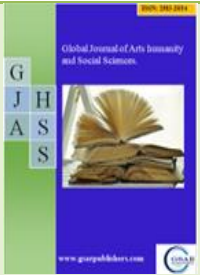
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The Constitutionality of Plea bargaining in Tanzania.

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Abstract

This study rigorously analyzes the legitimacy of plea bargaining in Tanzania, as delineated in the Criminal Procedure Act Cap 20. Additionally, the article examines the whole bargaining process in criminal cases. Plea bargaining is used to facilitate the prompt resolution of criminal cases. Plea bargaining is intended to shun complicated court proceedings; to reduce the congestion in the prisons in Tanzania; to save time and cost of the government revenues. Despite the good reasons, the plea bargaining is still faced by several challenges. It is considered that the plea bargaining is sometime contrary to the whole process of fair trial. There are number of concerns confronting the constitutionality of the plea bargaining process in Tanzania. Observing presumption of innocence is a challenge during plea bargaining process. Plea agreement leads to criminal records on the accused. In some circumstances the accused may plead guilty due to fear of long and complex court trial. This type of plea can be said to be involuntarily obtained hence contrary to the constitutional principle of presumption of innocence. Further, there is no room of establishing the burden of proof; proper investigation process and so many other challenges. This paper addresses the challenges on plea bargaining in details. The paper also provides the measures to be taken to ensure that the plea bargaining is applied towards the fair dispensation of criminal justice in Tanzania.

Keywords: Plea bargaining, Plea Bargaining Agreement, Tanzania.

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1.1.An Overview

Plea bargaining involves the negotiation of a criminal charge between the defendant and the prosecution. It is essentially the resolution of a specific offense or offenses. Plea bargaining serves as an alternative resolution for criminal cases, circumventing the need for a trial.ⁱ A plea bargain is a formal accord between the prosecution and the defendant in a criminal trial, often excluding the court's participation.ⁱⁱ It permits the defendant to submit a guilty plea, which may result in a mitigated sentence or even discharge.

Plea bargaining is a negotiation between the prosecutor on one side and the accused. During negotiation the accused can voluntarily confess to an offence(s) and the prosecutor on the other hand can voluntarily discharge the offence(s) against the accused person. Upon reaching an agreement the prosecutor can ask the court to impose the lesser punishment to the accused person.

In Tanzania plea bargaining is a recent establishment under the law. The concept is established under the Criminal Procedure Act Cap 20 in the year 2019. The rationale behind was to ensure timely disposal of criminal case and to reduce congestion of prisoners. Further, the plea bargaining process was introduced to avoid long and complicated court procedures. It should be noted that not all criminal offences are subjected to plea bargaining process. Some of the offences are exempted from plea bargaining specifically grave offences. The Criminal Procedure Act provides the list offences that are exempted from plea bargaining process. There are no specific offences that stipulated under the law for plea bargaining. Generally, plea bargaining arrangements in Tanzania are common in economic and corruption offenses.



1.2. Recognition of Plea Bargaining in Tanzania

Plea bargaining was used in Tanzania in 2019 to accelerate the conclusion of criminal cases and alleviate jail congestion.ⁱⁱⁱ The Criminal Procedure (Plea bargaining Agreement) Rules of 2021 delineate the protocols and guidelines for plea bargaining in criminal proceedings. The Rules of 2021 define the parameters and protocols for plea bargaining, including agreements between the defendant and the prosecution.^{iv} In June 2022, the Director of Public Prosecutions released the Plea Bargaining Guideline of 2022, mandating public prosecutors to adhere to principles of justice, avert legal exploitation, safeguard public interest, and govern criminal processes.^v

The court's involvement in plea bargaining negotiations is limited. The identical phrasing is also utilized in the Rules of 2021. According to Rule 8 of GN No. 180 of 2021, the court is prohibited from engaging in plea negotiations between the parties. This is for purposes of giving room of negotiation to parties to a criminal case.^{vi} However, there is a possibility of undue process of law during the negotiation process. The plea agreement may be obtained through coercion, corruption and fraud. This would cause the process nugatory. Thus, this paper will critically examine the role of plea bargaining in process of dispensing criminal justice in Tanzania.

Generally, plea bargaining is a vast, dynamic and modern concept in the legal field. It touches several areas under criminal law and criminal procedures. For instance, the meaning of the term plea bargain is dynamic and keeps changing daily. Formerly the term plea bargain involved a prosecutor from the office of the Director of public prosecution and the accused or a defendant who pleads guilty for a lesser charge. Currently, the term plea bargaining includes facts bargaining, counts bargaining, and sentence bargaining.^{vii}

Sentence bargaining, under a plea bargain the accused person enters a guilty plea with the expectation that the sentence given will be less severe or lighter. The rationale behind sentence bargaining is that the accused person did not waste the court's time and resources by going through trials. For example, under a sentence bargain, the accused person is given an avenue to plead guilty in a murder case, and in return, the defendant will not be punished by death sentence but rather a lifetime imprisonment.^{viii}

Facts bargaining under plea bargain, it includes the defendant who agreed to certain facts in issue which form part of the charge and in return of omission of those facts in issues. On the other hand, counts bargains involves a negotiation whereby the defendant agreed to some counts is charged with in exchange with a lesser sentence.^{ix}

1.3. Limitations on Plea Bargaining in Tanzania

There are restrictions on the use of plea bargaining in Tanzania. This implies that plea bargaining is not an option for all criminal

acts. The list of offenses for which the plea bargaining procedure is not applicable is provided by the Criminal Procedure Act, Cap 20. Plea bargains is not accepted for serious crimes.^x

Crimes that fall under the category of "restricted" include those with sexual consequences and sentences exceeding five years in prison, as well as treason and treasonable offenses, terrorism, and the unlawful possession of government trophies worth over twenty million shillings without the Director of Public Prosecutions' written consent.^{xi} Plus, that kind of plea agreement isn't appropriate for all crimes. Therefore, none of the aforementioned charges will be dealt with via a plea agreement.

a. Sexual offences

The plea agreement shall not apply to sexual offenses with a punishment exceeding five years or involving victims under eighteen years of age.^{xii} The term sexual offence is defined as an unlawful act involving sexual conduct, including prostitution, indecent exposure, incest, pederasty, and bestiality.^{xiii} The law limited the entry of plea agreements to cases involving sexual offenses.

b. Treason and Treasonable offences

Treason is the act of seeking to subvert the government to which one is loyal, either by waging war against it or by providing substantial aid to its adversaries.^{xiv} The Penal Code stipulates that an individual loyal to the United Republic, whether inside its territory or outside, who kills or tries to assassinate the President, or who wages war against the United Republic, will be deemed guilty of treason. The Penal Code, under section 39, delineates many circumstances under which an individual may be deemed guilty of treason.^{xv} Treason is frequently referred to as high treason. The plea bargain cannot be accepted for treason and treasonous offenses. Treason is seen as a serious offense.^{xvi}

c. Possession or Trafficking in Narcotic Drugs

Offences involving possession or trafficking of narcotic narcotics with a market value above twenty million shillings are prohibited from plea bargain agreements. Narcotic drugs refer to chemicals such as acetorphine, betameprodine, dimenoxadol, or any other substances classified as narcotic medications.^{xvii}

d. Terrorism

A plea agreement shall not be accepted for terrorism. The act of terrorism encompasses any action or inaction that might significantly harm a nation or an international entity. This pertains to acts or omissions designed to intimidate, coerce, undermine, or wield influence on a populace, government, or international organization.^{xviii}

e. Possession of Government Trophy

A plea agreement for the offense of possession of a Government trophy valued at over twenty million shillings shall not be entered without written consent from the Director of Public Prosecutions.^{xix}

f. Any Offence Published in the Gazette

By order published in the Gazette, the Minister, in consultation with other relevant authorities, may prescribe any additional crime.^{xx}



1.4. Initiation of Plea Bargaining Process

A plea bargain may begin when the defendant, their attorney, or a public prosecutor notifies the court that they would want to negotiate a plea agreement. No plea bargain may be reached in a private prosecution without the Director of Public Prosecutions' express approval.^{xxi}

1.5. Effect of Plea Bargaining Agreement

There was no ambiguity about the impact of plea bargaining under the Criminal Procedure Act. The accused and the public prosecutor must enter into a plea agreement after engaging in plea bargaining.^{xxii} In a criminal trial, the prosecution and the accused may reach an agreement known as a plea agreement. A written plea agreement is required. An attorney for the accused, or someone legally able to represent the accused in the absence of an attorney, must be present to witness the agreement.^{xxiii} A complete plea agreement will include all of the conditions, the main facts, any confessions made by the accused, and any other pertinent information from the case. The accused must be provided with a clear and understandable explanation of the plea agreement in his native language. In addition, the accused must agree to the terms of the plea deal, and all parties involved, including the prosecutor, the accused, and the accused's attorney (if hired), friend, family, or anyone else with the legal capacity to represent the accused (if not hired), must sign the document. A plea bargaining agreement's effects are as follows:

a. Charge the Accused with Lesser Offence

Upon finalizing a plea agreement, the public prosecutor may indict the accused for a lesser offense. The public prosecutor may dismiss further charges or implement other measures as deemed suitable based on the case's circumstances. The plea agreement may include a commitment to plead guilty to a charge in return for a recommendation for a reduced sentence.^{xxiv}

b. Withdrawal of Other Counts

This pertains to the individual facing several charges. The accused has the option to plead guilty to the charged offence, a lesser offence, or specific counts in a multi-count charge, in return for the withdrawal of other counts.^{xxv}

c. Order for Payment of Compensation

Punishment for a crime may take several forms, including monetary fines, restitution orders, or the seizure of any assets used in the commission of the crime.^{xxvi}

d. Accused Promise to Cooperate as a Witness for the Prosecution

The plea agreement between the accused and the prosecution may involve a commitment to cooperate as a witness for the prosecution in return for reduced charges or a lesser sentence, or both.^{xxvii}

1.6. Controversies on Plea Bargaining in Tanzania

Plea Bargain is Said to be Unconstitutional

Plea bargain takes away the accused constitutional rights. There are number of rights affected like the right to be presumed innocent,

right to fair trial, right to be heard and other rights. In some instance there are unreasonable influences during negotiation that may lead to plea agreement. Sometimes the accused may be forced or pressured into a plea bargain agreement. These factors affect plea bargain arrangement hence the process may be unconstitutional.

a. Presumption of Innocence

The presumption of innocence is a key constitutional concept, guaranteeing that a conviction cannot occur until guilt is shown beyond a reasonable doubt. Plea bargaining is a criminal practice that entails negotiations between a prosecutor and a defendant, whereby the defendant consents to plead guilty to a designated charge. The court upheld this concept in the Hassan Othman Hassan @ Hassanoo case, indicating that this process may compromise the presumption of innocence.^{xxviii}

b. Equality before the law

In a plea bargain, the defendant consents to enter a guilty plea to a lower charge in return for a reduced sentence or the dismissal of further charges. The plea bargain has been attacked for its potential to compromise the idea of equality before the law, even if it may be a helpful tactic in some criminal cases. Individuals with varying financial means, backgrounds, and access to legal counsel may be more or less likely to get advantageous plea agreements, resulting in unfair legal treatment.

Plea bargain leads into some harsh racial disparities in outcomes. Thus the defendants under plea bargaining arrangements they tend to receive very harsh proposal or unequal resources in other words. The prosecution side are being offered with resources which undermine defendant rights even if they are innocent.^{xxix}

c. Right to fair trial

plea bargain significantly affects the defendants' rights to a fair trial. The practice shows that commonly defendants they agreed to a plea bargain arrangement due to the pressure and risk of receiving a harsh sentence if they are convicted. Also defendants with resources they tend to have a vast opportunity of rescuing a good proposal.^{xxx} This creates disparities in administration of justice on the right to be represented. As far as Tanzania is concerned this situation goes against the spirit of what Article 13 and 107A of the Constitution of Tanzania provides on fair trial and representation but also on economic status should not determine the outcome of the case.^{xxxi} In the case of *Blackledge vs, Allison*^{xxxii} and the case of *Bordenkircher vs, Hayes*.^{xxxiii} The supreme court ruled that the use of threats to compel defendants to agree on plea arrangements violates constitutional rights of a defendant which is a right to a fair trial.

d. Standard of Proof in Plea Bargaining

Proof must be shown beyond a reasonable doubt in criminal cases. It is the responsibility of the state (Republic) to prove that the accused has the necessary means to conduct the offense, as established in the case of *Ali Ahmed Saleh Amgara vs, Republic*. The adage "he who alleges must prove" provides a foundation upon which this might be considered. In a criminal case, the

prosecution, often the state, has the primary responsibility for establishing guilt.

The relevance of the standard of evidence in plea bargaining is at stake here. The accuser and the accused negotiate as part of the negotiating process. It is well-established rule that in order for an accused person to be found guilty, the prosecution must prove its charges beyond a reasonable doubt. Convincing the accused based on the plea deal is the toughest part of plea bargaining.

e. Lack of Transparency

Plea bargaining is characterized by a deficiency of transparency. The Criminal Procedure Act Cap 20 and the Criminal Procedure (Plea Bargaining Agreement) Rules of 2021 limited the court's involvement in plea bargaining negotiations. The court must refrain from engaging in plea negotiations between the parties. The negotiation includes the prosecutor and the accused individual(s) or their agents, if applicable. During plea negotiations, there was no opportunity to provide evidence. Consequently, it is challenging to ascertain the strength of the prosecution's case via plea negotiating. This leads to an inequitable plea bargaining agreement between the parties.

In March 2023 the CAG reported that there was no transparency during plea bargaining.^{xxxiv} Due lack of transparency the prosecutor can misuse the process hence can undermine the accused. The lack of transparency may lead to coercion in the sense that the prosecutor may force the accused person to plead guilty of an offence. Plea bargaining occurs privately and off records. The victim(s), court and public are excluded to involve in plea bargaining. This is against the rule that the justice should not only be done but should be manifestly being seen to be done. Further, in the criminal law and Rules there are no any transparency rules guaranteed. As a result, the plea bargaining is shielded from outside scrutiny hence plea information missing.

1.7.Registration of a Plea agreement

A plea bargain arrangement can gain a force of law after its registration in the court of law. Before the court register a plea bargain arrangement several criteria's should be met. The court will make an observation as to whether the arrangement entered is based on a free consent. Thus, both parties especial the defendant has to decide to enter into a plea bargain arrangement voluntarily without any external force or fear. The reason behind is that a plea bargaining arrangement must consists of all essential elements of a contract to include the absence of coercion and capacity to enter into an agreement.^{xxxv} The court has the power to reject or accept an arrangement submitted basing on the formality followed to obtain an arrangement.^{xxxvi}

A plea bargain arrangement becomes a legal binding agreement immediately after its registration by the court. The binding nature of the plea bargain arrangement will involve the defendant side and the prosecution side of the case. The rationale behind is the fact that after registration of an agreement, it forms part and parcel of the court's records. This opens a rooms for the court to begins its conviction processes toward the defendant.^{xxxvii}

1.8 Oath Arrangements to the Defendant

Prior registration process of the plea bargain arrangement. The defendant is placed through a mandatory procedure by the court in order to abide with the constitutional principles. Firstly, the defendant will be putted under oath depending on the religious belief. Secondly, the court will proceed thereafter by telling the defendants' rights, the meaning and the reputations of being under oath. Thirdly, the court has that duty of informing the defendants on the fact that the right to a fair trial is being waived immediately after accepting the agreement.^{xxxviii} Due to that the rights of the defendant on appealing as specified under Article 13 (6) of the Constitution of the United Republic of Tanzania will be waived with the exception to appeal involves sentence given by the court.^{xxxix}

1.9 DPP Role's

The Director of Public Prosecutions has the power to ask the sentencing court to overturn a conviction and sentence that were acquired via a plea deal that included fraud or deception, if doing so would serve the public interest and ensure fair justice. It is possible for the court that imposed a sentence to reverse a conviction or sentence that was acquired via an unjust or dishonest plea bargain if the accused was involved in the deal.^{xl}

2.0 Reforms Suggested

- Involvement of the Victim of an offense. A plea bargain agreement normally involves a negotiation between the defendant and the state attorney from the director of the public prosecution office. This negotiation process does not involve the key party to the offense who is the victim of an offense.
- Amendment to the penal code of Tanzania to incorporate fines for offenses that are more of an economical nature. There are offenses in the Tanzania penal code that are economical and yet there is no fine as a punishment.

2.1 Conclusively

Plea Bargaining arrangement has helped in reducing caseloads in courts, and saving time and resources. That is to say in Tanzania legal regime plea bargain align with the spirit of Article 107A of the Constitution of Tanzania. Furthermore, plea bargain complement the important rule of justice delayed is justice delayed. Criminal cases in Tanzania especially those with money laundry cases have the tendency to consume a lot of time, the introduction of plea bargains in criminal procedures helps in solving a criminal case in an efficient and less time-consuming manner. On the other hand, plea bargains in Tanzania have negative impacts. A plea bargain commonly leaves the victim under criminal procedure unattended. This is a result of the fact that a plea bargain involves an arrangement between the defendant and state attorneys from the office of the director of a public prosecution and leaves a lacuna on whether a private prosecutor can have room to act on behalf of the director of a public prosecution office. Moreover, plea bargain after registration of an agreement by the court it removes that possibility of making an appeal by the defendant. That is to say, a

plea bargain in Tanzania it contradicts with what the constitution of Tanzania provides on fair trial and rights to seek redress, including appeal.

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