

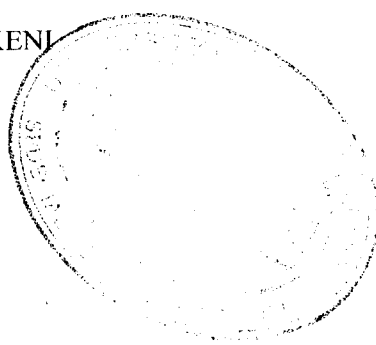
THE IMPACT OF THE PLEA NEGOTIATIONS AND AGREEMENTS ACT No. 20
OF 2010 ON THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA.

SPR
L.B.
2010

By

MAHAPE LIBAKENI

(28014928)

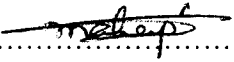


Being a Directed Research essay submitted to the University of Zambia Law Faculty in
Partial fulfilment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

DECLARATION

I, MAHAPE LIBAKENI, do hereby declare that this Directed Research Essay is my genuine work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorisation

in writing of the author.



.....

Mahape Libakeni.

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I Recommend that the Directed Research Essay under my supervision by:

MAHAPE LIBAKENI

(Computer No. 28014928)

Entitled:

**THE IMPACT OF THE PLEA NEGOTIATIONS AND AGREEMENTS ACT No. 20
OF 2010 ON THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA.**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the regulations governing Directed Research Essays.

.....

Mrs. A.C Chanda

.....

Date

ABSTRACT

This study examines the implications of adopting formal plea bargaining through the enactment of the Act, juxtaposed against the general concept of plea bargains and its advantages and disadvantages. It examines plea bargaining in Zambia under the Plea Negotiations and Agreements Act, No. 20 of 2010, particularly the manner in which it alters the informal plea bargaining framework that existed prior to the Act. The research is based on primary sources of information which are mostly foreign as the formal plea bargaining in Zambia is a novel idea which as yet, has had very little usage.

The study also takes into account the historical evolution of the practice of plea bargaining under Anglo- American criminal justice systems, seeking to find out whether the historical factors that gave to the practice are present under the Zambian legal regime. It has been posited that the emergence of professionalization of prosecutorial and criminal investigative authorities and complexity of rules of evidence in criminal trials provided impetus for the adoption of plea bargaining as a means of speedily resolving caseloads in Anglo-American criminal justice dispensation. This research has found that under the Zambian system, only the large amount of caseloads can be posited as a reason to embrace plea bargaining.

It has been discovered that the principle movers of the plea bargaining process are the public prosecutors and the accused, through defence counsel. Because plea negotiations in Zambia cannot be carried out without legal representation of the accused, the process is in essence driven by lawyers. This brings about attendant dangers such as abuse of powers of the prosecutor, for instance coercion. It has been found that the Act's insistence on legal representation allays such dangers. It has been acknowledged that legal fees are quite prohibitive and as such, many accused will not be able to afford legal counsel. The Act attempts to aid this ill by providing for the opportunity for an accused to avail himself legal

aid. It is recommended that for this to work, there must be increased funding of the Legal Aid Board so as to better serve the purposes of the Act.

The judiciary also has a regulatory role to play in ensuring that the process of plea bargaining is not abused and the dispensation of justice is hindered. This is manifested through the overall power of the courts to test the voluntariness of guilty pleas and refuse to accept any coerced or otherwise improperly conducted negotiations.

While the enactment of the Plea Negotiations and Agreements Act is a laudable exercise, there is still need for improvement. In its current state, the Act will have limited efficacy in achieving its goals mainly because its scope is limited only to charge bargaining. In order to allay this, sentence bargaining must be introduced to the plea negotiation procedure.

AKNOWLEDGEMENTS

I would like to thank Mrs. A.C Chanda, my supervisor for the task that she undertook reading through my chapters and offering valuable suggestions and comments which were most insightful.

I would also like to offer a special word of appreciation to Thandiwe, my friend and partner. You have been my greatest supporter throughout this race and have been there to offer encouragement whenever the future looked bleak. I am forever grateful

An especial word of thanks goes to the ever supportive body of friends and colleagues whom I have met during my time at the University of Zambia. Musa, Joshua, Arnold, Chuchu, Vincent, Evelyn and Kelly your help has been invaluable.

I would finally like to thank the Lord Almighty, without whom, none of this would be possible. I will continue to seek your favour.

DEDICATION

This work is dedicated to my mother, Mubiana Bernadina Libakeni for all the love and compassion you have always shown me, and the unwavering belief in me. If only every child could have a mother like you.

TABLE OF STATUTES

Zambian Statutes.

The Constitution of The Republic of Zambia, Chapter 1 of the Laws of Zambia.

The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

The Plea Negotiations and Agreements Act, No. 20 of 2010.

Foreign Statutes.

Federal Rules of Criminal Procedure, U.S.A.

The Code of Criminal Procedure, as amended by the Criminal Law (Amendment) Act, India, 2005.

TABLE OF CASES.

Alabama v. Smith Supreme Court of the United States (1989), 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed: 2d 865.

Brady v. United States Ed. U.S. 397th ed. No. 270 Vol. Supreme Court of The United States.

Bordenkircher v. Hayes 43 U.S 357 (1978).

Jones v. Barnes 463 U.S. 745, 761 (1983).

Re Westmid Packaging Services Ltd, Secretary of State for Trade and Industry v. Griffiths and Others [1998] 2 All ER 136.

Siulapwa v. Namasiku (1985) Z.R. 21 H.C.

The People v. Kambarage Kaunda and Another HPR/151/1990.

The People v. Siamwaba (1979) ZR 61.

CONTENTS

Research Topic i

Declaration.....ii

Supervisor’s Approvaliii

Abstractiv

Acknowledgementsvi

Dedicationvii

Table of Statutesviii

Table of Casesix

Contents.....x

CHAPTER 1

GENERAL INTRODUCTION

1.0 Introduction.....1

1.1 Problem Statement.....6

1.2 Objectives of Study.....7

1.2.1 General Objectives.....7

1.2.2 Specific Research Objectives7

1.3 Significance of the Research7

1.4 Justification8

1.5 Specific Research Questions.....8

1.6 Research Methodology9

1.7 Outline of Chapters9

1.8 Conclusion.....10

CHAPTER 2

HISTORICAL AND CONCEPTUAL BACKGROUND OF PLEA BARGAINING

2.0 Introduction.....11

2.1 History and Evolution of Plea Bargaining.....11

2.2 The Concept of Plea Bargaining.....16

2.3 Advantages and Disadvantages of Plea Bargaining.....20

2.4 Conclusion24

CHAPTER 3

INFORMAL PLEA BARGAINING AND THE IMPACT OF THE PLEA NEGOTIATIONS AND AGREEMENTS ACT, 2010

3.0 Introduction.....25

3.1 The Informal Plea Bargaining Framework.....25

3.2 The Plea Negotiations and Agreements Act- Salient Provisions.....27

3.2.1 Applicability27

3.2.2 Procedure 29

3.2.3 Contents of the Plea Agreements31

3.3 Effect of the Act on Informal Plea Bargaining34

3.4 Conclusion.....35

CHAPTER 4

THE ROLES OF THE PROSECUTOR, DEFENSE COUNSEL AND THE COURTS.

4.0 Introduction36

4.1.Prosecutors37

4.2 Defence Counsel42

4.3 The Judiciary45

4.4 Conclusion47

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS.

5.0 Introduction48

5.1 General Conclusion.....48

5.2 Recommendations.....50

5.3 Conclusion51

Bibliography52

CHAPTER ONE.

GENERAL INTRODUCTION

1.0 Introduction.

Criminal law is concerned with the relationship between the individual and the community in which he exists. It is that branch of law that governs the regulation of society by specifying prohibited acts and omissions in the common law and statute.¹ Performance of these prohibited acts invites criminal sanctions or punishment. These sanctions range from custodial sentences or imprisonment, fines or in certain cases the death penalty. For one to be subject to these sanctions, he must be proved to have actually committed the offending acts or omissions in a court of law through a free and fair trial. In Zambia for instance, Article 18 of the Republican Constitution² states that any person charged with a criminal offence must be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Conviction of a crime is a serious matter, especially for the person accused and convicted, but also for the entire social order which defines and supports the conviction process.³ As alluded to above, this is ordinarily done at a trial. It thus provides the primary means of separating guilty defendants from those who are innocent.⁴

At trial, when charged with an offence, an accused person has the option to plead either guilty or not guilty. This is done in court before the judge presiding over the matter. The accused may also refuse to plead and at this point, the court shall cause a plea of 'not guilty' to be

¹Criminal Law Lecture Notes at www.lawteacher.com Accessed 10th March 2012.

² Chapter 1 of the Laws of Zambia.

³ Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little Brown and Company, 1966), 3.

⁴ Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 3.

entered for him.⁵ Of course before that, an accused may confess to being guilty of the crime and a *voire dire* may be undertaken by the judge to ascertain the voluntariness of the confession.

On the other hand, it is possible under some legal systems to secure a conviction through a non-trial procedure where a guilty plea is a subject of negotiation between the prosecution and the accused. This is known as the plea bargain, plea agreement or the negotiated plea.

In general terms, a plea bargain would include any circumstance in which a defendant is rewarded for his guilty plea. More specifically, it can be defined as when the prosecutor induces the accused to confess guilt and waive his right to trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudged guilty following trial.⁶

In essence plea bargaining is a 'trade off' between the prosecutorial authority and the accused involving an admission of an infringement, or certain facts, in exchange for some reduction in the penalty.

Compared to guilty pleas, plea bargaining is a recent emergence in criminal procedure. It is contended by legal historians that the practice started sometime around the 19th Century. Alschuler has undertaken to document that plea bargaining was unknown during most of the history of the common law. Only in the nineteenth century does he find significant evidence of the practice in either England or America.⁷

Historically, plea bargaining is a shift from reliance on jury trials as a means of case disposition to the use of non-trial procedure. The sole reliance on jury trials prior to the advent of plea bargaining was a feature of amateur court actors, that is, largely untrained

⁵ Section 204(4) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

⁶ J.Langbein, "Torture and Plea Bargaining" *University of Chicago Law Review*, Vol. 46, Number 1 (Autumn, 1978): 8.

⁷ A. W Alschuler . "Plea Bargaining and Its History," 79 *Columbia. Law Review* (1979).

lawyers, judges and investigators.⁸ As professionalism increased among lawyers and the police, trials became extremely complicated and slow. As a consequence, caseloads began to be felt by the prosecutors and judges. They thus sought ways to encourage guilty pleas and hence the evolution of plea bargains or agreements. The conceptual basis of contemporary plea bargaining can be explained through the vista of contract. Indeed, a plea bargain is a type of contract. There is offer and acceptance and the intention that the agreement be binding. It is trite law that every contract must have consideration in order that it is cloaked in validity. In general terms, the accused relinquishes the right to go to trial, while the prosecutor surrenders the right to seek the highest sentence or pursue the most serious charge possible.⁹ Whatever the legal instrument governing plea bargaining in any jurisdiction, it is common to all that there be an exchange of valuable consideration.

It has already been stated that plea bargaining arose, at least in part, as a reaction to the effects of large caseloads on the criminal justice system, that is, prosecutors and the judiciary. This is given as plea bargaining's most favourable quality. So lauded is this efficiency that the United States Supreme Court has stated that it is "an essential component of the administration of justice".¹⁰ Proponents advance other advantages of plea bargaining; its rehabilitative influence on guilty offenders, its powers as a form of dispute resolution¹¹ and the propriety of sentencing offenders who acknowledge their guilt quickly without trial.

As laudable as plea bargaining is, it does have some serious drawbacks. The accused cannot raise defences and have his guilt proved to a jury beyond a reasonable doubt-his greatest

⁸ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History* (Portland: Hart Publishing, 2005), 2.

⁹ E.S Roberts and J.S William, "Plea Bargaining as Contract" 101 *Yale L.J* (1991-1992):1911.

¹⁰ *Santobello v. New York*, 404 U.S. 257, 260, 1971.

¹¹ K.P Pradeep , *Plea Bargaining-New Horizon in Criminal Jurisprudence*,(Kerala, 2006), 5 accessed at www.lawyersclubindia.com, 21st March 2012.

safeguard against mistaken conviction.¹² Connected to this is the proposition that the practice subverts the constitutionally guaranteed right to criminal trial of the accused. It also undercuts the need for proof of guilt beyond reasonable doubt and is particularly subjective to abuse as coercive force by prosecutors.¹³ Other problems are the erosion of the powers of judges and the ‘commodifying’ of human liberty. This is because every plea bargain is considered a conviction for the prosecution, equivalent to a conviction obtained through trial. Human liberty is ‘commoditized’ when prosecutors abuse the process to garner high conviction rates for themselves and accrue benefits that may flow from it.

Despite these drawbacks, plea bargaining has, in the past, been going on in Zambia on an informal basis¹⁴, that is, without any law regulating the conclusion of these agreements. This is no surprise, as the criminal justice system has long rewarded some forms of co-operation by the accused, notably, co-operation in procuring the conviction of co-accused persons who have committed serious crimes and offences in other jurisdictions as well.¹⁵

There have been no laws and regulations governing plea negotiations in Zambia, and as a consequence, no formal legal and institutional framework under which plea agreements could be negotiated. The major law that governed and codified the procedure by which criminal cases were handled, the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, provided no such mechanisms. The same can be said for any other laws relating to the prosecution of a criminal case.

However, the enactment of the Plea Negotiations and Agreements Act No. 20 of 2010 works to remedy this situation in that it is to provide for “the introduction and implementation of

¹² J.H Langbein, “Understanding the Short History of Plea Bargaining” . *Faculty Scholarship Series*. Paper 544 (1979) :262.

¹³ Pradeep, *Plea Bargaining-New Horizon in Criminal Jurisprudence*, 6.

¹⁴ As per Hon. C.K.B Banda S.C. *Zambia National Assembly Debates and Proceedings*, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

¹⁵ Pradeep, *Plea Bargaining-New Horizon in Criminal Jurisprudence*, 3.

plea negotiations and plea agreements in the criminal justice system and for matters connected with and incidental thereto”.¹⁶ The Act features the use of the term plea negotiations, and the end product of these negotiations is called a plea agreement. Nevertheless, the terms ‘plea bargaining’ and ‘plea negotiations’ are interchangeable and refer to the same thing, as what the Act refers to as ‘plea negotiations’ is identical to ‘plea bargaining’. It should be noted here that in order for one to fully understand the implications of the Act, one must understand the conceptual bases of plea bargaining. These have been alluded to above and shall be given in subsequent chapters.

The Act provides the process through which a prosecutor and an accused can come to an agreement relating to the accused’s conviction. This process is called ‘plea negotiation’ and Section 2 of the Act defines a plea negotiation as ‘any negotiation carried out between an accused person or the accused person’s legal representative, and a public prosecutor in relation to the accused person pleading guilty to a lesser offence than the offence charged in return for any concession or benefit in relation to which charges are to be proceeded with’.

The judiciary also has a role to play albeit only a review role. But a judge nevertheless retains power to greatly influence a plea agreement. Quite obviously plea negotiations and agreements precipitate the omission of the trial stage of criminal procedure and so the case only comes before a judge to decide on whether the bargain is fair and without legal fault.

While the enactment of the Plea Negotiations and Agreements Act No. 20 of 2010 is commendable, there is still room for improvement. Sight of its accomplishments must however, not be lost. The research exposits the historical context of plea bargaining and its emergence, particularly in Anglo-American legal systems and identifies both similar and divergent factors in the decision to adopt this mode of case disposition in Zambia.

¹⁶ Preamble of the Plea Negotiations and Agreements Act No. 20 of 2010.

1.1 Statement of the Problem.

As far as the existence of comparable legislation in the country, the Plea Negotiations and Agreements Act is a novel innovation and it signifies the first foray of the legislature into the area of formalized plea agreements. Prior to the enactment of the above Act, plea negotiations were carried out informally especially in the High Court.¹⁷

The Act thus intends to provide a non-trial procedure for dealing with criminal cases- where the accused agrees to plead guilty to an offence he is charged with, or a lesser offence in return for leniency in sentencing. It is a major development in the manner in which criminal cases are conducted and it is only befitting that research on the impact of such an important piece of legislation be carried out.

Various jurisdictions to various degrees have accepted the phenomena of plea bargains or agreements into their criminal justice systems. The reason most frequently given is the alleviation of the huge backlog of cases that the courts have to dispose of and the inordinate amounts of time and resources required to successfully try a criminal matter.

This paper assesses the impact of the Act on the Zambian criminal justice system, how the various features of the Act help to achieve its intended purpose and whether the Act has brought about any adverse effects as far as plea bargaining is concerned.

¹⁷ As per Hon. C.K.B Banda S.C. *Zambia, National Assembly Debates and Proceedings*, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

1.2 Objectives of the Research.

1.2.1 General Objective.

This paper is an assessment of the impact of the Plea Negotiations and Agreements Act of 2010 on the criminal justice system in Zambia. What are the innovations, potential problems and proposed solutions?

1.2.2 Specific Objectives.

1. To provide an analysis of the advantages and disadvantages of plea negotiations and plea agreements.
2. To provide comparisons between plea negotiations and agreements under the Act in Zambia, and that obtaining in other selected jurisdictions such as the United States of America, The United Kingdom and India.
3. To examine the roles played by the courts, legal practitioners and the Legal Aid Board in the realization of a plea agreement.

1.3 Significance the Research

The intention of the Act is to provide for plea negotiations and agreements. It is a vehicle by which an accused and the prosecuting authority can come to an agreement whereby the accused agrees to plead guilty to a lesser offence, or set of facts in exchange for leniency in sentencing.

Criminal justice administration is taking new dimensions worldwide. One of the recent developments in the administration of criminal justice is the emergence of plea bargaining. The research thus adds to legal knowledge regarding the criminal administration system, particularly in the area of plea bargaining. It will be noted that the Act is a new piece of

legislation. The research is of value because not only does it cover plea bargaining as provided for by the Act, but it also exposes the underlying concepts behind the practice.

1.4 Justification for the Research.

This research is important because the Act signifies the first foray of the Zambian legislature into the area of plea negotiations and their formalization. The Act is thus a novel innovation as far as Zambian legislation in the area of plea negotiating and bargains is concerned, especially as it now provides a legal framework for a practice that has previously been carried out informally. There have been no previous laws that deal with the issue of plea bargaining, hence the occurrence of informal plea bargaining.¹⁸

The research is justified because of the need for more literature on the subject of plea bargaining. Furthermore, because of the novelty of the Act under the Zambian legal system, such a research is justified because it will provide information on the Act, and the practice of plea bargaining.

1.5 Specific Research Questions

1. What is the intended purpose of the Act?
2. To what extent do the advantages and disadvantages of plea negotiations manifest themselves in the provisions of the Act?
3. Does the formalized framework for plea negotiations as provided for by the Act improve upon informal plea bargaining?

¹⁸ As per Hon. C.K.B Banda S.C. *Zambia, National Assembly Debates and Proceedings*, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

1.6 Research Methodology

The research is a qualitative one, based on both primary and secondary information. Secondary sources include Statutes, Judicial Decisions, Textbooks, Articles and Reports.

1.7 Outline of Chapters.

Chapter 1: General Introduction

This chapter gives an introduction to the research and in general terms give the synopsis of the research. It also deals with the basic aspects of the research. These include the statement of the problem, objectives of the research, significance of the study, the methodology and the chapter lay out.

Chapter 2: Historical and Conceptual Background of Plea Bargaining.

Chapter 2 provides an exposition on the history and background of plea bargaining in general. It documents the origin and rise of the phenomenon of plea bargains. The chapter also gives a general view of the concept of plea bargaining as it exists now and also provides a general overview of the advantages and disadvantages of plea negotiations and agreements.

Chapter 3: Informal Plea Bargaining and The Impact of the Plea Negotiations and Agreements Act, 2010.

Chapter 4 provides an overview of the entire Act and assesses it in relation to the already provided background information. It looks at aspects such as the objectives of the Act, its salient features and its extent of application. It also sets out the informal framework that governed plea negotiations in Zambia prior to the enactment of the Plea Negotiations and Agreements Act No. 20 of 2010. The chapter posits the changes that the Act brings about especially as regards the previous informal plea bargaining procedure.

Chapter 4: The Roles of the Prosecutor, Defence Counsel and The Courts in Plea Bargaining.

This chapter discusses the relevant institutions that are involved in the implementation of the Act. It analyses the role of the judiciary, the prosecution and the defence as provided for in the Act and also in the general scope of plea bargaining as a concept of legal procedure. In general, the chapter gives an exposition of the various stakeholders in the criminal justice system as regards plea negotiations and agreements.

Chapter 5. Conclusion and Recommendations

The chapter sets out a synthesis of the entire discussion and from this, recommendations will be advanced. On the other hand it points out the strengths of the Act as it exists currently.

1.8 Conclusion.

In conclusion, this chapter has given an overview of the research and provided the foundations on which the research has been carried out. It has been indicated that the term plea bargaining is a mode of pre-trial procedure used to dispose of cases in criminal justice administration. The practice has gained global momentum and has been lauded for its effectiveness. In Zambia this has culminated in the enactment of the Plea Negotiations and Agreements Act, 2010. However, an understanding of the concept and nature of plea negotiations is required for an appreciation of the Act.

CHAPTER TWO.

HISTORICAL AND CONCEPTUAL BACKGROUND OF PLEA BARGAINING.

2.0 Introduction

The phenomenon of plea bargaining is a fairly recent emergence in the criminal law and criminal justice administration. It is thus prudent to give a historical account of the rise of this procedure and how it came to transform the Anglo-American Criminal Justice System which for so long had relied solely on Jury trials as the fairest and most reliable method of case disposition. Of course, sight of the fact that this evolution took place in jurisdictions outside Zambia must not be lost, but this does not mean that it cannot render help in understanding the concept of contemporary plea bargaining.

This chapter has also provided a full exposition of plea bargaining as it stands today, that is, as a non-trial disposition procedure aside from any regulation by statute and it has also highlighted the advantages and disadvantages of plea negotiations which any criminal justice system that subscribes to plea bargaining arrangements must take into account.

2.1 History and Evolution of Plea Bargaining.

The origin of plea bargaining is generally unclear. It is most widely believed to have originated in the United States of America as evidenced in their criminal jurisprudence.¹ In the United States, it was used only episodically before the 19th century. Most cases reported where the doctrine was used are American cases, although not exclusive to the U.S developed earlier and more broadly there than most places. As a result of the fact that judges, not

¹ Sam Oguiche, "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency?" *NIALS Journal of Law Development*, Vol. No.1 (2011): 57.

prosecutors, controlled most sentencing, plea bargaining was limited to those rare cases in which prosecutors could unilaterally dictate a defendant's sentence.²

History narrates that although plea bargaining in felony cases before the nineteenth century was rare, non-trial dispositions in minor misdemeanor cases may have been the subject of express or implicit bargains.³ In the early nineteenth century in America, guilty pleas typically accounted for a minority of felony convictions. When occasional cases of plea bargaining began to appear in reported decisions in the second half of the century, appellate judges voiced strong disapproval of the practice.

Various scholars have advanced different historical reasons for the emergence of the phenomenon of plea bargaining in Anglo-American law. It should not be forgotten that Zambia's legal dispensation is a legacy of the period of her colonization by Great Britain. Also, plea bargaining has found its most fervent manifestation under the American criminal justice system. It is thus important to have knowledge of the history of the practice in these two jurisdictions.

According to Langbein⁴ before the 19th Century and as late as the 18th, jury trial at common law was a judge dominated and relatively lawyer free procedure. As a result, there was great rapidity in the manner in which trials were conducted and this rendered plea bargaining largely unnecessary. Simply put, certain factors came to a head that caused the otherwise expedient jury trial system to become a slow and complex procedure, and thus necessitate the need for non-trial disposition of criminal cases. These factors are the emergence of the rise of the adversary system and the related development of the law of evidence. From here spawned the following precipitating factors.

² O.Dirk. "Plea Bargain" *The New York Times Magazine*, September 29, 2002 www.nytimes.com accessed on 13/03/2012.

³ Pradeep, *Plea Bargaining-New Horizon in Criminal Jurisprudence*, 3.

⁴ J.H Langbein, "Understanding the Short History of Plea Bargaining," 261.

Leading socio-legal commentators such as Friedman⁵ and Feeley⁶ have posit that the rise of professionalism has the greatest explanatory force in understanding the leanings of criminal case dispositions towards plea bargaining. Their contention is that the reliance on trial proceedings was the ‘function of presence of amateur (court) actors’⁷, with reliance on guilty pleas being a manifestation of the professionalism which the police investigators and lawyers acquired. Feeley captured this situation when he succinctly stated;

... Frequently courts were staffed with part-time officers; often prosecutors and judges were not trained in the law ...Police officers often acting as prosecutors in court were unfamiliar with the rudiments of the law and cared even less ... Admissibility of evidence was capricious, points of law were treated with casualness.

Historically, the modern trial by jury emerged when the criminal justice system was staffed by untrained amateurs who were charged with the task of trying to cope with the problem of accusing, trying and convicting or acquitting someone.⁸ Professionalism is thus the first factor that contributed to the rise of the phenomenon of plea negotiations.

What this means is that because these court actors were largely untrained, they did not fully understand the law within which they operated and as such could not effectively use it to secure convictions, or decide which cases were worth pursuing. They tried these cases without much pre-emption of the result, not surprisingly because their legal skills could not afford them such foresight. This was exacerbated by the legal profession’s reliance on evidence and proof generated by police services that were amateurs themselves. The task of acquiring evidence was given to complainants, victims or voluntary community constables and as a result the reliability, sufficiency and persuasiveness of evidence became

⁵L. Friedman, “Courts Over Time: A Survey of Theories and Research” (eds. K O Boyum and L Mather) in *Empirical Theories About Courts* 38 [1983].

⁶ M. Feeley. “Plea Bargaining and The Structure of The Criminal Process,” *Journal of Justice Systems* 73 , 338 (1982): 349.

⁷ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History*, 2.

⁸ M.Feeley “Plea Bargaining and The Structure of The Criminal Process,” 349.

problematic.⁹ This state of affairs and its effects are what popularised the jury trial as a method of criminal case disposition.

In a system run by amateurs, or lawyers who spent little bits of their time and energy, with no technology of detection or proof, a trial was perhaps as good a way as any to strain the guilty from the innocent.¹⁰

However, with the emergence of professional lawyers, knowledge of the legal system, its rules and procedures was increased and was used with increased efficacy. The new breed of professional lawyer had the legal know-how to discern which cases were virtual certainties and which cases with triable issues would proceed to full jury trial. Also, the new professional police were able to find and provide quality evidence of guilt to lawyers who had emerged with the ability to assess properly this evidence and discern which cases were certain of conviction and those with triable issues.

The overall effect was that those cases with triable issues proceeded to trial, while those which were deemed to be certain convictions “gave ride to and became fodder for the guilty plea system”¹¹ which is the plea bargaining system.

The second factor that precipitated the rise of plea bargaining was reduced expedience of the trial system early trials were greatly expedited due to the lack of counsel. The accused was forbidden counsel; the prosecution might be conducted by a lawyer, but in practice virtually never was.¹² As a result, trial was not yet encumbered by the rules and procedures of evidence, and speeches of counsel that characterise the modern trial. Thus the addition of lawyers made trials more complex and time consuming.

⁹ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History*, 4.

¹⁰ L. Friedman and R. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910* (Chapel Hill: University of North Carolina Press, 1981) , 194.

¹¹ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History*, 2.

¹² Langbein, “Understanding the Short History of Plea Bargaining,” 263.

Due to the injection of the common law of evidence, trial procedure became even more complex. The common law of evidence, which has injected such vast complexity into modern criminal trials, was virtually non-existent as late as the opening decades of the eighteenth century.¹³ Plea bargaining thus emerged to escape the cumbersome and complex rules of evidence and procedure that had become part of the trial system.

The third factor that pushed criminal trial disposition towards plea bargaining and guilty pleas was the workload that professionalism and complexity brought to those charged with prosecuting cases. Unlike before, where the amateur was concerned solely with his case alone, the professional was charged with a duty to deal with a myriad of cases of which he had limited time to deal with and dispose of while maximising the opportunity for remuneration in consideration of his efforts.¹⁴ Thus lawyers turned to plea bargaining as a method of case disposition in which they could effectively handle caseloads in a cost effective manner. The plea bargain gave them an avenue to reduce the amount of work under their purview.

While the historical factors explained above individually contributed to the rise of plea bargaining, they cannot be viewed in isolation from each other if their effect is to be understood. Thus the full picture is that before plea bargaining, trials were expedient, non-complex and did not create the large caseloads characteristic of contemporary trials. There was thus little or no need for prosecutors to engage in plea bargaining with defendants as they had nothing to gain from it. Plea bargaining entails the surrender of the right to trial in exchange for a more lenient criminal sanction. The prosecutorial authority is thus served the arduous work of going through time consuming and complex trials in exchange for a lenient

¹³ J.H Langbein, "The Criminal Trial before the Lawyers" 45 *University of Chicago Law Review* 263(1978): 303.

¹⁴ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History*, 7.

sentence. In short, plea bargaining emerged essentially as an escape from the trappings of modern trials.

As a result of these factors, the phenomenon of plea bargaining was conceived. The aspect of workloads of prosecutors and judges seems to explain the need for a plea bargaining process in Zambia. It is well known that criminal trials in Zambia take a disproportionately long time to conclude. Plea bargaining would, on the face of it, arise in this country as a means of reducing caseloads. The historical aspect of trial complexity also adds to the need for a plea bargaining procedure. As for professionalism, it is submitted that this cannot obtain in Zambia as English Law criminal trial and professional police and prosecutorial services arrived at virtually the same time. In short, the rise of professional lawyers and policemen in no way increases the need for plea bargains.

2.2 The Concept and Nature of Plea Bargaining

The concept of plea bargaining is the product of common law, from the Medieval English Common Law court of guilty pardons to accomplices in felony cases. In modern times however, the significance it has acquired and the popularity it has gained can be traced to the United States of America.¹⁵

It would be prudent to properly define plea bargaining, even at the risk of repetition, in order to fully understand its problems and implications. Thus plea bargaining is defined as;

A negotiated agreement between the prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges- Also termed *plea agreement*; *negotiated plea*.¹⁶

¹⁵ D. Olin, 'Plea Bargaining' *available at* <http://www.truthinjustice.org>. accessed on 13/03/2012.

¹⁶ B. Garner *Black's Law Dictionary*, (St. Paul Minn: West Publishing Company Ltd., 1999), 1173.

The usual concessions provided for by the state are in general divided into three. In one circumstance, the prosecutor may agree to reduce or rather recommend a reduced sentence for the accused in exchange for the accused's cooperation. This is known as a sentence bargain.

A second circumstance is the charge bargain. Under this head the accused person is charged on several counts and the prosecutor is empowered to agree to drop some of the counts of the charge to a lesser offence in exchange for a guilty plea.¹⁷ In the case of charge bargain, it is arranged in such a way that the prosecutor takes out a less serious offence charge which carries a consequent less punishment than what would have been obtainable if the original charge were preferred and the accused successfully prosecuted.

A third situation is where the accused is charged with one offence but upon some sort of cooperation with the prosecutor, an agreement is reached where the prosecutor opts to charge the accused with an offence of a lesser nature than the original. This can be viewed as a species of charge bargaining, as the original charge is substituted with a lesser offence.

Plea bargaining is thus a process of negotiation between the prosecutor and the accused in a criminal case involving an exchange between the defence and prosecution; In exchange for a guilty plea, the defendant receives dispositional concessions from the prosecution and the prosecution in return gets cases processed expeditiously with minimal expenditure of legal trial. It is distinct from a guilty plea in that while both involve an admission of guilt, plea bargaining connotes negotiation over which offense the accused pleads guilty to, or what sentence he gets. Also, plea bargaining is done outside of court. Guilty pleas on the other hand are done in open court and there is no negotiation with the prosecutors over which offense the plea is a subject of. A guilty plea is no negotiation. Guilty pleas are usually part of

¹⁷ J. Sangwa. *Comments to the Committee on Delegated Legislation on the Plea Negotiations and Agreements Bill No 11 of 2010*, 2.

plea bargains but they must be made voluntarily. The accused must be informed of his or her rights and must understand them.¹⁸

Another feature of plea bargains worthy of note is that they present the veneer of contracts, but only to a certain extent. It is trite law that the elements of a valid contract are offer, acceptance, legality, the intention to create legal relations and of course consideration.

In terms of offers, it is submitted that the proposals for a bargain made by one party to another constitute a valid offer. The other party may consider this 'offer' and either accept it, decline or even make a counter offer. Thus, like ordinary contracts, the offer can be proposed from either side, either the prosecution or the defence. According to the Act, a prosecutor may, if he finds it desirable in any case, or where the circumstances of the case so warrant enter into a plea negotiation with the accused person for the purpose of reaching an agreement.¹⁹ The Act also empowers the accused person to enter into an agreement with the public prosecutor.²⁰ In other jurisdictions, the position is different. Under the American plea bargaining system, the prosecutor initiates the bargaining process, and never the accused.²¹ In India, under the Criminal Law (Amendment Act) 2005, as per S. 265 B, the process of plea bargaining starts with an application from the accused.

Another vital component of contracts and also plea bargains is acceptance. It is trite law that there can be no contract without a party accepting the other's offer. In the same way, for a plea agreement to come into being, the party being offered the bargain must accept. Acceptance comprises of approval of the terms of the bargain. According to *Brody v. United*

¹⁸ Oguche. "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency?" 63.

¹⁹ Section 4(1) of the Plea Negotiations and Agreements Act, 2010.

²⁰ Section 4(2) of the Plea Negotiations and Agreements Act, 2010.

²¹ Oguche. "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency?" 78.

States, a bargain struck must be agreed upon by both sides to the bargain and guilty plea must be made intelligently and voluntarily.²²

It is trite law that every contract made must have a legal purpose. A contract is void *ab initio* at law if it is made to serve an illegal purpose. Thus, one cannot have recourse to the courts if the contract made does not pass the legality test. The presence of the Act clearly gives the practice of plea negotiations and agreements a legal basis.

Consideration is also an indispensable component of any contract. It refers to something valuable in the eyes of the law proceeding from the offeree to the offeror in the performance of the contract. Consideration need not be adequate but has to be valuable.²³ In a plea agreement, the consideration provided by both parties is quite obvious; the accused provides a guilty plea, which is valuable since it saves the prosecution the trouble of discharging the burden of proof beyond all reasonable doubt. The accused in turn receives concessions from the state as consideration.

The final component is the intention to create legal relations and the binding effect of such intentions. Simply put, the parties must understand and desire that their agreement be binding legally. The plea bargain however, is seen to be atypical of this position owing to the fact that the parties may change their position after the bargain is made. In the American case of *Alabama v. Smith*²⁴ it was held that an accused had the right to derogate from a plea agreement. The position in Zambia is different. While the Act does permit derogation of the plea agreement, it does so only under certain enumerated circumstances.²⁵

²² 397, U.S. 742 (1970).

²³ Oguiche. "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency?" 61.

²⁴ *Supreme Court of the United States* (1989), 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed: 2d 865.

²⁵ Section 15 of the Plea Negotiations and Agreements Act, 2010.

2.3 Advantages and Disadvantages of Plea Bargaining.

Plea Bargaining is gaining popularity because of a number of merits that flow from it. Thus various rationales are advanced for its use as a manner of criminal law administration. These are discussed here.

The first rationale is that plea bargaining has the capacity to approximate the outcomes of trials or true adjudication but at a lower cost. This is because evidentiary laws and trial procedures have made trial adjudication very costly.²⁶ This means that the outcome of a plea agreement will usually be close enough to that which will be achieved using trial adjudication. The crux here is that it is better to use a plea agreement, which costs much less, to come up with a conclusion similar to that of trial, which would cost more. It has been noted that complexity of trial procedure and the inability of courts to handle large caseloads was largely responsible for the emergence of plea bargaining. The need to promote the efficiency of the criminal justice system has been identified as the overriding cause for entering plea bargaining negotiations in general.²⁷ In short, plea bargaining is advanced for issues of convenience.

Plea bargaining can also be used as a method of gathering evidence, especially where the prosecutor is dealing with members of a criminal organization. An intelligent prosecutor may agree for a plea bargaining of an insignificant accused to collect evidence against other graver accused²⁸ or against an accused that is higher in the criminal organization. The evidence will be in form of testimony in exchange for a lenient treatment.

²⁶ Oguiche, "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency?" 70.

²⁷ C. Oba . "Plea Bargain in a Developing Nigeria: Merits and Demerits" Alubo A.O. et al: *Emerging Issues in Nigerian Law: Essays in Honour of Honourable Justice B.A. Adejumo* (Ibadan: Constellation Publishers, 2009), 33.

²⁸ Pradeep , *Plea Bargaining-New Horizon in Criminal Jurisprudence*, 3.

From the angle of victim also, plea bargaining is a better substitute for his ultimate relief, as he can avoid a lengthy court process to see the accused convicted.²⁹ Many victims of crime, or survivors of dead victims are adverse to lengthy court procedures that they feel prolong their suffering. Plea bargaining thus allows them to come to terms with the crime committed against them in private, without being made to recount and remember the details in court time and again. In the same vein, the accused may not wish, especially if he is guilty, to have a protracted presence in the public eye. He may thus opt for a plea bargain. In *Brady v. United States*³⁰ the United States Supreme Court affirmed this advantage of plea bargaining when it stated: 'For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious-*his exposure is reduced...*'

Proponents of plea bargaining assert that it is appropriate as a matter of sentencing policy to reward accused persons who acknowledge their guilt.³¹ They believe that a plea agreement shows contrition and an acceptance of responsibility, that entry into correctional facilities after a bargain affords the opportunity for such accused persons to be rehabilitated in a shorter time than would otherwise be necessary.

Further still, plea bargaining is seen as a form of dispute resolution, rather than strictly and primarily a sentencing device. Some plea bargaining advocates maintain that it is desirable to afford the accused and the state the option of compromising factual and legal disputes. They observe that if a plea agreement did not improve the positions of both the accused and the state, one party or the other would insist upon a trial.³² It is viewed as an opportunity to clarify the facts of a given case.

²⁹ Pradeep , *Plea Bargaining-New Horizon in Criminal Jurisprudence*, 3.

³⁰ Ed. U.S. 397th ed. No. 270 Vol. Supreme Court of The United States.

³¹ "Plea Bargaining - Evaluations Of Plea Bargaining" at <http://law.jrank.org/pages/1289> accessed 10/02/ 2012

³² "Plea Bargaining - Evaluations Of Plea Bargaining" at <http://law.jrank.org/pages/1289> accessed 10/02/ 2012

Finally, plea agreements are viewed as creatures of economic necessity. Viewed as an administrative practice, rather than a sentencing tool. It is trite law that every criminally accused has the right to a fair and speedy trial. It is however advanced that society simply does not have the resources to provide a speedy trial to every person that demands it. It is thus financially prudent to reward guilty pleas so that resources are saved for other purposes, resources which would never be freed up if a ban on plea agreements was effected.

Despite the various positives that flow from plea agreements, they are not without their drawbacks and are problematic for at least some reasons.

The first criticism advanced by critics of plea bargaining is that it derogates from the constitutionally guaranteed right to trial. This is guaranteed by most national constitutions and Zambia is no exception. Article 18 (1) of the Republican Constitution provides that every person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. On this basis, critics see the practice of plea bargaining as unconstitutional.

Closely tied to this is the pervasion of the need to convict an accused by providing evidence of his guilt beyond a reasonable doubt. This is the burden of proof squarely placed on the prosecution which in Zambia, is provided by the constitution in Article 18 (2) which states that 'every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty'.³³ This, it is argued, offends the statutory duty placed on the prosecution to prove the accused's guilt beyond reasonable doubt.

Apart from the unconstitutionality of plea bargaining as regards the burden of proof, it is argued that the practice undercuts the burden of proof and thus deprives the accused of his

³³ Article 18 (2) (a) of the Republican Constitution, Chapter 1 of the Laws of Zambia.

greatest protection against mistaken conviction.³⁴ This is exacerbated by the fact that an accused cannot present witnesses during plea negotiations.

There is an attendant danger to plea bargaining in that it could very well lead to unjust sentencing. This is closely tied with the 'burden of proof argument' advanced in the preceding paragraph. Some commentators claim that plea bargaining creates an incentive system designed to discourage the exercise of constitutionally protected rights. If the defendant faces a far greater potential sentence at trial than through a plea bargain, this increases the incentive to bargain, which increases the potential that innocent parties will be sent to prison for crimes they did not commit.³⁵ Since the accused cannot produce witnesses and the prosecution is not required to discharge the legal burden, the negotiation is imbalanced against the accused that could then opt for the lesser offence due to the bleak nature of his prospects.

Plea bargaining, it is argued, can lead to unjust sentencing. It is believed by critics that the practice turns the accused's fate on a single tactical decision, which, they say, is irrelevant to punishment, deterrence, or any other proper objective of criminal proceedings.³⁶ This implies that the reasons that influence the prosecuting authorities to enter plea negotiations are usually extraneous to justice, such as expedience, for instance.

Through plea bargaining, a prosecutor can avoid much of the hard work of preparing cases for trial and of trying them. In addition, prosecutors can use plea bargaining to create seemingly impressive conviction rates. The personal bias with the defense lawyers may also influence plea bargaining practices. So there may be desires for professional advancement either within a prosecutor's office or after leaving it. Although most prosecutors probably do

³⁴ Langbein, "Understanding the Short History of Plea Bargaining," 262.

³⁵ T. Sandfeur. "In Defence of Plea Bargaining" Pacific Legal Foundation, *Regulation*, Vol. 26, No. 3 at p. 30.

³⁶ "Plea Bargaining - Evaluations Of Plea Bargaining" at <http://law.jrank.org/pages/1289> accessed 10/02/ 2012

not deliberately sacrifice the public interest to their personal goals, the bargaining process may be influenced by conflict of interests, and prosecutors may rationalize decisions that serve primarily their own interests.³⁷ In the United States of America, for instance, where certain positions such as the office of District Attorney (D.A), a rough equivalent to the Zambian position of Director of Public Prosecutions (D.P.P), high conviction rates may be used as a campaign fodder.

2.4 Conclusion.

In conclusion, the chapter has highlighted the historical context of plea bargain, that is, the factors that led to the rise of this legal phenomenon. It has also outlined the basic concept and nature of plea negotiations and agreements, as contemporarily understood. The attendant disadvantages and advantages of the practice have also been stated. It should be noted any legislation regulating the practice will be drawn on the basic concepts outlined herein. Armed with this knowledge, one may better analyze the Plea Negotiations and Agreements Act, 2010 and its provisions. This has been done in the next chapter.

³⁷ Pradeep, *Plea Bargaining-New Horizon in Criminal Jurisprudence*, 7.

CHAPTER THREE.

INFORMAL PLEA BARGAINING AND THE IMPACT OF THE PLEA NEGOTIATIONS AND AGREEMENTS ACT, 2010.

3.0 Introduction

The practice of plea bargaining in Zambia is obviously at an embryonic stage. It has previously been mentioned in this text that before the Act under consideration, The Plea Negotiations and Agreements Act 2010, there were no legal instruments by which plea negotiations and agreements could be entered into and concluded. The only avenue that was open to an accused and indeed the prosecution was the informal framework of plea bargaining by which a plea agreement would be reached. This chapter has advanced a legal basis upon which informal plea bargaining can be supported. It has also analysed the salient provisions of the 2010 Act. The thrust of this chapter is to discuss plea bargaining under the 2010 Act, juxtaposed with plea bargaining in general and informal plea bargaining in Zambia.

3.1 The Informal Plea Bargaining Framework.

It has already been reported that informal plea agreements have been concluded under the Zambian criminal justice system, especially in the High Court. It is submitted that such plea bargains are based on the discretion possessed by the Director of Public Prosecutions (DPP) to determine which offences to charge an accused person with. For instance, a prosecutor may charge an accused who is said to have driven a vehicle recklessly with negligent driving or only with exceeding the speed limit. Such a decision has a material effect upon the ability of the court to sentence the accused because the prescribed maximum sentences differ materially.

Prosecutorial powers and the discretion that comes with their use in Zambia emanate from the Republican Constitution which, under Article 56, creates the office of DPP and clothes him with the power to, in any case which he considers it desirable so to do, to institute and undertake criminal proceedings against any person before any court other than a court-martial, in respect of any offence alleged to have been committed by that person¹ and to discontinue, at any stage before judgement is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.² The DPP may delegate these powers to any public officer or class of public officers as may be specified by him, acting, in accordance with his general or special instructions.³ These powers are confirmed by Section 86 of the Criminal Procedure Code.⁴

Because of these provisions, the DPP or his delegates may choose to file any charge which is disclosed on facts of a case. If an accused acknowledges his guilt, the public prosecutor is entitled to pick a lesser sentence where more than one charge is disclosed on the facts. Prior to the Plea Negotiations and Agreements Act, if a prosecutor chose to charge an accused with a lesser offence after the accused admitted to his guilt, it would have amounted to an informal plea bargain. In *Re Westmid Packaging Services Ltd, Secretary of State for Trade and Industry v. Griffiths and Others*⁵, Lord Woolf MR stated that “but there can be negotiation as to the acceptability of an admission on a certain basis of fact... Furthermore in the criminal context very little discount is given if there is an admission of what is ‘indisputable’, but an admission of what might otherwise have taken a great deal of time and expense to prove surely merits some recognition.” Thus the prosecutor may use his discretion to charge an accused with a lesser offence in recognition of his admission and the expense he has saved

¹ Article 56(3) (a) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

² Article 56(3)(c) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

³ Article 56(4) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

⁴ Chapter 88 of the Laws of Zambia.

⁵ [1998] 2 All ER 136

the prosecution and the court. The accused may then plead guilty to this charge and thus conclude an informal plea bargain. The breadth of this discretion is further supported by the fact that the court cannot direct a prosecutor on what charge to file before it. In *The People v. Kambarage Kaunda and Another*⁶ it was held that the decision of whether to prosecute a charge belongs to the DPP and he is under the direction of no one in terms of exercising this power.

However, this state of affairs has been altered by the Act, specifically through its provisions. The Act is now operational, pursuant to Statutory Instrument No. 57 of 2010 - the Plea Negotiations and Agreements Act (Commencement) Order. Its salient provisions are analysed below.

3.2 The Plea Negotiations and Agreements Act, 2010- Salient Provisions.

The salient provisions of the Act have been analysed below, compared with similar provisions from the law of plea bargaining obtaining in other jurisdictions, most notably the United States of America and India. This is because the plea bargaining finds its most fervent use in the United States of America where 85-95 per cent of all criminal cases are disposed of through plea bargains. It is thus useful to compare the law in both jurisdictions to see if similar results can be replicated under the Zambian legal framework.

3.2.1 Applicability.

Section 4(1) and (2) deal with the application of the Act, that is, the circumstances in which the plea negotiation may be invoked. The section envisions two circumstances in which a plea negotiation may be entered into.

⁶ HPR/151/1990.

The first is when a public prosecutor considers it desirable in any case, or where the circumstances of the case so warrant, enter into a plea negotiation with the accused person for the purpose of reaching an agreement.⁷ This authorises an initiation of negotiations at the instance of the prosecutor. The section reads:

Subject to section six, where a public prosecutor considers it desirable in any case, or where the circumstances of the case so warrant, the public prosecutor may, at any time before judgment and in accordance with the provisions of this Act, enter into a plea negotiation with the accused person for the purpose of reaching an agreement in accordance with the provisions of subsection (3), for the disposition of any charge against the accused person.

The second is an initiation of negotiations for a plea agreement at the instance of the accused.

Section 4(2) reads:

An accused person may, at any time before judgment and in accordance with the provisions of this Act, enter into a plea negotiation with a public prosecutor for the purpose of reaching an agreement in accordance with the provisions of subsection (3), for the disposition of any charge against the accused person.

Apart from specifying who may initiate negotiations, the Act under the same sections states explicitly that a plea agreement can be entered into for any offence that the accused has been charged with. Thus, there are no limits on the ambit of offences that can be subject of a plea agreement.

This can be compared to the American law on plea bargaining, which is governed by Rule 11 of the Federal Rules of Criminal Procedure (FRCrP) where 'an attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement'.⁸ Like the Zambian situation, any offence can be subject to a plea bargain, meaning many more cases can be resolved, rather than a situation where there are

⁷ Section 4(1) of the Plea Negotiations and Agreements Act, 2010.

⁸ Rule 11 (c) (1) of the Federal Rules of Criminal Procedure.

restriction on offences in which the procedure can be invoked. Caseloads are thus reduced across the board.

3.2.2 Procedure.

As already stated, a plea negotiation under the Act can be begun at the behest of either the prosecution, or the accused. Section 4 requires that this be done any time before judgement. Obviously to allow a plea bargain after judgement would be pointless. The plea agreement, as per Section 7 of the Act, must be in writing and be signed by the prosecutor, the accused person and his legal representative. The form of the agreement is set out in the schedule, which also outlines the information required under the agreement, that is, the contents of the plea agreement.

It should be noted however, that an accused person under the *Zambian Act* cannot act *pro se*, that is, he cannot represent himself in the negotiation of a plea agreement. This can only be done through a legal representative. This can be contrasted with the American⁹ and Indian¹⁰ systems where an accused can proceed *pro se*. In any case, the prosecutor cannot commence any negotiation without informing the accused of his right to legal representation and of the right to apply for legal aid in respect of the negotiations. This is contained in Section 6 which reads:

(1) Notwithstanding any other provision to the contrary in any other law, a public prosecutor shall, before commencing any plea negotiation, inform the accused person of the accused person's right to representation by a legal practitioner of the accused person's choice and of the right to apply for legal aid in respect of the negotiations.

(2) Plea negotiations shall be held by a public prosecutor with the accused person only through the accused person's legal representative.

⁹ Rule 11 (c) (1) of the Federal Rules of Criminal Procedure, U.S.A.

¹⁰ Section 265C of the Code of Criminal Procedure, as amended by the Criminal Law (Amendment) Act, 2005.

The Act takes cognizance of the fact that legal representation is not easy to acquire, and thus provides that an accused may be granted legal aid for the purpose of a plea negotiation.¹¹ Legal representation increases transparency and tries to ensure that the accused and the prosecution are bargaining on an equal footing as regards the law. It will also reduce cases of prosecutor coercion. In this regard, the Zambian Act is better positioned than the American and Indian positions.

By Section 9 of the Act, the prosecutor is enjoined to notify the court, either in open court or upon showing good cause, in chambers, of the existence of a plea agreement. This is obviously after the agreement has been concluded. By the same section, this can be done either before the accused is required to plead, or after the arraignment. The court may also, where circumstances require, question the accused in order to confirm his knowledge of such an agreement.

Because the ultimate responsibility of sentencing the accused lies with the court, it has the power to accept the agreement, under Section 11 of the Act, or reject it under Section 12. Before accepting the agreement, the court must make a determination in open court that; no inducement was offered to the accused to encourage the accused to enter the plea agreement, that the accused understands the nature, substance and consequence of the agreement, there is a factual basis upon which the plea agreement has been made and that acceptance of such a plea would not go against the interests of justice and public interest.¹² This is important especially in cases that have a high profile and are in the public eye. One such instance would be corruption cases by public servants where a plea agreement would seem to be too lenient on an accused and would cause a public outcry. Another important function of the section is that the court has the opportunity to determine the voluntariness of the accused's plea.

¹¹ Section 19 (b) of the Plea Negotiations and Agreements Act, 2010.

¹² Section 12 of the Plea Negotiations and Agreements Act, 2010.

On the other hand, the court is also empowered to refuse to accept a plea bargain on certain specified circumstances, set out in Section 12. If the court determines that; acceptance of the plea agreement would be contrary to the interests of justice and public interest, the offence for which the accused person is charged is not disclosed on the facts or there is no confirmation by the accused person of the agreement or the admission contained in the agreement,¹³ it may reject the plea agreement and inform the prosecutor of the rejection and cite the reasons for such rejection.¹⁴ Where there is a rejection the court shall proceed to try the accused on the original charge. By subsection 3 of Section 12, such rejection shall not operate as a bar to any fresh negotiation and agreement in respect of the same case. Here, the parties are given an opportunity to rectify whatever defects the original negotiation had. This ensures that negotiations can continue if a plea bargain is the best way to settle the matter.

Section 11 and Section 12 must be read together with Section 10 which states that “a court shall not be bound to accept any plea agreement except where the non-acceptance would be contrary to the interests of justice and public interest”. Simply put, where public interest or justice would be infringed by a rejection, the court is bound to accept the plea agreement.

3.2.3 Contents of The Plea Agreement.

Any agreement reached by the parties under purview of Section 4 must be subject to subsection 3 of the same section. Sub section 3 reads:

(3) An agreement under subsection (1) shall require that—

(a) the accused person undertakes to-

(i) make a guilty plea to an offence which is disclosed on the facts on which the charge against the accused person is based; and

(ii) fulfil the accused person's other obligations specified in the agreement;
and

¹³ Section 12 (1) of the Plea Negotiations and Agreements Act, 2010.

¹⁴ Section 12 (2) (1) (a) and (b) of the Plea Negotiations and Agreements Act, 2010.

(b) a public prosecutor, having regard to the accused person's undertaking under paragraph (a) agrees to take-

(i) a course of action consistent with the exercise of the powers specified in section five; and

(ii) fulfil the other obligations of the State specified in the agreement.

Here, the accused must plead guilty to the offence which the plea agreement discloses. This offence must be supported by the facts so disclosed in the agreement. Both parties are enjoined to fulfil the other obligations placed on them by the agreement. The Act does not give any indication as to what these obligations are, but it is conceivable that they will be encompassed by the regulations that the minister is empowered to make under statutory instrument under Section 20(1), for the purposes of giving effect to the provisions of the Act, much like the American system where Department of Justice¹⁵ policies on plea bargaining must be followed by the prosecutor.¹⁶ One notable policy document is the Ashcroft Memorandum of September 22, 2003, which sets out specific guidance for both charge bargaining and sentence bargaining.

In negotiating the contents of the agreement, the prosecutor is enjoined by Section 4(3) (b) (i) to act in accordance to powers specified in Section 5 of the Act. These powers are to;

withdraw or discontinue the original charge against the accused person¹⁷ or accept the plea of the accused person to a lesser offence, whether originally included or not, than that charged.¹⁸

Section 5 must be read together with Section 2, the Interpretation Section, which defines a plea negotiation as “any negotiation carried out between an accused person or the accused person's legal representative, and a public prosecutor in relation to the accused person

¹⁵ The Department of Justice is the American equivalent of the Ministry of Justice.

¹⁶ David Taylor Shannon. “Making your Deal with the Devil; Plea Agreements under The Federal Rules, Federal Sentencing Guidelines and Department of Justice Guidelines”. (Tucson, Arizona: 2007).

¹⁷ Section 5 (a) of the Plea Negotiations and Agreements Act, 2010.

¹⁸ Section 5 (b) of the Plea Negotiations and Agreements Act, 2010.

pleading guilty to a lesser offence than the offence charged or to one of multiple charges in return for any concession or benefit in relation to which charges are to be proceeded with”.

From the reading of both sections, it can be easily deduced that the only form of plea bargaining envisioned by the Act is that of ‘charge bargaining’ already alluded to in Chapter 2. At the expense of repetition, a charge bargain is one in which accused person is charged on several counts and the prosecutor is empowered to agree to drop some of the counts of the charge to a lesser offence in exchange for a guilty plea. Thus the prosecutor can drop a charge he has already instituted for a lesser one, or if he has not yet charged the accused, pick a lesser offence from the several ones disclosed on the facts to charge the accused with.

The other species of bargain, the Sentence Bargain-where the prosecutor is empowered to recommend a lighter sentence in exchange for a guilty plea, is not envisioned by the Act and as such cannot be invoked. Here, the Zambian position differs from that of the United States and India in that both foreign jurisdictions allow sentence bargaining under Rule 11 (c) (1) of the FRCrP and Section 265E the Indian CCP. The Zambian Act therefore has a reduced application than the American or Indian system. This is because one can only charge bargain. Where several counts are not disclosed on the facts, or a lesser offence visible, one cannot plea bargain. It is not in all cases where a lesser offence will be present and in such cases, caseloads will continue to exist.

Where the agreement has been accepted by the court, the contents of such agreement shall become part of the record. At the end of the process, the accused is convicted and may be sentenced accordingly.

The Act is of high value to the criminal justice system because it has altered the informal procedure which existed before. The succeeding section posits the improvements that the Act has brought about.

3.3 Effect of the Act on Informal Plea Bargaining

Firstly, the informal plea bargaining system, the rights of accused persons in relation to the agreements were largely undefined.¹⁹ The accused did not know what safeguards he had while negotiating. The powers of prosecutors were also undefined. Thus the accused had no knowledge of the limits of the prosecutor's powers. The accused was thus at a disadvantage when concluding an agreement.

The Act has formalized the procedure by giving a clear way in which plea agreements are to be concluded. The powers of prosecutors have been delimited and the rights of the accused under the plea agreement process have been elucidated. Section 3 for example preserves the right of the accused to plead guilty without entering into a plea agreement.

Secondly, the Act has brought formality and certainty to the plea negotiating process. It is nearly everywhere agreed that a successful legal system must make the law relatively certain.²⁰ If the law is uncertain, it will be difficult to control behaviour because people will be unable to tell the consequences of their actions. The Act certainly allays the effects of uncertainty through its provisions that delimit situations when plea bargaining procedures can be invoked.

Thirdly, the Act has also brought about the requirement for legal counsel to represent the accused. Under the informal system, this was not required. It might be argued that the court will always assess the voluntariness of a guilty plea and such retaining counsel is an unnecessary cost placed on the accused. However, the presence of legal counsel will enhance the protection of the accused against being forced or coerced into an agreement. In addition, the cost of retaining a lawyer are somewhat allayed by the opportunity to apply for legal aid.

¹⁹ Hon. George Kunda. *Zambia, National Assembly Debates and Proceedings*, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

²⁰ Mulela Margaret Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries* (Lusaka: University of Zambia Press, 2004), 4.

3.4 Conclusion.

The chapter has given a background of the informal plea bargaining framework under which plea bargaining was done before the Act. It has described it as a consequence of the powers of discretion given to the DPP as delegated by him to public prosecutors. It has also given an analysis of the salient provisions of the Act, giving comparisons with other jurisdictions where it has been prudent to do so. It has finally shown how the Act has changed the informal framework. However, knowledge of the law and underlying principles alone is not enough. The main drivers of the Act, prosecutors and the defence exert forces upon the Act as they utilise it. They may present advantages and dangers. The thrust of this is that there are extra-legal characteristics that emanate from the roles played by the above parties which will affect plea bargaining. These form the discussion in the next chapter.

CHAPTER FOUR.

THE ROLES OF PROSECUTOR, DEFENSE COUNSEL AND THE COURTS.

4.0 Introduction.

It has already been explicated that a plea bargain is in essence a contract, between the prosecution and the accused whose purpose is to expedite the conviction process and dispose of the criminal case without the need for trial. The accused agrees to waive his right to trial and provides a guilty plea, which is valuable since it saves the prosecution the trouble of discharging the burden of proof beyond all reasonable doubt. In exchange, the prosecution provides the accused with concession. These may comprise sentence and charge bargains.

Thus the main parties to the plea agreement are the prosecution, and the accused. The accused usually acts via legal counsel. As a matter of fact, under the Zambian system as provided by the Plea Negotiations and Agreements Act, 2010, an accused cannot negotiate a plea agreement without the representation of legal counsel.

Taking the analogy of contract, either of the parties can be the offeror under Zambian law. It can thus be said that the prosecution and the accused are the fundamental elements of a plea bargain.

However, it must be remembered that the plea agreement must first garner the approval of the court before it becomes effectual. And so, another important component of the procedure is the trial judge. This chapter has analysed the roles that the prosecutor, defence counsel and the trial judge have to play in the plea bargaining procedure.

4.1 Prosecutors

The prosecutor is the person charged with the duty of trying a criminal case on behalf of the State. He is a delegate of the Director of Public Prosecutions (DPP) and the powers that a prosecutor is clothed with are derivative of those conferred on the DPP.

In *The People v. Paul Kankota*¹ a prosecutor was defined as the person who has the conduct of the prosecution, and the public prosecutor is a public officer appointed by the Director of Public Prosecutions for the purposes of proceedings instituted on behalf of the people.

Obviously, the prosecutor represents the State or the people during plea negotiations as shown by the provisions of the Plea Negotiations and Agreements Act. It names a “public prosecutor” as the officer of the law competent to carry out the function of reaching a plea agreement with the accused. Section 2 of the Act states the term public prosecutor has the meaning attached to it in the Criminal Procedure Code (CPC). Under the CPC, a public prosecutor is any person appointed under Section 86 of the same Act.²

It has been advanced that the practice of plea bargaining takes away the accused’s right to trial, his greatest safeguard against a false conviction. This is true, as an accused is always innocent until proven guilty, and his guilt can only be proven at a trial, and beyond a reasonable doubt. Against this backdrop, the prosecutor’s role in plea bargaining has attendant dangers that should be understood in order to ensure the protection of the accused from being the victim of abuse of the procedure. The whole problem hinges on the discretionary powers given to prosecutors over which cases will be tried in court, and those in which plea bargaining is to be employed. With this discretionary power, the prosecutor can give effect to public interest, which in the case of plea bargaining, is the reduction of caseloads on the

¹ (1978) Z.R 295 H.C

² Section 2 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

criminal justice system, a key reason for the enactment of the Plea Negotiations and Agreements Act.³ On the other hand, all discretionary power is liable to abuse. The role of the prosecutor in plea bargaining is thus the use of discretionary power for the right reasons, and employment of tools to curtail deviation from this goal.

Easterbrook⁴ provides a comprehensive justification of prosecutorial discretion in plea bargaining. He analogizes criminal case disposition in general to a market system in which prosecutors try to maximize the goals of criminal law such as deterrence, punishment or retribution. However, they must perform this task with limited resources. They cannot prosecute all possible cases and proceed with each case to a full trial. Absolute prosecutorial discretion allows them to select cases based on the marginal return in criminal punishment goals, and settle cases with a similar aim in mind.⁵ This means that with discretion, prosecutors can pick appropriate cases to take to trial, and those to settle through a plea agreement so as to use resources efficiently. Not all cases are appropriately settled by a plea bargain, and some cases are a waste of resources if taken to trial. The prosecutor must use his discretion to decide in which category a case falls.

Prosecutors can react to changes in the demand for trials, in the supply of trial services, in the need to deter certain crimes or offenders and in other factors, and accordingly change the allocation of resources between the different offences.⁶ What this means is that with discretion properly used, a prosecutor can use surrounding circumstances quite apart from the facts of the case to decide whether a plea bargain or full trial is appropriate. For example, where corruption by government officials is rife and public opinion is strongly against it, it

³ Hon. George Kunda. *Zambia, National Assembly Debates and Proceedings*, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

⁴ F.H Easterbrook, "Criminal Procedure as a Market System", *J. Legal Stud.*, 12(1983): 289.

⁵ European Association of Law and Economics. *Plea-bargaining and Prosecution*, Working Paper No. 13. by Oren Gazal-Ayal and Limor Riza (2009), 8.

⁶ Oren Gazal-Ayal and Limor Riza , *Plea-bargaining and Prosecution*, 8.

would be imprudent of a prosecutor to strike plea bargains with persons alleged to have been corrupt. This could cause considerable public outcry as information relating to plea bargains is to be kept secret according to Section 18 of the Act. The prosecutor here is thus well placed to use his discretion to take such a case to trial. On the other hand, where there are few cases before the courts and resources are plenty, too many plea agreements are not justifiable.

What this then comes down to is the reason why public officers are given discretionary powers in the first place, to enable them adapt and act to situations as certain circumstances dictate. Regulation can never be so adaptive.

The above exposition works on the assumption that prosecutors are perfect societal agents. The ideal of the adversary system presumes that prosecutors will decide whom to prosecute based on the evidence, the equities, and the justifications for punishment.⁷ Thus if the interests of society and the law so dictate, prosecutors will oblige. For example, if society was averse to plea bargains being offered to alleged plunderers of national resources, prosecutors would share this feeling and proceed to trial in such cases. Here, societal interests and those of the prosecutor are homogenous.

However, the reality is much more complex and the interests of prosecutors and society are not always the same. These interests might skewer the use of the prosecutorial discretion that prosecutors are endowed with and result in harmful effects on the accused. This is discussed below.

Firstly, trials are much more time consuming than plea bargains so prosecutors have incentives to negotiate deals instead of trying cases.⁸ Much of the hard work that goes into

⁷ Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial", *Harvard Law Review*, Vol. 117, No. 8 (2004): 2470.

⁸ Albert W. Alschuler, "The Prosecutor's Role in Plea Bargaining", 36 *University of Chicago Law Review*. 50 (1968): 54.

preparing for a trial can be eliminated by concluding a plea agreement with the accused. They may, for instance, have personal incentives to free up time for other activities.

Apart from lightening their own workloads, prosecutors may want to ensure convictions. A prosecutor may want to advance his own career by building up a good conviction rate. Favourable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.⁹ This is because, ordinarily, every guilty plea obtained out of a plea bargain is counted as a conviction, and will thus appear as a win on the prosecutor's "win-loss" record. Such a prosecutor will be much more averse to trial if there is a considerable chance of loss. Thus, he will opt to try and obtain a guilty plea through a bargain.

Conversely, where a prosecutor is interested in gaining experience, he will opt to try more cases than he is willing to bargain on. This experience may make such a prosecutor competitive in the job market and much more attractive to private law firms where gratification for work is high.¹⁰

What underpins this all is the basis upon which plea bargains are ideally negotiated. They must be a tool to achieve justice, not to advance a particular person's career or personal aspirations. Without the consideration of personal incentives, the prosecutor will apply only ideas of justice. Prosecutors are supposed to pursue justice. In some cases, doing so means pursuing lower sentences if the equities warrant them, or it may mean not prosecuting at all.¹¹ The decision to bargain must thus be made according to whether on the facts, the case is triable and is more likely to result in a guilty verdict, and trying such a case would be an unneeded strain on the criminal justice system.

⁹ Catherine Ferguson-Gilbert, "It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?", 38 CAL. W. L. REV. 283 (2001) :291-96.

¹⁰ Oren Gazal-Ayal and Limor Riza, *Plea-bargaining and Prosecution*, 17.

¹¹ Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 2470

Personal Incentives in deciding whether to plea negotiate or not can be detrimental. In one scenario, a prosecutor may opt to plea bargain a case that, in the interests of society should be heard at trial. On the other hand, he may proceed to trial with cases that could have been bargained away to save court time and resources.

There is also a risk to the accused in opting for plea bargains. Where the accused is guilty and acknowledges it, a prosecutor can be justified for offering a plea bargain. However, where the accused's guilt or innocence is unknown, that is, he does not admit any guilt, and the prosecutor gives in to personal incentives that require him to advocate for a plea bargain, there is a real danger of coercing the accused. An example can be taken from the landmark American case of *Bordenkircher v. Hayes*.¹² Hayes was indicted for attempting to pass a forged check in the amount of \$88.30, an offense punishable by a prison term of two to 10 years. The prosecutor offered to recommend a sentence of five years if Hayes would plead guilty, warned if he did not comply and "save the court the inconvenience and necessity of a trial," the state would seek a new indictment under Kentucky's "Habitual Criminal Act" where Hayes would face a mandatory sentence of life imprisonment. Hayes insisted on his right to jury trial and was subsequently convicted and sentenced to life imprisonment. In its judgement, the United States Supreme Court acknowledged the coercive nature of the prosecutor's conduct even though it upheld his conviction on grounds not relevant to this discussion. The case is illustrative of the amount of abuse that the discretion granted to prosecutors is susceptible to.

Coercion has a danger of causing innocent to plead guilty to an offence they have not committed for fear of a harsher sentence.¹³ A classic example of an innocent man who pled guilty is Christopher Ochoa who, under severe police coercion, falsely confessed to a

¹² 43 U.S. 357 (1978).

¹³ Oren Gazal-Ayal and Limor Riza, *Plea-bargaining and Prosecution*, 11.

homicide. According to Ochoa, the police threatened him repeatedly with the death penalty while he was in custody—at one point even pointing to the vein in his arm where the lethal injection would be administered.¹⁴

Eventually Ochoa pled guilty and received a life sentence. Years later, Achem Josef Marino, a man already serving a life sentence wrote to officials confessing to the crime. DNA testing proved that Marino was actually the perpetrator and that Ochoa was wrongly convicted. This case illustrates the danger of coercion.

4.2 Defence Counsel.

While prosecutors are professional actors in the plea bargain system, accused persons are not. The prosecutor gets many opportunities to negotiate plea bargains. Taking plea bargaining as contract as elucidated in chapter two of this text, it would follow that a prosecutor would have more experience in negotiating for a guilty plea than most accused persons. As shown in *Bordenkircher v. Hayes* above the accused may overestimate his chances of success at trial. Additionally Bibas¹⁵ forwards a theory of a number of heuristics, biases and other psychological pitfalls that are likely to impair defendants' ability to bargain rationally in the shadow of the trial.¹⁶ He asserts self-serving biases and overconfident optimism about trial prospects, denial mechanisms and psychological blocks that may prevent the parties from seeing the weaknesses in their own cases and lead parties to resist or even reject beneficial bargains.¹⁷ An example is an overconfident accused making unreasonable settlement offers and rejecting reasonable ones.

This problem however might not be felt as acutely in cases where accused persons retain the services of counsel. Like prosecutors, defence attorneys are often repeat players and thus can

¹⁴ Diane Jennings, "A Shaken System," *Dallas Morning News*, February 24, 2008.

¹⁵ Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 2496.

¹⁶ Oren Gazal-Ayal and Limor Riza, *Plea-bargaining and Prosecution*, 11

¹⁷ Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 2496

counteract their clients' biases.¹⁸ This means defence lawyers also engage in a lot of plea bargaining and thus have the experience to bargain with their opposite numbers, the prosecutors, on a level playing field. Because of this they can counteract the biases of their clients which would ordinarily cause mistakes and bad bargains. For even with defendants that are familiar with plea negotiations, the mechanics of plea bargaining are such that counsel can effectuate a negotiation with more ease than a defendant locked up in his cell.¹⁹

The attainment of a charge bargain or reduced sentence will be in good part to how strong a case he can make for the filing of a lesser charge and which casts doubt on the chances of conviction on the higher charge, for example. A defendant is unlikely to have the legal skill to perform such an act. Newman has commented that the full-blown negotiated plea is not merely an appeal for mercy; it is an adversarial process and the lawyer serves the function of the defendants advocate.²⁰ It requires no less skilful legal ability to evaluate alternatives than is required for other situations, such where evidence and convictability are involved.

Defence counsel should thus be a welcome addition to the accused person's proverbial corner. However, even here, cognizance must be taken of the agency costs involved in hiring or retaining the services of counsel.

While some defendants may be wealthy enough to hire highly reputed lawyers, most cannot and have to make do with less costly attorneys. Because defence counsel, like prosecutors, are not ideal, perfectly selfless, perfectly faithful agents, their personal interests might skewer the environment in which a plea bargain is concluded, and thus influence whether an accused will eventually be convicted by trial or through a plea agreement.

¹⁸ Oren Gazal-Ayal and Limor Riza, *Plea-bargaining and Prosecution*, 18.

¹⁹ Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 77.

²⁰ Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 77.

For example, lawyer fees have the capacity to influence a decision to choose trial over a plea bargain, and vice versa. A lawyer who receives a fixed salary has no incentive to try the case.²¹ This is because under a fixed salary, the lawyer will receive an identical amount, no matter what course of action he elects to take. He will thus avoid the drudgery of a trial, and dispose of cases quickly because quite simply, the pay the same amount. Such a lawyer will lean towards plea bargains and would encourage his clients to go for that option. Fixed fees create financial incentives to plead cases out quickly in order to handle larger volumes. In *Jones v. Barnes*²², Brennan J. stated that under a fixed-fee system, “[t]he incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed”.

The case is the same if one is being represented by a public defender, such as a lawyer from the Legal Aid Board. Such a lawyer might not even seek only to make money, but the Board is seriously underfunded and understaffed.²³ A public defender will thus have many cases to try, which would in all probability induce him to plea bargain more, so he can alleviate his large caseload.

If a lawyer is bent on plea bargaining and does so all the time, he cannot credibly threaten to go to trial. Prosecutors will offer fewer concessions to these lawyers’ clients because they do not have to offer more.²⁴ This means that such a lawyer faces a lot of pressure to bargain, and thus the prosecutor does not feel the need to offer generous terms because said lawyer will probably not go to trial and will himself be seeking a bargain. This reduces his bargaining strength.

²¹Stephanos Bibas, “Plea Bargaining Outside the Shadow of Trial,” 2477.

²² 463 U.S. 745, 761 (1983).

²³ Nkole Nkole “Maximum Prison Shows Ugly Side” *Daily Mail*, April 16, 2012.

²⁴William F. McDonald et al., *The Prosecutor’s Plea Bargaining Decisions*, in “The Prosecutor” William F. McDonald (ed.) Beverly Hills C.A: Sage Publications (1979),159.

On the other hand, privately retained counsel that who receive generous hourly rates have incentives to bill more hours and to fight matters out and go to trial if necessary. They spend more time preparing their cases and mount more vigorous defences.²⁵ Because he receives more than adequate remuneration, such a lawyer will properly advance his employer's cause and not be inclined to dispose of the case quickly. For him, good results attract more clients and so he must get his employer the best terms possible. Public defenders by contrast are not motivated by this as they generally do not pick their clients. Prosecutors will also be inclined to offer more generous pleas because they know the privately retained lawyer will go to trial if necessary.

The constraints on attorneys' funding, time, and working relationships described above appear to influence outcomes. Although the literature is that of foreign thinkers, it is useful as the factors that influence the behaviours of both prosecutors and defence counsel, such as remuneration, are universally applicable.

4.3 The Judiciary.

Thus far, the position is that the bargain is negotiated between the accused, through his legal counsel, and the prosecutor. However, the judiciary is involved in plea bargaining, at least at a supervisory or review level.

In other systems, the judge may take up an even active role than simply supervisory. For example, in England and Wales, defendants can charge-bargain with prosecutors but sentence-bargaining is only conducted with the judge.²⁶ This is mainly because in these jurisdictions, the accused can seek a sentence bargain. Quite obviously, such a situation cannot arise in the Zambia as the legal framework only allows for charge bargaining.

²⁵ Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 2479.

²⁶ Oren Gazal-Ayal and Limor Riza, *Plea-bargaining and Prosecution*, 24.

Because of this, in Zambia, at least during plea negotiations, a judge's role is largely passive. Judges are prohibited from direct participation in plea negotiations. The rationale behind such a prohibition is based on the idea and doctrine of impartiality. Impartiality of the judge is taken as very important under the Zambian legal system. The case of *Siulapwa v. Namasiku*²⁷ involved a magistrate who had begun to advise one of the parties to vacate the house in dispute even before he rendered a decision. In that case, C.M Musumali, Commissioner, opined that:

What the learned magistrate did went beyond the role a judicial officer can play in promoting reconciliation between the parties. Promoting reconciliation ... means that the parties should be allowed time to discuss the matter between themselves amicably. The court should never be involved in such discussions because it has to be appreciated that the parties may fail to arrive at an amicable solution the matter would then have to be litigated upon in a court of Law. Now if the judicial officer who would be required to preside over the hearing of such a dispute would have participated in the efforts of reconciliation, he would inevitably have exhibited agreement to some degree with one of the parties to the dispute. Now immediately that happens, he ceases to appear to be impartial in the matter... Judicial officers should always remind themselves of the maxim: Justice must not only be done, but be seen to be done.

The need for impartiality will exclude a judge from being involved in a plea negotiation. The principle that 'justice must not only be done, but be seen to be done' enjoins the judge to be impartial, but also be seen as impartial. However, the court in Zambia is enjoined to play a supervisory role as regards plea bargaining. The Plea Negotiations and Agreements Act stipulates that a plea agreement is only valid upon acceptance by a court. The plea bargain is brought to the attention of a judge in open court, where he must satisfy himself of certain safeguards before he accepts the plea.

²⁷ (1985) Z.R. 21 H.C

4.4 Conclusion

This chapter has outlined the role of prosecutors, defence lawyers and the judiciary in plea bargaining. While the knowledge of the law is essential, it is also prudent to know the operators of that law, and anticipate their influence on its operation. This chapter has also outlined the influences of these parties and the attendant dangers thereof.

CHAPTER FIVE.

CONCLUSIONS AND RECOMMENDATIONS.

5.0 Introduction.

Upon the basis of the preceding four chapters, this chapter provides a conclusion on the introduction of formal plea bargaining procedures in the Zambian criminal justice system under the Plea Negotiations and Agreements Act, No. 20 of 2010. Thereafter, recommendations are advanced, which are aimed at improving the implementation of the Act in the Zambian criminal justice system.

5.1 General Conclusions.

Plea bargaining is one of the recent developments to emerge and add to the scope of criminal justice administration. Many countries, such as India in 2005 and Nigeria, have adopted plea bargaining procedures under legislation. Zambia has not been left behind. This has resulted in the culmination of the Act. As a consequence, this study set out to examine what impact the introduction of plea bargaining would have on the Zambian criminal justice system. several conclusions have been drawn.

The research began with an exposition of the history of plea bargaining, highlighting its rise in Anglo-American criminal justice systems. It was shown that the combined effects of the professionalism of officers of the court and police, where before, these were amateurs. There was also the introduction of complex rules and procedures for trial courts and the caseloads that resulted. However, of the factors elucidated, only the onerous caseloads can be advanced as a factor that exists in Zambia that could have spurred the need for a plea bargaining system. This is because Zambia's court system under criminal law is a transplant of English

law, brought here by her British colonial masters.¹ Thus professional lawyers and police, and indeed the rules of trial procedure have been in the Zambian law from the advent of the British court system.

Many advantages of plea bargaining are posited by its proponents. By far, the overriding justification given is the alleviation of caseloads on the criminal justice system.² Yet another reason given is the scarcity of resources needed to provide speedy trials for all. Indeed, this was the biggest reason given for the introduction of plea bargaining in Zambia. In 2008, only 36% of cases filed on the High Court general list were disposed of.³ This is indicative of the need for speedier trials, and the need to alleviate caseload pressure on the judiciary. As per Hon. George Kunda MP, the Act sought to help the courts and prosecutors manage caseloads, thereby reducing pressure on the criminal justice system which is currently overburdened.⁴ It is conceivable that the practice of plea bargaining will allay the current pressures on the judiciary. This can be seen by the results that the practice has achieved in America, where it has been estimated that about 90 to 95 per cent of both federal and state court cases are resolved through this process, as of 2005.⁵

The Act has also impacted the criminal justice system by bringing about certainty to plea bargaining procedures in Zambia. This is due to the fact that the informal system did not define the rights of the accused, or the powers of the prosecutor. Moreover, because of its informality, even knowing of its existence would be problematic. Now that it is governed by

¹ Mulela Margaret Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries* (Lusaka: University of Zambia Press, 2004), 52.

² C. Oba . "Plea Bargain in a Developing Nigeria: Merits and Demerits" Alubo A.O. et al: *Emerging Issues in Nigerian Law: Essays in Honour of Honourable Justice B.A. Adejumo* (Ibadan: Constellation Publishers, 2009) , 33.

³ United States Agency for International Development (USAID). *Zambia Rule of Law Assessment June (2009 , 17)* James Michel, Margaret O'Donnell, Margaret Munalula.

⁴ Hon. George Kunda, *Zambia National Assembly Debates and Proceedings*, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

⁵ Bureau of Justice Statistics (2005). *State Court Sentencing of Convicted Felons*. Washington, DC: U.S. Department of Justice.

legislation, everyone has notice of it, and is certain of how to go about negotiating a plea agreement.

Under general plea negotiations, two species of concessions can be obtained from the state. The charge bargain and the sentence bargain. It has been discovered that under the Act, it is impossible for one to bargain for a reduced sentence, as the Act only provides for charge bargaining as can be seen by Section 5 which does not grant power to the prosecutor to sentence bargain.

The process of plea bargaining and negotiation in under the Act can be termed as party driven. The parties themselves, of their own volition, decide to conclude a plea agreement and work out all the terms; the prosecutor on one hand, and the accused on the other. It has been shown that several factors can skew the environment under which the bargain is negotiated such as agency costs and inexperience. Because of these, process is susceptible to abuse by the prosecution.⁶ The Act provides two mechanisms to guard against such abuses; the requirement that all negotiation for the accused is carried out through legal representation, and the veto or assent powers given to the court. Thus it becomes more difficult to abuse the process as the court has ultimate review over the agreement, and also, legal representation of the accused levels the playing ground with the prosecutor. The problem of coercion is thus allayed.

5.2 Recommendations.

The decision to enact the Plea Negotiations and Agreements Act is a laudable one. However, this paper advances the following recommendations based on the overall discourse.

Firstly, in order to better reduce caseloads, it is recommended that sentence bargaining be introduced to the law. Plea bargaining has been extremely successful in alleviating caseloads

⁶ As in *Bordenkircher v. Hayes* 43 U.S 357 (1978).

in the United States of America. While it is hoped that the Act have similar impact in Zambia, it must be noted that it would be difficult to replicate without a wider scope for the plea bargaining Act. According to Sangwa⁷, the absence of sentence bargaining means the Act will not go very far in achieving its objectives as it limits the situations in which it can be applied.

Secondly, the regulations by the Minister envisioned in Section 20 of the Act must include clear guidelines as to how prosecutors should use their powers. The law should make full use of the reflexive qualities of delegated legislation so as to take into account changes in societal interest, and thereby control the wide powers of discretion vested in the prosecution.

Thirdly, it has been acknowledged that legal costs in Zambia are quite high. This will mean most accused will be confined to the use of public defenders, as envisioned by the Act. However, the Legal Aid Board that provides most public defenders must be adequately funded for the better implementation of the Acts good intentions. In *The People v. Siamwaba*⁸ Sakala J. stated that the non-availability of legal aid counsel was a delay and denial of justice. An underfunded Legal Aid Board will be hard pressed to provide adequate representation.

5.3 Conclusion.

The final chapter has provided an overview of the entire study drawing a conclusion while at the same time effectively making recommendations. The introduction of the Plea Negotiations and Agreements Act, 2010 is commendable and timely. It will certainly be able to reduce the caseload pressures that currently vex the judiciary and prosecution. However, there is room for improvement and as such the recommendations above seek to suggest areas for improvement in the negotiation and conclusion of plea agreements.

⁷ John P. Sangwa. *Comments to the Committee on Delegated Legislation on the Plea Negotiations and Agreements Bill No 11 of 2010*, 1-2.

⁸ (1979) ZR 61.

BIBLIOGRAPHY.

Textbooks.

McConville M and Mirsky C.L. *Jury Trials and Plea Bargaining: A True History*. Boston, Hart Publishing, 2005.

Munalula, Mulela Margaret. *Legal Process: Zambian Cases, Legislation and Commentaries*. Lusaka: University of Zambia Press, 2004.

Newman D.J. *Conviction: The Determination of Guilt or Innocence Without Trial*. Boston, Little Brown and Company, 1966.

Journal Articles.

Alschuler, Albert. W. "The Prosecutor's Role in Plea Bargaining." 36 *University of Chicago Law Review*. 50 [1968].

Alschuler, A. 'Plea Bargaining and Its History.' *Columbia Law Review* 79 (1979).

Bibas, Stephanos. "Plea Bargaining Outside the Shadow of Trial." *Harvard Law Review*, Vol. 117, No. 8 [2004].

Easterbrook, F.H. "Criminal Procedure as a Market System." *J. Legal Stud.*, 12 [1983].

Feeley, M. "Plea Bargaining and The Structure of The Criminal Process." *Journal of Justice Systems* 73 (1982) 338.

Ferguson-Gilbert, Catherine. "It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?" 38 *CAL. W. L. REV.* 283 [2001].

Friedman, L. "Courts Over Time: A Survey of Theories and Research" (eds. K O Boyum and L.Mather) in *Empirical Theories About Courts* 38 (1983).

Langbein, John, H. 'Understanding the Short History of Plea Bargaining' (1979). *Faculty Scholarship Series*. Paper 544

Langbein, J. 'Torture and Plea Bargaining' *University of Chicago Law Review*, Vol. 46, Number 1 (Autumn, 1978).

Oguche, Sam. "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency?" *NIALS Journal of Law Development*, Vol. No.1. (2011).

Roberts, E.S and J.S William. 'Plea Bargaining as Contract' *101 Yale L.J* (1991-1992).

Sandfeur, T "In Defense of Plea Bargaining" *Pacific Legal Foundation, Regulation*, Vol. 26, No.3. (2003).

Papers.

Bureau of Justice Statistics (2005). *State Court Sentencing of Convicted Felons*. Washington, DC: U.S. Department of Justice.

European Association of Law and Economics. *Plea-bargaining and Prosecution*, Working Paper No. 13.by Oren Gazal-Ayal and Limor Riza [2009].

Friedman, L and R. Percival. "The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910" (Chapel Hill, University of North Carolina Press, (1981)

Oba, C . "Plea Bargain in a Developing Nigeria: Merits and Demerits" Alubo A.O. et al: *Emerging Issues in Nigerian Law: Essays in Honour of Honourable Justice B.A. Adejumo* (Ibadan: Constellation Publishers, 2009).

Pradeep, K.D. "Plea Bargaining-New Horizon in Criminal Jurisprudence" [Kerala, 2006.] accessed at www.lawyersclubindia.com, 21st March 2012.

Sangwa, John P. Comments to the Committee on Delegated Legislation on the Plea Negotiations and Agreements Bill No 11 of 2010.

Shannon, David Taylor. "Making your Deal with the Devil; Plea Agreements under The Federal Rules, Federal Sentencing Guidelines and Department of Justice Guidelines". (Tucson, Arizona: 2007).

United States Agency for International Development (USAID). *Zambia Rule of Law Assessment June 2009* by James Michel, Margaret O'Donnell, Margaret Munalula.

Public Documents.

Zambia, National Assembly Debates and Proceedings, Fourth Session of the Tenth Assembly, Friday 19th March 2010.

Newspaper Articles.

Nkole, Nkole. "Maximum Prison Shows Ugly Side." *Daily Mail*, April 16, 2012.

Jennings, Diane. "A Shaken System." *Dallas Morning News*, February 24, 2008.

Websites

Dirk, O. "Plea Bargain" *The New York Times Magazine*, September 29, 2002 www.nytimes.com accessed on 13/03/2012.

Olin, D. 'Plea Bargaining' available @<http://www.truthinjustice.org>. accessed on 13/03/2012.

Criminal Law Lecture Notes at www.lawteacher.com

“Plea Bargaining - Evaluations Of Plea Bargaining” at <http://law.jrank.org/pages/1289>
accessed 10/02/ 2012.

