

## **Plea Bargaining: An Analysis of its Prospects in the Criminal Justice Administration of Bangladesh**

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**Abstract:** *One of the cardinal principles of criminal justice is that nobody is to be compelled by threat, promise or inducement in any criminal case to be a witness against themselves. As a result, it is an uphill task for the prosecution to unearth a crime, bring the witnesses in support of his case, rebut the defense arguments and prove the case beyond all reasonable doubts. These tasks become difficult for want of resources, manpower in the prosecution, and sluggishness of government officials, political interruption and importantly pervasive corruption in the criminal justice delivery process in Bangladesh. Against this backdrop, plea-bargaining can play an important role to address many of these issues. An attempt is made here to analyze the practices of plea bargaining in different regions and in different legal systems of the world. Based on experience of other countries, several recommendations are made for incorporating it in our criminal procedure.*

**Key Words:** Plea-bargaining, Trial, Criminal justice, Procedural drawbacks

### **Introduction**

Our justice sector is divided into two parts viz. formal and informal sectors. Court system is within formal sector. Article 35(3) of the Constitution of Bangladesh lays down, "Every person accused of criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law". In the context of the administration of criminal justice system, it has a dual significance as because 'justice delayed is justice denied' or 'delayed justice is an infliction of injustice in the name of justice'. In our country justice is always delayed due to procedural drawbacks. So, we cannot expect a desirable outcome from this faulty delivery system. The prime reasons for these are: lengthy investigation process, outdated recording of evidence, corruption in police report, deficiencies in number of cases and last but not the least, long awaited trial. The study mainly focuses on the problems associated with the criminal justice and its impact on criminal justice delivery system of Bangladesh. In order to eliminate the delay in dispensing justice, plea bargaining will definitely be a welcome inclusion. This article attempts to set out the effective use of plea bargaining to disposal of cases expediently. It emphasizes the need for effective implementation of plea bargaining in criminal justice system. However this article argues that plea-bargaining has little chance of bringing a dramatic effect on the criminal justice system of Bangladesh as a whole but the use of plea bargaining helps enormously by reducing huge backlog of less important cases and thus helps everybody affiliated with the criminal justice delivery system to manage the important cases properly.

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### **Concept of Plea-bargaining**

“Pleading Guilty and ensuring Lesser Sentence” is the shortest possible meaning of Plea Bargaining. Plea bargaining may be defined as an agreement between the accused and the prosecution through which the accused can get lesser sentence by admitting his or her guilt. There are three main players in a plea bargaining: the prosecutor, the accused and the judge. *Bevier Law Dictionary* defines it-“as to make an agreement in which the defendants plead guilty to a lesser charge and the prosecutors in return drops more serious charges”. In 1975, the law commission of Canada defined plea-bargaining as any agreement by the accused to plead guilty in return for the promise of some benefit. According to the *Black’s Law Dictionary*, plea bargaining is the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case, subject to court approval<sup>1</sup>.

Plea Bargaining can be of three types:-

1. Charge Bargaining.
2. Sentence Bargaining.
3. Fact Bargaining.

**Charge Bargaining:** Charge bargaining involves a negotiation of the specific charges or crimes that the defendant will face at trial. Where there is only one charge against any person, the prosecution may promise the accused that a charge for a lesser offence will be brought in return for a plea of guilty. For example, a charge for culpable homicide instead of murder could be brought against any offender. Charge bargaining may include:

1. The reduction of a charge.
2. The withdrawal or stay of other charges.
3. An agreement by a prosecutor not to proceed on a charge.
4. An agreement to stay or withdraw charges against third parties.
5. An agreement to reduce multiple charges to one all-inclusive charge.
6. The agreement to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.

**Sentence Bargaining:** Sentence bargaining involves the agreement to a plea of guilty in return for a lighter sentence. It saves the prosecution from long trial as well as provides the defendant with an opportunity for a lighter sentence.

Sentence Bargaining may include the following:

1. A recommendation by a prosecutor for a certain range of sentence.
2. A joint recommendation by a prosecutor and defense counsel for a range of sentence
3. An agreement by a prosecutor not to oppose a sentence recommendation by defense council.
4. An agreement by a prosecutor not to seek additional optional sanctions, such as prohibition and forfeiture orders.
5. An agreement by a prosecutor not to seek more severe punishment.
6. An agreement by a prosecutor not to oppose the imposition of an intermittent sentence rather than a continuous sentence.

**Fact Bargaining:** Fact bargaining arises when the Prosecutor agrees not to reveal any aggravating factual circumstances to the court because that would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines.

In fine, plea bargaining refers to pre-trial negotiations between the accused and the prosecution in which the accused agrees to plead guilty in exchange for certain concessions guaranteed by the prosecutor. Plea bargaining cannot be enforceable until a judge approves it<sup>ii</sup>.

**Objectives**– Identifying the drawbacks of existing criminal justice delivery system in Bangladesh and introducing plea-bargaining as a substitute for trial.

### **Methodology**

The present article has been written by using qualitative method. All the data and information used here are from secondary sources such as journal articles, national and international documents, case laws and local newspapers.

### **Practice of Plea-bargaining in different countries**

The practice of Plea-Bargaining goes back to the seventeenth century Great Britain when the English Common Law Courts would grant pardons to accomplices in felony cases upon the defendant's conviction, or execution upon the defendant's acquittal. Plea bargaining was also common in the 19th century American Judiciary. It was estimated that 90% of criminal cases were resolved through plea-bargaining rather than jury in America as well as in Canada. In 1970, in *Brady versus U.S.A* the Supreme Court of the USA stated that it was not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the state. After one year in *Santobollo vs New York ( 1971)* the Supreme Court accepted that plea bargaining was essential for the administration of justice. In India, the concept of plea bargaining was introduced in Criminal Justice System in the year 2005 by means of Criminal Law (Amendment) Act, 2005 through sections 265-A to 265-L. The Supreme Court was very much against the concept of Plea Bargaining before its introduction. In *State of Uttar Pradesh vs. Chandrika (1999)* the Supreme Court of India held that mere admission of the guilt should not be a ground for reduction of sentence, nor can the accused bargain with the court that as he is pleading guilty his sentence should be reduced. But conversely, the Division bench of Gujarat High Court in *State of Gujarat V. NatwarHarchanjiThakor(2005)* observed that the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of justice, fundamental reforms are inevitable. Plea-bargaining was introduced in Pakistan by the National Accountability Ordinance in 1999, an anti-corruption law. In country such as in Wales of England and Victoria of Australia, 'Plea Bargaining' is allowed simultaneously. In civil law countries such as France, Estonia, Italy and Poland introduced plea-bargaining in a limited form. The European countries are also slowly legitimizing the concept of plea bargaining<sup>iii</sup>.

### **Advantage of Plea-bargaining Method**

Benefit of plea bargain can never be described in a word. When we look into the existing condition of our Criminal Justice system then we will better understand the logic behind this statement. As we all know everything on this earth has good and bad aspects, plea bargaining is no exception to this. But its advantages are more rather than its disadvantages. The criminal justice system of Bangladesh is surrounded by many drawbacks. We can remove some of the drawbacks through plea bargaining process. Moreover, there is a provision named compoundable offences mentioned in our code through section 345. This provision cannot be applicable in serious offences and there is no system of admission of guilt by the accused. As a result, the accused gets acquittal without confession. By using plea bargaining the shortcomings as well as the backlogging of courts can be reduced and justice can be ensured more effectively. When we analyze the reason as to why the criminals are interested to go for plea bargaining, then it comes to the fact that they are able to reduce their punishment which is not possible in existing judicial process. The principal benefit of plea bargaining is receiving a lighter sentence for a less severe charge that might result from taking the case to trial and losing. It will create a scope for the accused to rectify them. Another fairly obvious benefit that defendants can reap from plea bargaining is that if they are represented by private counsel, they can save a bundle on attorney fees. Through this, people can save money specially the poor people who do not have enough money to defend themselves. Litigation system always takes more time and effort to bring a case to trial whereas plea bargaining takes shorter period to solve. So the ultimate motto to introduce this system is nevertheless, dispose the cases quickly and thus to reduce the burden of courts and decrease the population of jail. I would like to say under Bangladesh perspective that we have no other alternative but to incorporate this concept in the code.

### **Disadvantage of Plea-Bargaining Method**

This article would be incomplete if it does not discuss the flaws that are hidden beneath the concept of plea bargaining. As we know plea bargaining is one type of negotiation, there must be possibility to create pressure on the accused. Sometimes the prosecutor may threaten the accused with a severe penalty if the accused decides to proceed to trial. In plea bargaining, the prosecution and accused decide the case ignoring the victim. Plea-bargaining violates many basic principles upon which the criminal justice system rests. One of these principles is that it is better to let ten guilty persons go free than to convict one innocent person. Critics say that plea bargaining subverts many of the values of criminal justice system as for example: right to be presumed innocent and to have a fair and public trial, right not to be compelled in any criminal case to be a witness against himself. In particular, this process being an irrational, unfair and secretive practice that facilitates the manipulation of the system and the compromise of fundamental principles. It robs the court of its ability to separate the guilty from the innocent. Hence, the justice system is reduced to a tool of the prosecutor instead of a tool of justice. Moreover, plea bargaining and its leniency towards the guilty undermines the deterrent effect of criminal sanctions and to

reform the offenders. The outcome of plea bargain may depend on the negotiating skills and personal demeanor of the defense lawyer, thus puts persons who can afford good lawyers at an advantage. So in that case, the poor will be the ultimate victim of it<sup>iv</sup>. Moreover, Plea bargaining allow criminals to defeat justice, thus diminishing the public's respect for the criminal justice process. Sometimes it is found unjust in which the punishment is too lenient given the severity of the crime.

### **Loopholes in Existing Criminal Justice Delivery System**

Bangladesh has got a criminal justice delivery system which it inherits from the British colonial rulers. Though this system was modified gradually but the vestiges of the nineteenth century colonial thoughts on it is still clear. In 1898, more than one hundred years back, the Code of Criminal Procedure was enacted by the British rulers. With the passage of time, some amendments have been made but it is still insufficient for disposal of cases quickly. Criminal justice delivery system is being delayed due to two reasons: 1. Delay in investigation stage, 2. Delay in trial stage. In investigation stage, police reports are the foundation of criminal justice. The police arrest the accused, put charges against the accused, investigate and submit charge sheet to the court inspector. As there is no fixed time limit for submitting the investigation report mentioned in our code, the police in case of investigation take too much time to dispense it<sup>v</sup>. The reason that is often cited for the delay in submitting charge sheet is that there is shortage of manpower and excessive workload in a police station. In addition to these delays in naraji petition (protest petition) with regard to acceptance and rejection of police report or delay in disposal of revision arising out of acceptance or rejection of a naraji petition are also included in it<sup>vi</sup>. Besides, corruption in police affects criminal justice<sup>vii</sup>. They make weak charge sheet when they get bribes from the offenders. In the existing criminal justice system, the police do all the preliminary work based on which judgment is delivered from the court. So, if the report is corrupted, fair and neutral justice cannot be ensured.

Trial stage commences after submission of investigation report and after taking cognizance of an offence by the court either on the basis of investigation report or on the basis of complaint petition. But when this final charge sheet is submitted to the court, it becomes the place where justice is stuck. In one year 60% of the cases are chargesheeted but 25% of these cases are put on trial<sup>viii</sup>. Following this rate, every year cases are accumulated causing a huge backlog. Besides, due to failure of police in ensuring the attendance of prosecution witness during trial together with time consuming mode of recording evidence of witness causes delay in trial stage. Frequent adjournment of cases at trial stage on less important pleas are another reason for delay. Absence of efficient prosecution and defense personnel is one of the main obstacles to get speedy trial. Besides, the prisons are overcrowded with accused persons undergoing trial. Moreover, with the increased population of the country, the number of courts and judges has not been increased. Because of shortage of manpower, a

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judge has to deal with five or six thousand cases in a year. Due to dissolution of a bench in High Court Division of Supreme Court, the cases do not proceed. There is also a lack of case management system which makes the judges overburdened. Even justice cannot be delivered until the confrontational parties receive a written copy of the judgment. To overcome this existing precarious situation in the criminal justice process, we need to introduce an alternative method which accelerates justice delivery system. .

**Need for Plea-Bargaining in Bangladesh:**

In Bangladesh as we know, criminal justice system is overburdened with procedural difficulties in different stages such as in inquiry, investigation and in trial stages. All these obstacles may be removed to a considerable extent by introducing plea bargain. In Bangladesh, courts are overburdened with pending cases, the trial life span is inordinately long and the expenditure is very high. As of December 2006, a total of 7,69,582 criminal cases are pending before lower courts (2,05,211 in Session Courts and 5,64,371 in Magistrate Courts) against a limited number of 583 judges and magistrates (64 Sessions Judges, 98 Additional Sessions Judges, 583 Magistrates of which all are not trial magistrates). From this statistics, it is obvious that due to the lack of number of magistrates and judges huge backlog of cases is creating inordinate delay. Introducing plea bargaining is likely to reduce this horrendous number of pending cases. If an accused is not released on bail, he rots in the jail and thus the prison is overcrowded with the prisoners<sup>ix</sup>. As of July 2008, the total number of prisoners in 67 prisons in Bangladesh stood at about 87,011 against the capacity of 27,451 which also puts huge financial burden to the state exchequer. Under these unpalatable circumstances, if plea-bargaining is introduced, most of the prisoners would likely to apply for it with lighter sentence rather than languishing in jail. At present, the conviction rate is only 10% in Bangladesh. The reason of low rate of conviction is faulty police investigation, political nature of public prosecutors and overall corruption practices among the stakeholders. As a result, after a long awaiting trial, 90% of the accused get acquittal. On the contrary, Due to shortage of manpower, a trial for every charge is impossible in the criminal court. So there is a strong ground for providing justice through plea bargain because it enables to get speedy justice as well as a merit-based judgment<sup>x</sup>.

The accused can be benefited through plea bargaining in many ways-to receive lighter sentence in case of heavier punishment, to save money that might spend on advocates, to save time and effort that might spend to bring a case to trial and last of all to save them from uncertainty of the result of trial<sup>xi</sup>. Long process of proof, legal technicalities and long arguments to higher courts prevents the prosecutors from disposing the case in time. By introducing plea bargaining both the prosecution and judges can save time. After a long and tiring saga of trial in lower court, appeal and revision in the higher courts, when the accused comes out with acquittal along with a guilty verdict with lesser punishment the victim feels cheated by this justice system. In this situation the essence of justice can be ensured by plea bargaining. Plea-bargaining can be introduced in Bangladesh in two stages:

**Guilty Plea at Investigation Stage**-There is no scope for any bargaining over confession in our Code of Criminal Procedure. If we analyze the specific provisions regarding confession, the fact will come before us. As we see, according to Code of Criminal Procedure 1898<sup>xii</sup> and Evidence Act 1872<sup>xiii</sup>, an accused may admit his guilt voluntarily before a magistrate at the stage of investigation if not that confession is extracted by inducement, threat or promise then in that case the confession will go against him in evidence (section-164,364,24-30 of Evidence Act 1872). Apart from these, any confession made before any police officer or under police custody will not be considered as evidence (section-25,26 Evidence Act 1872). Before recording such statement, the magistrate will inform the accused not to confess it together with the effect of confession. So no specific confession provision is mentioned in our code upon which the accused will get any lenient punishment.

**Guilty Plea at Trial Stage**-In trial stage, when the accused appears before the court, the responsibility of the magistrate is to frame the charge against the accused by considering the record of the case, documents and examination of the accused and the prosecution. Asking the accused whether he admits his guilt upon which he is charged and if the accused admits his guilt then an accused can be convicted by the magistrate accordingly (section-242,243of CrPC). In trial stage at session court, the court shall convict the accused upon the accuser's admission of guilt. There is no provision in any law that the court will convict an accused with a lenient sentence due to his guilty plea.

The provision of 'Tender of Pardon' in section 337 of the Code of Criminal Procedure, 1898 which states that a magistrate at any stage of investigation or inquiry or the trial may tender pardon to any accomplice provided that the accused will fully disclose the circumstances within his knowledge relating to the offence and to every person involved therewith. This provision can be used to streamline the method of 'plea bargaining' in our criminal justice system.

### **Recommendations:**

The criminal justice system of Bangladesh is threatened by sheer magnitude of unresolved cases. This calls for effective and meaningful alternative dispute resolution process in administration of criminal justice and in this respect plea bargaining will definitely be a pragmatic inclusion. A new and complete chapter may be incorporated in the Code of Criminal procedure of 1898 like India. Some recommendations are outlined below for active consideration:

- I. Plea-bargaining may be applicable in respect of those penal and other special laws for which punishment of imprisonment is prescribed up to a period of 7 years. Again it may not be applicable to those offences such as offences relating to socio-economic vulnerabilities of the country, violence against women and child, specially the children below the age of 14. Moreover, it should not be applicable in case of habitual offenders.

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- II. The accused should have informed knowledge about the effect of plea bargaining. Thus the court should have the duty to inform the accused that if he follows this process, he will lose some constitutional rights like right to due process of law or right to trial. A special provision in this respect can be inserted in the Code of Criminal procedure (CrPC).
- III. Police should not be involved with the plea bargaining process because it can aggravate corruption among police personnel. The judge and the prosecutors can take this initiative if the accused is undefended to avoid long delay in dispensation of justice. After negotiation between the accused and the prosecution, the court must deliver the judgment openly to avoid confusion. The judgment delivered shall be final and binding and no appeal or revision should lie against such judgment. The court has to be satisfied that the application made by the accused is voluntary. If it is found that the application of plea bargaining is involuntary the court may reject the petition.
- IV. Plea bargaining may be used in anti-corruption cases as corruption cases are all pervasive and need to be disposed off quickly. In this respect, the accused may apply to the commission accepting his guilt. On receiving this plea the commission may establish a court of special judge who will decide whether this plea should be accepted or not. If the plea is accepted, the accused stands convicted but any kind of sentence is not imposed on him. The accused should be dismissed from service, will be disqualified to take part in election or to obtain a loan from any bank.
- V. In deciding the lenient sentence for the accused, the reaction of the victim and society should be measured. The punishment of the accused might be reduced to one-third or one-fourth rather than the original punishment that might be awarded for such an offence.
- VI. At the first stage of introducing plea bargaining in Bangladesh, only sentence bargaining rather than charge bargaining should be allowed. If the opposite is done there is a possibility that prosecution will be facilitated and in some cases, even the lawyer of the accused may take undue advantage. Moreover, fact bargaining is a process which is complicated and require skilled lawyers for both parties.

**Concluding Remarks:**

The Bangladesh criminal justice system is presently facing a significant number of pending cases. Therefore, some compromises are warranted, as long as this is 'fair, just and reasonable'. In this respect, Plea bargaining could be a necessary evil for our criminal justice system. Without timely introduction of plea bargaining, our court system has the risk of collapsing altogether under the amount of cases going to trial every year. Our endeavour should be to use it towards serving the ends of justice and only the actual implementation of the



well tested provisions of developed systems can help us improve the practice of 'plea bargaining. A thorough analysis of how this system works in other countries, its merits and demerits and how efficiently the system helps in the expedient disposal of cases shall pave the way for effective implementation of the option of plea bargaining in criminal justice administration. The article concludes by stating that without the introduction of plea bargaining in Bangladesh, the criminal justice system would be at a great disadvantage with the possibility of collapsing the system as a whole.

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