DIREITO BRASILEIRO EM UMA PERSPECTIVA COMPARADA 29 (2009).

demonstrative argumentation, which aims at convincing all legitimate parties involved in the process: here, reaching a consensus between pairs is essential to validate the knowledge.¹¹²

In the context of criminal negotiation, the judicial practices show that the efficiency of the solution of processes prevails over any attempt to maintain the minimum guarantees of a process.¹¹³ In reality, this is not a process, but rather a means through which the operators will eliminate the problem.

There is a manipulation of information by means of an elite communication between the law operators, through which the parties are brought to an agreement more frequently through inquisitorial reason than by consensus, particularly because one cannot consent to something that one poorly comprehends.¹¹⁴ The fallacy of the consensus lies precisely in the fact that there is a false impression of a negotiated solution.¹¹⁵ As a result, there was an end to the process due to a camouflaged imposition.

It is therefore the implementation of informal practices outside the formal courtroom environment. One could say, however, that this informality also occurs in plea bargaining. Nevertheless, the difference is precisely its transparency. That is the way the system works; it is not camouflaged. There is not even a concern in regulating it. It is important to note, however, that there is a significant difference between the public character of the process (such as the process that occurs in Brazil) and its transparency. It is necessary to understand how the negotiation is publicized. The publication in the Official Gazette (*Diário Oficial*) does not grant transparency to the legal practices. The document is public, but there is no transparency. In one of the hearings I attended, this logic was quite evident in the words of the judge: “In your case, the agreement is the best solution because the continuation of the process will be much worse for you—and I will not give you a new opportunity.”

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

CONCLUSIONS

In the present work, we proposed to understand the law through a compared empirical perspective (Brazil and the U.S.) and performed a thematic delimitation notably within the framework of the forms of negotiation in criminal justice in both countries: plea bargaining and criminal negotiation. Because these systems are derived from considerably distinct sources, we first sought to contextualize them according to their traditions. Thus, we can draw several conclusions from the research.

(1) Despite all of the emphasis of the American universities in transmitting the techniques and developing skills in relation to the jury trial, the vast majority of criminal cases are resolved through plea bargaining (97% of the cases brought to justice).¹¹⁶ Although academia itself admits this prevalence, the course of informal practices focuses more on jury trial than in the practices of plea bargaining. Indeed, there is a paradoxical perception of the self-conception that the actors involved in the process have regarding their functions and what would be more relevant in them. Everyone in general has the power to negotiate, but only these actors have the prerogative to analyze the evidence and require the witnesses to appear in court, although under the statistical point of view, what they really do is plea bargaining.

(2) In this context, the trial techniques are not so relevant. On the contrary, there is a revelation of the connection between plea bargaining and the trial. It is as if all criminal judicial systems work around the idea of consensus, which in turn is best represented by plea bargaining. This would be the main target.

(3) Trial attorneys are considered the best negotiators due to their skill set and therefore often negotiate pleas. The other party foresees that going to trial will be a difficult fight. Moreover, the difficulty is not necessarily due to the other party having strong evidence, but the knowledge that your opponent has technical skills (either from experience or not) that intimidate you.

116. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?_r=1.

(4) Although it is customarily stated that the role of the judge in plea bargaining is mitigated, I noticed that there was no judge who gave up that control. I noticed a difference in the degree of relationship between the judge and the parties, and a certain level of interference in the agreements. Nevertheless, unlike what is observed in Brazilian law, I have never seen any magistrate who is a mere ratifier of agreements.

(5) In the legal process in the U.S., the truth is built according to the rules of consensus between the parties.¹¹⁷ What actually occurred is much less important than what is agreed regarding the occurrence of the facts. This collides with the Brazilian model in which the search for real truth still permeates in the midst of legal theory.

(6) In Brazil, there is no intention to reach consensus or, in other words, to establish the facts, including the evidence to be brought to trial. The logic of this contradiction eventually results in the unsuccessful attempt to achieve consensus at the basis of the process: the facts. The judge, gathering the contradictory ideas, will carry out his judgment upon free conviction.

(7) The option for bargaining in U.S. law makes the declaration of guilt indispensable.¹¹⁸ Moreover, the idea of confession, regret, and forgiveness appear to always be linked to local religious rituals.¹¹⁹ It would be difficult, indeed, to say that in a given society, the religious values should be separated from the way in which this same society addresses the regulation of the local law. In the case of the U.S., a nation with a very striking Protestant tradition,¹²⁰ it is not difficult to perceive the intermingling of these issues.

117. *Consensus-Based Decision-Making Processes*, CONSENSUS COUNCIL, INC. 3, <http://www.nd.gov/ndsd/docs/consensus-process.pdf>.

118. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

119. Paul Lauritzen, *Forgiveness: Moral Prerogative or Religious Duty?*, 15(2) J. RELIGION ETHICS 141, 141 (1987). In general, according to my observation, many people agree that many of these concepts mirror many of our religious values, but very many lawyers and judges would vehemently deny that U.S. legal system is linked to “religious rituals” and would argue quite vociferously that they have separation of church and state, unlike Brazil where it is possible to keep a large crucifix in the corner of the courtroom.

(8) Contrary to what occurs in the U.S. culture, in Brazil, the maintenance of law is more the result of the concealment of the conflict.¹²¹ In American law, the negotiation, as observed by the institution of plea bargaining, is transparent (regarding the forms of guilt and truth) and this is the characteristic that legitimizes the process.¹²² Hence, the need to make the comparison by confrontation and not by similarity arises because mixing a system of consensus with a system of dissent, whether it is accusatory (where charges are public) or inquisitorial (where charges are written and secretive) is the heart of the problem.

(9) In Brazil, the state has the justice in its hands.¹²³ The King is the Emperor.¹²⁴ These differences in the origin of the process demonstrate how these systems are anchored in different places. For this reason, it is evident that the identification of plea bargaining is linked to this feature of discretion, which does not occur in Brazil.

(10) Victory, game, opponent, and defeat are expressions that denote not only a relationship—as could appear at first—with the solution of the disputes found in the trials, but also in the negotiation of plea bargaining. The bargain is also performed in an arena behind the scenes, which is typical of an adversarial system. However, all of these rules, unlike in Brazil, are transparent and are part of the system.

(11) In U.S. law, the bargain is not limited to the intention of reducing the penalty to be imposed. From the moment the accused de-

120. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*, 21 J.L. & RELIGION 479-80 (June 2008). In my fieldwork, I could also talk to Judge “M” who said, “I don’t think this simply reflects a Protestant tradition. As a practicing Catholic, I am constantly reminded of sin, confession, regret, and forgiveness, but I agree that I sometimes feel like I must hear a statement of regret and admission of sin before I can ‘forgive.’ I think one difference is that we Catholics confess in private. Some Protestants seem to be compelled to make public confessions, or at least statements of regret.”

121. Matthew S. Winters & Rebecca Weitz-Shapiro, *Lacking Information or Condoning Corruption? Voter Attitudes Toward Corruption in Brazil*, COMP. POL. 418, 419-20 (2013).

122. Scott D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All*, U.S. DEP’T OF JUSTICE (Oct. 17, 2006), <https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all>.

123. Bruce Douglas, *The Story of Brazil’s Killer Cops*, GQ MAGAZINE (July 13, 2015), <http://www.gq-magazine.co.uk/article/brazil-killer-cops>.

124. *The Nature of Government*, AM. GOV’T (2014), <http://www.ushistory.org/gov/1b.asp>.

clares himself guilty, the negotiating parties establish their highest degree of discretion. When the prosecutor, the lawyer, and the judge start the negotiation, assuming there is a possibility of a declaration of guilt, a large opening regarding the “destination” of the accused and the legal classification of the committed crime can be “chosen.” Therefore, the prosecution will be formulated by a symbolic fact, which is “created” by means of a negotiation. On the negotiating table, the penal code does not serve as a parameter for the suitability of the practiced conduct, but as a range of options that serves as the helm for the choice (pick up) of the punishment to be applied.

(12) The term “plead guilty,” for citizens in general, is not purely a technical legal term. It is expressly and commonly pronounced by them. Unlike in Brazil, where information of certain procedures of the criminal proceedings is reserved for the experts, all of the classes in the U.S. are familiar with and fully aware of pleading guilty.

(13) In terms of development, the identification of the differences in the concept of citizenship in Brazil and in the United States is vital to understand the current Brazilian juridical landscape and, particularly, the criminal institutes involved. Socio-economic differences are typical of a capitalist model, but they do not prevent (on the contrary) legal equality, which is a real current attribute for the justification of privileges.

(14) Unlike plea bargaining, in which there is a consensus between the parties, in Brazil, this consensus is introduced by the D.A., who in practice is situated in the upper hierarchy. Agreements are not consensual because the parties, specially the defendant, do not know the real purpose of each of the hearings. The conciliators, the real holders of “power,” want to get rid of the process. Moreover, to achieve this, they take advantage of a concept that is already known in Brazilian legal culture: the process is a problem that one should eliminate. Thus, contrary to what occurs in the adversarial system, where the consensus is a remarkable factor, we found that in the Brazilian case, the negotiation enjoys a masked inquisitorial characteristic. Moreover, this transparency gives legitimacy to the process.

(15) The attempt to import models derived from different legal systems creates what is called “cognitive dissonance.”¹²⁵ Both the

125. MARIA STELLA DE AMORIM ET AL., *JUIZADOS ESPECIAIS CRIMINAIS SISTEMA JUDICIAL E SOCIEDADE NO BRASIL* 41-72 (2003).

comparison of the similarities between criminal negotiation and plea bargaining and the importation of the latter to Brazilian law (as intended by the proposal to reform the CP) collide in the problem of the paradox. In the U.S., the due process of law aims at individual guarantees, whereas in Brazil, the due process of law has been safeguarding the interests of the process itself, which makes it more of a state guarantee than a right of individual freedom.