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Juridical Possibilities of ADR through 'Plea Bargaining' of Compoundable Offences: Potentials and Perils under the Current Socio-Legal Context of Bangladesh

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Research on access to justice in Bangladesh identifies Alternative Dispute Resolution (ADR) as a promising way for speedy disposal of cases. This informal non-adjudicative dispute resolution process enhances access to justice delivered to all – particularly for the disadvantaged. While ADR has some commendable successes in extending low-cost fair justice for the disadvantaged, it is not a panacea of all inequities. Further, initiatives of ADR largely deal with the backlog in civil courts, while criminal cases are kept outside the purview of any significant discussion on ADR. Although provision for 'compounding' of offences is available in the Penal Code of Bangladesh, it is limited to victim-offender negotiation and may not have adequate judicial intervention. Hence, as a means of ADR in criminal cases with appropriate judicial intervention, this article aims to establish a positive outlook for juridical possibilities of applying 'plea bargaining' in the socio-legal context of Bangladesh. This article further embraces the socio-cultural barriers that may be paradoxical for its efficient performance. Finally, informed suggestions are included for policymakers to trounce the perils in implementing an effective 'plea bargaining' mechanism in Bangladesh.

Introduction

Legal entitlements in the courts is limited by an enormous case backlog, delays in the disposal of cases and high litigation costs for the poor and disadvantaged to formal access to justice in Bangladesh. It is not surprising that fees for lawyers, travel costs, forgone daily wages, costs of

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collecting evidence, and various court fees are overwhelming for the poor[3]. Sometimes even accessible alternatives are not feasible or adequate for them. For instance, one such alternative to enhance access to litigation is to provide legal aid, but the scarce supply of funds makes it economically impracticable to make legal aid accessible to the poor in need.[4] Thus, feasible and *'adequately accessible alternatives'* that provide access to justice for the poor is indispensably required in Bangladesh. The Alternative Dispute Resolution (ADR)[5] is an accessible alternative means that provides scope for informal non-adjudicative dispute resolution process and enhances access to justice delivered to all[6]. It developed as complementary to the adversarial system of law for speedy disposal of disputes. Since the Reformed ADR Movement in 2000, the provision of resolution through various modes of ADR has been widely incorporated in different laws of Bangladesh. The primary purpose of such extensive inclusion was to attain a quick resolution of the dispute and thereby reduce the backlog of cases in courts. However, almost all of these inclusive initiatives of ADR deal with the backlog in civil courts, while criminal cases are kept outside the purview of any significant discussion on ADR.

In the present criminal justice system of Bangladesh, criminal ADR can be practiced through the *'compounding'* of offences – not in the form of *'plea bargaining.'* In a criminal case, 'compounding' means a victim complies not to report the occurrence of a crime or not to prosecute an alleged offender in exchange for *'other consideration.'* The other consideration may consist of anything of positive value, such as money, property, or a promise of monetary gain. However, in the context of Bangladesh, the notion of 'other consideration' may include a negative value. For instance, it is possible that a locally influential criminal caused damage to one's house and threatened to cause even more damage if the criminal incidence is reported to the police. The victim house owner may *'compound the offence'* and not inform the police to save his property from even greater harm. Hence, a practice of *'compounding'* in a society with substantial power disparity and feeble prosecution may lead to the decriminalisation of violence[7]. Decriminalisation of offences is a reason why many western scholars vehemently

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3 Stephen Golub, "Non lawyers as legal resources" in Many roads to Justice: The law-related work of Ford Foundation grantees around the world eds. *Mary McClymond and Stephen Golub* (USA: Ford Foundation, 2000), 297, 313. See also Nusrat Ameen, "Dispensing justice to the poor: The village court, arbitration council vis-a-vis NGO," *Dhaka University Law Journal* 16, no.2 (2005): 103-22; Mohammod Shah Alam, "A possible way out of backlog in our judiciary," *The Daily Star*, April 16, 2000.

4 Nusrat Ameen, "The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid," *Dhaka University Law Journal* 15, no.2 (2004): 59-82.

5 ADR means the resolution of disputes by using any mode of amicable settlement, including negotiation, mediation or arbitration, conducted either outside or inside the courtroom.

6 Jamila A Chowdhury, *Gender, Power, and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012).

7 Jamila A. Chowdhury, "Women's access to fair justice in Bangladesh: Is family mediation a virtue or vice?" (Unpublished PhD thesis, the University of Sydney, 2011).

oppose the use of different methods of ADR in resolving criminal cases.[8] Hence, in many common law countries, even the agreement of compounding between an aggressor causing misdemeanour and the aggrieved is considered contrary to public policy and so remain unenforceable through courts. Thus, if any of the parties fails to perform his/her obligation following the agreement, the court will not assist the aggrieved party to enforce the agreement.

On the other hand, plea bargaining is an agreement between prosecution and defendant based on concession from prosecution. However, scholars sometimes warn against indiscriminate use of plea bargaining without considering the power dynamics of society. Due to the power disparity in the society, we may limit the use of plea bargaining only for reducing the backlog of less critical criminal cases and assist everybody affiliated with the criminal justice delivery system to manage the crucial cases accurately. Hence, to reduce unnecessary delay in dispensing justice against selective less grievous criminal offences, plea bargaining could be an effective mechanism. This article focuses on the potentials for *'plea bargaining of compoundable offences'* under Sec 345 of the Criminal Procedure Code (CrPC), 1898. However, while highlighting the potential of plea bargaining, this article also attempts to bring forth the perils in using plea bargaining for the expedited disposal of criminal cases in Bangladesh. Accordingly, based on the experience of other countries, several recommendations are made for possible incorporation of plea bargaining of compoundable offences in the criminal justice system of Bangladesh.

Conceptualising the Notion and Types of 'Plea Bargaining'

The notion of 'plea bargaining'

The practice of plea-bargaining dates back to the seventeenth century when the old English common law courts used to grant pardons to accomplices in felony cases upon the defendant's conviction, or execution upon the defendant's acquittal. This prosecutorial tool was used only episodically before the 19th century to seek pardons from the aggrieved party in the presence of the authority dealing with the conviction.[9] A plea bargaining or plea deal is a process whereby the accused and the prosecution in a criminal case negotiate a mutually acceptable disposition of the case. This negotiation leads to an agreement by settling the case against the accused. In a

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8 Western writers also use the term 'Decriminalization of Offence' to indicate an even broader concept of other white color offences, such as bribes or speed money are considered less offensive by the society. See, Larry Siegel, *Essentials of criminal justice* (Wadsworth, Belmont, 2011), 19; John Scheb, *Criminal law & procedure* (Wadsworth, Belmont, 2011), 161.

9 Monjur Kader, "Plea Bargain: An overview of the practices of alternative criminal trial and its prospects in the Criminal Justice Administration of Bangladesh," *Dhaka University Law Journal* 18, no. 1 (2007): 131- 132.

plea bargain or plea deal, the accused agrees to enter a guilty pea in exchange for some concession from the prosecutor. This concession can include a reducing of charges or limiting the punishments that the court may impose on the accused. Sometimes in a plea bargain process, the accused reveals information, such as the location of stolen goods, names of co-accused or admission of other crimes. Also, plea deals can, and often are, conditioned upon the defendants' agreement to certain conditions including, co-operating in an investigation, giving testimony for the prosecution against another accused and refraining from further violation of the law.[10] Black's law dictionary defines 'plea bargaining' as:

> *"The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge."*[11]

Further, in *Siganto v The Queen* (1998) 194 CLR 656 at 22, Gleeson, CJ, Gummow, Hayne and Callinan JJ indicated that:

> *"A plea of guilty is ordinarily a matter to be taken into account in mitigation; first because it is usually evidence of some remorse on the part of the offender, and second on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."*

To get benefited through plea bargaining, a defendant may apply to the court, stating his/her guilt in a case and his/her intention to participate in a plea bargaining. After receiving such an application, a court *may* require the applicant to confess before a camera to determine whether the applicant has voluntarily made such an application or not. Once assured about the voluntary nature of the petition, a court *may* examine the prosecution to conduct a plea bargaining for the disposition of the case. While taking into consideration the application of plea of guilt by the accused, the court shall consider the following issues:

- the fact of the guilty plea by the offender
- the intention of the offender to plea guilt

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[10] Ibid.,133.

[11] Bryan A. Garner, *Black's Law Dictionary*, USA: West Group, (1999).

- the time of the plea (e.g. whether it is pleaded as soon as it is practicable from the commission of the offence or is pleaded just before the trial proceeding)
- the gravity and nature of the offence committed by the offender

A plea bargaining, therefore, can be defined as a process whereby the accused may bargain with the prosecution for a lesser charge or punishment. Simply, it is bargaining or a deal done by the accused of a non-severe offence, with authority for a lighter punishment instead of a full-fledged trial.

Types of plea bargaining

As mentioned earlier, plea bargaining is an agreement between the accused and the prosecution regarding a criminal charge alleged by the prosecution against the accused.[12] Plea bargaining can be of the following three types:

- Fact bargaining
- Charge bargaining
- Sentence bargaining

Fact bargaining

In 'Fact bargaining,'[13] a defendant bargains with the prosecution to change his or her plea from 'not guilty' to 'guilty' on the assurance that the prosecution will present the facts of the case in a less impeaching way.[14] This is advantageous for the prosecutors as they obtain a guilty plea without having to take the risk of conducting a full trial. Presumably, the defendant would also benefit from a reduced sentence in exchange for his or her guilty plea.[15] One of the significant concerns about fact bargaining is the lack of checks it has in place. For example, if the prosecutor presents facts concerning a defendant's involvement in a crime in a harsh way, then defence counsel would oppose. However, if the prosecution were to present facts in a way that

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12 Apurva Pathak, "Plea Bargaining: A New Chapter in Indian Legal System," *International Journal of Research in Humanities & Social Sciences* 3, no. 1 (2015): 53

13 Fact bargaining is a form of plea bargaining where a prosecutor agrees not to contest a defendant's version of the facts or agrees not to reveal aggravating factual circumstances to the court. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines, "Definition and Types of Bargaining", Guilty Plea: Plea Bargaining accessed July 25, 2019, https://law.jrank.org/pages/1283/Guilty-Plea-Plea-Bargaining-Definition-types-bargaining.html.

14 Shivani Pal, "Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals," (PhD thesis, University of Central Lancashire, 2013), 55.

15 Micah Schwartzbach, "What Are the Different Kinds of Plea Bargaining?" accessed July 25, 2019, www.nolo.com/legal encyclopedia/what-the-different-kinds-plea-bargains.html .

was disproportionately flattering to the defendant, then the opportunity of the defence counsel to challenge automatically get reduced. However, the issue would result in an unfair bias towards the defendant as it would place them in a stronger position. In turn, this might give the impression that the victim has lost their 'voice' in the proceedings.[16]

Charge bargaining

Unlike fact bargaining, charge bargaining involves a negotiation of the specific charges of crimes that the defendant will face in the trial.[17] It is an exchange of concessions by both the sides, which may mean that the defendant confesses his/her guilt and pleads to a lesser charge. There are two kinds of situations where charge bargaining may be used. The first is where the defendant is charged with two or more crimes. Here, the prosecution can drop one or more of the charges in return for a guilty plea for the remaining charge(s). The other situation is when the defendant has been charged with a severe offence. [18] Here, the prosecution might drop this charge in exchange for a guilty plea to a less severe offence.

Sentence bargaining is the more appropriate mode of plea bargaining for Bangladesh

Sentence bargaining is a negotiation between prosecution and defence to reduce his/her sentences. It involves an agreement to a plea of guilty in return for a lighter sentence. Here, the accused pleas for reducing his/her sentence in exchange for 'other consideration.' Sometimes the result is probation for the offender, and sometimes it is a less than a maximum sentence in a penal institution.[19] For example, a sentence bargain allows the prosecutor to obtain a conviction in a less severe charge, assuring that the accused will not be convicted with the maximum penalty allowed by law for the offence committed by him/her.[20] Typically, a sentence bargain can only be granted if a trial judge approves it.

From another perspective, sentence bargaining is a comparatively appropriate mode of plea bargaining in a country like Bangladesh where the criminal justice system of Bangladesh is overburdened with procedural difficulties in different stages such as in inquiry, investigation and trial stages. As a result, the courts are overburdened with pending cases. In this circumstance, sentence bargaining saves the prosecution time by not having to prove the

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16 Pathak, "Plea Bargaining," 55.

17 K.V.K. Santhy, "Plea Bargaining In US And Indian Criminal Law Confessions for Concessions," *Nalsar Law Review* 7, no. 1 (2013): 85.

18 Pathak, "Plea Bargaining,"56.

19 Jerry C. Jolley, "Plea Bargaining and Plea Negotiation in the Judicial System," *The Kansas Journal of Sociology* 8, no.1 (1972): 65.

20 Ridoan Karim, "Introduction of Alternative Dispute Resolution in Criminal Justice System of Bangladesh," *Journal of Asian and African Social Science and Humanities* 1, no. 2 (2015): 106.

defendant's guilt at trial. In exchange, the defendant also gets benefit by not having to serve as much time in jail and the fines the defendant may be required to pay can be reduced. We know that the criminal justice delivery system is being delayed mainly for two reasons, i.e. such as delay in the investigation stage and delay in the trial stage. However, these obstacles may be reduced to a considerable extent by introducing sentence bargaining in criminal trial procedure, as this process not only disposes of the cases quickly but also mitigates the burden of courts. A later discussion in this article further reinforces why 'sentence bargaining' rather than 'charge bargaining' would be a more appropriate form of plea bargaining for Bangladesh.

Plea Bargaining of Criminal Offences in Bangladesh: Juridical Possibilities under the Compoundable Offences in the Penal Code, 1860

Section 345 of the Code of the Criminal Procedure (CrPC), 1898 allows 'compounding' of certain offences as stipulated under sub-section (1) and (2) of the section. Section 345(1) takes a more generous approach in compounding an offence by stipulating 'without the permission of the court', whereas section 345(2) includes compounding of an offence 'with the permission of the court'. Consequently, offences can be compounded at any stage of the proceedings:

- If a settlement is reached before the framing of the formal charge, the court may release the accused.
- If a settlement is reached after the trial has started, then the accused is regarded as having been acquitted (i.e. found not guilty).
- However, the permission of the Court is required in both cases.

This process is known as 'compounding', and it allows criminal cases to be finalised without taking up the court's time. It could be a line up with restorative justice in that the victim is compensated rather than having the accused pay a fine or go to jail. As such, it is usually encouraged.[21]

Section 345 of CrPC provides a list of offences that are punishable under the Penal Code 1860. Two different types of compounding are suggested in CrPC under two different lists. The first one suggests offences, like uttering words with deliberate intent to wound the religious feelings of any person, causing hurt on provocation, wrongful retainment or confinement, and forced labour, as compoundable with the intent of the aggrieved person. In fact, the first list mostly consists of minor offences punishable with maximum one-year imprisonment and/or fine. The second set of compoundable offences includes more grievous offences, like rioting with a

[21] Greg Moran, *Criminal Justice in Bangladesh - A best practice Handbook for members of the criminal justice system,* (Dhaka: Justice Sector Facility, 2015), 68-69.

deadly weapon, voluntarily causing grievous hurt, act endangering the personal safety of others, and assault or criminal force to women with intent to outrage her modesty. Punishment for these offences varies from two to seven years along with fine. These offences are also compoundable by the aggrieved person but only with the permission of a court. Therefore, the clause requiring permission from court acts as a 'safety clause' against any possibility of forced compounding that might happen in the case of compounding *'without'* the permission of the court.[22]

Potential Benefits of Plea Bargaining: Following the good practice of plea bargaining around the globe, if the mechanism of plea bargaining is appropriately applied in the criminal justice system of Bangladesh, it may have many benefits.

Efficiency in the criminal justice system

One of the most significant reasons for adopting the notion of plea bargaining is that it allows for efficient case handling.[23] Plea bargaining can reduce the need for innumerable court appearances, hearings, and the days spent in the trial. It is an established maxim that *'Justice delayed, justice denied'* which is evident in a trial process where the defendants and victims are waiting for years for their "day in court," particularly in less severe cases. If each case can be heard more quickly by using the plea bargaining system, it can reduce overall court backlogs of the country. People are more likely to respect and use a justice system when they know their case will be resolved quickly.[24] Further, increasing court efficiency can enhance human rights practice. Congested courts can create serious human rights problems, particularly in countries without developed bail systems or other procedures to release defendants from custody during the trial.[25] From another point of view, it can be said that plea bargaining can play an essential role in the criminal justice system by reducing excessive detention, lightening the load on overburdened prison systems, and reducing the time defendants spend awaiting for trials. Thus, plea bargaining can reduce the strain on the criminal justice system and contribute to increased access to justice and increase public trust in the legal system.[26]

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22 Dr. Jamila A Chowdhury, "Introduction of ADR in Criminal Cases," *The Daily Star*, March 9, 2013, accessed June 21, 2019, https://www.thedailystar.net/news/introduction-of-adr-in-criminal-cases

23 Cynthia Alkon and Ena Dion, "Introducing Plea Bargaining into Post-Conflict Legal Systems" (Research Memorandum, INPROL, 2014), 7.

24 Ibid., 8.

25 Jonathan L. Hafetz, "Pretrial Detention, Human Rights and Judicial Reform in Latin America," *Fordham International Law Journal* 26, no.6 (2002): 1745.

26 Karim, "Introduction of Alternative Dispute Resolution," 108.

Avoiding the uncertainty of trial

In Bangladesh, thousands of cases are pending in the Courts at the moment, which will perhaps take years to reach a decision. However, resorting to the plea bargaining process can provide a relatively quick and efficient method of handling such large caseloads. Plea bargaining permits a prompt resolution of criminal proceedings with all the benefits that result from the final disposition and avoids delay and the uncertainties of trial and appeal.[27] Some commentators suggest that the Court often justifies the process of plea bargaining as an essential component of the administration of justice, which leads to the prompt and disposition of most criminal cases.[28]

Plea bargaining may have another justification which allows the defendant to admit their guilt and to assume responsibility for their conduct. Supporters of this system contend that in pleading guilty, defendants can forgo *"the anxieties and uncertainties of a trial"*.[29] In the criminal justice system of Bangladesh, there is always a chance that the court will find the defendant not guilty. It is immaterial how strong the prosecution case appears from the evidence for the defendant is presumed innocent as long as a trial is pending.[30] Thus, agreeing to a plea bargain avoids uncertainty in securing for a conviction.

Other benefits of plea bargaining

Benefit to the prosecutors

In the process of plea bargaining, the prosecutor is relieved of the long process of proof, and complexity of legal formalities. By using plea bargaining, the prosecution can save time and evade the uncertainty of the result of a trial.[31] Plea bargaining allows the prosecutor to take into consideration equitable factor/s in a particular case so that he or she can *"tailor punishment to the crime"* and the person.[32] One of the essential benefits of plea bargaining to a prosecutor is

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27 Abdul Halim, *ADR In Bangladesh: Issues and Challenges* (Dhaka: CCB Foundation, 2013), 203.
28 Santobello v. New York, 404 U.S. 260, 61(1971).
29 Douglas D. Guidorizzi, "Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics," *Emory Law Journal* 47, (1998): 753.
30 Kader, "Plea Bargain,"136.
31 Halim, ADR in Bangladesh, 27.
32 Jeff Palmer, "Abolishing Plea Bargaining: An End to the Same Old Song and Dance," *American Journal of Criminal Law* 26, no. 3 (1999): 515- 516.

that it allows him/her to gain co-operation from the accused in capturing and compiling the evidence against more towering criminal figures.[33]

A prosecutor usually is overburdened with cases. They are reluctant to try cases where they may not be able to meet their burden of proving each element of the charged offence beyond reasonable doubt. Without plea bargaining, prosecutors would be forced to conduct trials in nearly all criminal cases. Hence, prosecutors have a high interest to offer plea bargaining to defendants to focus their efforts on more severe cases and to reduce the strain on their schedule.[34]

Benefit to the accused

Introducing plea bargaining in the criminal justice system is also beneficial for the accused. It ensures the accused that they will not receive the maximum sentence for their crimes. Infect, most of the accused receive a lighter sentence than what might result from taking the case to trial. Another advantage that the accused gets is that they can save a considerable amount of money which they might otherwise spend on lawyers. Plea bargaining system speeds up the process for the accused on a limited budget and lets them get on with their life.[35] In other words, the accused is saved the anxiety of the uncertainties relating to the trial process and the cost of defending the case on the assurance of a lesser sentence to be suffered by him.[36]

Benefit to the victims

In the plea bargaining process, the victims of the case do not need to go to the court for giving evidence, which could be a distressing experience for them depending on the nature of the case. Under the present criminal justice system of Bangladesh, through a protracted and exhausting trial procedure in the courts, the accused comes out with an acquittal in almost 90-95 percent criminal cases, which shatters every languishing hope of the victim, and very often, he or she does not rely on the justice system itself. Given this situation, the victim will get a sense of justice at least by applying for a plea bargaining process.[37]

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33 Vincent M. Creta, "The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statue and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia," *Houston Journal of International Law* 20, no. 2 (1998): 407.

34 Wallin and Klarich, "Who Benefits More from Plea Bargaining, the Prosecution or the Defense?", December 28, 2011, accessed June 18, 2019, www.southerncaliforniadefenseblog.com/2011/12/who_benefits_more_from_plea_ba.html

35 Mark S. Rubinstain, "Why Do Prosecutors Offer Plea Bargains?", November 6, 2017, accessed June 18, 2019. https://rubinsteinlawoffices.com/prosecutors-offer-plea-bargains/

36 Kazi Ebadul Haque, "Plea Bargaining and Criminal Workload," *Bangladesh Journal of Law* 7 (2003): 87

37 Halim, "ADR in Bangladesh," 203.

In the plea bargaining process, the victim of the crime might also be benefited by getting compensation. Further, plea bargaining allows the victim to be shielded from the emotional stress and sensationalism of trial.[38]

Other economic incentives

The total cost of crime includes expenses on police, prosecution, legal aid, courts, and prisons.[39] Plea bargain mitigates the expenditures. By reducing the length of the trial, it alleviates the workload of prosecutors, reduces the pressure on judicial resources, and decreases all other expenses necessary for trial. For the poor, it is not easy to appoint a good lawyer to defend his/her case for the whole trial; rather if he/she accepts the plea bargain, the case will be quickly resolved and consequently, legal costs will be reduced. The essential aspect regarding the economic incentive of plea bargaining is that it reduces enforcement costs for both parties and allows the prosecutor to concentrate on more important cases.[40] Further, another justification for the efficiency of plea bargaining is that it allows the prosecutor to allocate resources more effectively.[41]

Cultural Adaptability of the Concept of Plea Bargaining of Compoundable Offences in Bangladesh

Bangladesh has inherited a system of administration of justice from the British colonial rule. Still now, criminal cases are regulated by the Code of Criminal Procedure, which was enacted by British rulers in 1898. Over time, some amendments have been made, and some special laws have also been enacted. However, the provisions made by the British rulers continue to dominate. Although there is no express provision in the criminal jurisprudence on plea bargaining, there is a guiding light from the Appellate Division of the Supreme Court of Bangladesh on this concept. The Appellate Division, in a case[42], considering the nature of section 345, observed that the criminal administration of justice encourages compromise of some of the cases. It states, *"the law encourages settlement of disputes either by Panchayet or by Arbitration or by way of compromise or others."* That is to say, the word "others" refers to

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38 Adewale and Sikiru Akinpelu, "Plea Bargaining In Criminal Prosecution," 23, accessed July 3, 2019 https://www.academia.edu/35563178/PLEA_BARGAINING_IN_CRIMINAL_PROSECUTION

39 Potrebic and Milica Piccinato, "*Plea Bargaining,*" (Ottawa: The International Cooperation Group-Department of Justice of Canada, 2004), 1.

40 Frank Easterbrook, "Criminal Procedure as a Market System," *Journal of Legal Studies* 12, (1983): 289- 332.

41 Gene M. Grossman and Michael L. Katz, "Plea Bargaining and Social Welfare," *American Economic Review* 73, (1983): 749-757; see also Markel, Dan, Jennifer M. Collins, and Ethan J. Leib, "Privilege or Punish: Criminal Justice and the Challenge of Family Ties," *University of Illinois Law Review* (2007):1148-1228

42 Md. Joynal and others vs. Mohammed Rustum Ali Miah and others, 36 DLR (AD), 240, 245; See also, Abbdus Satter and others vs. The State and other, 38 DLR (AD), 38, 40.

some possible alternatives so that justice can be more efficiently served to its seekers and such possible alternatives can be the mechanism of "Plea Bargaining" by which negotiation can be conducted for the resolution of a criminal case without a trial.

Compromise – A cultural heritage in administering criminal justice in Bangladesh

As observed by Jain (1999) guilty plea before a village forum was a regular practice in ancient India.[43] When village elders (popularly known as *Panchayet*) hear both the parties, *"there was no question of telling lies as everyone knows everyone else since their birth and they live together till their death in the tiny villages of 100-500 families".*[44] Although the social context has changed much due to the more extensive interaction between an enormous number of people hardly known to each other, still there is a social preference in favour of a guilty plea and restorative justice through compromise. However, corruption has become prevalent after taking power from the hands of local indigenous institutions and bestowing it on more formal judicial institutions

Custodial torture – A common trend to marginalise the voice of offenders in Bangladesh

Torture in remand and police custody is an ongoing phenomenon in Bangladesh. We must consider the possibility of a confession by a convict under force or fear. Even if the intention of the defendant to plead guilty may be expressed in the camera, after such confession, a convict may have to return to police custody and remain there until the case is settled. This was observed by Chowdhury as a problem for implementing plea bargaining in the current socio-legal context of Bangladesh[45]. As described in the case reported in 4 MLR (HCD) 87, it was stated that *"the common law adversarial system in our criminal administration of justice is not working well.* "The usual tendency of the prosecution is to overcharge the accused at the start of the case.[46] The offer of decreased charges or sentencing under the plea bargain system may be enough to convince the innocent accused to plead guilty in order to avoid the risk of a substantially harsher punishment after trial. Also, where prosecutors offer a deal in return for cooperation, the accused may offer false information to get a better plea agreement.

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43 Mahabir P Jain, *Outline of Indian Legal History* (Bombay: Tripathy, 1999).

44 Shiva M Jaamdar, "Restorative justice in India: Old and New" in Restorative Justice in India: Traditional Practices and Contemporary Applications eds. *R. Thilagaraj and Jianhong Liu* , (Spring 2017).

45 Jamila A. Chowdhury, "ADR in Criminal Cases and Decriminalization of Violence: A Gender Perspective" *Indian Journal of Law and Justice* (2016).

46 Guidorizzi, "Should We Really Ban," 771.

Silence against some sexual offences and domestic violence – A generic trend to marginalise the voice of women in Bangladesh

Women living in extended families often face sexual harassment and sexual coercion from their male in-laws, especially when their husbands are absent from the house. Nonetheless, as society generally sticks to a victim-blaming strategy in the case of sexual harassment, women usually stifle these incidents to maintain the reputation of their family and to remove any other stringent social sanctions that may follow such incidents[47]. According to Khair,[48] it is about the exploitation of the gender advantage and institutional power that results in the loss of dignity and self-esteem of the victim. It provides *"perpetrators the sordid opportunity to seek sexual gratification."* All this leads to the under-reporting of family violence in the country and the consequent lack of reliable statistical data.

In Bangladesh, there is a broad perception that family violence is a private issue, and so women should neither discuss it in open forums nor report it to others. In a survey of 1,691 women, 72 per cent admitted they had endured severe battery by their husbands, while only 11 per cent of them filed cases against the perpetrator.[49] As exemplified in this section, social attitudes may also restrain others from becoming involved directly in family violence issues. For example, two-thirds of the female respondents in the ICDDRB study never shared their experience of family violence with others.[50] Also, law enforcement agencies may be reluctant to involve themselves in family violence because it is an issue that they consider highly personal.[51] Couples who allow their neighbours to know about their marital disputes and battery are considered immodest.[52]

Western scholars have identified other reasons why women may keep "silent" about past family violence inflicted on them. As explained by Astor,[53] in Australia, sometimes women keep silent because if they expose the violence that they have encountered in their marital life, there is a possibility that they will be screened out from mediation and have to go through the time

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47 Bangladesh National Women Lawyers' Association (BNWLA),Violence against women in Bangladesh 2004 (Dhaka: BNWLA, 2005).

48 Sumaiya Khair, "Understanding sexual harassment in Bangladesh: Dynamics of male control and female subordination" *Dhaka University Law Journal* 9, no. 1, (1998): 87- 95.

49 Hamida A. Begum, "Combating domestic violence through changing knowledge and attitude of males: An experimental study in three villages of Bangladesh," *Empowerment* 12, no. 1 (2005): 53-69.

50 International Centre for Diarrheal Disease Research Centre, Bangladesh (icddr, b), "Domestic violence against women in Bangladesh," *Health and Science Bulletin* 4, no. 2 (2006): 1-6.

51 Roushan Jahan, *Hidden danger: Women and family violence in Bangladesh* (Dhaka: Women for Women, 1994), 42

52 Ibid., 23.

53 Hilary Astor, "Violence and family mediation policy," *Australian Journal of Family Law* 8, no.1 (1994): 3- 14.

consuming and costly trial processes. It is also relevant that women may be too poor to bear the expenses for litigation, and so they may prefer to resolve their disputes quickly and at minimum cost through mediation.[54] Thus, in Australia, abused women who want to resolve their dispute quickly through ADR may not have any other option but to conceal past violence, as according to the *Family Law Act 1975* (Cth.) family disputes involving violence are referred back to a formal trial.[55] Further, the presence of "control" and "fear" in women with regards to their husbands could be one reason that women suppress information about past family violence and remain silent in meditation. It is argued that target women may become frightened of experiencing further violence from their husbands if information about past violence is revealed to others.[56]

In Bangladesh, the *Domestic Violence Act 2000* and several other special laws are providing women against such hidden gratifications. However, the inclusion of such offences under compounding may provide an extra edge to the perpetrator of such crimes. Therefore, as discussed in the next section, following the plea bargaining provisions of India, it is desirable to address this kind of silent offences committed against women but severe offences including domestic violence, marital rape, sexual harassment should be kept out of the purview of plea bargaining.

Recommendations for a Plea Bargaining of Compoundable Offences with Greater Interests for Victims

Plea bargaining of compoundable offences – mere compounding of offence is not preferred under the current socio-economic conditions of Bangladesh

If we compare the process of plea bargaining with the compounding of criminal cases, plea bargaining should be preferred rather than compounding because plea bargaining involves the formal agreement of a plea of guilty before the court in return for a lighter sentence. However, compounding offences allows the accused to be free from certain criminal charges without any formal agreement. In Bangladesh, as long as the offender is under the purview of section 345 of CrPC, no one can be declared convicted in '*compounding process*,[57] whereas, at least a

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54 Hilary Astor, "Swimming against the tide: Keeping violent men out of mediation" in Women, male violence and the law, ed. *Julie Stubbs*, (Sydney: Institute of Criminology,1994).

55 Family Law Rules (Family Courts of Australia) Order 25A, r 5

56 Lesley Laing, *Domestic violence and Family Law* (Australian Domestic and Family Violence Clearinghouse, 2003), 7; see also, Felicity Kaganas and Christine Piper, "Domestic violence and divorce mediation," *Journal of Social Welfare and Family Law* 16, no.3 (1994): 265-272.

57 The Code of Criminal Procedure, s 345(6) (1898).

punishment, though *lesser* in form, is awarded in plea bargaining for not fully contesting the case. However, an accused can *only* have this benefit of getting *lesser* punishment by going through a formal process before the court.[58] Thus, if we promote the system of plea bargaining, then no accused will be able to avoid the punishment, and by promoting so, we will be able to establish justice for the victim. In order to realise the justness for the plea bargaining system, one must be able to fix the premises regarding the useful application of plea bargaining.

In fact, some proponents of plea bargaining argue that the system bring about the same consequence of the trial system but at a lower cost. [59] Other scholars indicate that the process of plea bargaining brings the result for defendants that are fairer than the results of the trial process[60].

Sentence bargaining is the more appropriate mode of plea bargaining for Bangladesh

Although plea bargaining may be of three types, fact bargaining, as explained earlier, is not appropriate under the current socio-economic context of Bangladesh. Therefore, we have only two available options for plea bargaining that we need to investigate further. These are charge bargaining and sentence bargaining. The point is which is the preferred and more appropriate mode of plea bargaining in the context of Bangladesh? As mentioned earlier, charge bargaining involves a negotiation of the specific charges or crimes that the defendants will face at trial. Usually, in return for a plea of 'guilty' to a *'lesser charge'*, a prosecutor will dismiss the higher or other charge/s. For example, a defendant charged with rioting with deadly weapon under section 148 of the Penal Code may be offered the opportunity to plead guilty only riot under section 146 – a lesser charge than that of s.148. On the other hand, sentence bargaining implies the agreement to a plea of guilty for the stated charge rather than a reduced charge, in return for a lighter sentence.[61] Thus, it provides the defendant with an opportunity for a lighter sentence only when the prosecution goes through trial and proves the case.

Therefore, if we prefer charge bargaining, then we shall pave the way for the defendant to be free from certain criminal charges, which he had committed – even before the initiation of the trial process. Consequently, it shall be seen that the defendant will get an opportunity to avoid specific charge/s easily, *which will be an injustice to the victim*, and the *notion of 'decriminalisation'* will be promoted. Conversely, in case of sentence bargaining, *the defendant gets punishment but a lower or discounted sentence*. Hence, if we promote sentence bargaining,

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58 Eti Basaniwal, "Compounding of Offences: Origin and Rationale for this practice," July 6, 2017, accessed July 22, 2019, https://www.cimplyfive.com/compounding-of-offences-origin-and-rationale-for-this-practice/ ,

59 Fred C. Zacharias, "Justice in Plea Bargaining," *William and Mary Law Review* 39, no. 4 (1998): 1136

60 Ibid.

61 Suman Rai, *Law relating to Plea bargaining* (Delhi:Orient Publishing Company, 2007), 7

then no defendant will go unpunished, and by promoting so, we will be able to establish justice to the victim.

Plea bargaining should exclude habitual offenders and serious crimes

If the accused was previously convicted of a similar offence by any court, then he/she should not be entitled to plea bargaining. The plea-bargaining option should not be available for habitual offenders who might dilute the socio-economic stability of the country. Also, plea-bargaining should not be available for an offence committed against a woman or a child below fourteen years of age. The opportunity of plea bargaining is not acceptable for an accused in severe crimes including murder and rape. It does not apply to severe cases where the punishment is death or life imprisonment or a term exceeding seven years.

In pursuance of the provisions/principles of plea bargaining, new chapter/sections may be incorporated in the Code of Criminal Procedure 1898 (Act V of 1898) separately. For instance, in Australia, separate part and sections, namely ss. 22(1), 21A (3) (k) have been inserted under the *Crimes (Sentencing Procedure) Act, 1999. Further, section 25D (2) stipulates a fixed percentage while discounting the offence depending on its gravity and circumstances. For example, a 25 percent per cent discount is available, only if the offender pleads guilty as soon as practicable and it was accepted in committal proceedings; 10 percent discount is available if offenders plead at least 14 days prior to the first day of trial; 5 per cent in any other cases. It* categorically allows the notion of plea bargaining in mitigation of a sentence. Further, it elaborates the procedure under s 207 of the *Criminal Procedure Act 1986*. It states:

- *At any time after a conviction has been made against the accused person, he/she may apply to the court to change his/her plea from guilty to not guilty*
- *The court may set aside the conviction made against the accused person and proceed to determine the matter based on the plea of not guilty.*

However, such discretion of discounting the offence by the court should not be unfettered.[62] The notion of plea bargaining should *not* extend to crimes of serious nature as stipulated in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act, 2017* of Australia [e.g. Commonwealth offences under section 25A(1)(a), a sentence of life imprisonment under section 25F(9)].

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[62] Kate Stith, "The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion," *Yale Law Journal* 117, (2008):1420-97; See also Ryan W. Scott, "Inter-Judge Sentencing Disparity after Booker: A First Look.," *Stanford Law Review* 63, (2012):1-66.

Similar to Australia, India has also limited the scope of plea bargaining in their newly introduced Chapter XXI A of the Criminal Procedure Code, 1973. In India, three categories of offences have been excluded from the capacity of plea bargaining:

(i) Offences affecting socio-economic conditions;

(ii) Offences committed against women;

(iii) Offences committed against children below the age of 14. The opportunity of plea bargaining will also not be available to the habitual offenders as per the Code.

In consistence with the provision of plea bargaining of the said two countries, in Bangladesh, the provision of plea bargaining should not be introduced for all offences.

Informed consent is required

The offences listed under section 345 of the CrPC (Compoundable with the Consent of the court & compoundable without the consent of the court) must be brought into consideration in this regard. Whenever any person decides to plead guilty, he/she has to be made fully aware of the consequences. The Court concerned should be invested with the duty to inform the accused and victim that if he/she follows/allows the procedure of plea bargaining, he/she will lose some legal rights, such as the right to a trial, right to confront and cross-examine witnesses against him, right to appeal and so on.

Plea bargaining should be backed by the pro-active role of judiciary with a transparent and monitored court process

The court should play a dominant role in plea bargaining by monitoring the entire process. The trial court should be invested with the duty to ensure the voluntariness of adopting this procedure by the accused. The court must be satisfied that the accused resorted to plea bargaining voluntarily and not under any threat or coercion. If it is found that plea bargaining is involuntary, the court may reject the petition for plea bargaining. Further, if the petition for plea bargaining is rejected, the proceedings cannot be used as evidence. At the same time, the court should promote *'sentence bargaining'*, rather than *'charge bargaining'*. By doing so, we can avert the possibility of *'decriminalisation of offence'* and at the same time, the victim would get a sense of justice when a minimum/lower sentence is provided for the offence committed by the

accused. In such a case, the court must deliver the judgment in open court according to the terms of the mutually agreed disposition, including victim compensation.

Conclusion

In order to get rid of its enormous volume of case backlog at present, there is an indispensable need for a change in the criminal justice mechanism of Bangladesh. Plea bargaining may be one of those welcoming changes to reduce the burden on courts and allowing them to concentrate on more severe crimes while ensuring a swift and inexpensive resolution of other less severe criminal cases. Since the notion of plea bargaining has benefits for both justice seekers and the accused, we have tried to adapt it better for dispensing an effective criminal justice system in Bangladesh. Accordingly, it has been emphasised to implement the plea bargaining process for the ends of justice throughout this article, rather than its exclusion from the criminal justice system. Hence, informed recommendations based on practices in other countries (e.g. adding a separate chapter/section in the CrPC on plea bargaining), have been summarised in this article. Further, a pro-active role of the court is required to achieve the quick resolution of compoundable offences through plea bargaining – without reducing the quality or confidence of justice seekers on the criminal justice system of Bangladesh. Eventually, *'proper'* implementation of the notion of plea bargaining can contribute to a robust criminal justice system and better access to justice in Bangladesh.