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Plea Bargain: An overview of the practices of alternative criminal trial and its prospects in the Criminal Justice Administration of Bangladesh.

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1. Introduction

There is little scope of cooperation in a criminal case on the part of an accused in proving a case against himself as human psychology usually prevents one from admitting one's guilt, rather, it motivates him to resort to all possible ways for avoiding punishment. One of the principles of criminal justice i.e. nobody is to be compelled by threat, promise or inducement in any criminal case to be a witness against himself, makes the scope more untenable. As a result, it is always an uphill task for the prosecution to unearth a crime, bring the witnesses in support of his case, rebut the defence arguments and prove the case beyond all reasonable doubt. These tasks become more difficult on account of scarcity of resources, shortage of manpower in the prosecution office, sluggish and carefree mood of government officials, political interruption and most importantly corruption. Criminal courts are already overburdened with cases and the growing number of cases often makes it difficult to handle all cases through formal trial.

For many years, jurists of this region have been trying to overcome these problems and searching for an easier and speedy procedure. Civil courts, to avoid formal trial, have already embraced alternative dispute resolution (ADR) which is instrumental in deciding civil cases in expeditious ways.[1] For criminal courts, there are provisions for summary trial[2] and speedy trial[3] which help to dispose of a small number of cases while the rest the courts have to follow the normal and lengthy procedure. In this backdrop, plea bargaining may essentially play an important role. Plea bargaining is common in some jurisdictions of the world and has a wide application in the criminal courts of the United States of America.

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1. ADR is introduced in the Civil Courts of Bangladesh by several Acts, i.e. The Code of Civil Procedure (Amendment) Act, 2003 (Act No 4 of 2003); The Artha Rin Adalat Ain, 2003 (Act No 8 of 2003); The Code of Civil Procedure (Amendment) Act, 2006 (Act No 8 of 2006).
2. Chapter XXII of the Code of Criminal Procedure 1898 (Act No. 5 of 1898).
3. The Law and Order Violating Offence (Speedy Trial) Act, 2002 (Act No 11 of 2002).

This study seeks to provide a comprehensive idea about plea bargaining. Besides, an attempt is made to analyse the practices of plea bargaining in the different regions and different legal systems of the world. As a matter of objectivity, arguments both in favour and against the concept of plea bargaining has been put forward. Provisions of guilty plea under the present procedural laws of Bangladesh are identified and most importantly, this study emphasizes on the introduction of plea bargaining as a method to aid criminal justice system of Bangladesh. Based on experience of other countries, several recommendations are also made for possible incorporation it in our criminal procedure.

2. Conceptualizing 'Plea Bargain':

2.1 Historical basis of plea bargain:

The practice of plea bargaining dates back to the seventeenth century when the old English Common law courts would grant pardons to accomplices in felony cases upon the defendant's conviction, or execution upon the defendant's acquittal.[4] This prosecutorial tool was used only episodically before the 19th century.[5]

In USA, the practice of plea bargaining goes back a century or more. Plea bargaining was scarcely acknowledged in the United States before the 1920's.[6] Plea bargaining was not as pervasive as it is now, not even close to it, but it was by no means rare.[7] In 1839, in New York one out of every four cases ended with plea bargaining.[8] By the middle of the century there were guilty pleas in half of the cases.[9] It has kept its dominance ever since. One can trace steady and marked decline in numbers of trials by jury in America from the early 19th century on.[10]

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4. Suhan S. Desai; *Plea Bargaining Under the Rwandan Statue and Rules of Evidence and Procedure.* <http://www.nesl.edu/center/wcmemos/desaif99.htm> (accessed on 25/11/06).
5. Olin, Dirk; *Plea bargain*, The New York Times Magazine, September 29, 2002 Internet Edition <http://www.truthinjustice.org/bargaining.htm> (accessed on 24/7/06).
6. Langbein, J. H., *Torture and plea bargaining*. In Plea Bargaining: Travesty of Justice or NecessaryEvil? <http://www.missouri.edu/~tmk7a5/papers/plea%20bargainig.html> (accessed on 15/11/06)
7. Indian Law Commission- One Hundred and Forty Second Report on *"Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining"* 1991, at page-5.
8. Ibid.
9. Id.
10. Id.

2.2 Conceptualising plea bargaining.

Plea bargaining is a process whereby the accused and the prosecution in a criminal case work out a mutually acceptable disposition of the case. This negotiation leads to an agreement by settling the case against the accused. In plea bargain the accused agrees to plead guilty in exchange for some concession from the prosecutor. This concession can include a reducing of charges or limiting the punishment that the court may impose on the accused. Sometimes, one element of the bargain is that the accused reveals information such as, the location of stolen goods, names of co-accused or admission of other crimes etc. Plea agreements can, and often are, conditioned upon the defendants' agreement to certain conditions such as co-operating in an investigation, giving testimony for the prosecution against another accused and refraining from further violation of law.[11]

In 1975, the Law Reform Commission of Canada defined "plea bargaining" as

> "any agreement by the accused to plead guilty in return for the promise of some benefit"[12]

Black's law dictionary defines it as

> "the process whereby the accused and the prosecutor in a criminal case workout a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi count indictment in return for a lighter sentence than that possible for the graver charge."[13]
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> In plea bargain the accused or his pleader, prosecutor and in some cases, the victim sit together and resolve the case. The prosecutor advises the accused to plead guilty in return of some kind of incentives and when the accused accepts the deal the concerned court then passes a sentence according to their agreement. The incentives offered by the prosecutor to the accused must not go beyond the laws relating to plea bargain.

2.3 Areas of bargain:

There are basically three different ways in which parties can mutually arrive at an understanding, i.e. charge bargain, sentence bargain and fact bargain. This is not necessary that all of these are common in every jurisdiction using plea bargaining.

11. Supra note 4.
12. Law Reform Commission of Canada, *Criminal Procedure: Control of the Process* (Working Paper No.15), Ottawa, Information Canada, 1975, page 45.
13. *Black's Law Dictionary*, 7th edition.

2.3.1 Charge bargain: This is a common and widely known form of plea. Where there is only one charge against any person, the prosecution may promise the accused that a charge for a lesser offence will be brought in return for a plea of guilt, for example, a charge for culpable homicide instead of murder, or charge for attempted burglary instead of burglary. Where the prosecutor has the opportunity to bring more charges, the accused may be offered dismissing some of the charges against him.

Charge discussions may include the following[14]:

i. the reduction of a charge;

ii. the withdrawal or stay of other charges;

iii. an agreement by the prosecutor not to proceed on a charge;

iv. an agreement to stay or withdraw charges against third parties;

v. an agreement to reduce multiple charges to one all-inclusive charge;

vi. the agreement to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.

2.3.2 Sentence bargain: Sentence bargaining involves an agreement to a plea of guilt in return for a lighter sentence. This kind of bargaining occurs when an accused is told in advance what his sentence will be if he pleads guilty. The accused takes the incentive i.e. a lesser punishment for his co-operation which would otherwise be two, three or four times higher if he would not plead guilty. Typically, a sentence bargain can only be granted if it is approved by a trial judge. Sentence bargaining sometimes occurs in high profile cases where the prosecutor does not want to reduce the charges against the accused usually for fear of media or public reaction, but instead assures a reduction of the sentence.

Sentence discussions may include the following[15]:

i. a recommendation by a prosecutor for a certain range of sentence or for a specific sentence;

ii. a joint recommendation by a prosecutor and defence counsel for a range of sentence or for a specific sentence;

iii. an agreement by a prosecutor not to oppose a sentence recom mendation by defence counsel;

iv. an agreement by a prosecutor not to seek additional optional sanctions, such as prohibition and forfeiture orders;

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14. Potrebic, Milica Piccinato; *Plea Bargaining* ; The International Co-operation Group- Department of Justice of Canada- 2004, at page-1.

15. Ibid, at page-2.

v. an agreement by a prosecutor not to seek more severe punishment;

vi. an agreement by a prosecutor not to oppose the imposition of an intermittent sentence rather than a continuous sentence.

2.3.3 Fact bargain:

Fact bargaining is the least used of negotiation tactics. It involves an admission of certain facts in return for an agreement not to introduce certain other facts in evidence. In fact bargain, there may be a promise not to "volunteer" information detrimental to the accused during the sentencing hearing or promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor

3. Critical analysis of plea bargaining:

Plea bargaining or plea negotiation has been a subject of considerable debate over the last few decades among members of the judiciary, the practicing bar, law enforcement agencies and the academic community.[16] This debate helps us to comprehend the concept of bargain in criminal case more clearly.

3.1 Arguments in favour of plea bargain:

There are many arguments in favour of using the mechanism of plea bargaining in criminal justice system. Some of the most noteworthy arguments are highlighted below:

3.1.1 Efficiency in criminal justice administration: Courts of law, lawyers and law enforcement agency are the most important instruments of the criminal justice system. Plea bargaining has been proved to be a blessing for all these three organs. In many judicial systems the number of courts, judges, prosecutors and prison cells are inadequate to deal with the overwhelming number of criminal offenders. As criminal courts become packed to its capacity, prosecutors and judges feel increased pressure to move cases quickly. Plea bargaining greatly reduces the strain on the criminal justice system and, therefore, is considered essential to maintain its efficient functioning.[17]

Police officers remain busy in conducting investigation to find out the link of the accused with the crime. Police forces can function more efficiently in crime prevention and control once their ever binding pressure is reduced by plea bargaining.[18] The most common argument

16. Law Reform Commission of Canada, *Plea Discussions and Agreements* (Working paper no 60), Ottawa, 1989, page 5.

17. Supra note 4.

18. *The Possibility of a Plea Bargain* <http://usinfo.state.gov/products/pubs/legalotln/criminal.htm> (accessed on 6/9/06).

offered in favour of plea bargaining is that it lifts the burden of heavy caseloads from the shoulder of the courts. For a judge, the primary incentive for accepting a plea bargain is to move a long busy calendar.[19]

A great number of courts simply do not have time to try every case that comes through the door. Where there are a great many cases for trial, it becomes very difficult for the prosecution to take all requisite steps in order to win in trial. Prosecutors feel that they will have additional time and resources for important cases that merit more careful consideration if they conclude a large number of less serious cases by means of plea bargaining.

3.1.2 Decide other cases: One of the most important benefits of plea bargaining to a prosecutor is that it permits him to gain the co-operation of the accused in the capture of and compilation of evidence against larger criminal figures.[20] Prosecutors sometimes offer deals to the accused who, has given testimony about the accused or helped resolve some other troubling cases.[21]

3.1.3 Avoid the uncertainty of trial: No matter how strong the evidence may appear, no case is a forgone conclusion. An acquittal is always a possibility as long as a trial is pending. The prosecutor may wage a long, expensive and valiant battle and still lose the case. Plea bargain helps avoid the uncertainty of the trial and minimizes the risk of undesirable results for both parties. Here the benefit is an assured conviction.[22]

3.1.4 Inadequate evidence: In a number of cases the accused is acquitted simply on account of inadequate evidence against them. Prosecutors may be certain of the guilt of the accused in a matter, but the evidence may not be enough to convince the court. Plea bargain mitigates the possibility of the accused being found not guilty.

3.1.5 Mitigates the risk of being guilty for severe offence: In plea bargain, the accused is left to choose between the certainty of a much less

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19. *Defendants' Incentives for Accepting Plea Bargains* <http://www.nolo.com/article.cfm/ObjectID/4E8D6815-1797-46FC-8F8AB242FFE6391A/catID/D4C65461-8D33-482C-92FCEA7F2ADED29A/104/143/272/ART/> (accessed on 25/11/06).
20. Vincent M. Creta; *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statue and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia* (1998), at page 407.
21. Supra note 19.
22. For detail, please see <http://law.enotes.com/everyday-law-encyclopedia/plea-bargaining> (accessed on 28/10/06).

serious charge or the uncertainty of a trial in which the accused may be found not guilty, but which carries the risk of being found guilty of the original, more serious charges.[23] The accused will lose his chance of acquittal but he will also lose the risk of going to jail. For most accused, the principal benefit of plea bargaining is receiving a lighter sentence for a less severe charge than the result from taking the case to trial and losing.[24]

3.1.6 Time: Every trial is a time consuming, lengthy affair. The defendant, victim and witnesses have to spend considerable time for proper disposal of a criminal case. Judges and prosecutors also have to remain busy with the trial schedule of enormous number of cases. Plea bargaining curtails this otherwise long process. Trials which can take weeks or months often are arranged in minutes by means of plea bargain.[25]

3.1.6 Economic incentive: Plea bargain reduces expenditures. The total cost of crime includes expenditures on police, prosecution, legal aid, courts and prisons.[26] By reducing the length of trial it alleviates the workload of prosecutors, reduces the pressure on judicial resources and courtroom facilities and decreases all other expenses necessary for trial.

To defend a charge, usually the accused has to appoint a lawyer. The more time a trial consumes, the more time the lawyer engages and more money has to be paid. For a poor accused, it is not easy to appoint a good lawyer to defend his case for the whole trial, rather, it is up to the decision passed on the basis of plea bargaining.

3.1.7 Publicity: The absence of trial lessens publicity of the case. For personal interests or social pressures famous people as well as ordinary people who depend on their reputation in the community and do not want to bring further embarrassment to their families, may wish to avoid the length and publicity of a formal trial. By choosing to plead guilty they can keep their names out of the public eye.

3.1.8 Benefit for witness and victim: Plea bargaining may also bring benefits for witnesses and victims. For example, victims of sexual assault or domestic violence are often placed in the most emotionally sensitive situation and are required to testify in open court. Opposition pleaders often put forth questions which cause embarrassment especially in case of a woman or child as in many cases this becomes a social stigma on the

23. Plea bargain , Wikipedia <http://en.wikipedia.org/wiki/Plea_bargain> (accessed on 24/7/06).
24. Supra note 19.
25. Ibid.
26. Supra note 14.

woman so testifying. Witnesses are required to come before the court as many times as the case demands. As a result of plea bargaining, victims and witnesses can be relieved from the burden of appearing before the court as witnesses.

3.2 Arguments against plea bargain:

The issue of 'plea bargaining' is not above criticism, rather since its inception, some important arguments have been raised against the practice. They are highlighted below.

3.2.1 Pressure on the accused: For what offences a person will be prosecuted is determined by the prosecutor which provides a broad range of options for officials. The normal tendency of the prosecution is to overcharge the accused at the start of the case.[27] Prosecutor may threaten the accused with a severe penalty if the accused decides to proceed to trial.[28] The less the chance for conviction, the harder the bargaining may be because the prosecutor wants to get at least a minimal confession out of the accused.[29] As a result, plea bargain system puts strong pressure on the accused to plead guilty to crimes that they did not commit or for which they have a defence, in order to avoid the risk of a substantially harsher punishment after trial.[30] The possibility exists that an accused will be pressured by his counsel to plead guilty to a crime, even though he may be factually or legally not guilty.[31]

3.2.2 Participation of the victim: In plea bargain, negotiation between the prosecution and accused decides the case, ignoring the victim. The process of plea negotiations may undoubtedly affect the victim of a crime in a most profound and personal manner.[32] For example, it may be a matter of extraordinary significance to the victim of a crime of sexual assault whether the charge laid accurately reflects what really happened rather than a weak version of events that effectively denies the reality of the victim's experiences.

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27. Ibid.
28. Id, In *Should We Really Ban Plea Bargaining? : The Core Concerns of Plea Bargaining Critics*, Emory Law Journal, volume:53-783, at page 771.
29. *Outline of the US Legal System; The Criminal Court Process.* <http://usinfo.state.gov/products/pubs/legalotln/criminal.htm> (accessed on 12/12/06).
30. Supra note 14.
31. Ibid.
32. Department of Justice Canada, *Victim participation in the plea negotiation process in Canada*: 2002, <http://canada.justice.gc.ca/en/ps/rs/rep/2002/vppnpc/summary.html> (accessed on 12/11/06).

3.2.3 Violation of principles of criminal justice: Plea bargaining violates many basic principles upon which the criminal justice system rests. One of these principles is that it is better to let ten guilty persons go free than to convict one innocent person. Plea bargaining attempts to ensure that everyone is convicted, albeit with a lighter sentence than that which would have been awarded had he or she been found guilty in trial.[33]

Plea bargaining violates the principle that guilt or innocence should only be determined by those deemed fit to do so.[34] Only judges and where applicable, juries enjoy that status. Plea bargaining takes difficult decisions out of the hands of qualified and socially sanctioned individuals i.e. judges, and places them in the hands of lawyers,[35] who are subjected to serious financial and other temptations to disregard their clients' interests.

3.2.4 Violation of fundamental rights: Critics say that plea bargaining subverts many of the values of criminal justice system [36] as for example:

1. right to be presumed innocent and to have a fair and public trial
2. right not to be compelled in any criminal case to be a witness against himself
3. right to defend especially to trial by jury

3.2.5 Personal benefit: A trial requires significantly more personal effort and time than plea bargaining. When the court has heard all of the cases on the docket, the judge and public prosecutors are free to spend their time outside of the courtroom. Thus, it is often said that the incentives for public attorneys and judges to use plea bargaining are often personal.[37]

3.2.6 Demeaning justice: The plea negotiation process has been in many instances regarded unnecessary and degrading to the criminal justice system. In particular, the process has been criticized as being, or appearing to be, an irrational, unfair and secretive practice that facilitates the manipulation of the system and the compromise of fundamental principles.[38] It robs the court of its ability to properly separate the guilty from the innocent.[39] The justice system is reduced to a tool of the prosecutor instead of a tool of justice.[40]

33. Supra note 6.
34. Ibid.
35. Id. In Alschuler, A.W. (1983), *Implementing the Criminal Defendant's Right to Trial: Alternatives to the plea bargaining*. University of Chicago Law Review, 50, at page 931.
36. Supra note 14.
37. Supra note 6.
38. Supra note 21, at page 6.
39. Supra note 6.
40. Ibid.

3.2.7 Inconsistency with theory of punishment: The notion of plea bargaining is contrary to the purpose of the law in which a specific action should be associated with a specific penalty. Plea bargaining and its leniency towards the guilty undermines the deterrent effect of criminal sanctions and to reform the offenders.[41] One objection is that defendant's sentence may be based upon nonpenological grounds. The sentence often bears no relationship to the specific facts of the case.[42]

3.2.8 Keeping others out of the case: Some defendants may plead guilty to take the blame for someone else, or to end the case quickly so that others who may be jointly responsible are not investigated. Rich and influential persons may exploit this process to keep their names above any blame.[43]

3.2.9 Discrimination for poor accused: The outcome of plea bargain may depend strongly on the negotiating skills and personal demeanor of the defence lawyer, thus puts persons who can afford good lawyers at an advantage.

3.2.10 Possibility of misusing the process: When plea bargaining is available, prosecutors can extract a guilty plea in nearly every case, including very weak cases, simply by adjusting the plea concession to the accused's chances of acquittal at trial.[44] When almost every case results in a plea of guilt, regardless of the strength of the evidence, prosecutors have much less interest in screening away weak cases. Since some cases are weak because the accused is innocent, more innocent accused are charged and as a result, more are convicted.[45]

3.2.11 No scope for evaluation: Another strong critique of plea bargain points out that the process is largely inaccessible; it is not open for review or evaluation. Plea bargaining is inaccessible because bargains are made in the shadows[46] and within a low visible process.[47] Only the final

41. Supra note 6.
42. Supra note 29.
43. Supra note 19.
44. Oren, Gazal-Ayal; *Partial ban on plea bargaining;* Cardozo Law Review volume 27, issue 5, at page 2295 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=794549> (accessed on 30/11/06).
45. Ibid.
46. Wright, Ronald , Miller, Marc; *The Screening/Bargaining tradeoff* ; <http://www.questia.com/PM.qst?a=o&d=5001900495&er=deny> (accessed on 30/11/06).
47. Bibas, Stephanos; *Plea Bargaining Outside the Shadow of Trial;* Harvard Law Review

    Volume 117, number 8, June 2004, at page- 2547.

product of each negotiation is reported on paper and in the courtroom. Negotiations may turn on a huge range of factors going well beyond the elements of the offence and the strength of the government's evidence. Some of these factors may be appropriate, others inappropriate, but it is only the parties who ever know the actual factors that determined the outcome of the public proceeding.[48]

4. Plea bargain in Common Law Countries

Plea bargaining is originally an Anglo-American system of bypassing juries to reduce workload of the courts.[49] Although it is most actively used in the United States, a fair number of other common law jurisdictions have also incorporated the practice of plea bargaining.[50] A brief description of the practice as it exists in different jurisdiction is given below for a clear understanding of the issue in different legal contexts.

4.1 Plea bargaining in India:

The twelfth Law Commission of India, in its 142nd report on "Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining" recommended for the incorporation of plea bargaining in the Indian criminal justice system. Later on the recommendation of the 154th Law Commission report on "The Code of Criminal Procedure 1973 (Act no.2 of 1974)"was that plea bargaining should be incorporated in the criminal justice system. In April 2003, the Committee on Reforms of Criminal Justice System [51]submitted its report to the Ministry of Home Affairs which recommended that a system of plea bargaining be introduced into the criminal justice system of India to facilitate the earlier resolution of criminal cases and reduce the burden on the courts.[52]

Accordingly, the Criminal Law (Amendment) Act 2005[53]was passed which introduced plea bargaining in India. This Act came into effect since July 5, 2006. The amendment, through introduction of a new Chapter[54] in the Criminal Procedure Code enables a person accused of

48. Supra note 46.
49. Majumdar, Atreyee *Plea-bargaining- Guilty. But of a Lesser Offence?* <http://202.71.128.135:5/bc/focusdetails.asp?ID=77> (accessed on 15/11/06).
50. Ibid.
51. Malimath Committee , headed by a former Chief Justice of the Karnataka and Kerala High Courts and former member of the National Human Rights Commission of India, Justice V.S. Malimath.
52. Recommendation 106 of the report submitted by Malimath committee.
53. Act no.2 of 2006.
54. Chapter XXI A Sections 265 A to K of Code of Criminal Procedure, 1898 (Act No. V of 1898).

certain offences to file an application for plea bargaining in the court in which such offence is pending for trial.

In India plea bargaining is applicable for persons who are accused of offences for which the punishment does not exceed seven years of imprisonment.[55] Offences that affect the socio-economic condition of the country or committed against a woman or a child below the age of 14 years shall not be covered by this procedure.[56] Here, the application for plea bargaining has to be filed by the accused in the court in which such offence is pending for trial.[57] Along with the application, s/he has to submit an affidavit stating the voluntariness of his/her preferring this procedure.[58] It is made obligatory on the part of the Court receiving the application to examine the accused in camera[59] to satisfy that he or she filed the application voluntarily and if it finds so, it shall then provide a time to the parties to work out a mutually satisfactory disposition of the case.[60] When a case is instituted, on the basis of a police report, the public prosecutor, police officer who investigated the case, accused and the victim can participate in the negotiation; for other cases the accused and the victim will participate.[61] The accused as well as the victim, if they want, can participate with their advocates who are engaged in the case.[62] When the parties satisfactorily disposed of the case, the court shall prepare a report and it shall be signed by the presiding judge and the persons who participated in the meeting.[63] The Court has the continuing duty of ensuring that the entire process of plea bargaining is voluntary.[64] For the case which has successfully undergone this process, the court shall dispose of the case by sentencing the accused to one fourth of the punishment.[65] If a minimum sentence is provided by the law, the Court may sentence the accused to half of such a punishment.[66] The Court may release the accused on probation if the law allows for it in the offence

55. Ibid., section 265A.
56. Ibid.
57. Id, section 265 B(1).
58. Id, section 265 B(2).
59. Id, section 265 B(4).
60. Id, section 265 B(4)(a).
61. Id, section 265 C(a)(b).
62. Ibid.
63. Id, section 265 D.
64. Id, section 265 C(a)(b).
65. Id, section 265 E(d).
66. Id, section 265 E(c).

charged.[67] If the Court finds that the application has been filed involuntarily by the accused or he has previously been convicted for the same offence, it shall proceed further in accordance with the normal procedure of a criminal case from the stage such application has been filed.[68]

The judgement delivered by the court in the case of plea bargaining shall be final and no appeal shall lie in any court against such judgement except the special leave petition to the Supreme Court under article 136 or a writ petition to a High Court under articles 226 and 227 of the Constitution.[69] The statement or facts stated by an accused in guilty plea application shall not be used for other purpose other than for plea bargaining.[70]

4.2 Plea bargain in United Kingdom:

Provision to plead guilty was formally introduced in England by the Criminal Procedure and Investigations Act 1996.[71] Judges have been given the discretion to reduce sentence in case of guilty pleas by the Powers of Criminal Courts (Sentencing) Act, 2000. This provision of sentence reduction is directly reproduced in the Criminal Justice Act of 2003. In order to consider sentence reduction of any offence where the accused pleads guilty, the court has to take into account the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty[72] and the circumstances in which this indication was made.[73] In case of an offence the sentence for which falls to be imposed under subsection 2 of section 110 or 111 of the Sentencing Act, the court can impose any sentence not less than 80 percent of that specified in that subsection.[74]

The Code for Crown Prosecutors sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted. There are specific guidelines for the crown prosecutors in order to accept any guilty pleas. Defendants may want to plead guilty to some, but not all of the charges.[75] Crown Prosecutors should only accept

67. Id, section 265 E(b).
68. Id, section 265 B(4)(b).
69. Id, section 265 G.
70. Id, section 265 K.
71. Section 49 of Criminal Procedure and Investigation Act 1996.
72. Section 144(1)(a) of the Criminal Justice Act 2003.
73. Ibid, section144(1)(b).
74 Id, section144(2).
75. Guideline no. 10.1 of Code of Crown Prosecutor.

the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features.[76] Crown Prosecutors must never accept a guilty plea just because it is convenient.[77] While deciding to accept any plea, it is the duty of Crown prosecutors to ensure the interest of the victim[78] and he or she has to explain to the court the basis on which any plea is advanced and accepted.[79]

The practice of plea bargaining in the UK is somewhat different from the United States. It takes the form of insinuating reduction of sentence on particular occasions by the judge, in consultation with counsel on both sides. It does not involve formal negotiations between the counsels of both parties, where the accused decides to plead guilty on the assurance that he will get a lesser punishment.[80]

4.3 Plea bargaining in the United States of America:

In USA, trial by jury is a constitutional right. Article III section 2(3) of the US Constitution says that the trial of all crimes, except in cases of impeachment, shall be by jury. Whether the process of plea bargaining to avoid trial subverts this constitutional right has never been judicially determined. To the contrary the US Supreme Court in *Brady v US* [81] defended plea bargaining by arguing that it was beneficial for both parties. Later on, in the famous case of *Santobello v New York*[82] the US Supreme Court justified the constitutionality of plea bargaining by saying that

"Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged."

In the same judgement, the US Supreme Court justified plea bargaining on economic grounds and said that "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[83]

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76. Ibid.
77. Id.
78. Id, Guideline no. 10. 2.
79. Id, Guideline no. 10.3.
80. Supra note 49.
81. 397 US 742 (1970).
82. 404 US 260 (1971).
83. Ibid.

Both in the state and federal levels of the United States at least 90 percent of all criminal cases never go to trial and are instead resolved by plea bargaining.[84] About 95 percent of all felony convictions are the result of plea bargain.[85] This procedure is used so frequently and the criminal justice administration of United States is so heavily dependent on plea bargaining that it is often commented that the American criminal justice system would cease to function without plea bargaining.

For many years, there was no uniform or official system of plea bargaining in the United States.[86] The system of plea bargaining in the federal system was officially recognized with the passage of the 1974 amendments of Federal Rules of Criminal Procedure and is now regulated by Rule11 of the Federal Rules of Criminal Procedure.

In United States, the Government and the defendant may enter into a plea negotiation with prior permission of the Court.[87] There are three types[88] of promises that the prosecutor can offer an accused for his guilty plea:

1. move for dismissal or not bring other charges;
2. recommend or agree not to oppose the defendant's request, for a particular sentence;
3. agree that a specific sentence is the appropriate disposition of the case.

Here, the duty of the court is to ensure that the accused has entered a guilty plea voluntarily and not by any force, threat or promises other than the promises in a plea agreement [89] and to inform the accused the consequences of such agreement.[90] The contents of plea bargaining must be disclosed in open Court [91] and the trial judge has the power to accept or reject it.[92] The Courts are forbidden from participating in discussions looking toward plea agreements.[93] When the Court accepts the plea

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84. Supra note 29.
85. For detail please see <http://www.pbs.org/wgbh/pages/frontline/shows/plea/faqs/> (accessed on 21/1/06).
86. *Concept paper on plea bargains*, CEELI Concept Paper Series, December 16, 1999, at page-3.
87. Rule 11(A) of Federal Rules of Criminal Procedure.
88. Ibid, Rule 11(C).
89. Id, Rule 11 (b)(2).
90. Id, Rule 11 (b)(1).
91. Id, Rule 11 (c)(2).
92. Id, Rule 11 (c)(3)(A).
93. Id, Rule 11 (c)(1).

agreement it must inform the accused that it will embody the agreed disposition in the judgement.[94] When the Court rejects a plea agreement, it must inform the parties of its rejection, advice the accused personally that the Court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea.[95]

An accused may withdraw a plea of guilty with or without any reason before its acceptance by the Court and after its acceptance by showing just and fair reason.[96] After the imposition of sentence, the accused may not withdraw a plea of guilty and the plea may be set aside only on direct appeal or collateral attack.[97] The Court must determine that there is a factual basis for the plea before entering judgement on a guilty plea.[98]

5. Plea bargain in Civil Law Countries.

Civil law jurists consider the concept of plea bargaining to be abhorrent, seeing it as reducing justice to barter.[99] In civil law countries plea bargaining is extremely difficult as civil law systems have no concept of plea.[100] If any accused confesses, that confession is entered into evidence, but the prosecution is not absolved of the duty to present a full case.[101] Here prosecutors are required to file charges whenever sufficient evidence exists to support the guilt of the accused.[102] In recent years, in these countries, signs of a shift from a strict adherence to compulsory prosecution are noticeable. This trend is probably best seen in the emergence of plea bargaining in Germany and Italy.[103]

5.1 Plea bargain in Germany:

In 1877 when the German Code of Criminal Procedure was first drawn up, it incorporated the rule of compulsory prosecution by virtue of which prosecutors are allowed no discretion and are required to

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94. Id, Rule 11 (c)(4).
95. Id, Rule 11(c)(5).
96. Id, Rule 11 (d).
97. Id, Rule 11 (e).
98. Id, Rule 11 (b) 3.
99. For detail, please see, *Plea bargaining in civil law countries*; <http://en.wikipedia.org/wiki/Plea_bargaining> (accessed on 20/9/06).
100. Ibid.
101. Id.
102. Yue, Ma; *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective*; International Criminal Justice Review; volume 12, 2002; at page- 30.
103. Ibid, at page- 31.

prosecute all cases that are supported by evidence. The Code of Criminal Procedure provides that-

> "the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications."[104]

Later on, a variety of new provisions widening prosecutors discretion have been incorporated into the Code that led to a gradual erosion of mandatory prosecution. In Germany, plea bargaining takes different forms. The most commonly identified forms are:

i. Diversion bargain under section 153a of Code of Criminal Procedure: This section was added to the Code in 1975 and provided several exceptions to the rule of mandatory prosecution. It authorizes the prosecutor to refrain from prosecuting any minor offences on the condition that the accused agrees to provide some form of compensation to the victim or makes payment to a charity or the treasury.

ii. Bargain over penal orders[105]: This form of plea bargaining originates from the Penal Order Procedure.[106] Here the accused has 14 days to decide whether to request a trial in court or to accept the penal order.[107] The attractiveness of penal order for the accused lies in less severe penalties contained in the order compared to the potential sentences that could be imposed of if the accused was convicted at trial.[108] In the vast majority of cases, the penalty contained in the penal order is a monitory fine. By paying the fine, the accused avoids embarrassment, publicity and the costs of trial.[109]

iii. Bargaining over confession: Accused's confession and guilty plea do not replace the trial though it could shorten the length of the trial.[110] Before a formal charge is filed with the Court, the prosecutor plays a major part in negotiating with the defence counsel regarding the prospect of an accused's confession. The prosecutor may offer to charge the accused with fewer offences than the accused is alleged to have committed or to move for a lenient sentence at trial.[111]

104. Section 152(II) of The German Code of Criminal Procedure 1877.
105. Penal order is a document prepared by the prosecutor, which contains the accused's offence and punishment for the offence. Punishment in the penal orders include day fines, a suspended prison sentence of up to one year, suspension of a driving licence and forfeiture of the profits of the crime.
106. Procedures for Penal Order, section-407-412, the German Code of Criminal Procedure 1877.
107. Supra note 128, at page-37.
108. Ibid.
109. Id.
110. Id.
111. Id.

5.2 Plea bargain in Italy:

In Italy, the new Criminal Procedure Code of 1989 does not use the language of plea bargaining, but it contains two trial avoidance procedures that allow imposition of sentences on the accused without a full trial.[112] These special procedures have become known as Italy's plea bargaining analogues.[113] The two trial avoidance procedures are:

i. Party agreed sentences: The party agreed sentence procedures means that the prosecutor and the defence may enter into an agreement as to the appropriate sentence to be imposed on the accused without going through a trial.[114] The statutory requirement is that the punishment can't exceed two years of imprisonment.[115]

ii. Abbreviated or summary trials: Abbreviated trial procedure can only be requested by the defendant at the preliminary hearing to dispose of the case on the basis of the evidence accumulated.[116] The incentive given to the accused for availing themselves of this special procedure is that after being convicted under this special procedure, they will receive a statutory mandated one-third reduction of the sentence that would have been imposed on them should they have been convicted after a full trial.[117]

5.3 Plea bargain in France:

In France criminal offences are classified into minor offenses, intermediate offences and serious offences. These offences are tried by three different Courts i.e. police court, correctional court and the assize court. Although law requires that all serious offences be tried in the Assize Court, prosecutors may circumvent this limitation by charging an offender who has committed a serious offence with only an intermediate offence or a minor offence.[118] This power of prosecutors to reduce charges is known as correctionalization which is refereed to by American Commentator as the French analogue of plea bargaining.[119]

Once forbidden in most of Europe,[120] plea bargaining has steadily crept into many countries systems during the past generation. Italy has

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112. Id, at page 39.
113. Ibid.
114. Id.
115. Id, at page 40.
116. Id, at page 41.
117. Article 442(2) of the Code of Penal Procedure.
118. Supra note 102, at page 31.
119. Ibid, at page 32.
120. Supra note 5.

already passed federal legislation to legalize it formally. Germany, once praised as a land of without plea bargaining, has witnessed a rise in the popularity of plea bargaining.

6. Provisions of guilty plea in the Criminal Procedure Code of Bangladesh.

Bangladesh has inherited a system of administration of justice from the British colonial rule. We have the same administration of criminal justice as it was in British India. Criminal cases are basically regulated by the Code of Criminal Procedure, which was enacted by the British rulers in the year of 1898. With the passage of time some amendments have been made and some special laws have also been enacted but still the provisions made by the British rulers prevail.

6.1 Guilty plea at investigation stage

According to the Criminal Procedure Code of 1898, an accused may admit his guilt before a magistrate at the stage of investigation.[121] This confession must be made voluntarily maintaining the procedural laws[122] and not by inducement, threat or promise[123] in which case it will go against him in evidence.[124] It is to be noted that the Evidence Act, 1872 does not take into account any confession made before any police-officer[125] or under police custody[126] to ensure its voluntariness. Before recording such statement, the duty of the concerned magistrate is to inform the accused that he is not bound to confess and if he does so it may be used against him.[127] The Court has also the right to punish any person on the basis of his confession.[128] There is no provision in either in the Evidence Act, 1872 or the Criminal Procedure Code, 1898 that upon confession, the accused will get any lenient punishment or will be favoured in any way. This means that there is no scope for any bargaining over confession

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121. Section 164 of the Code of Criminal Procedure, 1898.(Act V of 1898).
122. Ibid, section 364 .
123. Section 24, the Evidence Act 1872 (Act no.1of 1872).
124. Section 164, 364 of the Code of Criminal Procedure, 1898 (Act No. V of 1898) and sections 24-30 of the Evidence Act, 1872 (Act No. I of 1872).
125. Section 25, of the Evidence Act, 1872.
126. Section 26, of the Evidence Act, 1872.
127. Section 364 of the Code of Criminal Procedure 1898 (Act No. V of 1898).
128. *State vs Mukter Ali* , 10 DLR 155.

6.2 Guilty plea at trial stage

In the trial of a case before any magistrate when the accused appears or is brought before the Court and the magistrate thinks, on the basis of the record, documents and examination and also after giving the prosecution and the accused an opportunity of being heard, there is ground for presuming that the accused has committed an offence, he shall frame a formal charge against the accused.[129] Then the magistrate shall ask the accused whether he admits that he has committed the offence with which he is charged.[130] If he admits the offence he is charged, magistrate may convict him accordingly.[131] In the trial of a case before sessions court, after framing a charge the Court shall ask the accused whether he pleads guilty of the offence charged or claims to be tried.[132] If the accused pleads guilty, the Court may convict the accused.

There is no provision in any law that the Court will convict an accused with a lenient sentence because of his guilty plea. In practice, magistrates and judges are often sympathetic and where they have any discretionary power regarding punishment and other charges to be withdrawn, they try to apply the discretion in favour of the accused.[133]

6.3 Tender of pardon to accomplice

According to the Criminal Procedure Code, 1898, a magistrate, at any stage of investigation or inquiry or the trial and court of sessions, at the stage of trial, may tender pardon to any accomplice.[134] The main object of this provision is to obtain evidence against others. The promise is made with conditions of full and true discloser of the circumstances within his knowledge relating to the offence and to every person involved therewith. That person shall be examined as a witness in the subsequent trial to establish the prosecutor's case.[135] If the person who has accepted such tender, does not comply with the condition with which the tender was made, that is, willfully conceals anything essential or give false evidence, may be tried for his offence which was offered to be tendered.

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129. Section 242 of the Code of Criminal Procedure, 1898, (Act No. V of 1898).
130. Ibid, section 242.
131. Id, section 243.
132. Id, section 265D.
133. Mr. Jalal Ahmed, Chief Metropolitan Magistrate, Dhaka. Interview over telephone on 12/11/06.
134. Section 337 of the Code of Criminal Procedure, 1898 (Act No. V of 1898).
135. Ibid.

Recommendations and Conclusion:

Ours is a justice system where the sheer magnitude of the number of unresolved cases threatens to undermine the core concept of justice. This calls for effective and meaningful measures to be incorporated in administration of justice and to this end plea bargaining will definitely be a welcome inclusion. The fact that the accused may be let off the hook with a lenient punishment in exchange for his admission of guilt should not be a deterrent as the benefit outweighs the disadvantages of the system. A thorough analysis of how this system works in other countries, its merits and demerits and how efficiently the system helps in the expedient disposal of cases shall pave the way for effective implementation of the option of plea bargain in criminal justice administration. Considering the overcrowded Criminal Courts and all the constraints prevailing, it will not be over ambitious for the Criminal Courts of Bangladesh to consider inclusion of this in our criminal justice system. A new and complete chapter may be incorporated in the Criminal Procedure Code of 1898. Specific recommendations are outlined for consideration:

1. As plea bargain is a process to avoid trial, it should be offered at the beginning of a case. In sections 242 and 265D of the Code of Criminal Procedure, 1898, where Courts frame formal charge against any accused after considering the case *prima facie* and ask the accused whether he pleads guilty or wants trial, they should have the power to offer the accused necessary incentives for a mutually satisfactory disposition of the case through plea bargaining.
2. Whenever any person decides to plead guilty, he has to be made fully aware of the consequences. As in section 364 of the Criminal Procedure Court, 1898, the Court concerned should be invested with the duty to inform the accused that if he follows this procedure he will lose some constitutional rights like right to trial, right to confront and cross-examine witnesses against him, right not to be compelled to incriminate himself, right to appeal and so on.
3. In the United States of America, the prosecution has the right to offer the accused to accept this proposal which facilitates prosecution to overcharge and take an upper hand over the accused. This proposal should come form the side of the accused. The option should remain open for a specified period at the beginning of the trial, for example, one month from the date of framing charge and if within this time, he decides to plead guilty, he may apply to the court in which the trial commenced.

4. To arrive at a mutually satisfactory understanding in a case, the victem's participation in a general registered case along with prosecution and accused or his lawyer has to be ensured so that his interest can be honoured. If any victim raises any complaint that the prosecutor and the accused in their mutual disposition have done something which provides extra benefit to the accused, the court sould take into account his allegation before its final acceptance.
5. In India, plea bargaining is not allowed for every offence. Here also, considering people's emotion and in order that serious offenders do not find themselves in a favourable position after committing a crime, plea bargaining should not be offered for grave offences. Cases which are tried summarily under chapter 22 of the Criminal Procedure Code, 1898 and also offences triable under the *Speedy Trial Act-2002* or offences coming under the preview of the *Nari O Shishu Nirjatan Daman Ain -2000* should not be permitted for resolution by way of plea bargaining.
6. The trial court should be invested with the duty to ensure voluntariness of preferring this procedure. It is imperative for the court to be satisfied that the accused resorted to plea bargaining voluntarily and not under any threat or coercion.
7. In the prevalent legal system of Bangladesh only sentence bargaining rather than charge bargaining should be allowed. If the opposite is done there is a possibility that prosecution will be facilitated and in some cases, even the lawyer of the accused may take undue advantage. Moreover, fact bargaining is a process which is quite complicated and requires skilled lawyers for both parties.
8. What incentive will be appropriate for an accused to induce him to admit his guilt - is a question which should be determined after conducting a study of the accused undergoing trial. The reaction of the victim and society should also be measured. The incentive may be two-third or three- fourth of the original sentence which might have been awarded, if found guilty. Accordingly, the accused who has preferred this process may be sentenced to one-third or one-fourth of the punishment provided for such offence.
9. Whatever the parties mutually accept, court has to respect it and pronounce its judgement on the basis of their mutual agreement. However, there must be a factual basis for the case. The court should satisfy itself by way of inquiry or by examining the report submitted by the parties that the act or omission which the accused admits constitutes the offence charged in the indictment. Such inquiry will protect an accused who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.