

# Plea-bargaining in South Africa: current concerns and future prospects

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## 1. Introduction

The powers of the prosecution service in South Africa are extensive, particularly when it comes to the exercise of its discretion to institute criminal proceedings,<sup>1</sup> to negotiate plea and sentence agreements and to divert matters from the criminal process. A court cannot prevent a prosecutor from withdrawing a matter or from accepting a specific plea. It is the state that remains dominus litis.<sup>2</sup> However it will be sufficient for the purposes of this paper to focus on how the prosecution service exercises its power when it negotiates a plea and sentence bargain and then to examine and determine the usefulness, fairness and the constitutionality of this process after 1994.<sup>3</sup>

In common law criminal justice systems the process of plea bargaining has for long been an established practice used by both the prosecution and the defence. In South Africa which in as far as its criminal procedure is concerned can be classed as a common law system,<sup>4</sup> the practice of negotiation prior to the plea was not regulated by any statute or policy and was seldom labelled as 'plea-bargaining'. It lacked formal recognition as a pre-trial procedure that fulfilled a specific function in the criminal process. Prosecutors are in a position to withdraw charges and stop prosecutions without any questions being asked by the judiciary as to what informed the decision.<sup>5</sup> Personal experience

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<sup>1</sup> See D van Zyl Smit and E Steyn 'Prosecuting authority in the new South Africa' (2000) 8 *CJLL* 137.

<sup>2</sup> See *S v Magoda* 1984 (4) SA 462 (C) and *S v Ngubane* 1985 (3) SA 677 (A). Also see N Isakow and D van Zyl Smit 'The decision on how to plead: A study of plea negotiation in Supreme Court criminal matters' (1986) 10 *South African Journal of Criminal Law and Criminology* 3.

<sup>3</sup> In 1994 when the Interim Constitution of the Republic of South Africa Act 200 of 1993, came into operation it brought about dramatic changes in the law and the values, and how we dispense justice in South Africa.

<sup>4</sup> See J Dugard *South African Criminal Law and Procedure* (1977) at 122 *et seq.*

<sup>5</sup> This does not mean that a prosecutor's decision could not be questioned by the appropriate Attorney-General of that division, pre-1994.

suggests that the exercise of such prosecutorial discretion in a majority of cases is as a result of informal plea negotiations or representations that are made by the defence to the prosecutor to intervene in this way.<sup>6</sup>

This informal and longstanding practice of plea-bargaining was formalised in 2001 when the South African Criminal Procedure Act<sup>7</sup> was amended to include a new provision, s 105A. In essence, the section codifies the practice of negotiated pleas and at the same time introduces sentence agreements. The provision can be used for all criminal offences including rape and murder.

Hitherto plea-bargaining has not enjoyed undivided academic support and has been labelled by some scholars as morally suspect, unethical and offensive to the principles of justice.<sup>8</sup> Others view plea bargaining as a procedure that provides unusual opportunities for lazy practitioners whose aim it is to take short cuts en route to finishing as many cases per day in pursuit of a greater income.<sup>9</sup>

Given the extraordinary powers of the prosecution service in exercising prosecutorial discretion in South Africa it is important to acknowledge that prosecutors are capable of negotiating an agreement by threatening accused persons with the maximum sentence that could be imposed. In light of this plea bargaining does potentially pose some risk whereby innocent people may admit guilt in cases in which they are not guilty in order to avoid maximum punishment.

With scholars expressing strong sentiments against plea-bargaining it is necessary to examine the procedure in South Africa in closer detail. Can one hold that there is merit in these opposing views particularly at a time when the South African criminal justice system is burdened with a heavy backlog<sup>10</sup> of cases? Is the practice not rather a pragmatic tool in order to deal with these case backlogs?

It is against this backdrop that this paper will examine the process of plea-bargaining in South Africa. Its uses or abuses will be looked at and then a determination will be made as to whether the process can be fairly labelled as offensive or whether it should rather be adopted

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<sup>6</sup> The author bases this statement on fifteen years of experience in the Department of Justice, working as a prosecutor, senior prosecutor and magistrate in various magisterial districts in the Western Cape.

<sup>7</sup> Act 51 of 1977. Hereafter 'the Criminal Procedure Act'.

<sup>8</sup> See J Burchell *Principles of Criminal Law* 3ed (2005) at 16.

<sup>9</sup> See AW Alschuler 'Implementing the criminal defendant's right to trial: alternatives to the plea bargaining system' (1983) 50 *U. Chi. L. Rev.* 931 at 933.

<sup>10</sup> At the end of March 2006 the backlog of cases in the district court was a total of 36 915 cases (19% of the outstanding roll of 197 404 cases) and in the regional court a total of 20 252 cases (42% of the outstanding roll of 47 813 cases) at March 2006. See National Prosecuting Authority *National Prosecuting Authority Annual Report 2005/2006* (2006) at 19.

on the grounds of pragmatism. For the sake of completeness plea bargaining will be discussed as it exists in its traditional sense coupled with the newly adopted statutory procedure.

Right at the outset it should be acknowledged that plea bargaining has been used with great success in countries like the United States of America as a reliable and practical way to clear case backlogs.<sup>11</sup> Whatever its wider shortcomings may be the process is clearly an instrument that eases the burden on justice systems and provides flexibility in sentencing.

## 2. Types of plea-bargaining

In order to understand what can be negotiated in terms of a plea bargain agreement it is important to define the concept plea-bargaining and in doing so to also examine how it is defined in the law of other countries.

In the United States of America plea-bargaining is defined as follows:

'Plea bargaining consists of the exchange of official concessions for a defendant's act of self conviction. Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged, or a variety of other circumstances; they may be explicit or implicit and they may proceed from any number of officials.'<sup>12</sup>

In an article in the 1980s South African scholars defined it as:

'the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence.'<sup>13</sup>

Regardless of which definition is preferred plea bargaining remains a process exercised before the trial where both parties can negotiate some benefit which will be in the interests of justice, provided that the accused pleads guilty to the negotiated charge as per the agreement. Plea bargaining can also be seen as a type of alternative dispute resolution. One of the most transformative criminal justice systems, the system used in Chile, albeit an inquisitorial system, views plea-bargaining as a type of alternative dispute resolution. The process consists of negotiations between the prosecution and the defence and a complete disclosure of all the evidence takes place, and the final agreement is handed to the judge who has the final control over the sentence and who then also reviews the evidence.<sup>14</sup> Interestingly plea-bargaining

<sup>11</sup> See South African Law Commission Fourth Interim Report (Project 73) *Simplification of Criminal Procedure (Sentence Agreements)* (2001) at page 1.

<sup>12</sup> AW Alschuler 'Plea bargaining and its history' (1979) 79 *Colum. L. Rev.* (1979) 1. For a comprehensive list of definitions see the South African Law Commission Fourth Interim Report (Project 73) op cit (n11) at 20 et seq.

<sup>13</sup> N Isakow and D Van Zyl Smit 'Negotiated justice and the legal context' (1985) 4 *De Rebus* 173.

<sup>14</sup> See R Blanco, R Hutt and H Rojas 'Reform to the criminal justice system in Chile: evaluation and challenges' (2005) 2 *Loy. Chi. Int'l. L. Rev.* 256 at 258.

in countries like Chile and Italy is not permitted in cases that carry a severe penalty.<sup>15</sup> In comparison the process of plea bargaining in South Africa is not limited and can be used for all offences.

### 3. Developments in England

Until very recently plea bargaining in England was very restricted. While the defence and the prosecution could negotiate there was to be no bargaining with the judge, nor could there be any indication of sentence from the judge. This principle which had been formally recognised since the 1970s was derived from *R v Turner*<sup>16</sup> which as the following extract indicates held that while counsel may give advice, which includes the likely sentence on a guilty plea, such information was impermissible coming from the court itself:

The judge should, subject to the one exception referred hereafter, never indicate the sentence which he is minded to impose. A statement that, on a plea of guilty, he would impose one sentence but that, on conviction following a plea of not guilty, he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of the complete freedom of choice essential.<sup>17</sup>

As can be clearly seen the position in England was that sentence indication was not permitted on the basis that it impacted unduly on the free will of the accused in his consideration of what plea should be tendered.

This restrictive approach has changed recently. In *R v Goodyear*<sup>18</sup> the Court of Appeal reconsidered its hard and fast position on sentence indication by the judge. The court drew a distinction between an unso-

<sup>15</sup> In Chile it is only permitted for crimes carrying a penalty of less than 5 years imprisonment and in Italy for crimes carrying a sentence of less than 7½ years imprisonment. For a more detailed discussion of the Italian system see WT Pizzi and M Montagna 'The Battle to establish an adversarial trial system in Italy' (2004) 25 *Mich. J. Int'l. L.* 429.

<sup>16</sup> (1970) 2 All ER 281.

<sup>17</sup> *Turner* supra (n16) at 285.

<sup>18</sup> (2005) 3 All ER 117. The facts of this case were as follows: G and his co-accused were workmen who developed a corrupt relationship with a council official, S, in relation to building work on council properties. G did not obtain work that would otherwise have been withheld from him, but rather paid out £3000 and did free work to 'keep S sweet' so that S would give them an easy ride in evaluating the quality of their work. The trial judge was initially reluctant to give G's counsel any indication of sentence, but upon being assured by both counsel that the case would be presented on the basis that G had not directly gained a corrupt benefit, the judge opined that 'this is not a custody case'. This having been relayed back to G, he changed his plea to guilty. However, after receiving further reports, the judge proceeded to sentence G to 6 months imprisonment suspended for two years and a £1 000 fine. The judge explained that he had meant to indicate that this was not a case for immediate custody. The appeal provided an opportunity to Lord Woolf CJ to reconsider the basic principles regarding sentence indications that had been previously established in *Turner*.

licited indication of sentence from the judge and a deliberate request from an accused for an indication of the sentence:

'In our judgment, there is a significant distinction between a sentence indication given to a defendant who has deliberately chosen to seek it from the judge, and an unsolicited indication directed at him from the judge, and conveyed to him by his counsel. We do not see why a judicial response to a request for information from the defendant should automatically be deemed to constitute improper pressure on him. The judge is simply acceding to the defendant's wish to be fully informed before making his own decision whether to plead guilty or not guilty, by having the judge's views about sentence available to him rather than the advice counsel may give him about what counsel believes the judge's view would be likely to be.<sup>19</sup>

... In effect, this simply substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself. In such circumstances, the prohibition against the judge giving an unsolicited sentence indication would not be contravened, and any subsequent plea, whether guilty or not guilty, would be voluntary. Accordingly it would not constitute inappropriate judicial pressure on the defendant for the judge to respond to such a request if one were made.<sup>20</sup>

It is my submission that in England at present there is even a greater impetus to negotiate a sentence indication in light of the recent guidelines set by the Sentencing Guidelines Council suggesting that defendants who plead guilty should be rewarded with shorter sentences. This means that even violent criminals would be able to ensure a lighter sentence in cases where the evidence against them is overwhelming.<sup>21</sup> Broadly the Guidelines state that if a suspect admits an offence by the time they are arrested then they are entitled to a third off their sentence; if they admit guilt after a trial date is set they can only get a quarter off; and if they plead guilty just before the trial starts they can receive a tenth off.<sup>22</sup>

#### 4. What can be negotiated?

Turning back to the South African situation a whole range of possible outcomes can be negotiated under the practice of plea bargaining and it is almost impossible to limit the scope of the negotiations. What follows is a list of some of the agreements that could be negotiated between the prosecutor and the defence:

<sup>19</sup> *Goodyear* supra (n18) at para 49.

<sup>20</sup> *Goodyear* supra (n18) at para 50.

<sup>21</sup> See S Doughty 'Judges to fight to save softer sentences for guilty pleas' *The Daily Mail*, 18 January 2007, available at [http://www.dailymail.co.uk/pages/live/articles/news/news.html?in\\_article\\_id=429825&in\\_page\\_id=1770](http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=429825&in_page_id=1770), accessed on 13 July 2007.

<sup>22</sup> *Ibid.*

- (a) A plea to the main charge but on the basis of lesser culpability, i.e. admitting *dolus eventualis* as opposed to *dolus directus*;
- (b) A withdrawal of charges against a co-accused on condition that the other accused pleads guilty to the charges;
- (c) A conditional withdrawal of a charge based on an undertaking by the accused to perform certain duties, for example to attend counselling sessions or to do community work;
- (d) A request to the court to dispose of a matter in terms of s 112(1)(a) as opposed to s 112(2) of the Criminal Procedure Act;<sup>23</sup>
- (e) The issuing of a notice in terms of s 57A of the Criminal Procedure Act whereby the accused can pay an admission of guilt fine without further appearing in court;
- (f) An agreement as to the type of sentence that should be imposed, for example a fine, suspended sentence, suspended sentence with specific conditions for its suspension;
- (g) An undertaking not to seek a sentence of direct imprisonment;
- (h) An undertaking to request that the accused would be under 'house arrest' as opposed to direct imprisonment, an application of s 276(h) of the Criminal Procedure Act;
- (i) An undertaking as to what facts would be revealed to the presiding officer.

Given this list it should be obvious that it is almost impossible to stipulate every action that could be negotiated or to limit the activities that can be dealt with through the application of plea bargaining. It will be up to the prosecutor and the defence to apply their minds to arrive at an agreement that benefits the interests of all parties. It follows that an examination of the potential benefits to the parties is necessary.

## **5. Benefits of plea bargaining**

Public trials impact on the state, the prosecution, the defence, victims of crime and the administration of justice. As will be shown hereafter the process of plea bargaining poses benefits to all of these participants in the criminal justice process.

### **5.1 State, prosecution and administration of justice**

It is a known fact that South Africa's prisons are severely overcrowded. Recent figures indicate that the population of our prisons is standing at

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<sup>23</sup> In practice section 112(1)(a) of Act 51 of 1977 finds application when the accused is charged with less serious offences. The court acts summarily and the accused on conviction may only be sentenced to a maximum fine of R1 500 and no direct imprisonment. Yet in terms of section 112(2) the court would be in a position to impose direct imprisonment without the option of a fine.

178 000 inmates and that it costs the South African taxpayer an amount of R117 per day per inmate to keep them behind bars.<sup>24</sup> A large number of these prisoners are awaiting trial prisoners.<sup>25</sup> Given the crime rate and the fiscal realities of South Africa and considering that adversarial trials are expensive, time consuming and immensely traumatic for most people involved, it should be obvious that the state can financially benefit a great deal from the process of plea-bargaining being used to reduce the number of awaiting trial prisoners in our prisons.

From the prosecution's point of view a plea of guilty avoids the necessity of a public trial and frees the time of overworked prosecutors who can thereafter focus their energies on the more serious and complex cases. An added bonus to the prosecution is an assured conviction. Prosecutors are also given some flexibility in cases where there are multiple accused: by striking a plea bargain with one of the accused they are in a position to use that accused against the others should such testimony be required.

## 5.2 Benefits to the accused

The benefits of plea bargaining to the accused are obvious. A public trial with all of its traumatic consequences is avoided. Many accused but regrettably not all are likely to seize the opportunity of a second chance in life that plea bargaining offers. Financially the accused and his family benefit as the legal fees that the accused would have incurred with a public trial are reduced as the entire proceedings are curtailed. No doubt criminal trials are stressful and most people would want to avoid one if possible. In tendering a plea bargain accused persons not only avoid any possible social stigmatisation but endure less stress and do not have to be frustrated by the slow process of justice. Plea bargaining offers accused persons some control over the criminal process whether they offer a guilty plea on a less offensive or serious charge or simply by allowing them to take control of the way justice is dispensed by expediting the trial process and sentencing.

## 5.3 Benefits to the victim

Plea bargaining if sensitively handled could also be of benefit to the victim of crime who will not have to suffer the trauma of being exposed to secondary victimisation in court. It is my view that s 105A could be

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<sup>24</sup> BMN Balfour 'Budget vote address in the National Assembly by Mr BMN (Ngconde) Balfour, MP, Minister of Correctional Services', 15 June 2004, available at <http://www.info.gov.za/speeches/2004/04061511451001.htm>, accessed on 13 July 2007.

<sup>25</sup> At March 2006 there were 48 807 awaiting trial detainees. See the *National Prosecuting Authority Annual Report 2005/2006* op cit (n10) 27 for statistics.

interpreted to mean that a victim would have the right to request that the matter should go to trial in cases where they elect to find closure by way of the trial process.

Section 105A is one of the few provisions in the CPA that recognises the interests of the victim in a formal way. Section 105A(1)(b)(iii) provides as follows:

- (b) The prosecutor may enter into an agreement contemplated in paragraph (a) —
  - (i) after consultation with the person charged with the investigation of the case;
  - (ii) with due regard to, at least, the —
    - (aa) nature of and circumstances relating to the offence;
    - (bb) personal circumstances of the accused;
    - (cc) previous convictions of the accused, if any; and
    - (dd) interests of the community, and
  - (iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding —
    - (aa) the contents of the agreement; and
    - (bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

Although some prosecutors may have given victims the opportunity to comment on plea negotiations pre-2001 there was no provision that compelled prosecutors to do so. This provision at the least gives victims of crime the opportunity to make representations to the prosecutor in qualified circumstances. By making provision for victim participation the provision aims at fairness towards the accused and also the victim and hence it also serves the broader interests of justice and society.<sup>26</sup> Furthermore, giving victims a say in the plea bargaining process enhances the transparency of the process and removes the notion that plea bargaining serves only the interest of the accused who has committed the crime.<sup>27</sup>

## **6. Determining a 'just sentence'**

Negotiating a settlement agreement is only one part of the plea bargaining process. Section 105A(8) provides that before an accused can be convicted on a charge in terms of the section a presiding officer

<sup>26</sup> See E du Toit, F de Jager, SE van der Merwe, A Paizes and A St. Q Skeen *Commentary on the Criminal Procedure Act* (1991) 15-11. See also PM Bekker 'Plea bargaining in the United States and South Africa' (1996) 29 *CILSA* 168 at 209.

<sup>27</sup> See *S v Sassin* [2003] 4 All SA 506 (NC) at 510.

must determine whether the negotiated sentence is 'just', the interpretation of which is not without its difficulties.

Section 105A(8) reads as follows:

'If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.'

One of the significant aspects of the provision is that the legislature preferred the use of the word 'just'<sup>28</sup> as opposed to 'appropriate sentence'. In the *Sassin* case the court considered the meaning of the word 'just' and consulted the Oxford English Dictionary which defines 'just' as 'morally right and fair, appropriate or deserved'.<sup>29</sup> The Afrikaans text however uses the term 'regverdig'. The Afrikaans *Verklarende Handwoordeboek* defines 'regverdig' as 'in ooreenstemming met wat reg is, regmatig, onpartydig, billik, eerlik'.<sup>30</sup> At first glance it might appear that the legislature simply opted for the use of plain English, but in my opinion the word 'just' was particularly chosen in order to compel the presiding officer to not only consider an appropriate sentence based on the nature of the offence but to take other factors into consideration in sentencing in terms of this provision.

What I believe is envisaged by the choice of the word 'just' as opposed to appropriate is that the presiding officer should firstly exercise a true sentencing discretion, which is to consider the traditional factors that play a role at sentencing, namely the circumstances of the accused, the nature of the offence and the interest of society.<sup>31</sup> Secondly, to take into account that the sentence agreement is based on a host of practical and factual considerations to which only the state and defence are privy.

As can be seen, the distinction between 'appropriate' and 'just' would be that a presiding officer has to consider more than the traditional factors in order to determine the justness of a sentence. Els J put it aptly when he said:

'The function of the court in considering the justness or unjustness of a plea and sentence agreement made under s 105A encompasses the following:

1. The consideration of the well-known triad as set out in *S v Zinn* 1969 (2) SA 537 (A).
2. The taking of a broad overview of the facts admitted and the crimes admitted to having been committed together with the proposed sentence to be imposed, all with a view to establishing whether the sentence

<sup>28</sup> Also see *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) at 1212H, *Haysom v Additional Magistrate, Cape Town and Another*; *S v Haysom* 1979 (3) SA 155 (C) at 161 and *S v Lovell* 1972 (3) SA 760 (A) for views on the interpretation of the word 'just', albeit in another context.

<sup>29</sup> *Sassin* supra (n27) at para 15.7.

<sup>30</sup> *Ibid.*

<sup>31</sup> See *S v Zinn* 1969 (2) SA 537 (A).

agreed upon and its effective content bear an adequate enough relationship to the crimes committed taking into account all of the agreed facts, both aggravating and mitigating, so that it can be said that justice has been served.<sup>32</sup>

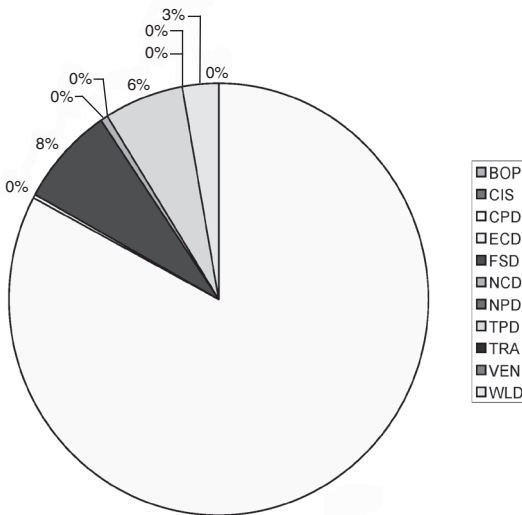
### 7. Impact on the South African criminal justice system

Having obtained a better understanding of the types and nature of plea bargains that can be negotiated and the benefits that accrue in utilizing the process, we can now look in closer detail at the application and effectiveness of plea bargaining in South Africa.

With all the benefits for the state and the other parties to the process, it is disconcerting that the prosecution in 2005/2006 only succeeded in 2 164 cases in reaching a plea and sentence agreement.<sup>33</sup> Plea bargaining also received very little acknowledgement in the National Prosecuting Authority Annual Report. In order to get a clearer picture of the usefulness of the procedure I turned to the office of the National Prosecuting Authority for the statistics they had on plea bargaining since its statutory inception in 2001.<sup>34</sup>

What follows is a breakdown of the statistics showing the use of s 105A by all of the jurisdictional divisions and the percentage of offences that it was used for:

Percentage of Agreements per Division April 2005 to March 2006

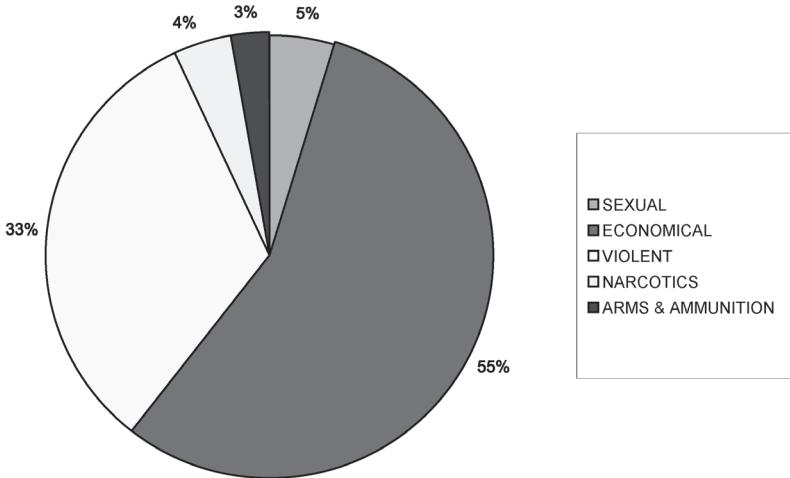


<sup>32</sup> *S v Esterhuizen* 2005 (1) SACR 490 (T) at 494-495.

<sup>33</sup> See *National Prosecuting Authority Annual Report 2005/2006* op cit (n10) 27.

<sup>34</sup> I am indebted to Advocate J Schutte of the National Prosecuting Services who assisted me by providing a comprehensive document with regard to the statistics kept by the prosecution service in all of the jurisdictional divisions.

## Percentage of Counts According to Crime Groupings: 2005/6



An analysis of the abovementioned statistics show that plea and sentence agreements were used predominantly by the prosecutors in the Western Cape. In some of the jurisdictional divisions no plea bargaining took place. In view of the benefits of plea bargaining it was necessary to enquire from the Prosecuting Authority why they so seldom made use of the process. The response of the Prosecuting Authority was that:

‘The plea bargaining concept is still quite new to the prosecution as well as to the defence. The impact of plea and sentence agreements is being influenced by various factors, such as:

- (i) Some divisions do not follow the route of s 105A of the Criminal Procedure Act, as they rather follow s 112 of the Criminal Procedure Act which is not so time consuming. Complainants and investigating officers must be consulted before the prosecutor may accept a plea agreement.
- (ii) Attorneys and prosecutors in some regions are short of personnel and do not have sufficient time to properly consult on the agreements/disagreements;
- (iii) Willingness by the accused and/or their legal representatives has a great impact on the number of agreements; and
- (iv) Plea agreements cannot be concluded in all cases. It depends on the merits and circumstances of each case whether a plea and sentence agreement might be possible.

In addition to the reasons given, the Western Cape has so many plea agreements as dedicated prosecutors deal with the agreements.’<sup>35</sup>

<sup>35</sup> Advocate J Schutte in a letter addressed to the author, dated 25 August 2006.

The reasons given in (iii) and (iv) seem convincing but those mentioned under (i) and (ii) are far less convincing. I will now deal with the reasons submitted by the office of the National Prosecuting Authority for not sufficiently resorting to plea bargaining in all of the divisions and the fact that a lack of time to consult on plea and sentence agreements impacts on the use of the procedure.

The aim of s 105A is not only to regulate the negotiations between the state and the defence but also to empower victims of crime. As stated above s 112 of the Criminal Procedure Act places no obligation on the state to consult with victims when they accept a plea of guilty, it is therefore the task of the National Prosecuting Authority to issue clear directives to prosecutors to be sensitive to the needs of victims and for the sake of transparency to use s 105A rather than to negotiate pleas with counsel in chambers. Whilst it might not always be practical in each and every case where an accused pleads guilty to make use of the provision there should be an attempt to make use of the procedure more often. If the application of s 105A is cumbersome and time consuming then consideration should be given to amendments to the procedure to make it more effective and efficient.

This brings me to the issue that some attorneys and prosecutors in some divisions do not have sufficient time to properly consult on the sentence agreements. To me it appears that there is an oversight by the prosecutors and the practitioners as to the purpose of consultation in general. One of the purposes of a consultation would be to determine the length of the trial and in order to determine that a consultation is needed. Furthermore it is the duty of each and every prosecutor to consult with witnesses, not only to prepare them for the trial but to serve justice. It is my submission that prosecutors will fail in their duties if they do not make sufficient time to consult with witnesses prior to the trial and that witnesses will be denied an opportunity to voice their opinions on what they consider fair and just. Lastly, prosecutors are obligated in terms of the National Prosecuting Policy to do so.<sup>36</sup>

## 8. Challenges

The greatest challenge facing the concept of plea-bargaining is that it carries with it an inherent risk that accused are not equally treated and hence that there is no equal protection before the law.

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<sup>36</sup> See National Prosecuting Authority *National Prosecuting Authority of SA, National Prosecution Policy* at page 16: 'An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that — where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.'

Section 105A provides for the state and the accused's legal representative to enter into a plea and sentence agreement. By implication all of those who are without legal representation would be excluded from the benefits of the procedure. It is therefore no surprise that plea bargaining has been viewed in South Africa as a process that will only benefit the rich. This perception is reinforced when the likes of Mark Thatcher, Roger Kebble and members of parliament appear to successfully bargain their way out of prison.<sup>37</sup>

Most of the accused appearing in the lower courts are indigent and cannot afford representation and accordingly the process provides no benefit for them despite the fact that ideally they would be the main beneficiaries of a plea bargain. Our Constitution<sup>38</sup> provides for a fair trial in terms of s 35(3) and that should include the right to receive equal treatment. It can be argued that the plea bargaining procedure as presently practiced in South Africa results in a significant portion of our population not receiving equal protection before the law. With more and more impoverished South Africans continuing to increase their demands for an improvement to many facets of their lives, the time will soon arrive when unrepresented accused challenge the constitutionality of the plea bargaining legislation. One can only wonder if s 105A will survive constitutional scrutiny in the years to come.

## 9. Conclusion

In conclusion it can be unequivocally stated that the process of plea-bargaining remains an effective instrument that eases the burden on different justice systems and provides flexibility in sentencing.

In South Africa urgent intervention is needed to reduce the large case backlog in all our courts and to address the burgeoning number of awaiting trial prisoners. Without plea bargaining the effectiveness of the South African criminal justice system will be further compromised, a sentiment shared by Uijs AJ in *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)*<sup>39</sup> where he said: 'I am of the view that the system of criminal justice in South Africa would probably break down if the procedure of plea bargaining were not followed because it had become the subject of judicial disapproval.'<sup>40</sup>

Like most processes plea-bargaining does have its shortcomings and there is the potential for abuse. Given the extraordinary powers of

<sup>37</sup> W Hartley 'NPA defends 'strategic' deal with Thatcher' *Business Day*, 3 October 2005, available at <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=1698159>, accessed on 13 July 2007.

<sup>38</sup> The Constitution of the Republic of South Africa, 1996.

<sup>39</sup> 1999 (2) SACR 669 (C).

<sup>40</sup> *North Western Dense Concrete CC* supra (n39) at 676.

the prosecution service in exercising prosecutorial discretion in South Africa it is important to be aware of the potential danger of prosecutors abusing their powerful positions to negotiate inappropriate agreements by threatening accused persons with the maximum sentence that could be imposed. In light of the aforesaid, plea bargaining does pose a risk of innocent people electing to admit guilt to avoid maximum punishment rather than taking the risk of defending themselves through the trial process.

In the final analysis however, there can be no debate that in the current South African situation the benefits of the process of plea-bargaining to all parties in the criminal justice system far outweigh the shortcomings and concerns about potential abuse. The process is simply not intended nor deserving of being labelled unethical and offensive. If aggressively yet judiciously applied the process of plea-bargaining may well emerge as the saviour of a crumbling administration of justice in South Africa.