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Plea Bargaining, Reconciliation and Access to Justice in Zambia: Exploring The Invisible Link

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This article looks at the criminal justice system in Zambia in relation to efficiency and plea bargaining. Using publicly available data, it demonstrates that the institutions under the criminal justice sector are struggling to cope with heavy caseloads. The majority of cases in this context are disposed of through plea bargaining, thereby avoiding full trial. Only a few proceed to full trial. In this respect, it can be seen that plea bargaining serves two ends: it enables deserving cases to have space for trial and it allows the rest of the cases to be disposed of efficiently, without resort to trial. This, however, is not always appreciated by policy makers and legislators as they pass laws that negate or impede the effectiveness of plea bargaining. The paper concludes that plea bargaining is an essential ingredient of an efficient criminal justice system, without which the system would collapse under an impossible case load, and that it is also consistent with traditional African conceptualization of justice, particularly the concept of Ubuntu.

Key words: Criminal justice; efficiency; plea bargaining; trial; Ubuntu; Zambia Police

Introduction

The justice sector of a country may contribute to national stability and development. It helps resolve disputes by allocating liability for social disharmony. There is evidence that an efficient justice system contributes to economic development (Kondylis and Stein, 2018: 2). To have an efficient justice system requires that reforms to the system are based on empirical evidence and accurate statistics. Uninformed reforms may unintentionally end up injuring the same systems they intended to help.

This article looks at the criminal justice system in Zambia in relation to efficiency and plea bargaining. Using publicly available data, it demonstrates that the institutions under the criminal justice sector are struggling to cope with heavy caseloads. The majority of cases in this context are disposed of through plea bargaining, thereby avoiding full trial. Only a few proceed to full trial. In this

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respect, it can be seen that plea bargaining serves two ends: it enables deserving cases to have space for trial and it allows the rest of the cases to be disposed of efficiently, without resort to trial. This, however, is not always appreciated by policy makers and legislators as they pass laws that negate or impede the effectiveness of plea bargaining.

The body of this paper is divided into six parts. The first section is an overview of the Zambian criminal justice system. It uses publicly available information to emphasize the need for continued strides in efficiency within the justice sector. The second section discusses the benefits and downsides of plea bargaining as a general practice. The practice is then formally characterized into a simple economic model within the third part of the paper. The fourth section further analyses the Zambian legal framework for plea bargaining, as well as discusses the recent introduction of potentially contravening policies. The fifth section deploys an economic model to verify both the prior effectiveness of plea bargaining and the impeding effects of mandatory minimums to the Zambian criminal justice system. Lastly, these conclusions are consolidated with existing concepts of reconciliation within the Ubuntu system of law in the sixth part of this paper.

State of the Criminal Justice System in Zambia: What do the numbers say?

Statistics show that the criminal justice system is struggling to cope under the current heavy case load. On average, the Zambia Police receive about 60,000 reports of crime per year (Zambia Police, 2017: 1). A research by the Danish Institute for Human Rights in 2012 put the annual crime incidence above 100,000 (Kerrigan et al, 2012: 148). This suggests that the police are under-reporting crime. However, only about 44 per cent of the reported cases lead to the identification of perpetrators or arrests (Zambia Police Service, 2017: 1). In the majority of cases, the offenders are never brought to justice. It should be noted, however, that the incidents of crime reported to police is a gross under representation of the prevalence of crime in the country. A survey by the Governance Department in 2009 established that only 11.2 per cent of the people surveyed reported crimes to police while 88.8 did not (Governance Secretariat, 2010: 67). John Hatchard has suggested three reasons for the low reporting of crime. First, the underdeveloped communication infrastructure, especially in rural area, which makes police stations (which are often only found in urban areas) inaccessible, may deter many people from reporting (Hatchard, 1984: 167). Second, there is widespread preference to deal with criminal matters using traditional conflict resolution mechanisms. This is important because the traditional redress for crime has predominantly been reconciliation and compensation for the victim and/or his/her family. So, where people consider that the courts are simply places of punishment but without compensation and

reconciliation, they would be reluctant to report crime to the police (Hatchard, 1984: 167). This is significant for rural areas where communities tend to be closely knit and desire to restore relations. Third and finally, people may not consider a crime worth reporting either because they consider the crime to be minor or they have no faith that the police will apprehend the culprit (Hatchard, 1984: 167).

Where the police act on the reports of crime and manage to arrest suspects, it seems that 28 per cent of cases end at the police station by defendants pleading guilty and paying an admission of guilt fee, while 20 per cent end at the police station through various ways such as reconciliation and cases being withdrawn by the complainants (Human Rights Commission, 2014: 24). Therefore, in only 52 per cent of arrests are cases dispatched to court for determination.

The Courts are hardly coping with the number of cases as they are characterized by endless backlogs. The 2009 research by Governance Secretariat found that it took an average of 146 days (against a target of 60 days) to dispose of a criminal matter in the Subordinate Court and 293 days (against a target of 130 days) to do the same in the High Court (Human Rights Commission, 2014: 59). These, however, only refer to cases that have been cause listed. The period from arrest to actual commencement of trial may be longer. The statistics also do not desegregate between cases that have gone to full trial and those that ended through plea bargaining or entry of guilty pleas.

Table 1: Average Time Taken to Dispose of Criminal Cases

Court	Target Days	Actual Days Taken
Local Court	30	102
Subordinate Court	60	138
High Court	130	330
Supreme Court	150	640

Source: Adapted from the Governance Secretariat, 2009 State of Governance Report-Zambia (2010)

Similarly, a 2014 survey by the Human Rights Commission found that about 30 per cent of remandees waited for judgment for a period of more than one year from the time trial concludes (Human Rights Commission, 2014: 23). The consequence of all these backlogs is to cause a severe strain on the holding capacity of correctional facilities. As of 2016, of the 21,000 prisoners in correctional facilities, almost 40 per cent were remandees (Zambia Law Development Commission, 2017: 12). To put these figures in context, the current prison capacity is for 8,500 inmates (Zambia Law Development Commission, 2017: 12). At 21,000 it means the facilities are holding in excess of 300 per cent of their capacity.

Table 2: Time Taken by Remandees Waiting for Judgment

Time	Per cent
Less than 1 month	32.5
1-3 Months	14.6
4-6 Months	12.1
7-9 Months	5.8
10-12 Months	5.3
Over 1 year	29.6
Total	**100**

Source: Human Rights Commission, A Survey Report on the Application of Bond and Bail Legislation in Zambia (2014)

It is worth noting that criminal cases are not the only cases competing for time and space before the Courts. Given the lack of Court specialization, civil cases also draw from the same pool of resources in direct trade-off. Preliminary data from a research by SAIPAR shows that even in relation to civil cases, the Courts are severely constrained and have a lot of backlogs, as the table below shows (SAIPAR, 2018: 43).

Table 3: High Court Exact Disposition Times of Civil Cases by Mode of Commencement

Mode of Commencement	Duration in Days
Writ of Summons	1,420
Originating Summons	447
Originating Notice of Motion	389
Petition	317
Appeal	629

Source: Southern African Institute for Policy and Research, Measuring Court Efficiency in Zambia (August 2018)

The strain on the Courts is quite evident despite the fact that only about 10 per cent of criminal cases proceed to full trial. About 90 per cent are resolved through some form of plea bargaining and thus do not necessitate the full scale of judicial resources normally allocated to a trial (Kerrigan, 2012: 82). This description of present-day judicial strain must furthermore account for the possibility of future changes in relevant factors. Assuming that the 88.8 per cent of Zambian citizens who currently do not report the crimes that they encounter begin to find a way to do so, and that the police gradually improve their investigation skills and manage to apprehend greater per centages of suspects,

one would predict the case load in criminal justice institutions will increase astronomically. One would subsequently recognize the threat of institutional burden, if not entire collapse, should corresponding goals for judicial efficiency not be met. This underlying dynamic shapes the following section's cost-benefit discussion of plea bargaining as a mechanism for justice.

Plea Bargaining: A Cost-Benefit Analysis

The preceding section has hinted that Courts are given a semblance of effectiveness as a result of many cases that do not proceed to full trial. Without mechanisms that dispose of cases without trial, Courts would literally grind to a halt under an impossible workload. Plea bargaining is the main mechanism for disposing of cases without resort to trial. But what is plea bargaining?

Plea bargaining is a procedure whereby an accused person waives his/her right to trial in exchange for a more lenient sentence or lesser charge than would ordinarily have been imposed had the accused been found guilty following trial. There are generally two ways plea bargaining is accomplished. It could either be done in a direct way whereby the prosecutor offers a charge reduction (which carries a relatively lower sentence or gives the judge more sentencing discretion) or indirectly through the formal offer of recommendations for a reduced sentence (Langbein, 1978: 8).

In the context of the history of the common law, plea bargaining is relatively new, and was unknown before the 19th century (Langbein, 1979: 261). Prior to that, trials characterized the criminal justice system as the main case dispositive mechanism. Then trials were short and never lasted more than a few minutes. It is estimated that a single Court could try between 12 and 20 criminal cases per day and give judgment in all those cases the same day (Langbein, 1979: 261). Trial was so efficient that judges discouraged defendants from pleading guilty in order to put their case to trial and test the evidence against them (Langbein, 1979: 261). It was unheard of for trial to last more than a day.

Trial was able to proceed in this swift manner because lawyers played no major role in trials and the judge called the witnesses himself, while the trial itself was not rigidly structured (Langbein, 1978: 10). Trial was no more than an "altercation" between the accused and the witnesses. However, increasing pressure for safeguards against convicting innocent people led to the development of stringent procedures in the rule of evidence and invariably increased the role of lawyers in the criminal justice system. This slowly led to the evolution of the current complex and time-consuming criminal trials that inevitably made trial as the normal dispositive mechanism of cases unworkable (Langbein, 1978: 11).

The pervasiveness of plea bargaining, the rarity of full trials and the limited capacity of criminal justice institutions have led to the growing strong consensus in present-day judiciaries and academia that governments "cannot afford to fund criminal justice systems that adjudicate more than a small fraction of prosecutions through ordinary trials." (Brown, 2016: 104). The intersectional field of law and economics produced a seminal model explaining why plea bargaining is optimal in terms of social resource allocation (Landes, 1971). On the state side, litigation funds saved on bargained out cases can be better channeled into budgets for enforcement or into more complex cases. On the side of the defendant, the diminished need for expensive legal fees and mitigated effects of risk are likewise valuable. These results are consistent with the reasoning in several legal judgments. In the *Santobello* (1971) case the US Supreme Court affirmed that plea bargaining is "an essential component of the administration of justice" without which the criminal justice system would grind to a halt. It is the primary procedure for disposing of criminal cases. Similarly, in the *Natsvlishvili* (2014) case the European Court of Human Rights acknowledged that the "plea bargaining process leads to expedited trial proceedings in every country that has such processes in place."

There are generally two features of the common law criminal justice system that make plea bargaining possible. The first one is that the law or the constitution giving defendants the right to trial does not preclude them from waiving the right and readily pleading guilty. There are many reasons, besides the possibility of leniency, that would incentivize an accused to plead guilty. These may include uncertainty about the outcome of trial, trial expenses, and also the need to avoid opening the defendant's private life to the public through trial (Adelstein, 2018)

The second factor is that in many jurisdictions, prosecutors enjoy wide discretion in selecting appropriate charges. This tool entails that prosecutors have something of value, putting them in a strong and advantageous position to extract a compromise from the accused and therefore avoid trial. This, coupled with the power to make recommendations for sentencing to the judge (where applicable), places the prosecutor in an influential position to offer potential charge or sentence discounts to an accused person in exchange for the defendant's waiving their right to trial (Idhiarhi, 2017).

Although the value of plea bargaining is widely acknowledged, it has been criticized for several short-comings. Four of such shortcomings can be highlighted and contended with here. The first criticism is that in plea bargaining that takes the form of charge bargaining, the defendant gets convicted not for what he did, but for something less opprobrious (Langbein, 1978: 16). Defendants, therefore, get punished for less serious crimes than they actually committed, and, therefore plea bargaining produces inaccurate outcomes relative to the gravity of their crimes (Adelstein, 2018: 12).

Punishing the guilty as severely as they deserve, however, runs the chance of wrongfully punishing the innocent. In contrast with the first criticism, an extension of the aforementioned Landes model demonstrates how plea bargaining can be used as a guilt screening mechanism for a prosecutor's office (Grossman and Katz, 1983). This economic argument is hinged on the fact that a defendant knows whether he is actually guilty or not, whereas the prosecutor is only able to estimate the defendant's likelihood of guilt. Therefore, innocent defendants will correctly tend to dismiss attempts to plea bargain whereas guilty defendants will be more likely to accept. A defendant's declining an offer could be useful to prosecutors in deciding whether to continue to pursue the case, as well as to benchmark the accuracy of law enforcement in apprehending suspects.

Second, plea bargaining is criticized for insulating the criminal justice system from the public, because its proceedings are held in secret and are not constrained by the procedural safeguards of trial (Manikis and Grbac, 2017). Trials routinely take place in the open court. Thus, trials are accessible to the citizen, who by attending trial, indirectly participates in the criminal justice system, thereby clothing it with legitimacy. This fosters transparency and accountability in the criminal justice system. Plea bargaining, which usually occurs in the background, away from the public gaze, only involves defence lawyers and prosecutors and thereby negates these values.

Thirdly, plea bargaining is criticized for dwarfing the *deterrence value* that a criminal trial and its subsequent sentencing holds in preventing crime from happening in the first place. In criminal trials, the majesty of the state and its full power is displayed and deployed against the defendant (without annihilating the defendant's right to a fair trial) (Adelstein, 2018: 13). Plea bargaining, on the other hand, often takes place away from the public eye and is characterized by informality. Violators are reasoned to be less wary of the enforcement of the law when it lacks a performative characteristic.

Some economists stand in support of the deterrence criticism, albeit from a different angle. One paper finds that existing sentencing guidelines for the violation of certain laws may be pre-set to create an optimal level of disincentive toward potential violators without being too draconian (Polinsky and Rubinfeld, 1989: 1-8). The frequent use of bargaining, however, may offset the calculated balance and dilute the disincentive, thus encouraging more lawbreaking. Another paper likewise emphasizes this point – even the possibility of a struck plea bargain reduces the face value of the threat carried by a crime's corresponding sentence (Zambia Law Development Commission, 2017).

The counterargument to the issue of deterrence is that with the Courts overloaded, it is far less likely that someone will be convicted for their crime. Guilty defendants may bank on the fact that a prolonged trial may obscure the facts of the case and they may be erroneously found innocent, or that their

charges may be altogether dropped by an overloaded office of the prosecutor. Plea bargaining allows prosecutors to channel their limited resources toward the cases at hand without being stretched too thin.

Finally, plea bargaining is criticized in that the incentives it presents or the pressure it exerts on the defendant may lead innocent people to readily plead guilty. This is because the sentencing discounts it presents to defendants may be enormous such that even "innocent defendants who think there is a chance of erroneously being convicted at trial will plead guilty to crimes they did not commit." (Miceli, 1996).

Another economist adds nuance to the scope of this criticism, suggesting that "higher levels of crime and a greater social emphasis on ensuring that guilty individuals are punished lead to a greater use of plea bargaining, while lower levels of crime and a greater social emphasis on ensuring that innocent individuals are not punished leads to less use of plea bargaining" (Givati, 2011: 1). This is important because it demonstrates that plea bargaining cannot be categorically criticized, but rather that there are only *certain* conditions under which it may lead innocent people to readily plead guilty. The implied onus is to then improve the plea bargaining process in respective legal systems to favour circumstances that are more conducive to the principles of justice.

Ultimately, the shortcomings of plea bargaining are widely acknowledged. To mitigate them it is often suggested that there is need to make the plea-bargaining process more transparent and subject to judicial oversight. Both the victim and the defendants need to play some role in the process and the judiciary should ensure that the process is fair. The European Court of Human Rights took such a view and held that plea bargaining needs at least two safeguards: a) the bargain should be accepted by the defendant in full awareness of all the facts of the case and the legal consequences and in a genuinely voluntary manner; and b) "the content of the bargain and the fairness of the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review" (Natsvlishvili, 2014).

A Simple Economic Model of Plea Bargaining

Plea bargaining has been robustly studied within the intersected field of law and economics. As mentioned in the previous section, Landes most famously modeled a state of affairs in which prosecutors sought to maximize the sum of expected punishments upon defendants given a fixed budget constraint of judicial resources (Landes, 1971). Additions were made to the Landes model by exploring the continuous cost of time that defendants face both pre-trial and during trial (Adelstein, 1978). Further examinations have been made upon plea

bargaining situations with multiple defendants (Kobayashi and Lott, 1992). One defendant's bargained sentence may be altered depending on his ability to induce confessions from other defendants. Lastly, a heuristic known as Nash bargaining may be used to examine a court settlement, with the haggling over a criminal sentence highly resembling any two parties' negotiation over the distribution of a shared, finite resource (Basu, 2000: 109-131).

All of the aforementioned economic models of plea bargaining hold two features in common: 1.) A simple decision-making tree in which the prosecutor first offers the defendant a bargained sentence, upon which the defendant decides whether to accept or to reject, and 2.) A mechanism describing how the rational defendant makes said decision. In this section, we deploy a bare-bones model containing the above two features in order to draw a few conclusions within the context of the Zambian court system. The simple model is created as follows:

There exist two actors – Prosecutor (P), and Defendant (D) – in a decision tree.

P must propose a bargained sentence S_{PB} that is between the range S_0, indicating 0 years in prison, and S_T, indicating the number of years in prison as recommended by statute (a.k.a the punishment the defendant would receive were he to be found guilty in trial). Thus, $0 = S_0 < S_{PB} < S_T$. Faced with P's plea bargain, D's decision node subsequently contains the options to accept or to reject.

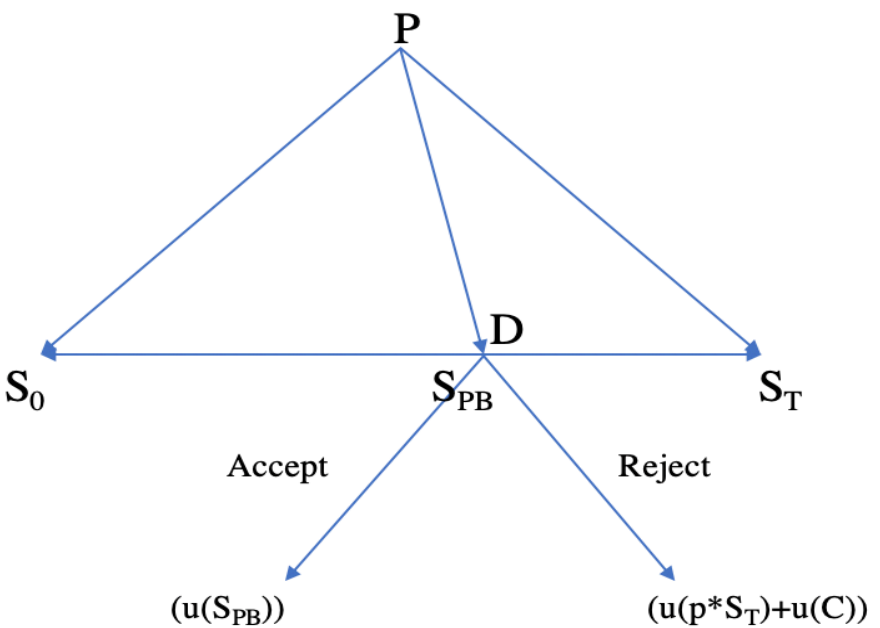

Figure 1: Plea Bargaining Decision Tree

We must consider the outcomes in order to model whether D will accept or reject a plea bargain. If D chooses to accept, then he must suffer the bargained prison sentence S_{PB}. The expected value of the outcome can be described as $u(S_{PB})$, with u() being D's utility function. It is important to note that all outputs of u() are negative granted that D is seeking to weigh the lesser of the punishments. Next, if D chooses to reject, then he must go to trial. In trial, he is said to uniformly suffer the cost C, which represents aggregated costs of trial (money spent on lawyer, time spent in courtroom, emotional strain, etc). D also holds probability p ($0<p<1$) in which he is convicted, upon which he would be thrown in prison for S_T. Conversely, he holds probability (1-p) for being found innocent, upon which he would be set free and receive a neutral utility of 0. Consequently, the expected value of deciding to reject the plea bargain would be $u(C)+u(p*S_T)$. The decision-making mechanism of a rational defendant would then dictate he accept if:

$$u(S_{PB}) > u(p*S_T) + u(C)$$

We furthermore stipulate the constraint that u() must be a well-behaved, convex function. Once again, note that u() is a dis-utility function producing negative outputs, therefore requiring it to be convex rather than concave. This accommodates the classical assumption that the average individual is risk averse, or that $p*u(S_T) > u(p*S_T)$. This can be explained via the anecdote that the defendant would prefer to have a 100% chance of being convicted to a sentence of 5 years in prison versus a 50% chance of being convicted to a sentence of 10 years in prison. In addition, the constraint also accounts for the diminishing marginal dis-utility of increased sentences. Whereas an added 10 years in prison would be greatly harmful to a defendant if he had to weigh between a sentence of 5 years versus 15 years, it would matter far less when weighing between a sentence of 100 years and 110 years.

Using the rational defendant's decision-making mechanism, we can bracket a range of plea bargain values S_{PB} between S_0 and S_T such that the plea bargain will be accepted. The upper bound of this range is hence designated as $S_{PB\text{-}Max}$. It follows from the above analysis that for any given D with u(), $S_{PB\text{-}Max}$ can be solved for using specific values of p, S_T, and C.

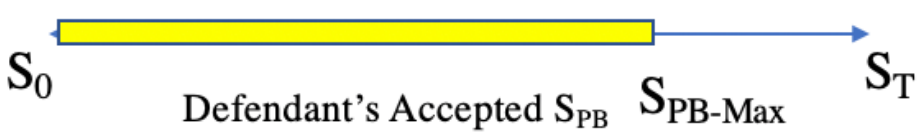

Figure 2: Demonstrating values of S_{PB} upon which D will choose "Accept"

For simplification purposes, this model does not enter into the prosecutor's side of the equation in determining the particular value of the S_{PB} offer that ought to be selected. Rather, it deploys the normative assumption that any increase in the range of a defendant's accepted S_{PB} values for a given S_T is desirable for the prosecutor because it makes plea bargaining *easier*. This can be alternatively measured as the ratio of $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$. Increases in $S_{PB\text{-}Max}$ must be held relative to the given S_T in order to account for different crimes holding different trial sentencing guidelines; the obvious conclusion would otherwise be that plea bargaining is inherently easier in cases where defendants are accused of more serious crimes.

Why does an increased range of a defendant's accepted S_{PB} values relative to S_T make plea bargaining easier? This normative statement is justified on the grounds that prosecutors hold greater room for error in deciding the particular S_{PB} offer to make. Often, due to external justice-based considerations, prosecutors are not able to offer too low a plea bargain. Prosecutors may also want to offer different plea bargains across multiple defendants on the same case and must be able to distinguish between each defendant. Lastly, and perhaps most realistically, prosecutors could erroneously estimate the probability, p, by which a defendant will be convicted. This means that the prosecutor may offer too high a S_{PB} relative to how the defendant perceives p in his own decision-making mechanism. Having a higher $((S_{PB\text{-}Max}\text{-}S_0/S_T)$, or range of acceptable S_{PB} values, grants more flexibility in each of these departments.

Legal Framework on Plea Bargaining and Reconciliation in Zambia

There are generally three ways plea bargains can be accomplished under Zambian law. The first is the formal process of plea bargaining specifically provided for by the law; the second, an informal way of plea bargaining, relies on the charging discretion of the prosecutor; and the third one is dependent on the Court exercising its power to foster reconciliation. Each of these is discussed in turn.

Formal plea bargaining is new in Zambia. It was introduced in 2010 following the enactment of the Plea Negotiations and Agreement Act No. 20 of 2010. Under this Act, plea bargaining or negotiation:

> *Means any negotiation carried out between an accused person or the accused person's legal representative, and a public prosecutor in relation to the accused person pleading guilty to a lesser offence than the offence charged or to one of the multiple charges in return for any concession or benefit in relation to which charges are to be proceeded with (Section 2, Plea Negotiations and Agreements Act, 2010).*

This definition of plea bargaining is restrictive in the sense that it simply allows a charge bargain. It does not extend to bargaining of the sentence. A prosecutor and an accused can, therefore, only agree to a lesser crime but not to any specific sentence as that remains entirely in the hands of the judge.

The Act empowers both the prosecutor and an accused person to enter into a plea agreement at any stage prior to the judgment (section 4(1)and(2) Plea Negotiations and Agreements Act, 2010). Where an agreement is reached, it is required that it should be in writing and the accused person should undertake to make a guilty plea to an offence which is disclosed in the agreement and the facts on which the plea is based (sections 4(3)(i) and 7, Plea Negotiations and Agreements Act, 2010).

Before commencing any plea negotiation, the concerned prosecutor is required to inform the accused about his/her right to legal representation. A plea bargain can only be had with the accused's legal representative (Section 6, Plea Negotiations and Agreements Act, 2010). The prosecutor is required to "inform" the victim or the immediate family members of the victim of the substance of, and reasons for the plea agreement (Section 8(1)(a) Plea Negotiations and Agreements Act, 2010). The victim is only entitled to be "informed" and, therefore, only envisioned to play a passive role in the whole plea negotiation process. He or she cannot object or make any representations. The crafting of the provision also entails that the victim is only informed when the plea agreement is concluded and not when it is in process nor about its desirability.

Although the victim is entitled to be present when the Court considers the plea agreement (Section 8(1)(b) Plea Negotiation and Agreements Act, 2010), that does not entitle the victim to object to the agreement or make representations to the Court. The procedure of formal plea bargaining in its current form, therefore, effectively leaves out the victims of crime from the process of plea bargaining. To compound the position of the victim, the Act requires the plea-bargaining process to be kept secret and all information to be kept confidential until it is presented in Court (Section 18(1) Plea Negotiations and Agreements Act, 2010). Violation of this provision is criminalized (Section 18(2), Plea Negotiations and Agreements Act, 2010).

Although a plea agreement may be successfully completed between an accused and the prosecution, that does not bind the Court to accept the agreement. The Court has power to reject the agreement where the agreement is "contrary to the interests of justice and public interest." (Section 10, Plea Negotiations and Agreements Act, 2010). Before accepting a plea agreement, the Court is obligated to determine the following:

(a) No inducement was offered to the accused person to encourage the accused person to enter into the plea agreement;

(b) The accused person understands the nature, substance and consequences of the plea agreement;
(c) There is a factual basis upon which the plea agreement has been made; and
(d) Acceptance of the plea agreement would not be contrary to the interests of justice and public interest (Section 11, Plea Negotiations and Agreements Act, 2010).

The Court therefore has an oversight role over the plea-bargaining process. Where the Court rejects a plea agreement, that is not a bar to any subsequent plea agreement in the same matter (Section 12(3), Plea Negotiations and Agreements Act, 2010). Both the accused ant the prosecutor may withdraw from the plea agreement at any time before sentence is handed (Section 15(1)and(2), Plea Negotiations and Agreements Act, 2010).

This formal plea bargaining is hardly used in Zambia. Undoubtedly, this is because it is time consuming and would slow down the dispositive rate of cases, as compared with informal plea bargaining.

Informal plea bargaining is accomplished under two provisions of the Criminal Procedure Code (Chapter 88 of the Laws of Zambia). The relevant provisions are sections 213 (for offences triable in the Subordinate Court) and 273 (for offences triable in the High Court). Under both provisions, the prosecutor simply makes an oral application to the Court to amend the charge and if granted the accused retakes plea, usually to a lesser charge. The mechanism has the advantage of being expeditious as there are no stringent formal procedures surrounding it. It is, therefore, hardly surprising that this is the kind of plea bargaining that is dominant in Zambia. Its downside is that it lacks transparency and accountability as it envisions no role for the victim and the public and has very little or no room for judicial oversight. However, despite this weakness, it is the mechanism that is at the heart of expeditious disposition of criminal cases in Zambia.

The third and final way a plea agreement can be struck is through the Courts fostering reconciliation. This only applies in the Subordinate Court. For criminal cases tried in the Subordinate Court, the Court is mandated to promote reconciliation by encouraging and facilitating the settlement of minor offences in an amicable manor (Section 8, Criminal Procedure Code). The offences that can be settled in this manner include assaults, offences of a personal or private nature which are not felonies and which are not aggravated in degree (Section 8, Criminal Procedure Code). Where reconciliation is effected, the Court may order compensation for the victim and or such other terms as the Court sees fit and thereafter the Court shall stay the proceedings. Although anecdotal evidence suggests this mechanism is widely used, there are no publicly available accurate statistics about its use.

Although plea bargaining plays a significant role in expediting disposition of criminal cases, the response of government to perceptions of increased crime since Independence in 1964 has been to indirectly undermine plea bargaining. This has usually been through legislating mandatory minimum sentences for certain crimes. This can be gleaned from the fact that in 1965 over 77 per cent of all prison sentences were for less than six months, but by 1977 more than 62 per cent of the sentences were six months or more (Hatchard, 1984: 171).

A more recent example of the policy drive towards the imposition of longer mandatory minimum prison sentences is the amendment to the Penal Code in 2005 (Penal Code (Amendment) Act No. 15 of 2005). The amendment significantly increased the mandatory minimum sentences for sexual offences. For example, the crime of indecent assault carries a minimum sentence of 15 years (Section 137(1)), defilement 15 years (Section 138(1)), and incest 20 years (Section 159). Not only would longer prison sentences exert pressure on the already limited prison capacity to take more inmates and for longer periods, but it makes it very unlikely for plea bargaining to work. Where a prosecutor has little or no discretion to prefer a similar charge with a shorter prison term, many defendants would naturally proceed to trial as they have nothing to lose. As a result, that may clog the Courts and contribute to the already existing backlogs. The following section will argue this point in more detail.

Plea Bargaining and Some Economic Implications

We can draw three conclusions relevant to the local context by interacting the simple model of plea bargaining with some of the previous section's descriptions of plea bargaining processes in Zambia.

First, it is reasonable to conclude that defendant D's aggregate cost of trial, or C, is very high already. The statistics on court congestion and trial delays indicate that defendants are expected to spend a long time in the justice system, regardless of whether they are convicted guilty or found innocent. Likewise, prior sections of this paper have found trial procedures to be intimidating and inaccessible, and lawyer costs to be inflated beyond the means of an average defendant. Some defendants go to trial without ever retaining a lawyer – a choice that makes the courtroom seem even more daunting. Emotional distress, albeit difficult to quantify, is also predicted to bear significant weight in contributing to the high aggregate cost.

The implication of C being high in Zambia is that $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$ is already high in the status quo, or that prosecutors should already have significant flexibility in forging a plea bargain with the defendant. The statistic of 90% of cases being pleaded out only confirms this conclusion.

Second, when examining instances of formal plea bargaining in the Zambian system, the model predicts the introduction of mandatory minimum sentencing to produce ambiguous effects upon $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$. As recalled from the previous section, the formal process only allows for charge bargaining, in which a higher charge is supplanted for a lower charge if the defendant chooses not to go to trial. The relative positioning of minimum sentences on the higher and lower charges ultimately decides whether $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$ increases or decreases.

The placement of a mandatory minimum on the higher charge (assumed to be higher than the charge's sentencing recommendation in the status quo) can be modeled via the usage of a new variable S_T' to calculate $S_{Pb\text{-}Max}$ such that $S_T' > S_T$. We must keep the original S_T in place for purposes of comparison across the intervention of the mandatory minimum but also introduce the new value S_T' in order to reflect the higher sentence at trial that the defendant uses to decide whether to accept or reject the plea bargain. The subsequent increase in $S_{PB\text{-}max}$ also increases $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$, thus extending the relative range of acceptable offers that a prosecutor could make. On the other hand, the placement of a mandatory minimum on the lower charge can be modeled as an increase in S_0 from its original value of 0. Unilaterally increasing S_0 diminishes $(S_{PB\text{-}Max}\text{-}S_0)$, and thus diminishes $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$ as a whole. An ambiguous effect thus arises when mandatory minimums are enacted on both the higher charge and the lower charge. The change upon $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$ in any individual case depends upon the opposing magnitudes of change stemming from each charge.

Third, when examining instances of informal plea bargaining in the Zambian system, the model predicts the introduction of mandatory minimum sentencing to result in a decrease of $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$. The previous section states that the informal process allows for sentence bargaining, in which the charge the defendant is accused of remains the same, but the prosecutor could recommend a lower sentence in exchange for pleading guilty.

The introduction of a mandatory minimum in a situation of sentence bargaining can be modeled as an increase in S_0 from its previous value of 0 to a non-zero value. This would simply diminish the absolute range $S_{Pb\text{-}Max}\text{-}S_0$, as well as the entire term $((S_{PB\text{-}Max}\text{-}S_0)/S_T)$. In fact, there may exist a scenario in which the mandatory minimum value of S_0 exceeds $S_{Pb\text{-}Max}$, and a successful S_{PB} offer may be impossible altogether! A mandatory minimum deployed in such circumstances would be a clear inhibitor to the prosecutor's usage of plea bargaining as a tool of justice.

Plea Bargaining, Reconciliation and Ubuntu: In Search of an Autochthonous Criminal Justice Concept

The importance of plea bargaining for the efficiency of the criminal justice system is by now obvious. The bulk of criminal cases are disposed of through this procedure. The safeguards of trial entail that courts can only process a few cases effectively. In a sense, plea bargaining can be said to be the engine that ensures that those cases that deserve trial are given space in the courts. Without plea bargaining, the entire criminal justice system may crumble under a heavy case load. Statistics discussed above speak to this.

This section attempts to supply an underlying philosophical concept that could reconcile the role of plea bargaining in the criminal justice system with the value systems of the Zambian people. This is not to argue that plea bargaining is a perfect mechanism. The shortcomings noted above need to be corrected in order to ensure it is victim centered and transparent and prosecutors are held accountable for the exercise of their discretion in the bargaining process. Further, judges would need to play an oversight role over the process but without making plea bargaining cumbersome and time consuming and so of little value in swift disposal of cases. The proposed concept is that of Ubuntu.

The concept of Ubuntu is widespread in Sab-Sharan Africa and is considered to have been at the heart of traditional moral consciousness. It is applied here, not so much in a revisionist and backward-looking sense, but in an attempt to make it relevant to circumstances of the current criminal justice challenges in Zambia. In a sense, it is an attempt to see it in its best light.

Ubuntu denotes that people are interconnected and accomplish full humanness and happiness through cultivating mutually beneficial relationships. It is a concept that disavows self-centeredness and embraces the inter-connectedness of human beings, that is, "a person is a person through other persons" (Mnyongani, 2012: 365). The concept of Ubuntu is a moral exhortation to nurture one's humanness, personhood or virtue, through social and sympathetic communal relationships (Metz, 2010: 254). In a sense, Ubuntu could be considered to be the potential for being fully human. In the Ubuntu sense the humanness of a person is not static but dependent on a person's moral disposition and qualities. A person's humanness, therefore, can fluctuate from the lowest (of being as good as a beast) to the highest (Mokgoro, 1998). It is this moral quality that separates humans from beasts. Where a person lives in constant harmony with other human beings, his or her humanness is elevated.

Ubuntu can be seen as a transcendental call towards common interests, to forego self-centeredness. It is a call towards the community, to cultivate relations of mutual support for the good of each of the people a person lives in community with (Cornell, 2012: 231). Former South African Constitutional Court judge,

Yvonne Mokgoro, summarized the concept of Ubuntu as follows:

> *Generally ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphysically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation (State v Makwanyane, 1995).*

Thaddeus Metz has argued that the concept of Ubuntu has two elements embedded in it: "identity" and "solidarity." (Metz, 2011: 538). To identify with others entails thinking or seeing oneself as integrated in the life of others. It is to think as a "we", to orient one's behavior towards the realization of shared ends. To fail to identify with each other entails alienation and undermining each other (Metz, 2011: 538).

Solidarity is shown through people undertaking mutual aid and acting in ways that are expected to benefit each other (Metz, 2011: 538). It is further shown in attitudes, emotions and motives that show positive disposition towards others. To fail to show solidarity is to show disinterest in whether others flourish and may mean ill-will, hostility and cruelty (Krog, 2008: 355; Metz, 2011: 538). Identity and solidarity are present together in Ubuntu and are at the heart of the concept.

How does this concept of Ubuntu relate to the criminal justice system? There are at least two factors that connect Ubuntu to the criminal justice system. The first is that when one commits a crime (such as rape, murder, kidnapping, theft and assault), such a person can be said to have acted in an unfriendly manner, in a manner that destroys the harmony of the community. By so doing, the culprit is distancing himself or herself from the person whom he has injured, thereby destroying the "we-ness" or togetherness. He or she subordinates the other person instead of identifying with the person and showing solidarity (Metz, 2010: 257).

When this happens, the community as a collective has a duty to restore this impaired harmony. To achieve this, the community or the political authority of the community may impose some burdensome compensation or burdensome rehabilitation on the culprit as a way of expressing disapproval, but more importantly, to help the culprit realize his wrong and reconcile with the community he has injured (Metz, 2018). Metz argues that under Ubuntu, the goal of punishment is reconciliation, to restore community harmony. Therefore, the burden or punishment imposed on the offender must be proportional to the

harm done, but above all, must not foreclose the possibility of reconciliation and resuming harmonious relations. In the case of Zambia, this approach would be consistent with the findings of the anthropologist, Max Gluckman, concerning judicial processes among the Lozi people of Western Zambia. Despite the Barotse judicial process being formal, it was tailored to ensure that, as far as possible, social and family relations were preserved and not broken. Gluckman observed that "Throughout a court hearing… the Judges try to prevent the breaking of relationships and to make it possible for the parties to live together amicably in the future" (Gluckman, 1969).

The second point, flowing from the first, is that when applied to the criminal justice system, Ubuntu would entail sentencing an offender in a manner that avoids unfriendly opposites, that is, sentencing offenders in a manner that forecloses the possibility of reconciliation (Metz, 2010). Society's response to an individual's wrong doing should not lead to further divisions and ill-will. That way harmony cannot be restored. In Metz's view, under Ubuntu, the kind of sentence that is acceptable is that which is "only necessary to counteract another's own proportionate unfriendliness." (Metz, 2010: 258). Punishment should not be intended to annihilate an individual or to degrade his or her capacity for identity and solidarity. Punishment should always leave room for reform and reconciliation, for re-growing one's humanness.

To this effect, the laws prescribing mandatory minimum sentences are considered inconsistent with the concept of Ubuntu. This is because it precludes judges from the "need to attend to the specifics of the offender, his victim and the broader social context in order to prescribe what is likely to foster reconciliation." (Metz, 2018). Mandatory minimum sentences in Zambia – especially those prescribing the death penalty for murder, aggravated robbery, and treason – are considered to be an extremely unnecessary punishment to rebut the offender's unfriendly behavior. The existence of such minimums indicate that the sentence is never designed in a manner that fits circumstances to ensure the possibility of rehabilitating the humanness of the offender and reintegrating him or her into the community. That carries away the ability of the offender to contribute to the well-being of the society in the future. The removal, and possible annihilation, of the offender is thus performed without any tangible benefit to either the victim or the society.

On the other hand, plea bargaining seems to fit the concept of Ubuntu well in the Zambian context. Where there is a mandatory minimum sentence, the prosecutor lacks the discretion that would enable him or her to negotiate with the defendant the compromise that would allow the defendant to readily accept his or her guilt; that is, his or her blame for injuring society. The subsequent outcome of a carefully crafted plea bargain offer may be better tailored for the benefit of all parties.

Concluding Remarks

Plea bargaining is at the heart of an efficient criminal justice system. In Zambia, it is responsible for disposition of more than 90 per cent of criminal cases that come before the Courts. In this sense, plea bargaining is the engine that facilitates access to justice in the Zambian criminal justice system. This efficiency, however, is impaired indirectly by legislation that is often not based on empirical research. Specifically, mandatory minimum sentences mean that plea bargaining in the Zambian context is more difficult to accomplish.

It was further argued that the practice of plea bargaining is consistent with the moral concept of Ubuntu which is still a widely recognized normative framework in the Zambian context. Ubuntu fosters cohesion, solidarity and harmonious living. A person who injures society has the burden to repair the relationship, but the injured society also has the duty of not annihilating the offender's potential for repairing his humanness, and to allow him to return to society and contribute to its harmony. Plea bargaining contributes to the achievement of Ubuntu goals.

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