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PRACTICE AND HUMAN DIGNITY IN THE BALANCE: COMPARING, EMPIRICALLY, *DELAÇÃO PREMIADA*, PLEA NEGOTIATIONS AND COOPERATING WITNESSES IN BRAZIL AND THE USA

A PRÁTICA E A DIGNIDADE HUMANA NA BALANÇA: UMA ANÁLISE COMPARATIVA, EMPÍRICA, SOBRE A DELAÇÃO PREMIADA, PLEA NEGOTIATIONS E COOPERAÇÃO TESTEMUNHAL ENTRE O BRASIL E OS ESTADOS UNIDOS DA AMÉRICA

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ABSTRACT

The present research aims to understand the law, in a human dignity perspective, 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 emphasizing the bargain, "delação premiada" among others subjects. The method used is empirical which implies to immerse in the "real life" of the occurrences. The originality derives from the method used itself, since what is observed is unique. In other words, the analysis makes part of particular events happened in a singular way. The attempt to import models derived from different legal systems creates what is

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called “cognitive dissonance.” Both the comparison of the similarities between criminal negotiation and plea bargaining and the importation of the latter to Brazilian law collide in the problem of the paradox. Unlike Brazil, the US Criminal System understands the *delação premiada* as “part of the game”. After all, we cannot forget that the system is – believe it or not – a type of game, where attorney (D.A. and Defender) measures his strength. While Brazil, nowadays, seems to be under a new system, the US use it as part of his historical Criminal System.

KEYWORDS: Practice; *Delação Premiada*; Comparative; Bargain; Empirical.

RESUMO

A pesquisa procura compreender o Direito, à luz da dignidade humana, em uma perspectiva empírica comparada (Brasil e EUA), bem como entender como a prática discursiva dos juristas pode organizar as práticas sociais, enfatizando a barganha, delação premiada dentre outros institutos jurídicos correlatos. A pesquisa investiga, em uma perspectiva comparada, processos institucionais de construção da verdade perante os órgãos do poder judiciário brasileiro e dos EUA, focando um estudo comparativo – por meio de suas diferenças – da transação penal dos Juizados Especiais Criminais e o instituto da plea bargaining, largamente utilizado no sistema judicial dos EUA. O método utilizado é o empírico o que implica em uma imersão nos acontecimentos da “vida real”. A originalidade deriva do método em si, tendo em vista que o que é observado é um evento singular. A tentativa de importar-se modelos que são provenientes de sistemas jurídicos diversos cria o que se denomina de “dissonância cognitiva”. Tanto a comparação entre a transação penal e a *plea bargaining* pelas suas semelhanças, bem como a importação deste último ao direito brasileiro, esbarram na problemática do paradoxo. Diferentemente do Brasil, o sistema criminal norte-americano entende a delação premiada como “parte do jogo”. Afinal, nós não podemos nos esquecer de que o sistema norte-americano é um tipo de jogo, em que os operadores do direito (ministério público e os defensores) medem suas forças pelo poder de persuasão da barganha. Enquanto o Brasil, atualmente,

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parece antever um novel sistema, o sistema de justiça criminal norte-americano o utiliza como parte de sua história sistêmica.

PALAVRAS-CHAVES: Prática; Delação Premiada; Negociação; Barganha; Comparado.

INTRODUCTION

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. 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.

2 FIELDWORK ON PLEA BARGAINING

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”(KANT DE LIMA, 2008).

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. There is a clear division between those who obey these consensual rules and those who deliberately and explicitly defy these rules. 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. Unlike Brazil,

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the United States judicial system's search for consensus is essential for the recognition of self-knowledge.

2.1 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 chamber[1] 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 (BLUME, 2014).

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,[2] which resulted in the identification of the first obstacle. The initial impressions from the

[1] Chamber is the term assigned to the office used by the judges within the court.
[2] CAL. PENAL CODE INDEX (West).

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common law dated back to an idea of a small number of written rules and a wide use of legal precedents. 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 Code of over 34,370 sections in California, notwithstanding the existing extravagant criminal legislation. [3] 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).[4] 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.[5] 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. Incidentally, 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 disicipline 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

[3] CAL. PENAL CODE INDEX (West).
[4] BRAZIL.C.C.; BRAZIL C.P.P.
[5] CAL. PENAL CODE § 830-830.15 (West 2016).

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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."[6] 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 Francisco 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.[7]

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

[6] Interview with former public defender (2010).
[7] Interview with Judge "J", California Hall of Justice (April, 2012).

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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. [8] 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 who 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.

2.2 THEJUDGE'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) they do however define plea agreement, which is, in essence, the same as plea bargaining.[9] 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." [10] 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

[8] Interview with Judge "J", California Hall of Justice (April, 2012).
[9] FED. R. CRIM. PRO. 11.
[10] FED. R. CRIM. PRO. 11.

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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."[11] 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 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.[12] 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.

2.3 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 (MCCOY, 1993, p.129-130). 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" (MCCOY, 1993, p.129-130).

[11] Interview with Judge "J", California Hall of Justice (2011).
[12] 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).

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At this moment, he simulated in a monologue a conversation between a District Attorney and a defender (MCCOY, 1993, p.129-130):

> 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?

In turn, Arlene Violet rebated without hesitation (MCCOY, 1993, p.129-130):

> 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.

The dialogue in the interview portrays the tension between the opinions from "those of the outside" and "those of the inside" (MCCOY, 1993, p.129-130). 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 (MCCOY, 1993, p.129-130).

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" (MCCOY, 1993, p.129-130). 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.

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2.4 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 understands as public ministry. In a controversial, but well accepted, study, Allen Steinberg (STEINBERT, 1984, p.592) intended to demonstrate that the image of a public prosecutor, which is a representative of the people, has been around since 1920 (GANS, 1973, p.132). 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 (STEINBERT, 1984, p.592).

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 (LEA, 2003). 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 (Unraveling, 2005). In addition, this volunteerism means nothing more than the discretion involved due to the private nature of this relationship (Unraveling, 2005).

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 (Are There Limits, 2003). Proof of this transference is that the District Attorney is elected.[13] 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 accountable for their actions; the understanding of the institution of accountability is paramount to the understanding of the main differences between the two systems.

[13] 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.

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In this sense, Vera Ribeiro de Almeida authoritatively observes the following (ALMEIDA, 2012):

> 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.

In Brazil, the state is the one 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 wiht 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 (STEINBERT, 1984, p.584-585). Before this period, cases tried by jury were generally decided more quickly, without significant regard for formal evidence examination and procedure (STEINBERT, 1984, p.592). It was common for lawyers to represent both parties in the same dispute. Moreover, no catalysts existed to promote the development of a plea bargaining system before the nineteenth century (STEINBERT, 1984, p.592). 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 (STEINBERT, 1984, p.584).

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

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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 (STEINBERT, 1984, p.585). 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 (STEINBERT, 1984, p.592).

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 (STEINBERT, 1984, p.572). 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 baragining. 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 (STEINBERT, 1984, p.585).

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 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, civil servants. This first point of analysis lends itself to the second point of examination. The question, and therefore the perception, of plea

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bargaining is not limited to actors in the legal system. Generally, it is common knowledge that the existence of plea bargaining arose from pragmatic conerns. 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 abovementioned scholar to allude to the words of a famous football coach speaking on victory: "Winning is not everything; it is the only thing" (DURE, 2015).

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

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> 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.[14]

2.5 PLEADINGGUILTY 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 (TURNER, 2006, p.560). It always existed and had (and still has) its various functions within the American judicial model (TURNER, 2006, p.562). The innovative and formal approval by the Supreme Court stressed that the American Constitution does not impose an obstacle to plea bargaining (TURNER, 2006, p.565). 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.[15]

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.

[14] Interview with Judge "J", California Hall of Justice (2012).

[15] I avoid using the Portuguese term "discricionariedade" 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.

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> When the District Attorney realizes that he will not 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]).[16]

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.[17]

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 the judge to investigate the 'truth of the facts' [...] the judge has a smaller chance of checking the basis of the [facts]" (TURNER, 2006, p.225).

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.

[16] Interview with Judge "J", California Hall of Justice (2012).
[17] Interview with Judge "J", California Hall of Justice (2012).

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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 (MENDONÇA, 2016). 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 (MENDONÇA, 2016). 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 consciously 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 (KIPNIS, 1976).

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-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" (KIPNIS, 1976).

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

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commonplace in American society, which accepts it (to a certain extent).[18] One academically[19] 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" (COLE, 2007, p.187). 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" (COLE, 2007, p.187). Or, as said by Benjamim Franklin: "Laws too gentle are seldom obeyed; too severe, seldom executed" (MELTON JR, p.161). 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.[20] 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."[21] It is with the same transparency and informality that "plea bargain" negotiations are held.

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.

[18] 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 (…)?" (KADISH, 1961).

[19] 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." (GOLDSTEIN, 1963).

[20] CAL. PENAL CODE INDEX (West).

[21] CAL. PENAL CODE INDEX (West), Section II.a.

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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.

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.

3 *"DELAÇÃO PREMIADA À MODA BRASILEIRA"* AND THE PROCEEDINGS IN US

The distinction between *delação premiada* in Brazil and the proceedings in US is often blurred. It is crucial to stress that, unlike Brazil, in US, the *delação premiada* is part of the whole system of the plea bargain.

It is not unusual to translate *delação premiada* as confidential informant, cooperating witness, whistleblowers[22]. These (not all of them) are much more related to what we call in Brazil as *agente infiltrado* (FITZGERALD, 2015). I have just used the expression "not all of them". There is a reason: ehe US System, besides the *agente infiltrado*, has much more options related to this matter, that is why there are so many names to define similar subjects.

It is simple to understand the close relation between *declaração premiada* and plea bargaing. We have to remember – again – that the US Criminal System is, nearly, sole based on the plea bargaining. And the bargain, itself, covers what we call *delação premiada*. When one is accused, he may bargain "cooperating" and witnessing against another one aiming reduce his punishment. On the other hand, confidential informant, cooperating witness and whistleblowers are not defendants.

[22] By the way, during the interviews I was unable to find someone who could give me a close translation to the term (even among between scholars who may understand and speak Portuguese).

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Again: unlike Brazil, the US Criminal System understands the *delação premiada* as "part of the game". After all, we cannot forget that the system is – believe it or not – a type of game, where attorney (D.A. and Defender) measures his strength.

While Brazil, nowadays, seems to be under a new system, the US use it as part of his historical Criminal System.

CONCLUSION

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) (GOODE, 2012). 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

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strong evidence, but the knowledge that your opponent has technical skills (either from experience or not) that intimidate you.

(4) In the legal process in the U.S., the truth is built according to the rules of consensus between the parties.[23] 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.

(5) 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.

(6) The option for bargaining in U.S. law makes the declaration of guilt indispensable (RAKOFF, 2014). Moreover, the idea of confession, regret, and forgiveness appear to always be linked to local religious rituals (LAURITIZEN, 1987). 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 (BERMAN, 2008),[24] it is not difficult to perceive the intermingling of these issues.

(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 (WINTERS, 2013). 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 (HAMMONG, 2006). 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 (DOUGLAS, 2015). The King is the Emperor (The nature of government, 2014). These differences in the origin of

[23] Consensus-Based Decision-Making Processes, CONSENSUS COUNCIL, INC. 3.

[24] 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."

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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 declares 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 diferences 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 diferences 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

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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) unlike Brazil, the US Criminal System understands the *delação premiada* as "part of the game". After all, we cannot forget that the system is – believe it or not – a type of game, where attorney (D.A. and Defender) measures his strength.

While Brazil, nowadays, seems to be under a new system, the US use it as part of his historical Criminal System.

(16) The attempt to import models derived from different legal systems creates what is called "cognitive dissonance" (AMORIM, 2003). Both the 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.

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