PLEA BARGAINING IN CORRUPTION CASES IN KENYA:

TOWARDS A RESTRAINT APPROACH

ZAINAB ABDULRAHAMAN

G62/34337/2019

A Research Project Submitted to the University of Nairobi Law School in Partial Fulfillment of the requirements for the Master of Laws (LL.M) Degree Program

November, 2021

DECLARATION

I, ZAINAB ABDULRAHAMAN, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

Signature…… Date **4/11/2021**

ZAINAB ABDULRAHAMAN

This research project has been submitted for examination with my approval as the University Supervisor

Signature……..Date **4/11/2021**

DR. NANCY BARAZA

DEDICATION

To my parents and siblings for their endless love, support and encouragement.

To my son Abdul for cheering me on.

ACKNOWLEDGEMENT

I am most grateful to Allah for unconditional providence, grace and good health.

I am overly grateful to my supervisor, Dr. Nancy Baraza, without whose limitless patience, uncompromising commitment to intellectual excellence and insightful critique this study would not have been concluded.

LIST OF CASES

LIST OF STATUTES

Anti-Money Laundering Act (AMLA) (2010) (PAKISTAN).

Criminal Justice and Police Act 2001, Laws of Kenya.

Federal Investigation Agency Act (FIA) 1974 (VIII OF 1975) (PAKISTAN).

National Accountability Ordinance (NAO) (1999) (PAKISTAN).

Pakistan Penal Code (PPC) (Act XLV of 1860) (PAKISTAN).

Prevention of Corruption Act (PCA) (1947) (PAKISTAN).

The Anti-Corruption and Economic Crimes Act No. 3 of 2003, Laws of Kenya.

The Leadership and Integrity Act, No. 19 of 2012, Laws of Kenya.

The Public Officer Ethics Act, Cap 183 Laws of Kenya.

The Civil Procedure Act, Cap 21, Laws of Kenya.

The Code of Criminal Procedure (CrPC) (1898) (PAKISTAN)

The Criminal Procedure (Plea Bargaining) Rules, 2018.

The Criminal Procedure Code, Cap 75, Laws of Kenya.

The National Accountability (Amendment) Bill, 2017 (PAKISTAN).

The Victim Protection Act, No. 17 of 2014, Laws of Kenya.

Government Printers (2018), National Ethics and Anti-Corruption Policy, Sessional Paper No. 2 of 2018.

Government Printer (2019), Plea Bargaining Guidelines. <https://www.odpp.go.ke/wp-content/uploads/2019/10/ODPP-Plea-Bargaining-Guidelines.pdf>accessed 8 February 2021.

LIST OF INTERNATIONAL INSTRUMENTS

United Nations Convention against Corruption (2003, UN Convention or UNCAC)

United Nations (2017), Conference of the State Parties to the United Nations Convention against Corruption, Vienna, Resumed eighth session, CAC/COSP/IRG/1/3/1/Add.32)

African Union Convention on Preventing and Combating Corruption and Related Offences (2003, AU Convention)

ABBREVIATIONS

ACECA- Anti-Corruption and Economic Crimes Act, Cap 65, Laws of Kenya.

ADR- Alternative Dispute Resolution

CBK- Central Bank of Kenya

CID- Criminal Investigation Department

CIT- Combine Investigation Team

CPC- Criminal Procedure Code (Kenya)

DPP- The Director of Public Prosecutions

EACC- The Ethics and Anti-Corruption Commission

ICC- The International Criminal Court

ICTR- The International Criminal Tribunal for Rwanda

ICTY- The International Criminal Tribunal for the former Yugoslavia

KACC- The Kenya Anti-Corruption Commission

NAB- The National Accountability Bureau

NAO- The National Accountability Ordinances (NAO) 1999 (PAKISTAN)

ODPP- The Office of the Director of Public Prosecutions

PB- Plea Bargain

VR- Voluntary Return

TABLE OF CONTENTS

ABSTRACT

Plea Bargaining refers to arrangements under which an accused person pleads guilty in order to be charged with a lesser offence or in order to receive a lesser sentence. In the past, Kenyan courts did not allow plea bargaining in corruption cases. However, current practice departs from this past jurisprudence and the Director of Public Prosecutions (DPP) is employing plea bargaining in corruption cases. The study investigated the impact of the practice on Kenya's quest for social justice as well as whether the practice upholds sufficient deterrence for corruption crimes in Kenya. It hypothesized that the current practice by the DPP has negative legal implications on Kenya's quest for social justice and that it does not uphold sufficient deterrence to such crimes. The study applied comparative and doctrinal research methodologies.

The study revealed that Kenya's legal framework does not have enough safeguards to respond to the peculiar nature of corruption cases. The courts have been unpredictable in enforcing plea agreements in corruption cases, and more uncertainty in this area has been occasioned by the ODPP's list of 'bare minimums,' which is not based in law or any policy. In addition, the policy framework for prosecution of corruption and economic crimes is deficient in that it does not give any special attention to corruption crimes. Kenya can borrow lessons from Pakistan. Pakistan's regime ensures that those who subject themselves to plea bargaining suffer serious consequences, which serve as a deterrence to engaging in the social vice. In addition, she has inbuilt mechanisms to ensure that the accused person does not benefit from his criminal conduct and the process of entering into a plea bargain underscores the rules of natural justice and the accused person's right to fairness. The findings will assist policy makers and legislators in identifying the most applicable legislative reforms towards achieving a prudent framework for plea bargaining in corruption cases.

CHAPTER ONE

INTRODUCTION

1.0 Background of the Study

There is no precise definition which applies to all degrees, types and forms of corruption,[1] but there is some general consensus that the term 'corruption' revolves around the abuse of entrusted power for private gain.[2] In the Kenya context, the term has been defined to include actions of breach of trust, abuse of office, misappropriation or embezzlement of public fund, fraud and bribery.[3] The United Nations Convention against Corruption (UNCAC) imposes on Kenya a duty to promote and strengthen measures to prevent and combat corruption effectively and efficiently.[4] In addition, it requires Kenya to develop effective ant-corruption policies that underscore public participation, accountability, transparency, integrity and rule of law.[5] In Kenya, it is an offence for state officers to engage in corrupt practices.[6] Legislators must not tolerate corruption and are bound to fight the social vice both in the public and private sectors.[7]

The definition of the term 'plea bargain' is least contested amongst academicians and in criminal law discourses. It is a negotiated agreement between an accused person and a prosecutor in which the accused person agrees to plead guilty to some charges, along with possible conditions, in consideration for reduction of the severity of the charges or dismissal of some of the charges.[8]

---

[1] Cecilie Wathne, 'Understanding corruption and how to curb it: A synthesis of latest thinking' (*Anti-Corruption Resource Centre*, 2021) 2. <https://www.u4.no/publications/understanding-corruption-and-how-to-curb-it.pdf>accessed 24 October 2021.

[2] Transparency International, 'What id Corruption' (*Transparency International*, June 2021) <https://www.transparency.org/en/what-is-corruption>accessed 24 October 2021.

[3] Anti-Corruption and Economic Crimes Act, No. 3 of 2003 s 2.

[4] United Nations Convention against Corruption (2003, UN Convention or UNCAC) Article 1.

[5] United Nations Convention against Corruption (2003, UN Convention or UNCAC) Article 5.

[6] The Leadership and Integrity Act, No. 19 of 2012 s 24.

[7] The Public Officer Ethics Act, Cap 183 Laws of Kenya s 19.

[8] USLegal, 'Plea Bargain Law and Legal Definition' (*USLegal*, December 2019) <https://definitions.uslegal.com/p/plea-bargain/> accessed 4 March 2020.

Similarly, it covers arrangements where the accused pleads guilty in order to be charged with a lesser offence or in order to receive a lesser sentence.[9] The striking of the agreement imposes certain duties on the accused breach of which is a ground for its revocation. The accused should plead guilty on a particular time, cooperate in the investigation of another offense or testify against a co-defendant.[10]

In the simplest meaning, plea bargaining is an accused person's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the prosecution for doing so.[11] But at the center of the agreement is a give-and-take covenant, which alters the rights of the state and those of the accused person during the trial. While the accused relinquishes his right to go to trial along with any chance of acquittal, the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible.[12]

Although the history of plea bargains is traceable to the United States, the practice has gradually gained acceptance globally. Plea bargains are now provided for under international instruments and its being practiced in international courts and tribunals. The International Criminal Tribunal for Rwanda, the International Criminal Court (ICC) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have provisions enabling plea bargaining.[13] Although the Statutes and Rules establishing ICTR and ICTY did not initially provide for plea bargains, the ICTY Appeals Chamber later successfully advocated for introduction of plea bargaining at the ICTY. While approving the first plea bargain agreement at the ICTY, the Appeals Chamber applauded

[9] FindLaw, 'Plea Bargains: In Depth' (*FindLaw*, November 2019) <https://criminal.findlaw.com/criminal-procedure/plea-bargains-in-depth.html> accessed 4 March 2020.
[10] USLegal (n 8).
[11] Cynthia Alkon, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems' (2010) 19 *Transnat'l L. & Contemp. Probs* 355.
[12] Robert E. Scott and William J. Stuntz, 'Plea Bargaining as Contract' (1992) 101(8) *The Yale Law Journal* 1909.
[13] Julian Cook, 'Plea Bargaining at The Hague' Vol.30 The Yale Journal of International Law 473, 504.

the benefits of plea bargaining and opined that introduction of the practice at international courts and tribunals could make significant contribution to international criminal justice.[14]

Academicians and scholars believe, and history supports them, that plea bargain has now acquired universal acceptance. Much of its achievements can be deducted from the trials at the ICTR and ICTY. While the ICTY accepted the first plea bargain in 2000, the tribunal had recorded thirteen similar bargains by 2003.[15] Similarly, the ICTR recorded 7 plea bargaining agreements between 1998 and 2011.[16] Although the ICC has not yet recorded a plea bargain so far, scholars have made a strong case on why the ICC should accept such agreements. It has been argued that acceptance of plea bargains at the ICC will be an effective tool of achieving its efficacy in administration of justice, saving its time as well as its funding.[17] Sheryn holds the same opinion that ICC ought to accept plea bargains on the condition that it observes the uppermost standards of fairness to the accused person.[18]

Modern criminal law discourses treat plea bargain agreements as an ADR mechanism. A professor of law, Gabriel Hallevy, has analyzed the idea of plea bargains in the western world as part of the broader concept of ADR.[19] He argues that a plea bargain is an alternative to conducting a full criminal trial in court and hence it is an integral part of the inclusive and broad idea of the ADR.[20] Elsewhere, scholars such as Ewulum B.E and Imolemen Ugberaese have advocated that plea

[14] Jenia Iontcheva Turner, 'Plea Bargaining and International Criminal Justice' (2017) 227.
[15] Ibid 228.
[16] International Residual Mechanism for Criminal Tribunals, 'Status of Cases, ICTR '(*UNICTR*, March 2020) <http://www.unictr.org/Cases/tabid/204/Default.aspx> accessed 4 March 2020.
[17] Volkan Mavis, 'Why should the International Criminal Court Adopt Plea Bargaining?' (2014) 5 (2) Inonu University Law Faculty 479, 481.
[18] Sheryn Omeri, 'Guilty Pleas and Plea Bargaining at the ICC: Prosecutor v. Ongwen and Beyond' (2016) 16 (3) International Criminal Law Review 480, 502.
[19] Gabriel Hallevy, 'Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? - Plea Bargains as Mediation Process between the Accused and the Prosecution' (2009) 5 (1) Original Law Review 8.
[20] Ibid 7. Also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315984>accessed 5 March 2020.

agreements ought to be treated as an instance of ADR such as mediation, arbitration and conciliation.[21] Academicians have equated the idea of plea bargains to ADR in the criminal judicial system arguing that they carry similar features of ADR.[22]

For a long time, the concept was foreign to Kenya's criminal law jurisprudential landscape. The trek towards plea bargaining agreements began in 2008 with the Attorney General's publication of the Criminal Procedure Code (Amendment) Bill which sought to amend the interpretation clause of the Criminal Procedure Code.[23] In 2018 Kenya adopted the Criminal Procedure (Plea Bargaining) Rules through Legal Notice No. 47 which breathed life into Section 137(A) to 137 (O) of the Criminal Procedure Code.[24] Subsequently, in 2019, Plea Bargaining Guidelines were published. These regulatory add-ons invariably placed the practice of plea bargaining within a formally recognized realm of the criminal process in Kenya.

1.1 Plea Bargain in Corruption Cases

In most jurisdictions, the adoption of plea bargain is guided by the nature and the seriousness of the crime. Jurisdictions outline the crimes which are open to a plea bargain as well as those that are not. In India, the procedure does not apply to socio-economic crimes like embezzlement of public funds, crimes committed against a child of 14 years and crimes committed against a woman.[25] In Pakistan, the courts place high premium on the seriousness of the offence and its

[21] Ewulum B.E, 'Alternative dispute resolution mechanisms, plea bargain and criminal justice system in Nigeria' (2017) 8 (2) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 119, 124.
[22] Imolemen Ugberaese, 'Plea Bargain and Its Effect on Criminal Justice System in Nigeria' (*Manifield Solicitors*, June 2018) <https://www.manifieldsolicitors.com/2018/09/03/comparative-analysis-of-adr-plea-bargain-and-its-effect-on-criminal-justice-system-in-nigeria/>accessed 5 March 2020.
[23] Cap 75 of the Laws of Kenya. The amendment expressly defined the concept of 'plea agreements' making the practice of plea bargaining formally recognized as part of the criminal process.
[24] Section 137A defines a plea agreement as an agreement entered by the defence and prosecution in a criminal trial.
[25]Ted. C Eze and Eze Amaka, 'A Critical Appraisal of the Concept of Plea Bargaining in criminal Justice Delivery in Nigeria' (2015) 3 (4) Global Journal of Politics and Law Research 34.

impact on the society. The procedure is jealously guarded against possible misuse by the corrupt political elites as it incorporates a severe approach to economic crimes and corruption related charges.[26] Similarly, Austria has prohibited plea bargaining in corruption offences.[27] Policy makers in South Africa have criticized plea bargains in corruption cases as being ineffective deterrence to misuse of public trust.[28]

For the longest time, Kenyan courts maintained that ADR mechanisms could not be employed on corruption cases. The position was informed by several factors majorly the impact of economic crimes on the economy and erosion of public trust. This came out conclusively in 2016 when the High Court declined to withdraw a case in which the accused had been charged with the offence of soliciting and receiving a bribe.[29] The complainant, who had reported the alleged criminal activity with the Ethics and Anti-Corruption Commission (EACC) wanted to withdraw his complainant against the accused person. The court reasoned that the nature of corruption is that they are indeed crimes against the entire population in Kenya.[30] They have negative direct impacts on the entire Kenyan population because they consist of non-delivery of public services without a payment and a loss of public trust in the Government's structures.[31]

Going by current trends, however, the Kenyan law on plea bargain does not create this demarcation especially with respect to corruption cases. Although the High Court in *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR was very clear on this issue, the current practice by the Office of the Director of Public Prosecutions (ODPP) has

[26] Ibid 35.
[27] Abiola Makinwa and Tina Soreide, 'Structured Settlements for Corruption Offences: Towards Global Standards?' *IBA Anti-Corruption Committee: Structured Criminal Settlements Subcommittee* (2018) 52.
[28] John Keen 'South Africa: Scopa 'Shocked' By Plea Bargains in Corruption Cases' *news24Wire* (14 June 2017) 11.
[29] Contrary to Section 39 (3) and Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.
[30] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR para 41.
[31] Ibid.

blurred this gap, making the Kenyan position intermittent and unstructured. In a public forum, the Director of Public Prosecutions (DPP) has opined that four types of crimes cannot be admitted to plea bargain, specifying that economic crimes are not among the four. Although his opinion has not been backed by a written law or published guidelines, the excluded crimes include sexual offences and crimes against humanity.[32]

So far, plea bargain has been employed to discharge and acquit public officers charged with cases related to corruption, bribery and misuse of public office. In 2018, the DPP entered into a plea bargain with a former senator, who had charged with abuse of office and fraud.[33] In 2019, the ODDP concluded three plea bargains with public officers who had corruptly acquired public property valued at 172 million, 3.4 million and 1 million in three different cases.[34]

Apart from contravening the High Court decision, the practice raises legitimate concerns on its possible legal implication on Kenya's quest for social justice. One of the concerns is whether the practice upholds sufficient deterrence to economic crimes namely corruption. Most of the concerns boil down to the legality and the justifiability of the practice in the Kenyan criminal justice system. The legitimacy of these concerns has been colored by Kenya's context in which the government has launched a strong fight against corruption, targeting public officials and persons holding offices of public trust. And what is more is that the practice has made Kenya's jurisprudence unsettled, intermittent and problematic with respect to rules governing application of plea bargains to economic crimes namely corruption crimes.

[32] R. Wamochie, 'Graft suspects who return money can enter plea bargain- Haji' *The Star* (25 October 2019) 4.
[33] Richard Munguti, 'Joy Gwendo freed, pays Sh 1.7m that saw her jailed' *Daily Nation* (14 December 2018) 6.
[34] Everlyne Kwamboka, 'Plea bargaining on the cards for big names as DPP seeks to cut costs, ease backlog of cases' *Standard Media* (26 October 2019) <https://www.standardmedia.co.ke/article/2001346873/plea-bargaining-on-the-cards-for-big-names-as-dpp-seeks-to-cut-costs-ease-backlog-of-cases>accessed 5 March 2020.

1.2 Statement of the Problem

In most jurisdictions, the adoption of plea bargain is guided by the nature and the seriousness of the crime. For the longest time, Kenyan courts maintained that ADR mechanisms could not be employed on corruption cases. It is expected that such an approach would assist the government in fight against corruption, targeting public officials and persons holding offices of public trust. However, going by current trends, the Kenyan law on plea bargain does not create this demarcation especially with respect to corruption cases. So far, plea bargain has been employed to discharge and acquit public officers charged with cases related to corruption, bribery and misuse of public office. And what is more is that the practice has made Kenya's jurisprudence unsettled, intermittent and problematic with respect to rules governing application of plea bargains to economic crimes namely corruption crimes. The problem of this study is that the Kenya's legal framework does not have a special regime to regulate plea bargains in corruption cases.

The practice brings into question its legality and justifiability in the Kenyan criminal justice system. The study seeks to investigate legal implication of the practice on Kenya's quest for social justice. It also seeks to investigate whether the practice upholds sufficient deterrence to economic crimes namely corruption. In addition, the study seeks to identify best practices from developed countries with respect to their approach to application of plea bargains in corruption crimes. Lastly, the study seeks to propose necessary legislative enactments with a view to making a sound legal framework on adoption of plea bargains in corruption and criminal cases.

1.3 Study Objectives

1) To investigate the theoretical and philosophical underpinnings of plea bargaining.

2) To examine the extent to which plea bargaining in corruption crimes upholds sufficient deterrence to such crimes in the Kenyan criminal justice system.
3) To investigate and identify best practices from Pakistan with respect to her approach to application of plea bargains in corruption offences.
4) To propose any necessary legislative amendments on Kenya's legal framework with respect to adoption of plea bargains in corruption offences.

1.4 Research Questions

1) What are the theoretical and philosophical underpinnings of plea bargaining?
2) To what extent does plea bargaining in corruption crimes uphold sufficient deterrence to such crimes in the Kenyan criminal justice system?
3) What best practices can Kenya learn from Pakistan with respect to her approach to application of plea bargains in corruption offences?
4) What are the necessary legislative amendments on Kenya's legal framework with respect to adoption of plea bargains in corruption offences?

1.5 Hypothesis

The study proceeds on the following hypotheses:

1) That plea bargaining is not diligently regulated to monitor prosecutorial powers failure of which breeds arbitrary sentencing discrepancies, uncertainty and erodes public accountability and transparency in criminal proceedings.
2) That allowing plea bargaining in corruption crimes has had negative legal implications on Kenya's quest for social justice and does not uphold sufficient deterrence to such crimes in the Kenyan criminal justice system.

1.6 Theoretical Framework

The theme of the study is based on the Shadow-of- trial efficacy theory. This theory has been widely used in literature to rationalize plea bargaining.[35] The theory pays a special attention to the nature of plea bargaining and the form in which it must take in order to obtain legitimacy. The theory's major tenet is the proposition that a plea bargain ought to mirror the results that would have occurred after a highly regulated trial process, but discounted to reflect the uncertainty of the process and the adjudication costs. In particular, parties to a plea bargain forecast the expected sentence after the criminal trial, reduce it by the possibility of acquittal, and consequently compromise a proportional discount.[36] The study offers a substantive discussion of the theory in chapter two.

1.7 Justification of the Study

The theme of the study is in line with the most felt necessities of the Kenyan society. First, the theme advances the Government's present fight against corruption targeting public officials and persons holding offices of public trust.[37] In this way, the study seeks to underscore the special conditions under which the practice should be adopted in a manner which upholds the necessary deterrence on economic crimes. In the same length, the work will contribute to the world of academia by filling the current gap on the legal implications of allowing plea bargain in corruption cases. It will address the legal implications of the practice on the Kenya's quest for social justice as well as upholding the requisite deterrence for such crimes.

[35] Scott W. Howe, 'The Value of Plea Bargaining' (2006) 58 (4) Oklahoma Law Review 599,600.
[36] Stephanos Bibas, 'Plea Bargaining Outside the Shadow of Trial' (2004) 117 (8) Harvard Law Review 2463, 2464.
[37] UNODC, 'UNODC welcomes President of Kenya's renewed anti-corruption pledge' (*United Nations Office on Drugs and Crime* January 2020) <https://www.unodc.org/easternafrica/Stories/unodc-welcomes-president-of-kenyas-renewed-anti-corruption-pledge.html>accessed 10 March 2020.

In addition, the work will be instrumental to the judges and other judicial officers whenever considering a plea bargain concerning a corruption or bribery offence. In these circumstances, the study will offer useful insights on the factors to consider and the guiding requirements designed to uphold the necessary deterrence for these crimes. It will also seek to help them settle the law on adoption of plea bargain in corruption cases. Furthermore, the study will aid in legal and policy reforms. It will point out the faulty provisions, as well as offering a guide on the necessary legislative enactment with a view of improving the law on plea bargains in Kenya.

1.8 Research Methodology

The study will apply various research methodologies including comparative and doctrinal research methodologies. The doctrinal approach will be useful in analysing the attributes of the Kenya's legal framework on plea bargaining with a specific emphasis on corruption crimes. Through this methodology, the study will investigate the history behind the current legal framework on plea bargaining, import of the specific legal provisions and their actual impact on the legal system. The study will also conduct a thorough review of the available primary and secondary sources of data. In particular, the study will review articles, blogs and websites, books, case law, master of law theses and international human rights instruments.

In addition, the study will undertake a critical analysis of Pakistan's legal framework on plea bargaining in corruption cases, with a view to identifying the best practices which can be drawn from her experience. The study preferred Pakistan because she has a very sophisticated system, which allows plea bargain in corruption offences but on very stringent terns which serve a severe view on corruption offences.

The choice of Pakistan for the current study is on principle. For starters, Pakistan is a common law jurisdiction just like Kenya.[38] In addition, the country has adopted a special regime for plea bargaining in corruption cases because its legal framework has restricted the application of plea bargaining to corruption cases only.[39] Further, she has a rich experience on the subject matter at hand because it has implemented the special regime on plea bargaining for the last 21 years, since the introduction of the National Accountability Ordinances in 1999.[40]

The Pakistan's regime for plea bargaining in corruption cases is by all standards a success story. Scholars have singled out the Pakistan's legal framework on plea bargaining as the most ideal participatory model of plea bargaining.[41] In addition, plea bargaining in corruption cases has acquired wide acceptance in Pakistan, with the country registering 630 plea bargains within a span of 2 years 8 months.[42] Moreover, plea bargain in Pakistan has been an effective tool of recovering public money looted or siphoned through white-collar crimes.[43]And what is more is that the country's ranking in the Corruption Perception Index has been improving significantly.[44]

1.9 Literature Review

Although there is much literature on plea bargaining, and its role in the criminal justice system internationally, there is paucity of this literature in the Kenyan context. Few persons have written about one aspect or another of the legal framework.

---

[38] Ted Eze and Eze Amaka, 'A critical appraisal of the concept of plea bargaining in Criminal Justice Delivery in Nigeria' (2015) 3 (4) Global Journal of Politics and Law Research 35.
[39] Hari Kishan, 'Darker side of plea bargaining: The worldwide scenario with future perspectives' (2018) 3 (6) International Journal of Advance Research and Development 33.
[40] Ibid.
[41] Udosen Jacob Idem, 'The Application of Plea Bargaining and Restorative Justice in Criminal Trials in Nigeria' (2019) 19 (3) Global Journal of Human-Social Science 20, 30.
[42] Sonia Ambreen Syed, 'Plea Bargain In White-Collar Crimes: An Argumentative Analysis' (2020) 11 (1) Pakistan Journal of Applied Social Sciences 73, 83.
[43] Adnan Mahmood, 'Efficacy and potency of NAB's plea bargain' *The News* (December 9 2020) 9.
[44] Nawazish Ali Asim, 'NAB committed to 'accountability of all'' *The News* (October 5 2020) 4.

Andrew Buluma writes on the import of the plea bargaining regime into the Kenya legal system and the impact it has in the legal system. He discusses the amendment of section 137 of the Criminal Procedure Code, which fundamentally sought to make this significant legal reform. He discusses the major components of the Kenyan procedure especially the DPP's consent, matters of public interest and the formalities of the agreement. However, although he argues that the procedure is useful in combating organized crimes and instrumental in the fight against corruption, he does not substantiate these general claims, leaving them exposed and unfounded.[45] In addition, he argues that the procedure cannot be used to abet corruption because the statutory procedure has effective checks and balances, which insulate it from possible misuse.

While his arguments were just visionary and future looking, they do not represent the current circumstances. Either way, much has happened since the time of the publication. One, the new constitution was later enacted, the publication of the Plea Bargaining guidelines 2019, the publication of the Criminal Procedure (Plea Bargaining) Rules 2018 and the current jurisprudence emerging from the courts and the Office of the Director of Public Prosecutions.

Apart from this, Kenya, on the most part, lacks recent jurisprudence on the subject, with most discussion happening in a pre-2010 era. For instance, Bwonwong'a in 1994[46] and Mwalili in 1997[47] reflect on the concept of plea bargaining, but only as a peripheral subject within a broader discussion on criminal justice in Kenya. Both scholars focus on descriptive aspects of the concept without indulging in in—depth appraisal. Without elaboration, Mwalili argues that plea bargaining

[45] Andrew Buluma, 'The Introduction of Plea Agreements into Kenyan Criminal Practice' (2008) 5. <https://www.academia.edu/9132783/The_Introduction_of_Plea_Agreements_into_Kenyan_Criminal_Practice>accessed 10 March 2020.
[46] Momanyi Bwonwong'a, *Procedures in Criminal Law in Kenya* (East African Publishers, 1994).
[47] Jonathan John Mwalili, 'The Role and Function of Prosecution in Criminal Justice' (1997) UNAFEI.

'increases the chances of serious crimes ending up as minor convictions which in turn may distort crime statistics, which are vital in the study of criminology.'[48]

Akintunde Adebayo analyses the appropriateness of adopting plea bargains in corruption cases in Nigeria.[49] He makes the analysis in the context of the government's fight against corruption. He argues that while the concept is laudable for some reasons, application of the concept to corruption cases must be done with caution. He writes that adoption of plea bargain in corruption cases has been criticized for offering a soft landing for senior politicians and government officials. He opines that this practice is an affront to justice and unfavorable to the government's fight against corruption. He proposes that courts and administrative agencies ought to be on the look out to ensure that the procedure is not employed to favour those guilty of financial crimes and embezzlement of public funds.[50] He warns that a contrary application would frustrate the essence of punishment especially the deterrence function.

Aborisade and Adeleke write to explain the legal implications of applying plea bargaining in high profile corruption cases in Nigeria.[51] The duo argues that the model of plea bargaining adopted by the USA is not suitable for Nigerian criminal justice system. They argue that the Nigerian current practice on plea bargain in corruption cases is an incentive to corruption, promotes social inequality and leads to injustice. On the basis of these, the duo concludes that the practice is unfriendly to Nigeria's quest for social justice. They also observe that plea bargaining in corruption cases has been advanced by the investigative inadequacies of the relevant state agencies which

[48] Ibid.
[49] Akintunde Adebayo, 'A Review of Plea Bargain Concept in the Anti-Corruption War in Nigeria' (2018) 5 (1) Journal of Legal Studies 1, 2.
[50] Ibid 13.
[51] Aborisade Richard and Adeleke Oladele, 'One Rule for the Goose, One for the Gander? The Use of Plea Bargaining for High Profile Corruption Cases in Nigeria' (2018) 12 (2) International Multi-Disciplinary Journal 1, 2.

have been occasioned by lack of capacity, inadequate funding and political interference. They opine that selective application of plea bargaining on high profile corruption cases involving social elites contribute further to issues of class and social inequality.[52]

Ibrahim Abdullahi argues that the USA' approach to plea bargaining is not suitable for the Nigeria's criminal system, due to the difference of the contextual and cultural backgrounds of the two jurisdictions.[53] He argues that the USA's model has been surrounded by much controversy in its very place of origin, which has prompted its prohibition in six states namely California, New Orleans, Alaska, Michigan, Ventura County and Oakland County. Noting these controversies, he argues that the model is not suitable for the peculiar circumstances of Nigeria. His work is very instrumental to the current research in underscoring the role of context in legal transplantation.

The other point of divergence is on the purpose of applying plea bargain in the two jurisdictions. The USA approach adopts a crime control model rather than the due process model. The crime control model employs plea bargaining primarily as a matter of expeditious convenience. On the other hand, Nigeria has adopted the due process model which places much emphasis on the due process. Whereas the due process model places justice first by granting the accused person equal protection under the law and the opportunity to defend himself, the crime control model puts more emphasis on the repression of criminal behavior than it does on justice, placing due process at the periphery.[54]

[52] Ibid 9.
[53] Ibrahim Abdullahi, 'Plea Bargaining in the United States of America: A Model for Nigeria's Criminal Justice System?' (2014) 2 (4) International Journal of Business & Law Research 99, 101.
[54] Ibid 109.

K.V. Santhy posits that India Courts have discouraged the use of plea bargaining in corruption cases.[55] She argues that the courts approach is based on the seriousness of corruption cases to the entire economy of the country. She agrees with the courts that corruption is a serious offence which defames the quality of the country, and which has serious consequences to the society.[56] Similar arguments have been collaborated by other writers, who have placed a caution on the application of plea bargain in India, especially on corruption cases. It has been argued that generally encouraging plea bargaining would encourage corruption and lower the standards of justice.[57]

Udosen Jacob argues that Pakistan has adopted a robust view on plea bargains in corruption cases.[58] He argues that the country has struck a healthy balance between the need to encourage plea bargaining in corruption cases and the need to underscore the deterrence function of criminal law. The procedure allows the accused person to return all what they had stolen from the public and regain their liberty, but at a consideration. The consideration is that the accused person will forfeit some of his political rights and have their reputation damaged.[59] Some of the forfeited political rights include being banned from holding public offices, dismissal from any public office occupied and disqualification from obtaining a credit facility from a bank.

1.10 Limitations

The study is limited in a number of ways. Due to scarcity of time, the study will not employ primary-data collection research methodologies like interview and questionnaire. As such, it will

[55] K.V.K Santhy, 'Plea Bargaining in US and Indian Criminal Law: Confessions for Concessions' (2013) NALSAR Law Review 95.
[56] Ibid.
[57] Shodhganga, 'Plea Bargaining in India' 179 <http://shodhganga.inflibnet.ac.in/bitstream/10603/28181/12/12_chapter%205.pdf.> accessed 10 March 2020. The article offers a review of the Indian case law on Plea Bargaining.
[58] Udosen Jacob Idem (n 41) 21.
[59] Ibid, 24.

be based on available literature. The research is not empirical and therefore relies heavily on theoretical data.

1.11 Chapter Breakdown

The study will comprise five chapters. Each chapter will have both an introductory and a concluding paragraph.

Chapter One: Introduction

The chapter will outline the overall trajectory of the entire study. As the preliminary chapter, it will inform the introductory part of the study. It will highlight the research problem, research objectives, hypotheses, and methodologies. The chapter will be significant in laying a basis for the rest of the study through a statement of the study objectives, research questions and literature review. The chapter will also address itself to limitations of the research study.

Chapter Two: Theoretical and Conceptual underpinnings of Plea Bargaining

The chapter will offer a thorough review of the legal theories informing the nature of a Plea Bargain. With respect to each legal theory, the chapter will identify its key proponents and their contributions to the development of the legal theory. The legal theories will be discussed in a manner to underscore the manner in which the procedure should be carried while maintaining the deterrence element crucial in the criminal justice.

Chapter Three: Kenya's Legal Framework on Plea Bargaining in Corruption Crimes

The chapter will offer a situational analysis of the Kenya's legal framework on application of plea bargaining in corruption cases. It will at first establish the Kenyan jurisprudence on application of

plea bargain in corruption cases. The theme of the chapter will be to establish the legal implication of the practice to Kenya's quest for social justice. It will also seek to establish whether the practice upholds the necessary deterrence in the criminal justice system.

Chapter Four: Pakistan's Legal framework on Plea Bargaining in Bribery Crimes

The chapter will investigate the two jurisdictions with a view to establishing best practices which Kenya can emulate from their practice on plea bargaining in bribery cases. First, it will demonstrate the rationale behind the choice of the two jurisdictions, and of course the reason behind avoidance of major jurisdictions like the UK and the USA. It will identify the positive attributes of the two jurisdictions in terms of the special conditions for allowing plea bargaining while maintain the necessary deterrence in the criminal justice system.

Chapter Five: Conclusions and Recommendations

The fifth, and final, chapter of the study will present the study summary in its conclusion while highlighting whether study objectives have been achieved. In addition, the chapter will present recommendations in the pursuit of a sensible regime which underpins criminal deterrence and social justice.

CHAPTER TWO

THEORETICAL AND CONCEPTUAL UNDERPINNINGS OF PLEA BARGAINING

2.1 Introduction

This chapter explains theoretical basis on which the study is grounded. It discusses the Shadow-of-trial Theory, and utilizes the theory as a lens to assess the implications of plea bargaining. First, the chapter explains the history of the theory and its major proponents. Secondly, it highlights the key tenets of the theory with regards to the nature of plea bargains, regulation of prosecutorial powers, the role of the judge in plea bargaining and institutional oversight during plea bargaining. Further, the discussion relooks some of the criticisms which have been raised against the theory. Furthermore, it discusses the interface between Shadow-of-Trial theory and the law of contract. Lastly, the chapter discusses the relevance of the theory and its contribution to the criminal justice system.

Theoretical Underpinnings

2.2 The Shadow-of-trial Theory

The Shadow-of-trial theory is also known as Trial-shadow theory. It is the most dominant theory used to explain the nature of plea bargains, the process of making plea bargains and the economic justification for incorporating plea bargains in criminal law. The theory has occupied a special relevance in plea bargaining discourses and it provides the dominant account of plea bargaining.[60] In its very basic form, the theory holds that plea bargaining is done in the shadow of expected trial outcomes. In principle, plea bargaining is based on the fundamental presumption that 'bargains

[60] Russell Covey, 'Signaling and Plea Bargaining's Innocence Problem' (2009) 66 WASH. & LEE L. REV 73, 77.

largely reflect the substantive outcomes that would have occurred at trial anyway, minus some fixed discount.[61]

2.2.1 History and its Major Proponents

The theory has several proponents led by William Landes. The other theorists include Bill Stuntz, Robert Scott, Stephanos Bibas and Frank Easterbrook. The history of the theory can be traced back to 1971 when William Landes came up with the first economic model of plea bargaining and which has since then been recognized as the most influential model.[62] The theory has in some academic quarters been described as 'the Economic Model of Landes.'[63] William suggested that the decision on whether to plea bargain or not is informed by five factors; the probability of conviction, the severity of the offence, the availability of evidence, attitude towards risk and trial costs versus settlement costs.[64] The theory was later advanced by Frank Easterbrook in 1983, when he incorporated agency costs and discount rates into the model.[65]

Frank's contribution with respect to the 'discounting' argument is majorly informed by two economic benefits which come as a result of entering into a plea bargain. The benefit that plea bargaining is obviously cheaper than a full trial *and* the benefit that it relieves the state its duty to finance the entire trial. Given that these two economic advantages are enjoyed by the state rather than the accused person, Frank argues that the accused should maximize on the two benefits to demand an additional discount in exchange for his plea.[66] Frank's view that the state gains more economically than the accused has been supported by other contemporary theorists like Covey

[61] Stephanos Bibas (n 36) 2465.
[62] Russell Covey (n 60) 78.
[63] Abubakar Bukar Kagu, 'Globalisation of Plea Bargaining: An Imperative Reform or A Compromise Of Ideals?' (2017) 3 (1) Strathclyde Law Review 14.
[64] William M. Landes, 'An Economic Analysis of the Courts' (1971) 14 J.L. & ECON. 61, 61.
[65] Frank H. Easterbrook, 'Criminal Procedure As a Market System' (1983) 12 J. LEGAL STUD 289, 309.
[66] Ibid.

Russell. Russell argues that by avoiding trial, prosecutors gain more that the accused persons because otherwise, the state would have borne majority of the trial costs.[67]

Other significant contributions to the theory were made in 2004, by Stephanos Bibas. Although he essentially criticized the theory as being simplistic, he did not rubbish it off. Instead, he opined that the theory should be extended to account for other external factors which indeed influence the negotiations between the accused person and the prosecutor.[68] Basically, he observes that these external factors distort plea bargaining as contemplated by the Economic Model of William. He characterizes these eternal factors as either structural impediments or psychological issues as will be discussed deeper later in the chapter.

2.2.2 The Key Tenets of the Theory

Essentially, the theory makes a fundamental assumption that parties will strike a plea bargain in the shadow of expected trial outcomes. It presupposes that rational litigants will forecast the expected trial outcome; and based on that forecast strike a bargain. The theory places a high premium on *the forecast* because it is the only basis on which the rational parties will negotiate. It also assumes that the agreed bargain will essentially make their positions better off by saving the parties the agony and the cost of going for a full trial.[69] Finally, the theory treats plea bargaining as a voluntary dispute resolution mechanism.

The theorists postulate that the contents of a particular plea bargain are determined by a combination of three key determinates which are; the expected trial sentence, the likelihood of a

[67] Russell D. Covey, 'Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings' (2008) 82 TUL. L. REV. 1237, 1247.
[68] Lucien E. Dervan, 'The Surprising Lessons from Plea Bargaining in the Shadow of Terror' (2011) 27 (2) Georgia State University Law Review 239, 252.
[69] Stephanos Bibas (n 36) 2464.

conviction and the cost implications of going for a full trial. The first factor focuses on the likely post-trial sentence.[70] It identifies the ultimate sentence which would be imposed on the accused person, assuming that the case is trial and the accused is ultimately convicted. The second factor reviews the chances of obtaining a conviction at the end of the trial. With respect to this factor, parties analyse the likelihood of the trial resulting to a conviction. The analysis is usually informed by the strength of the evidence available. It has been argued that the weakness or the strength of the prosecution's case is the most important factor.[71]

The third and last factor is on the cost implications of trying the case. This factor is underscored by the state's wish to conserve adjudication costs, especially where the parties are sure that the accused will be convicted and are almost certain on the sentence to be imposed. The factor becomes even more significant where the state, like in serious criminal offences, is mandated to hire advocates for indigent accused persons.[72]

The relationship of the three factors has been simplified into a mathematical formula. Theorists posit that the price of any plea should be the product of the anticipated trial sentence and the likelihood of conviction, discounted by some factor to reflect the resources saved by not having to try the case.[73] The price for a plea bargain increases as the probability of guilt increase.[74] Likewise, the minimum demands of the prosecutor rise proportionately with the possible sentence and the

[70] Ibid 2465.
[71] Albert W. Alschuler, 'The Prosecutor's Role in Plea Bargaining' (1966) 36 U. CHI. L. REV. 50, 58.
[72] Robert E. Scott & William J. Stuntz (n 12) 1941.
[73] Russell Covey (n 60) 78.
[74] David Bjerk, 'Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining When Defendant Guilt is Uncertain' (2007) 9 AM. L. & ECON. REV. 305, 307.

probability of conviction.[75] In addition, the model shows that the likelihood that a prosecutor will agree to a bargain is higher in circumstances where the expected penalty is smaller.[76]

2.2.3 Criticisms about the Theory

However, the theory has received considerable criticisms targeting its nature and its fundamental assumptions. But two of its criticisms have gained universal recognition and are worth special attention: 'the innocence problem' and 'the rational actor problem.' Under the innocence problem, critics argue that plea bargaining has the possibility of 'forcing' innocent defendants to accept guilty pleas. Under the second criticism, critics challenge the presumption that actors in plea bargaining are fundamentally rational.[77] Critics argue that the decision on whether to plea bargain or not has nothing to do with the rationality of the parties. Instead, they argue that the decision is influenced by other external factors other than the three factors identified by the model.[78]

The criticism on the innocence problem is well discussed in literature, and is well articulated by Oren and Lucian among other scholars. Bar-Gill points out that plea bargaining has the potential of 'forcing' an innocent accused person to accept a guilty plea.[79]Lucian *et al* similarly discusses the criticism to refer to occasions where an innocent accused person admits guilt so that they can avoid harsher punishments.[80] Though there could be other reasons explaining why an innocent person would admit guilt, scholars have attributed this to power imbalance which characterizes plea negotiations. Barnhizer argues that the power relationship between the prosecutor and the

[75] Frank H. Easterbrook (n 65) 297.
[76] WM Landes, 'An economic analysis of the courts' (1971) 14 (1) The Journal of Law and Economics 61, 64. See also Abubakar Bukar Kagu (n 63) 14.
[77] Daniel D. Bonneau and Bryan C. McCannon, 'Bargaining in the Shadow of the Trial?' (2019) West Virginia University 2.
[78] The expected trial sentence, the likelihood of a conviction and the cost implications of going for a full trial.
[79] Oren Bar-Gill & Oren Gazal Ayal, 'Plea Bargains Only for the Guilty' (2006) 49 J.L. & ECON. 353, 354.
[80] Lucian E. Dervan & Vanessa A. Edkins, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' (2013) 103 J. CRIM. L. & CRIMINOLOGY 1, 2–5.

accused person is apparently so one-sided that innocent accused persons feel inclined to admit guilt rather than go for trial.[81]

The rational actor criticism has been associated with the works of Shawn Bushway, Robert Norris, William Stuntz, Allison Redlich and Stephanos Bibas. Bushway *el al* argues that the theory's assumption of a rational actor is essentially flawed.[82] They claim that the assumption fails to account for external factors, other than the merits of the case, which too have influence on the conduct of plea negotiations.[83] Another critic, William Stuntz, similarly argues that the prosecutor's decision whether to bargain or not is usually influenced by other factors other than the facts of the case and the law. William claims that the preferences of the prosecutor and the priorities of the departments are some of the major external forces which too influence the prosecutor's decision.[84]

In light of this, William argues that prosecutors have a complicated 'utility function,' which cannot fall within the theoretical model. Instead, he believes that a prosecutor can have a personal perception on what he thinks to be a suitable sentence for a particular accused person, he may have some self-serving advantages or benefits for achieving the sentence, he may have reputation considerations in that he would want to be seen as 'tough' and may not want to be thought lenient. Based on these external factors, William concludes that the theory is not a real reflection of the plea bargaining process.[85] He opines that the best the model does is to define the opportunities

[81] Daniel D. Barnhizer, 'Bargaining Power in the Shadow of the Law: Commentary to Professors Wright & Engen, Professor Birke, and Josh Bowers' (2007) 91 MARQ. L. REV. 123, 124.
[82] Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, 'An Explicit Test of Plea Bargaining in the Shadow of the Trial' (2014) 52 CRIMINOLOGY 723, 724.
[83] Andrew Delaplane, 'Shadows cast by Jury Trial Rights on Federal Plea Bargaining Outcomes' 57 American Criminal Law Review 207, 220.
[84] William J. Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 HARV. L. REV. 2548, 2554.
[85] Ibid.

available for the prosecutors and nothing more; because it is actually the external factors which determine the goals of the prosecutor and the achieved results.[86]

This criticism has been echoed by Stephanos Bibas who argues that most plea bargains do indeed deviate from the model. He argues that the expected punishment and the strength of the evidence are not the only influencers of a bargain as claimed by the model. In other words, he posits that a plea bargain reflects much more factors than just the merits of the case at hand. Instead, he claims that many plea bargains are influenced and distorted by psychological biases and structural influences which occasion harmful bargains characterized by unfair allocation of punishment.[87] He describes the structural influences to include factors like agency costs, lawyer quality, bail and detention rules, information deficits and sentencing guidelines. In literature, these structural influences have come to be known as structural impediments.[88] On the other hand, he describes the psychological biases to include factors like self-serving biases, risk preferences, over-confidence, denial mechanisms and loss aversion.[89]

In other words, the theory underscores that a proper plea bargain should arrived at by the function of the expected penalty and the probability of success. The theorists agree that a sufficient regime for plea bargain is the one which meets the punitive role of the criminal justice system while spending fewer resources.[90] In addition, they agree that the plea discount granted to the accused person ought to be founded on the probable outcome of the trial.[91]

---

[86] Andrew Delaplane (n 83) 220.
[87] Stephanos Bibas (n 36) 2467.
[88] Daniel D. Bonneau and Bryan C. McCannon, 'Bargaining in the Shadow of the Trial?' (2019) West Virginia University 2.
[89] Stephanos Bibas (n 36) 2469.
[90] Ibid.
[91] Shawn Bushway and Allison Redlich, 'Is Plea Bargaining in the 'Shadow of the Trial' a Mirage?' (2012) 28 (3) Journal of Quantitative Criminology 437, 438.

2.2.4 The Relevance and Contribution of the Theory to the Criminal Justice System

The theory is of great significance to criminal law and the criminal justice system. For starters, it is the primary theory used to explain variation in the plea discount given to accused persons who plead guilty.[92] In addition, the theory reconciles the proof of guilty with the nature of sentence imposed. Through its mechanisms, the theory ensures that persons most likely to be found guilty of serious crimes will accordingly get longer sentences. In this way, the level of culpability is mirrored in the sentences imposed. Finally, the theoretical explanation of the model forms a basis for conducting plea bargains in criminal cases and for enhancing its use in the criminal justice system.[93] The study intends to use this theory to explain the fundamental elements and principles of a plea bargain regime. On the basis of these principles, the study will seek to analyse the extent to which the Kenyan regime conforms or deviates from it.

Conceptual Underpinnings

2.3 Regulation of Prosecutorial Powers

With time, Trial Shadow theorists have come to agree that psychological biases and structural forces do indeed vitiate the real nature of a sound plea bargaining regime. On one hand, the theorists are aware that the factors might 'help' some accused persons get a more lenient sentence. On the other hand, however, the theorists are more concerned that the factors might be prejudicial and actually 'hurt' particular classes of accused persons. In particular, Bibas feels that structural influences produce inequalities amongst the accused persons by underpunishing some accused

[92] Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, 'An Explicit Test of Plea Bargaining in the Shadow of the Trial' (2014) 52 (4) CRIMINOLOGY 723, 723.
[93] Ibid.

persons while overpunishing others. He attributes this large disparity on the wealth-status of the accused persons as well as other legally irrelevant factors.[94]

Theorists have established a causal link between the prosecutorial powers and the external forces (psychological biases and structural forces). They argue that the wide powers granted to the prosecutor create a breeding environment for the external forces to thrive and permeate the plea bargaining process. With this background, theorists have embarked on a journey to clamp the prosecutorial powers with a view to minimizing the impact of psychological biases and structural forces in plea bargaining.

For starters, theorists posit that the powers of a prosecutor in plea bargaining are susceptible to misuse. The prosecutor is the primary mover in plea bargaining and has wide discretionary powers whose exercise is practically unreviewable. The prosecutor will choose the accused person to charge, the charges to prefer against them, and whether to confer immunity on the accused.[95] And what is more is that prosecutors are not bound to justify their decisions to the public. They do not justify their charging preferences against the accused persons. In addition, they do not explain their willingness to amend the charge sheet with a view to adding more severe charges against an accused person who has declined the prosecutor's offer.[96]

The theory emphasizes that the powers of the prosecutor in the plea bargain process ought to be jealously regulated to prevent injustice. In the real sense, plea bargaining concentrates enormous power to the prosecutor by giving him the authority to charge, to try, and to sentence.[97] And although the theory presupposes that the prosecutor will employ the discretionary powers to

[94] Stephanos Bibas (n 36) 2470.
[95] Gersham in BG Stittand, RH Chaires, 'Plea Bargaining: Ethical Issues and Emerging Perspectives' (1992) 7 (2) The Justice Professional 72.
[96] Daniel S. McConkie, 'Judges As Framers Of Plea Bargaining' (2015) 26 Stanford Law & Policy Review 82.
[97] David T. Johnson, 'American Law in Japanese Perspective' (2003) 28 LAW & SOC. INQUIRY 771, 778–79.

facilitate the cause of justice, there has been a legitimate concern that the powers might generate injustice.[98] Thus, theorists have come to agree that failure to regulate the powers might cause prejudicial conduct against the accused as well as hinder the cause of justice.[99] Similarly, leaving the prosecutor's discretionary powers unregulated is a recipe for power imbalance which undermines process rights.[100]

Theorists argue that the process of entering a plea bargain should be done in a manner which underscores procedural justice and accountability. The model requires that the entire process ought to incorporate fundamental values of constitutional criminal justice namely consistency, freedom from coercion and transparency.[101]Bukar believes that failure to adhere to these constitutional values causes controversy in the way plea bargains are secured as well as inconsistency in the sentencing practices.[102] Similarly, Daniel postulates that a sound plea bargaining regime should ensure that the negotiations are done in a transparent manner and that the public is able to know why a particular concession has been made.[103]

From the foregoing, a prudent regime for plea bargaining should incorporate consistency and public transparency. Contemporary theorists advocate for a radical shift from the conventional way of plea bargaining which makes the process largely invisible and informal.[104] Roberts beliefs that consistency can be enhanced by enacting clear rules on plea bargaining. With respect to public transparency, he opines that the process should be done on record and with the involvement of the

[98] Y Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 (1) International Criminal Justice Review 22.
[99] Ibid.
[100] Abubakar Bukar Kagu (n 63) 20.
[101] Ibid 22.
[102] Ibid 23.
[103] Daniel S. McConkie (n 96) 76.
[104] Arnold Enker, 'Perspectives on Plea Bargaining' (1967) in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115.

court.[105] Similarly, Sussman argues that plea bargaining should be based on a regularized advocacy procedure which underscores consistency, accountability and transparency.[106]

In addition, contemporary theorists suggest that the external factors identified by major critics can be redressed by a more prudent regulation on plea bargaining. They agree that law is the most effective tool to streamline the practice with the three determinants originally proposed by William. Alkon beliefs that a special regulation designed to monitor and restrict prosecutorial powers and conduct will do.[107] Others have argued that the current crisis facing plea bargaining can only be addressed through better regulations enacted with a view to minimizing the influence of structural influences and psychological biases.[108] Susan postulates that the law should concern itself more with the procedural aspects of plea bargaining and incorporate reforms which enhance certainty and uniformity of the procedure.[109]

2.4 Legitimacy in the Discounting of Sentences

Theorists propose that a plea bargaining regime ought to uphold legitimacy and fairness of the criminal justice system. Proponents insist that the process should be transparent for it to acquire legitimacy in the eyes of the general public, the victims of the crime as well as the accused person.[110] They posit that legitimacy can be enhanced by publication of guiding legal instruments like prescribed sentencing guidelines. With such reference points, the regime would enhance fair

[105] Jenny Roberts, 'Effective Plea Bargaining Counsel' (2013) 122 YALE L.J. 2650.
[106] Robert M. Sussman, 'Restructuring the Plea Bargain' (1972) 82 YALE L.J. 286, 287.
[107] Cynthia Alkon, 'What's Law Got to Do With It? Plea Bargaining Reform after Lafler and Frye' (2015) 7 (1) Texas A&M Law Scholarship 15.
[108] Stephanos Bibas, 'Regulating the PleaBargaining Market: From Caveat Emptor to Consumer Protection' (2011) 99 CAL. L. REV. 1117.
[109] Susan R. Klein, 'Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining' (2006) 84 TEX. L. REV. 2023, 2042-50.
[110] Gregory M. Gilchrist, 'Plea Bargains, Convictions and Legitimacy,' (2011) 48 AM. CRIM. L. REV. 143.

ness to accused persons because they would predict their criminal sentences with certainty and hence be well equipped to bargain effectively.[111]

A proper regime ought to marry the seriousness of the offence with the harshness of the sentence. Theorists posit that a bargain should underscore the punishment role of criminal law by granting sentences based on the severity of the offence. The system should ensure that guilty accused persons are not allowed to get away with unduly lenient punishment.[112] Similarly, the gravity of the offence should be reflected in the terms of the plea agreement.[113] Proponents insist that the system should place more premiums on the gravity of the crime, so that accused persons do not get disproportionately harsh or disproportionately lenient sentence.[114] Such a regime, it has been suggested, should enable the courts to review and reject extremely lenient bargains.[115]

In addition, a sound regime ought to minimize arbitrary sentencing disparities by investing in uniformity and certainty in the discounting of sentences. Recent contributions to the theory insist that the regime should curb wide disparities on the sentences granted. Turner posits that the problem of wide disparities can be addressed by imposing limits on plea discounts.[116] It is believed that these measures will incorporate accuracy and fairness into the process. A prudent system should clamp the discretion of the prosecutors by imposing statutory limits on the charges and the sentences they offer as a consideration for a guilty plea. The discounting process ought to be

[111] Stephanos Bibas (n 36) 2466.
[112] Jenia I. Turner, 'Plea Bargaining' (2017) Reforming Criminal Justice 76.
[113] Sergio Herzog, 'Plea Bargaining Practices: Less Covert, More Public Support?,' (2004) 50 CRIME & DELINQ. 590, 590-92.
[114] Jenia I. Turner (n 112) 75.
[115] Oren Gazal, 'Partial Ban on Plea Bargains' (2005) Law & Economics Working Papers, Law & Economics Working Papers Archive: 2003-2009 p. 54.
[116] Jenia I. Turner (n 112) 76.

regulated with a view to discouraging enormous discounts which account for unjustified sentencing disparities.[117]

2.5 The role of Judges in Plea Bargaining

The orthodox proponents of the theory prescribe that judges and other judicial officers should have a minimal role in plea bargaining. They posit that the role of a judge is limited to ensuring that accused persons appreciate what they are just about to enter into and ensuring that they are doing so voluntarily.[118] The theorists postulate that judges have no powers to review or amend a plea agreement. Thus, in plea bargaining, a judge has no more duties than sentencing the accused persons according to their agreement with the prosecutor. Fundamentally, the judicial officer is there to rubberstamp the plea agreement[119] and his involvement is that of a passive verifier of plea agreements.[120]

This proposition has had real and practical implication on the role of the court in sanctioning negotiated sentences. Ordinarily, the role of the court will vary with the form taken by the sentence negotiation. A sentence bargain can take one of two distinct approaches.[121] The first approach is where the bargain takes the form of agreed sentence recommendations. Under this approach, the court is free to disregard the recommended sentence and impose a higher one instead.

The second approach is where the parties will agree on a binding sentence. For this approach, the court can either approve or reject the sentence. Rejection of the sentence allows the accused person

[117] Ibid 98.
[118] Daniel S. McConkie (n 96) 66.
[119] Stephanos Bibas (n 108) 1138.
[120] Jenia Iontcheva Turner, 'Judicial Participation in Plea Negotiations: A Comparative View' (2006) 54 AM. J. COMP. L. 199, 201-02, 206.
[121] Oren Gazal, 'Partial Ban on Plea Bargains' (2005) Law & Economics Working Papers, Law & Economics Working Papers Archive: 2003-2009 p. 54.

to withdraw the guilty plea.[122] Under both approaches, the role of the court is very limited because the most the court can do it to reject or approve the agreement as presented and as such it cannot edit or modify the negotiated sentence.

2.6 Towards a Judge-Centered Approach

However, contemporary scholars have criticized the model's allocation of duties between the prosecutor and the judge. The model has been faulted for over relying on prosecutors while snubbing judges. They argue that donating too much influence on the prosecutors while being mean to the judges might occasion lack of accountability and transparency in plea bargaining.[123] In other words, they claim that a regime that mounts much prosecutorial discretion while providing limited opportunities to exercise judicial discretion diminishes the ability of the judge to shape the outcome of the case.[124] These criticisms echo Sussman who had earlier on pointed out that plea agreements virtually circumscribe or preempt the ability of the courts to exercise their discretion to sentence accused persons.[125]

Recent contributions to the theory suggest that the trial court should play a central role. They argue that judges should have an active role to play because they are better at judging and sentencing, thanks to their institutional role.[126] The most compelling justification for their active involvement is that unlike prosecutors, judges are bound and used to giving reasons for their decisions, and their

[122] Ibid.
[123] Daniel S. McConkie (n 96) 66.
[124] Because prosecutors choose the charges and sentencing is largely guideline-driven, their discretion shapes case outcomes more than judges' discretion does.
[125] Robert M. Sussman, 'Restructuring the Plea Bargain' (1972) 82 YALE L.J. 286, 288-89.
[126] Daniel S. McConkie (n 96) 75-76.

justifications are open to public scrutiny.[127] Similarly, McConkie argues that the judge should have a chance to consider the unique circumstances of the case.

He opines that placing the court at the center will be helpful for two reasons. First, this is a pragmatic approach which will enable the court make a public analysis of the facts and sentence accordingly. Second, the approach would mitigate chances of undue coercion because the judicial officers will have an opportunity to familiarize themselves with the case.[128] This way, the judge will analyze the strength of the prosecution's case with a view to discerning whether the prosecutor was being fair and realistic with his proposals in the plea bargain.[129]

2.7 Institutional Oversight in Plea Bargaining

For more and efficient oversight, the theory requires that plea bargaining should incorporate views of other key stakeholders in the criminal justice system. Recent contributions to the theory postulate that the process should employ structures through which interest groups are kept posted about the progress of criminal cases. Theorists posit that disposition of cases through plea agreements should be a public process, which involves crime victims, bar organizations, crime witnesses, trial and appellate judges, scholars, concerned members of the affected community, judges and journalists. It is expected that the involvement of these groups will enhance oversight on the powers of the prosecutor.[130]

The importance of the oversight cannot be overemphasized. It will go a long way in ensuring compliance with the Shadow-of-Trial theory as was initially propounded by William Landes. In

[127] U.S. Sentencing Comm'n, (2011) Special Report To Congress: *Mandatory Minimum Penalties In The Federal Criminal Justice System* 96-97.
[128] Ibid 65.
[129] Ibid. The court's analysis will help the judge discern whether the government was offering a steep discount off of a potentially draconian post-trial sentence to compensate for the weakness of its case.
[130] Daniel S. McConkie (n 96) 82-83.

particular, the stakeholders will ensure that the conduct of the prosecutor is influenced exclusively by the five key determinants originally suggested by Landes' economic model.[131] Conversely, the stakeholders will also downplay the external forces which might influence the prosecutor's decision to opt for a plea bargain.

2.8 The Interface between Shadow-of-Trial theory and the Law of Contract

The Shadow of Trial theory borrows very much from the law of contract. For starters, the Economic model defines a plea bargain as *a contract* in the shadow of expected trial outcomes.[132] Frank, who is a leading proponent of the theory, argues that a plea bargain is a just another type of a contract. Thus, just like any other contract, he concludes that it should be subjected to or regulated by common law principles governing contracts.[133]

Seemingly, proponents of the Shadow-of-trial theory have been influenced by the doctrines of the classical law of contract, especially on characterizing the negotiations between the prosecutor and the accused person. Robert *et al* examines the concept of plea bargaining through lenses of conventional law of contract.[134] In addition, the idea that plea bargains should meet some fairness standards and enhance efficacy is largely a borrowed concept of contract law.[135]

Also common between the two is the effect of factors negating or vitiating a contractual agreement. The law of contract dictates that a simple contract must be free from vitiating factors like fraud

[131] As discussed up in the study, William suggested that the decision on whether to plea bargain or not is informed by five factors; the probability of conviction, the severity of the offence, the availability of evidence, attitude towards risk and trial costs contrasted with settlement costs. *See* William M. Landes, 'An Economic Analysis of the Courts' (1971) 14 J.L. & ECON. 61, 61.
[132] Lauren Clatch, 'Shining a Light on the Shadow-of-Trial Model: A Bridge Between Discounting and Plea Bargaining' (2017) Minnesota Law Review 923, 944.
[133] Frank H. Easterbrook, 'Plea Bargaining is a Shadow Market' (2013) 51 DUQUESNE L. REV. 551, 551
[134] Robert E. Scott & William J. Stuntz (n 12) 1912.
[135] Daniel D. Barnhizer, 'Bargaining Power in the Shadow of the Law: Commentary to Professors Wright & Engen, Professor Birke, and Josh Bowers' (2007) 91 MARQ. L. REV. 123, 128.

and coercion which essentially eat into the efficacy and the fairness of the economic transaction.[136] The presence of these factors in a contract calls for the contract to be avoided or rescinded. Similarly, the presence of coercion or fraud in plea bargaining necessitates abolition of the plea bargain.[137] Robert argues that such abolition will not be based on constitutional law but rather on the law of contract and principles of contracts.[138]

Another common element is the common law principles on freedom of contract. Easterbrook reasons that just as a person has an unconditioned right to enter into a contract, so does an accused person have the right to strike a deal with the prosecutor.[139] Scholars agree that under contract law, a person can bargain their entitlements away for value.[140] They opine contract law allows persons to contract away their constitutional entitlements since the freedom to contract is an overriding presumption.[141]

Relating this to the context of plea bargaining, scholars argue that an accused person has the freedom to bargain away his constitutional right to a trial. Denying the accused this freedom would be unfair, inefficacious and burdensome for the accused person because he would as a result of the denial loss their precious time, loss money in the process in terms of costs and loss the opportunity to get a reduced sentence.[142]

Similarly, theorists employ contract-law-based arguments to justify why courts should intervene and disapprove certain plea bargain agreements. In contract law, the requisite contractual choice requires a contracting party to make a rational, free and informed choice, without which a contract

[136] Lauren Clatch (n 132) 941.
[137] Robert E. Scott & William J. Stuntz (n 12) 1931.
[138] Ibid.
[139] Frank H. Easterbrook, 'Plea Bargaining As Compromise' (1992) 101 YALE L.J. 1969, 1978.
[140] Robert E. Scott & William J. Stuntz (n 12) 1915.
[141] Lauren Clatch (n 132) 941.
[142] Robert E. Scott and William J. Stuntz (n 12) 1913.

cannot be formed. Conversely, it has been argued that a plea bargain in which the accused is trading off their constitutional entitlements must satisfy the three elements; rational, free and informed choice.[143] Just as a judge will not sanction an unconscionable bargain, theorists argue that a court should not recognize a plea bargain in which the accused person did not make a rational, free and informed choice. Approving such plea bargains is equivalent to condoning disenfranchisement of the accused person.[144]

Furthermore, challenges of standard form contracts and market monopolies operate in plea bargains. Under contract law, courts will step in to protect parties where standard form contracts coupled with market powers operate to the detriment of one party.[145] One such market power is market monopoly which by its very nature constrains the freedom of the buyer in a material way.[146]

Conversely, theorists have argued that the prosecutor has a monopoly on plea bargaining and that monopoly status might serve to disenfranchise an accused person. Easterbrook opines that the prosecutor may misuse their monopoly status by imposing a harsh penalty given that the accused person does not have an alternative prosecutor to bargain with.[147] In addition, the Shadow of Trial theorists argue that the monopoly of the prosecutor with respect to the plea bargaining eats into the contractual choice of the accused person.

2.10 Conclusion

The chapter concludes that the theoretical and conceptual underpinnings of the most ideal legal regime champions prudent regulation of plea bargaining processes. Essentially, the theory makes

[143] Robert E. Scott and William J. Stuntz (n 12) 1918.
[144] Lauren Clatch (n 132) 942.
[145] Henningson v. Bloomfield Motors, Inc., 161 A.2d 69, 87 (N.J. 1990).
[146] Lauren Clatch (n 132) 942.
[147] Frank H. Easterbrook (n 65) 311.

a fundamental assumption that parties will strike a plea bargain in the shadow of expected trial outcomes. It presupposes that rational litigants will forecast the expected trial outcome; and based on that forecast strike a bargain. The theorists postulate that the contents of a particular plea bargain are determined by a combination of three key determinates which are; the expected trial sentence, the likelihood of a conviction and the cost implications of going for a full trial. However, two major criticisms have been raised against the theory: 'the innocence problem' and 'the rational actor problem.' Under the innocence problem, critics argue that plea bargaining has the possibility of 'forcing' innocent defendants to accept guilty pleas. While as under the second criticism, critics challenge the presumption that actors in plea bargaining are fundamentally rational.

The discussion reveals that a proper plea bargaining regime ought to uphold legitimacy and fairness of the criminal justice system, and that it ought to marry the seriousness of the offence with the harshness of the sentence. The theory advocates that the powers of the prosecutor in the plea bargain process ought to be jealously regulated to prevent injustice. Theorists argue that the process of entering a plea bargain should be done in a manner which underscores procedural justice and accountability. They posit that a prudent regime for plea bargaining should incorporate consistency and public transparency. In addition, contemporary theorists suggest that the trial court should play a central role in plea bargaining, showing a radical shift from the older proponents who seemed to suggest that judges and other judicial officers should have a minimal role in plea bargaining. For more and efficient oversight, the theory further requires that plea bargaining should incorporate views of other key stakeholders in the criminal justice system.

CHAPTER THREE

KENYA'S LEGAL FRAMEWORK ON PLEA BARGAINING IN CORRUPTION CASES

3.1 Introduction

The chapter offers a situational analysis of the Kenya's legal framework on application of plea bargaining in corruption cases. The objective of the chapter is two-fold. First, it seeks to ascertain the efficacy of Kenya's legal framework on plea bargaining in achieving deterrence in corruption cases. Second, it seeks to establish whether or not the current jurisprudence in this area enhances proper administration of justice, social justice and public interest considerations in the prosecution of economic crimes in Kenya. Lastly, the chapter examines the impact of the current jurisprudence on the government's present agenda on the fight against corruption and misuse of public trust.

3.2 A General overview of Kenya's legal framework on Plea Bargaining

Kenya has a relatively basic legal framework on plea bargaining. The framework is buttressed on the Constitution 2010, the Criminal Procedure Code[148] and the Plea Bargaining Rules, 2018.[149] The right of an accused person to enter into a plea bargaining can be associated with several constitutional principles including the principle of access to justice,[150] and the right to fair hearing.[151] In addition, courts are also bound to encourage and promote ADR mechanisms in criminal cases including mediation and reconciliation.[152] However, the most substantive law on plea bargaining is the Criminal Procedure Code, which outlines the process of initiating a plea

[148] The Criminal Procedure Code, Cap 75 Laws of Kenya.
[149] The Criminal Procedure (Plea Bargaining) Rules, 2018.
[150] The Constitution of Kenya, 2010 Article 48.
[151] The Constitution of Kenya, 2010 Article 50.
[152] The Constitution of Kenya, 2010 Article 159 (2) (c).

agreement, the role of the victim, the obligations of the accused person and the legal effect of a plea agreement once adopted by the court.[153]

The legal framework offers a clear apportionment of roles amongst the key players in the plea bargaining process. The court ought not to participate in the plea negotiation[154] and the prosecutor has the sole discretion on whether or not to enter into a plea agreement.[155] The prosecutor is required to consult with investigating officer and the victim.[156] In addition, the prosecutor is required to consider the interests of the community, and the personal circumstances of the accused person. But most importantly, the prosecutor is bound to have due regard to the nature of the crime and the circumstances relating to the offence.[157] Furthermore, the plea agreement should be in writing. Moreover, plea bargaining does not apply to crimes against humanity, war crimes, offences of genocide and offences under the Sexual Offences Act, 2006.[158]

To some extent, the Kenya's legal framework has mechanisms of ensuring transparency in the process of negotiating and finalizing a plea bargain. Victims have a right to give their views in any plea bargaining.[159] This concept of transparency can even be traced to the pre-2010 constitutional dispensation. History demonstrates that the Attorney General embraced some level of consultation and participation of relevant stakeholders before adopting a plea bargaining agreement. During the prosecution of Kamlesh Pattni for corruption crimes arising from the Goldenberg affair, his request

[153] The Criminal Procedure Code ss 137A-137O.
[154] The Criminal Procedure Code s 137C
[155] The Criminal Procedure (Plea Bargaining) Rules, 2018 rule 7 (2).
[156] The Criminal Procedure Code s 137D
[157] Ibid.
[158] The Criminal Procedure Code 137N.
[159] The Victim Protection Act, s 9 (1) (c).

for a plea bargain was copied to the Central Bank of Kenya, the Treasury and the Police for their observations and comments.[160]

The courts have upheld the independence of the DPP in the negotiation process by not interfering or questioning his discretion on whether or not to accept a plea agreement. The jurisdiction of the court in these matters is restricted to satisfying itself that the DPP has complied with the statutory steps set out for plea bargaining.[161] Thus, the court cannot fault or question the decision of the DPP to terminate plea negotiations. In addition, the DPP's decision on whether or not to accept a plea agreement is not amenable to judicial review by way of an order of certiorari.[162]

The courts have overtime generated a robust jurisprudence on plea bargaining with regards to the role of the court. The courts ought not to participate in the plea negotiations but the DPP is required to file the agreement in court. A plea bargain is not binding on the court and hence the court has the sole discretion of accepting or declining to adopt the plea agreement.[163] Importantly, the plea agreement acquires its binding nature upon adoption by the court.[164]The state is not bound to enter into a plea bargain agreement with an accused person.[165] The law leaves in open for the prosecutor and the accused person or their legal representative to enter into a plea bargain agreement.[166]

Kenyan prosecutors generally appreciate the concept. They adopt plea bargaining in almost all nature of cases like murder,[167] manslaughter[168] and abuse of office among others.[169] Even though

[160] *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR 13.
[161] Ibid para 48.
[162] Ibid para 43.
[163] *Republic v David Kinyua Gachoi* [2018] eKLR 6.
[164] *Republic v Joy Adhiambo Gwendo* [2018] eKLR
[165] *Florence Wanjiku Muiruri v Republic* [2020] eKLR 14.
[166] Aisha Abdallah, 'Anti-Bribery & Corruption Guide' (*ALN* 2019) 13 <https://www.africalegalnetwork.com/wp-content/uploads/2019/05/ALN-Anti-Bribery-Corruption-Guide-2019.pdf> accessed 8 February 2021.
[167] *Republic v I S O* [2018] eKLR; *Republic v Isaiah Goro Maloa* [2020] eKLR
[168] *Republic v Emily Jepyator Ngetich* [2017] eKLR
[169] *Republic v Joy Adhiambo Gwendo* [2018] eKLR

plea bargaining in now being applied to corruption cases,[170] this has not always been the case. As late as 2013, plea bargaining in corruption matters had not acquired acceptance from Kenyan prosecutors. The prosecutors were very cautious and restrictive in allowing plea agreements for cases touching on abuse of public office, embezzlement of public funds, and corruption cases. While declining a plea bargain offer in *Republic v. Attorney General Ex parte Kamlesh Mansukhlal Damji Pattni*, the DPP observed that the crime under trial was a matter of great public interest which ought to be allowed to go to full trial.[171]

3.3 Courts' Special Treatment for Corruption Cases

The Kenya's legal framework creates a demarcation between offences which are open to plea bargaining and offences that are not. Statute laws expressly provide that plea agreements cannot be adopted in crimes against humanity, war crimes, offences of genocide and offences under the Sexual Offences Act.[172] However, jurisprudence emanating from Kenyan courts seems to lengthen the list of offences that are not open to plea bargaining by adding corruption cases into the list.

The jurisprudence can be traced to the case of the *DPP v Nairobi Chief Magistrate's Court and Another*,[173] in which the High Court refused to uphold a reconciliation and withdrawal of a case where the accused had been charged with the offence of soliciting and receiving a bribe.[174] The case was founded on a complaint which had been registered with the EACC against the accused person. During the trial at the Magistrate's court, however, the complainant decided to withdraw

[170] Richard Munguti, 'Joy Gwendo freed, pays Sh 1.7m that saw her jailed' *Daily Nation* (14 December 2018) 6. *See also*, Everlyne Kwamboka, 'Plea bargaining on the cards for big names as DPP seeks to cut costs, ease backlog of cases' *Standard Media* (26 October 2019) <https://www.standardmedia.co.ke/article/2001346873/plea-bargaining-on-the-cards-for-big-names-as-dpp-seeks-to-cut-costs-ease-backlog-of-cases>accessed 5 March 2020.
[171] *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR 28.
[172] Government Printers (2018), Criminal Procedure Bench Book 42.
[173] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR.
[174] The Anti-Corruption and Economic Crimes Act, 2003 s 39 (3) and 48.

his complaint against the accused person. The trial court allowed the withdrawal due to reasons surrounding section 176 of the CPC and Article 159 (2) (c) of the constitution, both of which call for promotion of ADR in criminal cases.

The magistrate court's decision to withdraw the case was however set aside by the High Court on public policy reasons. Through its twelve paged judgment, the High court established key legal principles which have since had great significance in the prosecution of economic crimes in Kenya. The main finding was that the economic crime was not perpetrated against the complainant individually, but it was rather a crime against the Kenyan people, and hence the complainant did not have the capacity to pardon the accused person to the ends that the bribery charges against the accused should be withdrawn.[175]The High Court reasoned that the fight against corruption and prosecution for bribery and economic crimes is an issue of public interest and concerns the administration of justice.[176]

The restraint approach to adopting plea bargaining in corruption cases is not new in Kenya, as similar jurisprudence was available even before the promulgation of the Constitution 2010. During the trial of Kamlesh Pattni for corruption charges, the DPP declined an offer for plea bargaining, on grounds that grand corruption scandals are matters of great public interest which ought to be allowed to go to full trial.[177] And what is more is that at the time of the refusal, the accused person had already restituted the government by handling over the Grand Regency Hotel Ltd.[178]The accused had also restituted Kshs. 24 billion and the receipt of the sum had been acknowledged by the CID, the Treasury and the CBK. Again, all concerned parties who had been invited for their

[175] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR 41.
[176] Ibid 64.
[177] *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR 28.
[178] Ibid, para 25. This was pursuant to consent agreements with the Central Bank of Kenya and the Kenya Anti-Corruption Commission (now defunct).

comment were agreeable to the plea bargain.[179] Similarly, the ODPP later in 2020 declined to approve a plea bargain of a public officer who had been charged with the offence of receiving a bribe.[180]

In the spirit of the restraint approach, courts have handled complainants of corruption cases in a different and more cautious manner than they do to complainants of other criminal cases. Unlike other criminal cases, a complainant in a corruption case does not have the power to withdraw the matter or the charges against the accused person. This rule was first established in *DPP v Nairobi Chief Magistrate's Court and Another*, where the court held that the complainant in a corruption case is the state and that it is only the state that can apply for any withdrawal.[181] The rule has been applied in subsequent cases, notably in *Florence Wanjiku Muiruri v Republic*,[182] where the court held that the conduct of a complaint would not be a factor to take into account when sentencing public officers charged with soliciting and taking a bribe.[183]

This was also demonstrated during the prosecution of Kamlesh Pattni where the DPP declined to approve a plea bargain, even though the complainant, being the CBK, had indicated that it had no further claims against the accused person. Also, the fact that the CID, KACC, and the CBK had abandoned their interests in pursuing Kamlesh Pattni in civil and criminal proceedings was not a guarantee that his request for plea bargain would be accepted.[184]

And perhaps to drive the message home, courts have in several instances been less lenient to corrupt public officers. This was demonstrated in the case of *Alison Odera Mkangula & 2 others*

[179] *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR 25.
[180] *Florence Wanjiku Muiruri v Republic* [2020] eKLR 3.
[181] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR 47.
[182] *Florence Wanjiku Muiruri v Republic* [2020] eKLR
[183] Ibid, para 14.
[184] *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR 42.

v Ethics & Anti-Corruption Commission,[185] where a defendant admitted stealing and embezzling public funds. The defendant sought more time to repay the stolen funds in form of installments, within the meaning of Order 21 Rule 12 of the Civil Procedure Rules.[186] However, the court opined that the benefits under this provision should not be extended to persons who steal from the public.[187] It observed that it would be inappropriate for persons to embezzle public funds and then seek to convert the funds into some kind of 'contract sum' that can be repaid in installments.[188]

Another distinction is that corporations charged with corruption are required to appear and plead by their directors, rather than through their legal representatives. Even though corporations in other jurisdictions are allowed to take plea by their legal representatives, Kenyan courts have created an exception to this practice where a corporation is facing corruption charges. The exception is based on public interest and it is in response to Kenya's particular and peculiar circumstances where economic crimes have impoverished the country and left many Kenyans in poverty.[189] As a result, such pleas by a legal representative have been set aside for being improper and irregular, and the directors have been ordered to take the plea instead. Courts believe this is an effective way of dealing with corruption matters and hopefully deterring the social ill.[190]

[185] *Alison Odera Mkangula & 2 others v Ethics & Anti-Corruption Commission* [2020] eKLR.
[186] The Civil Procedure Act, Cap 21, Laws of Kenya.
[187] *Alison Odera Mkangula & 2 others v Ethics & Anti-Corruption Commission* [2020] eKLR 31.
[188] Ibid. It should be noted that the court nonetheless allowed the defendant to repay the decretal amount in installment, for his attempt to rediscover integrity and for accepting that he took funds that did not belong to him. Importantly, the court maintained that the defendant hardly merited the consideration.
[189] *Republic v Henry Rotich & 2 others* [2019] eKLR 36.
[190] Ibid. The Court held that it cannot be in the interests of fighting corruption that the alleged corporate accomplices of individual perpetrators of economic crimes remain in the shadows and hide behind legal representatives when such matters come to trial.

3.4 Public Interest, Social Justice, Administration of Justice and Plea Bargaining

Kenyan prosecutors discourage adoption of ADR in matters of public interest and administration of justice. This has been common where the offence in question involves more that the persons directly affected by the offence. This was demonstrated in *Mary Kinya Rukwaru v ODPP & another*,[191] where the accused had been charged with causing death by dangerous driving. Although the accused and the complainant had agreed on payment of compensation and reconciliation, the DPP opposed termination of proceedings on grounds of public interest, and instead preferred full trial of the matter. The DPP reasoned that the offence was a serious offence, it involves more than the complainant and that its consequences are borne by the whole society.[192]

Courts have held that resolution of corruption cases through ADR undermines key constitutional principles and vitiates fair and complete administration of justice. It has been held that adoption of ADR in corruption cases violates the Constitution, especially its principles on social justice, accountability and integrity. In addition, it has been held that adoption of ADR in crimes affecting the entire populace does not engender just and effective determination of the matter.[193]Lastly, courts have observed that matters of economic crimes should be resolved by appropriately determining the criminal charge against the accused person in a complete and fair criminal trial process.[194]

Kenyan courts have underscored the peculiar nature of corruption cases which render them unsuitable candidates for plea bargaining. First, corruption cases are economic crimes, which are crimes against the entire Kenyan population. Second, the impact of the crime goes beyond the

[191] *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another* [2016] eKLR
[192] Ibid, para 31.
[193] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR, para 59.
[194] Ibid, para 58.

complainant and spills over to the entire Kenyan populace as it involves loss of public trust in government structures.[195] Lastly, they are crimes against the collective basic tenets of democracy as they erode the faith of people in the administration of justice.[196]

The courts' severe approach to economic crimes is majorly informed by its long term impact on the national economy and its prejudicial effect on social-economic rights. The courts have noted that corruption crimes have deleterious effect as well as devastating consequences on the country's social and economic fabric.[197] It has also been observed that economic crimes are bad for the national economy since they entail non-delivery of public services without payment.[198]

3.5 The Inefficacy of the framework

The Kenya's legal framework does not have enough safeguards responding to the peculiar nature of corruption cases. The law provides few structures for attaining consultation and transparency in the plea bargaining process. The prosecutor is required to consult with the investigation officer and the victim.[199] The prosecutor is also required to give due regard to the nature of and the circumstances relating to the case and the interests of the community.[200] These safeguards serve best with respect to other crimes, but do not respond to the unique nature of corruption cases, which have diverse impact on the national economy and the fiduciary nature of public office.

The courts have been unpredictable in ensuring the formal aspects of plea agreements in matters concerning corruption. Even though the law requires that a plea agreement should be in writing, courts has in some instances accepted plea bargains made orally. This was the case in *Joyce*

[195] Ibid, para 41.
[196] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR 2.
[197] *Florence Wanjiku Muiruri v Republic* [2020] eKLR 14.
[198] *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another* [2016] eKLR 41
[199] The Criminal Procedure (Plea Bargaining) Rules, 2018 rule 7 (1) (a) and (c).
[200] Ibid, rule 7 (1) (b).

Gwendo v Chief Magistrate's Court[201] where, during plea negotiations, the accused agreed to compensate the victim but the final agreement submitted to the court did not have a provision to that effect. As a result, the proposal to offer compensation was made in court verbally, upon which the court gave directions with regards to the manner of making the installments.[202] If the practice were to go down that road, then the process would lose objectivity and as a result the public will not be able to critique the integrity, accountability and transparency of the plea bargaining process.

In addition, more uncertainty in this area has been occasioned by the ODPP's list of 'bare minimums' which is not based in law or any policy. The DPP has come up with a criterion for admitting corruption cases to plea bargaining agreements.[203] One of the conditions is that the person must return three times what they have looted. The other condition is that the accused person must serve at least 6 months imprisonment.[204] While these conditions are well-intended to ensure that plea bargain is not an easy way out, and not a green card to avoiding the law and condoning the social ill, these conditions are not based on any law or any published policy. At least the ODPP's bare minimum contradicts the ACECA, which requires persons convicted of corruption offences to pay a mandatory fine equal to two times the benefit they received or the loss they occasioned to any other person as a result of their corrupt conduct.[205]

Similarly, the Kenya's policy framework for prosecution of corruption and economic crimes is deficient in several aspects. Even though the government has enacted several guidelines on plea bargaining generally, the guidelines do not give any special attention to corruption crimes. The

[201] Chief Magistrate's Court at *Nairobi Anti Corruption Division & 2 others; Kisumu East Cotton Cooperative Society (Interested Party)*. The accused had been charged with five counts and one of them was abuse of office contrary to section 46 as read with section 48 (1) (a) of the Anti Corruption and Economic Crimes Act No. 3 of 2003.
[202] Ibid, para 31.
[203] NTV Kenya, 'High profile individuals in graft discreetly approach DPP for plea bargain pacts' (*NTV Kenya*, October 2019)<https://www.youtube.com/watch?v=PZ1ezn4dkZI>accussed 8 February 2021.
[204] Ibid.
[205] ACECA s 48.

national policy on anti-corruption does not issue guidelines on how to conduct plea bargaining in corruption cases.[206] The Plea Bargaining rules of 2018 are very general and apply to all crimes.[207] In addition, the DPP's plea bargaining guidelines published in 2019 do not offer special treatment to corruption cases.[208] But on a rather positive note, the national policy on anti-corruption already appreciates the special nature of these cases and suggests that the state should formulate plea bargain regulations.[209] The policy also proposes that the public be sensitized on the application of plea bargain agreements in corruption cases and the role of citizens in these matters.[210]

This is not the first time that policy makers are sending signals on the need for special rules on plea bargaining in corruption cases. In 2015, a taskforce which investigated on better ways of combating economic crime and corruption in Kenya recommended the enactment of special guidelines on plea bargaining.[211]Similarly, the international community has also recognized the need for specialized rules guiding plea bargaining in corruption cases in Kenya. A country review report proposes that Kenya should adopt special guidelines to ensure adequate predictability and transparency of plea bargains in corruption cases.[212]

3.6 The need for a More Structured Public Engagement and Participation

[206] Government Printers (2018), National Ethics and Anti-Corruption Policy, Sessional Paper No. 2 of 2018 p. 27.
[207] The Criminal Procedure (Plea Bargaining) Rules, 2018. (Legal Notice No. 47)
[208] Government Printer (2019), Plea Bargaining Guidelines. <https://www.odpp.go.ke/wp-content/uploads/2019/10/ODPP-Plea-Bargaining-Guidelines.pdf>accessed 8 February 2021.
[209] Government Printers (2018), National Ethics and Anti-Corruption Policy, Sessional Paper No. 2 of 2018 p. 27.
[210] Ibid 28.
[211] Government Printers (2015), Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya.
[212] United Nations Office on Drugs and Crime, Country Review Report of Kenya 10. A Review by Cabo Verde and Papua New Guinea of the implementation by Kenya of articles 15 – 42 of Chapter III. "Criminalization and law enforcement" and articles 44 – 50 of Chapter IV. "International cooperation" of the United Nations Convention against Corruption for the review cycle 2010 – 2015.

Although the jurisprudence from the courts points towards a cautious treatment of corruption cases, the DPP has currently adopted a rather non-restraint approach to the same. Given every opportunity, the DPP continues to contradict the already established jurisprudence by treating corruption cases as any other crime when considering plea bargaining options. In 2019, the DPP sealed three plea bargain agreements with state officers who were facing corruption charges involving Kshs 172 million, 3.4 million and 1 million respectively.[213] In 2020, the DPP expressed his willingness to enter into a plea bargain with an accused person, who had been charged with abuse of office and economic crimes amounting to lose of Kshs 357 million.[214] And what is more is that the court confessed its readiness to adopt a plea bargain in a corruption case, thanks to the judicial officer who went out of his way to advice the parties to seek plea bargaining.[215]

The debate on the suitability of plea bargaining in corruption cases is very relevant in the Kenya's context, given the government's current spirited fight against corruption. The call for maintaining the restraint approach on corruption cases is in line with the government's strategic goal on the fight on graft. And what is more is that current occurrences in prosecution of corruption cases indicate there is an urgent need for a special framework on plea bargaining in corruption cases. And as the fight goes on, the DPP has been approached discreetly by high profile persons facing graft charges with the aim of securing plea bargain agreements.[216] It's against this background that law practitioners and academics have called for a broader scope of plea bargaining to effectively

[213] Everlyne Kwamboka, 'Plea bargaining on the cards for big names as DPP seeks to cut costs, ease backlog of cases' *The Standard* (Nairobi, 26 October 2019) 12.
[214] Annette Wambulwa, 'Court allows Sonko plea bargaining in sh 357m graft case' *The Star* (Nairobi, 26 August 2020).
[215] Ibid. Nairobi Chief Magistrate Douglas Ogoti said he always tells parties in corruption cases to seek plea bargaining before the case proceeds to full hearing.
[216] NTV Kenya, 'High profile individuals in graft discreetly approach DPP for plea bargain pacts' (*NTV Kenya*, October 2019)<https://www.youtube.com/watch?v=PZ1ezn4dkZI>accussed 8 February 2021.

cover public interest.[217] This could be achieved through broader public participation and more structured public engagement on the plea bargaining rules.[218]

3.7 Conclusion

The chapter concludes that the Kenya's existing framework on plea bargaining is inefficacious in achieving deterrence in corruption cases. Even though courts have in the past correctly established a fairly restrictive approach, the current inefficacy has been occasioned by the DPP's non-restraint approach with regards to adopting plea agreements in corruption cases. It also establishes that the current jurisprudence in this area does not enhance proper administration of justice, social justice and public interest considerations in the prosecution of economic crimes. This is so because the framework does not encompass broader public participation and lacks a more structured engagement on plea bargain agreements in the context of corruption cases. Given the notable public interests in corruption cases, the current framework does not offer enough oversight mechanisms for reviewing these agreements with a view to achieving objectivity and deterrence in corruption cases.

[217] KTN News Kenya, 'Corruption suspects may choose to enter plea bargaining deal' (*KTN News Kenya,* August, 2018) <https://www.youtube.com/watch?v=JQSilE3mxpA>accessed 8 February 2021.
[218] Ibid.

CHAPTER FOUR

PLEA BARGAINING IN CORRUPTION CASES IN PAKISTAN

4.1 Introduction

The chapter analyses application of plea bargains in corruption cases in Pakistan with a view to identifying any positive lessons and best practices that Kenya can borrow from her experience. It examines the extent to which Pakistan's legal framework promotes transparency, flexibility, accountability and principles of procedural fairness in plea bargaining in corruption cases. The chapter seeks to identify the positive attributes that account for the country's recognized success in utilizing plea bargain as a tool to settle corruption cases.

4.2 An Overview of the Legal, Policy and Institutional Framework on Anti-Corruption

The special regime on plea bargaining in corruption cases operates against a backdrop of a general anti-corruption framework. The country is a signatory to the UNCAC and its regime on anti-corruption is captured by a host of statutes, with the major ones being the Prevention of Corruption Act,[219] the Anti-Money Laundering Act[220] and National Accountability Ordinance.[221] The statutes mark the country's attempts to discharge her international obligations under the Convention.[222] In addition, the country has adopted a holistic and proactive strategy for advancing and propelling the anti-corruption agenda as well as an 'Accountability for all' policy.[223]

[219] Prevention of Corruption Act (PCA) (1947).
[220] Anti-Money Laundering Act (AMLA) (2010).
[221] National Accountability Ordinance (NAO) (1999). Others include Federal Investigation Agency Act (FIA) 1974 (VIII OF 1975, Pakistan Penal Code (PPC) (Act XLV of 1860) and the Code of Criminal Procedure (CrPC) (1898).
[222] The United Nations Convention against Corruption Chapter III of the Convention.
[223] Nawazish Ali Asim (n 44) 4. *See* The National Anti-Corruption Strategy of Awareness, Prevention and Enforcement.

The country's conceptualization of corruption is very broad and it employs the term 'corruption offences' to refer to the different forms through which the vice manifests itself. It is these different formations of the vice that the law prohibits. The framework criminalizes passive and active bribery[224] both in the private sector and in the public sector.[225] The criminalization of private sector bribery has been affirmed by the Supreme Court which held that the use of the term 'any other person' throughout the body of the National Accountability Ordinance means that the provisions apply equally to private sector and private individuals.[226] Thus, the legal sanctions under the Ordinance apply to private persons as they apply to public officials unless where the Ordinance provides otherwise.[227]

In addition, the framework proscribes money laundering and concealment and criminalizes the aspect of abetting, aiding and conspiracy to commit.[228] It also prohibits breach of trust, abuse of office and misuse of power.[229] Lastly, the regime outlaws illicit enrichment, misappropriation and embezzlement in the private and the public sector.[230] The offence of illicit enrichment targets instances where the assets owned by the accused are disproportionate to known sources of income.[231] Similarly to the bribery offence, all these offences bind both public officers and private persons and NBA has struck plea bargain deals with employees of a private company.[232]

[224] National Accountability Ordinance (NAO) (1999) s 9 (a) (i), (ii), (iv).
[225] National Accountability Ordinance (NAO) (1999) s 9.
[226] National Accountability Ordinance (NAO) (1999) s 9 (a).
[227] United Nations (2017), Conference of the States Parties to the United Nations Convention against Corruption, (CAC/COSP/IRG/I/3/1/Add.32 p. 3.
[228] Anti-Money Laundering Act 2010 (AMLA) s 3.
[229] National Accountability Ordinance (NAO) (1999) 9 (a)(iii) and (vi).
[230] National Accountability Ordinance (NAO) (1999) s 9 (a)(iv) and (v) and 14 (c).
[231] United Nations (2017), Conference of the States Parties to the United Nations Convention against Corruption, (CAC/COSP/IRG/I/3/1/Add.32 p. 3.
[232] Web Desk, 'Biggest plea bargain in NAB's history worth over Rs1.29bn struck' *Geo News* (October 25, 2020) 8.

In addition, the country has a robust institutional framework comprising of specialized authorities charged with implementing the anti-corruption agenda. These institutions include the Financial Monitoring Unit, the Provincial Anti-Corruption Establishments, the Federal Investigative Agency and the NAB.[233] The institutions embrace inter-agency coordination and enjoy financial independence which has enhanced their efficacy and insulated them against political and other interferences.[234] The institutions employ informal cooperation mechanisms to promote information sharing amongst themselves.[235]

4.3 Plea Bargaining in Corruption Cases

Pakistan's legal framework offers two options through which a plea bargaining agreement in a corruption case might be arrived at and both of which require court approval. The first option is known as the Voluntary Return (VR) and occurs where a person voluntarily offers to return assets or gains acquired from a corrupt conduct before the commencement of investigation against him.[236] Acceptance of the offer discharges the person from all his liability in respect of the matter or transaction, and the option is only available where the matter is not *sub judice* in any court of law.[237] The second option is known as Plea Bargain (PB) and it covers circumstances where the accused person, who is already under investigation or trial for a corruption case, agrees to return the assets or gains acquired in the course of a corrupt conduct.[238] If the offer is accepted, the accused person is released.

[233] United Nations (2017), Conference of the States Parties to the United Nations Convention against Corruption, (CAC/COSP/IRG/I/3/1/Add.32 p. 5.
[234] Ibid.
[235] National Accountability Ordinance s 33C.
[236] National Accountability Ordinance s 25 (a).
[237] National Accountability Ordinance s 25 (a).
[238] National Accountability Ordinance s 25 (b).

The difference between voluntary returns and plea bargains is not just about timing, but it's also about the flexibility in the mode of returning the looted amount. Repayment arrangements under voluntary returns are more inflexible than those made under a plea bargain. Voluntary return envisages full deposit while a plea bargain requires a commitment to pay.[239] Therefore, in voluntary return, there is a condition that the person will make a full deposit of the looted amount. By contrast, a plea bargain will suffice if the accused person 'agrees to return' the amount determined by the NAB Chairperson, and the court approves such agreement.[240]

Pakistan's regime on plea bargains is a powerful tool for discouraging corruption and recovering looted assets and monies. The regime allows persons accused of official corruption to return their loot and regain their liberty with damaged reputation and infracted political rights.[241] The accused initiates the plea bargaining process by making an application in which he does a frank disclosure of all he has looted from public kitty. The application goes through the National Accountability Bureau (NAB) for scrutiny. If the NAB is satisfied as to its contents, it endorses the application and presents it to a court, which decides whether to accept the application or not. Whether the court accepts the applications or not, the accused stands convicted for the offence but is not sentenced.[242]

The country has a special institutional framework which oversees the implementation of plea bargaining in corruption cases. The framework establishes a National Accountability Bureau (NAB) which has the primary responsibility to administer the plea bargaining. In both the VR and the PB, the NAB receives the offer from the individual, considers the facts and circumstances of

[239] National Accountability Ordinance s 25 (a) and (b). Under clause (a) the phrase 'deposit with the NAB' and under clause (b) 'agrees to return to the NAB'
[240] *National Accountability Bureau v Shabbir Ahmed Malik & others* Civil Appeals No.621 to 624 of 2019 (Delivered 29 January 2020)
[241] Udosen Jacob Idem (n 41) 24.
[242] Ibid.

the case and accepts the offer on such terms and conditions as he considers necessary.[243] In addition, NAB is the initial receiver and custodian of the surrendered monies and assets, before it transfers them to the final recipient who could be the Federal Government, a Provincial Government among other recipients.[244]

Pakistan's manner of applying plea bargaining in corruption cases is very unique and distinct from how it applies the same to other crimes. The law does not sanction the application of plea bargains in other cases. However, prosecutors often utilize their general authority to drop a case or a charge in a case in return for a guilty plea on some lesser charge.[245] However, this kind of arrangement is does not allow any bargaining over the penalty which is a preserve for the courts.[246]

4.4 The efficacy of the regime

Those who subject themselves to plea bargaining suffer serious consequences, which serve as a deterrence to engaging in the social vice. Some of the consequences are immediate while others have long term effect. Although discharged from criminal liability, the convict suffers immediate consequences like dismissal from any public office held by them.[247] For long term consequences, the accused person is disqualified from holding any public office and taking part in any elections for ten years and the disqualification period is calculated from the date he discharges his liabilities.[248] The accused person is also disqualified from obtaining a credit facility from any bank for ten years, and disqualification period is calculated from the conviction date.[249]

[243] National Accountability Ordinance s 25 (b).
[244] National Accountability Ordinance s 25 (c).
[245] Bhagyodaya, 'Role of Plea Bargaining for ensuring access to justice- A Critical Analysis' Legal Service India (4)
[246] Ibid.
[247] Md Alamin, 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview' (2015) 3 (11) Journal of Research in Humanities and Social Science 70.
[248] National Accountability Ordinance s 15 (a).
[249] National Accountability Ordinance s 15 (b).

The Pakistan's legal framework has inbuilt mechanisms to ensure that the accused person does not benefit from his criminal conduct. The framework minimizes chances of corrupt officials getting away scot free by ensuring that all the loot is forfeited back to the national kitty. All assets and gains acquired in the course or as a consequence of the corruption offence constitute part of the plea bargain.[250] The individual is required to return the illegal gain received, acquired or made by him, plus capital gain thereon and profit at the bank rate from the date of its illegal receipt, acquisition, or making.[251] The meaning of the term 'illegal gain' is quite extensive as it touches all tainted properties held by the accused person whether directly or indirectly through associates, dependents and benamidars.[252] Under no circumstances the amount of the plea bargain can be less than the actual liability of the case.[253]

The Pakistan's regime strikes a healthy balance between the government's agenda to eradicate corruption while not interfering with the ex-convicts' ability to make livelihoods. The limitations that come with entering into a plea bargain in a corruption case are exhaustive and the convict can still engage in some gainful employments. Persons who have previously entered into a plea bargain with NAB can serve as directors of government and private companies. It should be noted that until 2020, these persons were barred from becoming directors and the disqualification was only lifted in May 2020.[254]

The Pakistan's process of entering into a plea bargain underscores the rules of natural justice and the accused person's right to fairness. The courts directly engage the accused person with a view to establishing whether the accused person is aware of the consequences of entering into a plea

[250] Adnan Mahmood (n 43) 7.
[251] The National Accountability (Amendment) Bill, 2017 s 3.
[252] The National Accountability (Amendment) Bill, 2017 s 4.
[253] Adnan Mahmood (n 43) 7.
[254] Shahbaz Rana, 'PTI moves to hire people in plea bargains with NAB' *The Express Tribute* (May 13 2020) 8.

bargain.[255]The presiding judicial officer has interrogates the accused person on the nature of charges they are being tried for, the particulars and the immediate consequences of the confirming the plea bargain. The accused person submits his response to these questions and interrogations on oath.[256]

The regime creates several obligations with a view to streamlining and easing the investigation process. The principle of bank secrecy cannot hinder investigations being conducted by NAB.[257] In addition, the law imposes on all financial institutions the duty to report suspicious financial transactions.[258] Further, the law criminalizes attempts to obstruct or frustrate investigations by proscribing false testimony, falsification of evidence as well as issuing of criminal force or threats to an investigation officer.[259]

4.5 The efficacy of the National Accountability Bureau

The composition of the NAB is well constituted to enhance impartiality, expertise and professionalism. The chairpersonship of NAB is offered to experienced professionals like retired judges of superior courts among others.[260] The liability of the accused person is determined by a team which comprising professionals like a civil engineer, a banking expert and a legal consultant.[261]These professionals work with investigation officers under the supervision of a concerned director and senior a supervisory officer forming what is commonly referred to as

[255] Chris Peterson, 'Court grants plea bargain to accused in corruption reference' *Pakistan Today* (August 2 2019)
[256] Ibid.
[257] National Accountability Ordinance s 19.
[258] Anti-Money Laundering Act s 7.
[259] National Accountability Ordinance s 30 (a) and s 31.
[260] National Accountability Ordinance s 6 (b). Others qualified for the position of chairperson include a retired officer of the Armed Forces of Pakistan equivalent to the rank of a Lieutenant General and a retired federal government officer in BPS 22 or equivalent.
[261] Adnan Mahmood (n 43) 7.

Combine Investigation Team (CIT).[262] Such arrangements are of great significance in that they not only boost the quality of NAB's operations and administration but also minimize chances of a single person influencing its proceedings.[263]

The NAB enjoys sufficient functional and operational independence from the executive, fostering its stability and jurisprudence. The chairperson of the bureau has security of tenure and can only be removed on the rounds of removal of a judge of the Supreme Court of Pakistan.[264] The bureau enjoys financial independence which has made it resilient to political and other interferences.[265] The Bureau is not accountable to any provincial or federal government or to any institution.[266] In practice, however, NAB has introduced several reporting mechanisms which ensure some level of transparency and accountability on its mandate. It publishes quarterly updates and annual reports through which it disseminates adequate information regarding its operations.[267] In addition, the bureau's official website has an efficient complaint mechanism through which members of the can relay their complaints.[268]

The NAB employs various mechanisms to measure and determine its efficacy in fighting corruption. It has a quantified grading system to assess the performance of regional offices and the headquarters on a mid-term and annual basis. The regular inspection and monitoring have contributed to its successes and improvement.[269]

[262] Anderson K, 'NAB rejects claim it approves plea bargains' *The News* (February 8 2021) 4.
[263] Ibid.
[264] National Accountability Ordinance s 6 (b).
[265] United Nations (2017), Conference of the States Parties to the United Nations Convention against Corruption, (CAC/COSP/IRG/I/3/1/Add.32 p. 5.
[266] Alia Ahmed and Munir Ahmad, Accountability Structures: A Comparative Analysis (Pakistan Institute of Legislative Development And Transparency, 2015) 19.
[267] Ibid.
[268] National Accountability Ordinance s 31-E.
[269] Anderson K (n 262) 4.

In addition to discharging its mandate, NAB plays a pivotal role in carrying out public sensitization and civic education. The bureau has a fully pledged awareness and prevention department which implements preventive measures and creates public awareness through educational programmes and media campaigns.[270] It has signed a memorandum of Understanding with the commission for higher education under which NAB is to sensitize the youth on the ill-effects of corruption.[271] Further, it actively engages in law reforms and research by examining statutory corporations, systems and procedures of provincial and federal government departments and the legal frameworks with a view to identifying loopholes and giving recommendations for minimizing corruption opportunities.[272]

The NAB's enforcement of the plea bargains is a success story and an effective tool of fighting corruption and recovering the loot. The role of NAB in eradicating corruption has been recognized by serious international institutions like the Mishal, PILDAT, World Economic Forum and Transparency International Pakistan.[273] The bureau sealed 633 plea bargains and 1400 voluntary returns between January 2008 and 2016.[274] The NAB's plea bargaining approach has been applauded as being very effective in recovering substantial amount. The bureau recovered Rs25.6bn between 2010 and 2016, and over Rs37 billion between its inception in 1999 to 2016.[275] It recorded its highest valued plea bargain deal in 2020, when an accused person agreed to return Rs 1, 290, 000, 000 to the treasury.[276]

4.6 Transparency, Accountability and the Role of the Court

[270] Alia Ahmed and Munir Ahmad (n 266) 19.
[271] Nawazish Ali Asim (n 44) 4.
[272] Alia Ahmed and Munir Ahmad (n 266) 19.
[273] Nawazish Ali Asim (n 44) 4.
[274] Syed Irfan Raza, 'New law aims to make plea bargains stigma' *Dawn* (January 8 2017) 7.
[275] Ibid.
[276] Web Desk, 'Biggest plea bargain in NAB's history worth over Rs1.29bn struck' *Geo News* (October 25, 2020) 8.

Pakistan's legal framework places high premiums on transparency and accountability in the plea bargaining for corruption cases. The government's underlying agenda is to ensure proportionality, predictability and transparency in entering into out-of-court settlements and plea bargains.[277] All investigations, complaints and inquiries at the NAB are handled on transparency and merit, and its decisions are influenced by documentary proofs and solid evidence.[278]

And what is more is that liability is determined in a transparent, collective and consultative manner. The process of setting the actual liability takes in the input of qualified professionals, like bankers, lawyers, engineers. The findings and recommendations of the professionals are submitted to executive board meeting or regional board meeting who also determine the issue in consultation with the board members. And what is more is that the law requires the recording and circulation of the minutes of the meeting.[279] It has been applauded for enhancing sufficient participation in its process.[280]

The courts do play a central role during plea bargaining in corruption cases. Essentially, the courts are the ultimate determiner of what qualifies to be a plea bargain. Plea bargains require court approval.[281] The courts are not mere rubber-stamps and have in some occasions interfered with the plea bargaining process, especially where they deem that the process is being abused. In 2018 the Supreme Court prohibited NAB from sealing a plea bargain in which persons accused of misappropriating over Rs3bn were to surrender only Rs800m.[282]The courts have also influenced legislation by pointing out areas for reform. In 2016, the Supreme Court opined that public officers

[277] United Nations (2017) Conference of the State Parties to the United Nations Convention against Corruption, Vienna, Resumed eighth session, CAC/COSP/IRG/1/3/1/Add.32 (7 and 8 November 2017) 6.
[278] Anderson K (n 262) 4.
[279] Adnan Mahmood (n 43) 7.
[280] Udosen Jacob Idem (n 41) 30.
[281] Zulfiqar Ali, 'Anti-corruption Institutions and Governmental Change in Pakistan' (2018) South Asia Multidisciplinary Academic Journal 8.
[282] Jane Goodluck, 'Plea bargains' *Dawn* (August 2, 2018) 7.

who have entered into voluntary return should not remain in service because such approach was enhancing corruption.[283] This court judgment was among the factors which influenced the 2017 amendments which sought to remedy the shortfall.

4.7 Political Goodwill and Conscious Government Agenda

The country has consistently repealed and improved her legal framework with a view to enhancing its efficacy in prohibiting corruption practices. Most of her legislative advancements demonstrate the country's ever growing desire to achieve more transparency and accountability in the processing of plea bargains in corruption cases. For the longest time, the option for voluntary returns was at the discretion of the NAB chairman and did not require court approval. However, this position changed in 2017 when the law was amended to achieve more transparency by requiring such arrangements to be approved by an accountability court.[284] This was the parliament's attempt to remedy controversies that surrounded most voluntary returns especially involving huge amounts of money.[285]

Pakistan's legislative history on plea bargain demonstrates the governments ever present agenda to enhance efficacy of the punishment and objectivity in sentencing. The most significant legislative intervention in this respect is the 2017 amendments to the 1999 National Accountability Ordinance, through which the government sought to remove the major discrepancies between voluntary return and plea bargain in terms of their attaching consequences.[286] The procedure under voluntary return did not attach serious consequences in that a person who entered into a voluntary

[283] Mohammad Bilal, 'NAB recovers Rs36.3 billion through plea bargain in five years' *Dawn* (September 21 2017) 6.
[284] National Accountability (Amendment) Ordinance 2017.
[285] Syed Irfan Raza (n 274) 3.
[286] Senate Standing Committee on Law and Justice (2017), Report on the National Accountability (Amendment) Bill, 2017, Report No. 37.

return was not disqualified from holding public office, was not dismissed from their official duties and the procedure did not require court approval. In contrast, those who opted for plea bargain faced serious consequences in form of disqualifications.[287]

The big disparities on the different consequences attaching to the two options prompted the government to adopt various policies with a view to galvanizing the law against abuse by the political elite. One of the policy was that law enforcers preferred using plea bargains to voluntary return when dealing with serving government official. This was because there was a feeling that voluntary returns were being too lenient to corrupt government officials, and that plea bargain was the only tool which could create deterrence to avoid looting public resources in future.[288] The NAB adopted the policy excluding voluntary returns from serving government officers so that the looted monies are returned and the officer is punished.[289]

It is these major discrepancies between the consequences of voluntary return and plea bargain that prompted the 2017 amendments. With time, policy makers and legislators were getting concerned that the discrepancies were promoting and condoning corruption.[290] This concerns were merited because corrupt persons who chose the voluntary returns option were literally walking away scot free and experienced no stigma for having engaged in the corrupt conduct. Unlike those who pursued a Plea Bargain, persons who chose voluntary return were not disqualified from holding public office and they could resume their duties forthwith.[291]

[287] Ibid.
[288] Asif Ali, Muhammad Jehangir Khan and Saif Ullah Khalid, 'Theory and Practice of Understanding Corruption in Pakistan: Case Study of National Accountability Bureau, KPK' (2016) The Pakistan Development Review 361, 373.
[289] Ibid.
[290] Senate Standing Committee on Law and Justice (2017), Report on the National Accountability (Amendment) Bill, 2017, Report No. 37.
[291] Syed Irfan Raza (n 274) 3.

All these concerns were addressed in the 2017 amendments, which essentially merged the provisions relating to plea bargain with those relating with voluntary returns. The changes made the difference between the two options almost non-existent as they now carried similar consequences and were all subject to mandatory court approval.[292] The persons who enter into voluntary returns are deemed as 'convicted' and are permanently disqualified from holding public office and from being a government servant.[293]

4.8 Conclusion

Pakistan's regime on plea bargains is a powerful tool for discouraging corruption and recovering looted assets and monies. Those who subject themselves to plea bargaining suffer serious consequences, which serve as a deterrence to engaging in the social vice. In addition, its legal framework has inbuilt mechanisms to ensure that the accused person does not benefit from his criminal conduct. The regime strikes a healthy balance between the government's agenda to eradicate corruption while not interfering with the ex-convicts' ability to make livelihoods. The process of entering into a plea bargain underscores the rules of natural justice and the accused person's right to fairness. The regime creates several obligations with a view to streamlining and easing the investigation process. The composition of the NAB is well constituted to enhance impartiality, expertise and professionalism and it enjoys sufficient functional and operational independence from the executive, fostering its stability and jurisprudence. Lastly, the legal framework places high premiums on transparency and accountability in the plea bargaining for corruption cases and liability is determined in a transparent, collective and consultative manner.

[292] Senate Standing Committee on Law and Justice (2017), Report on the National Accountability (Amendment) Bill, 2017, Report No. 37. 3.
[293] Ibid.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Study Conclusion

Essentially, the study has proved the three hypotheses advanced in chapter one. It has established that plea bargaining should be diligently regulated to monitor prosecutorial powers failure of which breeds arbitrary sentencing discrepancies, uncertainty and erodes public accountability and transparency in criminal proceedings. It has also proven that allowing plea bargaining in corruption crimes has negative legal implications on Kenya's quest for social justice and does not uphold sufficient deterrence to such crimes in the Kenyan criminal justice system. Lastly, the study has confirmed that Kenya has much to learn from Pakistan with respect to her approach to application of plea bargains in corruption offences.

With respect to the first research question on philosophical underpinnings of plea bargaining, chapter two established that plea bargaining is informed by two fundamental assumptions. One, that parties will strike a plea bargain in the shadow of expected trial outcomes and two, that the contents of a particular plea bargain ought to be determined by a combination of three key determinates; the expected trial sentence, the likelihood of a conviction and the cost implications of going for a full trial. The chapter reveals that the powers of the prosecutor in the plea bargain process ought to be jealously regulated to prevent injustice they are susceptible to misuse. In addition, the chapter reveals that the process of entering a plea bargain should be done in a manner which underscores procedural justice, consistency, accountability and public transparency failure of which breeds controversy and arbitrary sentencing disparities.

The chapter shows that challenges inherent to plea bargaining processes like the influence of structural influences and psychological biases can be minimized and redressed by a prudent special regulatory regime which enhances certainty and uniformity of the procedure and which monitors and restricts prosecutorial powers and conduct. It reveals that an idea plea bargaining regime ought to underscore the punishment role of criminal law, uphold legitimacy and fairness of the criminal justice system by marring the seriousness of the offence with the harshness of the sentence and avoiding unduly lenient punishment. Importantly, the chapter shows that a plea bargaining regime ought to have efficient oversight on the powers of the prosecutor by making plea bargaining a public process through incorporating views of key stakeholders in the criminal justice system like crime victims, bar organizations, crime witnesses, trial and appellate judges, scholars, concerned members of the affected community and journalists.

Chapter three generally established that Kenya's legal framework on plea bargaining is inefficacious in achieving deterrence in corruption cases. The regime suffers serious legal challenges because it does not have enough safeguards responding to the peculiar nature of corruption cases. It provides few structures for attaining consultation and transparency and the courts have been unpredictable in safeguarding the formal aspects of plea agreements in matters concerning corruption. In addition, more uncertainty in this area has been occasioned by the ODPP's list of 'bare minimums' which is not based in law or any policy. Similarly, the Kenya's policy framework for prosecution of corruption and economic crimes is deficient in several aspects because the enacted guidelines on plea bargaining do not give any special attention to corruption crimes.

With respect to the third research question on Pakistan's application of plea bargains in corruption cases, chapter four established that Pakistan's regime is by all standards a success story and it has been singled out as the most ideal participatory model of plea bargaining. And what is that her law does not sanction the application of plea bargains in other cases. Principally, the regime allows persons accused of official corruption to return their loot and regain their liberty with damaged reputation and infracted political rights. Those who subject themselves to plea bargaining suffer serious immediate and long term consequences, which serve as a deterrence to engaging in the social vice. This approach alongside other inbuilt mechanisms ensures that the accused persons do not benefit from their criminal conduct and minimizes chances of corrupt officials getting away scot free. The country has a special institutional framework to oversee implementation of plea bargaining in corruption cases, namely the NAB, which has the primary responsibility to administer the plea bargaining.

The regime is efficacious in many ways. For starters, the actual liability of an accused person under a plea bargain is estimated through a transparent, collective and consultative manner which takes in the input of qualified professionals, like bankers, lawyers, engineers. Furthermore, Pakistan's process of entering into a plea bargain underscores the rules of natural justice and the accused person's right to fairness by requiring the court to ensure the accused person is aware of the consequences of entering into a plea bargain and the nature of charge. And what is more is that the composition of the NAB is well constituted to enhance impartiality, expertise and professionalism and it enjoys sufficient functional and operational independence from the executive, fostering its stability and jurisprudence. Lastly, the implementation of the regime has been sanctioned by a manifest political goodwill and a conscious government agenda to enhance efficacy of punishment,

objectivity in sentencing, proportionality, predictability and more transparency and accountability during plea bargaining in corruption cases.

Lastly, although Kenya has a basic legal framework on plea bargaining founded on the Constitution 2010, the Criminal Procedure Code[294] and the Plea Bargaining Rules, 2018,[295] the study nevertheless concludes that the current framework does not have enough safeguards responding to the peculiar nature of corruption cases. The legal structures provided by the Kenyan law serve best with respect to other crimes, but do not respond to the unique nature of corruption cases, which have diverse impact on the national economy and the fiduciary nature of public office. The current framework is incapable of balancing competing interests inherent in corruption cases and vitiates efficacy of punishment, objectivity in sentencing, proportionality and effective deterrence of the social vice.

[294] The Criminal Procedure Code, Cap 75 Laws of Kenya.
[295] The Criminal Procedure (Plea Bargaining) Rules, 2018.

5.2 Recommendations

Based on the study findings, the study makes the following recommendations;

1. **Enactment of a special regulatory framework to govern plea bargains in corruption cases**.

Since study has established that the current framework is incapable of balancing competing interests inherent in corruption cases, it is recommended that the parliament should enact a special plea bargaining regulation designed to enhance efficacy of punishment, objectivity in sentencing, proportionality, predictability and more transparency and accountability during plea bargaining in corruption cases.

2. **Reform the institutional framework to institutionalize plea bargaining, enhance professionalism and institutional independence.**

The study established that plea bargaining in Kenya lacks transparency, and ought to be institutionalized to enhance objectivity. The study recommends that a specialized institution or a department within the ODPP should be established with the sole mandate of administering plea bargains. The specialized institution should have sufficient legal backing to enhance expertise, professionalism and impartiality as well as operational independence from the executive. Since the ODPP has exclusive prosecutorial powers, the DPP would be required to donate prosecutorial powers to the specialized entity by assigning and deploying prosecutors to the institution to carry out prosecutions in the name of the DPP. Such an institutional approach will bring transparency, predictability, proportionality as well as foster the institution's jurisprudence.

3. **Reform the policy framework by enacting a comprehensive policy on plea bargaining in corruption cases.**

The study found that even though the government has enacted several guidelines on plea bargaining generally, the guidelines do not give any special attention to corruption crimes. It also established that the DPP has come up with a criterion for admitting corruption cases to plea bargaining agreements, through the *ODPP's list of 'bare minimums'* which is not based in any law or any published policy. The study recommends that a robust policy be passed. The policy will be a good foundation on which to base the special legislation proposed in recommendation one, as well as substantiate and formalize the government's agenda to enhance transparency in plea bargains involving corruption cases.

4. **Restatement of the restraint approach by the courts.**

Past Kenyan jurisprudence adopted a restraint approach towards adoption of plea bargains in corruption cases and the courts reasoned that resolution of these cases through ADR undermines key constitutional principles and vitiates fair and complete administration of justice. However, the study established that the DPP has currently adopted a rather non-restraint approach to the same, and the DPP's approach has received court approval. The study recommends that the judiciary should consider abandoning this new approach and instead restate its restraint approach, by ensuring that acceptance of the plea bargains does not vitiate efficacy of punishment, objectivity in sentencing, proportionality and effective deterrence of the social vice.

Bibliography

Books

Ahmed A and Ahmad M, *Accountability Structures: A Comparative Analysis* (Pakistan Institute of Legislative Development And Transparency, 2015).

Government of Kenya, *Criminal Procedure Bench Book* (Government Printers 2018).

Bwonwong'a M, *Procedures in Criminal Law in Kenya* (East African Publishers, 1994).

Blogs and Websites

Abdallah A, 'Anti-Bribery & Corruption Guide' (*ALN* 2019) 13 <https://www.africalegalnetwork.com/wp-content/uploads/2019/05/ALN-Anti-Bribery-Corruption-Guide-2019.pdf> accessed 8 February 2021.

Buluma A, 'The Introduction of Plea Agreements into Kenyan Criminal Practice' (2008) 5. <https://www.academia.edu/9132783/The_Introduction_of_Plea_Agreements_into_Kenyan_Criminal_Practice>accessed 10 March 2020.

Kwamboka E, 'Plea bargaining on the cards for big names as DPP seeks to cut costs, ease backlog of cases' *Standard Media* (26 October 2019) <https://www.standardmedia.co.ke/article/2001346873/plea-bargaining-on-the-cards-for-big-names-as-dpp-seeks-to-cut-costs-ease-backlog-of-cases>accessed 5 March 2020.

FindLaw, 'Plea Bargains: In Depth' (*FindLaw*, November 2019) <https://criminal.findlaw.com/criminal-procedure/plea-bargains-in-depth.html> accessed 4 March 2020.

Wathne C, 'Understanding corruption and how to curb it: A synthesis of latest thinking' (*Anti-Corruption Resource Centre*, 2021) <https://www.u4.no/publications/understanding-corruption-and-how-to-curb-it.pdf>accessed 24 October 2021.

Transparency International, 'What id Corruption' (*Transparency International*, June 2021) <https://www.transparency.org/en/what-is-corruption>accessed 24 October 2021.

Ugberaese I, 'Plea Bargain and Its Effect on Criminal Justice System in Nigeria' (*Manifield Solicitors,* June 2018) <https://www.manifieldsolicitors.com/2018/09/03/comparative-analysis-of-adr-plea-bargain-and-its-effect-on-criminal-justice-system-in-nigeria/>accessed 5 March 2020.

International Residual Mechanism for Criminal Tribunals, 'Status of Cases, ICTR '(*UNICTR,* March 2020) <http://www.unictr.org/Cases/tabid/204/Default.aspx> accessed 4 March 2020.

KTN News Kenya, 'Corruption suspects may choose to enter plea bargaining deal' (*KTN News Kenya,* August, 2018) <https://www.youtube.com/watch?v=JQSilE3mxpA>accessed 8 February 2021.

NTV Kenya, 'High profile individuals in graft discreetly approach DPP for plea bargain pacts' (*NTV Kenya,* October 2019)<https://www.youtube.com/watch?v=PZ1ezn4dkZI>accussed 8 February 2021.

Shodhganga, 'Plea Bargaining in India' 179 <http://shodhganga.inflibnet.ac.in/bitstream/10603/28181/12/12_chapter%205.pdf.> accessed 10 March 2020.

UNODC, 'UNODC welcomes President of Kenya's renewed anti-corruption pledge' (*United Nations Office on Drugs and Crime* January 2020) <https://www.unodc.org/easternafrica/Stories/unodc-welcomes-president-of-kenyas-renewed-anti-corruption-pledge.html>accessed 10 March 2020.

USLegal, 'Plea Bargain Law and Legal Definition' (*USLegal,* December 2019) <https://definitions.uslegal.com/p/plea-bargain/> accessed 4 March 2020.

Journals

Makinwa A and Soreide T, ‘Structured Settlements for Corruption Offences: Towards Global Standards?’ *IBA Anti-Corruption Committee: Structured Criminal Settlements Subcommittee* (2018) 52.

Richard A and Oladele A, ‘One Rule for the Goose, One for the Gander? The Use of Plea Bargaining for High Profile Corruption Cases in Nigeria’ (2018) 12 (2) International Multi-Disciplinary Journal 1, 2.

Kagu A.B, ‘Globalisation of Plea Bargaining: An Imperative Reform or A Compromise Of Ideals?’ (2017) 3 (1) Strathclyde Law Review 14.

Adebayo A, ‘A Review of Plea Bargain Concept in the Anti-Corruption War in Nigeria’ (2018) 5 (1) Journal of Legal Studies 1, 2.

Alschuler A.W, ‘The Prosecutor’s Role in Plea Bargaining’ (1966) 36 U. CHI. L. REV. 50, 58.

Delaplane A, ‘Shadows cast by Jury Trial Rights on Federal Plea Bargaining Outcomes’ 57 American Criminal Law Review 207, 220.

Enker A, ‘Perspectives on Plea Bargaining’ (1967) in President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115.

Ali A, Khan M.J and Khalid S.U, ‘Theory and Practice of Understanding Corruption in Pakistan: Case Study of National Accountability Bureau, KPK’ (2016) The Pakistan Development Review 361, 373.

Bhagyodaya, ‘Role of Plea Bargaining for ensuring access to justice- A Critical Analysis’ Legal Service India (4),

Alkon C, ‘Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems’ (2010) 19 *Transnat'l L. & Contemp. Probs* 355.

Alkon C, ‘What's Law Got to Do With It? Plea Bargaining Reform after Lafler and Frye’ (2015) 7 (1) Texas A&M Law Scholarship 15.

Barnhizer D.D, ‘Bargaining Power in the Shadow of the Law: Commentary to Professors Wright & Engen, Professor Birke, and Josh Bowers’ (2007) 91 MARQ. L. REV. 123, 124.

Bonneau D.D and McCannon B.C, ‘Bargaining in the Shadow of the Trial?’ (2019) West Virginia University 2.

McConkie D.S, ‘Judges As Framers Of Plea Bargaining’ (2015) 26 Stanford Law & Policy Review 76.

Bjerk D, ‘Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining When Defendant Guilt is Uncertain’ (2007) 9 AM. L. & ECON. REV. 305, 307.

Johnson D.T, ‘American Law in Japanese Perspective’ (2003) 28 LAW & SOC. INQUIRY 771, 778–79.

Ewulum B.E, ‘Alternative dispute resolution mechanisms, plea bargain and criminal justice system in Nigeria’ (2017) 8 (2) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 119, 124.

Easterbrook F.H, ‘Criminal Procedure as a Market System,’ (1983) 12 J. LEGAL STUD. 289, 311.

Easterbrook F.H, ‘Plea Bargaining As Compromise’ (1992) 101 YALE L.J. 1969, 1978.

Easterbrook F.H, ‘Plea Bargaining is a Shadow Market’ (2013) 51 DUQUESNE L. REV. 551, 551

Hallevy G, ‘Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? - Plea Bargains as Mediation Process between the Accused and the Prosecution’ (2009) 5 (1) Original Law Review 8.

Gersham in Stittand BG, Chaires RH, ‘Plea Bargaining: Ethical Issues and Emerging Perspectives’ (1992) 7 (2) The Justice Professional 72.

Gilchrist G.M, 'Plea Bargains, Convictions and Legitimacy,' (2011) 48 AM. CRIM. L. REV. 143.

Kishan H, 'Darker side of plea bargaining: The worldwide scenario with future perspectives' (2018) 3 (6) International Journal of Advance Research and Development 33.

Abdullahi I, 'Plea Bargaining in the United States of America: A Model for Nigeria's Criminal Justice System?' (2014) 2 (4) International Journal of Business & Law Research 99, 101.

Turner J.I, 'Plea Bargaining' (2017) Reforming Criminal Justice 76.

Turner J.I, 'Judicial Participation in Plea Negotiations: A Comparative View' (2006) 54 AM. J. COMP. L. 199, 201-02, 206.

Turner J.I, 'Plea Bargaining and International Criminal Justice' (2017) 227.

Roberts J, 'Effective Plea Bargaining Counsel' (2013) 122 YALE L.J. 2650.

Mwalili J.J, 'The Role and Function of Prosecution in Criminal Justice' (1997) UNAFEI.

Cook J, 'Plea Bargaining at The Hague' Vol.30 The Yale Journal of International Law 473, 504.

Santhy K.V.K, 'Plea Bargaining in US and Indian Criminal Law: Confessions for Concessions' (2013) NALSAR Law Review 95.

Clatch L, 'Shining a Light on the Shadow-of-Trial Model: A Bridge Between Discounting and Plea Bargaining' (2017) Minnesota Law Review 923, 944.

Dervan L.E & Edkins V.A, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' (2013) 103 J. CRIM. L. & CRIMINOLOGY 1, 2–5.

Dervan L.E, 'The Surprising Lessons from Plea Bargaining in the Shadow of Terror' (2011) 27 (2) Georgia State University Law Review 239, 252.

Alamin M.D, 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview' (2015) 3 (11) Journal of Research in Humanities and Social Science 70.

Bar-Gill O & Ayal O.G, 'Plea Bargains Only for the Guilty' (2006) 49 J.L. & ECON. 353, 354.

Scott R.E and Stuntz W.J, 'Plea Bargaining as Contract' (1992) 101(8) *The Yale Law Journal* 1909.

Sussman R.M, 'Restructuring the Plea Bargain' (1972) 82 YALE L.J. 286, 287.

Covey R, 'Signaling and Plea Bargaining's Innocence Problem' (2009) 66 WASH. & LEE L. REV 73, 77.

Covey R.D, 'Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings' (2008) 82 TUL. L. REV. 1237, 1247.

Howe S.W, 'The Value of Plea Bargaining' (2006) 58 (4) Oklahoma Law Review 599,600.

Sergio Herzog, 'Plea Bargaining Practices: Less Covert, More Public Support?,' (2004) 50 CRIME & DELINQ. 590, 590-92.

Bushway S and Redlich A, 'Is Plea Bargaining in the 'Shadow of the Trial' a Mirage?' (2012) 28 (3) Journal of Quantitative Criminology 437, 438.

Bushway S.D, Redlich A.D & Norris R.J, 'An Explicit Test of Plea Bargaining in the Shadow of the Trial' (2014) 52 CRIMINOLOGY 723, 724.

Omeri S, 'Guilty Pleas and Plea Bargaining at the icc: Prosecutor v. Ongwen and Beyond' (2016) 16 (3) International Criminal Law Review 480, 502.

Syed S.A, 'Plea Bargain In White-Collar Crimes: An Argumentative Analysis' (2020) 11 (1) Pakistan Journal of Applied Social Sciences 73, 83.

Bibas S, 'Plea Bargaining Outside the Shadow of Trial' (2004) 117 (8) Harvard Law Review 2463, 2464.

Bibas S, 'Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection' (2011) 99 CALIF. L. REV. 1117, 1138.

Klein S.R, 'Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining' (2006) 84 TEX. L. REV. 2023, 2042-50.

Eze T and Amaka E, 'A critical appraisal of the concept of plea bargaining in Criminal Justice Delivery in Nigeria' (2015) 3 (4) Global Journal of Politics and Law Research 35.

Idem U.J, 'The Application of Plea Bargaining and Restorative Justice in Criminal Trials in Nigeria' (2019) 19 (3) Global Journal of Human-Social Science 20, 24.

Mavis V, 'Why should the International Criminal Court Adopt Plea Bargaining?' (2014) 5 (2) Inonu University Law Faculty 479, 481.

Stuntz W.J, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 HARV. L. REV. 2548, 2554.

Landes W.M, 'An economic analysis of the courts' (1971) 14 (1) The Journal of Law and Economics 61, 64.

Ma Y, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 (1) International Criminal Justice Review 22.

Ali Z, 'Anti-corruption Institutions and Governmental Change in Pakistan' (2018) South Asia Multidisciplinary Academic Journal 8.

Newspaper Articles

Mahmood A, 'Efficacy and potency of NAB's plea bargain' *The News* (December 9 2020) 7.

Anderson K, 'NAB rejects claim it approves plea bargains' *The News* (February 8 2021) 4.

Wambulwa A, 'Court allows Sonko plea bargaining in sh 357m graft case' *The Star* (Nairobi, 26 August 2020).

Peterson C, 'Court grants plea bargain to accused in corruption reference' *Pakistan Today* (August 2 2019)

Kwamboka E, ‘Plea bargaining on the cards for big names as DPP seeks to cut costs, ease backlog of cases’ *The Standard* (Nairobi, 26 October 2019) 12.

Goodluck J, ‘Plea bargains’ *DAWN* (August 2, 2018) 7.

Keen J, ‘South Africa: Scopa 'Shocked' By Plea Bargains in Corruption Cases’ *news24Wire* (14 June 2017) 11.

Bilal M, ‘NAB recovers Rs36.3 billion through plea bargain in five years’ *Dawn* (September 21 2017) 6.

Asim N.A, ‘NAB committed to ‘accountability of all’’ *The News* (October 5 2020) 4.

Wamochie R, ‘Graft suspects who return money can enter plea bargain- Haji’ *The Star* (25 October 2019) 4.

Munguti R, ‘Joy Gwendo freed, pays Sh 1.7m that saw her jailed’ *Daily Nation* (14 December 2018) 6.

Rana S, ‘PTI moves to hire people in plea bargains with NAB’ *The Express Tribute* (May 13 2020) 8.

Raza S.I, ‘New law aims to make plea bargains stigma’ *Dawn* (20 April 2021) 3.

Web Desk, ‘Biggest plea bargain in NAB's history worth over Rs1.29bn struck’ *Geo News* (October 25, 2020) 8.

Working Papers and Government Reports

Government Printers (2015), Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya.

Gazal O, ‘Partial Ban on Plea Bargains’ (2005) Law & Economics Working Papers, Law & Economics Working Papers Archive: 2003-2009 p. 54.

Senate Standing Committee on Law and Justice (2017), Report on the National Accountability (Amendment) Bill, 2017, Report No. 37. 3.

The National Anti-Corruption Strategy of Awareness, Prevention and Enforcement.

U.S. Sentencing Comm'n, (2011) Special Report To Congress: *Mandatory Minimum Penalties In The Federal Criminal Justice System* 96-97.

United Nations Office on Drugs and Crime, Country Review Report of Kenya 10. A Review by Cabo Verde and Papua New Guinea of the implementation by Kenya of articles 15 – 42 of Chapter III. "Criminalization and law enforcement" and articles 44 – 50 of Chapter IV. "International cooperation" of the United Nations Convention against Corruption for the review cycle 2010 – 2015.