Negotiated justice has been introduced formally by statutory amendment and accepted as a facet of criminal procedure in South Africa. It is, however, important to acknowledge that two independent systems of negotiated justice exist in South African criminal procedure, namely, statutory negotiated justice and informal negotiated justice. This article defines and analyses these systems, and demonstrates the manner in which they co-exist. Since the practice does not enjoy undivided academic support, the views of supporters and detractors of the practice are also considered.

1. Introduction

On 14 December 2001 negotiated justice obtained statutory recognition in South Africa.¹ Section 105A, which makes provision for the practice, was inserted into the Criminal Procedure Act (CPA) by the Criminal Procedure Second Amendment Act.² Negotiated justice represents a movement away from the traditional adversarial system which requires that the conflict between the state and the accused be settled through verbal confrontation before an impartial adjudicator. Instead, the practice proposes that the conflict be settled through negotiation and compromise between the state and the accused. Yet, this form of justice was not entirely unheard of within the confines of the South African criminal justice system. Despite some opinions to

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¹ The term ‘negotiated justice’ is used to denote plea and sentence negotiations, as well as plea and sentence agreements. Due to its versatility it may be used when the negotiation or agreement pertains to: a guilty plea to a lesser charge and a reduced sentence recommendation, or a guilty plea to a lesser charge without a reduced sentence recommendation, or a reduced sentence recommendation without a reduction in charge.

² See Government Gazette 22933 of 14 December 2001. The amendment was assented to on 7 December 2001. Section 105A was inserted by section 2 of Criminal Procedure Second Amendment Act 62 of 2001.
the contrary, the process of informally negotiating a plea existed well before 14 December 2001 and took place at every level of the criminal justice system.\textsuperscript{3} It was this practice which motivated the enactment of section 105A.

2. Informal negotiated justice

2.1 Categories of informal plea agreements

There are various categories of informal plea agreements. The most common is where the prosecutor and accused negotiate a guilty plea to an offence which may be a competent verdict for the offence charged, or an alternative charge.\textsuperscript{4} Thus, an accused charged with murder may offer a plea of guilty to culpable homicide.\textsuperscript{5} Alternatively, the accused may offer a guilty plea to the main charge but on a different basis to that alleged by the state. An example would be where an accused charged with murder committed with \textit{dolus directus} offers a plea of guilty on the basis of \textit{dolus eventualis} instead.\textsuperscript{6} Here the agreement is aimed at reducing the moral blameworthiness of the accused. A reduction in moral blameworthiness would serve as a mitigating factor when the court considers the sentence to impose.\textsuperscript{7}

A further category of informal plea agreements may find application where there are two or more co-accused. Where there are two co-accused, an agreement could be reached wherein one of the accused agrees to plead guilty in return for the withdrawal of the charge against the other.\textsuperscript{8} The prosecution would be inclined to conclude such an agreement when there is doubt as to the guilt of one accused, but the other is undoubtedly guilty.\textsuperscript{9}

In all categories of informal plea agreements, the prosecutor and the accused reach an agreement on the facts to be placed before the court. This is aimed at justifying a conviction on the basis agreed to by the parties.\textsuperscript{10}

\textsuperscript{3} \textit{North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C) at 674e.}

\textsuperscript{4} PM Bekker, T Geldenhuys \textit{et al} Criminal Procedure Handbook 6ed (2003) 199. The authors use the term 'traditional plea bargaining' to denote informal plea agreements.

\textsuperscript{5} Ibid.

\textsuperscript{6} Ibid.

\textsuperscript{7} See \textit{North Western Dense Concrete CC supra (n3) at 673d.}

\textsuperscript{8} \textit{North Western Dense Concrete CC supra (n3) at 675j.}

\textsuperscript{9} \textit{North Western Dense Concrete CC supra (n3) at 674a.}

\textsuperscript{10} \textit{North Western Dense Concrete CC supra (n3) at 673h.}
2.2 Recognition of informal plea agreements

In the decade or so which preceded the enactment of section 105A, authors analysed, criticized, and some categorically denied, the existence of informal plea agreements.11 The uncertainty surrounding the legality of these agreements resulted in most commentators regarding the practice with disfavour.12 However, the South African Law Reform Commission (SALRC), as part of its investigation into the simplification of criminal procedure, concluded that plea negotiations and agreements, however informal, do take place in South Africa and are considered legal.13 At this stage of its investigation the SALRC recommended that these agreements be regulated by legislation.14

2.3 Judicial recognition

Subsequent to the SALRC investigation, judicial recognition was afforded to informal plea agreements in the case of North Western Dense Concrete CC and Another v DPP (Western Cape).15 In this case the first applicant (a close corporation) and the second applicant (a member of the close corporation), as well as one Mostert (the production manager of the close corporation), had been charged in the regional court.16 The applicants were charged with culpable homicide as well as further substantive and alternative charges, while Mostert was arraigned on a charge of culpable homicide only.17 The legal representative of the applicants advised the prosecutor that Mostert would plead guilty to culpable homicide if the respondent agreed to withdraw all the charges against them.18 The prosecutor, after having been authorised to do so by the respondent, accepted the deal and Mostert was duly convicted.19 Then an undisclosed third party applied to the respondent for a certificate nolle prosequi.20 The respondent considered the

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15 North Western Dense Concrete CC supra (n3) at 673h.
16 North Western Dense Concrete CC supra (n3) at 671c.
17 North Western Dense Concrete CC supra (n3) at 671f.
18 North Western Dense Concrete CC supra (n3) at 671-672i-a.
19 North Western Dense Concrete CC supra (n3) at 672b-d.
20 North Western Dense Concrete CC supra (n3) at 672d.
application but decided, instead, to re-institute the charges against the applicants. In response to this the applicants sought an order directing that the respondent abide by the terms of the plea agreement, as well as an order interdicting the respondent from proceeding with the prosecution against them.

In this landmark decision, Uijs AJ stated that he was not ‘filled with joy’ at the prospect of being the first South African judicial officer to acknowledge that plea bargaining is an integral part of criminal justice in South Africa. According to the court, the process of negotiating a plea takes place daily and at every level of the criminal justice system. The court concluded that plea negotiations are entrenched in South African law, to the extent that the criminal justice system would probably break down if the procedure were not followed because of judicial disapproval. It was held, further, that a basic rule of the procedure was that the state abides by the undertaking given during negotiations leading to the plea agreement. The court, accordingly, granted the orders sought by the applicants.

It should be noted that the court disagreed with the SALRC finding that legislation was needed to regulate informal plea agreements. Instead, the court held that section 112 of the CPA is ‘virtually tailor-made for such agreements’. In terms of section 112(2) an accused may submit a written statement to the court wherein he sets out the facts on which he bases his guilty plea. The subsection further provides that the court may then convict the accused on the strength of this statement. Section 112(3) makes provision for evidence to be led, or a statement to be made, with regard to sentencing. At this stage the prosecutor and defence could recommend the sentence they consider just. This recommendation would form part of the agreement concluded between the parties. According to Uijs AJ, these provisions, combined with the constitutional law of South Africa, adequately regulated informal plea agreements.

Despite disagreeing with the SALRC recommendation, it is probable that the North Western Dense Concrete CC decision motivated the

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21 North Western Dense Concrete CC supra (n3) at 672e.
22 North Western Dense Concrete CC supra (n3) at 672f-g.
23 North Western Dense Concrete CC supra (n3) at 683f.
24 North Western Dense Concrete CC supra (n3) at 674e.
25 North Western Dense Concrete CC supra (n3) at 676f and 678c.
26 North Western Dense Concrete CC supra (n3) 670f-g.
27 North Western Dense Concrete CC supra (n3) at 677f. See part 2.2 above for the initial recommendation made by the SALRC.
28 North Western Dense Concrete CC supra (n3) at 677c.
29 North Western Dense Concrete CC supra (n3) at 677f.
finalisation of section 105A.\(^{30}\) Notwithstanding the decision by Uij\ AJ, uncertainty as to the legality of this form of negotiated justice still prevailed.\(^{31}\) The problem with the judgment in *North Western Dense Concrete CC* is that section 112 regulates guilty pleas and not plea agreements. To say that a plea agreement may be regulated by procedural rules which govern guilty pleas is to deny the true nature of this type of agreement. It denies the existence of negotiations and concessions made by the state and the accused which preceded and, in most cases, motivated the guilty plea. In addition, it is submitted that the agreement in *North Western Dense Concrete CC* would not have been the subject of judicial scrutiny were it not for the state attempting to renege on its undertaking. In other words, the fact that Mostert’s guilty plea was the result of a plea negotiation would never have formed part of the official court record if the state had honoured its undertaking. Thus, section 112 clearly fails to provide transparency, and hence legal certainty, to the practice of informal plea agreements.

### 2.4 The SALRC recommendation

In its report on the simplification of criminal procedure, the SALRC, noticeably influenced by the *North Western Dense Concrete CC* decision, found that informal plea agreements were sufficiently provided for in the CPA. According to the SALRC, these agreements ‘did not require regulation since there is no evidence of abuse of these provisions’.\(^{32}\) However, perhaps there was no record of abuse because the practice was not regulated. The negotiating parties were under no obligation to disclose that an informal plea agreement had been concluded, much less the manner in which such agreement had been reached. It is difficult, therefore, to establish a source of the supposed lack of ‘evidence of abuse’ referred to by the SALRC.

On the basis of its conclusion, the SALRC limited its study to sentence agreements.\(^{33}\) It identified and considered two types of such agreements.\(^{34}\) In the first type, the prosecutor undertakes to recommend a specific sentence to the court, or agrees not to oppose the proposal of

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\(^{31}\) Scholars such as J Burchell *Principles of Criminal Law* 3ed (2005) 16 and W De Villiers ‘Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?’ (2004) 37(2) *De Jure* 244 at 255, continue to question the legality of plea and sentence agreements.

\(^{32}\) See SALRC op cit (n14) para 4.15. The ‘provisions’ referred to by the SALRC are undoubtedly those contained in section 112 of the CPA.

\(^{33}\) Ibid.

\(^{34}\) SALRC op cit (n14) para 4.16.
the defence. The SALRC stated that this type of agreement is known in our law and, because it did not require any particular action from the court, it did not require regulation. The court could implement or ignore the agreement, and the accused would be sentenced accordingly. It is submitted that this type of agreement generally accompanies an informal plea agreement and is made possible by section 112(3), as explained above. The second type of sentence agreement, identified by the SALRC, could not be negotiated in accordance with the informal plea agreement system. With this type of agreement the accused pleads guilty on condition that an agreed sentence is imposed by the court. The SALRC recommended that the legality of these agreements should be confirmed and regulated by legislation.

The recommendations, made by the SALRC, for codification of sentence agreements played a significant role in the drafting of section 105A. Ultimately most of the recommendations were incorporated into section 105A.

3. Statutory negotiated justice

The enactment of section 105A resolved the uncertainty surrounding the legality of plea and sentence agreements in South Africa. In terms of section 105A(1)(a) a prosecutor, authorised thereto in writing by the National Director of Public Prosecutions (NDPP), and a legally represented accused may negotiate and conclude a statutory plea and sentence agreement. However, the agreement must be concluded before the accused is asked to plead. In the plea agreement the accused must agree to plead guilty to the offence charged or any offence which may be a competent verdict for the charge. The sentence agreement must be in respect of at least one of the following: the sentence to be imposed by the court, the postponement of sentencing, or a sentence which is suspended in whole or in part. Where applicable, it may

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35 SALRC op cit (n14) para 4.15.
36 SALRC op cit (n14) para 4.17.
37 Ibid and further SALRC op cit (n13) para 5.15.
38 SALRC op cit (n14) para 4.17.
39 SALRC op cit (n13) para 5.17.
40 See, for example, De Villiers op cit (n31) 244, where the author confirms that the recommendations made by the SALRC found their way into section 105A.
41 Section 105A(1)(a) of the Criminal Procedure Second Amendment Act 62 of 2001.
also be agreed that an award for compensation accompanies one of the aforementioned sentences.  

In the analysis, below, section 105A is divided into two broad categories, namely, the negotiation procedure, and judicial scrutiny and approval of the agreement.

3.1 The negotiation procedure

There are formal requirements which must be met before a statutory agreement may be concluded. These requirements are contained in section 105A and in the directives issued by the NDPP in accordance with section 105A(11).

3.1.1 The requirements contained in section 105A

Most of the requirements contained in section 105A place duties on the prosecutor. However, there are certain requirements which must be fulfilled by both the prosecutor and the legal representative of the accused.

3.1.1.1 Duties of the prosecutor

Section 105A(1)(b)(i) requires that the prosecutor consult with the investigating officer before concluding an agreement. In Commentary on the Criminal Procedure Act the authors state that this pre-agreement consultation ensures that the prosecutor makes an informed decision with regard to the desirability and necessity of concluding a statutory agreement. Furthermore, they view this requirement as a means to ensure that members of the police services do not gain the impression that the results of their investigative efforts can be ignored by the prosecution for the sole purpose of avoiding a trial. However, in terms of section 105A(1)(c) the pre-agreement consultation may be dispensed with if the prosecutor is satisfied that the consultation would not only delay the proceedings, causing substantial prejudice to the prosecu-

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44 See section 105A(1)(a)(ii) of the Criminal Procedure Second Amendment Act 62 of 2001, where the use of the word ‘and’ indicates that an award for compensation, as provided for in section 300 of the CPA, can only be an accompaniment to the other sentences listed in the subsection. See also Du Toit et al op cit (n30) 15-8.

45 Section 105A(1)(a) & (b)(i) of the Criminal Procedure Second Amendment Act 62 of 2001.

46 Du Toit et al op cit (n30) 15-10.

47 Ibid. The authors explain that this requirement is not meant to blur the distinction between the duties of those who investigate crime and those who must decide whether to prosecute or not. The purpose of a pre-agreement consultation is to provide a subtle form of ‘internal accountability’ between the parties.
tion, accused, complainant or his representative, but also adversely affect the administration of justice. The prosecutor exercises discretion in determining whether the envisaged consequences would result. However, this discretion is not unfettered. Section 105A(4) renders the decision to dispense with a pre-agreement consultation subject to judicial scrutiny.48

The second requirement to be fulfilled by the prosecutor is contained in section 105A(1)(b)(ii). In terms of this subsection the prosecutor, before entering into an agreement, must take into account the nature of, and circumstances, relating to the offence, the personal circumstances of the accused, the previous convictions of the accused, if any, and the interests of the community. According to Du Toit et al, the fact that this provision is couched in fairly wide terms is entirely acceptable because prosecutorial discretion and, not legislative prescriptions, should govern the decision to conclude the agreement.49 Also, an established principle in our law is that the prosecutor has discretion in deciding whether or not to accept a guilty plea on the main, alternative or competent charge.50 This discretion extends to the decision to enter into plea and sentence negotiations.51 It is submitted, therefore, that although the factors contained in section 105A(1)(b)(ii) may guide the prosecutor in determining whether to conclude the agreement, they do not constitute a numerus clausus. The strengths or weaknesses of the prosecution’s case, or the risk that certain evidence might be excluded by the trial court, for example, may be decisive factors in the decision to enter into negotiations.52

In addition to the above, section 105A(1)(b)(iii) provides that, where the circumstances permit, the prosecutor should afford the complainant the opportunity to make representations regarding the contents of the agreement and the inclusion of a compensation order.53 This requirement is qualified by the words, ‘where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant’.54 Although the prosecu-

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48 See part 3.2.1 of the text below for discussion.
49 Du Toit et al op cit (n30) 15-11. In support of their view the authors cite S v Esterhuizen 2005 (1) SACR 490 at 494c-h, where the court concluded that the prosecuting authority needs a fair measure of latitude in order to negotiate and reach plea and sentence agreements.
50 See North Western Dense Concrete CC supra (n3) at 676-7-d and further Du Toit et al op cit (n30) 15-11.
51 See further directive 4 of the Directives issued by the NDPP on 14 March 2002 in accordance with section 105A(11) which confirms this principle.
52 Du Toit et al op cit (n30) 15-11.
54 Du Toit et al op cit (n30) 15-12.
tor determines whether victim participation would be reasonable, his decision to exclude the victim from negotiations is subject to judicial scrutiny.  

3.1.1.2 Combined duties

In terms of section 105A(2) the accused, before entering into the agreement, must be informed that he has the right to be presumed innocent, to remain silent and not to be compelled to give self-incriminating evidence. By entering into an agreement the accused waives these rights, and a right can be waived only if the holder knows and understands what he is waiving. Thus, by requiring that the accused be informed of his rights, the legislature sought to ensure that plea and sentence agreements are not attained at the expense of the constitutional rights of the accused. However, the provision fails to indicate whether the prosecutor or legal representative of the accused is responsible for ensuring that the accused is informed of his rights before entering into the agreement.

According to Du Toit et al, the legal representative of the accused is primarily responsible for ensuring that his client has been informed of his constitutional rights. Yet, they submit that while the prosecutor is under no duty to inform the accused of these rights, a prosecutor should not sign the agreement unless he has been given an assurance, by the accused's legal representative, that these rights have been explained to the accused. It should be added that, in order to avoid judicial disapproval of the agreement, it would be in the state's best interest to ensure that the accused is aware of his constitutional rights before the agreement is finalised.

Section 105A(2) also requires that the agreement be in writing and be signed by the prosecutor, the accused and his legal representative. In addition, the terms of the agreement should be established and stated

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55 See section 105A(4)(a)(ii) of the Criminal Procedure Second Amendment Act 62 of 2001 and part 3.2.1 below for discussion.
57 See P Schwikkard & S van der Merwe Principles of Evidence 2ed (2002) 222-3. According to the authors, although the decision of the accused to waive the exercise of his rights must be an informed one, he need not be aware of all the factual details or all the details of the charge. The emphasis should be on the reality of the total situation having an impact on the accused's understanding and appreciation. It is submitted that the 'reality' which must be explained to an accused in the context of negotiated justice, is that by entering into the agreement he relinquishes his right to go to trial and offers full disclosure in exchange for leniency.
58 Du Toit et al op cit (n30) 15-13. These rights are contained in section 35(3)(h) & (j) of the Constitution of South Africa, 1996.
59 Ibid.
60 Ibid.
in the agreement. In this regard, the substantial facts on which the plea is based and all other facts relevant to the sentence agreement, as well as any admissions made by the accused, must be determined between the parties and included in the agreement. This is regarded as a crucial requirement because the purpose of negotiated justice is to circumvent a conventional trial, and in order to do this, sufficient information must be placed before the court to secure judicial approval of the negotiated plea and sentence.

3.1.2 The directives issued by the NDPP

In addition to the requirements prescribed by section 105A, the prosecutor must comply with the directives issued by the NDPP in accordance with section 105A(11), which provides that:

‘The NDP, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section.’

The directives referred to above were issued by the NDPP on 14 March 2002. The use of the words, ‘any directive so issued shall be observed’ permits the reasonable inference that non-compliance with the directives may render an agreement defective. It is, however, important to note that section 105A does not compel the court to ensure compliance with the directives. Thus, non-compliance would need to be raised by the negotiating parties and this is, admittedly, implausible.

The need for the directives is apparent. As far as the negotiation between the prosecutor and defence counsel is concerned, section 105A is non-prescriptive with regard to the types of offences which may be negotiated and the manner in which these negotiations are to be initiated. The directives therefore supplement the procedure prescribed by section 105A by regulating its application. In this regard, directive 2 contains the first form of clarification. It provides that:

‘Section 105A is to be utilised for those matters of some substance, the disposal of which will actually serve the purpose of decongesting or reducing the court rolls without sacrificing the demands of justice and/or the public interest.’

64 Du Toit et al op cit (n30) 15-14.
65 Du Toit et al op cit (n30) 15-24. See also De Villers op cit (n31) 244. The first draft had to be submitted to Parliament within four months of the commencement of section 105A.
66 Du Toit et al op cit (n30) 15-22.
67 Du Toit et al op cit (n30) 15-7.
The fact that section 105A may be utilised only when a matter is of ‘some substance’ means that the nature of the offence determines the eligibility of an accused to negotiate an agreement. However, neither section 105A nor the directives issued by the NDPP provide a closed list of offences which may or may not be negotiated. It is submitted, therefore, that the determination of whether a matter is of ‘some substance’ and thus capable of being negotiated is left to the discretion of the prosecuting authority.68

Directive 17 makes provision for the manner in which section 105A negotiations are to be initiated. The directive reads:

‘Where it is clear that a legal representative of an accused has expressed a firm intention to enter into formal negotiations with a view to a s105A agreement, the prosecutor must request a written offer to negotiate (which shall include the accused’s proposals) be submitted to him/her at least 14 days before the intended trial date. Where the decision to prosecute is that of a Senior Public Prosecutor, the written offer is to be submitted to that Prosecutor and the period for submissions may be lengthened particularly where the Senior Public Prosecutor is at a centre removed from the court.’

The discussion prompted by this directive pertains to the distinction between formal and informal negotiations. On a strict interpretation of directive 17, it would appear that the legal representative of the accused, as opposed to the prosecution, must initiate formal negotiations by submitting a written request to negotiate. This interpretation is supported by section 105A(1)(a), as well as by directives 5, 6 and 7. In terms of section 105A(1)(a), a prosecutor may enter into plea and sentence negotiations if he has obtained the written authority of the NDPP.69 It is submitted that for the prosecutor to obtain such authority he will be required to produce the written offer to negotiate. In

68 This submission is supported by directive 4 which provides that the established principle, in terms of which it is within the discretion of the prosecutor to decide whether or not to consider accepting a plea of guilty on the main, alternative or competent charge, applies.

69 See De Villiers op cit (n31) 245 who states that the NDPP has to date afforded all the directors, deputy directors and certain chief and senior prosecutors the authority to negotiate. See also S v Sassin (2003) 4 All SA 506 (NC) para 10 where the court held that proof of the prosecutor’s authority to negotiate and enter into an agreement with the accused was an essential pre-requisite in terms of section 105A(1)(a). The prosecutor then tendered a certificate from the NDPP which confirmed that he had been authorised to negotiate and conclude the agreement. However, see M Watney ‘Judicial scrutiny of plea and sentence agreements’ (2006) 1 TSAR 224 at 225 who argues that, although section 105A(1)(a) clearly stipulates that a prosecutor authorized thereto in writing by the NDPP may conclude a plea and sentence agreement, the maxim omnia praesumuntur rite esse acta donec probetur in contrarium (presumption of regularity) operates in favour of the prosecutor. She argues that the court’s interpretation in S v Sassin is unnecessarily strict and submits that it is unnecessary for the prosecutor to prove the delegated authority to a court as prerequisite for the prosecutor to participate in the agreement.
addition, directive 5 specifies that the prosecutor must refer a written offer to negotiate, to the senior prosecutor. Directives 6 and 7 further provide that unless authorisation has been obtained from the Director of Public Prosecutions (DPP), section 105A cannot be applied where the accused has a previous conviction, or where the DPP has instructed that the accused be prosecuted. As authorisation can be sought only after the defence submits a request to negotiate, it follows that formal negotiations can be initiated only by the defence.

Yet, in the *Commentary on the Criminal Procedure Act* the authors opine that, ‘the prosecutor or the legal representative of the accused may initiate the process of negotiation’.70 They also state that, ‘in practice much will depend upon each party’s assessment of the probable outcome of the case and the bargaining power available to him’.71 Although this appears to contradict a strict interpretation of directive 17, it is important to note that the authors are actually referring to initiating informal negotiations. This is clarified toward the end of their discussion where they state that, ‘once initial and tentative discussions have taken place and the defence has expressed an interest, directive 17 should be followed’.72 From this statement it can be inferred that informal negotiations usually precede formal negotiations. It can be inferred also that nothing prevents a prosecutor from initiating informal negotiations with the aim of concluding a section 105A agreement. However, the effect of directive 17 means that undertakings made during informal negotiations cannot bind the state until the defence requests that formal negotiations commence. If the NDPP or his authorised agents refuse the request, the state would not be bound by the undertakings made by the prosecutor during the informal negotiations.

It is submitted, therefore, that formal negotiations, aimed at concluding a section 105A agreement, can be initiated only by the defence, whereas informal negotiations may be initiated by either the prosecutor or the defence. This approach complies with the intended purpose of the directives, namely, to ensure that the office of the NDPP and DPP maintains a measure of control over statutory agreements.

3.2 Judicial scrutiny and approval of section 105A agreements

The court does not control or participate in the negotiations.73 According to the SALRC, such participation would be difficult to reconcile with

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70 Du Toit *et al* op cit (n30) 15-8. Original emphasis.
71 Du Toit *et al* op cit (n30) 15-9.
72 Ibid.
73 Section 105A(3) of the Criminal Procedure Second Amendment Act 62 of 2001. See further Du Toit *et al* op cit (n30) 15-6.
the court’s role as an impartial adjudicator because it could create the impression that the judicial officer, as a person in a position of authority, is exerting undue influence to exact a guilty plea. However, judicial scrutiny and approval of the agreement concluded are required. The duties of the presiding officer may be divided into three stages, namely, verification before plea, consideration of the plea agreement and consideration of the sentence agreement. 

3.2.1 Verification before plea

Before the accused is required to plead, the prosecutor must inform the court that a written agreement has been negotiated. The court is required then to verify two aspects of the agreement. Firstly, the court must ask the accused to confirm that such an agreement indeed has been concluded. Secondly, it must satisfy itself that the prosecutor has consulted with the investigating officer and, where it was reasonable to do so, has heard representations from the complainant.

The second verification requires consideration. As explained above, the prosecutor may enter into the plea and sentence agreement only after he has consulted the investigating officer. However, section 105A(1)(c) provides that the pre-agreement consultation may be dispensed with if the prosecutor is satisfied that the consultation would not only delay the proceedings, resulting in substantial prejudice to the prosecution, accused, complainant or the latter’s representative, but also would affect adversely the administration of justice. According to Du Toit et al, it would seem that the pre-agreement consultation may be dispensed with if the prosecutor alone is satisfied that such a consultation would result in the envisaged consequences. However, the authors quickly reject this interpretation. In their view the fact that the prosecutor was satisfied that he had grounds for dispensing with a pre-agreement consultation, cannot relieve the court of its duty to satisfy itself that the requirements of section 105A(1)(b)(i) have

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74 South African Law Reform Commission op cit (n13) para 4.18.
76 See, for example, De Villiers op cit (n31) 248.
77 Section 105A(4)(a) of the Criminal Procedure Second Amendment Act 62 of 2001.
79 Section 105A(4)(a)(ii) of the Criminal Procedure Second Amendment Act 62 of 2001, provides that the court shall satisfy itself that the requirements of subsections (1)(b)(i) and (iii) have been complied with. See further De Villiers op cit (n31) 248.
81 Du Toit et al op cit (n30) 15-10.
82 Ibid. The authors opine that, as a rule, a prosecutor must consult the investigating officer.
been met.\textsuperscript{83} In this regard, Du Toit \textit{et al} submit that the court should satisfy itself that the prosecutor has advanced adequate grounds for dispensing with the pre-agreement consultation.\textsuperscript{84}

It is submitted that this approach should extend also to the prosecutor consulting the victim. Even though section 105A(1)(b)(iii) requires that the prosecutor determine whether it is reasonable to allow victim participation, this cannot relieve the court of its section 105A(4) duty in respect of the victim. The court must determine, therefore, whether the prosecutor had adequate grounds for excluding victim participation.

If the court is not satisfied that the agreement complies with the requirements of sections 105A(1)(b)(i) and (iii), it must inform the prosecutor and the accused of the reasons for its finding.\textsuperscript{85} The parties will then be allowed an opportunity to comply with the requirements.\textsuperscript{86} If, however, the court is satisfied that the agreement complies with the requirements, it will require the accused to plead and order that the contents of the agreement be disclosed.\textsuperscript{87}

\subsection*{3.2.2 Judicial scrutiny of the plea agreement}

Once the accused has entered his guilty plea and the contents of the agreement have been disclosed, the court must question the accused to ascertain whether he confirms the terms of the agreement and the admissions he has made therein.\textsuperscript{88} With regard to the recorded facts of the case, the court must establish from the accused whether he admits the allegations in the charge to which he has agreed to plead guilty.\textsuperscript{89} Thereafter the court will require the accused to confirm that the agreement was entered into freely and voluntarily.

If, after this inquiry, the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was reached, the court must record a plea of not guilty and the trial will begin \textit{de novo} before a different presiding officer.\textsuperscript{90} However, if the court is satisfied with the plea agreement, it will proceed to consider the sentence agreement.\textsuperscript{91} It should be noted that the court will not convict the accused until it has scrutinised the sentence agreement. A formal

\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{86} Section 105A(4)(b)(ii) of the Criminal Procedure Second Amendment Act 62 of 2001.
\textsuperscript{87} Section 105A(5) of the Criminal Procedure Second Amendment Act 62 of 2001.
\textsuperscript{88} Section 105A(6)(a)(i) of the Criminal Procedure Second Amendment Act 62 of 2001.
\textsuperscript{89} Section 105A(6)(a)(ii) of the Criminal Procedure Second Amendment Act 62 of 2001.
\textsuperscript{90} Section 105A(6)(c) of the Criminal Procedure Second Amendment Act 62 of 2001.
\textsuperscript{91} Section 105A(7) of the Criminal Procedure Second Amendment Act 62 of 2001.
conviction of the accused can follow only if the court is satisfied with the sentence agreement.92

3.2.3 Judicial scrutiny of the sentence agreement

When considering the sentence agreement, the court may hear evidence, direct relevant questions to both the prosecutor and accused, and accept a statement from the accused or complainant. 93 Where applicable, the court must have due regard to the minimum penalty prescribed for the offence.94

If the court is satisfied that the sentence agreement is just, the accused will be found guilty and the agreed sentence imposed.95 However, where the court is of the opinion that the sentence agreement is unjust, the prosecutor and accused must be informed of the sentence which the court considers just.96 It should be noted that the court may regard a sentence as unjust because it is too harsh or too lenient. Where the court has decided that it will impose a different sentence, it must first inform the parties thereof. If the parties accept the sentence which the court intends to impose, the court must convict the accused and impose the sentence. Alternatively, either party may reject the court’s proposed sentence and withdraw from the agreement, in which event the trial will start de novo before a different presiding officer.97

When a trial is set to start de novo, section 105A dictates that the parties may not enter into a statutory agreement in respect of a charge arising out of the same facts.98 However, it must be noted that once an attempt to conclude a statutory agreement has failed, the parties are not prevented from concluding an informal plea agreement in respect of the same charge.99 In accordance with the rules of interpretation, it is presumed that the legislature does not intend to alter the common law.100 Thus, where an enactment does not explicitly provide for its repeal, it is assumed that the common law remains intact.101 As the Criminal Proce-

92 Du Toit et al op cit (n30) 15-7.
93 Section 105A(7)(b)(i) of the Criminal Procedure Second Amendment Act 62 of 2001. See further De Villiers op cit (n31) 249.
95 Sections 105A(7) and (8) of the Criminal Procedure Second Amendment Act 62 of 2001.
96 Section 105A(9)(a) of the Criminal Procedure Second Amendment Act 62 of 2001.
97 Sections 105A(9)(b), (c) and (d) of the Criminal Procedure Second Amendment Act 62 of 2001.
99 Bekker, Geldenhuys et al op cit (n4) 199. See also A Anderson ‘Step by step formal plea and sentence agreements’ (2005) August De Rebus 28.
101 Ibid.
dure Second Amendment Act does not expressly provide for the repeal of informal plea agreements, it would be reasonable to conclude, and it is therefore submitted, that two independent systems of negotiated justice exist in South African criminal procedure, namely, informal plea agreements and statutory plea and sentence agreements.

3.3 The effect of judicial non-compliance

Compliance with the provisions of section 105A is required from the negotiating parties as well as the presiding officer. While the consequences of non-compliance by negotiating parties are provided for in the section, it is silent about judicial non-compliance.

In the Solomans case the Cape High Court considered the effect of judicial non-compliance. The court stated that the plea bargaining regime constitutes a fundamental departure from the adversarial system and, as a result, the legislature sought to make the provisions of section 105A peremptory. From the record of the proceedings, the High Court detected three irregularities which raised questions as to the overall legality of the proceedings in the lower court. The first irregularity was, that the admissions made by the accused constituted a repetition of the allegations contained in the charge, whereas according to the court, section 105A(6)(a)(ii) requires the accused to confirm the facts upon which those admissions are based. All the elements of the crime must be admitted in the facts presented by the accused, so that the court may draw the conclusion that the accused had in fact committed the crime to which he pleads guilty. The court cannot reach this conclusion where the admission constitutes a mere repetition of the allegations against the accused. The second irregularity was, that there was no indication that the accused had entered into the agreement freely and voluntarily as required by section 105A(6)(a)(iii). The final irregularity arose from the fact that the magistrate had rejected the negotiated sentence but failed to disclose this to the parties. The magistrate then proceeded to impose a harsher sentence without affording the parties an opportunity to withdraw from the agreement, as required by section 105A(9)(a).

103 S v Solomans supra (n102) at 435d-e.
104 Cowling op cit (n102) 241.
105 S v Solomans supra (n102) at 435h.
106 S v Solomans supra (n102) at 436a.
107 S v Solomans supra (n102) at 436e.
108 Ibid.
Taking into account these irregularities, the High Court set aside the conviction and sentence and remitted the matter to the magistrates' court to be heard, de novo, before a different presiding officer.\textsuperscript{109} However, the court failed to indicate whether any single irregularity, or the cumulative effect of the three irregularities, motivated its decision.\textsuperscript{110} It is submitted that this would be dependent on the facts of each case. For example, Cowling states that, with regard to the second irregularity, if from the overall documentation, it is clear that the accused freely consented, this should be sufficient for the purposes of section 105A(6)(a)(iii).\textsuperscript{111} Thus, the second irregularity on its own would be insufficient to set aside the conviction. By contrast, the third irregularity constitutes a material non-compliance.\textsuperscript{112} Where the court does not intend to impose the negotiated sentence it is required to disclose the sentence it considers just, prior to convicting the accused.\textsuperscript{113} This constitutes one of the core provisions of section 105A, because the parties must be allowed the opportunity to withdraw from the agreement before the court may proceed to impose the sentence it considers just. Non-compliance in this instance constitutes a gross irregularity in the application of the section 105A procedure. It is possible, therefore, to set aside a conviction based upon judicial non-compliance with a single, but material, provision contained in section 105A.

4. The differences between informal and statutory negotiated justice

4.1 Sentence agreements

The main difference between informal negotiated justice and statutory negotiated justice is that sentence agreements were not recognised in South African law prior to the passage of section 105A.\textsuperscript{114} The prosecutor and accused cannot reach an agreement with regard to the sentence to be imposed in an informal plea agreement because this would require the co-operation and the participation of the presiding officer.\textsuperscript{115} At most, the parties can reach an agreement in terms of which the prosecutor undertakes to recommend that a reduced sentence be

\textsuperscript{109} S v Solomans supra (n102) at 437d.
\textsuperscript{110} See Cowling op cit (n102) 242 who states that, ‘the fact that the court did not give any indication as to whether these factors were measured cumulatively or whether they were weighted in any way, is to be regretted’.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} See section 105A(9)(b) of the Criminal Procedure Second Amendment Act 62 of 2001.
\textsuperscript{114} Bekker, Geldenhuys et al op cit (n4) 200.
\textsuperscript{115} See De Villers op cit (n31) 253.
Hence, informal plea agreements are not dependent upon the court’s acceptance of the prosecutor’s sentence recommendation. Thus, where the court imposes a sentence which is more, or less, severe than that recommended by the prosecutor, this would not constitute a ground upon which either party could withdraw from the agreement.

Notwithstanding the above, in *North Western Dense Concrete CC* the court defined informal plea agreements as, ‘the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence’. The inaccuracy of this definition is obvious. However, Uijj AJ reasoned that because the South African prosecutor is *dominus litis*, the court cannot prevent the state from accepting a plea, and once the factual basis of a guilty plea has been accepted by the prosecutor, the court is bound to sentence the accused on the basis of those facts. An informal plea agreement, therefore, curtails the sentencing discretion of the court, in that the court is obligated to sentence the accused on the basis of the facts which the accused has admitted and the prosecutor has accepted. Thus, even though the parties are unable to bind the court to a negotiated sentence, the plea agreement, in effect, manipulates the sentencing discretion of the court to the extent that the sentence finally imposed is usually the sentence preferred by the parties. However, the counter-argument to this is that the court does not have to accept a guilty plea. If, after questioning the accused about the recorded facts, the court is not satisfied with a guilty plea, it must record a plea of not guilty and order that the prosecutor proceed with the trial. The court’s ability to exercise this discretion outweighs, by far, any attempt made to manipulate its sentencing discretion.

By contrast, statutory negotiated justice includes sentence agreements. According to Du Toit *et al.*, a plea agreement on its own is insufficient to activate section 105A. There must be a sentence agreement

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116 This recommendation may be made in accordance with section 112(3) of the CPA.
117 See *North Western Dense Concrete CC* supra (n3) at 670c.
118 *North Western Dense Concrete CC* supra (n3) at 677c.
119 Section 113(1) of the CPA provides that ‘if the court at any stage of the proceedings under section 112(1)(a) or (b) or section 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused’s plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty shall stand as proof in any court of such allegation.’ This section demonstrates that the court is not compelled to accept the factual basis of a guilty plea even if the prosecutor has accepted the plea.
also. However, it must be noted that the prosecutor and accused still cannot bind the court to a negotiated sentence. This was confirmed in the case of Yengeni, in which the appellant, a former Member of Parliament, filed an appeal against his sentence on the basis that he had concluded a non-custodial sentence agreement with the NDPP. The court held that, even if such an agreement had been reached, it would be fundamentally unenforceable. Any attempt to fetter the court’s discretion on sentence or to seek to subject the court’s sentencing function to a prior agreement would be in conflict with the constitutionally protected independence of the judiciary. The sentence agreement in terms of section 105A is, therefore, better understood as a recommendation made to the court.

Nevertheless, there remains an important distinction between a statutory sentence recommendation and the sentence recommendation made in accordance with an informal plea agreement. Should the court reject the sentence agreement concluded in terms of section 105A, the parties may withdraw from the agreement and the trial will commence de novo before a different presiding officer, where the accused may enter a plea of not guilty. The court’s rejection of a sentence recommendation made in accordance with an informal plea agreement would not entitle the parties to withdraw from the agreement, and thus the accused will not be allowed to withdraw his guilty plea.

4.2 Victim participation

A fundamental difference between informal and statutory negotiated justice lies in the victim’s participation in the negotiation process. Little is known of how often victims have been allowed to participate in informal plea negotiations, and hence the extent to which such participation influenced the negotiations is also unknown. Traditionally victims have no formal or recognised rights in the process of plea negotiations. In addition to this, the uncertainty surrounding the legality of these agreements further entrenched the neglect of the victim.

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120 Du Toit et al op cit (n30) 15-8.
121 S v Yengeni 2005 (3) SACR 1306 (T) at 1308c.
122 S v Yengeni supra (n121) at 1310e.
123 S v Yengeni supra (n121) 1310f.
125 SALRC op cit (n14) para 4.17.
By contrast, statutory plea and sentence agreements make provision for victim participation.127

4.3 Transparency

Further differences between informal and statutory negotiated justice would include, but are not limited to, the issues of transparency in procedure and judicial scrutiny. With informal plea agreements the parties need not disclose that such an agreement has been concluded. Furthermore, the court need not be advised of the contents of the agreement because the guilty plea tendered by the accused is accepted as a plea submitted in accordance with section 112. Thus, transparency and judicial scrutiny are clearly absent from informal plea agreements.

With regard to section 105A agreements, the court must be notified that the prosecutor and accused have concluded a plea and sentence agreement. In addition, the contents of the agreement must be disclosed in court.128 Furthermore, the presiding officer is required to verify that all procedural requirements set out in the section have been satisfied. Thus, when statutory agreements are concluded the entire agreement is subjected to judicial scrutiny. By prescribing stringent guidelines, which provide a controlled legal context for negotiations, section 105A promotes a transparent system of negotiated justice.129

5. The controversy surrounding negotiated justice

Plea and sentence agreements remain a controversial subject among academics. It has not enjoyed undivided academic support.130 Both its

127 See section 105A(1)(b)(iii) of the Criminal Procedure Second Amendment Act 62 of 2001. Although it is beyond the scope of this article to assess the role of the victim in informal plea agreements, it is submitted that section 105A, which makes provision for victim participation, provides a constitutional challenge to the operation of informal plea agreements. In a statutory agreement the prosecutor has a duty to consider whether victim participation would be reasonable. In addition, where the prosecutor decides to exclude the victim from the negotiations, the court assesses whether the prosecutor can advance adequate grounds for his decision. Yet, in informal plea agreements the prosecutor is under no obligation to consider victim participation and the court does not scrutinise the reasons for excluding the victim. Thus, victims in informal plea agreements are treated differently from victims in statutory agreements. This differentiation is unlikely to withstand a constitutional challenge.


129 N Isakow & D van Zyl Smit ‘Negotiated justice and the legal context’ (1985) April De Rebus 173 at 174 where the authors predicted that South African courts might soon be faced with the realities of negotiated justice and suggested that the issue be confronted squarely and that positive guidelines be developed to provide a controlled legal context for the negotiation of pleas.

supporters and detractors present sound arguments to support their views.

5.1 Supporters

Supporters view negotiated justice as a means to exchange the truth for a reduction in charge and, where applicable, a reduction in sentence.\(^ {131}\) It has been described as a handsome alternative to lengthy and costly criminal trials and the *sine qua non* for the efficient administration of justice.\(^ {132}\) The supporters of negotiated justice place emphasis on the benefits of negotiation for the accused, the state and the victim.

For an accused, the main objective of a plea and sentence agreement is to influence the sentence which may be imposed.\(^ {133}\) Du Toit & Snyman explain that the primary aims of such an agreement are:

a) to minimise the ambit of the sentence through the negotiation of a reduction in the number or severity of the charges; and

b) to determine the exact type of sentence as far as it is possible, in advance.\(^ {134}\)

Where the accused has negotiated a reduction in the charge, this is usually accompanied by a shorter term of imprisonment or even a non-custodial sentence.\(^ {135}\) In so far as non-custodial sentences are concerned, the directives issued by the NDPP stipulate that:

‘Negotiating a plea and sentence agreement is not to be understood as meaning the bargaining away of a sentence of imprisonment for a non-custodial sentence. Where the interest of justice and/or public interest requires an effective sentence of incarceration that is the stance to be taken.’\(^ {136}\)

Thus, plea and sentence negotiations cannot be viewed as means of avoiding incarceration. Yet, a shorter term of imprisonment is viewed as an intrinsic benefit of negotiated justice.\(^ {137}\) A further benefit for the accused is that he could plead to what may be perceived as a ‘morally condonable’ or ‘softer’ offence. For example, a motorist charged with culpable homicide agrees to plead guilty to reckless or negligent

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\(^ {133}\) Du Toit & Snyman op cit (n132) 154.

\(^ {134}\) Du Toit & Snyman op cit (n132) 155.


\(^ {136}\) See directive 3 of the directives issued by the NDPP on 14 March 2002.

\(^ {137}\) See, for example, *S v Esterhuizen* supra (n49) at 495c and further Snyman & Du Toit op cit (n135) 197.
driving. The alternative offence results not only in a lesser sentence but also, because of the curtailed stigma attached to the offence, re-integration of the offender into the community is facilitated.

For the state, negotiated justice is viewed as a means of easing the overburdened criminal justice system and facilitating the achievement of an effective and efficient system. A plea and sentence agreement can be concluded swiftly, thus saving the time and the expense involved in a lengthy criminal trial with all its evidentiary risks.\(^{138}\) If used optimally, it could reduce awaiting-trial prisoner numbers, as well as the caseloads of criminal justice personnel such as the police, justice centre attorneys, magistrates and prison officials.

For the victim who has been traumatised by the offence, negotiated justice is viewed as a means to prevent re-living the experience, by having to testify at the trial and undergo cross-examination.\(^{139}\) In addition, the anxiety which accompanies lengthy criminal trials (usually the result of numerous delays) may be avoided by the swift outcome associated with negotiated justice.

5.2 Critics

Negotiated justice is practised extensively in the United States of America, and most South African critics base their views on the evident flaws within the American criminal justice system.\(^{140}\) These flaws include, \textit{inter alia}, the overzealous prosecutor who would systematically charge an accused with multiple and more serious offences so as to increase his bargaining power in the negotiation process.\(^{141}\) This situation is aggravated, then, by the incompetent defence counsel who, due to his overwhelming caseload, manipulates his client into an ill-advised agreement in order to dispose of the case quickly.\(^{142}\) Furthermore, the presiding officer may be motivated to accept the plea agreement in order to avoid a lengthy trial. Critics have labelled the above, 'the problems concerning the motivations of the actors' in negotiated justice.\(^{143}\)

\(^{138}\) Bekker, Geldenhuys \textit{et al} \citop cit (n4) 199.

\(^{139}\) Du Toit & Snyman \citop cit (n132) 154.

\(^{140}\) De Villiers \citop cit (n31) 250. See also Bekker \citop cit (n126) 195 who opines that over 90% of all criminal convictions in the United States of America are based on plea agreements.

\(^{141}\) Combs \citop cit (n131) 127. See also Du Toit & Snyman \citop cit (n132) 155.

\(^{142}\) See R Uphoff ‘The criminal defense lawyer as effective negotiator: A systemic approach’ (1995) 2 \textit{Clinical Law Review} 73 at 78. See also De Villiers \citop cit (n31) 251.

\(^{143}\) See De Villiers \citop cit (n31) 240 and further GP Fletcher \textit{With Justice for Some: Victims’ Rights in Criminal Trials} at 191 who states that ‘the very idea that the authorities cut special deals with particular defendants offends the rule of law’.
The foremost criticism levelled against negotiated justice is that it undermines the values of the criminal justice system.144 The criminal justice system contains explicit rules for the determination of guilt and the punishment of the guilty.145 Negotiated justice is viewed as a circumvention and manipulation of the established legal rules because the rigorous standards of due process and proof beyond a reasonable doubt are avoided.146 Detractors further argue that these agreements are procedurally unfair because the guilt of the accused is determined by weighing the chance of success at trial against a full investigation, the leading of evidence and impartial fact-finding.147 They submit that these procedural safeguards are our main assurance of equal protection of the law.148

In addition, a section 105A agreement may be concluded only when an accused is legally represented.149 Hence, it is only available to a small percentage of accused persons. De Villiers poses the following question: ‘Why are unrepresented accused deemed to be competent to plead guilty in the conventional manner but not to participate in section 105A proceedings?’150 To deny the accused an opportunity to conclude a plea agreement because he does not have the means to appoint a legal representative or has waived his right to legal representation is not defensible, and it is doubtful whether this limitation will survive constitutional scrutiny.151

Critics also express concern for the innocent accused who may be induced to plead guilty.152 The pressure placed on an innocent accused to conclude a plea agreement may originate from a lack of confidence in the criminal justice system or in the competence of defence counsel. In addition, the harsher sanctions associated with conviction after a trial may provide a prosecutor with significant bargaining power. Thus, an accused may fear harsher punishment should he attempt to contest the charges levelled against him.153 Furthermore, the prospect of incarceration may be especially unnerving to an innocent accused, rendering him willing to agree to almost anything if the agreement guarantees

144 Snyman & Du Toit op cit (n135) 195.
145 Ibid.
146 Ibid. See also De Villiers op cit (n31) 251.
147 See Snyman & Du Toit op cit (n135) 197, De Villiers op cit (n31) 251 and further Bekker op cit (n126) 210.
148 De Villiers op cit (n31) 252.
150 See De Villiers op cit (n31) 254.
151 Ibid.
152 See Steyn op cit (n130) 207.
153 Snyman & Du Toit op cit (n135) 197.
Critics, therefore, conclude that the most serious concern with negotiated justice is that innocent persons may be induced to plead guilty to offences which they did not commit, or for which they have a valid defence.

Linked to the above is the criticism most dear to public concern, namely, that a guilty accused will receive a lenient sentence if he enters into a plea and sentence agreement. The reduction in sentence is almost inevitable. In *Esterhuizen* the court stated that the price for such agreements may be that the sentence, which normally would flow from the commission of the crime, is less than might otherwise have been imposed. Although a reduction in sentence may be unacceptable to most victims and is arguably the reason why the public disapproves of the practice, it does not mean that justice has not been served. In *Esterhuizen* the court held that, as long as the sentence bears an adequate relationship to the crime, justice has been served.

6. Conclusion

There are clearly two independent systems of negotiated justice in South African criminal procedure, namely, statutory negotiated justice and informal negotiated justice. Despite the cogent arguments made by critics, negotiated justice has been introduced formally and accepted as a facet of criminal procedure in South Africa. Thus, arguments pertaining to the legitimacy of the practice have become obsolete to a large extent. However, these arguments are likely to be revived in critical assessments of the procedures followed in pursuit of negotiated justice.

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154 Uphoff op cit (n142) 130.
155 Snyman & Du Toit op cit (n135) 197.
156 *S v Esterhuizen* supra (n49) at 495c.
157 Snyman & Du Toit op cit (n1385) 197 and *S v Esterhuizen* supra (n49) at 495d.
158 *S v Esterhuizen* supra (n49) at 495c.