A Thesis Submitted for the Degree of PhD at the University of Warwick

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Introducing Plea bargaining in Ethiopia: Concerns and Prospects

By

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A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy (PhD) in Law

University of Warwick School of Law

May 2014
Table of Contents

Acknowledgment
Declaration
Abstract

Introduction

Chapter One: Plea bargaining: An overview

1.1 Definition
1.2 Types of Plea bargaining
1.3 History of Plea bargaining
1.4 Factors that give rise to Plea bargaining
1.5 Plea bargaining in Adversarial and Inquisitorial Systems: A brief overview
1.6 The Debate on Plea bargaining
1.6.1 Critics
1.6.2 Proponents
1.7 Some Selected Variants of Plea bargaining: A brief Comparison
1.8 Conclusion

Chapter Two: Research Design

2.1 Research Questions
2.2 Methodology and Method
2.3 Participants, Study area and Sampling
2.4 Preparing the Tools
2.5 Doing the Fieldwork
2.6 Data Organization, Analysis and Presentation
2.7 Ethical Issues
2.8 Challenges
2.9 Limitations and Scope of the Study

Chapter Three: Overview of the Ethiopian Criminal Justice System

3.1 Aspects of the Ethiopian Legal system: A brief sketch
3.2 The Structure of the 1961 Ethiopian Criminal procedure
3.3 Fundamental Principles of Ethiopian Criminal Law and Procedure
3.4 Organization and Functions of Justice Actors
3.5 Reforms on the Ethiopian Criminal Justice System
3.6 Conclusion

Chapter Four: The Ethiopian Variant of Plea bargaining

4.1 Legal Framework for Plea bargaining
4.2 Definition and Nature of Plea bargaining in Ethiopia
4.3 Policy Justifications: An appraisal
4.4 Scope and Stage of Application of Plea bargaining
4.5 The Role of Justice Actors
4.6 Legal Conditions for Plea bargaining
4.7 The Plea Agreement
4.8 Withdrawal of from Plea agreements and its Consequences
4.9 Conclusion

Chapter Five: Informal Plea bargaining in Ethiopia

5.1 Some Formal of Negotiated Justice
5.1.1 Special procedures
5.1.2 Cooperation Agreements
5.2 Informal Plea bargaining
5.2.1 Types of Informal Negotiated Justice
5.2.1.1 De-penalization
5.2.1.2 Charge bargaining .......................................................... 149
5.2.1.3 Sentence/Fact bargaining ................................................. 151
5.2.1.4 Informal Cooperation Rewards ......................................... 153
5.3 The Role of the Judge ................................................................. 156
5.4 Conclusion ........................................................................ 160

Chapter Six: The Inherent Flaws of Plea bargaining in Context .......... 165
6.1 Major Theories of Legal Transplants ........................................ 165
6.2 Mitigating the Flaws of Plea bargaining .................................... 168
6.2.1 The Innocence Problem ......................................................... 169
6.2.2 The Innocence Problem in Context ....................................... 170
6.2.3 Differential Treatment of Similarly Situated Defendants ......... 184
6.2.4 Inappropriate Punishment ..................................................... 187
6.3 Conclusion ............................................................................ 189

Chapter Seven: Unlimited Plea bargaining: Its compatibility with the Ethiopian Legal System .......................................................... 190
7.1 Contextualizing Plea bargaining to the Ethiopian Legal System .... 190
7.1.1 Institutional / Structural Problems ........................................ 192
7.1.2 Power Disparity between the Adversaries ............................ 211
7.1.3 Delay in Context and Options to Manage it ........................ 219
7.1.4 Legal Culture .................................................................... 222
7.1.5 Incompatibility with Principles of Criminal law and Procedure 246
7.2 Other Undesirable Consequences of Plea bargaining .............. 250
7.3 Conclusion ........................................................................................................................................255

Chapter Eight: Conclusion .................................................................................................................256

Bibliography .........................................................................................................................................267

Appendices ........................................................................................................................................293

Annex 1: Sample Research Tools ........................................................................................................293

Annex 2: Tables .....................................................................................................................................306
Acknowledgement

I owe a special thanks to my supervisor Prof. Jacqueline Hodgson from whose guidance and encouragement, incisive and constructive comments, understanding and hospitality, this work has benefited a lot. I am also indebted to Jackie for arranging me a forum to present the tentative findings of the thesis to the Warwick Academic community.

Many thanks go to my examiners: Prof Andrew Sanders and Prof. Roger Leng for the enjoyable viva I had with them. Thanks for your feedbacks as well.

I also extend my sincere gratitude to Dr. Elias Nour –for his advice and encouragement to pursue this research while I was frustrated with the cumbersome agreement I was asked to enter with Jimma University at the inception stages. Thanks Elias your advice is vindicated!

A special gratitude goes to my informants (whose name cannot be disclosed here), who shared me their views, concerns and hopes on plea bargaining. Thanks. This work came to existence with your help!

My families, friends and colleagues: Mesfin M., Yenehun B., Muradu A., Sintayehu D., Getahun A., Manaye A., Yibtal W., Terefe S., Bahru, Kaleamlak: my deepest gratitude. Your support in one way or another is much appreciated.
Declaration

I declare that this thesis is my original work, done under the Supervision Prof. Jacqueline Hodgson and that it has not been submitted either in part or in full for any Degree to this or any other University.

Alemu Meheretu Negash
Abstract

The thesis is about a contextual and prospective analysis of the Ethiopian variant of plea bargaining focusing on the major components of legal culture, legal structure and principles of criminal law and procedure. To this end, it makes use of a thorough analysis of policy and reform documents, laws, as well as comparative literature, interviews and questionnaires.

The thesis argues that the Ethiopian variant of plea bargaining is less desirable and feasible. It hardly fits into the Ethiopian legal system for it is constrained by inherent due process concerns in an exacerbated fashion as well as structural/institutional and cultural limitations. Here three sub-arguments emerge: First, plea bargaining which inherently relates less to evidence and circumvents fundamental principles of criminal law and procedure, aimed at ensuring the integrity of the process, is likely to yield, *inter alia*, inaccurate outcomes the innocence problem. With a less developed legal structure (weak defence in particular) and weak legal culture/rule of law, the problem would be exceptionally formidable in Ethiopia. Second, huge structural and functional limitations of legal institutions - the police, the prosecution, the judiciary, and the defence/legal aid, mean plea bargaining would not fare well. Third, plea bargaining tends to be incompatible with the prevailing legal culture. In America and Western Europe, it is often characterized by problems of fairness and outcome inaccuracy. On the face of weak legal culture/rule of law, it remains to be more so in Ethiopia.

While plea bargaining may solve problems of delay and enhance efficiency in many jurisdictions, it is not a universal prescription, though. With jurisdictions like Ethiopia whose legal institutions and legal culture are less developed; whose trial appears to be simple, inexpensive, less utilized and correlates very loosely as an underlying cause of delay, plea bargaining is less likely to offer the desired efficiency gains even at all costs. Conversely, it would be more of a liability than an asset at least in three senses: it is likely to yield inaccurate outcomes wrongful convictions in an aggravated fashion; put defendant’s rights at greater risk, and leave a room for abuses and corruptions.
Introduction

Though controversial plea bargaining not only occupies a central position in many adversarial jurisdictions but also permeates diverse justice structures including the classical inquisitorial systems. Inspired by adversarial jurisdictions, Ethiopia has adopted at Policy level what I have termed the *unlimited plea bargaining*. The thesis is about evaluating, *ex ante*, this variant of plea bargaining contextually so as to demonstrate whether it fits into the Ethiopian legal system. In so doing, the following general contributions can be made: the thesis provides to domestic policy and law makers an important tool for intervention. In particular, the fact that the study is prospective and the law is still in progress will help to take a timely action. As a pioneer work on the subject matter from the Ethiopian context, it also represents an original contribution to the literature. The thesis has a wider contribution as well. The lesson from Ethiopia suggests that plea bargaining may not be a universal solution for problems of inefficiency. The context of delay/inefficiency, the capacity of legal institutions and the prevailing legal culture matter most. Conversely, with jurisdictions like Ethiopia whose legal system is less developed, unlimited plea bargaining is likely to be met with unintended consequences: violations of defendants’ rights, wrongful convictions, abuses and corruptions.

The structure of the thesis goes as follows.

Chapter one begins by setting out the scene. It provides a general introduction about the concept, nature, development, and types of plea bargaining and the debate accompanying it. This Chapter also examines plea bargaining in a comparative perspective. The experience of four jurisdictions- namely USA, England, Germany and Italy is explored with a view to assess plea bargaining in differing contexts and draw some lessons to Ethiopia. Having distinguished between limited (restrained) and unlimited (unrestrained) forms of plea bargaining, this chapter argues that most of the criticisms levied against plea bargaining are valid to the unlimited variant and exist in a mitigated form as regards the former.

Chapter two addresses the *what* and *how* aspects of the research. It sets out the research questions, methodology and method, the scope and limitations of the study and related matters.
Chapter three provides a brief overview of the Ethiopian criminal justice system focusing on those areas that are likely to be affected by plea bargaining. Consequently, to the extent they are connected with plea bargaining, the organization and operation of justice institutions and fundamental principles of criminal law and procedure are dealt with. It also makes a quick introduction to the major criminal justice reforms, including the one introducing plea bargaining in Ethiopia.

Chapter four then explores the Ethiopian variant of plea bargaining as incorporated in the first ever criminal justice policy and the draft criminal procedure code. This chapter builds on chapters one and three to critically examine the nature of the Ethiopian version of plea bargaining, the nature and extent of procedural guarantees and the role of justice actors.

Chapter five examines informal plea bargaining as it applies in a very limited scope and argues that while the practice may help to reduce caseload to a certain extent, its undesirable consequences outweigh this.

Chapter six and seven which lie at the heart of the thesis examine the feasibility and desirability of the Ethiopian variant of plea bargaining and argue that the latter, constrained by inherent due process concerns in an exacerbated fashion (Ch 6) as well as institutional, substantive and cultural limitations (Ch 7), is less feasible. Chapter eight concludes.
Chapter One: Plea bargaining: An overview

The thesis examines the introduction of plea bargaining into the Ethiopian legal system. This starts by setting out the scene. Thus this chapter provides a general introduction about the concept, nature, development, and types of plea bargaining and the debate accompanying it. It also examines plea bargaining in a comparative perspective.

1.1 Definition

Before defining plea bargaining it appears worthwhile to overview the problem of terminology. The expression - *plea bargaining*, the use of the word `bargaining`, in particular, has long been under severe attack among commentators. Critics often stress that the use of the term `bargain` conveys the meaning that justice is `commoditized`. For this reason, some jurisdictions have attempted to name plea bargaining differently. Nonetheless, these efforts of re-naming are nothing but attempts to paint plea bargaining in glittering colours meant to obscure its flaws. Whatever name the practice gets it remains plea bargaining for what matters is the content.

Although over the years attempts have been made to define the term plea bargaining, no single definition that wins universal acceptance seems established. Definitions vary considerably from one context to another. Some perceive plea bargaining broadly as any favourable treatment to a defendant in return to not only pleading guilty but also waiving some rights as the right to appeal and the right to a preliminary hearing and testifying against other suspects. However, this seems to unjustifiably expand plea bargaining and

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1 See Cohen and Doob, `Public Attitudes to Plea bargaining`, 32 *C.L.Q* 85, 86-87(1989-90).
2 See Joseph Di Luca, `Expedient MCJustice or Principled dispute resolutions? A Review of Plea bargaining in Canada`, 50 *Crim. L.Q.* 14 (2005). A case in point is the experience of Canada, USA, and Italy. The Law Reform Commission of Canada reasoning that the term `suggests bartered justice`, recommended the use of terms such as `plea agreements` and `plea discussions` in lieu of plea bargaining. Similarly, the American Bar Association preferred to use the term plea discussion and plea agreement over plea bargaining in its standards (see ABA standards relating to plea of guilty (1968)). The Italian law deliberately avoids the use of the term for its negative connotation, instead uses the expression: *application of sentence at the request of the parties*.
3 The latter often referred as cooperation agreements is different from plea bargaining. While cooperation agreements are about finding evidence and thus do not avoid full-scale trials, plea bargaining is about avoiding or shortening full-scale trials- "when one defendant agrees to testify against another... his statements will be subject to refutation and critical evaluation in the courtroom", a phenomenon alien in plea bargains. See Alschuler, `Plea bargaining and its History`, 79 *Colum L. Rev.* 1, 4 1979. Yet some recognize cooperation agreements as one form of plea bargaining, See William F. McDonald, `From Plea negotiation to coercive Justice: Notes on the Respecification of a concept`, 13 *Law & Society Review*, 389-90, Special Issue on Plea Bargaining (winter, 1979).
confuse it with the broader spectrum of negotiated justice which involves quite many concessions. Simply put, all negotiated justice is not plea bargaining, but plea bargaining is one form of negotiated justice. On the other hand, plea bargaining can be understood to refer to a form of negotiation between the prosecutor and the defendant whereby the latter agrees to plead guilty in return to charge or sentence concessions. These concessions take the form of less severe charges or dropping of charges (commonly referred as charge bargaining) or some leniency regarding the punishment (sentence bargaining). Throughout this work, this definition of plea bargaining will be employed for its relative clarity and precision.

The nature of plea bargaining also varies considerably from one justice structure to another. Generally, while plea bargaining in adversarial systems is unrestrained or at least less restrained, it is very limited in inquisitorial structures. Unlike the adversarial variant, the inquisitorial variant of plea bargaining applies to limited range of relatively less serious crimes with a statutorily fixed discount and rigorous judicial scrutiny and usually with a ban on charge bargaining.

In plea bargaining, the offer to bargain may come either from the prosecutor or the defendant or his / her attorney or both. While deciding to plea bargain it is submitted that both the prosecutor and the defendant would consider, among others, the probability of conviction, the potential sentence at trial, the severity of the crime, and the weight of concessions offered. This is reflected by what is termed in literature - the shadow-of-trial model. Nevertheless, this seems a simplistic theory. At the other end of the string lies the administrative model of plea bargaining.

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4 For some detailed discussions see below, Sections 1.5 and 1.7.
6 See Stephanos Bibas, 'Plea bargaining outside the shadow of Trial'. 117 Harvard Law Review, 2463–2547 (2004) (reviewing and expanding the shadow of trial theory. He notes that, 'This oversimplified model ignores how structural distortions skew bargaining outcomes. Agency costs; attorney competence, compensation, and workloads; resources; sentencing and bail rules; and information deficits all skew bargaining'); R. Hollander-Blumhoff, 'Getting to guilty: Plea bargaining as negotiation'. Harvard Negotiation
1.2 Types of Plea bargaining

The type of concessions a defendant gets in exchange for pleading guilty include lowering or dropping of charges (charge bargains) and recommendation of more lenient sentence (sentence bargains).

1.2.1 Charge bargaining

Charge bargaining represents a kind of negotiation where a defendant agrees to plead guilty to a criminal charge in return for dismissal of one of the charges or the defendant pleading guilty for a lesser charge than he could otherwise face at the trial. The former is referred as horizontal plea bargaining and the later vertical plea bargaining. Charge bargaining does not directly involve the sentence the defendant receives; though the driving force behind it obviously rests on the desire to get the least possible sentence for a reduced charge.

Inquisitorial structures are generally sceptical of the virtues of charge bargaining. Germany and Italy, by expressly proscribing it, exclusively relied on sentence bargaining. So does Russia. In contrast, adversarial structures such as USA consider charge bargaining part of prosecutor’s charging discretion and thus put very limited restraint on it. In England too, charge bargaining, which often takes place well before the charge is formally filed, is less objectionable than sentence bargaining which in some way involves the judge thereby believed to interfere with his/her neutrality.

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7 This theory focuses on the role of the prosecution in dictating the terms and conditions of the bargain and relegates the defendant to the position of an unwilling, passive participant whose only power rests in the ability to accept or reject the government’s offer. See Dervan, Lucien E. “The Surprising Lessons from Plea Bargaining in the Shadow of Terror,” 27(2) Georgia State University Law Review 2010; Gerard E. Lynch, ‘Our Administrative System of Criminal Justice’, 66 Fordham L. Rev. 2117, 2145 (1998) (arguing administrative justice has replaced adversarial and the prosecutor now occupies the primary role in adjudicating guilt and setting punishments); Notes, ‘Plea bargaining and The Transformation of Criminal Process’, 90 Harv. L. Rev. 564 1976-1977; Donald G.Gifford, supra note 3 at 39(arguing that ‘plea bargaining is not a consensual agreement but rather mainly involves a negotiation whose terms are dictated by the prosecutor.); Maximo Langer, ‘Rethinking plea bargaining :the practice and reform of prosecutorial adjudication in America criminal procedure’, 33 Am. J. crim. L.223(2005-2006)( where the writer, having distinguished two kinds of plea bargaining:de facto unilateral adjudication by the prosecution and de facto bilateral adjudication by the parties, argues that in the former, the prosecutor using coercive concessions, unilaterally decides over the fate of a defendant).

1.2.2 Sentence bargaining

This type of plea bargaining involves the prosecutor agreeing to propose lenient sentence following the defendant’s guilty plea, and may include shorter prison terms, probation or referring to rehabilitation centres. Some further expand the scope of sentence bargaining to include a wide range of concessions. Sentence bargaining appears to involve an abandonment of the judge’s sentencing responsibility. Nevertheless, in theory, this is not the case as it is up to the judge to endorse or reject such recommendations.

It is interesting to note that sentence bargaining varies across jurisdictions. Unlike in adversarial systems its scope is much more limited in inquisitorial procedures. The limitation manifests itself in the type of the offence it applies to, the type of concessions involved and the amount of sentence that can be reduced by negotiation.

1.3 History of Plea bargaining

It is axiomatic to say that plea bargaining represents one of the most controversial topics in the area of criminal justice to date. What is contested is not just its use as a tool of disposing of cases, however; its genesis too is not settled and continues to be disputed within academia. While proponents of plea bargaining tend to defend the longevity of plea

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10 Such concessions include: "judges agreeing to impose specific time limits on probation...prosecutors refraining from raising special sentencing provisions for repeat offenders; prosecutors remaining silent at the sentencing hearing ;or not opposing defendants request for leniency or specialized rehabilitation program; prosecutors downplaying the harm to the victims; and agreement that a defendant serves sentence at a particular institution;...imposition of a fine or restitution; prosecutors agreeing to schedule sentencing before a lenient judge". See Kress, Prescription for Justice : the theory and the Practice of Sentencing Guidelines, 87(1980) cited in William W. Wilkins, 'Plea negotiation Acceptance of responsibility , Role of the offender and departures ;policy decision in the promulgation of Federal Sentencing Guidelines', 23 Wake Forest L. Rev. 181, 185-86 (1988).

11 Ibid.

12 While sentence bargaining in adversarial procedure in general applies across the board to all crimes and the amount of sentence concession is not limited (at least statutorily), it works otherwise in inquisitorial procedures- the type of offence and the amount of sentence concession are often statutorily fixed.
bargaining by claiming that it has long been around, opponents advocate that it is a post 19th century phenomenon\textsuperscript{13}.

One can roughly group the literature on the history of plea bargaining into three categories. The first group concerns those scholars who claim that plea bargaining is not a new phenomenon but rather has been with us since time immemorial\textsuperscript{14}. The second category belongs to those who see plea bargaining as a recent phenomenon\textsuperscript{15}. Somewhere in the middle of these two extremes lies the third group\textsuperscript{16}.

\textsuperscript{13} Albert W. Alschuler, one of the leading authorities on plea bargaining, argues that the literature on the history of plea bargaining might be affected by the authors’ stance to the propriety of plea bargaining itself. See Albert W. Alschuler, supra note 3. Similarly, Joseph Sanborn notes that prejudice has distorted the origins of plea bargaining and recommends further research on the subject matter. See Joseph Sanborn, `A historical sketch of plea bargaining`, 3 Justice Quarterly 2 1986.

\textsuperscript{14} Under the first category, one may find works, which tend to trace plea bargaining to time immemorial. Some writers date the origin of plea bargaining back to the classic struggle of Cain and Abel: one writer claims that:

\textit{Plea agreements are not new; in all probability such bargaining has gone on as long as there have been criminal courts... [I]t wouldn’t surprise many knowledgeable court observers to learn that Cain had pleaded to a lesser charge after having murdered Abel. See Newman, Reshape the Deal, Trial, May-June 1973 at 11 cited in Alschuler, supra note 3 at 2.}

Others prefer to tell us that plea bargaining has always been part of the administration of criminal justice. As put by Alschuler some claim that the practice ‘has been part and parcel of the judicial system ever since man was made to account for crimes against society’. Nonetheless, this assertion is rejected as devoid of historical support. Alschuler says ‘so strong are the emotional predilections of some defenders of plea bargaining that they have made historical statements without the slightest historical support.’ Ibid.

\textsuperscript{15} The second category advances the thesis that plea bargaining is a post 19\textsuperscript{th} century development. Led by prominent authors such as Albert Alschuler and Lawrence Friedman, writers under this group assert that the system of plea bargaining was nonexistent before 1800s. Acknowledging that the criminal justice system has long rewarded some forms of cooperation by defendants—notably, cooperation towards the conviction of other offenders, they submit that plea bargaining started to appear in the early or mid 19\textsuperscript{th} Century and became institutionalized in the last third of the same century.

Although Alschuler argues that plea bargaining is the creation of the 19th century, he acknowledges its antecedents prior to that period as studied by other scholars. He mentions some four ‘indications of plea bargaining’ prior to the American Civil War (1861): The first is the 1485 English statute. By this statute defendants who pleaded guilty were rewarded by charging them with summary offences, while those who denied guilt were made to face felony charges; Second, an empirical examination of cases from 1558- 1625 showed that defendants who admitted their guilt received reduced charges in return; the third instance comes close to 1749 where a charge of burglary was lowered down to a charge of theft; Lastly, in the early 19\textsuperscript{th} century England a defendant charged of forgery which attracts death sentence was offered to plead guilty to a reduced crime of possessing forged notes which is punishable only by deporting the defendant to colonies for a term of years. See Alschuler (1979); supra note 3 at 16-18.

Likewise, Friedman, in his article, which sketches the history of plea bargaining observed some manifestations of plea bargaining in the 19th century. In particular relying on data drawn from post 1880 California he concluded that plea bargaining preceded by implicit plea bargaining is a 19\textsuperscript{th} century product. See Lawrence M. Friedman, ‘Plea bargaining in historical perspective’, 13 Law & Soc’y Rev. 247 1978-1979.
1.4 Factors that give rise to Plea bargaining

The understanding that plea bargaining is a post 19th century phenomenon is also shared by the works of other scholars - Malcolm Feeley and John Langbein. Both examined the eighteenth century English court records (in the Old Bailey) and concluded that no sign of plea bargaining is discovered in that period- they reasoned that brevity of the then trials did not call for shortcut trial procedures as plea bargaining. See Malcolm M. Feeley, 'Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining', 31 Isr. L. Rev. 183, 202-05 (1997); John H. Langbein. 'Understanding the Short History of Plea Bargaining', 13 L. & Soc'y Rev. 261. 262-265 (1979).

George Fisher concurs with the authors’ assertion that no plea bargaining was practiced in the Old Bailey as he finds it consistent with his own observation of the records of the same court from 1715-1774, but refuses to accept the brevity of the trials as an explanation for the absence of plea bargaining. Instead, for him absence of public prosecutors as opposed to victims as persecutors and slight increase in caseloads explains the nonexistence of plea bargaining in the Old Bailey England. See George Fisher, ‘Plea bargaining’s triumph’, 109 Yale L.J. 857, 1018-1022 1999-2000.

McConville and Mirsky’s seminal work on jury trials also lends support to the thesis that plea bargaining is a 19th century phenomenon. Relaying on data from nineteenth-century and cases from 1850 to 1865 they argue that the politicization of justice professionals eroded principled policing and lawyering leaving case handling as a policy matter rather than that of evidence. They argue that ‘ideology of discretion’ that permeated the courts, with policy rather than evidence determining how cases were treated. The public demanded convictions; guilty pleas allowed prosecutors to provide them, but also be lenient to political constituents. The authors argue that law became a ‘resource by which local politics sought to reconcile contradictory notions of social control and clientelism’. See Marny Requa, publication review of M. McConville and C. Mirsky, Jury Trials and Plea Bargaining: A True History, Brit. J. Criminal. 965-966 (2006); See also M. McConville and C. Mirsky, Jury Trials and Plea Bargaining: A True History (Hart 2005).

In conclusion, albeit with divergence on the structural factors responsible for emergence of plea bargaining, the thesis that plea bargaining is a product of 19th century seems to dominate the literature. While some stress on the professionalization of lawyers, development of adversary system and evidence, and the criminal process becoming more complex- all promoting prosecutors and courts to seek ways of encouraging guilty pleas; others try to explain the transformation from a political perspective.( see below factors that give rise to plea bargaining ).

16 In between the above schools of thought, one finds the works of some scholars who reject both assertions that plea bargaining is a post American civil war development and that plea bargaining has always been with us; and advance their own account. Worth mentioning in this regard is Joseph Sanborn, who after having investigated sources from the 15th century through the 18th century, maintains that plea bargaining, predisposed by variable guilt and punishment bargaining, was practiced in the medieval England. (Variable guilt represents an old principle where the certainty of defendant's guilt determines the rigorousness of the punishment bargaining). See Joseph Sanborn, supra note 13 at 114(The author tells us that the then plea bargaining was similar in purpose with 20th century plea bargaining).

Likewise, commentators like E. McLaughlin and Bond trace plea bargaining to the 17th century England. See E. McLaughlin, ‘Selected excerpts from the 1968 report of Network state Joint legislative committee on crime its causes, control, and effect on society’, 5 Criminal Law bulletin, 225(1969) cited in Alschuler supra note 3(Both writers maintain that plea bargaining originated in the 17th century England as a means of mitigating unduly harsh punishment).

In a similar fashion Cockburn supplies us with evidence that plea bargaining was practiced in the 16th century England as a response to sudden increase in felony caseloads. " See Sanborn, supra note 13 at 15; Cockburn, 'Early-Modern Assize Records as Historical Evidence', 5 J. Soc'y Arcmnvms 215 (1975) cited in Alschuler, supra note 3. See also Langbein, supra note 15 at 268(who claims: in some cases indictments from the period under discussion seem to reflect negotiated charge reductions exchanged for guilty pleas; burglary charges had been lowered down to larceny charges, thereby the accused may avail benefit of clergy, and larceny charges which were felonies had been reduced to misdemeanours by the taking of lesser values for the stolen property.

8
What structural factors are responsible for the development of plea bargaining at the particular moment when it emerged? Absent a well established answer, most writers simply propose their own thesis. Here the principal theses upon which some sort of commonality among the academia seem to exist will be discussed briefly.

Broadly speaking the breakthrough of negotiation in the area of criminal law can be explained from two angles: the socio-criminology perspective and the legal perspective. The socio-criminology dimension focuses on the dynamism human society underwent and arrived at. As society gets more complex and egalitarian, authoritarian type of regulation-the imposed justice faces a challenge to cope with the developments thereby necessitating the redefining of the relationship between law and society to involve, to some extent, deregulation, decentralization and privatization of criminal justice. The legal perspective is often explained by the developments in the domain of substantive criminal law and procedure law, to be specific – over-criminalization and complicated procedures respectively, both of which raised problems of efficiency and legitimacy. As a remedy to such problems, flexible and informal ways of handling crime and criminal behaviour began to permeate the imposed criminal justice; with the ultimate desire to have an efficient, cost-effective and time saving administration of criminal justice.

Specifically, Malcolm M. Feely has identified four sets of factors to be responsible for the emergence of plea bargaining namely: the theory and assumption of an adversarial process rooted in a tradition of private prosecution; changes in the substantive criminal law [criminalisation]; changes in the rules of criminal procedure and evidence, the rise of full time law trained professionals who supplemented or replaced lay decision makers [professionalization]. These sets of factors are also reinforced by other writers. For instance, Langbiem while emphasizing the transformation of jury trial as a root cause for plea bargaining to emerge does not downplay the role of other factors. Similarly one

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17 See Francios Tulkens, supra note 8 at 645-48.
18 Tulkens and Van de Kerchove have developed four interrelated models of criminal justice namely: imposed justice, participatory justice, consensual justice, and negotiated justice. The imposed justice refers to the classical criminal justice, which insists on the strict enforcement of criminal law. See Tulkens and Van de Kerchove, 'La justice penale', cited in Francios Tulkens, supra note 8 at 643-44.
19 Ibid at 645-48.
20 Malcolm M. Feely, supra note 15 at 187
21 He recognizes this in the following paragraph: In isolating the transformation of jury trial as the root cause of plea bargaining, I do not mean to imply that this procedural development is the sole cause of a practice so
writer implies that the rise of plea bargaining is related to major changes in the criminal justice system which are manifested in the form of the development of modern police departments and full time prosecutors and the development of incarceration as a standard penalty.

From the forgoing discussions as well as other literatures, one can discern the following factors to represent the root causes for plea bargaining:

1) Transformation of jury trial /complexity of the criminal trial

2) Rise of Professionalism and specialization among the police, prosecution and defence attorneys [professionalization]

complex. When the history of plea bargaining is ultimately written, there will certainly be other chapters. In particular, it will be necessary to investigate: the influence of the rise of professional policing and prosecution and the accompanying changes in the levels of crime reporting and detection; changes in the social composition of victim and offender groups; changes in the rates and types of crime; and the intellectual influence of the marketplace model in an age when laissez faire was not an epithet. Wondering why the above factors which are also shared by continental legal systems did not give rise to plea bargaining in the continental legal system, Langbein demands any further research to explain why plea bargaining has characterized lands with such disparate social composition as the United States and England, but not Germany, France, or the other major European states.

Though plea bargaining was not known or at least not common (as studies show plea bargaining was going underground) in continental countries such as France and Germany while the author writes this article, things have now completely changed. Plea bargaining is widely practiced in many inquisitorial systems including Germany and France.

Mark H. Haller, 'Plea bargaining: the 19th century context', 13(2) Law & Society Review at 278.

For detailed discussions of such factors see for instance Friedman, supra note 15; Haller, supra note 22. Malcolm M. Feely, supra note 15; Langbein, supra note 15 at 62; Fisher, supra note 15; Alschuler, supra note 3; M. McConville and C. Mirsky, supra note 15.

Jury trials provide multifaceted theories on the history of plea bargaining. Many submit that Jury trial increases the complexity of the criminal process thereby consuming more time and resource and giving rise to shortcuts like plea bargaining. In this sense, the criminal trial (procedure) can be seen as something, which is a victim of its own success. On 'complexity theory' see for e.g. Albert W. Alschuler, "The Prosecutor’s Role in Plea Bargaining", 36(1) The University of Chicago Law Review 50-112(1968) (arguing that changes in criminal procedure expands the scope of trials as well as pre trial and post trial procedures); John H. Langbein(1979), supra note 15.

Still others provide a different explanation of jury trials. M. McConville and C. Mirsky argue that the transformation is imputable to "...the politicization of prosecutors, judges and other lawyers, a shift in emphasis from individual to aggregate justice in criminal courts, and the growth of a new criminology that linked propensity for crime with race, class and ethnicity". See Marny Requa, supra note 15; See also M. McConville and C. Mirsky, supra note 15.

The professionalization thesis appears to dominate the explanation for the decline of jury trial and the emergence of plea bargaining. This force of change is believed to have worked in two aspects. First, as lawyers and police get more trained and professional, they became capable of effective fact-finding to produce reliable evidence of guilt, thereby rendering the need to conduct full-scale trial redundant. Second, the more lawyers and police are professionalized, the more the trial gets formalized and complicated. This ultimately induced lawyers to avoid trials and look expedite procedures as plea bargaining. (For detailed discussions of such
3) Growth/expansion of criminal law

1.5 Plea bargaining in Adversarial and Inquisitorial systems: A brief overview

That said, some scholars reject the professionalization of police and lawyers, the most commonly proposed explanation for the rise of plea bargaining, as flawed, reasoning that the thesis, detached from the social context of the courtroom only serves to explain the rise of guilty plea system. They reinforce this by empirically showing that lawyers and judges were skilled in the first half of the 19th century, upholding due process and legal precedent. See M. McConville and C. Mirsky, supra note 15.

26 It is argued that mainly because of expansion of criminal law (the coming of criminal statutes such as those dealing with liquor traffic, financial and building regulations), courts begun to be clogged with cases. This forced them to use plea bargaining to clear their dockets. (See for e.g. Bruce Smith, “Plea Bargaining and the Eclipse of the Jury,” 1 Annual Review of Law and Social Science 131-149 (2005); John F. Padgett "Plea Bargaining and Prohibition in the Federal Courts, 1908-1934," 24(2) Law and Society Review 413-450 (1990).

27 Though it is difficult to exactly label a certain national system as purely adversarial or inquisitorial, it is possible, to have a theoretical model albeit by painting with a broader brush, and identify some traits that characterize each structure at least in the classical sense of the terms. Accordingly, the functioning of the criminal justice in the following areas can help us distinguish the adversarial and inquisitorial rooted systems: the method of discovering truth, the investigation of crimes, the trial and the post trial proceedings.

Scholars have observed that the two structures vary not only on the method they employ to uncovering the truth but also on the very definition of truth. Truth in inquisitorial systems is understood to mean material or substantive truth as opposed to the adversarial formal or procedural truth. The goal of the inquisitorial system thus lies on searching material /substantive truth while the adversarial looks for a formal or procedural truth, albeit often not so expressly stated. The method each system uses to uncover truth and the structural differences between the two systems seems to reflect such conceptions of truth. In the inquisitorial systems the procedures from investigation all the way to trial and post trial stages, are designed in such a way that substantive truth can be established. Investigation is made in an objective manner so that both evidences in support and against the conviction of a defendant can be gathered. Similarly, the trial judge examines both exculpable and culpable evidence objectively. In the post trial stage, courts enjoy broader appellate powers than their counterparts do in adversarial systems. In the adversarial structures, on the other hand, truth seeking focuses at the trial stage- a stage dominated by the parties in a setting involving complex rules of procedure and evidence, but a passive judge. Parties are expected to debate over the evidence and facts they garnered. The system believes that such fighting between adversaries in a structure that ensures fairness is the best way to unearth truth. Cross-examination, hearsay prohibition, the privilege against self-incrimination and extended exclusionary rules are all structured to such an end.

The process of investigation in classical inquisitorial systems involves an official investigation by prosecutors or magistrates, with the help of the police. The investigation is carried out in a non-partisan way to include both evidences in favour and against the accused and finally culminates in a pre-trial record often referred to as dossier based on which the criminal charge is instituted. This is in sharp contrast with the adversarial system of dual investigation where each party conducts his/her own separate investigation and amasses evidence to his/her favour.

While adversarial trials are characterized by the oral nature of the proceedings/insistence on oral evidence (the principle of orality), strict rules of evidence, guilty plea disposing, and passive judges; inquisitorial trials are often associated with reliance on written evidence (dossier), less strict rules of evidence, active judges who shoulder the responsibility of uncovering the truth, and an absence of case disposition by guilty plea.
Plea bargaining has its roots in the adversarial systems. Some even goes further to make it adversarial by nature. Some researches indicate that it is perceived as ‘the ultimate expression of adversarialism’, giving parties maximum control over the case outcome. An interesting question which is often raised is why plea bargaining has long characterized the adversarial structures and not the inquisitorial? Although it is difficult to label plea bargaining as adversarial, it derives its existence from this structure of criminal procedure. Relatively, this structure is configured and works in such a way to lend itself for negotiation - the criminal process involves a dispute between autonomous parties. This together with the fact that resolution of disputes naturally involves negotiation makes adversarial structures suitable for plea bargaining to flourish. This can be contrasted with the inquisitorial system’s official inquiry of truth and their conviction that truth cannot be negotiated. Moreover, the guilty plea procedure, the passivity of the judge and the nearly unfettered charging power of the prosecutor, which are some of the features of adversarial systems but nonexistent in inquisitorial systems, afford a fertile ground to negotiate on guilty pleas and thus for plea bargaining to function.

28 Some argue that the fact that plea bargaining places the adversarial trait of leaving the criminal proceeding to the party’s control than to the judge, makes it adversarial. On the other hand, others claim to the contrary - they maintain that plea bargaining collapses the power of investigation, charging, sentencing into the hands of one actor – the prosecutor - and relies on written evidence (the plea agreement instead of tested oral evidence). In this sense, it resembles inquisitorial structures. The writer is of the opinion that it is quite difficult to name plea bargaining adversarial or inquisitorial or something else since it does not fit into one or other of the models. For example, although it leaves enormous party autonomy and flexibility as adversarial systems do, it lacks one of the main features of the adversarial system – the contest of adversaries. Similarly, the fact that plea bargaining bestows the prosecutor with investigative and semi-judicial powers deviates it from the inquisitorial system, and it lacks the essence of the inquisitorial system – its insistence of the discovery of substantive truth, for instance. Because of such natures of plea bargaining it can be considered administrative in nature rather than adversarial or inquisitorial.


Damaska, a prominent authority on criminal procedure, developed two models of authority namely the hierarchical and the coordinate models - to describe the traditional Inquisitorial and adversarial structures of criminal procedure respectively. Plea bargaining seems to be closer to the second model – coordinate model. In the coordinate model, criminal justice is not viewed as something, which is preoccupied with the finding of truth, but as a system, which is concerned on resolving disputes towards the achievement of which, parties before a passive judge play a key role. Consequently, parties may look for ways of resolving their dispute consensually, which leaves a room for different forms of negotiated justice such as plea bargaining. Yet, for this kind of conflict resolving system to function well, Damaska’s model assumes an arrangement that ‘affords equal chance of victory for contestants’, an assumption that plea bargaining in the practice world hardly
Furthermore, unlike in the inquisitorial systems the principle of discretionary prosecution forms an important source of discretion for prosecutors in the adversarial structures to choose whom to charge, what to charge, how much to reduce, and even to drop charges altogether. All these flexibilities, which are prerequisites for plea bargaining, present in adversarial structures\textsuperscript{31}.

In contrast, the continental rule of compulsory prosecution seems to run counter to the adversarial style of plea bargaining. So long as sufficient evidence exists, prosecutors must proceed to trial and defendants cannot abort the trial by just confessing or pleading guilty. Nonetheless, with an increasing demand for efficiency, the principle of compulsory prosecution has become liberalized to accommodate itself to some trial alternatives. Some even say that the principle has become nothing more than a mere slogan, though it appears to be a hyperbole. Also, the guilty plea which is the subject of negotiation in plea bargaining is generally unknown in inquisitorial systems. Confession by the accused may not exempt the prosecution from proving its case, and still the court may find the accused not guilty. It is also suggested that plea bargaining is ill-suited with the inquisitorial version of truth-substantive truth (see below the comparative section). All these mixed with the negative stance of inquisitorial jurisdictions to plea bargaining\textsuperscript{32} invariably invites one to wonder how plea bargaining works in these jurisdictions.

\textsuperscript{31} Yet it does not mean that plea bargaining is something alien to the inquisitorial systems. Maintaining their inquisitorial nature to some extent, inquisitorial countries have been incorporating some adversarial elements including jury trials and plea bargaining.

\textsuperscript{32} For instance in Russia, plea bargaining was met with strong opposition: ‘In the Russian criminal justice an agreement (in Russian sdelka) – is an immoral, reprehensible, dishonest phenomenon; it is a bargain demeaning the government (vlast) suggesting its helplessness, its inability to solve crimes ... Negotiations will demean the investigator, the prosecutor and the judge since they will have to bargain with the criminal...’ See I. Petrukhin, ‘Agreements Regarding Confession of Guilt Are Alien to Russian Mentality’ cited in S Pomorski ‘Modern Russian criminal procedure: the adversarial principle and guilty plea’ 17 Criminal Law Forum 129, 135, 2007

Here it is important to note that all the literature in inquisitorial structures is not repugnant to plea bargaining. Some argue that plea bargaining which provides defendants a new role of influencing the outcome of the case to their advantage, is preferable over the traditional inquisitorial systems which are dominated by a judge whose purpose is to get confession. For the presentation of some detailed accounts See Markus D. Dubber and Mark G. Kelman, \textit{American Criminal law, Cases, Statutes, and Comments} 2nd ed., Foundation press 2009, at 99.
Yet this did not stop such jurisdictions mulling over plea bargaining; the practice which once was described as typical of adversarial systems has become increasingly common in inquisitorial systems, although, in a different shape. The inquisitorial variant of plea bargaining exhibits marked differences from its counterpart in the adversarial system. Perhaps the difference starts from naming; most inquisitorial systems that introduced plea bargaining did not prefer to use the term plea bargaining\(^{33}\). Further, the inquisitorial variant of plea bargaining is very limited in scope\(^{34}\)- it is applied to a limited range of relatively less serious crimes; it passes strict court scrutiny\(^{35}\); and the amount of sentence discount is usually statutorily fixed\(^{36}\). In so doing, inquisitorial jurisdictions tried to adopt plea bargaining in a controlled manner so that the propensity of using sentence differentials to induce a plea of guilty becomes minimal\(^{37}\). Conversely, plea bargaining in adversarial structures is generally wider in scope- it applies to all crimes across the board involving all forms/types of plea bargaining (charge, sentence, and fact); a statutorily fixed sentence discount is unknown. A typical example is the USA’s model where it takes an extreme form; prosecutors are often accused of threatening defendants with huge sentence differentials so that they plead guilty.

Thus based on its scope of application and the range of discretion it vests on the prosecution, plea bargaining can be broadly classified into unlimited/ unrestricted and limited/ restricted forms. While the first refers to the unlimited form of plea bargaining which is common in most adversarial systems (usually involving broader prosecutorial discretion-unlimited sentencing concessions, all types of plea bargaining-sentence, charge, fact bargains, etc); the latter denotes a more restrained form of plea bargaining where prosecutor’s discretion in plea bargains is limited, concessions are regulated, charge and fact bargains are outlawed etc. This form of plea bargaining is quintessential to

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\(^{33}\) For instance, while Italy calls it ‘application of sentence at the request of parties’; Russia and Germany use ‘agreement with the field charges’ and ‘negotiated agreement’ respectively. More than the naming, however, what is important is the content.

\(^{34}\) Civil law countries such as France, Italy, Estonia, Poland, and Russia all adopt the limited form of plea bargaining, though the scope of its application varies among them.

\(^{35}\) In Italy for instance, the judge must supervise the Italian patteggiamento or party - agreed sentence and must give reasons for such settlements including the congruity of sentence with the crime.

\(^{36}\) The most common discount in such countries is 1/3 reduction of the normal sentence which would have been imposed after trial. Such is the case for example in France, Italy, Columbia, Spain and Lithuania.

\(^{37}\) These coupled with the nature of the public prosecutor in inquisitorial systems- the fact that s/he is not a party to criminal proceedings and thus would not strive to obtain convictions like its counterpart in adversarial systems, could serve as an important check on the prosecutor’s discretion in plea bargaining.
inquisitorial/mixed structures. Throughout this work, such distinctions will be used in this sense of the terms.

1.6 The Debate on Plea bargaining

Plea bargaining, one of the essential features of criminal justice in adversarial systems, has long provoked controversy among researchers. Much of the research carried out on criminal justice prior to the 1980s was highly critical of it. Most denounce the practice as an undesirable feature of criminal justice system. It is gradually perhaps from 1980s onwards that the practice started to win the sympathy of some scholars in the US and Europe. In a nutshell, in those jurisdictions which have practiced the plea bargaining for a long time, the debate touches two dimensions: whether plea bargaining is preferable in principle as opposed to full scale trials; and whether it is inevitable in practice. While some fervently challenge the very foundation of plea bargaining as contrary to constitutional principles, ethics, and fair trial guarantees and robustly call for its abolition, others capitalizing on its positives espoused plea bargaining vehemently. Yet, some prefer to remain in the middle i.e. acknowledging the flaws of the system of plea bargaining, they often propose reforms to rectify them.

On the other hand, newcomers to plea bargaining in particular inquisitorial structures approach it very cautiously. Acknowledging its flaws but at the same time enticed by its practical benefits, such jurisdictions adopt plea bargaining in its restrained form. This

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38 Though the system of plea bargaining is rooted and widely practiced in adversarial systems, it now increasingly been adopted in varied forms in the inquisitorial jurisdictions.

39 According to Casper, several factors may be responsible for this shift of perspective–namely prevalence of the practice, its variation from jurisdiction to jurisdiction, the fact that it is not a recent phenomenon and perceptions about the trial. See Jonathan D. Casper, ‘Reformers vs. Abolitionists: some notes for further research on plea bargaining’, 13 Law & Soc’y Rev. 568 1978-1979.


41 Ibid (‘plea bargaining is for the most efficient and fair’); Robert A. Weninger, ‘The abolition of plea bargaining: a case study of El paso country’, Texas, 25 UCLA L. Rev (1987) where the author claims that ‘the inevitability of plea bargaining in American criminal courts is a notion that has gained nearly unanimous acceptance.’


43 See for example Joseph A. Colquitt, ‘Ad hoc plea bargaining’, 75 Tul. L. Rev. 695 2000-2001 (argues that plea bargaining is a necessary and a legitimate way of disposing criminal cases; the only problem lies on the practice where ‘many of the plea agreements struck are inappropriate, unethical, even illegal.’)

approach, though less efficient compared to its counterpart in adversarial systems, has fairness gains. Thus, it should be noted from the outset that most of the attacks levied against plea bargaining squarely fit to the unlimited version of plea bargaining. This section attempts to outline the debate on plea bargaining—focusing on the main and consistently advocated arguments for and against plea bargaining.

### 1.6.1 Critics

1. **Plea bargaining results in inappropriate punishment**

In plea bargaining a prosecutor, more often than not, tries to entice a defendant to plead guilty by making attractive offers— involving a considerable charge or sentence concessions. A defendant who welcomes such offers is privileged to benefit from a more lenient punishment than the legislatively prescribed one. This lenient treatment is tailored to such considerations as case pressure, efficiency, the probable outcome of trial, considerations which reflect neither the purpose of punishment nor the culpability of the accused. This may not only permit criminals escape the deserved punishment to the dismay of victims and the society but also may erode the deterrent effect of punishment.

This is typical to the unlimited form of plea bargaining. In the limited variant where, among others, sentence discounts are statutorily fixed and charge bargaining is outlawed, the problem is less worrying.

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46 This has to do with the retributive justification of punishment which embodies the following principles: (1) The moral right to punish is based solely on the offense committed. (2) The moral duty to punish is also grounded exclusively on the offense committed. (3) Punishment ought to be proportionate to the offense (the *lex talionis*). (4) Punishment is the "annulment" of the offense... See Jeffrie G. Murphy & Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* 121 (1990), cited in Russell L. Christopher, 'The prosecutor's dilemma: Bargains and Punishments', *72 Fordham L. Rev.* 96 2003-2004

That said however, some tried to justify plea bargaining from the utilitarian conception of the purpose of punishment—as explained by the adage: *half a loaf is better than none*, certain punishment is better than none. Yet, such justifications are embedded in the fallacy of false dichotomy: either no prosecution or lenient punishment. Further, it erroneously assumes that plea bargaining applies as a last resort. On the other hand, some defend plea bargaining asserting that by releasing resources to be used in the prosecution of other crimes it increases deterrence. Still others admitting the inadequate sentence involved in plea bargains tend to take this as a price worth paying for economic advantages. These justifications seem to emphasize on economic values. Yet, none of them can offset basic concepts of fairness and accuracy designed to protect the sacred values of human life and liberty.

2. **Plea bargaining creates the `innocence problem`**

By far the most serious and consistently voiced concern with plea bargaining relates to the innocence problem. As one writer puts: convicting the innocent is unequivocally easier in a world that permits plea bargaining. By creating powerful sentence differentials between trial and plea bargain cases, plea bargaining may coerce innocent defendants to

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50 For detailed critique of such justifications See Albert W. Alschuler, supra note 45 at 670-80.

53 Some contend that the full hearing of the case (witness accounts) makes judges less sympathetic for trial defendants thereby punishing them severely and thus widening the sentence differential. However, this argument erroneously assumes that the trial process uncovers only aggravating facts. It also downplays the role of plea bargaining in creating sentence differentials. See Alschuler, supra note 45 at 722.
plead guilty simply to avoid a more severe sentence later at trial. Where plea bargaining exists, trials are not viable options for defendants: in plea bargaining 'innocent defendants plead guilty as do guilty defendants because the other alternative – contesting guilt at trial – is too risky. This problem could be further exacerbated by such factors as overcharging, pre-trial detention, the unequal bargaining power of the parties and pressure from the

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54 The sentence differential may at times be so big that no rational defendant would ignore it. For instance if the prosecutor offers the defendant a reduction of death penalty to life sentence or some rigorous imprisonment, it is very unlikely that the latter rejects the offer, even if he is innocent. Indeed one empirical study on murder cases revealed that more defendants plea bargain to a life or longer sentence in countries where death penalty is practiced. (i.e. 'The average country with the death penalty disposes of 18.9% of murder cases with a plea and a long sentence, compared to 5.0% in countries without the death penalty '). See Kent S. Scheidegger, 'The death penalty and plea bargaining to life sentences', working paper 09-01 available at http://www.clr.org/papers/wpaper09-01.pdf (August 10, 2010). See also Hugo A. Bedau & Michael L. Radelet, 'Miscarriages of Justice in Potentially Capital Cases', 40 Stan. L. Rev. 21, 63 (1987) (reviewing five cases in which innocent defendants pleaded guilty in order to avoid the risk of a death penalty); Daina Bortleck, Note, 'Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty', 25 Cardozo L. Rev. 1429, 1442-45 (2004) (describing cases of defendants who pleaded guilty to capital offences they did not commit.) For more theoretical and empirical analysis of the innocence problem see for example Samuel R Gross Et al, 'Exonerations in the United states 1989 through 2003', 95 J Crim. L. and Criminology,523 (the writer provides us with empirical evidence that out of 35 falsely accused defendants 31 pled guilty); Anthony Walsh, 'Standing trial versus plea : Is there a penalty ?', 6 Journal of Contemporary Criminal Justice 1990 at 226.

Moreover, commentators document that the concession the prosecutor offers to defendants increases as the strength of prosecution evidence decreases or as defence becomes strong. However, the question, which is often simpler to ask than to find an answer, is when does the sentence discount become so big to work as a trial penalty? Obviously, there is no single answer for this question:it depends on several factors including the situation of the accused, whether the defendant is/can be effectively represented, the defendant's aversion to risks etc. Depending on their context countries tolerate or fix different amount of discounts; for instance, whilst in some states in the US the discount goes amazingly as high as 500 percent, in England it falls within the range of 30 percent. See C. McCoy, 'bargaining under the shadow of the hammer: the trial penalty in the USA' in Douglas D.Koski (ed),the Jury Trial in Criminal Process, Caroline Academic press, 2003 cited in Di Luca, supra note 2 at 38; Nancy J. King et al., 'When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial and Jury Trial in Five Guidelines States', 105(4) Columbia Law Review, 959,992 (May, 2005) (where it is shown that the average sentencing penalty varies considerably between offences; it goes as high as 461% in Washington while it ranges from 58% to 349% in Maryland, and from 23% to 95% in Pennsylvania. In UK, the maximum plea discount a defendant receives is fixed at one-third. See Sentencing Guideline Council, Reduction in sentence for a guilty plea (UK), (2007).

55 See R.D. Covey, supra at note 51 at 1239.

56See Albert W. Alschuler, 'The Prosecutor’s Role in Plea Bargaining', 36 Uni.Chicago L.Rev.50, 85-87(1968). (Distinguishing vertical overcharging – aggravated charging where evidence suggests otherwise and horizontal overcharging -unwarranted multiple charges against a defendant, the author discusses the problem of overcharging.) As shown by him some times the prosecutor uses overcharging strategy to induce defendants plead guilty. He also discusses other purposes of overcharging.

57 Ferguson and Roberts observed that: ... the longer it takes an accused to get trial date, the more likely it is that he will be induced to plead guilty and indulge in plea bargaining even if he may have a valid defence, simply because the longer the delay the more attractive guilty plea becomes. Ferguson and Roberts supra at note 22 at 528-529. For in depth discussion see kellough G and Wortley S , 'Remand for plea : bail decisions on plea bargaining as a commensurate decisions' ( 2002),42 B J Crim. 186 ; Rodney J. Uphoff, 'The criminal defence lawyer as effective negotiator: a systemic approach', Clinical L. Rev. 73, 130(1995).

attorney\textsuperscript{59}; all putting defendants under irresistible pressure and thus making them vulnerable to inducements of the state.

The degree of coercion however differs significantly across criminal justice structures depending mainly on the level of discretion the prosecutor enjoys and the availability of safeguards. While in the unlimited form of plea bargaining prosecutors are likely to use coercive plea offers (as is evident in the USA), this is less likely to happen in the limited version. In other words, while the sentence differential in the adversarial style of plea bargaining is generally high and thus more coercive\textsuperscript{60}, it is low and therefore relatively less coercive in inquisitorial variants of plea bargaining. As such, the innocence problem does not fall among the major shortcomings of plea bargaining in Germany\textsuperscript{61}, albeit there are some concerns elsewhere - the involvement of the judge can be counterproductive- i.e. turn out to be coercive. From this, it follows that, the inquisitorial variant of plea bargaining arguably protects innocent defendants better than the adversarial version.

The coercive nature of plea bargaining is sometimes compared with forced confessions extracted by applying torture\textsuperscript{62}.The bottom line for this critic lies on the view that the plea/ trial sentence differential, leaving the defendant with no rational choice than pleading

\textsuperscript{59}See Baldwin and Mcconville, \textit{Negotiated Justice}, 1977 cited in Monica Sabor, "Plea bargaining a Neglected issue", 32 \textit{Probation Journal} 1985 at 139 (showing empirically that defendants consider their attorney’s advice as coercive. The author quotes the experience of one defendant as: 'my barrister compelled me to plead guilty. He threatened me saying, you will go to gaol for three years if you plead not guilty; the case will go on for a long time and you will have to pay all the expenses...If you plead guilty you will just get a fine'.)

\textsuperscript{60}Indeed, adversarial structures like England try to limit sentence differentials to a maximum of one-third of the normal sentence. Yet the limitation is put by way of guidelines and not binding as such. In contrast, in inquisitorial style of plea bargaining, on top of several guarantees, the sentence differential is fixed by statute. For instance in Italy sentence reduction in plea bargaining is fixed by law to be one –third. For detailed discussion of the variants of plea bargaining in inquisitorial systems, see chapter 3.


\textsuperscript{62}Langbien did this comparison passionately as: \textit{We coerce the accused against whom we find probable cause to confess his guilt. To be sure our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries we did employ those machines, we make it terribly costly for an accused to claim his right to constitutionally safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right is there after convicted. The sentencing differential is what makes plea bargaining coercive. This is of course, a difference between having limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining like torture is coercive.} See Langbien, Supra at note 58, at 12-13.
guilty, is bound to produce coercive and involuntary guilty pleas; thus risking the conviction of innocents.

That said, proponents of plea bargaining categorically deny the ‘innocence’ problem claiming that ‘...inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial—not at the point of plea bargaining’\(^{63}\) and thus can be well addressed through meticulous screening of cases prior to charging which produces only those who are factually guilty\(^{64}\). However, this assertion seems to downplay the very justification of having plea bargaining and prosecutor’s disincentives to carry out rigorous scrutiny\(^{65}\). Prosecutors are often suspects of extracting guilty pleas even in very weak cases simply by tailoring their offers to the chances of the defendant’s acquittal\(^ {66}\). Further, it undermines the role of trials in fact finding- if pre charge screening methods were to be relied on, full scale trials would be unnecessary from the outset. It is also preoccupied with factual guilt, which is insufficient in itself to condemn a person under the law.

A related objection to the innocence problem runs from another comparison of the trial and plea bargains. It is contended that the innocence problem is not something unique to plea bargains; innocents face the risk of wrongful convictions in trials alike. However, this objection is off the mark both in principle and in practice. It seems based on an erroneous assumption that a wrong justifies another wrong. What is more, while trials are about fact-finding plea bargaining is not, thereby undermining outcome accuracy. That said, even if one cannot rule out the possibility of conviction of innocents at trial, it should be remembered that against coercive pleas offers and other conspiring factors discussed

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\(^{63}\) John Bowers, `Punishing the innocent`, 156 U. Pa. L. Rev. 1117, 1119 (2007-2008) (Where the author argues that the innocence problem springs from misperceptions over: ` (1) the characteristics of typical innocent defendants, (2) the types of cases they generally face, and (3) the level of due process they typically desire.`)

\(^{64}\) Richard A. Posner, Economic Analysis of Law, 4th ed, 561-64(1992) cited in Jeff Palmer, `Abolishing plea bargaining, an end to the same old song and dance`, 26 Am. J. Crim. L. 505, 519. Proponents also argue that the innocence problem would not be an issue where a negotiation meets the following:` (1) the defendant always has the alternative of a jury trial at which both verdict and sentence are determined solely on the merits; (2) the defendant is represented throughout negotiations by competent counsel; (3) both defense and prosecution have equal access to relevant evidence; and (4) both possess sufficient resources to take a case to trial.` see Thomas W. Church, `In defense of pleas bargaining`,13(2) Law & Society Review, Special Issue on Plea Bargaining (Winter, 1979), at 509-525.

\(^{65}\) By making convictions easy, plea bargaining reduces prosecutors’ incentives to screen out weak cases. See for example. Oren Gazal-Ayal, `Partial Ban on Plea Bargains`, 27 Cardozo L. Rev. 2295, 2299 (2006).

\(^{66}\) See for example James Vorenberg, `Decent Restraint of Prosecutorial Power`, 94 Harv. L. Rev. 1521 (1981) at 1534-35 (explaining why prosecutors are likely to offer the greatest incentives for those defendants with the greatest chance of acquittal at trial)
above, the likelihood of conviction, is much higher in plea bargains. Indeed, as shown elsewhere empirical evidence supports this.

3. *It treats similarly situated defendants differently*

Another concern with plea bargaining relates to its differential treatment of similarly situated defendants. Although the conventional criminal justice system is not immune from this problem at least in a different version than plea bargaining, the concern is quite apparent in plea bargains. The chasm the latter creates takes two dimensions: a) Defendants accused of the same crime may be treated quite differently simply depending on their choice of plea. While those who waive trial for negotiation are privileged enough to benefit from the generous concessions of prosecutors and receive lesser punishments, those who insist on exercising their right to trial get harsh penalties thereby creating dual sentencing structures. b) Even within those defendants who plea bargain, the result of the negotiation appears to be uneven and may perpetuate inequalities. The outcome of the negotiation depends on several extraneous factors of sentencing calculation – notably the bargaining power of the defendant, the strength of the prosecution evidence, and other subjective considerations. In both cases, plea bargaining sustains differential treatment among similarly situated defendants which may run counter to the equality principle and culminate in discrimination. Nor is it compatible with the requirements of fairness. This may erode public confidence and hence negatively affect the administration of justice.

In contrast, some moderate sympathizers of plea bargaining justify the differential treatment by making distinction between rewarding waivers of a right and penalizing its exercise. Thus, while defendants who waive their right and plead guilty are rewarded

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67 On discussions on the issue see for example Stephanos Bibas, supra note 45. Here it can be argued that in so long as both options (the option to bargain and the option to go to trial) are readily available to defendants, we cannot speak of discrimination. Yet, this argument holds little water as the options are not comparable to enable one make a free choice; in that with compelling sentence differentials, pressure from the prosecutor and the attorney to plead guilty, and so on, defendants find it hard to go for the trial. Thus, against all these, to make plea bargains and trials options is nothing but a fallacy. For debates on this problem see Blumberg, *Criminal Justice*, 1967 cited in Donald G. Gifford, supra note 3 at 40 (Where it has been argued that plea bargaining generates unequal treatment of defendants and that plea bargaining is unconscionable, Id, at 55); Note, "Plea Bargaining: the Case for Reform", 6 U. Rici. L. Rev. 325,334 (1972) (where the author challenges the inequality problem arguing that trial choosing defendants do have the chance to be acquitted, receive lighter sentence, or receive harsher sentence; and for those who might receive tougher sentence, their insistence on the trial is not responsible for the outcome depends on several infinite factors specific to each trial.)

those who prefer to stand trial fail to receive such rewards. However, it seems off the mark to make a distinction between the two notions: if pleading guilty is rewarded generously, the converse -pleading not guilty is in effect penalized severely\textsuperscript{69}. Besides, the distinction erroneously assumes that justice can be attained to the exclusion of the principle of equality\textsuperscript{70}. That said even if one accepts the distinction as valid, it cannot vindicate differential treatments within the plea bargaining defendants.

That said, the magnitude of the problem of differential treatment in plea bargains is not similar in all forms of plea bargaining. Thus, in the limited form of plea bargaining, with discounts statutorily fixed, charge and fact bargains outlawed, and rigorous judicial scrutiny, the problem exists in a mitigated form.

4. Plea bargaining undermines fair trial guarantees

Another set of objections to plea bargaining concerns its repercussions on fair trial guarantees. In criminal proceedings, the defendant is accorded with fair trial guarantees, which often receive constitutional protection. Plea bargaining is accused of unduly shifting the focus of criminal justice from the trial (the judge), where determination of guilt and punishment is made following defined procedures and reasoned arguments, to the parties’ haggling for a consideration in a setting dominated by the prosecutor. One writer notes: \textsuperscript{71}

\begin{quote}
69 See Albert W. Alschuler, 'Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System’, 50 U. Chi. L. Rev. 931, 657-59 (1983) (arguing that: "If the concepts of reward and penalty are relative-if these concepts derive their meaning only from each other-the assertion that some defendants are rewarded and none penalized is simply schizophrenic. As Judge David L. Bazelon, referring to the implausibility of a system in which there are winners but no losers, once observed, "If we are 'lenient' toward [defendants who plead guilty], we are by precisely the same token 'more severe' toward [those who plead not guilty]."

70 Id (who argues: Although the concepts of reward and penalty need not derive their meaning only from each other, the fact that some defendants are "penalized" simply in relation to other defendants ought to be considered in assessing the fairness of plea bargaining. Even when a defendant who is convicted at trial receives only the sentence that he "deserves", he surely will recognize that other, equally culpable defendants have received less severe sentences following their pleas of guilty. This inequality leads to a sense of injustice, and it would be entirely appropriate for a defendant sentenced only to what he "deserves" to conclude that, in one very clear sense, he has indeed been penalized. The defenders of a dividing line between reward and penalty seem to assume that they can properly consider abstract issues of justice to the exclusion of issues of equality, but equal treatment is itself an important principle of fairness.)

71 Gerard E. Lynch, supra note 7 at 2129-30.
\end{quote}
Justice ... is not a matter of bazaar haggling, but of thoughtful adjudication of claims. "To bargain" is different than [sic] to present reasoned arguments" and to reach a "bargain" or even an "agreement" is different than [sic] to obtain a "judgment". The more colloquial meaning of "bargain" is even worse. A "bargain" is a discount, something obtained at a cut-rate.

Where a defendant is prompted to forgo his/her right to trial and submit to plea negotiations, he/she surrenders fair trial guarantees. As Professor William Stuntz succinctly puts it:72 'in criminal trials the constitution [procedural guarantees] is omnipresent, in guilty pleas it is nearly invisible'. In contrast, the European Court of Human Rights seems to endorse waiver of rights in principle. The court in one case73 takes the view that in so long as the available choices for a defendant are not disproportionate, waivers of rights are permissible. However, it is questionable whether plea bargaining is able to offer proportionate choices to a defendant so that s/he arrives at a free and informed waiver.

Indeed, the order of the day in the past was that procedural rights of the accused could not be validly traded away for leniency74. Yet, with plea bargaining there seems a shift of

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74 Particularly, US courts took a firm stance in asserting the inalienability of procedural rights. In this respect, a statement from the decision of one court merits mention:

The public has an interest in [a defendant's] life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused...


Another court holds: There is, obviously, a wide and important distinction, between civil suits and criminal prosecutions, as to the legal right of a defendant to waive a strict substantial adherence to the established, constitutional, statutory and common law mode and rules of judicial proceedings. This distinction arises from the great difference in the nature of such cases, in respect to the interests involved and the objects to be accomplished. Civil suits relate to and affect, as to the parties against whom they are brought, only individual rights which are within their individual control and which they may part with at their pleasure. The design of such suits is the enforcement of merely private obligations and duties. Any departure from legal rules in the conduct of such suits, with the consent of the defendant, is therefore a voluntary relinquishment of what belongs to the defendant exclusively; and hence there is a manifest propriety in the law allowing such consent to have the effect designed by it. ... Criminal prosecutions involve public wrongs..., which affect "the whole community, considered as a community, in its social and aggregate capacity" ... The end they have in view is the prevention of similar offenses.... The penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life.... These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be
thinking in that ‘procedure’ is no more considered as a public good rather seen as a privilege of an individual, and thus can be traded away by individuals. This shift is grounded on the assumption that individuals own procedural rights as against the public, defendants are capable of making sound decisions with the help of their counsel and 'the increased incentives prosecutors and judges [acquire] to streamline the criminal process'.

However, the above conception, on top of ensuing costs on the public, leaves procedural safeguards of the defendant undermined. One of the negatively affected guarantees is the principle of presumption of innocence. In plea bargains plea offers are made on the assumption that the defendant is guilty, an assumption which starkly collides with the presumption of innocence. This opens a wider room for circumventing the standard of proof required of the prosecution by swapping the 'beyond a reasonable doubt standard with a more indeterminate standard based on the defence’s assessment of both the likelihood of conviction and the value of the concessions offered by the prosecution'. This by allowing the prosecution of weak cases is likely to leave innocents wrongfully convicted.

### 1.6.2 Proponents

#### 1. Efficiency

Perhaps the most frequently advanced justification for plea bargaining is that of efficiency. With the sophistication of criminal law, trials have become extremely complex and resource intensive. Plea bargaining by cutting short resources, time and energy consumed much more limited than in civil actions. See *Cancemi v. People*, 18 N.Y. 128, 135-37 (1858) cited in Alschuler, supra at note 45 at 717.

75 Nancy J. King, supra note 74 at 120; see also R. E.Scott, and W. J.Stuntz, supra note 6 at 1915. (who argue that the right to entitlement [such as the right to trial] implies not only the right to exercise it but also the right to trade it).

76 Nancy J. King , supra note 74, at 124-25

77 Notes, ‘Plea bargaining and The Transformation of Criminal Process’, 90 Harv. L. Rev. 564,573 1976-1977. For more on this see for example Heike Jung, Supra note 73 at 117 (arguing that “[a] procedure which relies largely on bargaining practices may hinder the presumption of innocence carrying full weight, since it favours a co-operative model of procedure and a co-operative defendant. Thus, plea bargaining may rather perpetuate or re-establish an authoritarian type of criminal procedure.”; Gregory M. Gilchrist, 'Plea Bargains, Convictions and Legitimacy', 48 Am. Crim. L. Rev. 143 (2011).

78 See Sanders Et al , supra note 9 at 489
in the criminal process, expedites justice. It is also praised for its role to manage case backlogs and enhance conviction rates\textsuperscript{79}.

The propriety of efficiency argument is open to challenge, however. Some, acknowledging plea bargaining for its efficiency, dismiss the efficiency argument as one that could sacrifice the sacred values of the criminal justice and never justify encroachment of fundamental rights\textsuperscript{80}. While it cannot be denied that plea bargaining may elevate the efficiency of the criminal process, it comes at the expense of the essence of any criminal procedure—ensuring the fairness of the process and outcome accuracy. Simply put it completely trades-off fairness and accuracy for efficiency and economy. Nevertheless, caseload management and efficiency cannot be pursued at any cost.

That said efficiency gains considerably vary depending on, among others, the scope of plea bargaining and the stage at which it is permitted. Thus, the unlimited form of plea bargaining is more efficient than the limited one. A plea bargaining held after hearing of evidence (cracked trials) is less efficient than the one struck at the earlier stage of the proceeding, albeit concerns elsewhere.

2. **Plea bargaining offers advantages to defendants**

Defenders of plea bargaining maintain that plea bargaining has something to offer to defendants. It has been argued that beyond ensuring a timely disposition of the case plea bargaining reduces sentences and such costs as material\textsuperscript{81} and emotional costs\textsuperscript{82} and uncertainty\textsuperscript{83}. It is maintained that the lenient sentences/charges defendants receive

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\textsuperscript{80} For example see Alschuler, supra note 45 670-85

\textsuperscript{81} Modern criminal trials are so long and complex that they consume considerable time and resource expenditure. Plea bargaining by bypassing this long process saves the defendant’s time as well as his/her trial expenses such as attorney costs.

\textsuperscript{82} It is argued that in addition to minimizing trial inconveniences, plea bargaining has also the benefit of avoiding the stigma and embarrassment of going public in a trial. This is true in situations where plea bargaining, by enabling defendants plead guilty to a lesser crime, frees them from high public sigma associated with serious crimes. In other cases as publicity eventually follows (via the press for instance), the problem may not be completely avoided and may instead persist in a reduced intensity compared with that of contested trials.

eventually benefit them in having a criminal record for a less serious crime, saving them from public stigma and repercussions of serious criminal records. It is also argued that defendants derive benefit from the certainty and predictability of plea bargains. This argument springs from the view that plea bargaining is more certain and predictable than trials.

The certainty argument has however limitations. It seems to overlook the uncertainties accompanying plea bargaining itself. In plea bargaining, the outcome of the criminal process depends on several factors including the bargaining power of the defendant, the readiness of the prosecutor to use them, the stage at which the agreement is allowed. Perhaps, the certainty advantage of plea bargaining becomes more certain in those models which use fixed discounts or allow the judiciary to become party to the plea negotiation, as is in Italy or Germany, for instance.

3. *Plea bargaining encourages remorse and facilitates rehabilitation*

Another advantage sometimes attached to plea bargaining relates to penology—the rehabilitation of offenders. It is claimed that plea bargaining paves a way for defendants to acknowledge guilt and manifest a willingness to assume responsibility for their action.

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84 This may include suspension of some civil and political rights. For related advantages of plea bargaining, see for example Nancy McDonough, 'Plea bargaining a necessary evil?' *UALR L. J.* 383, 383-84 (1979); David W. Neubauer, *America’s courts and the criminal justice system* 272 (1988) (arguing that plea bargaining helps poor defendants who cannot furnish bail bond to be released, as well as by pleading guilty to a less serious crime they avoid criminal records for serious crimes).

85 It has been said that trial leaves parties in the dark as to its outcome, especially given the wide statutory range of sentences and the broader discretion the judge enjoys as regards sentencing, the defendant is put in a state of uncertainties. Plea bargaining, therefore remedies this limitation of the traditional criminal trial, supporters argue. It settles the outcome of defendants’ case before trial and minimizes harsh sentencing; dispensing the defendant with the all or nothing nature of the trial process as well as its inherent uncertainties including...what the witnesses will say...whether the trial will proceed as scheduled...how...issues will be decided, what the sentence will be after trial’. Di Luca, supra note 2 at 29; See also Rudolf J. Gerber, 'A Judicial Review of Plea bargaining', *34 Crim. L.Bull.* 16, 17-18 (1998).

86 The earlier plea bargaining is permitted in the criminal prosecution, the less certain the outcome would be.

87 Jeff Palmer, supra note 45 at 517.

Once the American Bar Association (ABA) stated that:

*The defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him and that the concessions will make possible alternative correctional measures, which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment.* Ibid

Courts on various occasions have shown a tendency of endorsing the view that plea bargaining encourages remorse thereby facilitating rehabilitation. In *R v Turner* [1970] 2 QB 321 (at 326) the English court relied
The assumption is that a remorseful defendant will take lesson from his/her past wrong and is less likely to commit another crime, and hence deserves less moral condemnation than defendants who insist on challenging the prosecution’s case.

However, it is quite difficult to establish a link between pleading guilty and showing remorse for rehabilitation as it is equally difficult to distinguish a remorse motivated plea from that of a plea entered simply to avoid severe punishments. Thus, this justification is valid only to the extent one can have truly remorseful defendants.

4. Party autonomy and flexibility / plea bargaining as a form of dispute resolution

With the emergence of plea bargaining elements that characterize private litigations, chiefly negotiation begun to surface the realm of criminal justice- often referred as the ‘reprivatisation’ of the criminal justice. Actually, the shift shows a reshuffling of the equilibrium between the state, society and the individual. Plea bargaining shifts much power and flexibility, in terms of disposing of a given case, to parties than the trial does.

Such flexibilities of plea bargaining, it is contended, benefit both the defendant and the prosecutor- while the former avoids pre-trial detention and conviction for serious crimes that attract public stigma; the latter manages to tailor punishment to the individual defendant and the specifics of the crime, and is provided with some sort of certainty as to convictions.

exclusively on the remorse justification. See Fiona Leverick, ‘Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland’, Edin. L.R. 360 at 371 (2004). Similarly, in 1970 the US Supreme Court justified the practice of plea bargaining and upheld its constitutionality relying, among others, on such penological rationales. The court noted that: ‘[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary’. Brandy v. United States, 397 U.S. 742, 753 (1970), cited in Alschuler supra note 45.

88 See Heike Jung, supra note 73 at 116. For detailed discussions on the limitations of ‘dispute resolution’ justification see Alschuler, supra at note 45 , 683-716
89 In plea bargains, parties are afforded greater flexibility to strike a settlement/compromise. In exchange for guilty pleas, one charge/count can be dropped for the prosecution of another; a case can be dropped altogether, a charge can be mitigated; sentence can be reduced.
90 Yet, this may be achieved quite fairly though trials for judges are capable of appreciating the uniqueness of each case.
91 R. E.Scott, and W. J.Stuntz, supra note 6 at 1914,( who argue that as ‘the defendant bears the risk of conviction with the maximum sentence while the prosecutor bears the reciprocal risk of a costly trial followed by acquittal’; the principle of contractual autonomy in plea bargains helps both the defendant and the prosecutor avoid such risks)
Nonetheless, the flexibility of plea bargains expressed in negotiations may run contrary to the principle of foreseeability. Plea bargaining makes the outcome of the criminal process pivot very much on such several factors as the bargaining power of the defendant, the readiness of the prosecutor to use them; thereby leaving the outcome unpredictable under the pain of losing public confidence. Further, the flexibility element may sometimes yield unwarranted practices in that it may lend itself to improper and corrupt considerations.

Another advantage of plea bargaining relates to the participation of defendants in the disposition of the case. It is submitted that their direct participation in the process enables them to exercise some sort of control on sentence, enhances individual dignity as well as rehabilitation.

Yet, the above advantages rely much on the assumption of meaningful and effective participations of the defendant, an assumption which hardly applies in unlimited form of plea bargaining. Perhaps, such benefits may be realized only when the defendant is in a position to effectively negotiate with the prosecutor and freely accept or reject prosecutor’s proposals. Nevertheless, the institutional imbalance of bargaining power- respective interests at stake, available resources, and coercive sentencing differentials mean the benefits remain a fantasy. Else one may still suspect the merit of plea bargaining on this as it makes defendant’s interest override that of the public by avoiding trials and thereby replacing the wider public and victim participation with that of the defendant’s.

5. Plea bargaining ‘promotes’ victim’s interest

Proponents contend that plea bargaining promotes victims’ interests. By avoiding public trials, it spares victims, their families, and other witnesses from the ‘trauma’ of public

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92 See Heike Jung, Supra note 73 at 117
93 Alschuler, Supra note 45 at 693
94 See Notes, ‘Plea bargaining and The Transformation of Criminal Process’, 90 Harv. L. Rev. 564 576-77 (1976-1977). (Where it is argued that ‘[t]he notion of participation is basic to American criminal jurisprudence …. Because the defendant may feel morally obliged to honour the compromise that he has struck that is, to respect the product of the process in which he has participated—he is more likely to feel reconciled to his punishment’); See Scott & Stuntz, supra note 6 at 1913 (arguing that the issue autonomy justifies plea bargaining as an expression of the defendant’s freedom of contract).
95 Likewise, Schulhofer questions the advantages of plea bargaining in this regard. He writes that although plea bargaining has potentials for participation and valuable human interaction ‘deceptively few defendants take advantage of the system of individual autonomy’ for the system plea bargaining is structurally flawed. See Schulhofer, ‘Due Process of Sentencing’, 128 U. Pa. L. Rev. 733 (1980)
trials. However, victims themselves and critics argue that plea bargaining goes against victims’ ‘tremendous emotional stake’ of seeing their assailers receive the deserved punishment\textsuperscript{96}. It, on top of making victims lose their participation even as a witness, has some frustrating effects on them - they observe defendants pleading guilty to less serious offence than what is actually committed and lenient sentence which does not reflect the seriousness of the crime being imposed. Further, the justification is limited to a few crimes committed against interests that are predominantly private in nature; leaving the vast majority of crimes unaffected or at least less affected. This is especially true in such crimes as sexual crimes\textsuperscript{97}.

1.7 Some Selected Variants of Plea bargaining: A brief Comparison

This section is about a brief comparison of different models of plea bargaining as apply in diverse criminal procedure structures. For this exercise USA, England, Germany, and Italy are selected\textsuperscript{98}. A comparison of plea bargaining in these jurisdictions highlights striking differences as well as some similarities. The form of plea bargaining adopted by each jurisdiction, the reasons for adopting it, the range of crimes eligible to plea bargaining, the nature and extent of procedural guarantees and the role of the various actors in the criminal justice system represent some of the areas of marked contrasts and similarities.

\textsuperscript{96} Berger, ‘The Case Against Plea bargaining’, 62 ABA Journal (1976) at 621 cited Nancy McDonough, supra note 84; Rebbecca Hollander-Blumoff, supra note 5 at 115; Donald G.Gifford, supra note 3 at 73 (stating that prosecutors often make guilty plea concessions in disregard of victims preferences and interests ).

\textsuperscript{97} The idea is that victims of such crimes feel uncomfortable to stand trial as a witness and to be cornered with questions that flow from direct as well as cross-examinations.

\textsuperscript{98} These countries are not selected randomly but rather on the assumption that they represent the two major criminal procedure structures - the adversarial and the inquisitorial systems, albeit that the last of these has now moved towards the adversarial system. Indeed, there appears a common understanding that while USA and England represent the classical common law countries, Germany and Italy did the traditional continental block, at least before the latter’s structuring of its criminal procedure along adversarial lines. The selection of Italy and Germany can further be justified on the reforms both countries undertook to introduce and formalize plea bargaining respectively. Italy introduced adversarial elements including plea bargaining into a once inquisitorial based legal structure (which was entirely alien to plea bargaining). This serves as an interesting test of plea bargaining in a reformed inquisitorial tradition (mixed system). On the other hand, Germany implemented plea bargaining in a largely inquisitorial system, in a legal culture that had tolerated the underground operation of plea bargaining for decades (before it was formalized recently in 2009). As such, Germany’s experience will be illuminating on how plea bargaining functions in an inquisitorial system. Further, the German system which involves the judiciary in the very negotiation of plea bargaining provides an important tool of comparison. In this sense, the virtues of the German system can be contrasted with the USA and Italy-jurisdictions, which prohibit any judicial involvement in the process of plea negotiation and England, which tolerates little involvement.
1) Why plea bargaining?

While most jurisdictions employ negotiated justice (plea bargaining in particular) to manage caseload pressure and increase the efficiency of the criminal justice, it is also used to assist prosecutions in complex crimes. However, the context of caseload pressure varies across jurisdictions. It could be attributable to social factors such as an increase in crime rates especially that of complex and organized crimes, as is the case in some East European countries or it could be imputable to developments of criminal law or procedure (over criminalization and complex procedures) as is the case in adversarial structures such as England and the USA. In the latter’s case, it is widely believed that the complexity or length of criminal trials motivated lawyers to avoid trials. The extreme complex procedure in adversarial criminal trials, in particular the burdensome jury trial process is often blamed for inefficiency. The trial process, which is time consuming and resource intensive, has largely contributed for the infiltration of plea bargaining into the criminal justice system.

Germany, which traditionally insisted on the strict adherence of the principle of compulsory prosecution, relaxed it when bargaining over petty offences was allowed. This coupled with the rise of complex crimes such as white collar, environmental and drug related crimes provide a leeway for negotiation to flourish. It is suggested that proving mens rea, and establishing causation complicates investigation as well as trial thereby causing a swelling of caseloads. This coupled with the insufficiency of the German criminal

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99 This applies to the USA, Germany and England in varying degrees. This is called cooperation agreements. As shown earlier this is different from plea bargaining proper and is not covered here.
100 For more discussions see the section on the history of plea bargaining.
101 One may wonder why plea bargaining in Germany is often linked to such crimes. The complex legal and evidence issues these crimes involve could be one explanation. Yet, this may not justify the matter sufficiently as similar problems of complexity may exist in other crimes too. Some commentators justify this on the courts’ inclination of treating defendants of white-collar crimes favourably simply based on their economic and social status as ‘they are often the most respected members of the society from similar backgrounds as prosecutors and judges. See Kai-d. Bussmann, the discovery of informality: negotiations in criminal proceedings and their legal construction, 23 (1991) cited in Regina Rauxloh, supra note 61 at 303. Scholars argue that judges and prosecutors showed more willingness to negotiate and more respect to defendants of a high social status.
102 See generally, Thomas Weigend, supra note 30; See Regina Rauxloh, supra note 61 (The writer also observes that the introduction of penal orders had similar effect; it opened a room for negotiation between the defence counsel and the prosecutor).

One research by Schfinemann, as reported by Regina Rauxloh, revealed that more than seventy percent of judges and prosecutors prefer informal settlements if the case has complex legal issues. Similarly about ninety percent of judges and prosecutors favour informal settlements over trial where the case involves problems of evidence. See Regina Rauxloh, (here) at 306.
procedure code to cope with the matter, creates a fertile ground for informal settlements, and pushes criminal justice actors to see plea bargaining as an ideal way of dispensing with cases\textsuperscript{103}. Using plea bargaining/ cooperation agreements as a tool to prosecute complex crimes is not unique to Germany. Indeed, it also serves similar purposes in the USA\textsuperscript{104} and England\textsuperscript{105}.

In Italy the strict adherence to the principle of legality, a couple of amendments and court decisions meant to guard defendant’s rights, and the absence of guilty plea procedures, all complicate the trial process and consequently left the country exposed to massive case backlogs that attracted severe criticisms by European Court of Human Rights\textsuperscript{106}. This forced reformers in Italy to consider alternatives to trials including plea bargaining, so much so that the efficiency of Italian criminal justice is boosted\textsuperscript{107}.

In all jurisdictions in the present study but Italy, plea bargaining emerged through practice\textsuperscript{108} and it is subsequently that it was formalized by law. In Germany plea bargaining was practiced for nearly four decades before it was formalized in 2009. It is striking to see a code based criminal procedure in Germany, in a structure which insists on mandatory prosecution surrendering to an ‘informal’ practice such as plea bargaining. It is less surprising that plea bargaining in the US or in England had evolved through practice-as no codified law of criminal procedure existed. In Italy, the situation is quite different; plea bargaining is introduced by law as part of reforming the Italian criminal procedure code.

\textsuperscript{103} See Regina Rauxloh; supra note 61 at 300 and 327.  
\textsuperscript{104} In the USA, mostly cooperation agreements serve such a purpose and are important law enforcement tools. See Mary Patrice Brown & Stevan E. Bunnell, ‘Negotiating Justice: Prosecutorial Perspective on Federal Plea Bargaining in the District of Columbia’, 43 AM. Crim. L. Rev. 1063, 1073 (2006).  
\textsuperscript{105} This is the case in particular to serious fraud cases.  
\textsuperscript{106} The problem was so rampant that the Court, on a number of occasions, expressed its concerns over Italy’s violation of art 6(1) of ECHR which guarantees fair and public hearing within a reasonable period of time. The court condemned Italy in a series of its decisions on delays and prolonged pre-trial detentions. See Jeffrey J. Miller, Note, ‘Plea Bargaining and Its Analogues under the New Italian Criminal Procedure Code and in the United States: Toward a New Understanding of Comparative Criminal Procedure’, 22 N.Y.U. J. INT’L L. & POL. 215, 221-222 (1990).  
\textsuperscript{108} Since its inception plea bargaining has been justified from the perspectives of efficiency and remorse. In the 1970s when the propriety of plea bargaining was increasingly challenged in the USA and England, courts and practitioners defended it from remorse and efficiency angle. (Brady in the US and Turner in the UK are examples to this direction).
The extent to which countries rely on plea bargaining provides an intriguing contrast. No jurisdiction relies on plea bargaining like the U.S does; more than 90% of cases in the Federal courts are disposed of via plea bargaining. On the other hand about 50% of cases are disposed of through plea agreements in Germany; around 90% of cases in England and Wales in magistrates’ courts and 67% in Crown courts get disposed through guilty plea without a trial, albeit, not all necessarily with plea bargaining.

2) Forms of plea bargaining

Plea bargaining, born and raised in adversarial systems, takes different forms when it reaches inquisitorial structures. In Germany, negotiated justice takes the following forms: penal order, dismissals, and bargaining over confessions. While the first two can only be assimilated with plea bargaining, the latter which is known as Absprachen represents Germany’s equivalent of plea bargaining proper. As guilty pleas are alien in the German criminal justice system, bargaining occurs over confessions. What is unique about Absprachen is its tripartite nature in that it involves the judge, the accused /his counsel and the prosecutor. While Absprachen applies largely to crimes that give rise to complex legal and evidentiary issues, it works nearly in all ranges of offences.

Similarly, Italy recognizes three forms negotiated justice: Abbreviated trial (giudizio abbreviato), party-agreed sentence (patteggiamento), and proceedings by penal decree (procedimento per decreto penale). Of these patteggiamento- translated to mean ‘bargaining’ or negotiation represents the Italian plea bargaining. In this procedure, the prosecutor and the defendant, by avoiding trials, agree on a sentence to be imposed by a judge. From this it follows that the scope of patteggiamento is limited to sentence.

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109 Perhaps the exception could be Scotland where in 2004-05, 97% of all district court cases (excluding dismissals) were resolved through plea bargaining. See Stephen C. Thaman, ‘Plea bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases’ 11 Electronic Journal of Comparative Law, 2007 at 38.
112 See A. Ashworth and M. Redmayne, The Criminal Process, Oxford University Press, 4th ed, 2010 at 418. Dismissal represents a procedure where the prosecutor terminates proceedings and dismisses the case, with the consent of the court, in certain offences of little significance (misdemeanours) if the accused agrees to satisfy certain conditions, usually payment to charities or to the state; whereas, a penal order is a summary procedure involving a prosecutor filling an application before a court to dispose of less serious crimes without conducting trial, based on the outcome the investigation.
113 See Thaman, supra note 109 at 48.
bargaining and no charge bargaining is allowed, at least formally. The defendant in agreeing to settle his case through this procedure gets one-third sentence off. The procedure does not apply to all crimes.

A comparison of the above forms of plea bargaining entails several enthralling distinctions. What is striking in the German and Italian variant of plea bargaining is that both don’t involve guilty pleas at least in express terms. In Italy, the defendant by requesting the agreed sentence, which is statutorily fixed to be one-third, simply avoids trial, and receives the sentence should the judge after examining the dossier and the agreement is convinced that the sentence requested is supported by factual basis. Otherwise, the judge rejects the deal and even at times may conclude that the defendant is not guilty. This shows the mistrust the Italian system has on a plea of guilty. This nature of patteggiamento contrasts with the US and England style of plea bargaining where a defendant is required to admit guilt explicitly, which by itself is sufficient to establish the defendant’s culpability and hand down a judgment of conviction which is more or less similar to a judgment delivered following a trial.

Another beguiling distinction of the Italian patteggiamento with US or England variant of plea bargaining concerns the status of the judgment entered following plea agreements. With patteggiamento the judgement exhibits several unique features: it has no impact on civil or disciplinary proceedings, thus allowing the defendant to validly claim innocence in subsequent civil proceedings; nor does it disqualify a defendant from his civil rights; the criminal record does not last with the defendant, it gets vacated if the defendant remains for a specified period free of conviction for similar crimes. All these features together with the limited scope of patteggiamento may be taken as indications of the Italian mistrust over the system of plea bargaining.

\[115\] Here even if a defendant is not required to plead guilty formally, as long as he waives his right to trial and as long as he is convicted, should the judge endorses the deal, the absence of formal admission of guilt remains largely hypothetical. See W.T.Pizzi and Luca Marafotii, 'The New Italian Code of Criminal Procedure: the difficulties of building Adversarial trial system on a Civil Law Foundation', 17 Yale J. Int’l L. 1, 23 (1992). Because of absence of guilty plea in Germany criminal justice, some even claim that plea bargaining in its strict sense does not exist in Germany. See Regina Rauxlo, supra 61 at 53.

\[116\] See W.T.Pizzi and Luca Marafotii, supra note 115 at 23.

\[117\] For some detailed discussion of such effects see Stefano Maffei, 'Negotiations on evidence' and Negotiations on sentence in Italy: Adversarial experiments in Italian Criminal Procedure', 2 Journal of International Criminal Justice 1050-1069, 1064-65 (2004).
In Italy and Germany no charge bargaining is formally allowed. This goes with the principle of compulsory prosecution and aims at maintaining certainty - avoiding the risk of treating similarly situated defendants differently. Yet, this seems to remain on paper. Similarly, many doubt whether the new German legislation puts a halt on the use of the entrenched charge bargaining. In contrast, countries as USA and England in permitting charge bargaining seem to be less concerned with its problems. In particular, it is more worrisome in the USA where charge bargaining is often viewed as an exercise of prosecutor’s charging power and thus not well regulated. Unlike in Italy and Germany, sentence bargaining which involves the judiciary is often seen in the USA and England as inconsistent with their accusatorial ideal.

Another area of differences among jurisdictions relates to sentence rewards and other concessions due to a defendant. The reward a defendant receives in pleading guilty or confessing generally varies in two ways. First, the amount of reduction differs significantly as one goes from USA to Italy, Germany or England. While in the US system (Federal courts) a defendant on average receives a two –third off the sentence after trial, Italy provides for a one–third reduction. Second, whereas the reduction is statutorily fixed and is automatic in Italy, it is left for the courts’ discretion in USA, Germany, and England; albeit a sentencing guideline in England puts a maximum of one-third reduction. In addition to sentence concessions, a defendant may derive other advantages in the USA and Germany.

3) Crimes subject to plea bargaining

The range of crimes eligible to plea bargaining signals one major difference among countries selected for comparison. While plea bargaining is available for all crimes in the

118 The risk that defendants accused of same crime based on same evidence would face different charges solely because one plea bargains and the other opts for a trial.
119 Although, Italian reformers had limited the scope of plea bargaining to sentence bargaining, there are indications that charge bargaining is being practiced. See William T. Pizzi & Luca Marafioti, supra note 115 at 22.

120 See Regina Rauxloh, supra note 61 at 321.
121 This is administered based on the time of plea. The earlier the plea the higher the reduction would be within the maximum limit.
122 In the USA there are several concessions attached to plea bargaining including the option to be tried in a specific judge, to be sent to specific institution for rehabilitation, etc. Similarly, in Germany the defendant may get a release from custody or tactical exclusion of public trial in cases that may affect the will of the defendant, this is particularly true in defendants of white -collar crimes. See Regina Rauxloh, supra note 61 at 313.
USA and UK, *patteggiamento* in Italy applies to less serious crimes\(^{123}\). In contrast, although *Absprachen* principally works in complex matters involving white collar crimes, environmental crimes, drug related crimes and tax crimes; the law which formalizes plea bargaining seems to expand its scope by allowing courts to plea bargain with participants (the defence counsel and the prosecutor) `in suitable cases`\(^{124}\). Yet, the scope of *Absprachen* may not be broad, as it appears to be. Its application is limited to legal consequences such as sentencing, it does not apply to the verdict of guilty (charge bargaining)\(^{125}\). Further, at least theoretically it is constrained by the requirements of substantive truth\(^{126}\).

In sharp contrast to the Italian prohibition of plea bargaining in serious crimes such as organized crimes, one finds Germany, which applies plea bargaining mainly to big and complex crimes as white collar and drug related crimes. What explains such an amazing contrast? This has to do with the question why and how plea bargaining finds its way in the respective countries. Italy introduced plea bargaining formally as one form of case disposition to ease its massive case backlog, which was handled by offering amnesties. Thus, for tactical purposes (among others, distrust to the system and the threat organised crimes pose to Italy) the reform targets less serious crimes. In contrast, *Absprachen* has evolved through practice as a means to skip trial in most difficult and complex cases.

### 4) Stage of application

In the USA, plea bargaining can be entered anytime from the defendant’s first appearance to court all the way to the stage where the closing arguments of the parties are heard. This shows that plea negotiations in the US can take place well before charge. Similarly, in Germany negotiations can be conducted at all stages of the criminal proceedings--pre trial, trial, and post trial procedures; whereas, in Italy plea bargaining applies before the opening

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\(^{123}\) In Italy, the cap on the range of crimes eligible for *patteggiamento* is made in two ways: based on the type of crimes and the amount of sentence the crimes attract. Thus, crimes that carry more than seven and half years of imprisonment and specific serious crimes such as organized crimes, kidnapping, drug trafficking and terrorism do not qualify for *patteggiamento*. Moreover, *patteggiamento* is not applicable to recidivists if the final sentence they would receive exceeds two years.

\(^{124}\) This law provides, in suitable cases, the court may `reach an agreement with the participants on the further course and outcome of the proceedings. The use of a vague phrase like `in suitable cases` seems to suggest that plea bargaining applies across the board. See Code of Criminal procedure (Germany) of 1987 as amended by Article 3 of the Act of July 2009.

\(^{125}\) See Section 257 (1) and (2) of Code of Criminal procedure (Germany) of 1987 as amended by Article 3 of the Act of July 2009.

\(^{126}\) See Section 257 (1) of Code of Criminal procedure (Germany) of 1987 as amended by Article 3 of the Act of July 2009 which explicitly provides that the requirement of substantive truth shall remain unaffected by plea bargaining.
of the trial. The situation in England appears to be a bit different. Though it permits plea bargaining even after trial has commenced, England discourages late pleas by reducing the sentence reduction due to a defendant who pleads guilty late\textsuperscript{127}. Demanding a plea of guilty at the first reasonable opportunity means that a defendant may be expected to plead guilty well before indictment, and even at the police station stage\textsuperscript{128}.

The preceding discussion on the stage of the criminal process at which plea bargaining can be initiated and entered is instructive in many ways. First, it shows us the degree of reliance countries have on the utility of plea bargaining as a resource and time saving tool\textsuperscript{129}. Second, though not conclusive it tells us something as to the fairness of a plea bargaining system. The earlier in the criminal process plea agreements are allowed, the higher the probability for them to be unfair, \textit{citrus paribus}\textsuperscript{130}. Lastly, the stage under discussion is indicative of who the participants of plea bargaining are and their respective roles, from which one can gauge the risks and gains involved thereof.

\textsuperscript{127} A maximum of one-third for guilty pleas entered at the first reasonable opportunity; a maximum of one-fourth reduction where trial date has been set; and goes down to one-tenth where guilty plea is entered just before trial commences or afterwards. See \textit{Sentencing Guideline Council, Reduction in sentence for a guilty plea (UK)}, (2007); par. 4.1.

\textsuperscript{128} Indeed the sentencing guideline envisions this under its annex 1.

\textsuperscript{129} Some countries may prohibit or at least like England, discourage plea bargaining late after the hearing of evidence while encouraging earlier pleas. This is done, for instance, by reducing the sentence discount as the plea of guilty nears to the trial. Such arrangement is often made to minimize last minute guilty pleas-pleas responsible for what is commonly known as the problem of \textit{cracked trials}, which involves waste of resources. In so doing, countries try to minimize late guilty pleas and exploit the resource and time advantage of plea bargains to the maximum possible. Thus, allowing plea bargaining until late at the end of trial means a reduced utility of it, and can be at times a waste of resources. In sharp contrast to what prevails in England, Germany seems to discourage earlier confession while making it to bear no or little chance for bargaining. (See Thomas Weigend, Supra note 30). Perhaps this could be a reflection of its insistence on the principle of substantive truth, which indeed is expressly made remain unaffected by plea bargaining. The issue of fairness could also be another explanation, the earlier the plea the more likely it would be based on an uninformed decision.

\textsuperscript{130} Considerations of fairness demand that a defendant be provided with adequate opportunities to understand the nature of the charge, evaluate the evidence and consider the available options before deciding to enter into plea negotiations. A legal system, which allows plea bargaining before the criminal investigation is over or for that matter before a criminal charge is instituted, is \textit{citrus paribus} unlikely to be fair since it, apart from denying defendants important safeguards, undermines their bargaining power. In an attempt to counterbalance this problem, defendants in England are entitled, among others, to sentence indications from the judge, the latter having an increased involvement in the process. See Andrew Ashworth, ‘The Royal Commission on Criminal Justice: part 3: Plea, Venue and Discontinuance’ \textit{Crm.LR}836 (1993). Yet, its virtue in terms benefiting the defendant has been questioned. A. Ashworth and M. Redmayne took this point and argue that sentence indication though it may help reduce uncertainty, create additional pressure ‘through the authoritative figure of the judge’. See A. Ashworth and M.Redmayne, Supra note 112 at 317.
5) **Procedural safeguards**

a) **Regulating prosecutorial discretion**

Much of the criticism of plea bargaining as shown above concerns the broad discretionary powers it leaves to the prosecutor. Accordingly, any attempt to enhance the fairness of the plea bargaining must not naturally miss to put a check on these broad powers of the prosecutor.

In Germany and Italy, prosecutorial discretion is limited by adhering to the principle of legality and largely to mandatory prosecutions, which are formally embodied at the constitution level. As an extension of such principles, both jurisdictions introduced a limited form of plea bargaining. Unlike in USA and England prosecutors in Italy and Germany are required to justify their charging decisions, including refusal to plea bargain, in a written form. This requirement not only makes the prosecutor accountable to his decisions, but also facilitates internal supervision within the prosecution office and external review by the judiciary\(^\text{131}\). The prosecutor’s discretion in Germany is further constrained by victims challenging of his charging decisions and absence of multiple consecutive sentence in concurrent offences that limits tactics of overcharging which is often common in the USA\(^\text{132}\). Similarly, Italy further curtailed the prosecutor’s bargaining options by putting a limit on the nature of offences plea bargaining applies to, putting fixed discounts which are automatically due when the defendant agrees to settle his case via plea bargaining. This obviously limits the parties’ chance of bargaining over the amount of sentence reduction.

In contrast, in the USA and England the prosecution enjoys broad discretions. Prosecutorial discretion in the USA takes rather an extreme form. This is why the US criminal adjudication is sometimes referred as prosecutorial adjudication\(^\text{133}\). Prosecutors are often


\(^{132}\) Most continental countries do not allow imposition of several sentences for concurrent crimes. Rather the most serious charge will absorb the lesser ones and then it will be aggravated accordingly. So prosecutors in these countries may not file like their counterparts in the USA multiple charges and latter switch to the one with strong evidence. This situation has its impact on the use of overcharging to induce guilty pleas.

accused of using their discretion as a leverage to obtain a plea of guilty. With little restraint on prosecutorial power, prosecutors may resort to coercive plea offers. Indeed, studies indicate that they use different tactics to obtain guilty pleas including overcharging, charging under penalty enhancing statutes.

In England, though prosecutors enjoy relatively broad charging discretion, the propensity of using such discretion to induce guilty pleas appears pretty low, at least in theory. This is because its criminal justice system contains important safeguards to prevent prosecutors from using their charging discretion as leverage to produce guilty pleas. The Code for Crown Prosecutors regulates prosecutors’ charging discretion in many ways. To start with it puts a high threshold the prosecutor needs to observe before moving to charging i.e. a ‘realistic prospect of conviction’. This standard which is higher than the USA’s ‘probable cause’ requires the prosecutor to gauge the prospect of conviction realistically; taking into account the strength of his own as well as the defence evidence. In so doing, the code requires the prosecution to filter out weak cases thereby narrowing the possibility of producing weak guilty pleas. The code also explicitly prohibits overcharging and undercharging, and thus limits the latter’s power to induce guilty pleas. Furthermore, defendants in England are also protected from the excesses of plea bargaining as they are entitled to relatively broader discovery rights before agreeing to settle their case through plea bargaining.

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134 The grand jury and preliminary hearing procedures which are used as a check on prosecutor’s discretionary powers are very weak; and are often ‘mere rubberstamps of prosecutors decisions’ Ibid at 248; Niki Kuckes, ‘The Useful, Dangerous Fiction of Grand Jury Independence’, 41 Am. Crim. L. Rev. 1 (2004); Andrew D. Leipold, ‘Why Grand Juries Do Not (and Cannot) Protect the Accused’, 80 Cornell L. Rev. 260 (1995).

135 See Yue Ma, Supra note 131 at 26-27.

136 In practice, it is documented that prosecutors do over-charge defendants to put pressure on them to plead to lesser charges. See A. Ashworth and M. Redmayne, Supra note 112 at 299.

137 It provides “crown prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one”. The code also bans undercharging and over leniency stating that: “crown Prosecutors should only accept 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. Crown Prosecutors must never accept a guilty plea just because it is convenient.” Available at: http://www.cps.gov.uk/publications/docs/code2010english.pdf, May 22, 2011.
b) The prosecutor’s duty of disclosure

The notion of disclosure, which is inseparably linked with the principle of equality of arms, demands the prosecutor to disclose its case and evidence before trial so that the trial goes smoothly and fairly, and defendants are protected from miscarriages of justice.\textsuperscript{138}

In plea bargaining too, disclosure has vital importance. If defendants are to arrive at an intelligent and informed decision over the choice of plea, material information needs to be disclosed to them. In particular, pre-plea disclosure enhances the accuracy of guilty pleas. Disclosure is normally the duty of prosecutors, albeit countries increasingly require defence disclosures. In general, prosecutors in England and the USA have a duty to disclose information favourable to defendants. Yet, in case of the latter, the scope of disclosure is not only limited but also is not triggered by plea negotiations. This leaves defendants to negotiate on inadequate information thereby undermining fairness and outcome accuracy. On the contrary, a more liberal disclosure is recognized in England. In principle, the prosecutor has the obligation to disclose any material that has a bearing on the offence charged, regardless of whether it is going to be adduced before trial. In this sense, such broad rights of disclosure enable the defendant to gauge the strength of the prosecution case, any possible defences, and chances of acquittal. In the context of plea bargaining such disclosure could assist a defendant reach an informed decision.

Inquisitorial jurisdictions usually require that defendants have full disclosure of the entire contents of the investigative file. It is submitted that this full disclosure right naturally flows from the nature of the inquisitorial investigations - unilateral official investigation of

\textsuperscript{138} For example, non-disclosure of prosecution case has been a common factor in many miscarriage of justice cases in England. See A. Ashworth and M. Redmayne, supra note 112 at 259.


\textsuperscript{140} i.e. `the prosecution has no obligation to disclose material during plea negotiations that might lead a defendant to reassess his chances of acquittal at trial, and therefore his incentive for entering into the bargain`. See Nick Vamos, `Please don`t call it `plea bargaining` `, Criminal Law Review 620, 2009. Such limited discovery is often justified that it protects perjury, witness intimidation, and that liberal discovery favours the defendant to much at the expense of states ability to obtain convictions. See William J. Brinnan, `The Criminal Prosecution Sporting Event or Quest for Truth? A progress Report` 68 Wash. U. L. Q. 1, 5-13 1990.

\textsuperscript{141} Susan R. Klein, `Enhancing the Judicial Role in the Criminal Plea and Sentence bargaining`, 84 Texas Law Review 2023, 2044 (2006).

\textsuperscript{142} See Nick Vamos, supra note 140 at 623.
both culpable and exculpable evidence; the defence having no other possibility to know the case unless the outcome of this investigation – the dossier is disclosed to him. In Germany, for instance the defendant / his counsel enjoys broad discovery rights – in particular in plea negotiations the defendant benefits from full knowledge of prosecutor’s case. This increases the fairness of negotiations, as it, among others, helps defendants arrive at informed decisions and puts a restraint on the prosecutor’s leverage of overcharging.

c) Judicial Review

The role of the judge ranges from secondary positions in a sense that s/he supervises the role of other justice actors to dominant positions in that the judge actively engages in plea bargaining, as a party to plea negotiations.

Generally, the neutrality of judges in adversarial systems seems to continue with plea bargaining too. The judiciary in the U.S. remains impartial- it is not allowed to participate in the process of plea bargaining. More or less this holds true for England, which disallows in principle the involvement of a judge in plea negotiations. Although Italy explicitly prohibits the judge from participating in plea negotiations, it vests in the judiciary much broader power than their counterparts in the USA and England do.

On the other hand, on top of reviewing plea agreements judges in Germany participate as a party in the plea negotiations. As such, they may initiate negotiations, indicate the

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145 That said however the English judges seem to have greater involvement gradually. This is reflected in sentence indications and plea discussions in fraud cases. Although such developments are often justified from the perspective of enhancing the openness of plea negotiations and increasing certainty, they are compounded by clouds of concern – i.e., creating undue pressure on defendants to plead guilty- concerns shared by the Royal Commission on Criminal Justice of 1993 but downplayed by the Auld Review. See A. Ashworth and M. Redmayne, supra note 112 at 317. Here it is important to note that the propriety of sentence indication by a judge remains controversial. On the one hand, it is argued that the involvement of the authoritative figure of the judge means that the defendant feels compelled to accept the plea proposals. On the other hand, it is contended that sentence indication helps defendants reach an informed decision whether to accept plea proposals.

146 See below.
maximum and minimum sentence they would impose as part of the bargain\textsuperscript{147}. This reflects the inquisitorial tradition of making the judge a central figure at trial, bestowing on him/her central responsibility to uncover substantive truth. It is believed that the judge’s participation serves important purposes in controlling the power of the prosecutor and ensuring that the plea bargain is `fair and consistent with the facts of the case` so that the defendant receives appropriate sentence\textsuperscript{148}. Having observed empirically the experiences of Germany, Florida and Connecticut, Turner\textsuperscript{149} argues that earlier judicial involvement in plea bargaining is essential in arriving at an `accurate and procedurally just` outcome.

However, judicial involvement in plea negotiations is under fire. The worry concerns the dual capacity the judiciary are expected to play- as a party to the negotiation and as an adjudicator should the agreement fail or in its enforcement. This is objected on the ground that it erodes the impartiality of the judge for he might have formed his opinion as to the guilt of the defendant, that with the strong authoritative figure of judges it puts undue pressure on defendants to accept plea deals\textsuperscript{150}, and that it undermines the efficiency of plea bargaining.

In general, given that fact that the practice of plea bargaining involves a host of risks including the problem of unfairness, coercion and inaccurate verdicts, the role of the judiciary in enhancing the fairness of the process and outcome of plea bargaining should

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\textsuperscript{147} In so doing, they are required to consider the rules of sentencing and may not propose a sentence disproportionate to the degree of guilt; sentence need not be excessively high or low. See Maike Frommann, supra note 111 at 203.


\textsuperscript{149} J. I. Turner, supra note 148 at 200. The author argues: `Judges can provide a neutral assessment of the merits of the case and prod the defense attorney or the prosecutor to accept a fairer resolution. They can also offer a more accurate estimate of the expected post plea and post trial sentences, which is especially valuable in systems of indeterminate sentencing. Finally the involvement of an impartial party can render the bargaining process more transparent and more acceptable to the public`.

\textsuperscript{150} The coercive nature of judicial plea bargaining was once stressed by US Supreme court as : The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the ful force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a substantially longer sentence. See United States ex rel, Elkisnis vs. Gilliga, 266 F. Supp 244(1966) cited in S. R. Schlesinder and E. A. Malloy, supra note 144 at 588.
not be downplayed. While it may be risky to make the judiciary party to the plea negotiation as Germans do since it may affect the impartiality of the judge, undermine the role a judge as a symbol of justice, and likely to coerce innocent defendants to plead guilty, it is equally unwise to make the judiciary passive endorsers of plea agreements as the US system is often accused of.

Courts provide defendants vital safeguards against the excesses of plea bargaining, among others, by regulating the prosecutor’s decision to plea bargaining and reviewing plea agreements.

i) Reviewing the decision to plea bargain

As opposed to the U.S., the judiciary in Italy and Germany plays an active role in supervising prosecutorial decision making so that prosecutors discharge their duties properly. In Italy, for instance, all charge dismissals pass under court scrutiny and no prosecutor drops a charge before it is reviewed by the court. This is a reflection of two most worshiped principles in continental jurisdictions - namely the principle of compulsory prosecution and the legality principle.

In disposing of cases through plea bargaining, prosecutors in Germany are subject to a number of checks. Unlike prosecutors in the USA and England, the German prosecutors are required to justify in writing their charging decisions. Thus in accepting or rejecting plea proposals (penal orders or bargaining over confessions), they should support their decisions with reasons. This guarantee is also available in Italy\textsuperscript{151}. In this sense, both the German system and the Italian system try to ensure that justice actors remain accountable to their decisions, and thereby protect defendants in similar situations from differential treatments with which the American system tends to be less concerned. Moreover, in Germany the law explicitly demands that the court while entering plea agreements with parties should always consider the requirement of the substantive truth - the agreement

\textsuperscript{151} The decision of the prosecutor to use patteggiamento must pass the court’s scrutiny. The former is required to support his decision with reasons. Thus, where the prosecutor refuses to engage in patteggiamento unjustifiably or to accept the proposed sentence, the court steps-in to impose the agreed sentence. This provides the defendant a guarantee that his /her requested (agreed) sentence is enforced. See Stephen P. Freccero, ‘Article: An Introduction to the New Italian Criminal Procedure’, 21 Am. J. Crim. L. 375-76 (1993-1994).
does not affect the court’s duty to take evidence ‘to all facts and means of proof relevant to [its] decision’\textsuperscript{152}. However, it is less likely for plea bargaining to lead to the truth\textsuperscript{153}.

On the other hand, adversarial systems whose prosecution is guided by \textit{discretionary prosecution} and the \textit{adversarial principle} would probably consider such kind of judicial review repugnant to their principles, and give the above principles primacy over judicial review so that the autonomy of adversaries remain uncompromised\textsuperscript{154}. In this sense, U.S prosecutors’ discretionary power in plea bargains remains largely unreviewable. Thus, prosecutors determine whether they have to enter into a plea agreement with defendants without the court’s intervention. On the other hand, there appears a relatively wider form of judicial review of the decision to plea bargain in England. Unlike their counterparts in the USA, prosecutors in England are subject to judicial review where their charging decisions or acceptance of pleas are made contrary to what is provided in the code for Crown Prosecutors\textsuperscript{155}.

\begin{itemize}
\item[ii)] \textit{Reviewing the plea agreement}
\end{itemize}

Although plea agreements pass through courts’ review in all jurisdictions, the magnitude of the oversight differs. In Italy and Germany there appears to exist a strict judicial review. Courts in Italy are required to evaluate plea agreements using such specific standards as the congruity of the offence with the agreed sentence and the appropriateness of the offence with the evidence\textsuperscript{156}. Likewise, German courts, before delivering any judgment based on defendant’s admission of guilt should be convinced not only that the offence has

\begin{itemize}
\item[\textsuperscript{152}] The German Code of Criminal Procedure (1987) section 244(2) cum section 257c, as last Amended by Article 3 of the Act of 30 July 2009.
\item[\textsuperscript{153}] T. Weigend, Is the criminal process about Truth?: A German Perspective Har. J.L. &Pub.Pol’y, 157, 171, 2003 (arguing that plea bargaining is ill suited with the inquisitorial systems which insist on the discovery of substantive truth.)
\item[\textsuperscript{154}] Generally, U.S. courts seem to prefer maintaining their passive role with respect to overseeing the exercise of prosecutorial discretion. The justification for such passive role and reluctance pivots on the following grounds: the principle of separation of powers, the assumption that prosecutors are able to discharge their duties properly and the fear that rigorous judicial supervision may have its repercussions on law enforcement. See Yue Ma, Supra note 131 at 46.
Nonetheless, on the face of concerns that the prosecutor oversteps its discretion to induce defendants to plead guilty, none of the above justifications seems to justify shying away from judicial supervision or an extremely loose supervision.
\item[\textsuperscript{155}] See Nick Vamos, Supra note 140 at 626.
\item[\textsuperscript{156}] Thus, where the court believes that the agreed punishment does not reflect the facts of the crime as for example the sentence is too lenient or too high or when the factual basis does not support a crime; or where the sentence is inconsistent with the rehabilitative purpose of punishment, it rejects the agreement. In so doing, the Italian judge must assess the case file for any exculpatory evidence which may justify acquittal. Otherwise, the court approves the agreement but only after explicitly stating its reasons.
\end{itemize}
been fully investigated but also that there are grounds for believing that the admission of
guilt is genuine, thereby making mere formal admissions - admissions unsupported by facts, insufficient for a judgement\textsuperscript{157}. Further, courts may reject plea agreements where the projected sentence fails to reflect the guilt of the accused.

With a view to protect mere rubberstamps of plea agreements, courts in Germany and Italy are required to state their reasons while accepting or rejecting plea agreements. This requirement beyond raising fairness enhances judicial accountability.

All these can be seen as attempts to accord plea bargaining with some embellish inquisitorial principles – the principle of legality - a principle, which is offended by the imposition of punishment simply because parties requested so, as well as the principle of substantive truth.

The situation in the USA appears pretty different. Courts in many states are not required to determine whether the plea is supported by any factual basis; thus making defendants plead guilty to unrelated offences, offences that don’t match the facts of the case\textsuperscript{158}. This clearly trades truth for efficiency. Even in those jurisdictions that have such a requirement, for example, as is the case in the Federal government, the standard for measuring the factual basis is very low\textsuperscript{159}. Judges often consider a thorough judicial oversight as judicial participation in plea bargaining and thus covet to limit their role\textsuperscript{160}. In England too, in so long as the plea is entered unequivocally and voluntarily the court appears to be less concerned with the factual basis of the plea and its truthfulness\textsuperscript{161}.

Further, there are sharp contrasts among the subjects of comparison concerning review by appeal. Germany tends to have allowed extended appeals on plea agreements. For this

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\textsuperscript{157} See Regina Rauxloh, supra note 61 at 296.

\textsuperscript{158} Yue Ma, supra note 131 at 43.

\textsuperscript{159} J. I. Turner, supra note 148 at 212.

\textsuperscript{160} See Wayne R. Lafave et al, Criminal procedure, 2\textsuperscript{nd} ed, 1999. This coupled with the difficulty of ascertaining factual basis (as parties who agreed to settle a case may lack interest to uncover anything that turns the agreement), and court’s reluctance to inquire into the factual basis of the plea, exposes defendants, as a result of either overcharging or undercharging, to face charges unrelated to the facts of the case. For see J. I. Turner, supra note 148 at 212-13.

purpose, it proscribes advance waivers of appeals in plea agreements so that the agreement remains subject to appellate review. Although, this kind of arrangement may be criticised for its inefficiency, it serves important purposes in checking plea bargains- a practice, which is often identified by its opaque and coercive nature. Conversely, Italy disallows appeal over pattegiamento, but reserves review by cassation. The USA goes even further down to allow waivers of appeals beforehand as part of a plea bargaining deal. In so doing, USA seems to subordinate fairness to efficiency.

\[d\) The defence counsel\]

The right to legal counsel is most needed in plea bargaining- a practice which involves waiver of many procedural guarantees. Throughout the process, a defendant desperately needs the help of a lawyer. In recognition to this, some jurisdictions make legal representation a prerequisite for plea bargaining to take place. None of the studied jurisdictions follows this path, however. In contrast, in the USA not only may plea bargains be accepted in the absence of legal counsel but also the right to counsel may be waived in the process of plea bargaining.\(^{162}\)

A romantic view of the role of defence counsel in plea negotiations suggests that the counsel is there to make sure that the defendant bargains on equal terms with the prosecutor, makes an informed decision to settle his/her case. Nevertheless, in reality, it is quite different. With attractive, if not coercive plea offers from the prosecutor coupled with financial and non-financial incentives involved\(^{163}\), the defence counsel may find it difficult to choose trial against plea bargaining even if his client’s interest so suggests.\(^{164}\) This makes

\(^{162}\) See Stefano Maffei, supra note 117 at 1066.

effective legal counsel less likely\textsuperscript{165}. That said, if rendered properly, legal counsel though incapable of avoiding the inherent problems of plea bargaining, would help mitigate its evils- it may raise the awareness of the defendant of his rights and consequences of waiving them, increases the truthfulness and voluntariness of the plea, which ultimately minimizes the conviction of innocents.

e) Victims

Historically victims dominated the criminal justice system in terms of both initiating and prosecuting crimes. Nevertheless, gradually they lost their central position to the state, their role dwindling to the status of a witness. This was typically true in common law countries. In civil law countries, they retained some powers of participation as private prosecutors, for example. Since late 20th century although things tend to go in favour of victims for, among others, their participation through victim impact statement was introduced in many common law countries, victims are largely kept passive. This general pattern seems more or less to apply to plea bargaining too. Victims lack any meaningful role; they are not involved in plea negotiations; nor do they affect the outcome of the plea negotiations. In Italy, they are completely marginalized in the plea bargaining process. On top of lacking any role of participation in plea bargains, victims lose advantages they could have obtained in full scale trials\textsuperscript{166}. In Germany, only victims who join the prosecution as a civil party have the opportunity to get consulted and to challenge plea agreements later in appeals\textsuperscript{167}. Though not meaningful as such, victims in several states in the USA\textsuperscript{168}, and England have some say in the plea bargaining process. In England, the prosecutor is

\footnote{\textsuperscript{165}See for example A. Hessick and R. M. Saujani, Supra note 162 (arguing that for similar reasons defendants in the US don’t receive effective legal assistance); See also Albert Alschuler, 'The Defense Attorney’s Role in Plea bargaining’, 84 Y. L.J 1179, 1180, 1975(who argues that [plea bargaining] subjects defence attorney to serious temptation to disregard their clients interests .. He also argues that ‘plea bargaining is an inherently irrational method of administering justice and necessarily destructive of sound attorney-client relationships).

\textsuperscript{166}They have no chance of joining the criminal trial as civil party, which among others, denies them important evidence for the guilt established in the criminal court serves as a conclusive evidence to claim compensation. Moreover, they lose their right to reimbursement for costs incurred in the investigation of crimes. See Stefano Maffei, supra note 117 at 1067.

\textsuperscript{167}T. Weigend, supra note 30 at 47.

\textsuperscript{168}About one-third of the states in the USA require the prosecutor to consult victims before engaging in plea bargains. U.S. Dep’t of Justice, Office for Victims of crime, Victim input into Plea agreements 2 (2002), available at \url{http://www.ojp.usdoj.gov/ovc/publications/welcome.html} (about one-third of states expressly permit victims to be heard at plea proceedings); Michael M. O’hear, plea bargaining and victims from consultation to guidelines, 91 Marquette Law Review 324, 2007.}
required to be informed of the victim's interest and where possible to consult them before accepting any plea offers\textsuperscript{169}.

\textbf{1.8 Conclusion}

In the preceding pages, an attempt has been made to outline the debates around the notion of plea bargaining and briefly to dwell on them. The following can be said by way of conclusion. While most of the criticisms of plea bargaining in the main apply to the unlimited variant, they exist in a mitigated form with respect to the limited variant.

In this chapter, plea bargaining is examined in a comparative perspective. From this several lessons can be drawn. The need to dispose of cases efficiently urges jurisdictions across the globe to target trial avoidance procedures such as plea bargaining. The form of plea bargaining made use of, the role of justice actors, and the availability of procedural safeguards depends on the orientation and ideology of the respective jurisdictions. For example, while those from the adversarial origin tend to see plea bargaining as compatible with adversarial principles (such as party autonomy) or else value efficiency gains more than fairness- and thus leave much discretion to the parties to use plea bargaining in its unlimited form. This is not to suggest that this model applies across adversarial jurisdictions monolithically- variations are natural. This characterization of plea bargaining in particular holds true of the USA’s model where prosecutors value efficiency over accuracy\textsuperscript{170}.

Those from inquisitorial origin, however, are often sceptical about the fairness and compatibility of plea bargaining with their established procedural principles such as the material truth, principles of legality, mandatory prosecution, and so prefer to adopt it in its limited form. These approaches are indicative of the weight each jurisdiction attaches to the competing principles of criminal procedure: fairness/ accuracy and efficiency. Thus, while the former with unlimited variant of plea bargaining values efficiency gains, the latter with creative and cautious approaches to plea bargaining tries to mitigate its flaws and


\textsuperscript{170} See J. Bowers, supra note 63 at 1117-22.
enhance its accuracy\textsuperscript{171} and fairness. In this sense, the approach taken by inquisitorial systems could be instructive for jurisdictions like Ethiopia whose legal system is less developed and thus prone perverse effects of plea bargaining (see Ch 7).

\textsuperscript{171} Some even posit that this variant of plea bargaining is capable of getting at the truth. See R.L. Lippke, Supra note 68 at 231.
Chapter Two: Research Design

2.1 Research Questions

The paradox in plea bargaining is that while countries with a long tradition of it are working to limit its application or are even tempted to abolish it\(^1\), and while it still continues to be a subject of fierce attack in the academic circle; nonetheless, with its practical benefits, it is now increasingly recruiting new members from diverse criminal justice structures. The system has grown upon common law soil and is typical of common law legal systems like the USA and the UK; yet it has now been transplanted in varying degrees to countries as diverse as France, Italy, Russia, Georgia, India, Taiwan, South Africa, Nigeria, and Argentina. While most of such jurisdictions have adopted plea bargaining in its limited form (i.e. types of concessions limited, sentencing differentials statutorily fixed, strict judicial scrutiny of plea agreements involved, etc), some of them preferred to have it in its unlimited form (broad prosecutorial discretion, with no limitation on the type and amount of concessions)\(^2\).

Ethiopia is not an exception to such a wave of plea bargaining. Enticed with its developments, Ethiopia has transplanted the unlimited variant of plea bargaining. Although this variant of plea bargaining helps reduce the problems of case backlog in the Ethiopian criminal justice system to some extent\(^3\), it is bound to pose its own tribulations which are either inherent to the institution or typical to the version adopted by Ethiopia or to the Ethiopian context. This thesis investigates the viability and desirability of this variant of plea bargaining in Ethiopia. To this end, the thesis addresses a set of research questions.

The principal question, around which the thesis is constructed, is an assessment of the feasibility and the desirability of the introduction of plea bargaining into the Ethiopian system.

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\(^1\) In the USA, states have taken measures to address problems of plea bargaining. Some states, as Alaska attempted to abolish plea bargaining altogether while others focus on limiting its evils. Similarly, in England, attempts have been made to control prosecutorial bargaining power by, among others, forbidding the use of charges to induce plea, prohibiting unwarranted charges, overcharging and undercharging, stipulating fixed discounts (though not binding as such).

\(^2\) On such distinctions, see chapter 1.

\(^3\) See chapter Seven, the context of delay.
of criminal justice. In order to address this, the following issues are considered: the motivation for the introduction of plea bargaining in Ethiopia; the problems that plea bargaining is said to address; the extent to which plea bargaining in the Ethiopian context is likely to be able to address these problems; and the limitations and constraints in incorporating a system of plea bargaining within Ethiopian criminal justice – be these institutional or connected to established legal and occupational cultures. Although drawing on the rich literature of plea bargaining practices in the US and Western Europe, this thesis considers the very different legal and political culture of Ethiopia, and the consequences of importing plea bargaining into a criminal process that lacks many of the characteristics of more established systems of criminal justice.

More specifically, the thesis examines whether the driving forces to adopt plea bargaining are justified in the Ethiopian context; the nature of plea bargaining as adopted by Ethiopia (focusing on the sufficiency and the extent of workability of legal conditions, procedural safeguards, and the role of justice actors); the extent to which the inherent problems of plea bargaining are mitigated and plea bargaining is made to comport with local contexts-institutional capacity and cultural contexts, in particular; actors’ perception and likely reception of plea bargaining and its possible impacts on the implementation of the reform; and whether plea bargaining applies informally and its repercussions.

2.2 Method and methodology

2.2.1 Methodology

Since plea bargaining is going to be a new inclusion into the Ethiopian criminal justice system, it was impossible to study its implementation within the period of this PhD project. Thus, this thesis examines the feasibility of the Ethiopian variant of plea bargaining prospectively. To this end, a qualitative methodology which makes use of a mix of contextual and comparative approaches is employed. This methodology is relevant to understand processes-the what, the

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4 The Ethiopian Criminal Justice Policy, which incorporates plea bargaining as one case disposing tool, was endorsed in 2011. The policy leaves the details for the care of the long-awaited Criminal Procedure Code. Yet, the proposed law is moving at a snail’s pace and yet to be enacted.
how and the why of a given phenomenon. In particular, it is pertinent to such studies as mine which aim to understand the experiences and attitudes of the subjects. Basically, the contextual approach involves a contextual analysis of policy and the proposed law on plea bargaining. This endeavour is informed by the perception of justice actors on how plea bargaining would fare in the Ethiopian context. This helps to obtain a direct knowledge on the perspectives and experiences of the implementers which is essential to the success of the reform. It also helps to identify the possible challenges and constraints of plea bargaining. In addition to evaluating the Ethiopian variant of plea bargaining contextually - focusing on the Ethiopian legal culture and legal structure - this work attempts to investigate empirically whether plea bargaining is being practiced in Ethiopia. This is useful to have a general snapshot on the practical challenges and prospects of plea bargaining. Moreover, to have a broader contextual analysis, the Ethiopian variant of plea bargaining is examined in a comparative perspective to a certain extent. It is compared and analyzed with some selected versions of plea bargaining as adopted by various criminal justice structures. For this purpose, the experience of four countries from the two major structures of criminal procedure (i.e. adversarial and inquisitorial) namely USA, England, Germany and Italy is employed (see Ch 1 on why these jurisdictions are selected). The use of a mix of contextual and comparative approaches is suitable for such studies which evaluate the feasibility and desirability of plea bargaining transplants.

2.2.2 Data collection Methods

The first chapter is devoted to identifying major issues in plea bargaining. As such, this part of the research heavily relies on literature review as well as comparative perspectives based on experiences of selected countries in Europe and North America. The next chapters (Chapters three and four) introduce the Ethiopian criminal justice system and examine the reform which introduced plea bargaining to Ethiopia respectively. This involves a thorough analysis of policy documents (the new Criminal Justice Policy being the main target), reform documents (including proposed laws), and laws as well as relevant literature. The last set of chapters (chapters five and six) consider the place of informal plea bargaining and the feasibility of the

particular version of plea bargaining Ethiopia adopts respectively. To this end, interviews and questionnaires were administered to gain further insights into practice and the likely reception of plea bargaining.

Thus, the empirical part of the research investigates the perception of justice actors to plea bargaining, whether informal plea bargaining exists and if so, its nature, scope and implications. To ensure validity and confidence in the findings, the study initially intended to approach this using a variety of data collection methods including interviews, questionnaires and observations. In fact, it did not prove possible to conduct observations. The plan was to observe the two Federal Courts selected for piloting plea bargaining and pre-trial conferences, and to evaluate how plea bargaining is being used. However, the failure of the piloting endeavour meant that there was nothing to observe. During the fieldwork, I learned from judges and the registrars that the piloting exercise was attempted unsuccessfully. The major reason for this was absence of a legal framework that compels prosecutors (who are purportedly the ones who refused to participate) to attend pre-trial conferences. Nor was the method of observation suitable to investigate whether informal plea bargaining applies, as the practice is not visible through the observation of court trials and pre-trial processes. This meant that, I have to rely on in-depth interviews and questionnaires. These methods complement each other. One can fill the weakness of the other. For example, the fact that questionnaires are filled in anonymously increases credibility while interviews offer flexibility and control over the participants.

All in all the research employed multi-data collection methods which include: documentary research, interviews and questionnaires. This is desirable not only to raise the amount of relevant data but also to validate findings and increase reliability of the findings. Further, it helps to properly address the various research questions involved in this study.

Documentary research and literature: The research consulted policy documents (the criminal justice policy being the target), reform documents (including proposed laws – the draft criminal procedure code), laws (including the FDRE Constitution, the 2004 criminal code, the 1961 criminal procedure code, other special substantive and procedural laws – including the anti-

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corruption proclamation with its amendments, the anti-terrorism proclamation and the
witness protection proclamation) and other sources resulting from library searches – in
particular, literature on the subject matter - literature on the experience of countries selected
for comparison. In this respect, my access to the rich resources of the University of Warwick
was vital. Domestic libraries were also explored. Such sources are generally selected based on
their authenticity and relevance.

Interviews: As noted by many, interviews are the most popular method of doing qualitative
research. This is because of the numerous advantages they offer for researchers: they enable
one to collect on-target information; to avoid unselected participants; they are more flexible
and characterized by outcome certainty/ high response rates. In particular, interviews are
preferred to probe more answers and clarify questions on the subject matter of the study. This
is all the more relevant to the study of plea bargaining in Ethiopia where the notion is
completely alien to the public and largely unknown among justice professionals. This study
uses face- to -face interviews for they offer the above specific advantages. The empirical aspect
of the research seeks to investigate actors’ perception on plea bargaining and whether plea
bargaining has any room for informal application. A data of this kind, which involves actors’
opinion and practice, can be appropriately obtained using interviews and questionnaires.
Questions can be designed to cross-check information and to probe further in order to
determine, for example, the extent to which practices described by respondents are typical.
Indeed, such methods as observations are more ideal for studying practices and attitudes in
their natural settings. However, absence of the relevant natural settings i.e. absence of open
practice of plea bargaining which is suitable for observations means the method of observation
did not work. As shown above the plan to use this method was not successful either for the
piloting experiment with plea bargaining failed.

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7 Jurisdictions from both adversarial origin and inquisitorial origin are included. For details see chapter three
where such matters as the standards (justifications) for the selection, the subjects of comparison are detailed.
8 Paul Ten Have, Understanding Qualitative Research and Ethno methodology, sage publications Ltd., London,2004
9 Ibid at 5.
10 See Earl Babbie, supra note 8 ( noting that surveys(interviews and questionnaires) are well suited to the study
of public opinion)
**Questionnaires:** Though questionnaires are common in quantitative research, they are used here to complement and triangulate interview data. Further, albeit problems of response rates, questionnaires are easy to administer, economical - cover a large number of population/subjects, and offer advantages of better accessibility. This is all the more important for such inquiries which are constrained by resource and time limitations. Given problems of openness and self-censorship among the participants, the assurances of anonymity and privacy in questionnaires means respondents can be motivated to give candid responses. However, this should not suggest that the data obtained via interviews is overshadowed by such problems. As shown below, I managed to overcome this challenge or at least hold it to the minimum using my connections- i.e. by establishing trust. A comparison of the interview data and the questionnaire data lends support to this.

**2.3 Participants, Study area and Sampling**

This stage benefited from the preparation stage-a stage where appropriate institutions were identified and some contacts were made with relevant authorities and individuals. As a qualitative research study constrained by resource limitations, the study makes use of smaller data sources which are believed to serve as a rich source of information on the subject matter. That is why the research employs three appropriate sampling techniques- quota sampling (participants are selected from each sector of justice actors), snowball sampling (locating participants through the already known participants) and purposive sampling technique \(^{11}\) (whereby key sources or persons are targeted). Such techniques of non-probability sampling are useful for qualitative research that is constrained by resource limitations. In applying the techniques, however, I tried to make the data as representative as possible-covering the young as well as experienced, known professionals, and relevant officials\(^ {12}\).

The study covers four First Instance (District) Courts, three High Courts, and one Supreme Court and one penitentiary\(^ {13}\). These courts were selected based on such factors as the

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\(^{12}\) For instance, the experience of participants ranges from 1year – 25 years.

\(^{13}\) The attempt to include another prison centre (prisoners/defendants) in Addis Ababa was not successful.
researcher’s prior information that some of them were experimenting with plea bargaining, the majority of justice actors were working in these courts\textsuperscript{14}, the number of cases they handle\textsuperscript{15} and convenience. Though the number of participants is not that big the effort to make sure that the study covers all justice actors bore fruits. Thus, participants included criminal bench judges, defence attorneys (both private and public), public prosecutors and defendants involved in the above courts/ penitentiary. Overall, I administered 40 questionnaires each, totalling 120 (except defendants where circumstances forced me to exclusively rely on interviews), of which I managed to collect 18, 14, and 32 questionnaires from judges, defence attorneys and prosecutors respectively. I also interviewed 11 criminal bench judges, 6 attorneys, 18 defendants and 14 prosecutors. In total 29 criminal bench judges, 20 Attorneys, 46 prosecutors and 18 defendants, have effectively participated in this study, a total of 113 participants. Roughly, these participants represent about half of the entire population of criminal justice actors in the respective selected institutions\textsuperscript{16}. In addition to this, I have interviewed two prison officials and two members of the drafting committee of the proposed law on criminal procedure. The Fieldwork was conducted in two rounds: from March 17 - May 11 and September 13 - October 9, 2012.

2.4 Preparing the Tools

The data sources include interviews and questionnaires with judges, prosecutors, defence attorneys, defendants and some officials of justice institutions. Tools, in particular interview tools, were prepared in such a way to permit participants to describe as well as offer their own insights into the subject matters in question. Interview tools are semi-structured in that predetermined questions are prepared to be presented with the same wording and order to every participant but leaving a room of flexibility for follow-up questions and detailed discussions while questionnaires are structured containing both closed questions and open-ended questions, with the latter held to the minimum. In the process of preparation of the

\textsuperscript{14} For example at the time of the fieldwork while courts which are not included in this study are staffed with as low as two criminal bench judges, some of the selected courts were staffed with up to 22 criminal bench judges.

\textsuperscript{15} For example, one selected court alone covers 25-30 % of annual first instance filings.

\textsuperscript{16} For instance in one court out of 7 criminal bench judges 4 judges; in one prosecution office out of 28 prosecutors, 12 of them have effectively participated. In another court staffed with 22 criminal bench judges, 14 questionnaires were administered though the return was poor.
tools, care has been made to use proper wording and maintain question sequencing so that misconception of tools is reduced and quality of response is enhanced. This standardization also helped to ensure that participants respond to the same set of questions thereby facilitating the analysis.

Specific questionnaire and interview tools were prepared for each sector of justice separately so that the tools are pertinent to the particulars of each sector. At the same time, some general questions common to all sectors were included. With a view to triangulating the findings of the research, the content / substance of the questionnaire and interview questions is made to be similar.

Yet, developing an appropriate tool was not simple. Initially the tools were prepared having in mind the piloting of plea bargaining in two courts. However, in the course of administering them I found out that the piloting project was a failed exercise. As a result, I had to develop the tools again. Samples tools used in the research are annexed.

Broadly speaking, the tools cover the following major components: a) the criminal justice actor’s view /perception of plea bargaining; b) guilty pleas; c) informal plea bargains; d) readiness to apply plea bargains and e) other miscellaneous issues.

2.5 Doing the Fieldwork

Although, the idea was to apply the multiple data collection methods to all participants horizontally, this proved to be inappropriate. Thus, before doing the fieldwork, I had to decide which survey method is suitable to which subject /justice actor. Thus, interviews were used exclusively to key informants (who are thought to be better sources of information) and to all defendants. The reasons in doing this has to do with the benefit of having in-depth interviews (to make intensive investigations and get as much relevant information as possible), and the particulars of defendants (illiteracy or low level of comprehension of the questionnaires makes questionnaires less relevant) respectively. It is important to note that the surveys were self-administered with interviews, being face-to-face17.

17 Phone interviews were used in exceptional circumstances only to two respondents.
The fieldwork was conducted in two stages. In the first stage, questionnaires developed based on the piloting of plea bargaining were administered. This stage served double purposes—piloting as well as data gathering. Although the failure of the piloting project reduced the relevance of the tools attempt was made to use part of the questionnaire which is not affected by it. Parallel with this, in-depth interviews were held. The second stage did benefit a lot from the first stage(piloting) for it was conducted after the weaknesses of the first stage were rectified—i.e. the questionnaires revised, access improved, rich sources of information better identified, and in general the suitability of fieldwork techniques tested.

In any event, the fieldwork passed through the following process. The first key task was ensuring access to the participants. Normally I tried to reach participants formally through the head of the respective justice institutions. Although this approach appears to give my project added weight and thus increased participant cooperation, it also has dangers. For one thing there could be selection bias in distributing questionnaires. Further, participants may not be comfortable with their boss knowing their participation in the study. To some extent, I tried to quell such worries by inserting assurances of anonymity in the questionnaires and collecting the questionnaires myself. Moreover, I used informal ways to reach many of them. In this regard, my earlier connection with some justice actors helped me a lot. I found this approach very useful not only in getting access but also in conducting frank and open interviews and discussions. Almost all of my interviews were approached this way while many of the questionnaires were distributed formally through the head of the studied institutions and collected mainly by the researcher himself. The latter was particularly the case with judges. Still a significant portion of the questionnaires were distributed and collected by the researcher himself. This applies in particular to defence attorneys as a whole and the majority of the prosecutors. As expected, getting access was relatively easier in questionnaires than in interviews. Nevertheless, the response rate was poor in the former. As regards interviews while some of them were willing to be interviewed on our first meeting, many of them preferred to arrange another time. Only quite few failed to show up on the agreed time.

Once access is secured for the interview, I briefly introduced myself and explained the purpose of the research and where appropriate showed the participants a letter of introduction. I also stressed that their participation in the research was vital to the fruition of my project but they
were absolutely free to participate. Besides, I told them that their responses would be handled with strict confidentiality and they would only be cited in anonymity. With strict assurances of confidentiality and establishing of some sort of trust with the help of my earlier contacts, interviewees were asked whether they are willing to have their interviews recorded. Most of them agreed to. In addition, I found it helpful to take key notes during the interview. This helps, among other things, to maintain a clear focus and to ensure the relevance of the interview. For the minority of the justice professionals and for all defendant interviewees I only took notes for in the latter’s case, it is prohibited to record their interview in prison centres. Interviews were conducted in Amharic following the wording of the prepared survey questions so that the responses are not affected simply by the presentation of questions. Yet, this was not allowed to affect the follow-up questions, the mark of interviews. Most interviews were conducted at the interviewees’ office or offices arranged for the interview while some of them in a café. The interviews lasted from 30 minutes to 3 hours, the shortest being interviews with defendants.

In one prison centre, I had amazing experiences. With the help of prison authorities, all prisoners from all quarters were gathered for orientation. After a brief introduction of myself and the purpose of the research, I asked for volunteer interviewees from two categories: those convicted based on their guilty pleas and those who were convicted after contesting trials. Surprisingly, of about two thousand prisoners, roughly the majority was willing and competing to be interviewed. Their extraordinary desire to participate in the study and to talk to me was unbelievable. As I understood later in the interview, this was partly due to misconception of my role – often I had to make clear that I was there not to investigate complaints but to conduct a research to whose success their input matters most. After a long process, I selected and interviewed 13 prisoners most of whom were guilty plea convicts. In the process of the interview, subjects were not aware of the concept of plea bargaining at all thereby necessitating me to explain further its nature using a range of practical scenarios that they could relate to, showing all forms of plea bargaining (charge, sentence and fact bargaining). Still, I found most defendants vocal of their treatment at the prison centre while some demanded for clemency. Reiterating my role as a researcher, I had to politely direct them time and again to the subject matter of the interview.
Once, interviews are completed I exchanged address with most of the participants (justice professionals). This was done for mutual benefits: to get clarifications on any vague expressions or any additional information as well as to provide interviewees access to any queries they may have in relation to the project or their interview.

2.6 Data organization, Analysis and Presentation

The first task after the collection of data through interviews is transcription. Having identified their relevance based on the key notes I took during the interviews, I decided to have a selective full transcription. Accordingly, with regard to key and relevant subjects a word-by-word transcription is made while condensed notes and repeated listening apply for some less relevant interviewees. Then I translated into English sample interviewees from each justice actor as well as quotations used in the research. This was necessitated not only to facilitate the data analysis but also to discuss the data with my supervisor who is English speaker. To ensure confidentiality and anonymity, each interviewee is assigned with pseudonyms combining his/her profession and numbers starting from 01. (For example, judge 01, prosecutor 05, defence attorney 10). The organization of the data obtained through questionnaires is done by tallying it against the questions. This is repeated turn by turn to all justice actors.

After going through all the interviews (transcriptions), key notes, and reviewing the tallies, I did a thematic classification of the data. This takes the form of what is technically called categorical analysis - the process of analyzing data by sorting it on a line-by-line basis while coding it into categories that emerge in the process. This is done deliberately to avoid any over-generalizations. Admittedly, the data is too small for extrapolation i.e. to make inferences, which are valid across the country. Yet, this does not suggest that the data is incapable at all to stand by itself. It is used to generate arguments and provide new insights where all or the substantial majority of the justice actors who

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participated in the study confirm it and their views are considered to be representative. Otherwise, the data is used to inform the study. Even then, it not extrapolated across the nation; instead, it is used to analyze particular themes in question.

Here it is noteworthy that the tentative finding of this research was presented in a seminar arranged by my supervisor at Warwick University during the last residency period (May 2013). This research has benefited a lot from the constructive feedback obtained from this seminar.

2.7 Ethical issues

As communities operate within agreed codes of conduct, researchers generally share some ethical agreements in doing research. Thus, research involving human beings must ensure, among others, voluntary participation of subjects, and adherence to the principle of no harm to participation and no deception. The former two principles, which are formalized in the concept of informed consent, demand that subjects should consent to participate with a full understanding of the possible risks involved.\(^\text{19}\)

In this research, an attempt is made to address apparent ethical issues.\(^\text{20}\) Finding participants uncomfortable with it, I have deliberately avoided requiring them to sign a document as an expression of informed consent. After explaining the objective of the research, their freedom to participate, and assurances of confidentiality and anonymity, a verbal consent was obtained. Still, there were some limitations in this regard. The distribution and collection (partly) of questionnaires through institutions may raise some ethical issues relating to obtaining an informed consent. However, the insertion of guarantees of freedom to participate, anonymity, and confidentiality in the questionnaires helps to quell the problem. Moreover, most of the questionnaires were returned directly to the researcher. This helps at least to keep the confidentiality of the responses from the institution, the subject of the study.

In the course of acknowledging sources attempt is made to ensure that interviewees and respondents run, to the extent possible, no risk simply because of their participation in this research.

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\(^{19}\)Earl Babbie, Supra note 8 at 66.

\(^{20}\) It is quite difficult to foresee all ethical issues involved in a research.
study. To this end, I have provided them with the protection of confidentiality horizontally. No names of participants and sometimes institutions are mentioned. That is why codes are exclusively used. In acknowledging sources or in the body of the work, some general expressions (such as titles of the participant, the name of the institution) which tend to disclose identity are deliberately avoided. This is so even if the mentioning of it tends to add weight and credibility to the information.

2.8 Challenges

1) Problems of Access

One of the major problems in the process was getting access to some institutions, in particular special investigative units and prisons. Getting access to defendants was, as expected, extremely challenging. An attempt was made to locate them randomly among court attendants. After successive attempts, I managed to contact only five defendants. Yet interestingly, I managed to interview thirteen prisoners at one regional prison centre, albeit, the authorities did not allow me to record the interview. I also tried to interview defendants (prisoners and detainees) at another prison centre but this was unsuccessful due to access problems.

Defendants I interviewed were not aware of the concept of plea bargaining at all. This necessitated me to explain further the nature of my research and the plea bargaining proposals. I did this using a range of practical scenarios that they could relate to, showing all forms of plea bargaining (charge, sentence and fact bargaining). Most of those I spoke to were positive about the prospect of bargaining mechanisms, but others preferred to talk only of the problems they face.

I expected it to be easier to access judges, but this did not prove to be the case. The access problem takes two forms: problem in contacting judges for they were unavailable and problem of reluctance to participate in the study. Many of them were reluctant to participate in the study – albeit, this needs further investigation it could be perhaps because they were busy, or unfamiliar with the plea bargaining reforms (powerful people do not like to appear ill-informed or ignorant), or they were not interested in the plea bargaining proposals. Interestingly, I managed to reach some of them officially and the majority through my earlier connections with some judges. The latter was vital in gaining access to almost all the
interviewees while officials helped me as regards the questionnaires. (For details see above the section on participants)

Prosecutors were by far the most accessible actors. With the exception of some working in special investigation units, I was able to gain access to prosecutors without difficulty. However, the challenge I faced was to persuade them to share their plea bargaining experiences. Since most of them fear that practicing plea bargaining in the absence of a legal framework may involve disciplinary measures, they are not comfortable to share such experiences. Thus, the formidable challenge was establishing some sort of trust. Fortunately, with unwavering help from prosecutors I knew and strict guarantees of confidentiality, I managed to do this with some of them and carried out their interviews. Here there is a paradox – on the one hand, BPR reforms demand that plea bargaining is applied; on the other hand, justice actors feel that they risk discipline should they apply it publicly. Partly due to this, the BPR reforms as they relate to plea bargaining remain on paper or at least do not apply formally or publicly. There appears some sort of tension lingering around the BPR reforms. The problem lies on the fact that the reforms were not backed by law.

2) Lack of statistics/ organized data and literature

Organized data is at worst unavailable in justice institutions and at best is insufficiently available (for example attempt was made at the Federal courts to organize some relevant data - but currently access is hindered by ‘technical problems’). Such national statistics and trends on crime rates, conviction rates, etc are unavailable. This has been a serious challenge. Nor is there empirical research on topics of significance. This presupposes the gathering of information/evidence from scratch. However, it is evident that it is impossible to collect empirical evidence on everything connected with plea bargaining within this project. Just one example of such experiences relates to the issue of legal culture in general and guilty plea culture/guilty plea averse defendants. In general, the plan was to examine the interplay between such components of legal culture (as measured and established by writers) as support for rule of law, perceptions of the neutrality of the law, the subjective significance of

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21 This stands for Business Process Re-engineering, a reform embarked upon by the government on government sectors including the justice sector. For some details on this, see chapter 4.

22 On the underground practice of plea bargaining, see chapter 6.
individual liberty and preferred modes of dispute settlement with the Ethiopian variant of plea bargaining. Nevertheless, lack of resources/literature on such aspects of legal culture has hindered the plan. Thus, the examination of plea bargaining in light of the Ethiopian legal culture is limited to the extent secondary data/literature is available or collection of primary data is found to be feasible. A similar problem arose in relation to guilty plea culture of defendants. Actors opined that guilty pleas are extremely rare. The best way to inform this would be to look into court statistics on the proportion of cases that ended with guilty pleas, but no data is available on this. Nor is there any empirical research on guilty pleas. Thus, attempt is made to triangulate this by including the experiences and opinions of all justice actors on the matter.

Similarly, literature on topics of significance to this study is very scant. There are few law journals in the country. None of these is devoted to criminal matters; nor do they provide adequate coverage on the subject. Empirical research in the area of criminal justice in general is very scarce. This makes extremely difficult not only the developing arguments around important variables in the criminal justice system but also the corroboration of the fieldwork findings with secondary resources/literature.

That is why the research tried to the extent possible to investigate some of the issues empirically; otherwise, it made use of the most out of the scanty literature, reports by government and non-government entities.

3) Response problems

The response rate to the questionnaires was low in the cases of high court judges and defence attorneys. For example, in one study area, out of 22 high court judges who preside over criminal matters, I distributed 14 questionnaires. The response rate was very low; after frequent visits, I managed to collect only five questionnaires. Quite interestingly, the response rate was staggeringly high among prosecutors and relatively better among first instance/district judges where in the former case I was able to collect all but eight questionnaires out of forty.
My quick inquiry on the problem seems to suggest that judges and defence attorneys took the concept as entirely alien to Ethiopia and thus found the questionnaire extremely confusing. However, this should not have prevented them to complete at least the first part of the questionnaire which tries to solicit their views on whether the practice of plea bargaining exists and whether plea bargaining is worth introducing into the Ethiopian criminal justice system. Perhaps their unfamiliarity with the concept of plea bargaining could partly explain the reluctance. The high response rate among prosecutors who were already exposed to informal plea bargaining at the investigative stage seems to support this. Disproportionate response rates did affect the original plan to have an even representation of each justice actors in the study. However, its impact on the findings tends to be minimal for the research is not interested in making comparisons among justice actors but rather on the cumulative effect.

4) The failure of the pilot project

The questionnaire was initially designed based on the information I obtained from relevant authorities that plea bargaining, as part of the BPR reform, is being piloted in the selected study areas. Yet, the fact on the ground was not as imagined-the piloting was a failed exercise. This not only created confusion among participants but also reduced the relevance of the questionnaire. Provisionally, an attempt was made to fill this gap by explaining the questionnaire to the participants, and failing this - focusing on interviews. Later, a revised version of the questionnaire was administered successfully in the second round of the fieldwork.

2.9 Limitations and the Scope of the Study

The study is affected by three major limitations. The first limitation is inherent to the nature of the study. As a prospective assessment, it has limitations in identifying the effects of the Ethiopian variant of plea bargaining with certainty. Nor can its possible effects be exhaustively explored ex ante. The fact that the reform introducing plea bargaining is still in progress, albeit at a snail's pace and hence it is not formally tested adds another uncertainty. To mitigate such problems, an attempt has been made to inform the study with the rudimentary informal plea bargaining identified in this research. A corollary to this is the uncertainty of the proposed law.
As expected, the proposed law kept changing in the course of this study. I have tried to update the study with such developments. With the uncertainty of the enactment of this law and the coming to end of this project, it is simply impossible to keep on updating the research with new developments. Therefore, I have to stick to the latest version of the proposed law as was valid in June 2013. Further, much emphasis is placed on the criminal justice policy, which is already endorsed.

The second limitation has to do with the limited coverage of the fieldwork in that only four First Instance (District) Courts, three High Courts, and one Supreme Court and one penitentiary are covered\textsuperscript{23}. I have tried to compensate this by taking big sample sizes.

The third limitation is typical to less developed legal systems like Ethiopia, that relevant literature, statistics or court jurisprudence on topics of significance (on the operation the criminal justice system) are hardly found. That is why the study resorts to reports by government and non-governmental entities. In particular, the part dealing with Ethiopian legal culture is significantly affected by this problem\textsuperscript{24}.

This study predicts the viability of the Ethiopian variant of plea bargaining primarily focusing on the extent of its contextualization to local conditions and circumstances (with particular attention on legal institutions, legal culture, and criminal law principles). This assessment does not claim to be comprehensive, however. This is so especially with respect to legal culture and principles of criminal law. Only some major variables which are closely linked with plea bargaining are dealt with. Thus, as regards legal culture one aspect of it \textsuperscript{25} from defendants, victims, justice professionals and the public, each is addressed.

Yet, this does not mean that the context of the origin is totally ignored. Indeed, attempt is made to examine the context as well as the flaws of plea bargaining as applied in the country of origin and to investigate this in light of the Ethiopian reality (Chapter 1, 3 and 6).

\textsuperscript{23} For details see above, the section on participants, study area and sampling.
\textsuperscript{24} On the measures taken to mitigate this problem, see section 2) above and chapter 7.
\textsuperscript{25} The selection is generally made based on its possible effect on the success or failure of a given legal transplant as well as the availability of literature or the feasibility of collecting primary data.
Chapter Three: Overview of the Ethiopian Criminal Justice System

This chapter provides a brief overview of the defining features of the Ethiopian criminal justice focusing on the structure of criminal procedure, the organization of legal structures and fundamental principles of criminal law and procedure. This facilitates the evaluation of the likely reception of plea bargaining.

3.1 Aspects of the Ethiopian Legal System: A brief sketch

The term legal system is understood differently among scholars. Throughout this thesis, it is conceived as a synergy of three components: legal structure (institutions and processes), legal culture (values and attitudes towards laws and legal institutions), and laws. This chapter highlights two elements of a legal system (legal institutions and laws) from the perspective of Ethiopian criminal justice. The third element—legal culture—is discussed elsewhere in chapter seven. The chapter begins by discussing the structure of the Ethiopian criminal procedure.

Ethiopia is a civil law country but its legal system has also common law elements, particularly its procedural laws. As put by one writer, the Ethiopian legal system has been shaped by five major layers of sources: customary laws, Fetha Negast, traditional public

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1 See Lawrence M Friedman, 'Legal culture and social Development', 4 Law & society Review 29, 31 (1969); See also Lawrence M Friedman, The legal system: a social science perspective (1975).

2 See below, the organization and functions of justice actors.

3 Here it is not possible to discuss all laws connected with plea bargaining. Rather emphasis is placed on fundamental principles of criminal law and procedure as they relate to and affected by plea bargaining. See below.

4 This is because of the fact that the Ethiopian legal culture remains largely unknown. It is not possible to investigate it within this project either. In the circumstances, a separate treatment seems less feasible. Thus, some aspects of it are discussed under chapter seven together with the analysis part.


6 Though the codification tries to incorporate customary laws, the attempt has often been far less than necessary. Even some argue that the reformers were hostile to the Ethiopian custom and tried transplant western legal norms in fiasco. See for e.g. Stanley Z. Fisher, 'Traditional criminal procedure in Ethiopia', 19
laws, imported western codes\(^8\), and socialist driven laws of the Mengistu regime. Added to this list are the semi-capitalist oriented laws of the incumbent government. Quite exceptionally\(^9\), codes managed to survive regime change and continued to influence the Ethiopian legal system. Customs also continued significantly influencing the Ethiopian legal system to date- if not; they constitute the prevailing norm in the country\(^10\). With some piecemeal amendments, the codes, though promulgated in the 1950’s and 1960’s, are still active, albeit they are increasingly becoming unable to respond to the multifarious developments in the country. Noticeable in this regard is the 1961 criminal procedure code. That is why the code, with the coming of a new criminal procedure code (still awaited), is in its dying minutes\(^11\).

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\(^7\) Fetha Negast often referred as ‘law of the kings’, was introduced to Ethiopia from Egypt between the 14\(^{th}\) and the 16\(^{th}\) century as a religious code for Christians. This piece of law represented the first example of a reception of foreign law in the Ethiopian legal history. Nonetheless, its application was limited for among others its inaccessibility, and its inability to override the well-entrenched Ethiopian customs. Currently Fetha Negast ‘remains the text of Canon law for Ethiopian Orthodox Church’. See J. Vander Linden, ‘Civil law and common law influences on the developing law of Ethiopia’, 16 Buff. L.Rev.251-252 1966-1967; See also Abera Jemberie, Legal History of Ethiopia 1434-1974: some aspects of substantive and procedural laws (1997).

\(^8\) In the 1950’s and 1960’s Ethiopia embarked on ‘modernizing’ of its legal system. This was done, *inter alia*, through codification. During this period six codes, which are either drafted by foreign lawyers or inspired by foreign sources, were promulgated. The codes include a civil code, penal code, commercial code, maritime code, civil procedure code and criminal procedure code.

\(^9\) Legal systems in general and laws in particular do not often survive regime change in Ethiopia. The legal system changes with the change of a regime. Though it needs a separate investigation this trend could imply that the system is yet to be owned by the public or failed to win public acceptance- (in fact it has been imposed by the rulers). On the other hand, some attribute this to the diverse/opposing conception and interpretation of our past and present. See Muradu Abdo, *Introduction to legal history and Traditions*, 2010 at 161 (suggesting that the diverse interpretation of the past and today by the key political actors is considered as a root cause for the instability of the legal system).

\(^10\) The society prefers customary dispute settlement over the formal system. Because of the dominance of customary dispute settlements, some question the appropriateness of calling them ADRs. For discussions on the role of customs see for example, Van Doren, supra note 5; Alula Pankhurst and Getachew Assefa (Eds), Grass-roots Justice in Ethiopia: The contribution of Customary Dispute Resolution, 2008, Centre Français des Études Ethiopiennes. Addis Ababa.

\(^11\) Nonetheless, the draft law is moving in a snail’s pace.
3.2 The Structure of the 1961 Ethiopian Criminal procedure

The 1961 criminal procedure code of Ethiopia on which many updated principles of criminal procedure are superimposed by the 1995 Ethiopian constitution and which is currently under the process of drastic reform, is the most difficult code to trace its pedigree. This is mainly because neither the process of its preparation nor its minutes are documented. Nonetheless, some sources revealed that the then codification commission had rejected a draft criminal procedure code modelled along inquisitorial lines and opted for a common law based criminal procedure. Accordingly, Sir Charles Mathew, a Briton who served as a legal advisor in the then ‘fird minster’ (now Ministry of justice) of Ethiopia, was tasked with the drafting of the code. Mathew’s draft which finally came out as the 1961 Ethiopian criminal procedure code, drew its sources from the then Malaysian criminal procedure code which in turn was inspired by sources from England. The structure of the prosecution and the trial as well as guilty pleas lend support to the adversarial feature.

12 See Stanley Z. Fisher, ‘some aspects of Ethiopian arrest law: the eclectic approach to codification’, 3 JEL 1966 at 463-64. The writer observes that ‘in contrast to the introduced and explained penal and civil codes, the criminal procedure code has apparently been disowned by its drafters, none of whom have written a word of commentary on it.’ See also Yohannes Hiruy, ‘Yetezenegu yewonjel fith ser’at dingagewoch bemilew tsiguf lay yekerebe techemari asteyayet’ 4(1) Ethiopian Bar Journal 2010 at 41.

13 Ibid, at 464; see also Abera Jemberie, supra note 7.

14 The structure the prosecution under the 1961 criminal procedure code (Hereinafter the CPC) has essentially a common law touch. As in Common law systems (adversarial), investigation and prosecution of crimes are separated and are put under the responsibility of the police and the prosecutor respectively, allowing the latter to review the decisions of the former (the investigation). The limited role of the prosecution in investigation seems to have been imported from England during the period when it relied on police prosecutions. However, current reforms have changed this and reflect civil law traditions, making the prosecutor involve in the very investigation of crimes. The criminal policy allows the prosecutor to get involved earlier in the investigation process and demands that the police conduct the investigation under the guidance of the prosecutor. Yet, in terms of prosecutorial discretion, the code has much to share with the inquisitorial systems, rather than the adversarial ones. As in the former, prosecutorial discretion is very limited. In other words mandatory prosecution is the rule.

15 The trial stage tends to be structured along adversarial lines. It is divided into the case for the prosecution and the case for the defence, the court at least theoretically remaining largely passive. Even though it is not the case in pre-trial (investigation) stage, the trial involves two adversaries, each having the mandate to present his/her own case and to test the reliability of his opponent’s case through cross-examinations. Accordingly, at least in theory it is up to the parties to call witnesses and to examine them, with the court having the power to call additional witnesses where it deems it necessary to further the interest of justice.

16 Another important aspect of the Ethiopian criminal procedure code that leans more to the adversarial system than to the inquisitorial pedigree, has to do with the guilty plea procedure. Though not as pervasive as in the classical adversarial systems, the guilty plea, by aborting full scale trials, spares the prosecution from...
of the code. Yet, the content of the code does not entirely square with this assertion as it has inquisitorial features too. That is why some claim that the code is inquisitorial. Still presenting its full case. Nonetheless, the court retains the discretion and the veto over the plea: it may immediately convict the accused or may still demand the prosecution to present the full case. In deciding over these options it naturally assesses the validity of the guilty plea - the court determines whether the guilty plea is entered voluntarily and intelligently. In any case, the guilty plea in the 1961 code is not just one form of evidence as in inquisitorial systems, but like in adversarial systems, it is capable of avoiding full scale trials and leading to immediate case disposition.

To say that the code is inspired by adversarial elements does not mean that it is devoid of inquisitorial traits. Indeed, one can find some inquisitorial features that characterise the Ethiopian criminal procedure code. These include: less strict rules of evidence which permit the admissibility of hearsay evidence and out of court testimony, a semi-inquisitorial brand of investigative stage (unilateral investigation), victim participation in criminal proceedings as a civil party, broad appeal rights etc.

a) Admissibility of hearsay evidence and out of court testimony: As in inquisitorial systems, the Ethiopian criminal procedure generally admits uncontested evidence such as hearsay and out of court testimony. The issue of hearsay even if not explicitly recognised under the law can be inferred arguably from Article 137(1) of the CPC which allows witnesses to testify not only on matters of which they have direct knowledge but also on matters of which they have indirect knowledge. The use of the term ‘indirect knowledge’ appears to include information the witness learns indirectly such as hearsay evidence. Yet, hearsay evidence tends to win little acceptance among courts. The testimony of witnesses recorded at the preliminary inquiry can be admitted at trial if the witness cannot appear before court for some justified causes, which include absence, death and insanity. Likewise, upon the request of either of the parties, the court may consult witness statements made at the police station during the investigative stage. Admission of uncontested evidence such as hearsay though unique to inquisitorial systems is gradually applying as an exception in adversarial systems.

b) The pre-trial stage (focus on investigation): in some aspects, the pre-trial stage (albeit nowhere the code uses the word pre trial) of the Ethiopian Criminal proceedings appears to be more close to inquisitorial structures than adversarial ones. The power to investigate is reserved to the exclusive jurisdiction of the state. Nowhere the 1961 criminal procedure code mentions defence investigation. Moreover, the outcome of the investigation, though exceptionally, can be admitted as evidence (Art 144 and 145 of CPC). Thus, in as long as it recognises unilateral official investigation of crimes and that its proceeds are admitted as evidence, the Ethiopian pre-trial stage (investigation in particular) is akin to inquisitorial systems. Nonetheless, in other aspects this stage barely fits with the inquisitorial structure. This is because important features of inquisitorial investigation / pre-trial stage namely impartial investigation involving a judge and broad pre-trial discovery rights seem to have no room in Ethiopia. The code neither demands the state investigative organs (police and prosecution) to investigate and garner exculpating evidence (though not clear the prosecutor is required to open his case at trial impartiality and objectively (art 136 CPC)) nor does it guarantee pre-trial discovery rights to the accused (The preliminary inquiry (Art 80ff CPC), which is designed simply to record prosecution evidence, may serve this purpose incidentally). Unfortunately, this has remained on paper as the procedure is repealed by non-use. On the other hand the constitution guarantees the right to discovery to the accused. See the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Article 20(4)). No judge is authorised to involve in the investigation, either (except with prosecution of young offenders where court authorization and instruction is needed to institute the investigation (Art 172 CPC)). In this sense, it is in sharp contrast to inquisitorial systems.

c) Extended appeals: According to Damaska, this is characteristic of continental systems: ‘...comprehensive and widely used system of appeals’ is instrumental to counter ‘tendencies of centrifugal’ (maintain centripetal) decision-making. The right to appeal attains constitutional status; the process of appeal is ‘inexpensive’, ‘not risky for the parties’ (See Mirjan Damaska ‘Structures of authority and comparative criminal procedure’, 84 Yale L.J. 480, 488-90(1974- 1975)). Whether it is a judgment of conviction or acquittal, the 1961 Criminal procedure code (Art181ff) allows broader appeal rights to both the defendant.
others maintain that the code is neither inquisitorial nor adversarial, rather it is eccelectical. Fisher who advances the latter account writes\textsuperscript{19}: “the code has roots in no single system, nor even in any single family of systems. Rather it is the product par excellence of an eclectic approach to codification, more than any other Ethiopian code.”

### 3.3 Fundamental Principles of Ethiopian Criminal Law and Procedure

This section does not claim to discuss principles of Ethiopian criminal law and procedure in detail. Rather, it tries to briefly sketch those fundamental principles which are likely to be affected by the introduction of plea bargaining and leaves their contextual analysis for the subsequent chapters.

1) **The presumption of innocence**

The presumption of innocence forms one of the cardinal constitutional principles in many jurisdictions. The FDRE Constitution unconditionally guarantees the accused the right to be presumed innocent until guilt is established by a court of law. Yet, the Criminal Justice Policy\textsuperscript{20}, the Draft Criminal Procedure code\textsuperscript{21} and some statutory laws such as the Anti-

and the prosecution. The defendant may appeal on convictions and sentences. Similarly, unlike in many common law countries, the prosecutor may appeal on acquittals and on the insufficiency of sentence without encroaching upon the principle against double jeopardy. Such appeals may even lie for a second time. This feature of the Ethiopian criminal procedure leans to inquisitorial systems.

d) **Victim participation as a civil party in criminal proceedings:** as classical inquisitorial systems do, the 1961 criminal procedure code allows victims to join criminal proceedings as a civil party. With respect to compliant crimes, victims’ consent is a precondition to prosecute.

e) **Absence of detailed and strict rules of evidence:** As regards law of evidence, Ethiopia seems to adhere to the inquisitorial tradition in that it has no separate law of evidence yet. All attempts to have a separate code on evidence have been futile. However, some general rules of evidence can be found scattered in the civil code, the criminal procedure law and other substantive laws. Thus, the details are left for the judges’ appreciation.

\textsuperscript{18} Yohannes Hiruy maintains that Ethiopian criminal litigation is inquisitorial. To him, the adversarial style of the trial and pre-trial stages are unknown by the code. The ‘trial’ is not a contest between the two parties rather it is an inquest by the judge. Yohannes Hiruy, supra note 12, at 60-64.

\textsuperscript{19} See Stanley Fisher, Supra note 12, at 464.

\textsuperscript{20} The policy allows the shift of the burden of proof from the prosecutor to the accused in some specific crimes as terrorism, corruption, organized crimes and crimes against constitutional order. There is one precondition for this: the prosecutor needs to establish basic facts first. See FDRE, the Criminal Justice Policy of Ethiopia, 2011, section 4.4 at 33.

\textsuperscript{21} See, the Draft Criminal Procedure Code as was valid in June 2013 (Here in after the draft code), Article 5 (3)
corruption law limit the scope of the right by shifting the burden of proof to the accused. The proposed law envisions further limitations of the right by law. Such limitations, beyond doubts over their constitutionality, could pose a serious threat to the right. This is not to suggest that the presumption should be absolute. It can be limited in exceptional cases as is the case elsewhere. But the concern here rests on the question whether such limitations cohere with the Constitution, the permissibility of further limitations, limitations of the presumption in serious crimes and its propensity to wider interpretations, if not abuses.

2) The principle of equality before the law

The general principle of equality is embodied under article 25 of the FDRE Constitution. Similarly, the criminal code proscribes differential treatment of similarly situated criminals: No difference in treatment of criminals may be made except as provided by this Code, which are derived from immunities sanctioned by public international and constitutional law, or relate to the gravity of the crime or the degree of guilt, the age, circumstances or special personal characteristics of the criminal, and the social danger which he represents.

To be sure, plea bargaining fits into none of the above exceptions (see chapter 6).

22 In particular, the permission of further limitations of the right by law could provide the executive impetus to further erode the right.

23 Generally, in Europe the following represent modalities of putting limitations to the presumption/Onus reversal: presumption of intent in some crimes that requires the defendant to rebut this, defences and justifications, reversal of onus in specific minor crimes. See J.R Spencer, ‘Evidence’ in Mireille Delmas–Marthy and J.R Spencer, European Criminal procedures (Cambridge university press, 2005) at 597-99.

24 As shown above (footnote 20), the limitation concerns serious crimes as terrorism, organized crimes, corruption and crimes against constitutional order. This seems worrying in Ethiopia for two reasons. First, unlike most jurisdictions where reversal of onus applies to less serious infractions of law, for Example France), it works for serious crimes which carry life or death penalty. In fact, in Italy there were attempts to introduce by law the reversal of onus in serious crimes (organized crimes and corruption). Nevertheless, it was soon rejected as unconstitutional. See Ibid. Secondly, our weak political culture means the limitations are susceptible to abuse by the executive. Indeed, there are serious allegations of politically motivated prosecutions and convictions involving the above crimes. See chapter 7, the prosecution.

25 See Article 4 of the Criminal Code.
3) The principle of equality of arms

This principle aims to ensure that both parties enjoy procedurally equal position in the criminal process - have reasonable opportunity to present their case. This is all the more important in criminal cases where the balance of power rests on the prosecution.

Neither the criminal code nor our courts expressly recognized the principle of equality of arms. However, interestingly the proposed criminal procedure code has incorporated the principle in its latest version26.

4) Speedy trial / Trial within a reasonable time

Almost all jurisdictions guarantee that any person accused of a crime be tried within a reasonable period of time. This guarantee basically protects the accused from insecurities and uncertainties he / she finds himself as a result of the criminal charge s/he faces. It is also in the interest of victims and the public to see that the defendant receives a trial within a reasonable and short period of time. The FDRE constitution entitles any accused person to the right to be tried within a reasonable period of time of charge27. Here the point which often poses difficulty is what constitutes ‘within a reasonable period of time’. The Ethiopian jurisprudence has not provided any criteria to measure reasonableness. Though not an authority in Ethiopia resort to the rich jurisprudence of the European Court of Human Rights provides that reasonableness can be measured against the complexity of the case (issues of fact and issues of law), the situation of the accused (whether the accused is in custody or otherwise), the conduct of the parties.28 Such criteria can be adapted to the contexts of Ethiopia.

The commencement of this guarantee in the Ethiopian criminal proceeding seems to be clear, though its virtue is open to doubt. The Constitution puts the time of institution of a

26 See the draft code, supra note 21 Article 9.


charge as a starting point for the application of the guarantee. This tends to work against the interests of the suspect, and is likely to open a room for circumventing fair trial guarantees by withholding the institution of the charge and, thus, may indirectly promote pre-trial detention.\(^29\)

5) *The principle of truth discovery*

Though the search for the truth can be implied from the provisions of the existing criminal procedure code, explicit inclusion of the principle is made only recently by the reforms.\(^30\) Thus, it is the duty of the investigative organs and the judiciary to work to uncover the truth. In so doing the latter may go beyond what is brought in by the parties to call additional witnesses and demand collaborative evidence to guilty pleas. In this sense, arguably objective truth as opposed to procedural truth seems the target.

6) *Right to a public trial*

Article 20(1) of the Constitution provides that accused persons have the right to a public trial. The court may hear cases in a closed hearing only with a view to protecting the privacy of the parties, public morals, and national security.

7) *The right to counsel*

The right to legal assistance is an indispensable component of the right to a fair trial; as such, it is guaranteed under several instruments. As in any legal system the accused in Ethiopia have a constitutional right to the assistance of a lawyer of their own choice, and if they cannot afford one, to be provided with free legal assistance.\(^31\) For an accused to qualify for free legal assistance he/she has to satisfy the two-prong requirements: the legal requirement namely non-representation is likely to result in miscarriage of justice and the

\(^{29}\) In fact if invoked (which is less likely as the practice indicates), the 48-hour rule, and the right to habeas corpus can be taken as guarantees against such circumventions for detained persons. The concern, however, remains valid for those suspects who are out of custody as they should be cleared from the clouds of a criminal charge as soon as possible.

\(^{30}\) See the Draft Code, supra note 21, Article 11.

\(^{31}\) See the FDRE Constitution, supra note 27, Art 20(5)
economic requirement- lack of sufficient means to pay for legal counsel. The second requirement is a matter of assessing the financial capacity of the accused. Conversely, the legal requirement- expressed in the phrase ‘miscarriage of justice’ is so fluid that it can be amenable to diverse interpretations. Customarily, Ethiopian courts often link this requirement with the seriousness of the crime and the capacity/resources of the state. This leaves a significant number of defendants, particularly those in the lower courts unrepresented, likely resulting in the end in miscarriage of justice. This calls for specific criteria through which the legal requirement should be understood and can be done by the upcoming criminal procedure law or by the Cassation Bench of the Federal Supreme Court, whose decision binds lower courts32.

In practice, legal aid is not generally available on arrest or detention or at prisons and is limited to where the accused appears before court, and even then only for serious crimes33.

8) The right to examine witnesses

The right to examine witness, which lies at the heart of the right of the defence, has got its place under the constitution and the outgoing criminal procedure code, with both guaranteeing the accused the right to examine witnesses for the prosecution (the right to confrontation) and the right to call and examine witnesses in support of his/her cause. The exercise of such a right ipso facto requires the existence of contested trials. However, in plea bargaining, the defence is pressured to waive or at best waives such rights. This could undermine the fairness and accuracy of the verdict.

32 In this regard, the experience of the European court of Human rights is illuminating. The court has developed four criteria – namely the seriousness of the offence (in the Quaranta case), the complexity of the case (Benham case), the particularities of the proceedings, as for instance can be triggered by the principle of equality of arms (Pakelli case) and the particularities of the accused- his ability to defend the case personally (Quaranta case). See Stefan Trechsel and Sarah J. Summers. Human Rights in Criminal Proceedings at 271ff (Oxford university press 2005).

33 See generally UNODC Assessment of the Criminal Justice system in Ethiopia; in support of the Government’s reform efforts towards an effective and efficient criminal justice system, 2011 at 68.
3.4 Organization and Functions of Justice Actors

This section tries to outline the organization, functions and responsibilities of actors in the Ethiopian criminal justice system as are provided under the relevant laws, leaving the recent BPR reforms aside\textsuperscript{34}.

3.4.1 The Ministry of Justice

The Ministry of Justice, which forms part of the executive and is a chief advisor to the Federal government on matters of law, is responsible for prosecution of crimes. In this sense, the Ministry combines both political and judicial (prosecution) tasks. This structure, which is not quintessential to Ethiopia, raises serious concerns whether it ensures independent and autonomous prosecutions. The Ministry could intervene and influence prosecutions out of pure political motives. Expressing its concerns on this structure one study\textsuperscript{35} recommends that the Ministry refrains from making day-to-day operational decisions in the public prosecution service and a separate prosecutor general office should be established to handle this. In fact, the office of Attorney General is not new to Ethiopia. During the Dergue regime, the office of the Attorney General renamed as procurator General, was established under the 1980 Ethiopian Constitution. Similarly, during the Transitional Government, the office of Central Attorney General was established as an independent and a separate organ from the Ministry of Justice\textsuperscript{36}. Nevertheless, this structure remained only for a brief period. The Attorneys Proclamation, Proclamation No.74/93 abolishes the Attorney General office to put prosecution under the Ministry of Justice. In some jurisdictions, such subordination of prosecution to a political authority is often justified, though not sufficiently, in the interest of accountability-accountability to a democratically elected organ\textsuperscript{37}. Yet, the Proclamation provides no sufficient justification to

\textsuperscript{34} As to the meaning and legal status of this reforms see section 3.5 (on BPR reforms).

\textsuperscript{35} See the Federal Democratic Republic of Ethiopia Comprehensive Justice System Reform Program, base line study, 2005 at 229.


\textsuperscript{37} See for example See J. Hodgson, 'Hierarchy, Bureaucracy and Ideology in French Criminal Justice: Some Empirical Observations' 29(2) Journal of Law & Society 227, 235-7 (2002) (showing the experience of France
abolish the Office of the Central Attorney General and merge it with the Ministry of Justice.\textsuperscript{38}

The merger of the independent office of the Central Attorney General with the Ministry of Justice makes the Minister act as the Attorney General. This structure raises questions on the independence of the prosecutor, exposing him/her to politically motivated prosecutions and/or impunities. The concern could be more apparent in plea bargaining, an institution which is open to manipulations.\textsuperscript{39}

It is important to note that prosecution is not under the exclusive authority of the Ministry; other government institutions such as the Federal Inland Revenue Authority, Customs Authority, and Federal Ethics and Anticorruption Commission do exercise prosecutorial powers. It is not clear what kind of relationship such institutions establish with the Ministry of Justice. Some point finger at this approach of having the effect of weakening the institution of prosecution.\textsuperscript{40}

Apart from combining executive and prosecution powers, the ministry is also tasked with other important functions including drafting of laws. However, of all the Ministry's functions and responsibilities, perhaps the contentious one is its power to license and supervise advocates practicing before Federal Courts.\textsuperscript{41} These advocates will be the Ministry's strong adversary in court. This is unsettling since it may put the independence of advocates at the mercy of the Ministry.\textsuperscript{42} At a state level, state justice Bureau which are part

\begin{quote}
which is overshadowed by concerns of interference by Ministers to protect politicians and powerful business people. In theory, accountability can best be ensured subjecting an autonomous office of prosecutor general to parliamentary supervision. Judicial reviews and internal reviews do play important role as well.
\end{quote}

\textsuperscript{38} See the preamble of the proclamation. See also Tilahun Teshome, ‘\textit{Akábe hignet muyaw na sinemígaru}’ 3(1) \textit{Ethiopian Bar Review} at 120-121 (showing the anomaly of the justification).

\textsuperscript{39} For some detailed discussions, see chapter 7.

\textsuperscript{40} See \textit{Comprehensive Justice System Reform Program}, supra 35 at 15.

\textsuperscript{41} In an attempt to investigate this empirically one interviewee responded by showing me his license which is signed by a prosecutor - his opponent.

\textsuperscript{42} The base line study on the Ethiopian criminal justice system (2005) which was commissioned by the Ethiopian government once identified this problem and recommended that the licensing business should be removed from the ministry and be placed under an independent Bar. See \textit{Comprehensive Justice System Reform Program}, supra 35 at 15.
of the executive branch of state governments have comparable powers and functions with that of the (Federal) Ministry of justice.

3.4.2 The police

The Ethiopian police service is structured along Federal lines – a federal police service and 9 regional police forces. The Police Commission of the Addis Ababa City Administration and the Police Commission of Dire Dawa City Administration are established under the Federal Police.

The Federal Police Commission, established by the Federal Police Commission Proclamation 313/2003, is headed by a commissioner and is accountable to the Ministry of Federal Affairs. Police are further organized into directorates and departments. In addition, the regular police forces are paralleled with what is commonly called `militia’, composed from farmers on a voluntary basis. Though not formally created, the militia provides general and preventive surveillance at local level43. The Federal police commission is tasked with several police powers including maintaining the peace and security of the public, prevention, and investigation of crimes44.

Generally, the organization of the police at the regions (states) mirrors that of the Federal government. Regional police commissions, which are headed by a commissioner, are established, and are accountable to the respective Minister of State of Affairs. Police structure at the regions follows the administrative divisions of the respective states. The respective state police normally exercise power with respect to matters within their regional competence. Further, they may assume jurisdictions on Federal matters through delegation. In such cases, they are accountable to the Federal police Commission45.

Reform Program, supra 33. Nonetheless, no progress is made so far. On the possible impacts this structure on the operation of plea bargaining see chapter 7.

43 See Comprehensive Justice System Reform Program, supra note 35, at108.

44 To have a full picture of the powers and functions of Federal police commission See Federal Police Commission Proclamation No. 313/2003, Article 7.

45 See Proclamation 313/2003, Article 23(2).
Prior to the BPR Reform, criminal investigation was under the exclusive jurisdiction of the police. There is no or little involvement of prosecutors in the process. Police conduct the investigation even without notifying the prosecution office. It is after the completion of investigation that the prosecutor gets involved at which point s/he determines the sufficiency of evidence for further action. All this inaction of the prosecutor prevailed despite the fact that the criminal procedure code authorizes the latter to instruct and supervise police\textsuperscript{46}. Perhaps this can be partly explained by absence of any indication by the law on how such supervision can be exercised, workload, (the prosecutor may focus on avoiding delays than supervising the police), the way the prosecution is organized (unlike in other systems such as the USA, there is no structure which assigns specific stages of the proceeding to specific prosecutors), the legal culture within the prosecution (viewing their role as limited to prosecution) and the institutional relations of the two—a relationship which sometimes involves mistrust and disrespect\textsuperscript{47}.

The limited role of prosecutors in the investigation could be among the factors responsible for case backlog in the prosecutor’s office, and police abuse and corruptions\textsuperscript{48}. Due to lack of proper supervision from prosecutors, weak cases may find their way until the investigative file reaches the prosecutor. Problem of delay was more apparent where the prosecutor orders police for further investigations whose response sometimes takes up to six months\textsuperscript{49}.

However, currently following reforms on the criminal Justice system (BPR), criminal investigation at least at the Federal level is conducted jointly by the police and the

\textsuperscript{46}See the 1961 criminal procedure code of Ethiopia (herein after the CPC), Article 8.

\textsuperscript{47}The professional relation of the two has been poor, if not full of mistrust. See Comprehensive justice system reform program, supra note 33. This was especially apparent immediately the prosecution joins the investigations. One prosecutor shared me his first day frustrating experience—`I was not allowed to share office with them, even no chairs to sit on... but now things are improving... we are working together`. Interview with prosecutor 05 held on 07/05/2012.

Reports show that police resents working with the prosecution. See UNODC Assessment, supra note 33 at 50.


\textsuperscript{49}See Comprehensive Justice System Reform Program; supra note 35, at 192.
prosecution. This is also reflected in the new criminal justice policy and the upcoming criminal procedure code is expected to accommodate it. The policy has clearly spelt out the respective roles of the prosecutor and the police in the investigation of crimes. It allows the police to initiate investigation of its own motion or when so ordered by the prosecution; it introduces the possibility of joint investigations (police–prosecutor); it requires the prosecutor to ensure that police investigations are carried out lawfully and properly and empowers the prosecutor to decide the sufficiency of evidence having regard to public interest.50

This new initiative may improve efficiency and quality investigations and transfer of knowledge and experience between the police and the prosecutor51. Nonetheless, this reform is not without concerns—there are indeed concerns over the impartiality and objectivity of prosecutors in guiding investigations and exercising prosecutorial discretions52. The absence of check and balance means propensity for arbitrariness and abuse is high53. Conversely the police-prosecution partnership in Tigray, in which both were located in one office and perform ‘all works jointly’, is abandoned for efficiency reasons54. Currently, following agreements between the two their cooperation is limited to serious crimes55.

That said, it is intriguing to reflect on police discretion in the Ethiopian criminal process and its repercussions on plea bargaining. Generally police enjoy broader discretion during the intake procedure and afterwards. Their arrest power has been too broad with little judicial review. This is true of both the law and the practice. The existing criminal

50 See The Criminal Justice Policy, supra note 20.

51 See UNODC Assessment, supra note 33 at 49.

52 In this regard concerns are raised in particular in those states where police and prosecution work very closely such as SNNP. See ibid at 50.

53 Indeed, defence attorneys claim that their right to redress over refusals to prosecute cases has been constrained by this initiative (joint investigation of the two).

54 Ibid. Police resentments to work with prosecution are also reported. Ibid

55 Ibid
procedure code puts no clear standard for the police to undertake arrest. It simply authorizes police to effect arrest when the offence justifies arrest or when summons fails. The exceptions put to arrest with warrant are so broad and vague that in effect the exception becomes the rule. Although the proposed law tries to narrow such gaps, a lot remains to be done in terms of putting effective restraint on police power, adopting strong standard for arrest, ensuring effective review of the legality of arrest, translating these and other similar guarantees into practice, among others. For instance, the proposed law introduces two-prong tests to carry out arrest without warrant: *where there is sufficient reason to believe that the offender has committed or is prepared to commit an offence and the attendance of the offender is absolutely necessary for the investigation.* Yet, the standard to be used to measure sufficiency remains vague. It also recognizes review of legality of arrest by courts- that police are required to show reasonable suspicion during the first court appearance of the defendant. However, this is a lower standard to protect innocents from arbitrary arrest (elsewhere it is used to lesser intrusions as stop and frisk and brief detentions, not for arrest). All these mixed with competence problems of the police effectively to prevent, detect and investigate crimes may encourage arbitrary arrest and the processing of weak cases in plea bargains. (For more discussions on the implications of broad police discretion in plea bargaining, see chapter 6 and 7).

### 3.4.3 The Prosecution

Prosecution in Ethiopia is the province of prosecutors, legal professionals who have gone through the same training as judges. There is no separation of career paths between judges and prosecutors- a prosecutor can easily join judgeship. With the prosecutor’s background of prosecuting criminal defendants, this may raise some concerns of bias against the latter.

As a Federal state, Ethiopia organizes the prosecution office at two levels: Federal and state level. The Federal prosecutors’ office is structured within the Ministry of Justice and is

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56 There are reports showing that court orders to release suspects (example on bail) are not always respected by the police. See Committee against Torture (2011), *Consideration of reports submitted by States parties under article 19 of the Convention - Concluding observations of the Committee against Torture - Ethiopia.* United Nations, CAT, Forty-fifth Session, 20 January 2011.
accountable to the Ministry, which retains final prosecution authority. Prosecutors are also answerable to their immediate supervisors. At lower level, the office is organized along Sub-cities. State prosecutors are accountable to state justice Bureaux, a political organ. The prosecution office at both the Federal and state level do not enjoy functional independence in terms of finance. This structure as shown above is fraught with problems and cannot ensure independent and autonomous prosecution services. Federal prosecutors prosecute Federal crimes before both Federal courts and State courts\textsuperscript{57}.

Prosecutorial discretion has been very limited in Ethiopia. The 1961 criminal procedure code provides that so long as there is sufficient evidence, the prosecutor shall institute a charge. In the presence of sufficient evidence, it is under exceptional situations\textsuperscript{58} that the prosecutor may be justified not to institute a charge. Nevertheless, currently, the criminal justice policy makes a significant shift towards discretionary prosecution. It provides for a legal framework for the exercise of broad prosecutorial discretion to withdraw, abandon, or withhold charges\textsuperscript{59}. In exercising such power the prosecutor is required to determine the sufficiency and the admissibility of evidence, the prospect of success and the public interest served by prosecution. The policy further empowers the prosecutor to refuse to institute proceedings, even in the presence of sufficient evidence when public interest so demands\textsuperscript{60}. The new criminal procedure code is expected to heed to such developments.

These broad discretions of the public prosecutor together with the power to plea bargain means the prosecutor is situated to exercise, beyond the conventional prosecutorial

\textsuperscript{57} For state/ Federal division of crimes see below on the judiciary.

\textsuperscript{58} See the CPC, supra note 46, Art 42

\textsuperscript{59} The Criminal Justice Policy, supra note 20, para 4.5.1 (c).

\textsuperscript{60} The policy identifies areas for the exercise of such discretion to include: the punishment is likely to be no more than a reprimand, warning or minor punishment; the suspect is senile or terminally ill; the procedures will damage international relations or national interest; the proceedings could result in excessive and unacceptable corollary damages; the case loses its importance due to delay; the offence is minor and was committed with an absolute lack of understanding or due to a legitimate mistake; the case is likely to result in a better and last solution through traditional norms and institutions rather than through the formal criminal justice system; reconciliation has been reached between the suspect and the victim for an offence punishable by simple imprisonment or requiring the complaint of the victim to proceed; or the offence is minor, the suspect admits the offence, genuinely regrets his acts, has compensated the victim and asked for forgiveness.
functions, semi-judicial functions- having the mandate to end cases through ways other than the formal trial. Thus, the prosecutor, among others, may end cases by dismissing minor offences, cases that lost importance due to delay, cases that involve permanently ill or senile defendants, cases which negatively affect international relations or national interest and also may resort to other alternatives such as reconciliations (ADR) and plea bargaining. Such an unprecedented expansion of prosecutorial discretion is believed to enhance the efficiency of the Ethiopian criminal justice system. Yet, absent cautious regulation/review, this could produce undesirable consequences of fairness and accuracy⁶¹.

Plea bargaining is formally recognized for the first time under Proclamation No. 691/2010, Proclamation to define the Powers and Duties of the Executive as amended on 27th October 2010. This law, leaving the details for the upcoming criminal procedure code, mandates the Ministry of justice to allow plea bargaining.

### 3.4.4 The Judiciary

The FDRE constitution has established a dual court system: Federal Courts and State Courts, each having three tiers namely District Courts (First instance), High courts, and Supreme Court with civil, criminal, and labour benches. Judicial power vests in the judiciary, which is established as an independent and impartial organ by the Constitution⁶². In addition to regular courts, the constitution also recognises religious and customary courts, having no criminal jurisdiction though⁶³. Even if it appears unconstitutional, social and municipal courts are also active in service in most regions and the capital.

The allocation of criminal jurisdiction between Federal courts and State courts is not clearly demarcated by the Constitution, often raising controversy on the extent of states’

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⁶¹ For details see chapter 7.

⁶² See the FDRE Constitution supra note 27, Art 78 and 79.

⁶³ Their competence is on civil matters particularly on family and personal matters.
criminal jurisdiction. Yet, with respect to judicial jurisdiction, the job is done by statutory laws. The Federal Courts Proclamation defines the jurisdiction of Federal Courts, while states have issued their own laws dealing with the matter.

The Federal and State supreme courts exercise First instance, appellate and cassation powers. Though in principle decisions of higher Courts do not establish precedent in Ethiopia, the decisions of the Cassation Division of the Federal Supreme Court are binding on all lower courts, state courts included. It is important to note that the Ethiopian Judiciary lack both the power to interpret the constitution and decide over constitutional disputes as these powers are expressly reserved for a political organ, the House of Federation. They have no or little role in reviewing parliamentary or executive power.

The controversy relates to legislative jurisdiction as well as judicial jurisdiction of states. As to the former, see page 296 below. The debate on jurisdiction of courts emanates from the fact that it is left unaddressed by the constitution. Some argue that with the power to legislate the criminal code (substantive part) reserved to the Federal government (Art. 55(5) of the Constitution), and thus Federal courts are mandated to apply it (Article 3 of Proclamation 25/96), state courts lack original criminal jurisdiction. If one follows this line of argument, upper state courts have only delegated jurisdiction, while district courts lack any jurisdiction to handle criminal matters.

On the other hand, the Federal Courts’ proclamation (under Article 3) reserves to the Federal jurisdiction matters arising under the Constitution, Federal laws, International treaties, between parties specified in Federal laws and in places specified in the constitution and Federal laws. It goes on (under article 4) to specifically list crimes that fall under Federal courts’ jurisdiction without clarifying the exhaustive or the indicative nature of the list. From the general principle which leaves reserved powers to the states (see article 52 (1) of the FDRE Constitution), it can be argued that the list is exhaustive and matters not listed therein are within the states’ jurisdiction. Otherwise, the state courts will remain without any original criminal jurisdiction.

See the Federal Courts proclamation No. 25/1996 and its amendments.

For instance, the state of Oromia and the state of Amhara defined the criminal jurisdictions of their respective courts. See the respective laws.

This blends the US approach of vesting final judicial power on the Supreme Court and the French approach of vesting the Supreme Court with cassation powers. See Ugo Mattei, “The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions in Grande, Elisabetta, ed. Transplants, Innovation, and Legal Tradition in the Horn of Africa (Torino: L’Harmattan Italia, 1995) at 111-129

See the Federal Courts Proclamation Re amendment Proclamation No.454/2005, Article 2(4). This subordination of state Supreme Court to its Federal counterpart (cassation over cassation) is met by opposition among the academia as incompatible with Federal arrangement.

See the FDRE Constitution, supra note 27 Art 62. On constitutional adjudication, see for example Assefa Fiseha, ‘Constitutional adjudication in Ethiopia exploring the experience of the House of Federation’ 1(1) Mizan Law Review, 1, 2007; Yonatan Tesfaye, ‘Whose power is it any way: the courts and constitutional
some argue the power of the court is further curtailed by the parliament following the enactment of proclamation 251/2001 and 250/2001 which define powers and responsibilities of the House of Federation and the council of Constitutional Inquiry respectively.\(^{70}\)

### 3.5 Reforms on the Ethiopian Criminal Justice system

This section aims to introduce the several reforms, which took place in the criminal justice. While evaluation of the reforms is beyond the scope of the work and requires a separate research, reflections are made where possible.

Following the launching of the National Capacity Building program initiative (NCBP)\(^ {71}\), the Ethiopian criminal justice system has gone through a series of reforms. Notable in this regard are the Justice System Reform Program (JSRP), the Public Sector Capacity Building Program (PSCAP) the Justice Sector included, and the recent Business Process Reengineering (BPR). By such reforms, the Ethiopian criminal justice system was reviewed with the purpose of identifying and addressing the factors that impinge on the ability of the criminal justice to function effectively and efficiently.

#### 3.5.1 The Justice System Reform Program (JSRP)

As part of the National Capacity Building Program (NCB), the Justice System Reform Program (JSRP) sought to identify and address key problems the criminal justice system.


\(^{71}\) This program was launched in 2001 with a view to overhaul the entire levels of government administration. It identified fourteen inter-dependent Programmes that led on to the creation of a Federal Ministry - the Ministry of Capacity Building, which no more exists now - to coordinate and provide strategic guidance to the overall programme. The areas include Civil service reform, district level decentralisation, justice system reform, tax and customs reform, urban management reform, ICT for improved service delivery and modernising government, Civil society capacity building, construction sector capacity building, textile and garment capacity building, development of manufacturing sector, Technical Vocational Training (Agricultural), cooperative development, higher education reform, and Technical Vocational Training (non-agricultural).
These include problems in the quality of judges and prosecutors, and the methods of delivery of justice, the incoherence of much of the existing legal framework, lack of access to information and lack of sufficient legal institutions capable of producing qualified professional justice-sector actors\(^\text{72}\). The reform recommended comprehensive measures to overhaul the entire criminal justice system. These recommendations cover the parliament, the judiciary, the public prosecution, the police, the prison system, and the legal education. Some of the recommendations include: the amendment of the law making process, the integration of international treaties to domestic law, the consolidation, codification and publishing of laws, the strengthening of the capacity and the independence of the judiciary, transparency in recruiting and selecting judges, training of judges, easing of case backlogs, enhancing the legal aid system, possibilities of using ADR in criminal cases, support to civil societies, the reorganisation of the public prosecution service (PPS) under directors of PPS, the separation of the political and judicial role of the Ministry of Justice, accountability of police be ensured (police code of conduct must be adopted, and policy of using force must be established).

### 3.5.2 BPR Reforms

The Business Process Reengineering (BPR) is the fundamental reconsideration and radical redesign of organizational processes in order to achieve drastic improvement of current performance in cost, services and speed\(^\text{73}\). BPR usually involves a re-thinking and re-design of private sector business processes to enhance efficiency. Yet it has become so common in the public sector. Before briefly outlining BPR reform as applied in the criminal justice sector, it is important to note some of the anomalies surrounding the reform, one of them being its legal status- the reform as applied now has no legal basis under the law making process of the country. The BPR reform document, produced by committee members drawn from the respective justice sectors appears to suspend any law, perhaps save the constitution. Obviously, this is not the proper procedure to revise or repeal laws and hence

\(^{72}\) See Comprehensive Justice System Reform Program, supra note 35.

usurps the parliament’s power. The problem is further aggravated by the fact that the reforms are currently implemented without any blessing from the parliament. For instance, absent any formal amendment by the lawmaker, many provisions of the criminal procedure code are repealed by the reform. In any case, as part of reforming the whole government administration, the criminal justice system was studied with a view to enhancing the quality and efficiency of justice delivery. The study examines the criminal process from investigation all the way to the final disposition of a case and enforcement of punishments. Several reforms were recommended both at state and Federal level. Notable in this regard is the consolidation and reorganisation of the investigation, prosecution and adjudication processes in one structure which is subdivided into units along functional lines so that efficient, quality, accessible and fair justice is delivered.

Caseload has been a pressing problem in the Ethiopian courts for a long time. Pushed by unwarranted successive adjournments, criminal cases took several years before final disposition. Nowadays, however there are reports of noticeable developments in handling

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74 Provisions regarding prosecutions and investigations are among the most affected ones. Further, in the state of Tigray the criminal jurisdiction of courts has been reshuffled, making high courts and the Supreme Court only appellate courts, which normally under the law have first instance jurisdictions.

75 For instance, at the Federal level main actors in the administration of criminal justice: the judiciary, the prosecution office, the police and the prison administration jointly established a body called: wonjelin yememermer, mekeraker ena wusane mestet wana yesira hidet (literally translated to mean Main Business Process on criminal investigation, prosecution and adjudication). To increase efficiency and ensure institutional as well as operational independence of the justice actors, this Business process is divided into two: yememermer and mekeraker yesira hidet (investigation and prosecution) and wusane mestet yesira hidet (adjudication). Nonetheless, the extent to which such an arrangement ensures the autonomy and independence of the respective justice actors remains to be seen. See Manual on wonjelin yememermer, mekeraker ena wusane mestet wana yesira hidet, 2003 EC. at 1. Likewise, in the state of Tigray the functions of investigation, prosecution, adjudication and prison administration are organised in one “business process”, which is further dissected into three units: compliant hearing and prosecution, adjudication and “ginbata” units. Under this arrangement, the investigation, prosecution and adjudication services are organised in one premise and work in close collaboration. Here it is interesting to note that reports on the success of this arrangement are uneven and inconsistent. One study shows that the reform (the new arrangement) is successful, raising conviction rate to 95% and cutting time and costs significantly (lowers costs incurred for one case from more than Birr 3000 to Birr 89). See Befederal Mengist yewonjel fith astedader wonjelin Yememermer, mekeraker ena wosene mestete wuana yesira hidet addis aserar, 2003 EC. (Here in after BPR to be document) at 4. Conversely, another report by UNODC indicates that the arrangement is abandoned for being inefficient. See UNODC Assessment, supra note 33 at 50.
caseloads. The factors that have contributed to such a reduced caseload include: the practice of dismissing cases adjourned repeatedly, the increase in the number and quality of judges and prosecutors, the introduction of joint and prosecution led investigation, the sentencing guidelines, court annexed alternative dispute resolution programs, case management using IT (video conferencing, transcribing, developing a court database, online services etc), document authentication and registration offices at the federal and regional levels.

3.5.3 Other piecemeal reforms

a) RTD

Modelled after its French analogue, Real Time Dispatch (RTD) or Next day justice courts in Ethiopia are established to dispose of flagrant cases instantly. The procedure, which usually involves guilty pleas, is so simple and brief that it takes just less than a day. The procedure initially disposes of flagrant crimes. Later, it covers non flagrant crimes where sufficient evidence is available and not guilty plea cases where the defendant is ready to defend his case immediately. Though this procedure is acknowledged for its efficiency, it also attracts severe criticisms. Prominent among them is its fairness to defendants - that they are neither represented (except capital crimes) nor provided with adequate time to prepare their defence, hence the adage `justice rushed is justice crushed'.

That said however, RTD could be generally seen as a success in terms of enhancing efficiency. According to the Ethiopian Justice Sector Strategic plan for 2010/11 to 2014/15, in real time dispatch courts about 80 percent of cases are disposed of by guilty pleas while conviction rate is staggeringly high – 98 percent. This procedure, which was applicable in

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77 see The Justice Sector Strategic plan for 2010/11 cited in UNODC Assessment, supra note 33 at 18

78 See for example Linn A. Hammergren, 'Justice Sector corruption in Ethiopia' in Janelle Plummer(ed), *Diagnosing corruption in Ethiopia: Perception, realities and the way forward for key sectors* (Washington DC, The World Bank, 2012) at 206 (Observing that `...fast-tracking [RTD] does pose serious risks to the innocent suspect caught in the system').

79 See the Ethiopian Justice Sector Strategic plan for 2010/11.
some Federal courts long before the BPR reform was initiated, has served as a benchmark for the latter.

\( b) \) **Reconfiguring of the Judging panel**

With a view to enhance the efficiency of the overburdened courts and thereby the efficiency of the Ethiopian Criminal Justice system, the Federal court’s re-amendment proclamation - Proclamation No 454/2005 reconfigures the traditional panel of three judges\(^80\) that sit in Federal High courts and Federal First instance courts to a single judge in crimes that carry less than 15 years of rigorous imprisonment\(^81\). This reform allows courts to entertain as many cases as possible to ultimately reduce case backlog. Though I do not have empirical works to show the impact of the reform on the quality of justice, it is likely to affect quality negatively as three minds are generally better than one. That seems why the law at Federal level does not exclude the possibility of varying adjudication by a single judge and hence gives the Federal Judicial Administration council the mandate to issue directives that vary adjudication by a single judge and demand a panel of three judges instead\(^82\). In this regard, though the law fails to provide some guidance to the Judicial administration council, it seems that such factors as complexity of cases, the public interest involved in a particular case, the quality of decisions, etc are relevant.

\( c) \) **Pre-trial conferences**

*Pre-trial conferences* sometimes called *pre-trial hearings* are meetings held between the parties and the judge to consider any matter that promotes a fair and expeditious trial. A pre-trial conference can be held for several reasons. The following include some of them: to expedite disposition of the case, help the court establish managerial control over the case, discourage wasteful pre-trial activities, improve the quality of the trial with thorough

\(^{80}\) In fact, this is not new to Ethiopia. The administration of justice proclamation, proclamation No. 52/1975(during the dergue regime) recognized adjudication by a single judge in lower courts (Woreda and Awraja courts).

\(^{81}\) See Proclamation No. 454/2005, Article 3.

\(^{82}\) Ibid, article 3 (3) (b).
preparation, and facilitate a settlement of the case. As such, pre-trial conferences may take two forms: dispositional conferences and managerial conferences. The former can be designed in such a way to produce earlier guilty pleas and facilitate plea bargaining.

In Ethiopia, pre-trial conferences are often associated with the introduction of the BPR reforms. However, they are known in the anti-corruption law, though in a different form-preparatory hearings. Thus, where corruption crimes are so complex to drag the trial, and where the procedure serves such purposes: as to identify material issues and assist the parties understand them, to facilitate the proceedings, and help the management of trials; the court may order the holding of a preparatory hearing. The subject matters of the hearing include disclosures of evidence, preliminary ruling on the admissibility of evidence and issues of law that should be settled before the trial. The court gives a ruling that is subject to appeal. Such rulings may sometimes result in closure of the file. Interestingly, closure of a file owing the inadmissibility of evidence is no bar to subsequent prosecution of the same crime. There are nonetheless complaints that the system instead of facilitating trial, drags it, with for example corruption cases taking years to finally get disposed of.

That said, however, pre-trial conference in its full-fledged form is introduced for the first time by the BPR reforms. The reform provides that pre-trial conference should be held before the registrar of the court on such matters that do not determine the guilt or innocence of the defendant. In particular, subject matters include issues of disclosure, requests for interpreter and legal counsel, and guilty pleas. Whereas either the prosecutor or the suspect may initiate the conference, the court’s role is not clear. However, the procedure confers on the registrar a new role. Beyond facilitating the conference, the registrar seems to be granted with the power to decide on the above subject matters of the conference.

83 See Article 35 and 36 of Proclamation No. 434/2005.
84 See 40 and 41 Proclamation No. 434/2005.
85 Interview with judge 11, held on 17/04/2012.
86 See the BPR manual, supra note 75 at 83.
The BPR reform sees pre-trial conference as a forum for disclosure of evidence between the parties ultimately to facilitate a fair and expeditious disposition of the case. Disclosure puts the prosecution in a position to evaluate the strength of its case against the defendant and decide whether to press on with the charge. Similarly, the defendant gets the opportunity to see the strength of the case and decide his course of actions from the available options - to enter a guilty plea, to plea bargain, or to insist on the trial. In this sense, pre-trial conferences have both managerial and dispositive roles. However, in practice none of these applies except that the managerial version is tried unsuccessfully. Lack of legal framework is responsible for this.

3.5.4 The Draft Criminal Procedure Code

A component of reforming the Ethiopian Criminal Justice System lies in revising the existing laws as well as enacting new laws that can address the existing legal gaps. To this end, among others, a new Criminal Code, Anti-terrorism, Anti-corruption, and witness and whistleblower protection laws have been promulgated. Nonetheless, the promulgation of a new criminal procedure code is long overdue. Over the last decade, various attempts have been made to issue a new procedure code. But none of them did bear fruit so far.

The 2010 Draft Criminal Procedure code is far behind schedule. Before taking its current shape, the draft has passed through intense discussions and debates\(^\text{87}\). In particular, the issue of legislative jurisdiction was so controversial that it might have contributed to the delay. The contention was on the issue whether the federal government can enact one criminal procedure law that applies across the board, States included\(^\text{88}\). Initially, the drafting Committee went in favour of a uniform criminal procedure code to produce the first version of the draft law. Nonetheless, the Justice System Reform Board on whose blessing the proposed law passes to the next stage rejected the draft law and prompted

\(^{87}\)So far, a couple of workshops (5) were convened to have stakeholders deliberate on the draft. Participants include universities (law schools), representatives of civil societies, and representatives from the justice sector. Interview with X, a member of the drafting committee, interview held on 06/05/2011

\(^{88}\)Ibid
States to prepare their own. Three reasons were proposed to support this:

1) As per Article 52(1) of the Constitution residual power vests in the States;
2) As opposed to the substantive criminal law (Article 55(5)) nowhere the Constitution mentions that criminal procedure is under the Federal jurisdiction; and
3) Since such matters connected with procedure as the structure and operation of legal institutions are within the jurisdiction of the States, so does the power to issue procedural laws. Accordingly, the draft was reduced to cover the Federal government only and one State moved to prepare its own law. Here, the first argument which is derived from Article 52(1) of the constitution - which entrusts States with a residual power seems strong. Applying this principle on any subject matter but the inherent powers of the federal government justifies the States’ constitutional power to enact their own procedural laws.

However, this direction has now been abandoned and the jurisdiction to issue the law seems to settle in favour of the Federal government. This oscillating of decisions has impaired the progress of the code, albeit it is not among the major causes of the delay.

89 See the letter by the Ministry of Capacity of Building addressed to the States, Nehase 17, 2002 EC (Translation mine).

90 From the discussions I had with X (a member of the drafting committee), I have learnt that only the state of Oromia took moves to exercise its legislative powers in this regard.

91 The strict adherence to the principle of residual power suggests that criminal procedure is under the exclusive jurisdiction of the states. This is unwarranted and inconsistent with the Federal structure.

92 I was not able to fully investigate the reasons behind such a move for the fieldwork was over by then. However, one of the reasons advanced among members of the Drafting committee (while preparing the first draft) could be valid here too. Article 55(5) the FDRE Constitution confers the power to enact penal code to the Federal government, reserving to the states the power to issue penal laws on those matters not covered by Federal penal legislations. It follows from this that the Federal Government is the appropriate body to legislate the law which enforces its substantive criminal law-the criminal procedure code. Interview with X, supra note 87.

More arguments are advanced along this line. The justification for entrusting the Federal government with the power to legislate a penal code, which is mainly maintaining uniform application of criminal laws equally works to the procedure law. Since this purpose cannot be achieved through a heterogeneous procedure and application, the Federal Government should also take care of the procedure. Another argument could come from human rights perspective. Procedure largely involves human rights issues. In this context, leaving the procedure to the states means leaving human rights to diverse applications which is difficult to maintain minimum standards. Indeed, it could be argued that the constitution (both Federal and state constitutions) can serve such a purpose to maintain such standards. Yet, as constitutions are not detailed enough, disparity on human rights issues are likely to arise in diverse procedural laws. The US approach of using the Federal
The draft law introduces several reforms to the Ethiopian criminal justice system. It not only attempts to address the many legal chasms the existing code suffers, but also introduces three alternatives to the full-scale trials: plea bargaining, Alternative Dispute Resolution Mechanisms (ADR) and preliminary hearing. The code also makes the principle of mandatory prosecution give way to discretionary prosecution, authorizing the prosecutor, *inter alia*, to drop charges when public interest so demands.

Leaving plea bargaining for the subsequent chapters, this section provides a brief analysis of ADR/CDR\(^93\) in Ethiopia. In Ethiopia, a country of diverse traditions, ADR has immense potential to dispense quality, accessible and efficient justice. That is why the current reform accommodates it as one alternative to the formal trial\(^94\). The policy demands that its principles be incorporated in appropriate laws and programs. It also provides that criminal cases can be diverted to ADR mechanisms upon the request of the defendant, the public prosecutor or on the court’s own motion\(^95\). While this is a commendable move, there remains one concern that the recognition of ADR in criminal matters appears unconstitutional\(^96\). This should be addressed.

The policy and the draft code provide several cumulative requirements to have a resort to ADR. These encompass\(^97\): the availability of sufficient evidence that justifies conviction, the utility of ADR in serving public interest best, the defendant’s willingness to plead guilty with repentance, the guilty plea is tendered after adequate legal counselling, the defendant

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\(^93\) Given its *de facto* dominance in the Ethiopian criminal justice system, rather than as an alternative mechanism, one may wonder whether the use of ADR (Alternative Dispute Resolution) is appropriate here. For this reason, one study prefers to use Customary Dispute Resolutions (CDR). See Alula Pankhurst and Getachew Assefa, supra note 10.

\(^94\) See the Criminal Justice Policy supra note 20, section 4.1(d) and section 4.6.1 at 38.

\(^95\) See the Criminal Justice Policy supra note 20 section 4.6.1 at 38.

\(^96\) The Constitution recognizes customary laws only in limited civil matters as family and personal matters. No recognition of customary laws exists in criminal matters. See the FDRE Constitution supra note 27, Art 34(5).

\(^97\) See the Criminal Justice Policy, supra note 20, at 39; See the draft code, supra note 21, Article 237.
is informed of his right to object the ADR and that he receives the charge with the list of evidence before ADR is chosen. Besides, both documents put victim’s interest as one precondition for ADR to take place.

It is interesting to see the nature of crimes that are subject to ADR. Generally, the policy without putting any restriction on the type of the crime, stresses the application of ADR to some specific category of defendants namely: young offenders, women, non-recidivists or persons accused of crimes that attract simple imprisonment\(^9\). These categories seem to have one thing in common – low risk. Yet, these are not the only defendants to whom ADR applies. After putting some standards\(^9\), the policy empowers the Prosecutor General to define which crimes, suspects, or defendants are subject to ADR.

Pending the enactment of the law on the matter, prosecutors and police settle crimes punishable with not more than three years, by reaching agreement with the accused and the victim so that the former pays the latter compensation instead of facing a trial\(^1\). The basis for such practice is the BPR reform. This practice though important in expediting the administration of justice and fulfilling the victim’s needs, is met with some challenges. The major concern relates to its legality. Since the legality of the BPR document that allows ADR is in question, there is no consistent application of the alternative among prosecutors. Nor is it constitutional. Further, it is not clear whether and how ADR applies to ‘victimless’ crimes. This is unaddressed by the reform and is creating confusion among prosecutors\(^1\).

Nevertheless, on a rough assessment ADR appears to have a huge potential and a greater prospect in Ethiopia than any other trial alternatives targeted by the government, provided that its limitations, in particular its incompatibility with human rights( rights of vulnerable groups are affected ), procedural fairness, and the constitution (ADR is not recognized in

\(^9\) See the Criminal Justice Policy supra note 20, at 38-39.

\(^9\) The standards include the seriousness of the crime, the antecedent and record of the offender, the type and intensity of damage to victims, the age and social conditions of the offender and so on. See the Criminal Justice Policy supra note 20, section 4.6.2.4 at 40.

\(^1\) See for e.g. UNODC Assessment, supra note 33 at 18.

\(^1\) Interview with Prosecutor 12, interviewed on Apr 02/12.
criminal matters) are sufficiently addressed. This is precisely because of three reasons: First, ADR is not new to Ethiopia but rather has been a well-entrenched practice for long now. Thus, what the reform does is just give recognition for it. Unlike legal transplants, it is not affected by problems of legitimacy and resistance, which in turn facilitates its smooth application. Second, unlike other modes of case disposition (such as trial and plea bargaining), ADR involves a win–win approach, thereby satisfying both victims and defendants which in turn is vital in bringing a lasting peace. This is important especially in Ethiopia for it may minimize the vengeful practice in the rural part of the country, in particular. Third, unlike other alternatives, it is accessible and is very cheap, the parties incurring no or little cost in the process.

3.6 Conclusion

This chapter highlights the defining features of the Ethiopian criminal justice focusing on the structure of criminal procedure, the organization of legal structures and fundamental principles of criminal law and procedure. It argues that the Ethiopian system exhibits both adversarial and inquisitorial features, albeit it inclines to the former. This makes it unique from those jurisdictions where plea bargaining has been established. Less developed legal structures (police, prosecution and the judiciary), weak defence, broad discretion of the police, and the fact that fundamental principles are not always respected, are key features of interest to mitigate the concerns of plea bargaining (For details see, Ch1, Ch 6 and Ch 7).

102 For more advantages of ADR/CDR as well as its limitations, see Alula Pankhurst and Getachew Assefa, supra note 10, at 260–65.
Chapter Four: The Ethiopian Variant of Plea bargaining

Building on chapters one and three- chapters that introduced plea bargaining and the Ethiopian criminal justice system respectively, this chapter deals with the Ethiopian variant of plea bargaining as proposed in the reform- the Criminal Justice Policy and the Draft Criminal Procedure Code. It examines critically the rationales of plea bargaining, basic features of the Ethiopian model of plea bargaining, the role of justice actors, and the available safeguards.

4.1 Legal Framework for Plea bargaining

While defining the powers and the duties of the Ministry of Justice, Proclamation No. 691/2010 entrusts the latter with the power to permit plea bargaining\(^1\). This together with the policy represents the first step towards providing a legal/policy framework for plea bargaining in Ethiopia, pending the issuance of the new criminal procedure code. However, this power of the Ministry is yet to be enforced. Probably, the fact that the law is new and generic\(^2\) and the absence of procedural law on the subject matter could be partly responsible for this.

4.2 Definition and Nature of Plea bargaining in Ethiopia.

Neither the Criminal Justice Policy nor the Draft Criminal Code explicitly defines plea bargaining in the Ethiopian context. Nowhere is it systematically defined. Perhaps, an operational ‘definition’ can be found in the BPR document. There, plea bargaining is defined as a negotiation between the prosecutor and the accused on charge, sentence or facts in a criminal charge\(^3\). Admittedly, this is just an operational definition, which does not

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\(^1\) See Article 16(5) of Proclamation No 691/2010 (Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010). This law is among the most unstable laws of the country. So far, it has been repealed/amended several times including its recent (October 2010) amendment.

\(^2\) As a law meant to define the powers and duties of the executive, the proclamation simply lists the power and duties of the Ministry, the power to allow plea bargaining being one of them.

\(^3\) See the Manual on wonjelin yemermer, mekeraker ena wusane mestet wana yesira hidet. (The BPR Implementation Manual), 2011 at 7.
capture the concept of plea bargaining in all contexts. It is incomplete since, it fails to provide clearly the concession a defendant makes in return for a lenient treatment. It is not clear whether the negotiation is limited to the defendant’s guilty plea or goes beyond this to include cooperation agreements, waiving of some rights such as the right to a preliminary hearing, as some understand plea bargaining to include.

Based on the provisions of the Draft Code and the Policy, one can construct a more complete definition of plea bargaining. Consequently, plea bargaining can be defined as a case disposing method whereby defendants plead guilty, usually following negotiations with the prosecution, in return for some concessions related to charge, sentence or facts in a criminal charge. From this definition and other relevant documents, the Ethiopian variant of plea bargaining has the following general features.

First, it is broader in scope, covering any crime across the board and all types of plea bargaining—charge bargaining, sentence bargaining and fact bargaining. Unlike, most countries that transplant plea bargaining (especially those from the inquisitorial structure) Ethiopia seems to prefer adopting plea bargaining in its unlimited form, nearly as applied in adversarial systems. While it is true that this approach may increase the efficiency of the Ethiopian criminal justice system to a certain extent, it is worrisome as it may have its own undesirable upshots when put in the Ethiopian context.

Second, the power to plea bargain vests in the public prosecutor, excluding the police and the courts. The Draft Code expressly reserves this power to the prosecutor. But the Policy seems to envisage a kind of implicit plea bargaining when it authorizes courts to reduce sentence for those defendants who plead guilty.

4 See for example Article 219, 221 and 230 of the Federal Democratic Republic of Ethiopia Draft Criminal Procedure Code, 2013 as was valid in June 2013 (Here in after the draft code) and section 4.5.4 of the Criminal Justice Policy, 2011 at 36 (Here after the Criminal Justice Policy).

5 See The Criminal Justice Policy at 37; see also Article 230 of the Draft code, supra note 4.

6 Most inquisitorial systems adopt plea bargaining in a limited form. It applies to a limited range of less serious crimes; the amount of sentence discount is usually statutorily fixed. For some detailed discussions, see chapter one.

7 For details, see chapter six and seven.
Third, the Policy and the Draft Code provide legal conditions for plea bargaining. These include the voluntariness requirement, duty of disclosure, the requirement of sufficient evidence and mandatory legal representation.\(^8\)

Fourth, as it stands now the amount of concession is left for the discretion of the prosecutor. Simply put, in contrast to most inquisitorial jurisdictions that put a fixed discount of one-third, this is unknown in the Ethiopian variant. The possibility of having fixed discounts is not totally closed, however - the draft law or subsequent guidelines can still provide for such discounts.

### 4.3 Policy Justifications: An appraisal

The Criminal Justice Policy envisages various reforms aimed at\(^9\): 1) introducing plea bargaining and compensation for miscarriage of justice 2) strengthening alternative dispute resolution mechanisms (ADR), legal representation and the capacity of investigative organs, among others. Of these, the introduction of plea bargaining represents an unprecedented and ambitious development in the Ethiopian legal system. What motivates Ethiopia to introduce plea-bargaining? Would plea-bargaining serve its intended purposes? The Policy tries to justify plea-bargaining from diverse perspectives. A brief appraisal of these justifications is now in order.

#### 1) Efficiency

As shown in chapter one, jurisdictions justify plea bargaining in terms of efficiency. Likewise, the first and the main justification for transplanting plea bargaining into the Ethiopian criminal justice system relates to efficiency. The Policy subscribes to this justification in providing that plea bargaining cuts costs and time spent in full scale trials; it also relies on the caseload management justification - that plea bargaining helps reduce case backlog and workload.\(^10\) Apparently, the efficiency and caseload management

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\(^8\) See article 221 of the Draft code, supra note 4. For an in-depth discussion of such conditions and accompanying concerns, see section 4.7 below.

\(^9\) See the Criminal Justice Policy section 4, supra note 4 at 30.

\(^10\) Ibid, at 36 (translation mine).
justifications are the strongest justifications for having plea bargaining in Ethiopia, a poor nation that has been struggling with massive case backlogs\textsuperscript{11}. Indeed, reducing case backlog has far-reaching implications in expediting the process and improving the conditions of detention centres. For instance, by minimizing the amount of time defendants spend in pre-trial detention, it may improve the handling of suspects/ detainees in Ethiopia, a country known of its congested and poor detention and prison conditions.

That said, however, the investigation of these justifications in context suggests that they are not compelling as such: First, in the circumstances where problems of efficiency (case backlogs and delays) are much less correlated with the nature of trials (over-procedures and party autonomy) plea bargaining helps very little to address the problem. The cause of backlogs largely rests, among others, on the capacity of legal institutions, frequent and longer adjournments, gaps in the legal framework and gaps in practice\textsuperscript{12}. Second, to the extent it is acknowledged for efficiency, this comes at a greatest cost- by trading away important values of the criminal justice (namely fairness and accuracy) for efficiency, in a jurisdiction still struggling to uphold the former\textsuperscript{13}.

2) Remorse

The justification of remorse wins the sympathy of the Ethiopian policy makers. The policy validates plea bargaining from remorse perspective – that by encouraging remorse, plea bargaining facilitates the rehabilitation of offenders\textsuperscript{14}. This justification often invoked by many jurisdictions selected for comparison including England and the USA has, its limitations. While the possibility of having defendants who plead guilty out of pure remorse cannot be ruled out, it is also likely that defendants plead guilty because of other strategic considerations. Such is the case for example where evidence against them is overwhelming.

\textsuperscript{11} Despite the rise of caseload, there is significant improvement in this regard following reforms. See chapter 3.

\textsuperscript{12} For detail accounts, see chapter 7- Delay in context and options to manage it.

\textsuperscript{13} For fuller discussion of this issue from the Ethiopian context, see chapter 6 –Mitigating the flaws of plea bargaining; for general discussion, see chapter one- the debate on plea bargaining. See also chapter 3 and 7, the respective discussions on principles of criminal law and procedure.

\textsuperscript{14} See the Criminal Justice Policy, supra note 4 at 36.
Thus, it is impossible to distinguish remorse motivated guilty pleas from tactical guilty pleas. Furthermore, given the inherent coercive nature of plea bargaining and its high sentence differentials, a guilty plea can be entered simply to avoid severe punishments at trial. The material and legal contexts of Ethiopia makes this even more probable (see chapter 6). Experience elsewhere seems to suggest that this justification is losing its significance; that is why it is even abandoned by one of its prominent advocates in the US-the ABA. It has also been discredited in England.

3) Avoiding the trauma of trials/ victim and defendant oriented justifications

The Policy further tries to justify plea bargaining from the perspective of victims and defendants, claiming that it benefits both by shielding them from the trauma of public trials. However, this validation makes little sense. In general, it completely trades away the merits of trial as well as the interests of victims and defendants in trials and tends to portray that plea bargaining promotes their interest. As shown below, it hardly promotes their interest aptly, however.

In particular, protecting defendants from the trauma of public trial serves no legitimate purpose of criminal justice. On the contrary, by treating defendants leniently and avoiding the social stigma associated with public trials, it could affect the deterrent effect of punishment. Further, even assuming it serves such purposes, plea bargaining is ill-suited to do the job. It spares only the hearing of evidence and its accessory (examinations); the plea agreement would still be endorsed in an open court. Perhaps by enabling defendants to plead guilty to a lesser crime it may neutralize the stern public stigma associated with serious crimes. But this comes at a higher price i.e. at the cost of admissions made in the absence of due process protections (see chapters 1&6). In other words, protection of defendants from wrongful convictions is too a sacred value to be offset by sparing defendants from public stigma of crimes.

The Draft Code invokes the efficiency rational and claims that plea bargaining spares justice actors` time and resources. One can imply the defence here. Although, not mentioned in the

\[15\text{ See the Criminal Justice Policy, supra note 4 at 36( translation mine )}\]
reform, it is often suggested that plea bargaining enables defendants receive lenient treatment. Yet, these advantages hardly justify plea bargaining. For the most part, plea bargaining benefits justice professionals and the justice system, and the advantages to the defendant are not only ancillary but also likely to be overwhelmed by the former (see chapter 6 and 7). Further, there are considerable instances where plea bargaining can be counterproductive to defendants. Notably, it is likely to result in the wrongful conviction of innocent defendants and to discriminate similarly situated defendants. To be sure, the above justifications are too weak to prevail over the adverse effects of plea bargaining. There are overriding values human beings should cherish.

Similarly, the victim oriented justification – the claim that it helps victims avoid the trauma of trial is not compelling either. First, the trauma of public trials is an issue for victims in some specific crimes committed against interests that are predominantly private in nature, leaving the vast majority of crimes unaffected or at least less affected, which even can be regulated using other methods (using anonymous witnesses, trial in camera) rather than doing away with the trial altogether. Second, lenient treatment of defendants in plea bargains hardly satisfies victims and the public thereby undermining their trust in the justice system and pushing them to self-help measures. Victims are morally satisfied seeing their perpetrator receive the deserved punishment rather than a lenient sentence that follows plea bargaining. The concern would be even more worrying in the Ethiopian context. Judges told me that in serious crimes such as murder, victim’s relative sometimes tend to deliberately work for an acquittal of the offender (provide exculpating information) so as to take self help measures later. To be sure, plea bargaining, an institution characterized by lenient treatment, would intensify such tendencies (for details see chapter 6).

Perhaps, plea bargaining could promote victims’ interest only when it allows them a meaningful participation, if not a veto, to influence the outcome of the negotiation. Yet this is a test plea bargaining, in general and the Ethiopian variant, in particular, barely passes.

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16 For detailed discussion see chapter one.
4.4 Scope and Stage of Application of Plea bargaining

In chapter one, it is shown that a transplanted plea bargaining assumes a different form than its form at the origin. Typical examples are transplants of plea bargaining from adversarial to inquisitorial structures. Thus, Italy adopts plea bargaining in its limited form—applying it only to sentence bargaining and to a limited range of crimes. On the other hand, some jurisdictions seem to prefer transplanting plea bargaining in a blueprint form as applied in its origin—adversarial systems\(^\text{17}\). Ethiopia belongs to this category. All the three types of plea bargaining applied in adversarial jurisdictions namely charge bargaining, sentence bargaining and fact bargaining are recognized\(^\text{18}\). Further, the Ethiopian reform does not put any limitation on the range of crimes to which plea bargaining applies—as in adversarial structures it applies to all crimes across the board. Nor does it fix the maximum amount of sentence discount to which the defendant is entitled upon pleading guilty. From these, one can see that the reform bestows upon the prosecutor broader discretion in plea bargains, and this may have its own pros and cons. Leaving the details for chapter six, such form of plea bargaining could generally enable the prosecutor to dispose of cases efficiently yet under the pain of compromising procedural fairness.

The stage at which jurisdictions allow plea bargaining to take place is indicative of at least three things: the extent to which they have relied on the utility of plea bargaining, the fairness of plea bargaining and the ‘who’ of participants in the plea bargaining process. Depending on their policy considerations on the above and other related points, countries such as Italy permit plea bargaining any time before the opening of the trial while others like USA go beyond this until the closing arguments of the parties are made. Still jurisdictions like England and Wales discourage late guilty pleas by attaching a reward to earlier guilty pleas. In Ethiopia, the draft law initially permits plea agreements to be made any time before a final judgment is handed down. However, as it stands now plea bargaining is made to apply anytime before the hearing of evidence at trial commences so

\(^{17}\) While plea bargaining is available for all crimes in the USA and UK, patteggiamento in Italy applies to less serious crimes (crimes punishable less than seven and half years).

\(^{18}\) See the Criminal Justice Policy, supra note 4, at 37; see also the Draft Code, supra note 4, article 230.
that it spares time and resource as is intended\textsuperscript{19}. Once the hearing of evidence commences, no plea bargaining seems permissible. But what if the defendant pleads guilty thereafter? Should s/he benefit from any sentence reductions? Such guilty pleas give rise to what is called `cracked trials` and are often discouraged for they involve wastage of resources and time. For instance, in England such guilty pleas are discouraged by reducing the amount of sentence reduction from one-third to one-tenth. In Ethiopia, though plea bargaining at this stage is impliedly prohibited, cracked trials are inevitable and thus late guilty pleas should at least mitigate sentence.

A related issue has to do with the starting point of plea bargaining. All the jurisdictions selected for comparison seem to allow plea bargaining at the pre-trial stage and even some encourage with greater incentives earlier guilty pleas –as early as at the police interview. Similarly, with both the policy and the draft law using the phrase `any time before hearing of evidence` and explicitly allowing the prosecutor to plea bargain with a suspect as opposed to a defendant, plea bargaining may be struck during the pre-trial stage even well before a criminal charge is prepared. What does this imply? How does this go with the requirement of sufficient evidence - a legal condition for plea bargaining? This coupled with the lack of higher standard for assessing the requirement of sufficient evidence, the absence of duty to pre guilty plea disclosure and the right to legal counsel at the pre-trial stage including police investigations\textsuperscript{20}, is likely to leave the defendant without adequate opportunities to understand the nature of the charge, evaluate the evidence and consider the available options before deciding to enter into plea negotiations. This compromises the requirements of procedural fairness and outcome accuracy.

\textsuperscript{19}See the Draft Code, supra note 4, Art 219.

\textsuperscript{20}Indeed, during plea bargaining legal counsel is mandatory in principle. Yet, on top of real concerns on its enforceability (given dire resources, among others) it is not available in less serious crimes. It is also uncertain whether it applies to police interrogations. Besides, absence of information at this stage means even those represented at the pre trial stage could be at disadvantaged position.
4.5 The Role of Justice Actors

4.5.1 The Prosecutor

In Ethiopia, prosecutorial discretion has been very limited. Prosecutors have always been required to prosecute so long as sufficient evidence of guilt exists. Moreover, as prevailed in common law countries, prosecutorial functions have been clearly separated from police functions, leaving the former under the exclusive jurisdiction of the prosecutor while the latter is reserved for the police. Thus, the prosecutor had a limited role in the investigation of crimes, his/her roles being limited to that of supervision of police investigations. In this regard, the prosecutor may order police to conduct further investigations. But, currently all these have changed. The reform has expanded the roles of the prosecutor significantly. The prosecutor is actively involved in criminal investigations and prosecutorial discretion is massively expanded. As a result, the prosecutor enjoys considerable discretion as to when to institute charge, to withdraw it, and to refuse to institute charge even in the presence of sufficient evidence when public interest so demands. The power to plea bargaining - a quasi-judicial power - forms part of this expansion process. It follows that the reform collapses three functions in the hands of the prosecution: investigation, prosecution, and quasi-judicial functions. This is worrying as it inhibits checks on the prosecution. Like in adversarial systems, the prosecutor in Ethiopia plays a central role in the process of plea bargaining starting from the very decision to plea bargain all the way to the enforcement of plea agreements, once struck. As part of exercising his/her discretion, the prosecutor decides whether to offer plea bargaining or to accept any offer from the accused. In determining this, however, the prosecutor needs to make sure that there is sufficient evidence to justify conviction, the defendant/suspect: is willing to plea bargain, is represented in the process, has agreed or consented to waive his constitutional rights and has pled guilty and taken responsibility for the crime.

21 See the Criminal Justice policy, supra note 4.

22 See the Criminal Justice policy, note 4 at 36 and the Draft Code. For fuller discussion of these, see the section below on legal conditions to plea bargaining.
On top of the duty to refrain from improper conducts aimed at obtaining guilty pleas such as threats and misrepresentations\(^{23}\), the prosecutor is charged with the responsibility to ensure that defendants understand the nature and content of the charge, the possible sentence, the bargaining process and its outcome, that they are free to bargain, and their right to participate in the process, the advantages of plea bargaining, and other related issues. In this sense, the role of the prosecutor is pushed further. Beyond being an adversary, s/he is expected to assume a sort of quasi-impartial role. This was more so in the earlier draft where s/he is required to advice defendants not only on the merits of plea bargaining but also on its demerits and rights to be waived\(^{24}\).

That said, the ban on misrepresentations and threats are difficult to reconcile with plea bargaining- an institution which operates on misrepresentation of facts and threats of severe penalties. Perhaps, exceptions could be made to this\(^{25}\).

In general, by putting preconditions to plea bargaining, the draft law tries to enhance the fairness of the process as well as prosecutorial accountability. Nonetheless, because of institutional and legal limitations mixed with inherent limitations, none of these are likely to ensure the fairness of the Ethiopian variant of plea bargaining\(^{26}\). Another problem with the Ethiopian version is that it does not protect defendants against unjustified plea bargaining refusals by the prosecutor thereby leaving the possibility of differential treatment based on invidious grounds wide open. Unlike what prevails in Italy and Germany courts in Ethiopia seem to have no mandate to question the prosecutor’s refusal to plea bargain. Even once concluded, nothing stops prosecutors from refusing to submit

\(^{23}\) See Art 229 of the draft code.

\(^{24}\) See the earlier Draft Code Art 214. Now this is omitted in the latest draft. Thus, the prosecutor is not expected to inform the defendant the rights s/he waives and the demerits of plea bargaining.

\(^{25}\) That is how it operates elsewhere. See Stephanos Bibas, Regulating the plea bargaining market: from caveat emptor to consumer protection, 99 Cal. L. Rev. 1117, 1125 (2011). (Observing that ‘the landmark approval of lawful threats as part of the rough-and-tumble of plea bargaining is Bordenkircher v. Hayes, 434 U.S. 357, 362-65’).

\(^{26}\) See chapter 6, the innocence problem.
plea agreements for court approval. In fact, such matters could be regulated with guidelines and internal review. But this is not as effective as external review.

Prosecutors are required to make plea bargaining decisions based on multiple factors including the seriousness of the crime, the defendant’s record/character, the time and resource spared by plea bargaining, the predictability and proportionality of sentence\(^{27}\). Though not expressly indicated the prospect of conviction at trial, the prosecutor’s own incentives cannot be ruled out here. In particular, the performance evaluation system (conviction rate) and the certainty of convictions in plea-bargaining could influence decisions.

Where negotiation culminates in a plea agreement, the agreement cannot be enforced unless approved by the court. And the responsibility to get the agreement approved rests exclusively on the prosecutor\(^{28}\), the defendant having no role in this regard. Here, it is not clear why the defendant is excluded from having similar role or at least why it is not left for the joint submission of the parties\(^{29}\). Perhaps, this role may be assimilated to prosecution and thus reserved to the prosecutor alone. Nonetheless, this makes little sense as it goes at odd with party autonomy- one merit plea bargaining is praised for\(^{30}\). The need to have the agreement approved or else to seek other reliefs is likely to be felt where the prosecutor reneges or refuses to present the agreement for approval. Put simply, the prosecutor may easily circumvent the enforceability of the agreement by withholding its approval. Yet, the reform ignores this possibility. Consequently, as opposed to what prevails in some jurisdictions such as the USA, the defendant may not seek specific performance nor may s/he receive any sentence mitigation, as is in Germany. Thus, the only option available for the defendant in such cases is perhaps to withdraw his/her plea\(^{31}\). The writer is of the

\(^{27}\) See the Draft Code; supra note 4, Art, 218 and 230.

\(^{28}\) See the Criminal Justice Policy, supra note 4 at 36; see also the Draft Code, supra note 4, Article 220.

\(^{29}\) This may be included in the minute of the code which is yet to be prepared.

\(^{30}\) On the plausibility of this justification, see chapter one.

\(^{31}\) This is not even expressly provided. Unlike the earlier versions of the draft, the latest version keeps silent on whether and when the defendant withdraws his plea. See below the section on the withdrawal of plea.
opinion that once the plea agreement is duly struck the defendant should be given the opportunity to present it before court for approval or for any other possible relief.

Where the court refuses to approve the plea agreement the prosecutor reserves again an exclusive right of appeal. The defendant has no appeal right recognised under the reform32.

4.5.2 The Court

Whilst prosecutors and defence attorneys are the principal actors in any plea bargaining process, the role of the court considerably varies across jurisdictions. While countries like Germany put the court at the centre of plea negotiations, allowing them to actively participate therein, others such as the USA, with the exception of few states, completely alienate the court from the process and limit their role to that of reviewing the plea agreements. Ethiopia opts for the latter. Originally, the criminal justice policy envisaged the participation of the judiciary in the process, but it is abandoned later. The justifications for this appears to rest on the fact that it erodes the impartiality of the judge for the latter might have formed his opinion as to the guilt of the defendant, that with the strong authoritative figure of the judge, it puts undue pressure on defendants to accept plea deals, and that it undermines the efficiency of plea bargaining33. Such characterization of judicial bargaining reflects mainly the role of the judge in adversarial systems that s/he is not party to the case. In contrast, for classical inquisitorial structures where the judge is actively involved in the process, such justifications hold little water34.

1) The decision to plea bargain

By the reforms, mandatory prosecution has given a way to discretionary prosecution. As such in contrast to jurisdictions like Italy and Germany, prosecutor’s charging decisions as well as the decision to plea bargain passes no court scrutiny. Thus, prosecutors are required to justify neither their charging decisions nor their plea bargaining decisions to

32 On the implication of this, see below.

33 See Policy Note # 9 Criminal Justice Administration Policy, Ministry of Justice – Ethiopia at 11

34 For debates on the issue, see chapter one - the role of the Judge.
the court. This could promote differential treatments of defendants based on unwarranted grounds as well as invite abuses. The observance of the requirement of sufficient evidence that justifies conviction is unreviewable ex ante; even its ex post review remains less certain (see below the requirement of sufficient evidence). Thus, plea bargaining decisions may well be based on unreliable and insufficient evidence.

2) **Reviewing plea agreements**

Judicial review in Ethiopia is constrained by legal factors - scope of review is limited by law, cultural factors - courts’ misperception of judicial review and institutional factors - weak judiciary, strong preoccupation and incentives in quick case disposition\(^{35}\). This will certainly overshadow any review of plea bargaining by courts. Theoretically, as can be inferred from the criminal justice policy and the proposed law, the role of the court in plea bargaining is confined to a later stage to review the plea agreement and its process. Pre-trial review is unrecognized. Where plea agreements are submitted for approval, the court is required to make sure that the defendant enters plea agreements voluntarily and intelligently. To do this, the court seems reliant on the questioning of the defendant or his counsel\(^{36}\). It is not clear whether it must review any other evidence that helps to ascertain the factual basis of the plea. Else, the court is required to endorse plea agreements unless it is contrary to morality or the law\(^{37}\).

The courts’ role of review in the Ethiopian variant of plea bargaining is not limited to first instance hearing – it also applies to the appeal stage, albeit in very limited instances. The plea agreement is appealable by the prosecutor only where it is rejected; the defendant having no similar rights recognized. In fact, denying defendants their right to appeal in guilty based conviction is not new. The outgoing law (the 1961 criminal procedure) also

\(^{35}\) For details, see chapter 7, Institutional / structural problems.

\(^{36}\) This is done to verify whether the defendant was informed on such issues as the nature and content of the charge, the possible sentence, the bargaining process, his right to participate in the process, the advantages and disadvantages of plea bargaining, etc. See article 223 of the Draft Code, supra note 4.

\(^{37}\) See the Draft Code, supra note 4, Art 232. For discussions on this see below, legal conditions to plea bargaining, judicial approval.
prohibits any appeal from guilty plea based convictions, albeit it may lie on the sentence. But in plea bargaining, there seems a blanket implicit denial of appeal right to the defendant. Generally, this appears inconsistent with the principle of equality of arms, a principle that finds its place in the latest version of the proposed law for the first time. Further, it leaves defendants with no opportunity to have their guilty plea reviewed against any irregularities overlooked by lower courts. Arguably, part of this problem can be addressed via review by cassation, which normally lies on any final decision of courts in the event where a fundamental error of law is established. Nonetheless, its application is very limited to fundamental errors of law as opposed to that of fact. Thus, where courts err on facts and accept the plea agreement, no review shall lie against such decisions. Probably one more avenue of redress can be thought - reopening the case for reversal of conviction (review by court of rendition). But this is very restrictive and makes it extremely difficult for the defendant to get a reversal of conviction.

As shown in chapter one, countries such as the USA, beyond prohibiting any appeal, go to the extent of making appeal waivers to form part of the plea deal. On the contrary, Germany allows extended appeal and prohibits any such advance waivers of appeal. In Ethiopia, advance waiver of appeal is not an issue in plea bargaining for the right does not exist in the first place.

4.5.3 **The Defence Counsel**

In any system of criminal justice, the defence attorney plays a matchless role in promoting the fairness of the criminal process. Without the defence counsel, defendants whose cause

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38 See Article 185 of the 1961 criminal procedure code. The justification seems that in as long as the defendant is convicted based his admission of guilt there is nothing that he can challenge at the appeal stage.

39 The latest draft code leaves out defendants while entitling the prosecutor limited rights of appeal. That why the denial is implicit.

40 What constitutes fundamental error of law has not been clarified so far by our courts.

41 See the Draft Code, supra note 4, Article 467.

42 The earlier draft law seems to permit limited appeal rights for the parties. However, the latest draft reserves this right only to the prosecutor.
calls for legal representation hardly exercise their fair trial rights. As such, the defence counsel’s role is instrumental to ensure that defendants enjoy their fair trial rights. Albeit, concerns of enforceability, legal representation is more indispensible in plea bargains than in any other proceedings. This is particularly true of plea bargaining in the Ethiopian context—a country with high prevalence of poverty and illiteracy. What roles can defence counsel play in the Ethiopian variant of plea bargaining? This begins with a brief outlining of the stage at which the right to legal counsel is available. This right appears to be limited to the trial stage. This is particularly so in practice. At the investigative stage of the criminal process, the suspect’s right to legal counsel is not fully guaranteed. The constitution has unequivocally and adequately guaranteed this right to accused persons. But the suspect’s or arrested person’s right is this regard tends to receive lesser attention. Similarly, a limited statutory right to legal counsel (only for detained persons) can be found in the 1961 criminal procedure code. Interestingly, the policy document has expanded this to enable the suspect, arrested persons and the accused enjoy the right to counsel at any judicial proceedings. The upcoming criminal procedure code is expected to guarantee the right in a similar fashion. But the chronic resource limitations on the part of the defendant and the state mean most defendants will still go unrepresented. To be sure, this shrinks the role of the defence counsel in plea bargaining.

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44 See chapter three.


46 Indeed, Article 21 of the constitution provides that persons held in custody shall be provided with the ‘opportunity’ to communicate and be visited by their legal counsel. However, this provision is not sufficient to guarantee the right to legal counsel at the entire investigative stage. For instance, it may not apply to suspects under interrogation.

47 See article 61 of the 1961 Criminal Procedure Code.

48 See the Criminal Justice Policy, supra note 4 at 41. Here the phrase any judicial proceeding is equivocal. It is not clear whether this refers to the narrow meaning – court proceeding or its broader meaning – any stage in the criminal process, including police interrogation.
In plea bargaining, the role of defence counsel generally starts with investigating his/her client’s case and then advising him/her to make an informed choice of plea. Ideally, the option that advances the best interest of the client will be made, having regard to such factors as the probability of conviction and the severity of sentence, on the one hand and the weight of concessions offered to the defendant, on the other hand. But, in reality, there are other multiple extraneous factors that can shape the defence attorney’s advice. These include such ‘structural forces and psychological biases’ as prosecutors’ pressure and incentives, the attorneys’ pressures and incentives (both financial and non-financial), pressure from judges, defendants’ aversion to risk, information deficit and bail and pre-trial detentions. Largely, the fieldwork sources lend support to such trends. Asked to rate the influence of a set of factors in their decision to accept and make plea offers, most defence attorneys rate most of the factors very important or important.

The plea bargaining system confronts the defence attorney with several ethical issues whose handling demands the latter’s utmost loyalty and diligence. The problem starts from the critical advice on the making of a choice between plea bargains and trials. With limited resources and absence of pre-guilty plea disclosure, massive pressures to plead guilty and self-interests involved, making proper choice is problematic at best. Perhaps the toughest of these ethical problems is when defendants who claim to be innocent want to plead guilty.

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49 Stephanos Bibas, ‘Plea bargaining Outside the Shadow of a Trial’. 117 Harvard Law Review, 2463, 2469–2527 (2004). For related factors that may skew defence counsel’s decision to plea bargain see R. Hollander-Blumhoff, ‘Getting to guilty: Plea bargaining as negotiation’. 2 Harvard Negotiation Law Review, 115–148, 1997; On similar agency problems on the defence side in the USA see S.J. Schulhofer, plea bargaining as disaster, 101 Yale L.J. 1979, 1988(1992) (‘More often, defense attorneys have powerful incentives to avoid trial, even when a trial would be in the client’s interest. The incentives vary with the particular form of the attorney-client relationship, but the net effect is nearly always the same—a sharp divergence between the economic interest of attorney and client, together with powerful financial incentives for the attorney to settle as promptly as possible’); Stephen J. Schulhofer, Criminal Justice Discretion as a Regulatory System, 17 J. LEGAL STUD. 43, 49–60 (1988) (addressing the problems of agency costs and lawyer quality and funding in plea bargaining).

50 This factors include: caseload, case complexity, seriousness of the crimes, the likely sentence, probability of conviction, defendants desire, victims interest, the situation of the accused (detention), time and cost, financial interest, pressure from the prosecute / judge, attractive offer and work relations.

51 The exception is their work relationship with other justice actors, which they put it ‘less important’ in affecting their decision. Moreover, about a third of the sample (20) considers financial incentives important.
merely because of coercive offers from the prosecutor. Ethical attorneys should advise and persuade such defendants to plead not guilty. Yet, this could be easier said than done.

The defendant depends on his/her counsel’s advice to make choices that can serve his/her interest best. Thus, the role of the defence attorney is not to make such choice on behalf of defendants, but help them arrive at an informed choice. To this end, the attorney has the obligation to ensure that the defendant understands the nature and content of the charge, the possible sentence, the bargaining process and its outcome, the fact that the defendant is free to bargain, and his right to participate in the process, the advantages of plea bargaining and other related issues. Consequently, even if the defendant rejects feasible recommendations from the attorney, as for instance he decides to stand trial despite the attorney’s advice that the chance of prevailing at trial is too slim, considerations of ethics demand that the latter should try to persuade his client, failing this he should respect the client’s choice. Some jurisdictions go further to proscribe any withdrawal of counsel on such grounds. It is important to note here that the draft law omits such responsibilities of the defence attorney as his/her duty to make sure that the defendant is informed of the demerits of plea bargaining, the possible defences, and the rights the defendant waives. Perhaps, the omission could be attributed to a poor drafting of blending the responsibilities of the defence and the prosecutor under Article 223 of the Draft Code. Else, it is axiomatic that such issues lie at the core of any legal representation in plea bargains.

Once the defendant decided to forgo the trial in favour of plea bargaining, the defence attorney continues to play an indispensable protective role in enhancing the fairness of the process. At least in theory the defence attorney is there to make sure that the defendant

52 This is the case elsewhere. See ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011)

53 See Steven Zeidman, ‘To Plead or Not to Plead: Effective Assistance and Client-Centred Counselling’, 39 B.C. L. Rev. 841, 909 (1998) (“The attorney will be required to invest herself, to offer an opinion and try to persuade, but not to usurp the decision from the client. Ultimately, it is and must be the client’s choice. The attorney, however, should assume the responsibility and take on the burden of advising her client, with compassion and empathy, as to whether to accept or reject a plea offer. By supplying the bases for her opinion, she should try to persuade the client to accept her recommendation. The result will be fully counselled decision making based on truly effective assistance of counsel.”).

54 See the Draft Code, supra note 4, Article 223.
bargains on equal terms with the prosecutor. To raise the integrity of the process, the draft law requires the defence attorney to ensure that, before proceeding to negotiate, the defendant attends in the process; otherwise, any plea agreement will be invalid, except where the defendant fails to attend for reasons beyond his/her control and authorizes his defence lawyer to proceed alone in writing. This not only enables the defendant decide on his own fate and enhance fairness- at least in theory, but also serves as a means to ensure defence attorney’s accountability. In this way, it can minimize the possibility of plea withdrawal and thus raise the efficiency of the system.

The Federal Advocates code of conduct demands the advocate to follow up his client’s case diligently and take all the necessary measures carefully and in a timely fashion so as to obtain a quick and just decision. Similarly, in the process of plea negotiation the draft law requires the defence attorney to have regard to the law, the rights and needs of his client, the purpose of plea bargaining, the nature and circumstances of the case, as well as his professional ethics. Guided by the requirements of the law and ethics, an ethical defence attorney works to have the best terms of agreement to his client which is at the same time consistent with the purpose of plea bargaining. Thus, the attorney should refrain from using dilatory tactics, misrepresentations, deceptions, unlikely promises, among others. In this sense, the attorney needs to balance fairness with efficiency. But the outcome would depend on several intertwined factors – his negotiation skills, his preparations, his own interests, knowledge of the prosecution case and the strength of his own as well as the prosecution case.

Where the process culminates in a plea agreement, the defence attorney shoulder the responsibility to make sure that the agreement reflects accurately and completely all the concessions exchanged. Moreover, he has to ensure that the defendant understands the

55 See, the Draft Code, supra note 4, article 228.

56 Ibid, article 229.

57 The purposes of plea bargaining as provided in the draft code include: raising the effectiveness and efficiency of the justice system, assisting the rehabilitation of the offender, avoiding the trauma of trial to victims and witnesses. See Art 218 of the Draft Code. Whether it would actually serve such purposes see above, the section on policy justifications of plea bargaining.
agreement and its consequences including the court’s discretion to accept or reject the agreement, and makes an informed decision to accept or reject it. Here it is not clear to which consequences of the agreement the attorney has a duty to inform a client and the effects of failure to do so. Admittedly, this is more romanticized than real- this is particularly true in countries like Ethiopia whose population is largely illiterate, and thus incapable of appreciating the content of the agreement.

In conclusion, the defence attorney undertakes to deliver competent representation to his client. But in the Ethiopian variant of plea bargaining which may involve irresistible if not coercive offers from the prosecution, the attorney’s own interests, limited prosecutorial disclosure whose enforcement is not properly guaranteed, absence of robust ethical standards and difficulties of monitoring attorneys in plea bargaining , competent representation would be problematic to attain. In short, plea bargaining, in general and the Ethiopia variant, in particular impairs effective legal representation.

4.5.4 The victim

In the formal criminal justice system of Ethiopia, victims have some roles to play. Where a reconciliation agreement has been struck between the victim and the offender in less serious crimes, any investigation or charge will be discontinued. As provided in the 1961 criminal procedure code, victims may also act as private prosecutors in less serious crimes

See, the Draft Code, supra note 4, Article 223.

For example, there are direct and collateral consequences. It is not clear whether the duty extends to collateral consequences such as the impact on the exercise of civil rights. This has been a subject of discussion USA in a slightly different context – the scope of defence attorney’s duty to advice on the effects of plea bargaining (its effect on deportation). See Padilla v. Kentucky, 130 S. Ct. 1473 (2010)[ where the court ruled that ... before a guilty plea, criminal defense counsel must advise clients not only about the plea’s direct criminal consequences, but also about one of its chief collateral civil consequences, deportation. ’). For analysis of this case, see Stephanos Bibas, ’Regulating the plea bargaining market: from caveat emptor to consumer protection’, 99 Cal. L. Rev. 1117 (2011).


See the Criminal Justice Policy, supra note 4 at 13.
of private nature (which are punishable upon victim’s complaint). At trial, they can also join the prosecution as a civil party. This is mainly true of jurisdictions from the civil law tradition such as Germany.

With respect to plea bargaining, jurisdictions approach the role of victims differently. In countries such as Germany and Italy, victims lack any meaningful role; they are not involved in the plea negotiations; nor can they influence the outcome of the plea negotiation\(^{62}\). On the other hand, while several states in the USA require the prosecutor to consult victims, Russia takes the extreme – allows them to veto the plea agreement. Ethiopia takes the former. The prosecution has the obligation to consult victims and whenever necessary to make them attend in the process. Here one can clearly observe that victims have very limited role in the plea bargaining process i.e. they may not directly participate in the process, albeit, upon the discretion of the prosecutor they may simply attend the plea negotiation.

It is worthwhile to see the role of victims in the informal plea bargaining. Their place and level of participation depends on the nature of plea bargaining. Thus, in exceptional cases where plea bargaining works with reconciliations (a hybrid form of plea bargaining)\(^ {63}\), the consent of victims is indispensable. The prosecutor bargains only when victims are willing to reconcile with the offender. In this sense, victims have a veto power at least in principle. In other ordinary cases, they have no or little role in the process\(^ {64}\).

**4.6 Legal Conditions to Plea bargaining**

Plea bargaining cannot be rightly undertaken merely because the parties so wish. Before its initiation and thereafter, the policy together with the proposed law puts some conditions to

\(^{62}\) The exception is Germany where victims who join the prosecution as a civil party have the right to be consulted and may challenge the plea agreement.

\(^{63}\) See chapter Five.

\(^{64}\) Although one report by UNODC claims that victims have central role in prosecutorial decisions including to accept plea bargaining, from my fieldwork I found out that they have no or insignificant role in plea bargains. For the report See UNODC Assessment of the Criminal Justice system in Ethiopia; in support of the Government’s reform efforts towards an effective and efficient criminal justice system, 2011. For discussions on how the informal plea bargaining works in Ethiopia, see chapter Five.
be complied with. Accordingly, it can be validly made only where the defendant/suspect:
is willing to plea bargain, is represented in the process, has agreed or consented to waive
his constitutional rights, and has pled guilty and taken responsibility for the crime.
Moreover, the reform demands duty of disclosure, sufficient evidence which justifies
conviction and judicial approval of the plea agreement.

1. The requirement of sufficient evidence

In plea bargaining, the Criminal Justice Policy and the draft law require the prosecutor to
make sure that there is sufficient evidence to warrant the defendant's guilt. In jurisdictions
where the practice is established, this requirement is sometimes called a partial ban on
plea bargaining. The requirement which has no parallel in any of the jurisdictions
selected for comparisons, ordains that plea bargaining can be validly made only after
investigation has produced sufficient evidence of guilt. By proscribing the prosecutor from
simply resorting to plea bargains before the case is investigated thoroughly, and adequate
evidence is amassed, the policy tries to raise the fairness of plea bargaining. But there
remains a huge gap in measuring the sufficiency as well as the reliability of evidence. This
requirement is nothing unless safeguards to ensure the reliability of evidence as well as a
strong standard to measure the sufficiency of evidence with appropriate review mechanism
are put in place. But neither the policy nor the draft code seem to unequivocally envisage
external review of the sufficiency of evidence as well as a standard higher than the one
the prosecution uses in deciding to institute a criminal charge. Moreover, though the policy
calls for the exclusion of illegally or improperly obtained evidence, it envisages the
possibility of admitting such evidence as an exception. This in the end may result in the


66 One may argue that such review can be implied from Articles 232 and 29(3) 29(5) of the latest draft code
which mandate courts to check the compatibility of the agreement with the 'law' and make invalid an
agreement which is contrary to the law, the objective of plea bargaining, ethics, and rights and interest of
defendants. However, the question is which kind of non-compliance is sufficient to invalidate the plea
agreement. Can such requirements as the requirement of sufficient evidence qualify for this? Put simply, how
do courts enforce/sanction the requirement? There is no clear answer. It seems to have been left for the
courts' appreciation. Given their incentives in the quick processing of cases (caseload management
significantly influencing their performance evaluation) and poor review culture, a thorough review would be
less probable.
circumvention of the requirement of sufficient evidence to simply resort to plea bargaining without a thorough investigation or with illegal/improper evidence.

2. The voluntariness requirement

The voluntariness requirement is often used to assess the legality and validity of the plea agreement ex post than ex ante. Here, it is used as a condition for the prosecutor to initiate plea bargaining where he/she is required to secure the defendant’s willingness to bargain. It is incumbent on the prosecutor to ensure that the defendant bargains out of his volition. To this end, he/she assumes both negative and positive obligations. S/he is proscribed from deceiving, bribing, lying, misrepresenting facts, giving promises that may not be kept, and other similar acts. Any agreement obtained as a result of such improper acts contravenes the requirement of voluntariness and is thus void. But it seems unrealistic to detach plea bargaining from misrepresentations, threats and promises, unless those inherent in plea bargaining are exempted. For example, charge and fact bargaining literally operate on misrepresentation of facts.

Further, s/he is required make sure that the defendant understands the nature and content of the charge, the possible sentence, the bargaining process, s/he is free to bargain, and his/her right to participate in the process and the merits of plea bargaining. If properly measured and applied, this requirement may increase the fairness of the process by guarding the defendant against prosecutorial coercion, deceit or other improper methods. The material conditions of Ethiopia and the sentencing differentials would virtually render this impossible, however.

Explicit in this requirement is the problem of post guilty plea negotiations. The phrasing of one of the preconditions to plea bargaining which says …where the defendant pleads guilty

67 For more discussions, see chapter six, the innocence problem.

68 See, the Draft Code, supra note 4, article 229.

69 Ibid

70 Ibid, Article 223.
and accepts responsibility ... implies plea negotiations after pleading guilty. Strictly speaking, once the guilty plea is tendered, it is difficult to think of plea bargaining for there is nothing to bargain for. Perhaps, ‘negotiation’ can still be made about the sentence. Yet, any post guilty plea negotiation is unlikely to be fair as it undermines, if not completely stripes off, the defendant’s bargaining power. Once s/he has pleaded guilty, the defendant looses his/her bargaining tool and thus may easily submit to the prosecutor’s whims. A similar comment also applies to the requirement which demands defendants’ waiver of their constitutional rights.

3. The Duty of disclosure
The huge disparity of power between the parties to the trial is quite pronounced in criminal litigations. Only the state has the powers of search and seizure, the power to arrest, intercept conversations, compel witnesses to testify, etc. The defence, having none of these opportunities, finds him/her self in a weak and vulnerable position. The notion of disclosure (prosecution disclosure in particular), which is inextricably linked with the principle of equality of arms, aims to narrow down such a power imbalance.

Yet, the duty of disclosure is not known in the Ethiopian criminal procedure code. The 1961 criminal procedure code does not guarantee any pre-trial disclosure rights to the accused. Though it appears unclear whether it applies to the pre-trial stage, the constitution has guaranteed the accused right to disclosure. The anti-corruption law also enshrines the concept of disclosure in preparatory hearings. Yet, this is incomplete as it depends on pre-trial hearings whose application is limited only to complex corruption crimes, even then at

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71 Ibid, Article 221.

72 Ibid, Article 221(4).

73 Perhaps the procedure of preliminary inquiry whose main purpose is to record prosecution evidence may incidentally serve discovery purposes as the accused is entitled to attend and put questions to witnesses of the prosecution. Unfortunately, this has remained on paper. Regarding the nature of the procedure, see Articles 80ff of the 1961criminal procedure code.

74See The FDRE Constitution; supra note 45, article 20(4).
the discretion of the court. As such, this law does not establish the duty to disclose evidence.

Save the above, the duty of disclosure is addressed in a relatively comprehensive fashion in the Criminal Justice Policy. This Policy proposes such duty and calls for a legal framework imposing the duty on both the prosecution and the defendant. But, the policy does not require the same degree of disclosure between the prosecution and the defence. The prosecutor has the obligation to disclose any evidence he/she intends to rely upon, directly or indirectly, as well as any exculpatory evidence. However, the defence's duty of disclosure to the prosecution is limited to those evidences and laws he/she intends to use at trial. In contrast, the latest draft law takes a different approach—it imposes the duty on the prosecution alone. Though contentious, this seems a positive move to enhance the fairness of the process.

By introducing the duty of disclosure in the Ethiopian criminal justice system, the policy aims to elevate the fairness, effectiveness and the expeditiousness of the criminal process. Arguably, the duty of disclosure is indispensable in plea bargains than in any other case disposing tools. In particular, the importance of prosecution disclosure cannot be overemphasized in Ethiopia, where the power imbalance remains much more skewed in the prosecution’s favour. A complete and early prosecution disclosure of all relevant evidence, both culpable and exculpable, may increase the fairness of negotiations. It may help defendants arrive at an informed decision and put some sort of restraint in the prosecutor’s leverage of overcharging, thereby improving the accuracy of the plea.

75 See article 35 of the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005 (herein after the Revised Anti-Corruption Proclamation)

76 See the Draft Code, supra note 4, article 227

77 Defence duty of disclosure is debatable. See for example J. McEwan, ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ 31 Legal Studies 519, 532-34 (2011). (observing: ... there is considerable concern about the defence disclosure requirements...Although pre-trial disclosure has been rationalized in the language of managerialism rather than the language of legal theory or doctrine it is difficult to defend, on any theory...)

78 See for example DK Brown 'The Decline of Defense counsel and the Rise of Accuracy in Criminal Adjudication' 93 California Law Review 1585, 1621(2005) (suggesting that: ...discovery is a primary mechanism to improve the factual record's comprehensiveness and reliability, because it makes fact investigation and pre-trial... scrutiny of evidence easier).
policy pushes this a bit further to claim that the duty of disclosure may pave a way to produce earlier guilty pleas and plea bargains. This is particularly true where the defendant finds the prosecution evidence overwhelming.

Although, the duty of disclosure is essential to the proper functioning of plea bargaining, it may sometimes be counterproductive in terms of efficiency. The time required by the parties to manage voluminous files in complex crimes and possible disputes over the scope of the duty of disclosure and its exceptions, as well as its management by courts, may drag out the process and cause delay.

That said it is worthwhile to discuss the timing of disclosure. At which particular stage of the criminal process does the duty of disclosure start apply? It is generally believed that disclosure should take place at the earliest possible stage in the process. This not only may help reduce delays and avoid unproductive hearings but also smooth the process of plea negotiation and increase the accuracy of guilty pleas, to ultimately enhance the fairness as well as the efficiency of the criminal justice system. The policy ordains the duty to be discharged before the trial commences. This could create an impression that the duty of disclosure can validly be discharged any time before the trial, even a day or so before it starts. Similarly, the draft law appears to demand disclosure (late) during the plea negotiations. Such timing seen in the context of plea bargaining tends to be insufficient to achieve one of the major purposes of disclosure - i.e. enabling the defendant make an informed choice of plea. Nor is it efficient. Therefore, the proposed law not only should explicitly require pre-guilty plea disclosures but also demand the prosecutor to discharge the duty at the earliest possible stage so that the defendant has adequate time and

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79 One study recommends the duty should commence before the committal proceedings/preliminary hearing. See Yvon Dandurand, Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review, 2009 at 31.

80 Ibid; for discussion of disclosure and its role in enhancing the accuracy of guilty pleas see also Thomas R. McCoy & Michael J. Mirra, `Plea Bargaining as Due Process in Determining Guilt`, 32 Stan. L. Rev. 887, 933 (1980) (arguing that pre-plea discovery enhances accuracy of pleas because many defendants do not know all relevant facts, or are compelled to plead guilty by large sentence differentials motivated by weaknesses in the case of which they are unaware); Kevin C. McMunigal, `Disclosure and Accuracy in the Guilty Plea Process`, 40 Hastings L.J. 957, 968–97 (1989)

81 See the Draft Code, supra note 4, See Article 227.
opportunity to investigate the file to ultimately decide his / her course of action. This not only helps to ensure the voluntariness and intelligence of the guilty plea but also to raise the accuracy of convictions and sentences. Further, pre-plea disclosure of evidence, by facilitating earlier guilty pleas, helps achieve economic efficiency, an objective stressed by the Ethiopian Criminal justice policy.

Nonetheless, it should be noted that the duty of disclosure is not a onetime duty but rather is a continuous one. Thus, the need to disclosure may arise even after trial or plea negotiation has started.

To be sure, the duty of disclosure may not be available all the time. Under exceptional circumstances, the policy allows justified non-disclosures. These include, among others, materials / evidence which relate to national security, national economic interest or financial security, surveillance techniques or to other methods of crime detection. At this point, it is interesting to see how this affects plea bargaining. Though justified in the interest of the public, non-disclosures may leave the defendant in the dark and unless ethical obligations of the prosecution are heightened to restrain the latter and other procedural safeguards are put in place, the possibility that the outcome of the plea bargaining will be tainted is wide open.

Before concluding this part, two points deserve discussion –one pertains to the effect of prosecution’s failure to discharge the duty of disclosure and the second relates to the question whether disclosure rights can be waived as part of the plea bargaining deal. The Ethiopian reform remains silent on the possible consequences and sanctions where the prosecutor fails to discharge his / her duty of disclosure. Given prosecutors’ opposition to

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82 See for example Steven L. Friedman, ‘Pre-plea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial’, 119 U. Pa. L. Rev. 527, 529–35 (1971) (arguing for enhanced pre-plea discovery to enable defendants to better assess the likelihood of conviction).

83 See for example Thomas R. McCoy & Michael J. Mirra, supra note 80 at 933 (arguing that pre-plea discovery enhances accuracy of pleas because many defendants do not know all relevant facts, or are compelled to plead guilty by large sentence differentials motivated by weaknesses in the case of which they are unaware); Kevin C. McMunigal, supra note 80 at 968–97.

84 See the Criminal Justice Policy, supra note 4 at 35.
the duty, problems of ethics among the parties, and the limited access to legal counsel, the possibility of failure looms large. It is probably true to argue that where evidence which is the subject of disclosure has been suppressed by the prosecution, the defendant’s decision (guilty plea) is likely to be based on insufficient information and thus uninformed. This, as it may raise concerns on the accuracy, fairness and reliability of the guilty plea, is sufficient to invalidate any plea agreement and thus to prompt plea withdrawal.

The second point relates to waivers of disclosure. Can the right to disclosure be validly waived? In the USA, studies show that the range of rights that are bargained away by plea agreements has expanded to include such important safeguards as the right to disclosure. In Ethiopia, it is not clear whether this right can be waived as part of plea bargaining. It is suggested here that the proposed law should expressly prohibit waivers of such rights so that any room for waiver is pre-emptively blocked. To argue otherwise may entail overarching ramifications on the propriety of the plea negotiations/agreements. A waiver of disclosure means defendants would lose their bargaining power and would be more exposed to prosecutorial coercions and manipulations. Similarly, by leaving the defence counsel incapable of gauging the strength of the prosecution evidence, waiver is likely to undermine the quality of legal counsel the defendant may receive. All these combined are likely to culminate in an unfair and inaccurate process as well as outcome. In other words, with exculpatory evidence undisclosed and with enticing concessions from the prosecution, innocent defendants are likely to plead guilty. Therefore, waivers of disclosures are objectionable in many aspects and thus should be outlawed.

In conclusion, although disclosure may enhance the accuracy of guilty pleas in Ethiopia, it is likely to be hampered by a couple of factors: First, the permissibility of pre-charge bargaining (before evidence is collected) means there is nothing to disclose and thus defendants are likely to bargain in the dark. Related to this is the timing of disclosure,


86 On further concerns involved in waivers see for example Erica G. Franklin, ’Note, and Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of “Discovery” Waivers’, 51 Stan. L. Rev. 567, 568-69 (1999) (arguing that waivers not only undermine the accuracy and fairness of criminal justice but also have no significant benefit).
which is `during negotiation`, is too late and likely to leave the defendant uninformed. Second, absence of effective enforcement mechanism, i.e. the fact that the effect of failure to disclose evidence remains unaddressed, casts a serious doubt over the enforceability of the duty. Third, such implementation barriers as prosecutors’ misperception of the duty (many prosecutors interviewed are opposed to the duty) coupled with problems of ethics among the parties could undermine the duty. Further, the limited access to legal counsel and particulars of defendants mean its applicability would be limited.

4. Legal representation

The reform demands that the accused should be represented in plea bargains. The draft law goes further to proscribe the prosecutor from making any plea negotiation with unrepresented defendants, but at the same time reserves rooms for negotiating with them.87 Accordingly, in less serious crimes where a defendant expresses in writing that s/he intends to negotiate alone, it is possible for the prosecutor to plea bargain with unrepresented defendants. This approach, tested against the Ethiopian context is, nonetheless, indefensible. Given the inherent coercive nature of plea bargaining coupled with the particulars of Ethiopian defendants (mostly poor, uneducated...) the outcome is likely to be flawed. Moreover, unless backed by adequate safeguards, it is susceptible to circumventions and is likely to apply even in serious crimes. This appears likely if one looks at the weakness and vulnerability of defendants to manipulations as well as the huge sentencing range prescribed by the criminal code. For that matter, most defendants are not in a position to know under what conditions bargaining with unrepresented defendants is allowed or even their right to legal counsel. This means defendants could simply waive their right to legal counsel. In short, bargaining with unrepresented defendants is unreliable for: a) it distorts the power imbalance further; b) it is not properly sanctioned; c) any guarantee to it is prone to circumventions.

Even with those represented, there are real concerns whether competent legal representation can be ensured in plea bargaining. Particulars of defendants (poor and uneducated) and attorneys (weak professional ethics and regulation) mixed with such

87 See the Draft Code, supra note 4, article 224.
structural forces and psychological biases as prosecutors` pressure and incentives, the attorneys` pressures and incentives (both financial and non-financial), defendants` aversion to risk, and information deficit - all would taint legal representation.

At this point, it is worthwhile to discuss the effect of plea agreements struck without a defence attorney present. In jurisdictions such as the USA, incompetent and ineffective counsel could render the guilty plea involuntary, let alone its total absence. In Ethiopia, neither the policy nor the draft code expressly addresses the fate of plea agreements reached with unrepresented defendants. The presence of competent defence counsel in plea negotiations presumably enables the defendant make well informed choices. Where a defendant whose cause calls for legal representation goes unrepresented, miscarriage of justice is likely to arise. The problem appears to aggravate in the context of plea bargaining – an inherently coercive institution. This coupled with the particulars of defendants in Ethiopia, makes plea bargaining much less likely to be based on intelligent and voluntary guilty pleas. This in the final analysis is sufficient in itself to set aside the plea agreement. In fact, one can arrive at similar conclusion from the language of the proposed law by implication. Under this law, the court is mandated to reject the plea agreement if it is contrary to the law and morals.88 Form this it can be implied that bargaining with unrepresented defendants, which is contrary to the law, is sufficient to reject the agreement. But absent clear standard on this, it depends on the court whose decisions might be overshadowed by its own incentives and weak culture of judicial review.

5. Judicial Approval

Though, courts in Ethiopia may not take part in plea negotiations, in theory they still can play a key role in reviewing the process, the plea agreement and authorising its enforcement. Plea agreements are not valid and thus cannot be enforced until approved by the courts. In principle, the veto power courts exercise over the plea agreement maintains their conventional authority of determining the guilt or the innocence of the accused. But, in reality, it all depends on how this translates into action. This works well only if courts go beyond rubberstamping the plea agreement and meticulously review the process as well as

88 Ibid, articles 229 and 232.
the content of the agreement. But as shown above in section 4.5.2 and in chapter 7, this is unlikely to be the case in Ethiopia for a couple of reasons: cultural, legal and institutional reasons (For details see chapter 7).

That said in general courts when presented with the plea agreement have three options: to accept it as agreed, to accept it with modifications, or to reject it altogether. Though their power to reject and accept plea agreements cannot be disputed, jurisdictions vary as to the court`s power to modify the plea agreement. While jurisdictions like Italy and France seem to adopt the all-or-nothing approach – the court must either accept or reject the agreement, USA takes the middle position - courts` decision in this regard depends on the nature of the agreement. Thus, if the agreement falls within what is referred to as `binding pleas` or `Type C agreements` courts cannot modify its terms to impose a sentence other than the agreed one without triggering withdrawal of pleas. If they accept the agreement, they are bound by the sentence. The position taken by the above jurisdictions, which trades away the traditional power of courts, seems to be justified by principles of contract law- the terms of the plea agreement can only be modified by parties to the agreement. It seems also to be vindicated by defendant`s reasonable expectations and protection from prejudicial increase of sentences by courts. But as shown below, this is moot.

In Ethiopia, it is not yet clear whether courts can modify the terms of plea agreement to vacate the agreed sentence and substitute with appropriate sentence. But from the language of the draft law which addresses only the court`s power to accept and reject the plea agreement as well as the authorisation of the prosecutor to rectify the problem which causes the rejection or to plea bargain anew where the agreement is rejected, one may argue that courts lack the power to modify the plea agreement. This approach sounds problematic and difficult to vindicate. To disallow courts from modifying plea agreements compromises the principles of judicial independence as well as the courts` duty to discover

89This represents agreements where the prosecutor instead of recommending a particular sentence or range, agrees to a specific sentence.

the truth. Thus, where the proposed sentence is not proportionate to the criminal act and
the degree of guilt, it is the inherent power of the court to correct it. To argue otherwise
offends the conventional roles of the courts in determining the appropriate sentence and
hence may not be consistent with the independence of the judiciary and thus the
constitution which demands courts to heed to only the law and not the terms of the
parties. Thus, to avoid any possible dispute over the matter it seems imperative to
expressly regulate it in a manner that empowers courts to modify plea agreements.

A derivative question which follows judicial variation of the terms of the plea agreement (in
particular, that of sentence recommendations) is whether the defendant should
be permitted to withdraw his/her plea. Some jurisdictions seem to allow this, but its merit is
open to challenge. Firstly, by discouraging courts from modifying the terms of the
agreement, it may promote mere rubberstamps. Besides, such arrangement can prompt
the defendant to withdraw his/her plea and proceed to trial. This sounds uneconomical.
Therefore, plea withdrawals should not be permitted merely because the court varies the
plea agreement. Perhaps resort to appeal can be considered.

At any rate the above options should be made having regard to the requirements of the law
and considerations of fairness. Thus, before endorsing the plea agreement Ethiopian courts
are invested with the responsibility to ensure that the plea agreement as well as the
process is in line with the law and morals. But, the use of such general and vague terms as
law and morality, which are included in the latest version of the proposed law, seems
problematic. What constitutes morality in this context? Whose morality? How can we

91 Whether the court is mandated to review the proportionality of sentence with the gravity of the offence or
the degree of guilt with the bargained-for-charge is not clear. However, it can be argued from Art 79(3) of the
FDRE constitution that the court is obliged to review the above matters. This Article provides that judges shall
exercise their functions in full independence and shall be directed solely by the law. From this, it follows that
the judge must only heed to the law and not the sentence agreed upon by the parties. Thus, if the sentence
proposed by the parties is disproportionate to the degree of guilt the court should reject it or revise it.
Nevertheless, the passivity of courts on reviews means this would be far-fetched.

92 See the Draft Code, supra note 4 Article 232. It is unclear what constitutes morals. It is so fluid a concept to
serve as a standard to measure the validity of plea agreements (plea bargains) whose underlying moral
justification is under severe attack. Perhaps the guidelines to be issued subsequently may clarify it.

93 This applies to the use of the generic term ‘law’. In the earlier draft, a specific mention of legal provisions
(such as those providing for legal conditions to plea bargaining), was preferred.
measure the agreement, whose moral justification is under attack, with moral standards? Which law— the law of plea bargaining or any law? A reading of Article 229(1) and (2) of the Draft Code suggests this refers to both. But with a less developed doctrinal and jurisprudential guide for interpretation, these would be questions difficult to quantify, unless standards are set forth. Although in principle this approach may facilitate expanded form of judicial review, it is less realistic given the disincentives involved and the weak culture of judicial review in Ethiopia. Rather, the approach could be exposed to uneven applications, if not evasions. For instance, it is not pretty clear whether judges must review and assess all of the collected evidence to ensure that the prosecutor has put forward enough legally valid evidence to ascertain the guilt of the accused. Even then, it is not clear what standard the court uses in assessing the requirement relating the sufficiency of evidence. If the threshold is simply that of probability (which is used to press for a charge, which is very likely to be the case) it makes little sense in protecting innocent defendants.

In any case, where the court finds the agreement inconsistent with the law or morals, it has to reject it. Where the court rejects the agreement, the prosecutor has three options: to rectify the problem that caused the rejection, to plea bargain anew or to proceed to trial. Two points seem worrying here: First, allowing a second plea bargaining is problematic for it may put the defendant under added pressure. Second, the draft law seems to be partial in permitting such options to the prosecution alone; the defendant having none of them recognised. Of course, nothing would prevent the latter to proceed to the trial. Apart from

94 Institutional preoccupation with efficiency, which is partly expressed through the performance evaluation system in place, means courts have little incentive to reject agreements. For details, see chapter 7.

95 Perhaps such review may be implied from the law. However, it is unclear what consequence is attached to it. See supra note 66.

96 As regards the prosecution, this is left for internal guidelines to be issued by prosecutor General (The Minster of Justice). Yet, such approach has its own limitations: First, given the policy toward efficiency, the office of prosecution is less likely to restrain itself meaningfully using its own guidelines. Second, effective enforcement mechanisms of the rules may presuppose external review. However, weak culture of judicial review, judicial disincentives (desire to manage caseload) mean the possibility that the guidelines are effectively challenged before court (judicial review) would be very rare.

97 See the Draft Code, supra note 4 Article 233.
this, the only guarantee for the defendant is the prohibition of the use of any statement obtained in the process for the subsequent prosecution of the same crime.

It is interesting to see whether courts in Ethiopia should check the factual basis of the plea before accepting the plea agreement. Courts in Italy and Germany are required to do so. Thus, where the court believes that the agreed punishment does not reflect the facts of the crime as for example the sentence is too lenient or too high or when the factual basis does not support the crime; or where the sentence is inconsistent with the rehabilitative purpose of punishment, it rejects the agreement. The Ethiopian reform though it does not go into that much detail, seems to demand that courts check the factual basis of the plea. The court is required to take the defendant’s plea after interrogating him on such matters as are relevant to ensure that the plea is made intelligently and voluntarily. Yet, this may not be sufficient to guard the defendant from facing charges unrelated to the facts of the case. It is not clear whether the court should consult any other evidence or use other methods to establish the factual basis of the plea. Perhaps the court may avail of the general principle of truth discovery - a principle, which obliges them to uncover the truth, to check such issues. But that would be farfetched (see chapter 7).

Finally, two points deserve discussion here. The first concerns whether courts need to consider victims’ interest before approving the plea agreement. As it stands now, victim’s interest is not among the factors to be considered (at least expressly indicated) in approving plea agreements. This represents one area of weakness the Ethiopian variant exhibits.

The second relates to the courts’ power to oversight the defence attorney. Given the structural problems accompanying legal representation in plea bargaining (which is discussed above and in chapter 7 in detail) this is all the more important. While claims of

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98 Ibid, articles 223 and 232.

99 For example it is not clear whether courts can require the prosecution to produce sufficient proof of defendant’s guilt.

100 On the advantages of affording victims meaningful participation, see the role of victims above and chapter 7, legal culture.
ineffective representation/competent representation have increasingly been construed expansively elsewhere- thereby enhancing judicial oversight of the role of the defence attorney in plea bargaining\textsuperscript{101}, the issue remains bizarre in Ethiopia. For that matter, ineffective representation appears to have been even unrecognised as a ground for appeal in full-scale trials.

From the foregoing, we can see that the court's decision to accept or reject the plea agreement hinges on its legality and morality. In some jurisdictions as Germany and Italy, whatever the reasons for accepting or rejecting the agreement may be, it forms part of the court judgment i.e. courts are required to state their reasons explicitly. This requirement is worth having in Ethiopia for, among others, it helps discourage simple rubberstamps of plea agreements and thus increases judicial accountability. It also facilitates further reviews by appeal or cassation, as appropriate.

4.7 The Plea Agreement

In Ethiopia, plea bargaining can only be created as between the prosecutor and the defendant / his counsel in a written form\textsuperscript{102}. In principle, as in any agreement, parties define the terms and conditions of the plea agreement and their respective obligations. Yet, obligations can also be implied from the law or facts in the agreement. Like in most countries, plea agreements in Ethiopia are contingent upon conditions: conditions-precedent (legal conditions to plea bargaining) and conditions-subsequent (Judicial approval and other conditions associated with prosecutors conduct such as making sentence recommendations as per the agreement).

The trickiest thing about a plea agreement is defining its status. A plea agreement involves the elements of contract: `offer and acceptance`, `considerations`, and the intention to be bound by the terms of the agreement. Under this conception, it resembles contracts. That is why many make analogies between the two and even apply contract principles in enforcing

\textsuperscript{101} This is the case for example, in the USA. Following Padilla, the role of the court in plea bargaining has been the subject of discussion. See Stephanos Bibas, supra note 59.

\textsuperscript{102} See the Criminal Justice Policy, supra note 4 at 36; See the Draft Code, supra note 4, Art 219. Here it is important to note that form is a requirement for validity.
plea agreements\textsuperscript{103}. But, a closer look at the features of the law of contract, in particular that of the Ethiopian variant and the nature of plea agreements, reveals plea agreements albeit, they exhibit elements of contract, cannot fit into contracts. Four counts support this:

First, the setting in which the two operate is quite distinct and thus makes contract principles insufficient to govern plea agreements. Frank H. Easterbrook puts that plea bargains do not fit in to’ ... all aspects of either the legal or economic model\textsuperscript{104}’ He convincingly argues\textsuperscript{105}:

\begin{quote}
On the economic side, plea bargains do not represent Pareto improvements. Instead of engaging in trades that make at least one person better off and no one worse off, the parties bicker about how much worse off one side will be. In markets, persons can borrow to take advantage of good deals or withdraw from the market, wait for a better offer, and lend their assets for a price in the interim. By contrast, both sides to a plea bargain operate under strict budget constraints, and they cannot bide their time. They bargain as bilateral monopolists (defendants can’t shop in competitive markets for prosecutors!) in the shadow of legal rules that work suspiciously like price controls.
\end{quote}

Related to this there is a huge distinction between civil cases (contacts) and criminal cases (plea bargaining) as regards to the interests involved and the goals to be achieved. While the former affects individuals and strives to enforce private obligations, the latter involves public wrong and aims at shaping conduct through penalties. This makes contract principles ill suited for plea agreements. Further, such features in plea agreements as the institutional unequal bargaining power of the parties, the criminal sanctions involved, issues of procedural rights, and the available remedies for breaches of the agreement make


\textsuperscript{105} Ibid, at 1975
contract principles inappropriate to plea bargaining. For instance, applying contract principles to breaches of plea agreement suggests specific performance as one remedy. Yet, this remedy hardly applies for the prosecutor (defendant breaches) for it is illegal to force the defendant to stick to the agreement or to plead guilty. Moreover, the requirement of free consent barely applies in plea bargaining for it is likely to be vitiating by threats of punishment (sentence differentials).

Third, unlike contracts, plea agreements always require judicial ratification. Though courts may not participate in the process, they are often viewed as a third party whose blessing is a prerequisite for both the validity and enforcement of plea agreements. To be sure, courts do exercise power over the enforcement of proper contracts too. For instance, finding the object of the contract contrary to the law, they may invalidate it. But as opposed to plea agreements, their approval is not a prerequisite for enforcement of the contract. While contacts can be enforced without court involvement or approval, plea agreements cannot, at least in the Ethiopian context. Put simply, the veto power courts exercise over plea agreements distinguishes the latter from contracts. Relying on this aspect of the plea agreement, and other conditions attached to plea agreements, some argue that plea agreements are conditional contracts. Yet, this is indefensible simply because the requirement of court approval does not fit into the conditions known in contracts (conditional contracts). While conditions in contracts do not affect the validity of contracts, court approval of the plea agreement does.

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106 One court in the USA observes that: The danger in a pure contractual approach to plea bargaining is that it may seduce one into thinking that the plea bargain involves only two parties, the prosecutor and the defendant, when in fact the trial court plays a critical role in the process. ...the trial court clearly retains discretion in accepting or rejecting plea bargains. See United States v. Ocanas, 628 F.2d 353, 356 (5th Cir. 1980), cited in Micheal C. Cicchini, supra Note 102 at 183-84.

107 See the criminal justice policy, supra note 4 at 36. Here one may wonder how charge bargaining works. The prosecutor may agree, before instituting a charge, to drop one charge in return to the defendant pleading guilty to another charge. In principle, the terms of the agreement such as exchanges of concessions should be expressly indicated in the agreement so that the court reviews it. However, this is susceptible to evasions. In such cases, charge bargains can be enforced underground without court approval/review.

108 Ibid; See also the Draft Code, supra note 4, articles 219 and 231 (making both the enforceability and the validity of plea agreement hinge on court approval). On the one hand, as can be inferred from articles 1869-79 of the 1960 Civil Code of Ethiopia, conditions in contract affect only performance.
Fourth, a derivative of the first argument is that contracts as applied in Ethiopia are characterized by some unique features that cannot be found in plea agreements. For example, contracts can be created only on obligations of proprietary nature—an element that is missing in plea bargains. To be sure, plea agreements too involve a consideration, but it is of a different nature – unlike in the case of contracts, it cannot be appreciated in terms of money. Thus, any application of contract principles to plea agreements in Ethiopia presupposes the revisiting of this conception of contract.

Therefore, though plea agreements have contract flavours, principles of constitutional law and criminal procedure should largely guide their application. That is why some call plea agreements as ‘constitutional contracts’. Yet, for the above reasons this is insufficient to capture the nature of plea bargaining.

The plea agreement once duly formed and approved by a competent court is as good as a court judgment after full trial, having the same judicial status and effect. This can be contrasted with the Italian version of plea agreement which has unique features and whose status as a judgment is controversial. In any case, the court (Ethiopia) determines both the defendant’s guilt and sentence. No appeal lies from this judgement except under very limited instances. While the defendants’ right to appeal is not recognised, the prosecution may appeal only where the agreement is rejected.

4.8 Withdrawal from the Plea agreement and its Consequences

Plea agreements may be disturbed where the defendant or the prosecutor withdraws from it or where the court refuses to endorse it. Where plea agreements fail, any statement made thereof is generally inadmissible in subsequent trials. This is true of many jurisdictions

109 Article 1677 of the 1960 Ethiopian Civil Code defines contracts as: an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature.


111 On the propriety and consequences of this, see chapter 6.

112 For fuller discussion on this, see chapter one and six.
selected for comparison. Likewise, in Ethiopia, the policy ordains that where the negotiation fails for any reason or the plea agreement is rejected by the court for any reason, any evidence obtained thereof is inadmissible for subsequent prosecution of the same crime i.e. the crime that triggered the failed agreement.

Yet, this guarantee would be of limited avail for defendants: First, it does not protect defendants from independent prosecutions and arguably from civil liabilities based on the evidence under consideration. Put simply, any evidence or guilty plea obtained from the rejected agreement is admissible for independent prosecutions and civil actions. Here it bears mentioning that the draft code fails to reflect the policy on this point. Secondly, the guarantee may not sufficiently neutralize the effect of guilty pleas. Still absent adequate guarantees, it will have negative bearing on presumption of innocence and thus such defendants may be affected by judicial bias in subsequent proceedings. Further, unless expressly proscribed and strictly enforced, prosecutors could circumvent the guarantee by encouraging defendants to waive it in plea agreements.

Plea agreements do not create absolute obligations. For various reasons parties may feel withdrawing from it. Here, two central questions emerge: under what grounds can they do so? What consequences withdrawals (justified or otherwise) entail? There is no definite answer for these questions under the reform, both the policy and the draft law remaining silent. Perhaps, this might have been left for guidelines or courts to decide. Yet, such approach appears unrealistic and liable to bring inconsistent applications, if not abuses.

113 There are some exceptions though. For example in the USA statements made in a failed plea agreement may be used to impeach the defendant at trial. See Rachel A, Van Cleave, ‘An offer you cannot refuse? Punishment without trial in Italy and the United states: The search for truth and an efficient Criminal Justice System’, 11 Emory Int’l L. Rev. 419 1997 at 459-60.

114 Without addressing the fate of any statement / guilty plea in a failed or rejected plea agreement directly, the draft law authorizes the prosecutor to rectify the problem that caused the rejection, to plea bargain anew or to proceed to trial. See the Draft Code, supra note 4, Article 233.

115 For example, the fact that the plea agreement has failed should not be disclosed in subsequent proceedings.

116 This is a serious problem for instance in the USA.
Weak jurisprudence and doctrine could mean the lawmaker should provide some standards on the matter, leaving the details for guidelines and courts.

In other jurisdictions, the above subject matters are regulated and thus can be illuminating for Ethiopia. Thus, withdrawal by the defendant is time bound. Its availability and extent depends on such factors as whether courts accept the agreement and whether the court passes a sentence. Thus, in the USA (Federal government), withdrawal of a guilty plea is permitted 'for any reason or no reason' if requested before the court accepts the plea; and after that where the court rejects the agreement\textsuperscript{117} or where the defendant shows 'fair and just reason'\textsuperscript{118}. Any other withdrawal may amount to breach thereby prompting the prosecution to withdraw and re-prosecute the defendant.

Likewise, prosecutor's withdrawal is regulated. The defendant waives his right to trial and enters the agreement expecting the state to honour its promises. Thus, once the defendant performs his part (pleads guilty) the prosecution should not arbitrarily withdraw its promise and deprive the defendants of the benefits attached to the agreement. If the prosecutor does so, the defendant is entitled to a relief. The relief may take, depending on the circumstances\textsuperscript{119}, a form of plea withdrawal or a specific performance.

\textbf{4.9 Conclusion}

In this chapter, such matters as the rationales of plea bargaining, basic features of the Ethiopian model of plea bargaining, the role of justice actors and available safeguards are examined critically. On a balance, this chapter argues that many of the justifications advanced to import plea bargaining into Ethiopia are less convincing. Apparently, the efficiency justification seems strong. Yet when put in context (weak legal culture and

\textsuperscript{117} Nevertheless, it does not mean that any plea rejection by the court entitles a plea withdrawal.

\textsuperscript{118} See rule 11(d) Federal Rules of Criminal procedure, USA. The requirement of 'fair and just reason' is construed to constitute either of the following grounds: (1) evidence that the plea was not knowing or voluntary; (2) evidence of legal innocence is discovered; (3) ineffective assistance of counsel; and (4) judicial economy. See Plea Agreements and Procedure: available at http://www.lexisone.com/bstore/sample/bender/0820556564.pdf at 40-45, May19/12.

\textsuperscript{119} Specific performances are appropriate in particular where plea withdrawal cannot restore the defendant to his previous position.
structure and the context of delay in Ethiopia), and seen against the values it trades-off, it is less convincing.

The reform puts in place several procedural safeguards to plea bargaining. These include the requirement of sufficient evidence, the voluntariness of guilty pleas, duty of disclosure, judicial approval of plea agreement, and mandatory representation of defendants as a rule. However, none of these guarantees would be capable of ensuring the fairness and accuracy of plea bargaining for reasons relating to the version of plea bargaining Ethiopia adopts; the nature of the guarantees and the Ethiopian context – an under-developed and constrained institutional capacity.

In particular, the reform exhibits several limitations including but not limited to: its failure to regulate grounds and consequences of withdrawal from the plea agreement, to provide for mechanisms of enforcement for such matters as disclosure duties, the requirements of sufficient evidence, mandatory representation of the defendant, and victim consultation in plea bargains. Areas of further concern include: lack of clarity on whether courts can modify plea agreements, the aptness of the starting time of disclosure duty (late during negotiation as opposed to earliest possible stage or pre-guilty plea disclosure) and the stage at which plea bargaining can commence (the permissibility of pre-charge bargaining), the possibility of a post guilty plea negotiation, and concerns on the observance of the principle of equality of arms (the prosecution is made to exclusively control not only state resources but also such matters as appeal, presentation of the plea agreement for approval, and re-negotiation).
Chapter Five: Informal Plea bargaining in Ethiopia

This chapter investigates informal plea bargaining in Ethiopia and attempts to inform the thesis with the practical issues involved in plea bargains. To the extent they are connected with plea bargaining, some variants of negotiated justice are also discussed.

5.1 Some Forms of Negotiated Justice

This section outlines briefly some forms of negotiated justice which are either introduced through recent reforms or have been in operation for a long time.

5.1.1 Special procedures

1) Procedure in private prosecutions

As some jurisdictions do, the 1961 criminal procedure code of Ethiopia accommodates the notion of complaint crimes on less serious crimes that are linked to the privacy of individuals. The current reform recognizes private prosecutions more or less in a similar fashion. Perhaps one difference would be the expansion of its scope of application to include non-complaint crimes punishable with simple imprisonment (less than one year).

For state authorities to take actions in complaint crimes, victims` consent is a prerequisite. Victims or their representatives have a veto over prosecutions; they may initiate prosecutions by reporting crimes and may at any time withdraw from it. This leaves a room for them to deal with the perpetrator privately. Here, it is interesting to observe that

1 Negotiated justice here is understood in its broader sense as distinct from the imposed justice which insists on the strict enforcement of criminal law.

2 Complaint crimes refer to those crimes which are prosecuted only when victims / their representative express their consent to prosecution by reporting the crime to the officials.

3 See Article 268 of the Draft Code. One may wonder why private prosecution in crimes other than those punishable upon complaint. Obviously, the justification put to allow private prosecutions in compliant crimes hardly applies. But it can be justified in terms of efficiency.

4 See Article 212 of the criminal code of the Federal Democratic Republic of Ethiopia 2010 (Hereinafter the Criminal Code) (Putting victims` complaint as a precondition for prosecution of such crimes). Interestingly, victims` consent also decriminalizes any such crimes where these crimes are committed with the consent of the victim or his representative, no criminal liability arises from it. See Art 70(1) of the Criminal Code.
victims and their offenders sometimes came to agreement to settle crimes other than those punishable upon complaint, including crimes of homicide. They often submit such agreements before the trial court, but often the latter resolutely discouraged this type of settlement by rejecting them as unlawful. This stand of the judiciary might have far-reaching repercussions on the healing of the damaged relationship of the two and the restoring of lasting peace. But, recently policy makers seem to heed to such concerns and embrace ADRs in an unprecedented fashion. BPR reforms as well as the draft criminal procedure code allow prosecutors to have cases that attract a punishment of three years or less, settled through ADR.

Upon securing the consent of victims, the prosecutor may, for lack of sufficient evidence, decide not to pursue the case. In such cases, the victim or his/her representative may step in as a private prosecutor. Interestingly, in private prosecutions even if victims show interest to pursue their case, the court would not adjudicate the matter there and then. Before that, it tries to reconcile the parties so that a settlement, which is binding as a court judgment, is reached. Here one can see that the court facilitates the process of settlement.

2) Procedure in petty offences

The applicable procedure for petty offences is quite different from ordinary procedures. Normally in ordinary proceedings, intake procedures commence with the police summoning or arresting the suspect as the case may be. The power to summon is under the exclusive jurisdiction of the police. However, in petty offences with the prosecutor initiating it, the power to summons vests in the court. Moreover, the nature of the summons in petty offences is detailed, containing the circumstances of the offence committed and the law and provision of the law to be invoked\(^5\). This can be contrasted with summons in ordinary procedures where the law does not at least expressly require such details. These detailed requirements are not without purposes. The law maker intends such summons serve dual purposes- as document serving the conventional purpose of summons (notifying the accused that he has a charge to answer and thus make himself available before court), and /or as a document on which he / she can admit guilt by endorsing that s/he pleads

\(^5\) See the 1961 Criminal Procedure Code of Ethiopia, Article 167(2). (Here in after, the CPC.)
The second purpose i.e. pleading guilty requires understanding of the nature of the charge. That is why the summons contains the above details.

Thus, the special procedure in petty offences starts with the prosecutor applying to the court for the summons of the accused. The accused after receiving the summons may endorse on it that he / she pleads guilty. The court then after verifying the facts of the case from the prosecutor convicts the accused and passes a sentence.

This special procedure is similar to *penal order* of Germany in that it applies to petty offences and that it avoids formal trial should the accused pleads guilty. The special procedure applies only to petty offences punishable with a fine. Thus, if the petty offence is punishable with imprisonment or forced labour the special procedure does not apply. In this sense, it is also similar with the Italian procedure for *penal decree*.

Despite the above similarities, the special procedure has marked differences with both penal orders and penal decrees. While penal orders in Germany and penal decrees in Italy offer defendants sentence reductions, no such reduction is involved in the Ethiopian special procedure; perhaps the court like in any ordinary procedure may mitigate sentences for the guilty plea. As a result, one may wonder what incentives the defendant has in disposing of cases with this procedure. This may be one reason for its extremely limited application in practice. Perhaps, the only advantage the defendant may obtain in this procedure is that he / she is dispensed with attending the court’s session and receives the copy of the judgment from the court later, thereby sparing time, money for defence and avoiding the hassle of standing trials.

Another sharp distinction between the German penal order and Ethiopian special procedure lies on their magnitude of application. In Germany penal orders are applied widely, currently disposing of about 35 percent of all cases while the special procedure in Ethiopia is yet to apply - perhaps a quasi-special procedure applies to traffic offences.

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*See The CPC, Article 168.*

*See chapter one, some selected variants of plea bargaining: a brief comparison.*
5.1.2 Cooperation Agreements with Defendants

Cooperation agreements involve a defendant agreeing to cooperate in the prosecution of others, namely co-offenders by supplying evidence notably in the form of testimony, so that he/she receives lenient treatment from the state. The leniency may go up to exempting him/her from criminal liability—often known as immunity. Many literatures see cooperation agreements as one form of plea bargaining. But this is not sound simply because cooperation agreements are about finding evidence that will be tested in full scale trials while plea bargaining is about avoiding full scale trials. Still, most countries which adopt plea bargaining recognize cooperation agreements as a vital tool of garnering relevant evidence in a criminal participation—particularly to investigate and prosecute those suspects up in the ladder of a criminal activity. Cooperation agreements are usually employed to dismantle organized crimes such as drug trafficking, terrorism and corruption.

In Ethiopia, cooperation agreements found their places mainly through three statutes: the Anti-Corruption laws, Anti-terrorism law, and Witness and whistleblowers protection law. Such agreements are also included in the criminal code (Art 406-crimes of corruption) and the first ever adopted Criminal Justice Policy. The Policy explicitly allows cooperation agreements in organized crimes, corruption, terrorism, and complex crimes provided however that the information a co-offender supplies, is so substantial that without it prosecution is impossible or becomes taxing.

The Anti-Corruption Proclamation No. 434/2005 makes cooperating defendants immune from any criminal liability on condition that he/she provides substantial evidence as to the offence and the role of his partners before the case is taken to the court. Here, we can clearly see that the defendant’s willingness to provide any relevant evidence does not qualify him/her to benefit from immunity. Two cumulative conditions are attached to the

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8 Sometimes, the latter could also involve guilty pleas in return to sentence and charge concessions. In this sense, it subsumes plea bargaining proper. For more see chapter one.

9 See FDRE, The Criminal Justice Policy, 2011 at 22 (Herein after the criminal justice policy).

benefit: the weight of the evidence s/he supplies and the timing. Only supply of substantial evidence at an appropriate time makes him/her eligible. What constitutes substantial evidence? Evidence is said to be substantial and entitle immunity where\(^\text{11}\): a) it is sufficient to bring conviction by itself; b) it serves as a basis to lead to other evidences; c) when corroborated with other evidence, is sufficient to bring conviction, and whose absence makes conviction unlikely. The second condition is timing. The appropriate time for cooperation is put at the time before the case is taken to the court. What does this mean? Apparently, it seems to refer to the time before charge is instituted. But this is not consistent with the purpose of cooperation agreements, i.e. producing vital evidence for the prosecution of others. Thus, the requirement should be construed to permit the benefit of immunity any time before the case (evidence) is heard.

Here, it is important to note whether a cooperating defendant whose case does not satisfy the above requirements can get any other concession as sentence reductions, for instance. Unlike, witness protection law, Proclamation No. 434/2005 does not expressly recognize other concessions due for such defendants. However, short of immunity other concessions as mitigation of sentences need to be available for those who do not satisfy the above requirements.

The Anti-terrorism Proclamation under Article 33 authorizes courts to treat cooperating defendants leniently. To benefit from lenient punishment, a defendant is expected to plead guilty with repentance or disclose the identity of co-offenders\(^\text{12}\). Here, the concession due to the defendant in the anti-terrorism law is unique in two ways: First, unlike in corruption cases, the weight of the information appears less important (at least not expressly required) to get the benefits attached to it. Second, the benefit cooperating defendants draw seems to be limited to mitigation of sentences as against immunities. This is in contrast to what is provided under the witness and whistle blowers protection law.

\(^{11}\) See Id, article 43(2).

\(^{12}\) Article 33 of the proclamation provides: The court may mitigate the punishment, upon a request made by the public prosecutor where the defendant repents about his act of committing any of the crimes mentioned under this Proclamation and cooperates in elaborating in detail the manner of the commission of the crime or discloses the identities of the persons who participated in the commission of the crime. See the Anti-terrorism Proclamation No. 652/2009.
The recently promulgated witness and whistleblowers protection law (herein after witness protection proclamation) provides a number of protection measures to witnesses, whistleblowers and their families\(^\text{13}\). One of such measures concerns immunity from prosecutions\(^\text{14}\). Arguably, the protection of immunity could presuppose the participation of the witness or whistleblower in a criminal act. This immunity; however, is not available to all witnesses or whistleblowers across the board. The *seriousness of the crime* for whose prosecution the information is supplied (in that it should be punishable with rigorous imprisonment for 10 or more years or death)\(^\text{15}\), *the absolute relevance of the information*- that the offence cannot be prosecuted in the absence of the information and *the degree of threat of danger the supplier of the information faces*, are condition precedents to extend the protection measures\(^\text{16}\). If all these prerequisites are satisfied, a co-offender may be immune from offences for which he/she supplies information.

From the foregoing, we can see that the law by exempting co-defendants from criminal liability encourages them to come out and testify against their mates. As shown above, for any person (co-defendants included) to be eligible for the protections, the law generally puts three conditions. While the first two conditions may be pertinent to extend protection of immunity, the merit of the last condition i.e. the degree of threat of danger to the defendant, is not clear. Perhaps, it is necessary to provide such defendants other kinds of protection measures such as changing of identity, provision of self defence weapon etc.

\(^\text{13}\) Article 2(2) defines protected persons as: a witness, a whistleblower, or a family member of a witness or a whistleblower who has entered into a protection agreement with the ministry (of Justice). To enter such an agreement and benefit from the protection measures the seriousness of the crime for whose prosecution the information is supplied, the indispensability of the information, the degree of threat of danger posed are prerequisites. See article 3 of Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010 (herein after the witness protection proclamation).

\(^\text{14}\) See article 4(1) (f) of the witness protection Proclamation

\(^\text{15}\) Beyond using the generic term ‘serious crimes’, the criminal policy goes further to name crimes in this regard. Included are organized crimes, corruption, terrorism, complex crimes and mob -related crimes. See the Criminal Justice Policy at 22.

\(^\text{16}\) See Article 3 of the witness protection Proclamation. Moreover, those detailed factors listed under Article 5 of the same proclamation may apply as appropriate.
That said, let now attention be turned to the issue on how cooperation agreements can operate as recognized in the above statutes. Though recognized in both statutes, cooperation agreements function differently in rewarding cooperating defendants. At least two major divergences could be raised here. The first concerns the nature of concessions involved. While the Anti-terrorism proclamation rewards a cooperating defendant (in terrorism cases) just by mitigating sentences, the witness protection proclamation goes up to extending him/her immunity.

Second, the requirements attached for the concessions to materialize are quite disparate. For instance, immunity for cooperating defendants in corruption cases is available under two preconditions: one relating to the weight of the evidence, the other on the time at which the evidence should be supplied\(^1\)\. On the other hand, the witness protection law demands three different (at least two of them) prerequisites for immunity to work: the seriousness of the crime (punishable with not less than 10 years), the relevance of the evidence, and the threat of danger to the defendant.

### 5.2 Informal Plea Agreements

This section which is based on interviews and questionnaires\(^2\) reveals that informal and rudimentary plea bargaining exists at the investigative stage, usually the suspect being unrepresented. About 60 percent of the prosecutors participating in the study admit that they sometimes practice plea bargaining in different forms. This practice has the following general features: it applies to any crime, the concessions the defendant obtains range from total immunity to sentence or charge reductions, it does not involve defence attorneys, it is not enforceable, nor does it form part of the record either in the investigation file or in the judgment. (This is done deliberately to avoid any responsibility associated with bargaining without legal authority).

Having said this as a general remark, the subsequent sections briefly examine such issues as the magnitude of the practice, the justification for it, the types of plea bargaining

\(^1\) On these preconditions, see above.

\(^2\) See chapter 2 on Methods and Methodology.
involved, the risks and benefits of the practice, the role of the parties as well as the role of the judge.

5.2.1 Why Informal Plea bargaining?

Prosecutors try to justify the informal practice from many perspectives. The following represent the major justifications put forward.

1) **Efficiency**

Like any form of plea bargaining, this informal practice is believed to increase the efficiency of prosecution of crimes and helps to manage caseload. Prosecutors point to this advantage in practicing plea bargaining informally. While it is true that the practice could enhance efficiency and help manage caseload, it nonetheless scarifies the requirements of fairness and outcome accuracy. For example, the ‘bargaining’ is held without the suspect being represented and officially charged. This means that the suspect remains in a sheer ignorance and is likely to enter into the informal agreement based on an uninformed, if not involuntary, admission of guilt (see below, the conclusion).

2) **Half a loaf is better than none**

The difficulty to obtaining evidence in particular that of witnesses is often used by prosecutors as one major reason to vindicate the practice of informal plea bargaining (see below). Thus instead of ‘risking no punishment at all’, it is better to impose some of the punishment offenders deserve. This justification seems in line with the validation of plea bargaining which is often reflected using the adage: ‘halve a loaf is better none’\(^{19}\).

However, this is far from being unassailable both in theory and practice: In theory, the justification is less defensible as it offends `principled prosecution` which operates within the limits of procedural justice\(^{20}\). In practice too, one cannot be sure whether prosecutors have recourse to plea bargaining after making all reasonable effort to gather evidence.

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\(^{19}\) On detailed accounts of such justifications, see Richard L. Lippke, *The Ethics of Plea Bargaining* (Oxford University Press 2011 at 191 -216.

\(^{20}\) Ibid at 192.
Instead, the weak nature of criminal investigation that prevails in the criminal justice system-i.e. the fact that charges are instituted without sufficient evidence and preparation seems to suggest that resort to the practice can be made without a thorough investigation. Admittedly, the formal version of plea bargaining Ethiopia adopts tries to address this problem by demanding the prosecutor to establish sufficient evidence that warrants the defendant’s guilt. Nonetheless, this requirement is nothing unless safeguards to test the reliability of evidence as well as a strong standard to measure the sufficiency of evidence with appropriate review mechanism are put in place, safeguards which remain tenuous. (For discussions on this, see chapter 4 the requirement of sufficient evidence. On the propensity of the requirement to circumventions, see chapter 6, the innocence problem).

3) The BPR reform

BPR reforms incorporate many alternatives to trial including plea bargaining. Joint investigation of crimes by the police and the prosecution is also introduced. Though most of the prosecutors question the legality of this reform and refrain from applying it as regards plea bargaining, some of them claim that their plea bargaining decisions are based on these reforms or attributable to their involvement in the investigation. Yet, such prosecutors do not seem in a position to defend the practice comfortably without any fear of sanction. These reforms as shown earlier lack any authority and thus cannot validate the informal practice. Perhaps, the joint investigation, though hardly justifies the practice, could explain it.

Studies/reports show that prosecutors often institute charges without sufficient evidence and preparation. See Uses and users Justice in Africa: the Case of Ethiopia’s Federal courts at xxi; Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years (2010/11-2014/15) Strategic Plan, July 2010, at 27-8 (recognizing defects in the capacity of prosecutors to investigate crimes, examine investigative files, collect sufficient and relevant evidence, prepare quality charges, and to have adequate preparation for trial ); See also Justice Performance Report, 2010 at 18 available at www.moj.gov.et/ ministry of justice downloads/ accessed on 03/06/12. For more discussions on this see chapter 6, the innocence problem and chapter 7, institutional/structural problems.

BPR stands for Business Re-engineering Process. On the nature of this reform, see chapter 3.

This is because the BPR Reforms lack legal authority as they are not translated into law.

Prosecutors are not comfortable to share their plea bargaining experience for fear of disciplinary measures. This has been a major challenge to the researcher. See chapter two, the section on challenges.

143
5.2.2 The Magnitude of the Practice

As shown above, about 60 percent of prosecutors of the sample (46 prosecutors) admit that they experience informal plea bargaining in one or another form. Yet, asked how often they practice it, most of them indicate in a scale of percentage that it accounts only less than 10 percent of the totality of cases they prosecute. Unless underestimated deliberately or otherwise\(^{25}\), this suggests that though it appears that over half of the prosecutors (of the sample) use informal plea bargaining, the practice exists in a very limited scope. Most defendants also state that prosecutors approach them to induce guilty pleas with sentence mitigations (see below). Nonetheless, judges and attorneys more often remain unaware of the practice, albeit the former suspect its application from the conduct of the parties. (See below). This is because the informal plea bargaining is practiced underground at the investigative stage where judges and attorneys\(^{26}\) have neither participated nor been informed of it. This has adverse repercussions on the fairness of the practice (see below).

The practice of informal plea bargaining is not limited to the field sites studied. Some reports indicate that plea bargaining is practiced in other parts of the country as well. For example in the State of Tigray, it exists in some degree in serious crimes\(^ {27}\). Further, a hybrid form of plea bargaining (involving reconciliation of victims and offenders) exists with respect to complaint crimes. This practice involves the prosecutor securing the consent of the victim and then negotiating with the offender so that he pleads guilty and in return his custodial sentence (imprisonment) is converted into a fine. Here, the offender may pay compensation to the victim – a gesture considered by courts in fixing the amount of the fine. While this practice could increase efficiency and help restore lasting peace between the offender and the victim where it involves reconciliation, the conversion of

\[^{25}\text{In addition to difficulties of estimation, prosecutors may for various reasons see themselves as they are not using plea bargaining very often.}\]

\[^{26}\text{The right to counsel is not available at this stage and thus most defendants are unrepresented.}\]

\[^{27}\text{See UNODC Assessment of the Criminal Justice system in Ethiopia; in support of the Government’s reform efforts towards an effective and efficient criminal justice system, 2011 at 54.}\]
imprisonment to fines could be vulnerable to abuses\textsuperscript{28}. Thus, it needs strict regulation and follow up that ensures, among others, meaningful participation of victims.

\subsection*{5.2.3 Types of Informal `Plea bargaining`/Negotiated Justice}

Sometimes, prosecutors approach and deal with suspects so that the latter plead guilty or cooperate to provide information/evidence or fulfil other conditions (returning the misappropriated thing, paying compensation, fines etc) and in return the prosecution drops charges, charges less aggravated offences or promises to propose sentence mitigation at trial or suspension of penalties (\textit{begedeb melkek}). According to prosecutors, resort to plea bargaining is made only where it is difficult to obtain evidence from other sources. But, nothing prevents them to negotiate without making any effort to investigate the crime.

\subsubsection*{5.2.3.1 De-penalization/Diversion}

This informal practice involves a settlement whereby a defendant agrees to admit guilt and fulfil other conditions such as paying compensation to victims, payment of fine, returning the property / money misappropriated in exchange for the prosecutor agreeing to abandon the prosecution or dismiss the case. To the extent that it involves an admission of guilt, negotiation and exchange of concessions, this practice resembles plea bargaining, though very loosely. More than plea bargaining proper however, it is very close to what the French call \textit{composition}\textsuperscript{29} or what Germans call \textit{Dismissal}\textsuperscript{30}. However, this informal practice differs from the German/ French variant in three respects: that it is not limited to less serious crimes; that it is not formal; that it does not involve court`s approval in most cases. In contrast to plea bargaining the practice benefits the defendant most as it involves no guilty verdict and thus no criminal liability. Moreover, by avoiding trial it could serve as

\textsuperscript{28}In fact there are complaints in this regard. Interview with Judge 03, held on 02/04/12.

\textsuperscript{29}This involves the prosecutor offering the defendant the option of diverting cases to a settlement requiring the latter to admit guilt and fulfil other conditions such as paying compensation, paying fine, returning property etc in exchange for dropping of prosecution /charge.

\textsuperscript{30}This is a procedure which allows the prosecutor to terminate proceedings and dismiss the case, with the consent of the court, in certain offences of little significance (miscarriage of justice) provided that the accused agrees to satisfy certain conditions, usually payment to charities or to the state.
a form of caseload management for the state. That said, however, the practice involves many downsides. What is troubling most is not only the fact that it is informal and thus unregulated but also it involves impunity, even in most serious crimes.

In Germany plea bargaining proper is believed to have emerged from this kind of practice. In Ethiopia though it may not have such effects as plea bargaining is already introduced by reforms, only time will tell us its future impact on the formal plea bargaining or its very continuity.

5.2.3.1.1 Forms of De-penalization

De-penalization takes many forms. These include: payment of compensation to victims, payment of fine, returning over the property / money misappropriated, in exchange for the prosecutor agreeing to abandon the prosecution or dismiss the case.

a) Returning over the misappropriated property / money

This practice applies to crimes of breach of trust for the most part, and sometimes in crimes of drawing of cheque without sufficient cover, corruption etc. In the former, where the offender confesses and returns the object s/he misappropriates, proceedings will be terminated and the case will be dropped. This practice is common especially in those crimes of breach of trust committed around market areas (in particular around the giant Merkato), where a person misappropriates a property s/he agreed to transport, traditionally known as shiblele. My fieldwork suggests that prosecutors tend to vindicate this practice from two angles: First, it is taken as a matter of necessity - they point to the difficulty of getting witnesses in market areas which involve people from every corner of the country. Moreover, they believe that this practice is justified under Article 675(3) of the criminal code which provides that intent to misappropriate is presumed if the offender is unable to repay or produce the thing. From this article, some prosecutors imply that it is

31 See chapter one, some selected variants of plea bargaining: a brief comparison.

32 This provision reads: 1) Whoever, with intent to obtain for himself or to procure for a third person an unjustifiable enrichment, appropriates... a thing or a sum of money which is the property of another and which has been delivered to him in trust or for a specific purpose, is punishable... 3) The intent to obtain for himself or to procure for a third person an unjustifiable enrichment shall be presumed where the criminal is
legitimate to drop charges if the offender returns the property or money s/he misappropriated. This, however, gives a wrong impression that returning the misappropriated property or money absolves one from criminal liability. The presumption of intent is inserted for evidentiary purposes thus once the defendant refuses to return the thing, the crime materializes and returning the thing thereafter cannot cancel the offence. In this sense the justification appears less convincing.

Various arrangements of dropping of charges exist in crimes of drawing of cheque without sufficient cover and crimes of corruption. In case of the former, the prosecutor and the suspect workout an agreement that the latter pays the victim what he owes and in return the prosecutor abandons prosecution. Similarly, prosecutors negotiate with suspects on crimes of corruption that involve not more than Birr 50, 000 (about £1800) and attract up to 10 years of imprisonment. Where the latter is willing to pay back the money s/he embezzled, the case will be dropped. This kind of settlement, which is based on BPR reforms, is commonly used by the anti-corruption prosecutors. Normally this settlement applies at the investigative stage only the specified crimes. But sometimes it is made use of at the trial stage even in crimes involving over Birr 50 thousand and may result in the termination of the trial and abandonment of the case by prosecutors. For instance, in one case, several defendants were accused of corruption involving the grant of Birr 89 million loan without collateral, out of which 4 million was collected by one of the defendants. While the case was pending at trial, the prosecutor and the latter defendant struck a deal in which the defendant returned over the collected money immediately and in return the case was withdrawn. Such disguised withdrawals are done with the court being unaware of the motive behind of it.

unable upon call, to produce or repay the thing or sum entrusted, or at the time when he should have returned it or accounted there for.

33 Interview with Prosecutor 11, held on 28/03/12. See also the BPR reform.

34 The Anti – Corruption Commission has established its own prosecution wing.

35 Moges chemere et al Vs Federal Anti corruption commission, File No 24336, 28 /09/ 98 EC.

36 On problems associated with withdrawal of cases, see the section on the role of the judge below.
From the foregoing, the following can be said by way of conclusion. Though victims seem to be better off in getting their money or property back, the larger picture of public interest i.e. seeing offenders account for their wrongs remains unaddressed. In this sense, such practices could sustain and encourage impunity. Moreover, the poor quality of investigation in the criminal justice system, investigators’ limited ability to collect evidence and produce them mean one cannot be sure whether the practice serves its intended purposes. Conversely, it may promote laziness among investigators.

\[b) \textit{Payment of compensation to the victim}\]

This settlement routinely applies to crimes attracting simple imprisonment i.e. not more than 3 years of imprisonment. Recognized by the BPR reform, this practice requires courts’ approval. But still it remains informal as the BPR reform itself lacks any formal recognition\(^{37}\). The prosecutor works out a settlement between a defendant and a victim on crimes that attract simple imprisonment. S/he actively participates by encouraging and bringing the parties to the table. If successful, the settlement involves the defendant admitting guilt and accepting responsibility, and agreeing to pay compensation to the victim. Even if such an arrangement is intended to be applied only to less serious crimes, sometimes serious crimes such as grave wilful injury (which is punishable up to 15 years of rigorous imprisonment) are settled just by payment of compensation to the victim. Even worse, there are complaints that prosecutors sometimes use this practice for improper personal gains (corruption). Although absent a comprehensive empirical evidence on this particular concern, prosecutions and convictions of some prosecutors seem to lend support for it. (For more on this, see chapter 7).

That said, on top of termination of prosecutions, paying of compensation to victims serves as a sentence mitigation ground. In this sense, the practice squarely fits into the law\(^ {38}\).

\(^{37}\) On the status of such reforms, see chapter 3.

\(^{38}\) Article 82 (1) (e) of the Criminal Code provides this as one factor which courts must consider to mitigate penalty.
c) Payment of Fine

Sometimes prosecutions are abandoned or charges are dropped where a defendant accepts responsibility and agrees to pay a fine. For instance, in one case involving real estate developers accused of crimes relating to land abuse that carry a maximum of 15 years of imprisonment, prosecutions were abandoned in return to the suspects accepting responsibility and agreeing to pay a fine of up to Birr 15 million each (roughly £0.55 million). This diversion to administrative measure (fine) was justified on such grounds as the developers' current contribution to the real estate business and government's interest to work with them in the future, their good previous record, the fact that the business is new, among others.

This practice does not squarely fit into the notion of plea bargaining, though it shares several elements with it. Notably, the fact that it involves negotiations and exchange of concessions between the government and the suspects makes it close to plea bargaining. On the other hand, it also resembles an exercise of prosecutorial discretion - abandoning prosecution in the public interest. However, absent any clear standard on this, public interest is a fluid concept open to mean everything. Further, the seriousness of the crime and the scale of the problem related to land abuse - that utterly requires strict regulation as opposed to leniency, its impact on the community, and the exchange of concessions mean the practice is more akin to plea bargaining than the former. Thus, albeit, in its crude form, the practice can be taken as a form of plea bargaining.

5.2.3.2 Charge bargaining

Where a defendant pleads guilty, one or either of the charges initiated may be dropped (horizontal bargaining) or less aggravated charges are instituted (vertical bargaining). In the latter case, the new sentencing manual which classifies crimes into different offence levels depending on their gravity is used as a bargaining chip by some prosecutors. Where the defendant agrees to plead guilty, prosecutors institute a reduced charge by picking

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39 This case was aired on state owned media, ETV. It was also reported by some newspapers such as The Reporter. My presentation of the facts is therefore based on the information I obtained from these media.
lower offence levels\(^40\). This works, for example, in negligent homicide cases (where such facts as degree of negligence, use of weapons, victim’s contribution, and the offender’s professional duty determine offence levels). Certainly, in the advent of formal plea bargaining such practices are destined to become daily routines.

Moreover, using the overlap created between the copyright law and the criminal code, a form of charge bargaining applies in crimes involving copyright and trademark violations. The copyright law, which prescribes from 5-10 years of rigorous imprisonment as opposed to 1-10 years of imprisonment of the existing criminal code, is used as a bargaining leverage\(^41\). Thus, defendants who cooperate to supply information on co-offenders are charged under the criminal code so that the minimum sentence will be as low as one year, while the uncooperative ones are charged under the criminal code and face a minimum of five years of imprisonment. To be sure, with the formalization of plea bargaining these types of leverages might be frequented. At worse the possibility of using such overlapping laws, as it works elsewhere\(^42\), to overcharge defendants and induce them plead guilty to a lesser charge, cannot be ruled out. In fact, even without plea bargaining, overcharging - be it horizontal or vertical is not something uncommon in Ethiopia. This is particularly evident in high profile and politically sensitive cases-cases that attract public attention\(^43\). Certainly, plea bargaining, especially the unlimited variant, provides a good atmosphere for overcharging to intensify.

It is axiomatic that the mental element of an offence whether it is committed with intention or by negligence determines the seriousness of the crime and the punishment. This serves another bargaining chip for prosecutors. While cooperating defendants are treated

\(^40\)The manual provides several offence levels for crimes. Albeit with its own merits, this provides the prosecutor with massive latitude to negotiate along the continuum.

\(^41\)Normally one of the principles of interpretation – \textit{the special prevails over the general} should be used to decide which law to apply. But efficiency interests seem to prevail here.

\(^42\)This is true of the USA. See Richard L. Lippke, supra note 19 at 222.

\(^43\)This was the case for example in Demissew Zerihun vs. the Federal public prosecutor where the charge (which involves an acid attack of a woman) was inappropriately bifurcated into two counts: \textit{bodily injury} and \textit{attempted homicide}. 150
leniently and charged with negligent crimes, uncooperative ones would face serious charges that are based on intention. This applies for example in copyright violation cases. In one case, vendors of forged music CDs who provide information about the distributor were charged with negligent violation of the right while those who refuse to tell their supplier were charged with intentional violations. As a result, while the former face only a maximum of 5 years imprisonment the latter could be punished with a maximum of 10 years.

5.2.3.3 **Sentence/ Fact bargaining**

This practice involves the prosecutor agreeing not to invoke aggravating circumstances, to invoke extenuating circumstances, not to oppose proposals by the defence or working on the suspension of the sentence.

Prosecutors and defendants agree on the suspension of a penalty where the latter pleads guilty and reconciles with the victim, usually upon payment of compensation, or where s/he cooperates by supplying information in the prosecution of `the bigger fish`. For instance, in one trademark violation case involving the sale and distribution of forged cosmetics products, the prosecutor proposed the suspension of the sentence to a defendant having lesser participation and willing to cooperate in providing information to help locate and prosecute the main distributor. The court accepted the proposal and sentenced the defendant with one year imprisonment and suspended it for 2 years. Here, the court seems to be involved in the practice. Similarly, suspension of sentence applies in crimes of negligent homicide (543 (2)). Where the defendant and the victim settle their case with the former accepting responsibility and compensating the victim, the prosecutor proposes for suspension of the sentence. The trial judge often accepts such settlements. However, there are times where the judge expresses his/ her doubt over the settlement and seeks the victim’s consent (who is the prosecution witness). Suspension of sentence also works in drawing of cheque without sufficient cover (Article 693 of the Criminal Code).

44 Interview with Prosecutor 09, held on 22/03/12.

45 Interview with prosecutor 09, held on 22/03/12.
To be sure, suspension of sentence is designed to assist the rehabilitation of the offender\textsuperscript{46} and not to reward cooperating defendants. However, from the foregoing one can observe that it is applied to induce guilty pleas and reward cooperating defendants. This is so even if the conditions to grant suspension of penalty are not fully satisfied\textsuperscript{47}. In this respect, some courts seem to uphold the informal practice to encourage cooperating defendants so that the system benefits from efficiency\textsuperscript{48}.

It is also a common practice that prosecutors do advise and induce defendants to plead guilty. One prosecutor points out\textsuperscript{49}: ‘if I believe that the defendant has committed the crime, I will encourage and advise him to plead guilty. But if he insists I will not pursue it since doing so may involve a responsibility’. This sort of advice and encouragement is routinely offered by prosecutors during investigations. The advice is often too generic - ‘If you plead guilty you will get a sentence discount’. Though common in other ordinary cases, advices and inducements particularly apply in RTD (Real Time Dispatch) cases which involve flagrant crimes and strong cases\textsuperscript{50}. Thus, where the defendant refuses to plead guilty or to confess, prosecutors often attempt to induce him/ her with promises of sentence mitigation. Apparently, as apply in RTD cases, the informal practice appears to be grounded on some evidence- that either the defendant is red-handed or evidence is available. In this sense, plea bargaining defendants seem to be relatively better protected. But still, such issues as the reliability and sufficiency of evidence remain a concern and could taint the process. There is no guarantee whether confessions /guilty pleas are free from coercions and other improper investigative methods (see below).

\textsuperscript{46} See Article 190 of the Criminal Code.

\textsuperscript{47} On the requirements of suspension of penalty see Article 191 of the Criminal Code. For example one of the conditions to suspend a penalty relates to the seriousness of the punishment. Thus, it is impossible to suspend a penalty if the crime is punishable with more than three years of imprisonment. This requirement is often bypassed.

\textsuperscript{48} Of course, the trial takes the normal route. Largely, the efficiency advantage comes from the investigation stage where defendant’s cooperation spares time and resources of the investigative organs. It also spares prison resources.

\textsuperscript{49} Interview with Prosecutor 07 held on March 19, 2012.

\textsuperscript{50} Interview with Prosecutor 10, held on 28/03/2012.
Apparently, the Ethiopian sentencing structure wherein guilty plea serves as a sentence mitigating ground seems to invite plea inducement practices. However, this should not suggest that these practices are lawful—nowhere the existing criminal procedure code allows investigative officials to induce guilty pleas; conversely the code proscribes any inducement, promise, and threat to obtain confessions\textsuperscript{51}.

To conclude, in addition to sentence and charge concessions, defendants draw some ancillary benefits from the informal practice. For instance, by avoiding full scale trials they are often convicted under expedited trial procedures thereby sparing their time and resources. Nonetheless, this should not mean that defendants always stand to benefit from the practice. Indeed, in pre-charge bargaining where the suspect is usually put in the dark as to the nature of the charge, one cannot expect fair negotiations and outcome. The problem of fairness becomes even plainer when plea negotiation is made at the investigative stage with unrepresented defendants.

More ominously there is no effective guarantee against investigative organs’ (prosecutors included) possible uses of coercion (be it psychological or physical), threats and other improper conducts to obtain confessions. Reports by Non-governmental and intergovernmental organs\textsuperscript{52} of the use of such coercive techniques in Ethiopia mixed with the paucity of safeguards mean the possibility is wide open (See chapter 3 and 7, the police).

\textbf{5.2.3.4 Informal Cooperation Rewards}

Cooperation rewards or agreements are formally recognized in Ethiopia to a limited scope\textsuperscript{53}. This applies to crimes of corruption and terrorism. Here, the focus would be on its

\textsuperscript{51} See Article 31 of CPC.

\textsuperscript{52} See for example Reports by UN Committee Against Torture (2010) (expressing its deep concerns over “the numerous, ongoing, and consistent allegations” on “the routine use of torture”); Amnesty International Annual Report 2013 available at: http://www.amnesty.org/en/region/ethiopia/report-2013, June 25/14. (Reporting that during interrogations detainees are tortured, ill-treated and forced to sign confession documents).

\textsuperscript{53} For some general observations see cooperation agreements above.
informal application beyond these crimes. This involves informal arrangements where an accused who partakes in a criminal activity agrees to provide testimony or information against accomplices in exchange for immunity (and thus conversion to a status of a witness), reduction in sentence or charge or suspension of sentence. While generally this informal practice applies for almost any crime, fieldwork sources indicate that it is common in such crimes as homicide, robbery, copyright and trademark violations, fraud, human trafficking, theft, breach of trust and harbouring cases. From the forgoing, one can observe clearly that the concessions a cooperating defendant obtains take two forms: immunity and charge or sentence reductions.

The first dimension of cooperation rewards involves switching the suspect to a status of a witness. In this practice, usually suspects with a lesser participation enjoy the benefit of immunity in return for testifying against their accomplices. But sometimes, defendants with a higher degree of guilt benefit from this arrangement (see below). The practice covers crimes ranging from very serious ones such as first degree homicide to simple theft crimes. In one homicide case a employee of a victim who, for a payment, participated in the crime by arranging things for principal offenders (among others, by leaving the victim’s premises open late at night), was granted immunity in return to testifying against the principal offenders. Accordingly, the latter were convicted of life imprisonment. Similarly, one defendant who harboured stolen cement was converted into the status of a witness and benefited from immunity in exchange for testifying against those who stole the cement.

The second aspect of cooperation rewards involves sentence or charge concessions. Merely because prosecutors believe that they lack the mandate to extend immunity, no matter how vital information they provide, some defendants are made only to benefit from sentence mitigations, suspension of sentence or lowering of charges. In this sense, the practice where it involves guilty pleas includes plea bargaining proper.

54 Interview with Prosecutor 05, interview held on 07/05/12.

55 Interview with Prosecutor 07 held on March 19, 2012.
These trends clearly show that informal cooperation rewards treat defendants so inconsistently. Similar cases are treated quite differently solely depending on the prosecutor’s conception of her/his discretions. Serious inconsistencies also arise in the prosecutors’ decision to convert suspects to the status of a witness. My interviewees (judges and prosecutors) suggest that sometimes suspects with a higher degree of participation and guilt are converted into witnesses to prosecute co-offenders with similar or even lesser degree of guilt. Some justify this in criminal organizations. Those up in the ladder of criminal organization know more about the operation of the organization and provide valuable information to prosecute members and dismantle the organization. But, it is simply unjust to treat suspects with higher degree of guilt more leniently than those with less participation and degree of guilt.

The above inconsistencies often raised at trial by defendants, concern judges as well. But judges believe that they lack the mandate to review the prosecutor’s decision whom to prosecute and whom to call as a witness. Nonetheless, by virtue of the courts’ duty to enforce human rights provisions of the constitution, this can be reviewed, for example, against selective prosecutions or discriminations. However, as will be shown in chapter 7, the culture of judicial review is very weak in Ethiopia. Thus, part of the problem can be explained by the fact that the practice is subject to neither external (judicial) nor internal review. Absence of clear guidelines that provide standards for converting cooperative suspects to witnesses or granting other concessions also adds to the problem. But this should not suggest that the formalization of the practice cures such problems altogether. Apart from inconsistencies that emanate from their application, cooperation rewards are characterized by inherent inconsistencies. Put simply, while those who cooperate benefit from substantial concessions, those who refuse face harsh treatments. It is also inconsistent with the purpose of punishment in that sentences are not proportionate with the seriousness of the crime or degree of guilt.

56 Arguably, the witness protection proclamation can be of limited avail here. See above cooperation agreements. Nonetheless, the envisaged protections are yet to be enforced. Enabling Regulations and Directives are yet to be issued.
Another concern with cooperation rewards in Ethiopia is that suspects are not assisted by a lawyer nor are they provided with any protection against retaliations\textsuperscript{57}. They enter into such arrangements without the help of a lawyer who can advise them on the potential advantages and risks of such agreements\textsuperscript{58}. Once they perform their part there is no guarantee that the government honours its promise. This is particularly true of promises of sentence concessions whose realization come after the defendant gives testimony or the evidence\textsuperscript{59}.

\textbf{5.3 The Role of Judges}

Most of the above arrangements of informal plea bargaining require neither the involvement of courts nor specific actions from them. Thus, in the majority of cases the practice remains hidden and unknown to judges; there is no judicial regulation of the practice. However, my interviews with judges reveal that some of them know that the practice is going underground while others just suspect. This is inferred from the following: the conduct of the parties in the course of the trial- abrupt withdrawal in a way that invites suspicion, lenient recommendation from the prosecutor in particular on sentence, tendering of instant guilty pleas, co-defendants openly challenging the propriety of the deal with a co-offender of higher degree of guilt or the truthfulness of the testimony, among others. In this respect one judge\textsuperscript{60} shares his experience on instant guilty pleas as:

\textit{In one negligent homicide case, the moment the defendant, his counsel and the prosecutor appeared, the defendant pleaded guilty instantly. In so doing the defendant was so confident.}

\textsuperscript{57} Indeed, the witness protection proclamation provides procedural and non-procedural protection against retaliations. The former includes the protection of anonymity, trial in camera, shielded testimony through the use of screen, curtain or two way mirror. While the latter includes relocation, change of identity, physical and surveillance protection. Yet, as long as the practice remains informal, such formal protections cannot be invoked. Even assuming the protections can be invoked, they are yet to be enforced.

\textsuperscript{58} With his /her knowledge and expertise, an ethical defence attorney enables the defendant evaluate the likely output of the trial, the value of the information, the nature of the respective obligations of the parties, whether the prosecutor is trusted, etc.

\textsuperscript{59} Such guarantees as specific performances, insertion of a clause that bars the prosecutor from using the information once the agreement fails, among others are often used to protect the defendant in other jurisdictions.

\textsuperscript{60} Interview with Judge 03, held on 02/04/12.
He showed no fear unlike others. Then immediately the prosecutor requested the court to enter a verdict of conviction of 'simple level' negligent homicide though the circumstances under which the crime was committed warrants a 'middle level'. The defendant was convicted based on this proposal. Later I have learned that the attorney and the prosecutor were former colleagues, reinforcing my suspicion that some sort of negotiation was behind this. The belief that such deals may attract disciplinary sanction keeps them underground.

This judge knows or at least suspects that plea bargaining was going underground. Yet, he seems to implicitly endorse it by accepting the prosecutor's proposal (simple offence level) while it was in his mandate to refuse this and insist on proceeding with a middle level homicide.

Further, judges learn the practice of informal cooperation agreements from the way the testimony is tendered or from co–offenders’ frequent and open objection of the testimony of their accomplice. Here, it is interesting to see the response of courts to such objections. In one case, the Cassation Division of the Federal Supreme Court rejected such objections and upheld the practice reasoning that no law prohibits the prosecution from using cooperation agreements. Likewise, my fieldwork reveals that judges often turn down the objections and routinely accept the testimonies. However, there are variations on the weight attached to the testimony and the extent to which the witness is examined. While some opine that they vigorously examine the witness, others simply attach lesser weight to the testimony; usually taking it as a collaborative evidence. Thus, unless corroborated by another evidence or witness, the latter judges suggest that they often dismiss cases which exclusively rely on the testimony of such cooperating witness. Apparently, this seems to contradict the witness protection proclamation which proscribes the invoking of witness’s protection (cooperation agreements included) as a ground to undermine the credibility of

61 Witnesses tell accounts that create clear impressions of their participation in the crime. One judge told me his experience: 'In a crime of arson which was committed late at night in a place that one cannot reasonably expect the presence of the witness unless s/he is partakes in the crime, the witness unequivocally testifies the commission of the crime'. Interview with Judge 01, held on 08/052012.

the testimony\textsuperscript{63}. Yet, this stance of judges, albeit cannot avoid the concerns involved in the practice, can mitigate it.

That said, this should not suggest that such testimonies are treated cautiously by all judges. There are judges who exert no extra scrutiny or attach on them no lesser probative value than ordinary testimonies. Simply such testimonies are treated like ordinary testimonies. In this case, the concerns would be quite pronounced (see below).

Abrupt withdrawal of cases is another ground to suspect plea bargaining is behind the curtain. It is important to note however that such moves of the prosecutor are not treated alike by judges. While some simply accept any withdrawal, others require a letter of confirmation from the Ministry of Justice. Indeed, for absence of clear authority particularly on the role of the court, withdrawal of charges has been a vexing issue\textsuperscript{64}. Charges are withdrawn not only for absence of evidence or disappearance of the accused, but also for tactical reasons—i.e. to circumvent the principle of double jeopardy\textsuperscript{65}. This needs to be resolved. In any event, to the extent judges simply accept withdrawals anytime, the possibility of underground plea bargaining appears very high.

\textbf{5.3.1 Guilty plea Advice by Judges}

More than one-third of criminal bench judges in my sample do advise defendants whenever they are in a dilemma to plead guilty or not. Such judges explain to defendants the advantages and disadvantages of pleading guilty. The common advice being: \textit{If you plead guilty you will have your sentence mitigated but at the same time you will lose your right to appeal on the conviction. You can still appeal on the sentence.} Such advice, if done impartially, could benefit defendants who in most cases stand trial unrepresented. It may

\textsuperscript{63} See Article 26 of the witness protection proclamation, supra note 13.

\textsuperscript{64} Moreover, there are practical problems on the grounds of withdrawal and their effects. In practice, prosecutors withdraw charges simply for absence/disappearance of evidence (witness disappearance). This is controversial. Defence Attorneys often object this and argue that in such instances the case should be dismissed. But courts categorically reject this.

\textsuperscript{65} This is the case where the prosecutor learns after the hearing of evidence that his case is weak. Judges’ response to such withdrawals seems uneven. While some judges unconditionally reject this kind of moves, others simply accept it for alleged lack of authority.
also spare time, resource and energy of the court and the parties. Yet, given the judge`s strong incentives in ending cases with guilty pleas\textsuperscript{66}, there are concerns that the impartiality of judges may be affected and judicial bargaining may crop up thereby affecting the integrity of defendants` plea decision. Put simply, judges could well be tempted to induce defendants to plead guilty by promising sentence mitigations. Indeed, with the institutionalization of plea bargaining this is highly probable.

5.3.2 \textit{Time of Pleading/Late Guilty pleas}

This subsection tries to investigate such issues relating to late guilty pleas as: whether it is accepted by judges, if accepted, for what reason and at which stage, its impact on the ongoing trial and the sentence. Judges` approach to late guilty pleas is divided. Some of them argue that the appropriate time for pleading guilty and deriving the benefit thereof, is before the prosecution opens its case and proposes its evidence i.e. when the presiding judge asks the defendant to plead. Such judges reinforce this argument by emphasizing the phrase under article 82(1) (e) of the criminal code which says \textit{`... tekeso fird bet bekerebe gize...yamene\textsuperscript{67}.} To benefit from sentence mitigation, the argument goes, the defendant should plead guilty when charged and appeared before court. Any guilty plea made subsequently even just before the commencement of the hearing of evidence is unacceptable. Even if the defendant pleads guilty, these judges assert that they will proceed with the hearing of evidence and evaluate the case only based on the prosecution evidence. It follows from this that should the prosecution evidence fail to establish guilt to the required degree, defendants will be acquitted despite pleading guilty. To be sure, it is difficult for such judges to remain unaffected by the guilty plea while weighing the evidence.

\textsuperscript{66} In addition to clearing of caseloads, the performance evaluation system in place, which is the number of cases decided per month, provides judges (courts) strong incentive to induce guilty pleas.

\textsuperscript{67} The article reads: The Court shall reduce the penalty, within the limits allowed by law (Art. 179), in the following cases: a) ... b) ... c) ... d) ... e) when he manifested a sincere repentance for his acts after the crime, in particular by affording succor to his victim; recognizing his fault or delivering himself up to the authorities, or by repairing, as far as possible, the injury caused by his crime, or when he \textit{on being charged}, admits every ingredient of the crime stated on the criminal charge.
Here it is interesting to know why judges refuse to accept late guilty pleas. The reasons include: lack of procedure which accommodates such cases\textsuperscript{68}, the fear that guilty pleas could be abused (guilty pleas could be exchanged for money – there are indeed cases of this sort), that such guilty pleas are likely to be purely tactical (with no repentance) and thus do not deserve sentence mitigation. While most of these reasons seem to be valid to weigh late guilty pleas on case by case basis, they are, nonetheless; insufficient to exclude late guilty pleas altogether. It is not in line with the requirements of efficiency, either.

On the other hand, some of the judges accept guilty pleas any time before judgment and regardless of the time (stage) of pleading guilty, the defendant stands to benefit a flat sentence mitigation, \textit{citrus paribus}. I believe that similar sentence treatment to defendants irrespective of the time of pleading guilty could discourage earlier guilty pleas and promote tactical moves thereby wasting time and scarce resources. Simply put it is liable to result in \textit{cracked trials}. Indeed, there are experiences of such tactics wherein defendants plead guilty the moment the prosecution witness are called to testify (after making sure that witnesses have appeared and the case is proceeding) or in the middle or at the end of the hearing of prosecution case. Thus, distinction of benefit should be made depending on the time of pleading guilty.

5.4 Conclusion

While it is true that the informal plea agreement may help reduce caseloads to some degree, it may have many undesirable consequences. In general, on top of being illegal, the practice signals a change of paradigm that the need for efficiency is taking primacy over requirements of fairness. It also results in a dual system: formal and informal\textsuperscript{69}. Absent any standard that guides the use of informal procedure over the formal one, pure administrative convenience and efficiency dictates the system. Perhaps, this is likely to end

\textsuperscript{68} While the criminal procedure code under article 135 permits the amendment of \textit{guilty plea} to that of \textit{not guilty plea} at the courts own motion, it remains silent on the reverse.

with the formalization of plea bargaining\textsuperscript{70}, and give way to system duality in a different sense: plea bargaining and trial.

Furthermore, the informal practice has many specific upshots. First as a covert practice which does not appear on the record, the informal agreement is not enforceable. Defendants have no avenue to claim any remedy should the prosecutor breach the agreement. The practice is subject to neither judicial review nor internal reviews within the prosecution structure. It is simply left to the integrity of prosecutors. In fact, prosecutors are well aware that breaches will backfire against securing future confessions. Nonetheless, still defendants know that it is up to prosecutors to honour the informal agreement or nothing comes out as a redress should the former renege. This leaves them in uncertainty, and may at times discourage them from confessing on their own will to simply invite pressures and threats from investigative organs whose investigation tends to rely on the suspect as a source of evidence. Although this concern may be shared by any informal plea bargaining in general, the existing conditions in Ethiopia in that the particulars of suspects (poor and uneducated), absence of procedural safeguards such as legal counsel at the investigative stage/ police interview and weak occupational culture of investigative organs mean the concerns are more worrying in Ethiopia.

Absent any regulation, the informal practice cannot be immune from prosecutorial abuses either. It is possible for prosecutors to give false hopes and induce guilty pleas; discriminate against defendants on unwarranted grounds or even engage in corrupt practices. Indeed, in some regions there are complaints of this sort\textsuperscript{71}. To a certain extent the conviction of some prosecutors of crimes in relation to the use of various forms of de-penalization lends some support to this.

Further, the informal agreement is made at the early stage of the investigation with unrepresented suspects before they are formally charged – leaving them unaware of the

\textsuperscript{70}But there is no guarantee that plea bargaining would apply formally, following proscribed procedures. For instance, though police bargaining is not recognized, with some practices present in this regard, the possibility looms large. See chapter 6 and 7.

\textsuperscript{71}In some regions (I preferred it to be anonymous) there are complaints of corruptions in plea bargains.
nature of the charge against them. This makes a good synergy with the paucity of pre-trial guarantees to produce unfair, if not inaccurate outcomes. In the circumstances, suspects have no/little room to bargain; rather they would simply accept what is proposed to them and confess. Successive investigation-driven remands which are quite common in this country could add to the problem. Even worse the process could be tainted by interrogations which involve coercive techniques as threats or psychological torture, if not physical torture\textsuperscript{72}. Thus, the agreement is likely to be based on an uninformed, if not involuntary, admission of guilt. This contrasts defendants’ rights and involves the risk of wrongful convictions.

The practice could also be used to circumvent a thorough investigation of crimes. Even though prosecutors claim that they use the informal plea bargaining as a last resort, nothing stops them from using it without making any reasonable effort to collect evidence independent of the accused. Their investigation experiences-the fact that charges have been instituted without sufficient evidence and preparation lend support to this\textsuperscript{73}. Besides, it is much simpler and cost effective to induce guilty pleas than finding evidence elsewhere. Perhaps the only restraint would be the rare event that guilty pleas need collaborative evidence to result in convictions\textsuperscript{74}.

Moreover, some forms of the practice such as conditional dropping of charges invite impunity. This is troubling as it involves even the most serious crimes. The practice could also encourage laziness among investigative organs. Instead of conducting investigation thoroughly and prosecuting the crime, prosecutors may simply approach defendants so that they fulfil some conditions (returning the misappropriated thing, paying compensation etc) and face no prosecution. However, this should not suggest that there must be no room for such settlements. In the interest of efficiency, the practice should be formalized with strict regulation only to less serious crimes.

\textsuperscript{72} See for example Reports by UN Committee Against Torture, supra note 52; Amnesty International Annual Report 2013, supra note 52. See also Chapter 3 and 7, the police.

\textsuperscript{73} See chapter 6 for further discussions on this.

\textsuperscript{74} Despite guilty pleas courts may at their own motion demand the hearing of evidence. See Article 134 the CPC. Nonetheless, this appears very rare.
In addition to the moral objections often raised, the practice of cooperation rewards sounds a risky business for defendants in Ethiopia. Defendants enter into such arrangements in the dark. They are not assisted by a lawyer. No protection is provided against any retaliation by accomplices. As an informal practice, it is not enforceable. No guarantee exists against the prosecutor reneging on the agreement. All of these mean that defendants are leaping into the unknown while entering into cooperation agreements.

Last but not least, most of the criticisms levied against the formal plea bargaining apply to the informal practice as well. For instance, like the formal one, it treats similarly situated defendants differently; it treats defendants leniently or allows them escape punishment.

To recap, all these undesirable consequences of informal plea bargaining are not just theoretical concerns rather they are real ones. However this is not to suggest that all of them are unique to Ethiopia. Some of them are general risks of informal plea bargaining wherever it operates. Yet the Ethiopian context—material conditions and the paucity of procedural safeguards makes the problems formidable.

That said the introduction of plea bargaining into Ethiopia formalizes most aspects of this covert practice. This is done by default and not by design as the reformers are not even aware of the informal practice let alone able to formalize it; nor is there any attempt to investigate whether plea bargaining is practiced in any form. Simply put, though proceeded by informal plea bargaining and other formal and informal variants of negotiated justice, the Ethiopian variant of plea bargaining has not developed through practice. As with the Italian experience, it is entirely a product of a reform which is inspired by adversarial jurisdictions. As a result, as it stands now, the informal plea bargaining is denied any chance of influencing the formal version officially. This, however, should not mean that the possibility is totally closed. It can still affect the formal version positively or otherwise as actors are already predisposed to the practice to a certain degree. In theory, the possibility

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75 Cooperation rewards/agreements are often objected on such grounds as they reward betrayal, yield inconsistent sentencing, produce unreliable evidence etc.

76 For the discussion of some of these concerns, see Jenia I. Turner, Plea bargaining Across Borders (Hiram E. Chodosh ed., 2009); Regina Rauxloh, supra note 69.
of revisiting the proposed law on plea bargaining against the informal practice cannot be ruled out either. In principle, the formalization could help to make the practice more transparent and to be carried out following prescribed procedures. Nonetheless, this is easier said than done. The version of plea bargaining adopted by Ethiopia interacted with local conditions can insulate any regulation\textsuperscript{77}.

\textsuperscript{77} For details, see chapter 6 and 7.
Chapter Six: The Inherent Flaws of Plea bargaining in Context

Building on the preceding chapters, this chapter investigates the viability of the Ethiopian variant of plea bargaining focusing on the extent to which the inherent flaws of plea bargaining are mitigated/addressed. This is informed by justice actors’ perceptions and to a limited scope by the practice of informal plea bargaining.

6.1 Major Theories of Legal Transplants

It should be noted from the outset that this section attempts only to briefly outline the debate over legal transplants. To begin with, the possibility and the extent to which legal rules can be transplanted across different cultures has been the subject of debate for many years now. This debate can be broadly compartmentalized into two theories: culturalists and transferists. While the former contend that the success of a legal transplant depends on the culture of origin as well as the receiving culture, the latter claims that law is independent from culture, and thus can be transferred transcending different cultures. For transferists what is important is not the context of the origin, rather the legal rule itself and the conditions of the receiving state. In what follows, I will briefly summarize the works of one prominent theorist from each, as being indicative of each approach.

6.1.1 Culturalists

Distinguished culturalists like O.Kahn-Freund advance the proposition that law is closely intertwined into its context— that law is inseparable from its purpose or from the circumstances in which it is made\(^1\). While O.Kahn-freund does not advocate the complete non-transferability of legal rules, he makes out degrees of transferability along the continuum where at one end legal rules can be comfortably transferred, and at the other end transplants involve high risks of rejection. According to him rules which are `designed to allocate power, rule making, decision making…policy making’\(^2\) fall under high risk of rejection. Moreover, he has identified several factors that affect the success of legal transplants along the continuum.

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\(^2\) Ibid, at 17
Building on the environmental, social and political factors insinuated by Montesquieu, Kahn-Freund emphasizes political factors. He argues that determining the viability of a legal transplant involves two steps: identifying the relationship between the legal rule to be transplanted and the socio-political structure of the donor state and then determining how closely related are the socio-political environments of the donor and the receiving state. In such an exercise, he suggests the following factors/yardsticks for examination: the macro-political structure of the donor state (democracy vs. dictatorship); the distribution of power within the political system; and the role played by organized interests. Thus, where a legal rule is closely connected to the socio-political environment of the donating state, legal transplants will be viable only if the two states have closer socio-political environments.

6.1.2 Transferists

A renowned advocate of this theory, Alan Watson posits that a legal rule is autonomous, with a life of its own, having no inherent relationship with the society in which it operates. In contrast to culturalists (Khan-Freund), Watson downplays the difference between the donor and the recipient country. For him successful transplant of legal rules can be made... even where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system. However, he does not deny the relevance of the context of the recipient jurisdiction. According to him the rule itself as an idea-(that a foreign rule will be adopted not because it was the inevitable consequence of a particular social structure, but because it was known to achieve desired benefits or goals), and the conditions in the receiving state (the political, social, or economic circumstances existing in the recipient state) are crucial for successful transplants. While Watson has not provided us with

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3 Ibid, at 18.


5 See Alan Watson, `Comparative Law and Legal Change`, 37 Cambridge L.J. 313, 313-14 and 321 (1978). “There is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law.” Ibid

6 See A. Watson, `Legal Transplants and Law Reform`, 92 Law Q. Rev. 79, 80 (1980).

7 See Alan Watson, supra note 5 at 314-16.
explicit criteria to predict the viability of legal transplants, his work on legal change provides a framework to illuminate successful transplants. His theory of legal change (legal transplant being the target) provides the following factors to determine whether conditions are ripe for legal change by transplantation\(^8\): Source of Law, Pressure Force, Opposition Force, Felt Needs, Transplant Bias, Discretion Factor, Generality Factor, social Inertia and Law-shaping lawyers. Thus, the success of legal transplant can be predicted by examining the rationale behind the legal rule (whether it is a good idea) and determining whether conditions for legal change by transplantation are ripe in the receiving state\(^9\).

While the above competing theories on legal transplants diverge on the role of the context of the donating state for successful legal transplants, general consensus seems to exist on the role of the existing conditions in the receiving state. This work acknowledges the role of the context in which the law is shaped as well as the context of the receiving jurisdiction to have a bearing on the success of legal transplants\(^10\), yet the latter being the dominant force\(^11\). In fact, many commentators do recognize this; emphasizing the domestic dynamics of the receiving state rather than that of the donor state\(^12\).

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\(^9\) See Alan Watson, supra note 6 at 81.

\(^10\) Some suggest that the blend of the two theories can produce best theory for predicting transferability of law. See for example Lorraine M. McDonough, supra note 8.

\(^11\) This is because of the adaptability of legal rules in such a way to fit to the conditions of the receiving state. If we accept that law is inseparably linked to the context it is shaped, legal transplants are virtually impossible; a conclusion unwarranted by practice. Thus, I do not advocate that law should always reflect the society for it might also shape a given culture. That is why we need reforms.

Investigation of the viability of transplants of plea bargaining in Ethiopia captures two interconnected questions: 1) how effectively Ethiopia mitigates the inherent flaws of plea bargaining; what remains as concern in the Ethiopian context? 2) To what extent it transforms plea bargaining to comport with its legal system: can it fit into the Ethiopian legal system? Implicit in these baselines one may find elements of the above theories of legal transplants, but I am not testing plea bargaining using them\textsuperscript{13}. While it is noted that the country of origin is also important in the study of legal transplants, much attention is placed on the recipient jurisdiction (Ethiopia). Leaving the second question to chapter seven, this chapter tests the Ethiopian variant of plea bargaining against the first.

6.2 Mitigating the Flaws of Plea bargaining

A former Supreme Court judge says\textsuperscript{14}:

'We [Ethiopia] are latecomers to plea bargaining. As such, we have many opportunities to learn from the experience of other countries. So we need to exploit this...we need also to see our context...'

Nonetheless, Ethiopian reformers seem content simply to import unlimited plea bargaining, as it applies in adversarial jurisdictions. There, this form of plea bargaining attracts all sorts of criticism\textsuperscript{15} including but not limited to wrongful convictions, differential treatment of similarly situated defendants, problems relating to lenient punishment and other due process concerns. The reformers seem to be simply affected by what A. Watson labels as transplant bias\textsuperscript{16}.

\textsuperscript{13}I am not interested in testing plea bargaining using these theories for a couple of reasons: first, neither theory is self sufficient to predict the viability legal transplants. A blend of the two, which requires a separate investigation and refinement, would have been suitable. That is beyond the scope of this work. Second, adhering to these theories (which are just models) requires the restructuring of my research questions, which is not desirable.

\textsuperscript{14}Interview with judge 11, held on 17/04/2012(translation mine).

\textsuperscript{15}For details see chapter one - the debate on plea bargaining.

\textsuperscript{16}See A Watson ‘Legal change, sources of law and legal culture’ 131 U Pennsylvania L Rev 1121, 1147 (1983) (observing that: ‘Often the foreign rules are borrowed without investigation into whether the rules are the best possible or even appropriate. The main causes of this transplant bias are... the general high standing of the donor system; the general high prestige, apart from its law, of the donor state...; and the accessibility-for instance, in writing or in a code-of the law to be borrowed’.
In what follows, I will discuss the limitations of the Ethiopian variant of plea bargaining in addressing/mitigating the above legitimate concerns and its possible upshots.

6.2.1 The Innocence Problem / Wrongful Convictions

Though trials are not totally immune from this problem, plea bargaining is much more vulnerable to produce wrongful convictions than the former. With increasing concessions tailored against the chance of acquittal along with other prosecutorial tactics, strong risk aversion than the guilty, mistrust of the system, innocents are likely to plead guilty simply because they believe it is rational to do so. Defendants may also be coerced by the police to plead guilty. The innocence problem is not a mere speculation. Indeed, empirical studies

17 Unlike in trials once pleaded guilty, every one (including innocents) is convicted in plea bargains. As one writer puts: A procedure that is designed to determine who is guilty and who is innocent [i.e. trial] seems almost certain to accomplish this task more effectively than a procedure that is deliberately designed to evade the issue [i.e. plea bargaining]. Even if the function of plea negotiation were merely to vector the risks of litigation, the practice would certainly yield a larger number of wrongful convictions than trial. See Albert W. Alschuler, The Changing Plea Bargaining Debate, 69 Cal. L. Rev. 652, 714 (1981); See also Gregory M. Gilchrist, Plea Bargains, Convictions and Legitimacy, 48 Am. Crim. L. Rev. 143, 145 (2011) (More innocent defendants are convicted by plea bargains than would be by trials alone.)

18 Studies in some jurisdictions document such trends and some argue that this is well-designed to produce the conviction of innocents. Albert W. Alschuler, supra note 17, at 714-15.

19 Studies show that the innocent is inherently more risk averse than the criminal because the latter willingly assumes risk while breaking the law in the first place. Innocents mistrust the criminal process for charging them for a crime they did not commit. Unlike the guilty nor are they psychologically prepared to face the repercussions of public trials. Prosecutors offer innocents similar concessions as the guilty. However, because of difference in evaluating risk, the innocent attaches higher value for it and may choose the lesser evil - plea bargaining. See Andrew Hessick and Reshma M. Saujani, Plea bargaining and convicting the innocent: the role of the Prosecutor, the Defence counsel and the Judge, 16 Byu J. Pub. L. 189, 201 (2001-2002); See also Michael K. Block & Vernon E. Gerret, Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk, 24 J. Legal Stud. 123, 138 (1995) (finding prisoners-criminals less risk averse than students-innocents).

20 Some innocent defendants are so mistrustful of the system that they believe their guilt is a foregone conclusion if they stand trial, and so they readily accept any inducement to plead. These feelings of mistrust are sometimes nourished by defence counsel who begin with a presumption of client guilt, and both begin and end the representation by looking for the best available bargain. See Andrew D. Leipold, How the Pre-trial Process Contributes to Wrongful Convictions, 42 Am. Crim. L. Rev. 1123, 1154 (2005).

21 See the innocence problem, chapter 1.
carried out in jurisdictions with more established legal systems such as the USA and England, confirm the problem exists\textsuperscript{22}.

\subsection*{6.2.2 The Innocence Problem in Context}

With a less developed legal system and other contributing factors (see below), the plea bargaining model that Ethiopia adopts is prone to have innocents plead guilty for all sorts of reasons, including those mentioned above\textsuperscript{23}. As it is not possible to test the innocence problem empirically (especially concerning a legislation not yet in force), I have incorporated the perception of justice actors and the problems they envisage the law will create. Of the 113 survey participants in my study, a significant proportion was concerned about wrongful convictions of the innocent. Asked to rate the problem of wrongful conviction in plea bargaining in Ethiopia, justice actors responded as follows:

\begin{footnotesize}

\textsuperscript{23}For example, defendants in Ethiopia may well plead guilty to acts that can be justified by legitimate defence; On the face of reports of police induced / forced confessions and weak regulation of police misconduct, defendants are likely to be coerced to enter guilty pleas (See chapter 7, the police).
\end{footnotesize}
Table 6.1: Criminal Justice Actors’ Views on the Risk of Miscarriages of Justice Where Plea Bargaining Takes Place.

<table>
<thead>
<tr>
<th></th>
<th>Total No. participants</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>No view</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors</td>
<td>46</td>
<td>9</td>
<td>15</td>
<td>10</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Judges</td>
<td>29</td>
<td>8</td>
<td>10</td>
<td>6</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Defence attorneys</td>
<td>20</td>
<td>2</td>
<td>7</td>
<td>3</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Defendants</td>
<td>18&lt;sup&gt;24&lt;/sup&gt;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>113&lt;sup&gt;25&lt;/sup&gt;</td>
<td>19</td>
<td>32</td>
<td>19</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>

From this table one can see clearly that the innocence problem is among the major challenges identified by actors. Of the survey participants, slightly over half of the prosecutors, nearly two–third of the judges, and nearly half of the defence attorneys acknowledged (strongly agreeing or agreeing with) the problem. Yet, this seems to have little impact on their acceptance of plea bargaining: perhaps because they believe that the problem can be addressed using proper safeguards or they impliedly take it as a price worth paying for efficiency<sup>26</sup>.

<sup>24</sup> Almost all them are interviewees and thus are asked whether plea bargaining is liable to create the innocence problem where quite many of them (12) responded in the affirmative. They are excluded here as the format of the interview questions I have used for them does not fit in with this. This was necessitated by the particulars of defendants (illiteracy or low level of comprehension of the questions).

<sup>25</sup> Of these, 5 prosecutors, 3 judges and 6 defence attorneys do not respond to this particular question.

<sup>26</sup> See chapter 7, the section on legal culture.
Though the innocence problem is inherent in plea bargaining, the Ethiopian context is likely to exacerbate it. Interacted with the inherent defects of unlimited plea bargaining\textsuperscript{27} and professional’s shared incentives in plea bargains\textsuperscript{28}, several legal and socio-political contexts conspire to fuel the problem and make it formidable.

\textit{a) Huge bargaining power disparity}

The unparallel bargaining power of the parties\textsuperscript{29} means fair negotiation and outcome accuracy is less attainable; instead, prosecutorial manipulations and wrongful convictions are likely. While plea bargaining expands the power of the prosecutor, the defence remains intolerably weak- mostly unrepresented defendants (poor, illiterate or less educated and unaware of the need for legal counsel). With the represented ones the quality of representation\textsuperscript{30} and the nature of plea bargaining would compromise effective representation\textsuperscript{31}.

\textit{b) The situation of the accused and the conditions of detention centres}

Despite improvements, longer pre-trial detentions have remained a problem\textsuperscript{32}. Pre-trial detention covers a wide range of cases: defendants accused of serious crimes to which bail is

\textsuperscript{27} As shown elsewhere, the innocence problem is one of the major flaws of this form of plea bargaining. This form of plea bargaining involves all sorts of concessions, massive sentencing discounts, and invites all sorts of prosecutorial manipulations, tactics, pressures to induce guilty pleas such as overcharging, and other abuses.

\textsuperscript{28} Prosecutors, judges and defence attorneys have common incentives to end cases with plea bargaining: managing caseloads and increasing efficiency. This could affect the integrity of plea bargains.

\textsuperscript{29} For some detailed discussions, see chapter 7: the inequality of arms.

\textsuperscript{30} For details, see chapter 7 access to legal counsel and free interpreter

\textsuperscript{31} Research shows that with financial and non financial incentives involved, effective legal representation is less likely in plea bargaining. See chapter 4 the section on the defence attorney and chapter 7, access to legal counsel.

\textsuperscript{32} On several occasions, many Human Rights groups and US State Department expressed their concerns on this. Reports by EHRC once documented that the percentage of detainees awaiting trial was ‘unsatisfactorily high’. See EHRC (Ethiopian Human Rights Commission), “Report on Visits to 35 Federal and Regional Prisons.”, EHRC, Addis Ababa, 2008; another report documents: ‘Some detainees reported being held for several years without being charged and without trial. Trial delays were most often caused by lengthy legal procedures, the large numbers of detainees, judicial inefficiency, and staffing shortages’. See Country Report on Human Rights Practice for 2012, United States Department of State available at http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm, at 4, visited on 14/3/13. On the other hand, another report shows that the majority of criminal cases both at Federal and State level pending for less than 6 months. See World Bank, \textit{Uses and users of justice in Africa: the case of Ethiopia’s federal courts.} (Washington DC: World Bank, 2010) http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts(7/10/14); UNODC \textit{Assessment of the Criminal Justice system in Ethiopia; in support of the}
made out rightly inapplicable- which seems on the rise, defendants charged with lesser crimes but bail is denied for conditions are not satisfied - the grounds of which tend to be widely interpreted by our courts, and defendants temporarily withheld - where successive and arbitrary remands pending investigation are common. It also applies to bailed defendants who are unable to furnish the required bail as a non-financial bailing system is yet unknown. From this, one can see clearly that the problem covers a broad category of defendants. Pre-trial detentions put such defendants in the dark. This, by hampering their ability to mount a defence, increases the probability of convictions33, which in turn may lead them to uninformed pre-charge bargains. This is alarming in Ethiopia where the majority of defendants are not represented.

Further, the state of pre-trial detention centres and prisons is reported to remain troubling and at times 'life threatening’34. Thus, pleading guilty would be the best way to end or at least to cut short further detentions under such an environment. In the circumstances, it is probable

33 Innocent defendants may fail to gather helpful evidence because they don’t know that they need it until it is too late. One uncontroversial tenet of litigation is that the passage of time degrades the quality of the evidence. Witnesses forget (or worse, misremember), they disappear or die; physical evidence is lost, becomes contaminated, or is discarded. See Andrew D. Leipold, supra note 20 at 1139. Apparently, this limitation seems to hinder the prosecution as well. However, that is not the case at least in theory for the prosecution exclusively uses the preliminary inquiry to record evidence. On their impact on increasing the probability of convictions, see Hans Ziesel, The Limits of Law Enforcement (Chicago: University Chicago press, 1982). See also Stephanos Bibas, 'Plea bargaining Outside the Shadow of a Trial’.117 Harvard Law Review, 2463, 2491 (2004).

34 One report notes:

Prison and pre-trial detention centre conditions remained harsh and in some cases life threatening....Severe overcrowding was common, especially in sleeping quarters. The government provided approximately eight birr ($0.44) per prisoner per day for food, water, and health care...Medical care was unreliable in federal prisons and almost nonexistent in regional prisons. Water shortages caused unhygienic conditions, and most prisons lacked appropriate sanitary facilities. Information released by the Ministry of Health during the year reportedly stated nearly 62 percent of inmates in various jails across the country suffered from mental health problems as a result of solitary confinement, overcrowding, and lack of adequate health care facilities and services. See for example Country Report on Human Rights Practice, supra at note 32 at 4.

See also Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years (2010/11-2014/15) Strategic Plan, July 2010, (indicating such problems as inadequate prison services and overcrowded prisons and absence of national statistics on prisoners). My interviewees in particular judges and prison officials confirm the problem exists. I had also the opportunity to visit one penitentiary where I observed that male prison quarters are incredibly overcrowded.
that innocents are induced or even coerced to plead guilty, or at the very least, their plea decisions are influenced by the poor decisions in which they must await trial. Indeed, the opinion of defendants seems consistent with this; many of them take pre-trial detention as one important factor to affect their choice of plea. My interview with judges also provides a sense of the problem: in practice some defendants pled guilty for crimes `they have not committed' when they believe that the sentence they would ultimately receive at the end of the trial matches with the time they spent at pre-trial detention centres; in which case, they were immediately discharged. From these, it logically follows that innocent defendants are likely to plead guilty instead of awaiting their day in court at least where the duration of pre-trial detention exceeds or is equivalent with the sentence offered by the prosecutor.

\textbf{c) Fact/truth finding capacity}

The Ethiopian criminal justice system has a limited capacity of fact/truth finding. Almost all actors believe that ineffectiveness in the discovery of the truth is among the major problems that plague the Ethiopian criminal justice system.

Judge 11:\footnote{Interview with Judge 11, held on 17/04/2012.}

\begin{quote}
Ineffectiveness in terms of discovery of the truth remains a serious problem. The problem starts from investigation. We have not yet developed scientific investigations. Although marred by false testimonies we heavily rely on witnesses as a source of evidence. Further the absence of level playing field for defendants (as they are mostly unrepresented) adds to the problem.
\end{quote}

\footnotemark[35]{For similar arguments see Stephanos Bibas, `Plea bargaining Outside the Shadow of a Trial'. 117 Harvard Law Review, 2463, 2491 (2004). Further, many have shown that pre-trial detention adversely affects the defence. See for example Andrew D. Leipold, supra note 20 at 1130. ( `pre-trial detention can hamper the defence by making it difficult for the suspect and his lawyer to find witnesses, gather and review evidence, and consult about strategy'.); Charles h. whitebeard & Christopher Slobogin, Criminal Procedure 527-28 (4th ed. 2000) ( bail "facilitates preparation of a defence and prevents incarceration of a possibly innocent person"); Albert W. Alschuler, `Preventive Pre-trial Detention and the Failure of Interest-Balancing Approaches to Due Process`, 85 Mich. L. Rev. 510, 517 (1986).}

\footnotemark[36]{For an observation a similar problem in the USA see Stephanos Bibas, supra note 35. Here one may raise the effect of pleading guilty as criminal records. However, according to judges other effects of pleading guilty (criminal record) are less known by defendants.}

\footnotemark[37]{Interview with Judge 11, held on 17/04/2012.}
Judge 03:

Our truth finding capacity whether at the stage of investigation, prosecution or trial is extremely weak. When it comes to the judiciary, the focus is on efficiency. Because of this, we may not carefully scrutinize cases. This undermines the reliability of our decisions; wrongful convictions are very likely. …in fact persons are attacked with fabricated crimes and witnesses. Even at prisons, victims of false testimony are known.

The problem starts from the intake procedure and goes all the way to the trial stage. As it stands now, the intake procedure in particular that of arrest can be carried out without adequate checks and restraints put on police arrest power. The problem has to do with both the law and the practice. The existing criminal procedure code puts no clear standard for the police to undertake arrest. It simply authorizes police to effect arrest when the offence justifies arrest or when summons fails. Even worse, though it demands that in principle arrest should be made with court authorization, the exceptions put to this principle are so broad and vague that in effect the exception becomes the rule. Nonetheless, it should be acknowledged that the proposed law tries to narrow such gaps. For example in addition to limiting cases where arrest without warrant can be made, it introduces two-prong tests to carry out arrest without warrant:

where there is sufficient reason to believe that the offender has committed or is prepared to commit an offence and the attendance of the offender is absolutely necessary for the investigation. Yet, the standards remain fluid and uneven. This reinforced by other insufficient guarantees (see below), police occupational culture (experience of arbitrary

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38 Interview with judge 03, held on Apr 02/12.

39 See Articles 26, 50 and 51 of the 1961 Criminal procedure code of Ethiopia.

40 See Article 147(2) of the Federal Democratic Republic of Ethiopia Draft Criminal Procedure Code, 2013 as was valid in June 2013 (Herein after the Draft Code).

41 See Article 147(1) of the Draft Code (Translation mine).

42 It is not clear whether an objective standard, which is higher than reasonable suspicion, applies here. If so, it can be equated with probable cause – a standard used for similar purposes in the USA. (This standard requires facts or evidence that would lead a reasonable person to believe that a suspect has committed a crime (‘most likely’)). However, elsewhere the proposed law requires only reasonable suspicion (‘a crime may have been committed’) to justify arrest (See article 154 of the Draft Code). Thus, the standard is far from clear and as always, its enforceability remains to be seen. In the USA, the latter is used to stop and frisk and for brief detentions, and not for arrest and searches as such.
arrest)\textsuperscript{43}, courts` alleged reluctance to seriously scrutinize applications for arrest warrant\textsuperscript{44}, no/little pre-trial review of arrest in practice (courts simply decide over the custody/bail issues leaving the legality of arrest aside)\textsuperscript{45} and defendants` inability to challenge illegal arrest\textsuperscript{46} mean that more innocents could still be arrested and subject to plea bargaining, absent any concerted effort to curtail this.

The investigation does not rely very much on scientific or forensic evidence; no DNA evidence is made use of, for example\textsuperscript{47}. Some prosecutors deny any scientific investigation and describe the current criminal investigation as an exercise dominated by `interviewing` of the suspect\textsuperscript{48}. False testimonies are common\textsuperscript{49}. Prosecution of crimes is relatively cheap in Ethiopia\textsuperscript{50}. With

\textsuperscript{43} Arrest warrants are rarely sought; arbitrary arrests and detentions are reported. See for example Country Report on Human Rights Practice, supra note 32(although the constitution and law prohibit arbitrary arrest and detention, the government often ignored these provisions in practice. There were multiple reports of arbitrary arrest and detention by police and security forces'). Even worse, there are concerns that political authorities or higher-level officers direct police to undertake investigations, or arrest "suspects" without probable cause. See Linn A. Hammengren, `Justice Sector corruption in Ethiopia` in Janelle Plummer(ed), Diagnosing corruption in Ethiopia: Perception, realities and the way forward for key sectors, 2012 at 215.

\textsuperscript{44} There are complaints that courts for the most part rubberstamp the rare applications for arrest warrant. This could be because of lack of express legal authority. Neither the constitution nor the existing criminal procedure code explicitly includes pre-trial review of the legality of arrest during the suspects` first appearance to court. Both simply require the appearance of the suspect before court within 48 hours; albeit the constitution recognizes the right to be informed of the reasons for arrest (Art 19(3) and the code mandates the court to grant or deny bail (Art 29 and 59). That said, the draft criminal procedure code that explicitly incorporates pre-trial review of arrest for the first time. Thus, where the suspect is brought before court within 48 hours of arrest, police is required to show reasonable suspicion. See Article 154 of the latest draft Code. Although an important development, this standard is lower than the probable cause. Thus, it may not protect innocents effectively. See above note 42.

\textsuperscript{45} Most defendants who are less educated or illiterate are not represented and thus unable to exercise their rights. Still it is not uncommon to see defendants who do not know whether it is possible to bring legal action at all against the police, both in their individual capacity and as a representative of the state. Indeed, the prevailing maxim among Ethiopians has been: `It is impossible to sue the king [state] as is to till the sky`.

\textsuperscript{46} This test would play a key role in prosecuting crimes of murder and rape, common crimes Ethiopia. According to UNODC Homicide statistics, 2013 intentional homicide rate in Ethiopia was recorded at 25.5 in 2008.

\textsuperscript{47} Interview with prosecutor 10, held on 28/03/12.

\textsuperscript{48} Almost all interviewed judges confirm this and some of them shared me troubling experience of false testimonies. For example one judge told me this account:

\textit{Let me tell you one case on the problems I mentioned. The case is a fraud case. A certain woman complained that she was defrauded by a man who agrees to have her child receive medical treatment abroad. She claimed that the man defrauded her some 200 thousand Birr. The case having exhausted its course reached at trial. Three witnesses were called: the alleged victim, her sister and a neighbour. All witnesses have testified against the defendant. They claimed that they do not know him, have no connection other than this encounter, and witnessed that the woman
plea bargaining it becomes even cheaper\textsuperscript{51}. This in turn would allow prosecution of weak cases. The orientation of the investigation is unilateral but also partisan. The right to evidence disclosure is only introduced for the first time by the current reforms. The trial consists of a contest between two disproportionally unequal parties\textsuperscript{52}, defendants usually being unrepresented. In the circumstances, it is unrealistic to expect effective truth/fact finding. Plea bargaining which undermines the quality of the criminal process (investigations, prosecution and trial) would exacerbate the problem. The unlimited form of plea bargaining, in particular charge and fact bargaining weakens truth/fact finding further\textsuperscript{53}.

A corollary to this is the problem of wrongful convictions\textsuperscript{54}. On the face of less restrained police arrest power and weak fact finding capacity of the criminal process, innocents could be arrested and prosecuted. Indeed, fieldwork sources, in particular judges indicate instances where innocents are punished on a falsely organized testimony\textsuperscript{55}. In particular, two judges told me two striking cases as an example - involving falsely alleged crimes of rape and fraud\textsuperscript{56}. Though I could not verify their claims, many of the prisoners I approached allege that they are

\textit{gave him part of the agreed money. Then I weighed the testimony of witnesses and decided that the prosecution has established its case and ordered the defendant to defend. The defendant stated to the court that he did not commit this crime but he did something wrong. He told the court that:} “this woman is married and her husband lives abroad. I had an affair with her. This accusation is only because I broke up with her and now married to another woman. That is the wrong I did. I did not take a penny from her. If the court is willing, I can tell the specific scars on her body”. Then the court ordered that defence witness be heard. Witnesses testify that the two were in a relationship and she often spent nights with him. They also testified that the woman’s child was not sick. From the witnesses, it is also established that no decision of medical board, which recommends treatment abroad (which is necessary for treatment aboard), can be produced by the prosecution. The defendant successfully defended the case and I acquitted him. I remember how he did burst into tears. If I was lazy, I could have sent this man to prison. This case is just one example. There are many cases which are organized based on false testimonies.

\textsuperscript{50} This could be partly due to absence of strong standard for prosecution, lack of pre-trial reviews and weak defence.


\textsuperscript{52} See the section on inequality of arms.

\textsuperscript{53} For more see below, the section on the search for truth/Accuracy.

\textsuperscript{54} On its flipside is, of course, the problem of letting the guilt escape punishment. On the effect of such unpredictability of trial on the defendant’s choice of plea see the section on legal culture, rarity of guilty pleas.

\textsuperscript{55} What is not clear is the magnitude of the problem, which obviously needs a separate investigation. To the best of my knowledge, no research is carried out on this so far.

\textsuperscript{56} See supra note 49.
wrongly convicted. This perception of defendants regardless of its veracity interacted with the practice of wrongful conviction, could further pressure innocents to forgo trials and accept attractive plea bargaining offers. Moreover, my interview with judges reveals that sometimes innocent defendants plead guilty for some motives such as to obtain money or simply because of social pressures. In anticipation of such problems, some judges require collaborative evidence to guilty pleas especially in serious crimes. By offering attractive concessions, circumventing the fact finding process and lowering the standard of proof, plea bargaining could reinforce such motives to increase innocents plead guilty.

In conclusion, in the advent of plea bargaining, an institution which relates less to fact finding and circumvents fundamental safeguards mixed with the above contexts, wrongful convictions are very likely.

d) Severe punishments

The harshness of punishment at trial, which includes death penalty reinforced by enticing, if not, coercive plea offers and such tactics as overcharging from the prosecution, could further risk innocents plead guilty. This is empirically tested elsewhere - revealing that guilty plea rates are higher in countries that uphold death penalty than those which do not and innocents plead guilty to avoid the risk of death penalty. Albeit, death sentences are rarely executed,

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57 It seems based on this that some commentators argue that if trials were capable of filtering the guilt from the innocence, there would be no innocence problem with plea bargaining since innocents have nothing to risk by going to trials. See Easterbrook, 'Plea bargaining as a compromise', 101 Yale L.J 1969(1992). However, as it is hardly possible to bring trials to perfection the problem subsists.

58 The real offender pays money for an innocent accused in exchange for pleading guilty and covering him/her up. This is a real concern especially in traffic offences, negligent homicide cases (car hits), etc. With plea bargaining which involves no fact finding as such and is open to corruptions, this trend could expand to other crimes as well.

59 In some parts of the country, a social pressure induces innocents to plead guilty to crimes they have not committed. In such communities, the family of the victim of crime of murder is often put under strong social pressure to take revenge on the offender or at worst on his relatives. Thus, where the offender is killed by somebody, one who fails to revenge, takes the responsibility and pleads guilty simply to cool-off the social pressure. Judges told me two striking rape and murder cases of this sort (where in the former case an impotent person pleading guilty (of rape) to prove to the society that he can make love).

60 See Kent S. Scheidegger, 'The death penalty and plea bargaining to life sentences', working paper 09-01 available at http://www.cjlf.org/papers/wpaper09-01.pdf (August 10, 2010). See also Hugo A. Bedau & Michael L. Radelet, 'Miscarriages of Justice in Potentially Capital Cases', 40 Stan. L. Rev. 21, 63 (1987) (reviewing five cases in which innocent defendants pleaded guilty in order to avoid the risk of a death penalty); Daina Borteck, Note, 'Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to
one may not rule out this possibility in Ethiopia. With the prevalence of over-charging, prosecutors could threaten defendants with charges that carry a death penalty.

\[ e) \] Absence of pre-trial review

Absent trial safeguards for testing the reliability of evidence in plea bargains, the role of pre-trial review becomes even more important. Yet no pre-trial review of the decision to plea bargain seems envisaged. Sufficient evidence that justifies conviction is required in plea bargaining but its observance by the prosecutor is unreviewable ex ante. For that matter, it is not expressly subjected to ex post judicial review\(^{61}\). Thus, plea bargaining decisions may well be based on unreliable and insufficient evidence\(^{62}\). In trials, weak fact finding means charges are instituted based on insufficient evidence\(^{63}\). This would be more so with plea bargaining, which has little to do with fact finding and circumvents trial guarantees that test evidence sufficiency and reliability. This reinforced by the certainty advantage of conviction plea bargaining offers to prosecutors and other disincentives involved in criminal investigation notably caseloads and resource limitations, weak cases are highly likely to be subject to plea bargaining\(^ {64}\).

That said, it could be argued that measuring prosecutors’ performance using conviction rates may discourage them from pursuing weak cases. In particular, the manner of calculating conviction rates at Federal level, which is based on the ratio of convictions over indictments as opposed to final judgments, could be a good disincentive to pursue weak cases. Nonetheless,

\[ \text{Prisoners Who Pled Guilty}, 25 \text{ Cardozo L. Rev.} 1429, 1442-45 (2004) \text{ (describing cases of defendants who pleaded guilty to capital offences they did not commit.)} \]

\(^{61}\) One may only imply it from Article 232 of the draft criminal procedure code which mandates courts to check the compatibility of the agreement with the ‘law’. Even then, it remains unclear how it is going to be sanctioned/enforced.

\(^{62}\) This is very likely to be true of unrepresented defendants as they are too weak to challenge such evidence.

\(^{63}\) See below the practice of ‘charging to fail’, charging without sufficient evidence.

\(^{64}\) In contrast, one may argue that ex ante judicial intervention would invite judicial bargaining and thus the processing of weak cases. But it must be ensured that the court is not mandated to involve in the plea negotiation but rather only to check whether preconditions for plea bargaining are met i.e. to license plea bargaining and its decision to do so needs to be reasoned. Again one may wonder whether such reviews could help on the face of the judge’s interest to end cases quickly. However, though it cannot be an absolute guarantee (due the inherent flaws of plea bargaining), ex ante review is likely to mitigate the problem by making prosecutors more accountable.
this may not be always the case within the context of plea bargaining. Given the possibility of circumventing the requirement of sufficient evidence (as practice indicates), the relative certainty of convictions in plea bargains, vulnerability of defendants and most importantly the possibility of pre-charge bargaining wide open, prosecutors may work on plea negotiations to raise convictions even in weak cases while strong cases go to trial. Further, the way conviction rates are calculated differs from state to state - some of them using the ratio of convictions over judgments\textsuperscript{65}. This would rather encourage the processing of weak cases via plea bargaining so that conviction is more or less ensured.

\textbf{f) Ethics and professionalism}

It is generally acknowledged that professionalism and ethics among actors are at infancy stage in Ethiopia. Nor are robust ethical standards put in place. Given this, it may well be difficult to see interests of justice often prevail over personal interests and preferences. Deals that do not serve defendants’ interests might simply be struck and thus endorsed for reasons extraneous to the requirements of fairness - mere expediency, for example. Indeed the desire to handle more cases and enhance performance provides professionals with a strong incentive to plea bargain\textsuperscript{66}. Financial incentives may also play a role here\textsuperscript{67}. Certainly, this adversely affects innocents.

\textbf{g) Vulnerable defendants}

Experience in the USA reveals that in guilty pleas/plea bargaining some defendants are more exposed to wrongful convictions. This concerns young offenders, intoxicated defendants and

\textsuperscript{65} One government report acknowledging the use of different approaches of computing conviction rates among states, notes the difficulty of making comparisons and drawing appropriate lessons. See the strategic plan, supra note 34.

\textsuperscript{66} This is likely to be true even with a robust code of conduct put in place. Empirical research shows that formal rules have limited impact on working routines of lawyers but rather organizational and ideological drivers are important in shaping behaviour. See for example Goriely C. Tata, \textit{et al}, 'Does mode of delivery make a difference to criminal case outcome and clients’ satisfaction?’ \textit{Criminal Law Review}, 120-135 (2004). As shown elsewhere, in Ethiopia both the ideological and institutional drive inclines towards crime control and efficiency.

\textsuperscript{67} Indeed, in my questionnaires some defence attorneys acknowledge that financial incentives may affect their plea bargaining decisions. See below the section on access to legal counsel and free interpreter.
insane/mentally retarded defendants. With the less developed material conditions and legal procedures come in to play, this is also more probable in Ethiopia.

That said, however, it bears mentioning that with a view to mitigate problems of plea bargaining, several guarantees are put in place. These include the requirement of sufficient evidence, mandatory representation of defendants as a rule, disclosure rights, and judicial review of plea agreements. Yet, none of these guarantees seem to be sufficient to ensure the fairness and accuracy of plea bargaining for reasons relating to the nature of the guarantees, the Ethiopian context as well as the nature of plea bargaining (unlimited plea bargaining).

The requirement of sufficient evidence that justifies conviction is susceptible to evasion. This is a determination that the prosecutor makes based on untested evidence with little/no pre-trial safeguards to ensure its reliability—no lawyer present, little prosecutorial supervision, no defined standard to measure sufficiency, no ex ante review; even ex post review and its effects remains equivocal. Nor is the possibility of using illegally or improperly obtained evidence ruled out. Indeed, the criminal justice policy envisages such possibility as an exception. Thus, the likelihood of inducing guilty pleas with a prosecution having no prospect of success cannot be dismissed, if not highly probable. In fact, this is not mere speculation at least in trials; empirical evidence shows that prosecutors often institute charges without

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68 Brandon L. Garrett, 'The Substance of False Confessions', 62 STAN. L. REV. 1051, 1064 (2010) (reporting that mentally ill, mentally retarded, and borderline mentally retarded defendants composed 43 percent of DNA exonerees who had falsely confessed; 65 percent of false confessors were mentally disabled, under eighteen at the time of the crime, or both).

69 However, unlike in the earlier draft, the latest draft omits the requirement from the list of preconditions and puts it as a principle. Does it mean that sufficient evidence is no more a prerequisite? It is not clear. Nevertheless, the policy clearly puts it as a precondition.

70 For more discussions see chapter 4, legal conditions to plea bargaining.

71 The standard is yet to be determined by the prosecutor general. See FDRE, The Criminal Justice policy, 2010, section 3.10 at 13 (which demands that the Prosecutor General issues directives that provide standards on this). Yet, such approach has its own limitations: First, given the policy toward efficiency, the office of prosecution is less likely to restrain itself meaningfully using its own guidelines. Second, effective enforcement mechanisms of the rules may presuppose external review. However, weak culture of judicial review means the possibility that the guidelines are challenged before court (judicial review) would very rare.

72 See chapter 4, the requirement of sufficient evidence.

73 The Criminal Justice policy, supra note 71 at 17.
sufficient evidence and preparation.\textsuperscript{74} Plea bargaining creates a good atmosphere for this to happen for prosecutors have little incentive to weed out weak cases\textsuperscript{75}. Specifically, pre-charge bargaining which is permissible under the Ethiopian variant of plea bargaining can be effectively used to circumvent the requirement of sufficient evidence and negotiate on weak cases. All these coupled with institutional pressure to raise efficiency and own interest to maximize performance could provide prosecutors with good incentives to circumvent the requirement of sufficient evidence.

Similarly, legal representation is not always mandatory; even in those mandatory cases, the quality\textsuperscript{76} and availability of legal service is constrained by the limited recognition and respect of defence rights\textsuperscript{77}. Above all, effective counsel is likely to be hampered in an unlimited plea bargains\textsuperscript{78}. Thus, it is probable that many defendants go unrepresented or receive ineffective counsel.

Further, the duty of disclosure would be marred by the absence of effective defence investigation, the timing of disclosure, absence of enforcement mechanism, the prevailing

\begin{itemize}
\item \textsuperscript{74} This practice is ironically labelled as ‘charging to fail’ See uses and users of Justice in Africa, supra at note 32 at xxi.
\item \textsuperscript{75} See Oren Gazal-Ayal, supra note 51 at 2299 (by diminishing the cost to the prosecutor of bringing weak cases, plea bargaining decreases the incentive to properly screen out weak cases through prosecutorial discretion at the outset).
\item \textsuperscript{76} There are concerns as to the quality of legal representation defendants receive. Defendants I approached complain that they are not receiving proper and competent services. This applies both to public defence attorneys and private ones. The complaints in this respect include: accepting weak cases, lack of adequate preparation for the case, little or no contacts/meetings with clients, failing to promote clients interest, etc. This problem is also shared by judges and some defence attorneys themselves. Moreover, some piecemeal empirical studies confirm the problem exists. See for example Abebe Asemare, ‘Yetebekoch sinemigbar chigrochin betemeleketite lewuiyiit yekerebe tinat’ (concept paper on problems of ethics of advocates), Alemayehu Haile memorial foundation periodical, December 2011. For some detailed discussions, see the section on access to legal counsel and free interpreter.
\item \textsuperscript{77} The defence has no/little room to effectively participate in the pre-trial process. Interrogations are conducted in the absence of a lawyer, no parallel defence investigation as such exists, and there is limited defence access to resources and unparallel power between the prosecution and defence. For more discussions, see chapter 7 the sections on Inequality of arms.
\item \textsuperscript{78} See A. Alschuler, ‘Personal failure, institutional failure and the Sixth Amendment’, 14 \textit{N.Y.U. Rev. L. & Soc. Change} 149 1986; Stephanos Bibas, ‘The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel’, 2003 \textit{UTAH L. Rev.} 1; Stephanos Bibas, supra note 35 at 2463–2547. For discussions from the Ethiopian context, see chapter 4, the role of the defence attorney and chapter 7, the section – access to legal counsel and free interpreter.
\end{itemize}
practice\textsuperscript{79} as well as other implementation problems\textsuperscript{80}. Surely, all these would inhibit the defendant in arriving at an informed decision as to the choice of plea.

Judicial review also has its own limitations in regulating the Ethiopian variant of plea bargaining. The weak culture of judicial review\textsuperscript{81}, institutional drive towards efficiency and the tendency towards crime control ideology\textsuperscript{82} make effective reviews of prosecutorial discretion unlikely and the rubberstamping of plea agreements in overburdened courts hard to resist in the context of scarce resources. The nature of review envisaged by the proposed law\textsuperscript{83}, the inherent coercions involved in plea bargains which are beyond the reach of judicial scrutiny\textsuperscript{84}, the weakness of defendants (in particular unrepresented ones) all conspire to make judicial review less reliable in protecting the defendant.

In conclusion, because of the above socio-legal and material contexts, the Ethiopian variant of plea bargaining is highly prone to have the innocent plead guilty. This beyond harming the

\textsuperscript{79} Though the Constitution guarantees defendants’ access to government’s evidence it is hardly practiced.

\textsuperscript{80} The perception of prosecutors (many prosecutors I interviewed are opposed to the duty), ethics of the parties, the limited access to legal counsel etc could be challenges for implementation.

\textsuperscript{81} See chapter 7 the section on institutional problems (on the judiciary).

\textsuperscript{82} While this requires a separate investigation, my fieldwork and personal observations provide a sense of this tendency. This ideology seems to prevail not only among the society but also among our justice professionals. In many occasions, the society sought for harsh treatments of offenders that sometimes bore fruits. For instance, in Demissew Zerihun Vs The Federal public prosecutor, a case involving acid attack on a woman, the criminal process was utterly affected by public pressure (seeking death penalty). Not only the charges were inappropriately bifurcated (bodily injury and attempted homicide), the High court did break the law and imposed death penalty for an attempted homicide, though subsequently reduced to 20 years of imprisonment by the Supreme Court and finally raised to life imprisonment by the Cassation Division of the Federal Supreme Court. My interview with prosecutors and attorneys also reinforces this ideology. For instance, one former prosecutor has to say this: in practice, the Ethiopian criminal process is `highly protectionist `in that it focuses on crime prevention, protecting individual rights being a least priority (translation mine). Interview with Attorney 01 held on March 30, 2012.

\textsuperscript{83} For example, the plea agreement is unreviewable by appeal once accepted by the court; no appeal rights for defendants; grounds of withdrawal and available remedies are not provided. As to the nature of judicial review envisaged in the Ethiopia variant of plea bargaining see chapter 4.

\textsuperscript{84} This has to do with the conditions under which the plea agreement is struck: the large sentence differentials, unequal institutional bargaining power of the parties, respective incomparable stakes involved etc and courts’ limited access to information in the bargaining process as they depend on parties’ selective presentation of facts. (All the evidence and information remains at the hands of the parties. The judge is presented with the agreement. Although he may inquire information from the parties, the latter may have little/no incentive to provide him. Nor the judge is allowed to hear victims account. The requirement of sufficient evidence as shown above is not promising either).
latter would put the integrity of the criminal process into question thereby making the public further lose confidence in the system.

6.2.3 **Differential Treatment of Similarly Situated Defendants**

As has been shown earlier in chapter one, unequal treatment of similarly situated defendants forms among the major defects of plea bargaining. This emanates from the inconsistent charge and sentence concessions the prosecutor offers to similarly situated defendants. Such differential treatments of defendants which lack principled justifications take two forms: those inherent in plea bargaining and those based on invidious grounds such as ethnicity, sex, religion and political outlook. The Ethiopian variant of plea bargaining is highly a suspect of both forms of unequal treatment, inconsistency in sentencing and unpredictability.

   a) **Differential treatments inherent in plea bargaining**

The inherent differential treatments, which operate depending on such factors as the strength of the prosecution case, the negotiating power of the defendant, the degree of defendant`s aversion to risk and other subjective considerations, take two dimensions: differential treatments between plea and trial defendants and differential treatments among plea defendants. Defendants accused of the same crime may be treated quite differently simply depending on their choice of plea. While those who waive trial for negotiation are privileged to benefit from the generous concessions of prosecutors and receive lesser punishments, those who insist on exercising their right to trial get harsh penalties thereby creating dual sentencing structures.

Another dimension of differential treatment rests on the similar treatment of bargained-for convictions and trial convictions (judgments) - as often said: similar treatment of *un-equals*

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85 See Donald G.Gifford, 'Meaningful reform of plea bargaining: the control of prosecutorial discretion' 1983 *U. Ill. L. Rev.* 37, 61 (1983). See Stephanos Bibas, supra note 35 at 2468 (’Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence’).

86 With respect to sentence disparity, see chapter 7 the section on sentencing practices.
perpetuates inequality. With certain exceptions\textsuperscript{87} the two, though distinct in their relation to evidence and actual guilt\textsuperscript{88}, entail similar consequences on such matters as disqualification from the exercise of civil rights, criminal record as a mitigating factor and their impact on civil or disciplinary proceedings\textsuperscript{89}. "Treating the less reliable conviction-by-plea identically to the more reliable conviction-by-trial undermines the perceived neutrality of the system"\textsuperscript{90}.

Even within those defendants who plea bargain the result of the negotiation appears to be uneven and perpetuates inequalities. The outcome of the negotiation depends on several extraneous factors of sentencing calculation as opposed to the degree of guilt – notably the bargaining power of the defendant, the strength of the prosecution evidence, and other subjective considerations.

In both cases, plea bargaining sustains differential treatment among similarly situated defendants which may run counter to the equality principle and culminate in discrimination.

Other material conditions may also intensify the problem. A case in point is the effect of the problems of availability and quality of legal counsel in Ethiopia. The indigent/poor defendants are at best represented by a public defender who is overburdened with heavy caseload (faced with time and resource constraints as well as perception problems) and at worst go unrepresented (which is permissible under the Ethiopian variant of plea bargaining), while the affluent ones benefit from a relatively better quality of legal representation. Prosecutors faced

\textsuperscript{87} Certainly, a more lenient treatment applies for bargained-for conviction. Another exception relates to post trial reliefs (no appeal right exists for the defendant in bargained-for convictions).

\textsuperscript{88} See Gregory M. Gilchrist supra note 17 at 160-61.

\textsuperscript{89} It is important to note that Italy recognizes the defects of plea bargaining in this respect and attempts to treat the two differently. Thus, the negotiated-for conviction has no impact on civil or disciplinary proceedings, thus allowing the defendant to validly claim innocence in subsequent civil proceedings; nor does it disqualify a defendant from his civil rights; the criminal record does not last with the defendant, it gets vacated if the defendant remains for a specified period free of conviction for similar crimes. All these features together with the limited scope of patteggiamento may be taken as indications of the Italian mistrust over the system of plea bargaining. For some detailed discussion of such distinctions see Stefano Maffei, ‘Negotiations on `evidence' and Negotiations on `sentence' in Italy: Adversarial experiments in Italian Criminal procedure’, 2 Journal of International Criminal Justice 1050, 1064-65, 2004.

\textsuperscript{90} i.e., failure to treat like cases alike and different case distinctively. See Gregory M. Gilchrist, supra note 17 at 164.
with the latter kind of defendant are, ceteris paribus, most likely to grant large concessions to lure them to plead guilty. Conversely, the former kinds of defendants are less likely to receive comparable concessions. Their weak bargaining position means they would submit to fewer concessions, thereby intensifying unequal treatments. Further, defendants’ mistrust of the criminal justice system and their aversion to risk affects their decision to accept the prosecutor’s concessions. While the more risk averse accepts modest concessions, the less risk averse demands larger concessions\textsuperscript{91}. This would also aggravate the problem of differential treatment.

\textit{b) Differential treatments based on invidious grounds}

The Ethiopian model of plea bargaining which permits all sorts of non-transparent deals to drop or reduce charges, reduce sentence and manipulate facts, is prone to abuses and discriminations based on such invidious grounds as wealth, ethnicity, sex, religion, and political outlook. With vindictive and selective prosecutions reported\textsuperscript{92} and the possibility of prosecutors’ unjustified refusal to plea bargain or to submit the plea agreement for court approval wide open, coupled with absence of judicial scrutiny of prosecutor’s decision to plea bargain\textsuperscript{93}, the concern is highly probable. Most troublingly, weak rule of law and accountability mixed with lack of transparency in plea negotiations mean the disparate sentencing in plea bargaining can be used to cover corruptions and political interferences in prosecutions. Under the guise of plea bargaining, prosecutors could drop charges or reduce charges and sentences, in exchange for some kickbacks or due to political pressures.

The problem of differential treatment is not a mere speculation, however. The practice of informal plea bargaining provides some empirical evidence. The informal practice of dropping

\textsuperscript{91}Stephanos Bibas, supra note 35 at 2496-2527(Psychological factors such as loss aversion, risk preferences, framing, self-serving biases, over confidence skew plea bargaining decisions and lead to inequalities).

\textsuperscript{92}There are reports of abuses of authority by the prosecution. See Linn A. Hammergren, supra note 43 at 215. In some regions, defendants complain about differential treatments based on such invidious grounds as religion and ethnicity. This concerns in particular the investigative stage and prisons.

\textsuperscript{93}One of the limitations of the Ethiopian version is that it does not protect defendants against unjustified plea bargaining refusal by the prosecutor thereby leaving the possibility of differential treatment based on invidious grounds wide open. Even after the agreement is struck, it is the exclusive privilege of the prosecutor to present the agreement for court approval, the defendant having no role on this. It is not reviewable by court either. For more discussions, see chapter 4.
of charges and conversion of custodial sentence to a fine are indications of the fact that plea bargaining discriminates against poor defendants. Though in a slightly different context, the informal ‘plea bargaining’ made with real estate developers accused of crimes relating to land abuse can provide a sense of the problem. In this case, while government employees who took part in the crime have been formally prosecuted, the affluent real estate developers benefited from the dropping of charges in favour of administrative measure of a payment of money. This differential treatment, though said to be justified in the public interest, is apparently down to wealth buying justice. What is more, there are reports that prosecutors and defendants workout on conversion of custodial sentence to a fine (see Ch 7). It would be troubling if plea bargaining includes negotiation on fines which is increasingly used in Ethiopia, in which case the rich may easily negotiate to avoid imprisonment and ‘purchase freedom’ while the poor desolately face imprisonment.

Although unavoidable in plea bargaining, all the above problems can be mitigated by procedural safeguards and substantive regulation of prosecutorial concessions. Yet, no sufficient guarantees, (in particular substantive) are put in place in the Ethiopian variant of plea bargaining thereby inviting the problem to prevail.

6.2.4 Inappropriate Punishment

By under-punishing many (it permits the dropping of one or either of the charges a defendant is accused of, or allows generous sentencing concessions) and over-punishing others (this happens due to overcharging or indirectly via trials/trial penalties), plea bargaining results in inappropriate punishment. This is likely to undermine the purpose of punishment under both utilitarian and retributive conceptions and thus public confidence in the system.

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94 Since the very concept of plea bargaining operates in sentencing differentials, the problem remains.

95 Appropriate punishment is understood to mean a punishment that serves the purpose of criminal law. For similar observations see Stephanos Bibas, supra note 35 at 2469-70.

96 In Ethiopia, the utilitarian justification of punishment seems to prevail. Under the criminal code, punishment has deterrence, preventive and incapacitation or rehabilitative goals. See article 1 of the criminal code of the Federal Democratic Republic of Ethiopia 2004 (herein after the Criminal Code).

97 This is about a punishment that is necessary to accomplish deterrence, preventive and rehabilitative goals. On the critics of consequentialist justification of plea bargaining See chapter 1; See also R.A. Fine, ‘Plea bargaining:
problem may well characterize the Ethiopian variant of plea bargaining, and thus entail far reaching implications. Particularly in Ethiopia where there is strong tendency of correlating the deterrent effect of punishment with the severity of the punishment among the society as well as the law maker, the ramifications of excessively lenient treatment of offenders appears to be substantial. That is why, not only the criminal code explicitly mentions punishment as a major crime prevention method but also raises it to crimes such as rape and aggravated theft in response to public opinion\textsuperscript{99}. One incidence following the adoption of the sentencing manual gives additional flavour of such conceptions. In property related crimes (such as theft and robbery), the sentencing manual attaches the amount of sentence to the value of the property against which the offence is committed. This approach which culminates in substantially reducing sentence, has sparked public dissatisfaction, and even some dubbed the manual: `a defender of thieves’\textsuperscript{100}. This is just one signal of how the public perceives a criminal justice system that treats offenders leniently.

From the foregoing, it logically follows that with greater magnitude and frequency of lenient treatments of offenders involved in the Ethiopian variant of plea bargaining, the problem of public perception would be more severe. In plea bargains, the public would see that defendants receive a low sentence or go unpunished with respect to some crimes. This can look to the public not only that the system is unable to make criminals account for their

\textsuperscript{98} This is about a punishment the offender deserves. On retribution-based attacks of plea bargaining see, for example Kipnis who observes that criminal justice should be "one in which persons are justly given, not what they have bargained for, but what they deserve, irrespective of their bargaining position." See Kenneth Kipnis, Criminal Justice and the Negotiated Plea, 86 Ethics 93, 104 (1976).

\textsuperscript{99} See the Criminal Code supra note 96, its preamble.

\textsuperscript{100} Interview with Judge 09, president of a high court, held on 11/07/2012. Indeed, there are also prosecutors who believe that thieves exploit such gaps by targeting less expensive properties like cell phones. (Properties whose value is less 1000 Eth birr that fall under offence level 1, attracting an initial of 2 months of simple imprisonment.) Nevertheless, aggravation following recidivism should not be forgotten. That is why the revised sentencing manual aggravates sentences.
wrongs but also something wrong (perhaps corruption) is going with it. In a system that wins very little public confidence the lenient treatment of offenders or impunity in plea bargaining appears to skew public perception of the criminal justice further, to the detriment of effective administration of justice.

Against all these concerns, the reform does little in mitigating the inappropriate punishment that prevails in plea bargaining. Of course, the possibility of developing sentencing guidelines at a later stage cannot be ruled out. Yet, given the nature of unlimited form of plea bargaining and local contexts, this can be of very limited effect in regulating plea bargaining concessions and in particular prosecutorial tactics such as overcharging and undercharging.

### 6.3 Conclusion

This chapter examines the inherent flaws of plea bargaining in context and argues that such concerns of plea bargaining as the innocence problem, the problem of differential treatment of similarly situated defendants and inappropriate punishment would be exacerbated by socio-legal and structural contexts of Ethiopia. This eventually makes the Ethiopian variant of plea bargaining a more worrisome and a less feasible option.

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101 In fact, there are misconceptions even in trials. When offenders are acquitted or treated leniently, the public tends to attribute it to corruption or favouritism by judges.

102 See chapter 7 the section on public confidence in the justice system.

103 Sentencing manual would bring no or little change for the very institution of plea bargaining exists/works on sentence differentials. For more discussion, see chapter 7, sentencing practices.
Chapter Seven: Unlimited Plea Bargaining: Its Compatibility with the Ethiopian Legal System

This chapter investigates the question whether the Ethiopian model of plea bargaining comports with its legal system. It focuses on the extent of contextualization and canvasses the suitability of this variant of plea bargaining in light of the prevailing institutional set up, legal culture and fundamental principles of criminal law and procedure. These pillars of the Ethiopian legal system are examined within the context of plea bargaining based on the fieldwork data- notably justice actors’ perceptions on aspects of plea bargaining and to some extent, the practice of informal plea bargaining as it already operates to a limited scope, and literature.

7.1 Contextualizing Plea Bargaining to the Ethiopian Legal System

It is generally submitted that to be viable, legal transplants should cohere with the contexts of the society in which the law is to be applied. Otherwise, the transplant runs the risk of being alien to the society’s values and as a result would be neither effective nor legitimate. This has been the rhetoric in the Ethiopian reform projects. Nonetheless, the plethora of criminal justice reforms that Ethiopia has embarked upon has had very limited success in this regard. The 1950’s and 1960’s codification of Ethiopian laws based on western norms provides an excellent example. These reforms at best gave very little attention to Ethiopian custom and contexts, and at worst attempted to abolish customary laws but unsuccessfully. Still customary dispute resolution based on customary laws continues to be applied, transcending the ‘modern laws’. Because of this, one writer maintains that the prevailing norms in Ethiopia are not the

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1 For instance, during the codification web of the 19650s and 1960s, Emperor Haile Sellassie I had to say this: “No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation.” Yet this hardly captures the reality on the ground.

2 For example, several provisions of the commercial code are non-applicable; the civil code contains several provisions which are repealed by non-use (example those on names); For discussion on the dominance of indigenous values See John W. Van Doren, ‘Positivism and the rule of law, Formal systems or concealed values: A case study of the Ethiopian legal system’ 3 J. Transnat’l L. 165, 180 (1994); Alula Pankhurst and Getachew Assefa (eds), Grass-roots Justice in Ethiopia: The contribution of Customary Dispute Resolution (Centre Français des Études Éthiopiennes, Addis Ababa, 2008).
imported norms, but rather indigenous unwritten customary laws\(^3\). Recent reforms generally tend to have enjoyed only limited success\(^4\).

The reform that introduces plea bargaining would not be an exception: as it stands now, the unrestrained variant (commonly referred as the US Model) is adopted at policy level. Careful adaptation ensures that the transplanted law will have a truly national character and may minimize problems of application. Judge 03 puts\(^5\):

*Plea bargaining is alien to the Ethiopian legal system. Thus unless properly contextualized, it may turn out to be a liability. The question whether plea bargaining fits into Ethiopia legal system needs to be carefully addressed.*

However, in this variant, very little has been done in terms of transforming plea bargaining to reflect Ethiopian problems and needs. Indeed, absence of proper contextualization has been a major problem of legal transplants in Ethiopia. Such endeavours dominated by foreign lawyers\(^6\), often ignore the contexts in which laws will be applied. There is also general reluctance among reformers to look inside\(^7\). The current reform is not immune from such problems either\(^8\). For example, no attempt is made to investigate whether informal plea

\(^{3}\) See J. W. Van Doren, supra note 2 at 180.

\(^{4}\) For instance, my interview with judges and prosecutors shows that the introduction of pre trial hearing in corruption cases is causing delays among courts.

\(^{5}\) Interview with judge 03, held on 02/04/12.

\(^{6}\) This is because of not only the unfamiliarity of foreigners to Ethiopian local conditions but also the exclusive dominance of lawyers as against experts in other relevant fields.

\(^{7}\) There appears a tendency of undermining domestic sources of reform. Admittedly, relying on domestic sources would rather be demanding- it needs expertise, intense resources and so on. Still as the saying goes: ‘*yagerun serdo begeru berie*’, it is worth doing. That said, it would be unfair to turn a blind eye to the recognition the reform gives to customary norms (customary dispute resolutions). Leaving the depth, sustainability/constitutionality (as it requires constitutional amendments) of such recognition aside, this is a noticeable development. However, the problem (of contextualization) remains as regards plea bargaining.

\(^{8}\) Participating consultants from Canada, the Ethiopian variant of plea bargaining seems to be inspired by that of the Canadian model. For instance, the marginalization of victims by the earlier version of the proposed law (lacking any formal legal status in the process), the unlimited nature of plea bargaining in that, it applies to any crime across the board and that it covers charge, sentence and fact bargaining, are among the salient common features of the two versions. Indeed, the explicit incorporation of charge and fact bargains, the exclusion of judicial bargaining *inter alia* are shaped by recommendations of Canadian experts. See Policy Note # 9 Criminal Justice Administration Policy Ministry of Justice – Ethiopia at 10-12.
bargaining is practiced in Ethiopia in one or either form. In what follows, I will discuss the major institutional, legal and cultural constraints of plea bargaining in Ethiopia.

7.1.1 Institutional / Structural Problems

Ethiopia is a country of civil law tradition. However, its procedural laws, in particular criminal procedure law, reflect substantially adversarial traits with some inquisitorial elements. As a system already exposed to an adversarial structure of criminal procedure, one may not expect major incompatibility when the Ethiopian criminal procedure is structured entirely along adversarial lines. In the same vein, the injection of plea bargaining into the Ethiopian criminal justice system appears to be not liable to create major structural incompatibility unique to Ethiopia, as it does for instance in classical inquisitorial systems.

Yet, it does not mean that plea bargaining is compatible with adversarial systems. By replacing the principle of adversarialism, contest of the parties with that of negotiation, it undermines the system. In this sense, plea bargaining is inconsistent with the Ethiopian criminal process which is dominated by adversarial features. Moreover, to the extent that the Ethiopian system has been exposed to inquisitorial systems, the challenge might relate to such notions as material truth, unilateral investigations and the principle of mandatory prosecution. Leaving the interplay of plea bargaining with adversarial and inquisitorial structures for chapter one, here the main focus will be on the institutional framework. This section argues that the required institutional platform for the operation of plea bargaining is not well in order in the Ethiopian criminal justice system. There is a huge gap. This gap manifests itself in two ways: Organization and limited capacity of legal institutions. Here, I argue that the reform that introduces an unlimited form of plea bargaining seems to overlook the suitability of legal institutions in properly enforcing it.

Needless to say, no matter how well articulated a reform program might be it cannot be properly enforced if it overlooks the context of legal institutions that carry out the reform.

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9 On the nature of informal plea bargaining practiced in Ethiopia see chapter 5.

10 For some general discussions, see the sections on the inequality of arms, principles of criminal law and procedure, and reception and internalization by justice professionals.
Modern legal institutions in Ethiopia evolved lately in 1940s and 1950’s. Since then these institutions had not endured regime changes. They are among the most unstable institutions of the country. As a result, they remain institutionally weak; no career judiciary, prosecution appears to flourish to date. This together with other structural and institutional problems is likely to hinder the proper penetration of plea bargaining.

7.1.1.1 The Judiciary

Historically, the judiciary in Ethiopia remained under the exclusive domination of the executive. Currently, the constitution provides for the separation of powers and vests judicial power in the courts. Despite this, judicial matters are being taken away from courts by the law maker, the executive (in its delegated law making power), and relinquished by the judiciary itself. Decisions of the Cassation Bench of the Federal Supreme Court which rubberstamped the executive’s usurpation of judicial power (which involves the issuing a regulation that authorizes dismissal of employees without following procedural fairness and denying such employees any right of reinstatement by a court order) is just one indication of this. Such

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12 Article 37 of Regulation No 155/2008( Ethiopian Revenue and Customs Authority Regulation ) provides: 1)Notwithstanding any provision to the contrary, the director general may without adhering to formal disciplinary procedures dismiss any employee from duty whenever he has suspected of him of involving in corruption and lost confidence in him. 2) Any employee who has been dismissed from duty in accordance with sub article 1 of this article may not have the right to reinstatement by the decision of any judicial body. On the other hand, the Ethiopian Constitution provides: Art 37(1) everyone has the right to bring a justice able matter to, and to obtain a decision or a judgment by, a court of law or any other competent body with judicial power. The paradox on the ground is that the director, who has been put beyond the law by the above Regulation, is charged of the crime of corruption.

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13 In Ato Wolday Zeru et al vs. The Ethiopian Revenue and Customs Authority, the cassation bench held not only that the regulation falls within the executive prerogative but also that the employees’ claims (right to be heard and reinstatement) are non-justice able – i.e. beyond the reach of courts. This decision has far-reaching implications at least in two senses: First, it denies employees’ access to justice before any judicial body and binds lower courts to do same. Second, the court sets a precedent that the executive may [if authorized by parent legislation] further strip off judicial power by issuing similar regulations/directives in other matters/sectors. This shows, among others, the court’s apparent misconception of delegated law making powers. See Yemane Kassa, supra note 11; Ato Wolday Zeru et al vs. The Ethiopian Revenue and Customs Authority, File No. 51790, Ginbot 16/2003.
abdication of power is a real concern in a parliamentary system in which parliamentary check on the executive is virtually non-existent. Illuminating several instances where the judiciary has failed to check executive power\textsuperscript{14} one study concludes that the Ethiopian judiciary has not defined its role as a third branch of the government within the constitutional framework\textsuperscript{15}.

Emphasizing the non-judicial constitutional review some suggest that the Ethiopian judiciary, as prevails in a socialist ideology, is made weak by design\textsuperscript{16}. This approach (of vesting constitutional review in a political organ) though extreme is not capable of denying judicial involvement in the interpretation of the constitution as the latter at least leaves the enforcement of human rights provisions- fair trial rights included, among others, to the judiciary\textsuperscript{17}. Regrettably, however, there appears to be a conventional wisdom among courts themselves that they have little or no role in enforcing and interpreting human rights provisions of the constitution, let alone those on policy matters\textsuperscript{18}. Similarly, some writers pursue a similar line of argument as courts do\textsuperscript{19}. Thus, one wonders whether courts could

\textsuperscript{14} This kind of review, the author argues, is permissible under the constitution but courts erroneously abdicate their power. For instance, the author denounces the cassation courts’ conception of the principle separation of powers in ruling (in a case involving cancellation of title deed) that courts cannot review acts of city administration. See Assefa Fiseha, supra note 11 at 118-121.

\textsuperscript{15} Ibid at 146


\textsuperscript{17} See Article 13 of the constitution. This argument is based on the assumption that enforcement implies interpretation. On similar views see for example. Assefa Fiseha, “Constitutional interpretation: the respective role of courts and the House of Federation” in Faculty of Law/Civil Service College (ed.) Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution (2000), at 18.


(“There is a general conviction among judges that the courts are not allowed to discuss the provisions of the Constitution when they consider cases”). One survey indicates that over 50% of Supreme Court judges, 46% of high court judges, 48% of district court judges believe that they have limited or no role in enforcing and interpreting chapter three of the constitution. See Assefa Fiseha, supra note 11 at 122.

\textsuperscript{19} Some argue the Courts’ duty to enforce human rights does not necessarily imply interpretation. The argument goes; courts are permitted to enforce the human rights provisions of the constitution in so long as they are clear. Where a need arises for interpretation courts should refer them to the CCI. See Yonatan Tesfaye, ‘Whose power is it any way: the courts and constitutional interpretation in Ethiopia’, 22(1) Journal of Ethiopian Law, 128, 2008. However, this argument is less convincing for it renders the courts’ power to enforce human rights provisions of
vigilantly review prosecutorial excesses (in plea bargaining) or review at all plea bargaining directives /guidelines against constitutional rights of the accused.

The constitution provides for an independent judiciary. However, concerns are raised on its observance in practice- from the selection of judges to their functioning. In fact, the selection process is politicized in both law and practice. The selection of judges and the appointment of presidents and deputy presidents of courts could compromise judicial independence. In practice, the selection criteria tend not to be merit-based, efficient, and transparent: sometimes involving handpicks/appointments by Court presidents, decisions of judicial administration council affected by letters from the executive based on the candidates’ political affiliation. Part of the problem can be explained by the ambiguity of the selection criteria. There are some concerns that though tenure of judges is fairly guaranteed by law, it is met the constitution meaningless. Constitutional provisions are by nature very general and thus interpretations are inevitable. Every case involving human rights issues eventually needs interpretation.

20Appointment of presidents is highly politicized. Judges are selected by the Judicial Commission (composed of judges, legislative organ, civil societies, and in some states the executive) and appointed by the parliament/state council. See the FDRE Constitution and the respective judicial commission administration proclamations. The executive may influence the process directly (as in some states where it is made a member to the commission) or indirectly through the parliament. This is pretty possible (indeed materialized as shown below) in a parliamentary form of government exclusively dominated by one party (currently having 99.6% of the parliamentary seats). Such politicization is often taken as the beginning of the problem of judicial independence.

21See UNODC Assessment of the Criminal Justice system in Ethiopia; in support of the Government’s reform efforts towards an effective and efficient criminal justice system, 2011 at 30-31; See also Independence, transparency, accountability in the Judiciary of Ethiopia prepared by the National Judicial Institute for the Canadian International Development Agency, 2008 at 143; See Linn A. Hammergren, Justice Sector corruption in Ethiopia’ in Janelle Plummer(ed), Diagnosing corruption in Ethiopia: Perception, realities and the way forward for key sectors, 2012 at 211-212 (observing: ’There are more indications of a political element in selection, promotions, transfers, and discipline. The courts, and especially the Federal judiciary, are remarkably non-transparent in their personnel management...there is a perception among current and former professional staff as well as among outsiders that since about 2004 there has been an effort to recruit judges and prosecutors who, as one informant noted, are active rather than passive members of the ruling party (or its regional affiliates)’

22For instance, in the state of Oromia in the year 2002 about 60 judges were appointed by the president without the involvement of the parliament and the judicial administration council. See Assefa, supra at note 11 at 134.

23For instance, such criteria as good conduct and loyalty to the constitution are difficult to quantify. In particular, in practice the latter criterion is often confused, deliberately or otherwise, with loyalty to the ruling party. See Linn A. Hammergren, supra note 21 ( observing that : members of the public and the judges and prosecutors themselves perceive that loyalty—not just “to the constitution” but also to the administration—counts.) See also Assefa, supra at note 11.

with non-observance in practice\textsuperscript{25}. Transfers and promotions lack openness and transparency; no criteria exist to guide the process\textsuperscript{26} thereby raising concerns that promotions are not merit based\textsuperscript{27}.

As regards budget, though higher courts exercise a relative autonomy, district courts lack any autonomy in terms of budget preparation and administration\textsuperscript{28}. With reports indicating political interferences with the operations of the judiciary\textsuperscript{29}, the latter’s functional independence remains compromised. All these could leave judicial decisions influenced, if not dictated, by political pressures.

The above concerns can erode the independence of the judiciary and thus damage its integrity and reputation. Perhaps partly owing to this and lack of incentives\textsuperscript{30}, the establishment of a career and stable judiciary is yet to be realized. Turnover of judges is very high—courts are serving as ‘training grounds for the private practice’\textsuperscript{31}. High turnover of judges affects the quality of justice negatively as the experienced are substituted by the inexperienced ones\textsuperscript{32}. This trend, should it continue, will overshadow the implementation of new reforms such as

\textsuperscript{25}See UNODC assessment supra Note 21 at 33-34 (‘...some judges have been transferred or taken off active duty or had their salary revoked in order to pressure them to resign. There are also concerns regarding the tenure of Presidents and Vice-Presidents.’)

\textsuperscript{26}National Judicial Institute of Canada, supra Note 21, at 137.

\textsuperscript{27}See Linn A. Hammergren, supra note 21 at 211-212 (observing: ‘There are more indications of a political element in selection, promotions, transfers, and discipline.’)

\textsuperscript{28}National Judicial Institute of Canada, supra Note 21, at 133.

\textsuperscript{29}See Linn A. Hammergren, supra Note 21, at 183 (Noting...’political interference with the independent actions of courts or other sector agencies...’ labels it as one form of corruption.); Assefa Fiseha, Separation of powers and its implication for the judiciary in Ethiopia, 5(4) Journal of Eastern African Studies,702-715 (2011); See also uses and users of Justice in Africa supra note 37 (indicating political and other interference with judicial decisions and operations); Independence in the judiciary of Ethiopia, supra note 105 at 117( reporting government interferences with the judiciary-Government officials making comments that damage the impartiality and integrity of the judiciary; Ministry of Justice admonishing courts for alleged assuming of jurisdiction outside their mandate; intimidation and pressure on the judges).

\textsuperscript{30}This includes problems relating to salaries and benefits, career paths, etc. See UNODC Assessment, supra Note 21, at 34-35; See Assefa, supra note 11.

\textsuperscript{31}Interview Judge 10 held on Apr. 05/2012. About 20 judges resigned within a year just in one district court alone. See Assefa, supra note 11 at 140.

\textsuperscript{32}On the flipside, the influx of judges to the private practice could affect the latter positively.
plea bargaining. The judiciary is further constrained by infrastructure and problems of manpower. There is also an increasing pressure of caseload that leaves emphasis placed on case disposal and judicial efficiency even at the expense of quality. One judge observes: ‘there is a strong urge (both self imposed and institutional) to increase the number of decisions regardless of quality.’

Inhibited by the above problems, the institutional competence of the judiciary remains under question. Under the circumstances, one may understandably wonder how the judiciary discharges its responsibility in reviewing prosecutorial discretion, the process and the outcome of plea bargaining.

On the contrary, there are many incentives for the judiciary to rubberstamp or encourage plea agreements. First, with institutional pressure and preoccupation to clearing of caseloads, courts could be reluctant to allow the revocation of guilty pleas and conduct full-scale trials. The performance measurement system which exclusively focuses on disposition rates provides a good incentive to lead to this direction-if not to a mere ‘case counting’. This pressure often vindicated in the name of efficiency interferes with the independence of the judiciary and hinders the court from discharging its responsibilities properly - ensuring due process for example. Second, once endorsed the plea agreement is non-appealable. This beyond saving

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33 For instance, at Federal level several district courts are staffed with 3 or 4 judges. Amazingly, in one district court the ratio of judges to prosecutors currently stands at 1:17.

34 Many participants including judges told me that judges are concerned much with quantity of judgments as opposed to quality. Their caseload, the performance evaluation system in place, which is 60 cases per month in one high court and 44 cases per month in another regional high court, could be liable for this.

35 Interview with Judge 05, interviewed on 05/04/12 (translation mine).

36 In fact, it bears mentioning that plea bargaining may ease courts’ caseload. However, given the challenges, the capacity of the judiciary to thoroughly securitize plea bargaining/agreement is under question. i.e., the problem of quality is likely to remain even in an escalated form.

37 In fact, one may argue the other way round. As plea bargaining reduces their role, judges would be opposed to it and are likely to tightly review the process and the outcome with a view to assert their authority. Yet, the instrumentality of plea bargaining to reduce workload as well as weak culture of judicial review can explain possible rubberstamps of plea agreements.

38 To function properly courts/judges must be free from not only political interferences but from their supervisors who are concerned with the quick processing of cases. See Richard Klein, Due process denied: Judicial coercion in the plea bargaining process, 32 Hofstra L. Rev. 1349, 1416, 2003-2004.
courts’ time and energy could provide additional incentive to judges in that s/he may avoid any possible damage of reputation caused by reversal by appeal\textsuperscript{39}. Third, the weakness of the defence/legal profession, absence of meaningful participation of victims and absence of independent and vibrant media can insulate courts from scrutiny and may promote mere rubberstamps of plea agreements.

Even if the court is able to overcome the above problems(institutional and personal), the coercive environment under which plea bargaining functions (example high sentencing differentials, incomparable stakes involved-threat of severe punishment vis-à-vis losing at trial, unequal institutional bargaining power of the parties, insufficient guarantees)remains beyond their reach. This is especially true of their efforts to ascertain the voluntariness of the guilty pleas. Courts normally check if the guilty plea is free of physical coercion leaving the above coercive conditions (which may taint the outcome) unattended.

7.1.1.2 The Prosecution

Like other legal institutions, the prosecution service is not absolved of institutional and structural problems. To begin with, the current reforms collapse investigative, charging and sentencing powers in the prosecutor’s hands\textsuperscript{40}. This by undermining independent checks on prosecutors’ discretion would invite arbitrariness and abuse of charging as well as plea bargaining decisions. This would particularly be the case ‘...in the absence of well-organized accountability systems’\textsuperscript{41}...of prosecutors, including judicial reviews.


\textsuperscript{40}The prosecutor is vested with the power to investigate criminal cases, institute charge and plea bargain on sentences, facts and charges to ultimately influence, if not unilaterally decide on sentences.

\textsuperscript{41}See Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years (2010/11-2014/15) Strategic Plan, July 2010. Literature shows that the separation of investigations and prosecution is justified in the interest of prevention of abuse of power, ensuring consistency and competence. See Nuno Garoupa, \textit{et al} The investigation and prosecution of regulatory offences: is there an economic case for integration? C.I.J. 299, 234-36, 2011.
Further, reports indicate that prosecutors are less qualified, paid, and equipped compared to the judiciary\(^\text{42}\). The government’s strategic plan document also recognizes defects in the capacity of prosecutors to investigate crimes, examine investigative files, collect sufficient and relevant evidence, prepare quality charges, and to have adequate preparation for trial\(^\text{43}\). This has resulted in inefficient and ineffective prosecution, characterized by a low conviction rate and high discontinuance rate of cases\(^\text{44}\). Apart from the conventional competence and skill requirements of prosecution, plea bargaining needs special skills of negotiation. Although prosecutors are relatively better informed of plea bargaining, they are yet to acquire the necessary skills in this regard.

Limitations in the capacity, skills and competence of prosecutors could affect both the fairness and the efficiency of plea bargaining. To enhance fairness, the law requires the prosecutor to have sufficient evidence as a prerequisite to plea bargaining. With a reduced prosecutorial capacity (investigation and collection of evidence in particular), absent an independent scrutiny of the requirement and strong standard to measure sufficiency mean weak cases can be subjected to plea bargaining. Given the coercive plea offers involved in unlimited forms of plea bargaining, this may ultimately produce unfair and inaccurate outcomes (For more discussions on this see chapter 6, the innocent problem).

Prosecutors’ bargaining decisions could well be skewed by such structural factors as caseload pressures and personal incentives. Plea bargaining provides prosecutors with the incentives of reducing caseload and raising certainty of convictions, among others\(^\text{45}\). This mixed with institutional pressure to raise efficiency and own interest to maximize performance (due to the


\(^{43}\) See the Strategic Plan supra note 41 at 27-8.

\(^{44}\) Despite improvements, conviction rate at Federal level is 59% while it ranges from 76-84 % in the regions. Moreover, about 22% of cases are discontinued for absence of witnesses or defendants. This figure though still high indicates good progress compared with the earlier 56. 33%. See Justice Performance Report, 2010 at 18 available at: [http://www.moj.gov.et](http://www.moj.gov.et) accessed on 03/06/12.

disproportionate emphasis put on conviction rates as performance indicator), the general conviction-oriented values of prosecutors, absence of direct financial interest in the outcome of the case, the opaque nature of the process, the paucity of safeguards (absence of pre-trial review of evidence) and weak defence mean interests of justice may not always prevail in the prosecutors’ plea bargaining decisions. Instead, personal preferences could often come into play.

Another setback for plea bargaining relates the possibility of reneges by prosecutors. In my interview many defendants as well as lawyers express their doubts whether the prosecutor keeps his/her promises in plea bargaining. One lawyer observes from his experience that:

... defendant’s mistrust of the system of plea bargaining and the prosecution- meaning whether they will actually be rewarded for their guilty plea, will be a problem. In one corruption case, my client (whom I represented at the appeal stage) has experienced a renge at the lower court. After promise of immunity, my client cooperated with the prosecutor by providing information which is relevant to prosecute other co-offenders. However, the prosecution reneges and finally she received 18 years of imprisonment.

This could discourage defendants from using plea bargains and thus likely to invite added pressures on them. This is especially true in the unlimited form of plea bargaining where conditions that justify withdrawal from the plea agreement and the reliefs available for unjustified withdrawals are left unaddressed.

Logically speaking, the problem of renge would not be that pervasive and worrying unless prosecutors are shortsighted. This is because any failure to keep promises, by discouraging future cooperation among defendants, backfires against the prosecution. This may serve strong restraint on prosecutorial reneges. Yet, should renge occur, virtually the law provides no remedy for the defendant; for that matter, the latter has no mandate to seek for court approval of the plea agreement. Perhaps, one can think of reliefs based on principles of justice.

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46 Interview with defence attorney 01, held on March 30, 2012 (translation mine).
and fairness. However, this sounds unrealistic in Ethiopia. Asked why he did not appeal on such grounds the above lawyer puts:

*If not just simply to test it, such appeals are far-fetched in Ethiopia. One of the challenges in the Ethiopia criminal justice system is that those concepts you raised: the principle of fairness, the abstract essence of justice, etc do not apply. If you raise arguments based on such notions, judges will tell you to take them to school [showing that such arguments are for academics]. Our Judges are too mechanical—just preoccupied with rules. They apply the law as it is, even if it results in absurd conclusion. They take the issue of crime exclusively as an issue of rule. That is not the case. Many principles are involved.* [The interviewee supported such stance of judges with cases he faced. However, I have omitted them here]. Of course, judges alone should not take the blame. It seems that the government does not trust them. There is a concern that they may abuse their power. Judges also fear this and thus want to avoid any responsibility beforehand.

As has been discussed in chapter three, the Ministry of Justice and State Justice Bureaux are responsible for the prosecution of crimes. This structure results in institutional as well as functional dependence of prosecutors. By leaving the final prosecution authority to a political organ and allowing the latter to involve in the routines of prosecution, it raises concerns on the independence of prosecutors; exposing him/her to engage in politically motivated prosecutions and/or impunities. Where there are tensions between the judicial and political role of the Ministry, political ends will prevail even by overriding the rule of law. Of course, this cannot be ruled out even in any developed political culture let alone in the Ethiopian legal and political culture. In the circumstances, prosecutors who are accountable to the Ministry (in


48 See Assefa Fiseha, supra note 29. Indeed, there are strong allegations of prosecutions of this sort. See for example Country Report on Human Rights Practice for 2012, United States Department of State available at http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm, visited on 14/3/13. The report claims that there are about 400 political prisoners in Ethiopia. See Ibid at 10. Recently following the Supreme court’s upholding of 18 years and life sentences of one journalist and one opposition leader respectively, the US Government openly slammed Ethiopia of its politically motivated prosecutions of government critics; See also Linn A. Hammargren, supra note 21 at 215 (reporting concerns that: Political authorities or higher-level officers direct police to ignore complaints, undertake investigations, or arrest “suspects” without probable cause.)

49 To blame the Ministry on this is like ‘accusing a fish of being wet’. The problem rests on the structure that leaves the prosecution under the Ministry. With this structure, the problem is inevitable even in most advanced
their appointment, promotion, transfer, discipline and importantly in their decision-making) have many incentives to simply submit to politically motivated interventions of the Ministry or that of their immediate supervisors indirectly; nor can one rule out the inclination to do what they think the government wants. With a less restrained executive power, the problem could be more apparent in the Ethiopian variant of plea bargaining, an institution which overwhelmingly expands prosecutorial discretion and is open to manipulations. This provides the prosecution bodies or the government additional incentive to hijack the criminal process to their political or personal ends. Even before plea bargaining is formalized, charge withdrawals are being used this way. Surely, plea bargaining will exacerbate such problems.

To conclude, plea bargaining offers prosecutors a quasi-judicial power. This reinforced by insufficient guarantees, problems of competence and lack of political independence (at least structurally) mean the integrity as well as the efficiency of plea bargaining is likely to be significantly compromised. Nor is it going to be free from abuse.

7.1.1.3 The Police

Despite improvements following reforms, the capacity of the police effectively to prevent, detect and investigate crimes remains a problem. Absent special police expert tasked with crime investigations, the regular police do the job. In the main, the regular police are not well and democratic states. The difference would be one of intensity. Simply put structural dependence erodes functional independence. A case in point is France where Ministers interfere to protect politicians and powerful business people. See chapter 3, organization of justice actors.

That said, it is submitted that the England model ensures functional independence of prosecutors despite the latter’s structural dependence on the executive. See for example Antoinette Perrodet, ‘The public prosecutor’, in Mireille Delmas–Marthy and J.R Spencer, European Criminal procedures, Cambridge university press, 415-457, 2005. Leaving its feasibility there aside, this is simply impossible in less developed political culture and legal system as Ethiopia.

50 In a parliamentary form of government exclusively dominated by one party (currently having 99.6 % of the seats) and characterized by weak or virtually no judicial review of the executive and weak media, the executive enjoys unfettered power.

51 For example, such abuses of prosecutorial power are being investigated against Customs authorities. Further, it is not clear why some crimes committed against the public and which once were a talking point among the public are suddenly withdrawn. Cases involving the forging of medicines and food items are just some of the examples.

52 In this regard, the recent reform requiring investigation of crimes to be made with the prosecutor involved merits mention.
equipped with modern investigative techniques and forensic capabilities. Consequently, they are accused not only of relying on the accused as a source of evidence but also of using improper methods including torture to extract confessions. Consequently, they are accused not only of relying on the accused as a source of evidence but also of using improper methods including torture to extract confessions. 53.

Despite the prosecutor’s explicit authority of supervision over the police 54, the former hardly exercise it 55. Although, its real impact needs a separate empirical investigation, the involvement of prosecutors in the investigation of crimes 56 could bring positive developments on this 57.

Limitations in the capacity of the police and absence of sufficient police supervision have ramifications for the operation of the justice system in general and that of plea bargaining in particular. Weaknesses in the areas of police investigations and evidence collection result in a very low rate of convictions, minimal deterrent effect for the public, and poor perception among the population of the effectiveness of legal institutions 58. Police weakness, by producing unreliable and insufficient evidence, may well affect prosecutors’ plea bargaining.


54 See article 8(2) of the 1961 Criminal Procedure Code.

55 Though such abdication of power by the prosecutor needs a separate investigation, the possible reasons could include: Prosecutors misconception of their role (perceiving their role limited to prosecution only), lack of enforcement mechanism, tensions and mistrust between the two etc.

56 This nonetheless is not true of all states. On the contrary, some states are moving to the opposite direction. In Tigray Region, police and prosecution were once working jointly in one office. However, for ‘efficiency’ reasons the two are separated and their cooperation is limited to serious crimes. UNODC Assessment, Supra note 21 at 50.

57 One prosecutor opines:

Generally, joint investigation has brought some improvements on the quality and reliability of investigations. However, it all depends on the commitment of the individual prosecutor. Some prosecutors simply endorse what the police do. They are there only for signature. While some of them do properly guide and supervise police and do actually participate in the investigation. Interview with Prosecutor 05, held on 07/05/12. On the other hand, prosecutors are accused of failing to properly examining investigation files and preparing quality charges. See the Strategic plan, supra Note 41 at 28.

58 See uses and users of Justice in Africa supra note 42, ( observing ... ‘[e]ither because of corruption, incompetence or simple work overload, police failures to bring witnesses or even the defendant to court lead to many criminal cases being temporarily closed’).
decisions negatively. Put simply, plea bargaining decisions could be made based on unreliable or insufficient evidence. Moreover, the absence of adequate pre-trial guarantees in particular on arrest\textsuperscript{59}, and lack of effective judicial review, may encourage arbitrary arrest and the processing of weak cases in plea bargains.

Further, though police have no formal role in the Ethiopian variant of plea bargaining, lacking scientific investigative techniques, informal bargaining over confessions cannot be ruled out. Indeed, many prosecutors witness that the practice already exists in a very limited extent at the investigation stage. This practice could be intensified with the formalization and prevalence of plea bargaining, an institution which stimulates the continued use of confessions/ guilty pleas thereby raising concerns about the integrity of the plea agreement. At this stage where defendants are unrepresented and uninformed of the charges, plea bargaining appears to be more coercive. The possibility of forced confessions cannot be ruled out either (see below).

7.1.1.4 Lawyers/ the Bar

The Bar remains `intolerably weak as a profession`\textsuperscript{60}. It is not well organized- nor is it recognized by law as a Bar; it is active only as an ordinary association\textsuperscript{61}. Nor does it have `...any significant role in leading the legal profession and guiding its members...and watching over the development and respect of the legal profession`\textsuperscript{62}. It is far from being politically independent\textsuperscript{63}. In such a format, the Bar is unable to influence practices and policy decisions that affect the legal system, for example plea bargaining. For that matter, it has not participated

\textsuperscript{59} For details, see the innocence problem chapter 6.

\textsuperscript{60} See National Judicial Institute of Canada, supra note 21; See also `The Federal Democratic republic of Ethiopia Comprehensive Justice System Reform Program, base line study`, 2005.


\textsuperscript{62} Ibid.

\textsuperscript{63} See Ethiopian legal and judicial assessment, World Bank, 2004 at 28.
in the reform that introduces the latter. This could affect plea bargaining and its reception among members of the Bar.

Another problem with respect to private attorneys has to do with the structure that puts them under the supervision of the Ministry of Justice or justice bureaux that combine both political and judicial functions. As shown earlier, lawyers are licensed and supervised by the Ministry of Justice or justice bureaux, their rivals in court. In theory, this structure presents major issues of independence of lawyers in discharging their responsibility in general, and in effectively negotiating plea bargains to their client’s best interest in particular. In practice, with the substantial majority of lawyers stating that they are somewhat or sufficiently independent, apparently the problem seems less pervasive. Yet, as this may bring in difference in status—i.e. the prosecutor licensing and supervising the attorney, there is no parity between the two parties. This together with limitations of resources and access to evidence on the part of the defence would jeopardize the principle of equality of arms and thus would compromise the fairness of plea negotiations.

Apart from structure, the public perception of criminal defence lawyers presents another challenge. Sometimes, their role is misperceived and linked with the crime their client is charged with. With plea bargaining allowing the dropping of charges or substantial reduction of sentence, this perception is likely to get worse and adversely affect attorneys and thus defendants.

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64 Interview with attorney 07, held on 12/04/2012.

65 More than three-fourth of the lawyers participated in the study claim they are somewhat or sufficiently independent.

66 Those attorneys who represent unpopular defendants and ‘political prisoners’ claim that they sometimes receive threats and intimidations from the public and government officials respectively.
7.1.1.5 The Legal Aid System

With other forms of defence service/legal aid organization, notably the contract and appointed models, unknown, legal aid service in Ethiopia is organized through public defenders. A very limited role is also played by pro bono services and legal aid centres.

a) The Public defender’s office

It was first established informally in 1995 to provide legal representation to dergue (former government) officials who were accused of serious crimes such as genocide. Currently, at the Federal level it is formally organized under the Federal Supreme Court yet administered under the Civil Service regime. At the state level, it is structured within courts and is accountable to the state judicial administration commission. The office (in particular at the Federal level) remains largely under-resourced, staffed with poorly paid and overburdened defenders (defenders having little or no time to prepare their defences—usually they assume representation on the spot at trial). Neither investigator staffs nor other professionals such as interpreters and social workers assist the office. All these would undermine the quality as well as the availability of legal services.

67 The office exclusively relies on employed public defenders; it does not contract out legal services as some public defender offices do, to private attorneys.

68 It was a year later that proclamation 25/ 1996 formally vests the power to organize the office to the president of the Supreme Court.

69 This structure in states enables the office to have relatively equitable budget and pay public defenders equivalent with judges See UNODC Assessment, supra note 21 at 72.

70 My interview with the person in charge reveals that the office has no separate budget, no sufficient office and manpower (at the time of writing only 18 public defenders cover Federal courts including DireDawa and circuit benches that reside in the regions). Three more staffs were under recruitment at the time of interview.

71 A Report by the office indicates that current staff case ratio stands at 1: 60-65 files or 120-140 defendants. Currently, 349 cases at Lideta high court are being handled by just 4 public defenders. Interview with attorney

72 In practice, legal representation by public defenders is available to indigents only in most serious crimes; excluding virtually all cases under first instance (district) court jurisdiction, most crimes under the high court jurisdiction and pre-trial proceedings. This is inconsistent with the constitution. From the time of its establishment (1996) to 2011, the office delivered legal representation to about 29 thousand defendants at Federal level. Given, the criminal jurisdiction of the Federal government and the number of the needy, this is a small figure.
Further, my field investigation reveals that public defenders win no/little confidence among their clients. The problem of trust has two dimensions: the first has to do with the low quality of service they provide. As shown above the service they provide is inhibited by a host of problems: including caseload, time and resource constraints. The second and most troubling dimension of the problem relates to defendants’ perception of public defenders. Some defendants consider public defenders as agents of the state and hence do not trust them to confide their secrets. One defendant opines\(^73\): ‘I do not trust my attorney. He is after all assigned by the state, my accuser. So how can I trust him?’ This problem of perception is also recognized by some judges as well as public defenders themselves\(^74\):

*I was assigned to represent a friend of mine who was accused of first-degree homicide. I knew for sure that his case falls under ordinary homicide, as he was provoked. Then I advised him to plead guilty to ordinary homicide. Yet, he turned down my advice and told me that: ‘you are assigned by the state and thus I do not trust you on this’. You see even our friendship did not help here. ....Unfortunately he was convicted as charged.*

Another constraint, though temporary, with the public defender’s office and legal aid in general is that defendants are not fully aware of their right to free legal assistance at state expense. This affects the exercise of the right negatively.

With the above structural constraints, the public defender’s office remains too weak to effectively represent defendants in plea bargains. In particular, underfunded and overburdened public defenders mean plea bargaining is likely to be used even without much effort to investigate the case and amass defences, which may ultimately weaken their bargaining leverage and push them to submit to cheap bargains\(^75\). On the face of public defenders’ incentives in plea bargains, in particular the advantage of ending cases more quickly, this is probable.

\(^{73}\) Interview with defendant 11, interview held on 09/07/2012 (translation mine)

\(^{74}\) Interview with Judge 09( ex-defence attorney ), held on 11/07/2012 (translation mine)

Misperceptions and mistrusts of public defenders would skew any proper legal advice in plea bargaining. At the same time for defendants who are brave enough to overbear threats of unlimited plea bargaining, it could also compensate improper advices to plead guilty. Nevertheless, this seems less realistic as defendants are too weak to withstand this and other possible pressures to plead guilty.

To recap, the quality of legal service defendants obtain from public defenders is expected to be undermined by the above constraints. Admittedly, to some extent plea bargaining could help reduce public defenders’ caseloads. However, this would come at the expense of competent representation. Two counts support this: First, it is difficult to reconcile unlimited plea bargaining with competent legal representation\textsuperscript{76}. Second, local contexts would provide public defenders incentives to use plea bargaining even in disregard of their clients’ interest. Though, no immediate financial interest is involved, the fact that their income is not affected by the amount of time spent on individual cases or the method by which cases are resolved, the performance evaluation system in place (the number of cases handled as a major performance indicator), caseload pressure, low level of professionalism, and the particulars of defendants (see below)-all would create strong incentives to plea bargain. In other words, there are no/little incentives (both financial and non-financial) to try the case. These could make competent and effective counsel difficult to obtain in the Ethiopian variant of plea bargaining.

\textit{b) Pro bono service}

Advocates / lawyers are required to render legal service to the needy for 50 hours a year for free or with a minimum payment\textsuperscript{77}. Yet, this obligation is inhibited by several setbacks including absence of enforcement mechanisms\textsuperscript{78}. As a result, apart from some piecemeal

\textsuperscript{76} Legal counsel in plea bargains is adversely affected by lawyer’s preferences and interests. See chapter 1; See also the section on access to legal counsel and free interpreter below.

\textsuperscript{77} Council of Ministers Regulation No. 57/1999 Federal court Advocates’ Code of Conduct Regulations article 49.

\textsuperscript{78} Other problems as identified by the Bar Association include: weak supervision / supervisory body, structural/recognition problems that limit the role of the Bar Association, absence of law firms, absence of incentives, etc. See Enforcement of Pro bono, Supra note 61 at 14-18.
efforts\textsuperscript{79}, the lawyers' \textit{pro bono} obligation is yet to be fully implemented. Even if, properly implemented, lawyers generally lack the necessary incentive to exert reasonable effort on pro bono cases. In the circumstances, the \textit{pro bono} service is of no or little avail in plea bargains.

\textbf{c) Law school legal aid centres}

Another important development with legal aid in Ethiopia is clinical legal aid centres established by law schools in collaboration with the Ethiopian Human Rights Commission. (Similar arrangements existed in some law schools with APAP, a local NGO). While this arrangement has a gap filing role in making legal services available to the indigent, it has its own limitations. Students lack the experience to deliver quality legal counsel and the service is being delivered incidentally—primarily students provide legal counsel as an academic requirement. Moreover, on top of its limited scale, the service is confined to counselling, and obviously not appearing before court\textsuperscript{80} or negotiating plea bargains.

In the preceding paragraphs attempt is made to highlight the challenges of legal aid system in Ethiopia. Any endeavour to reform the criminal justice system could not be complete unless it includes the legal aid system. Unfortunately, governments tend to leave legal aid out of the picture while reforming their criminal justice system. This appears so in the current reform that introduces plea bargaining in Ethiopia. The limited legal services are being run in a disorganised and precarious fashion. No single organ is responsible for integrating the several methods of delivering legal aid service to the poor. The reform (policy) leaves the responsibility diffused among the attorney general, courts, defence attorneys and the Bar association. This is not a wise approach and thus might have a negative bearing on plea bargaining transplant. To have an effective and organised legal aid program, one independent

\textsuperscript{79} The Bar association provides very limited legal aid service to the poor and the socially unprivileged ones. See Enforcement of \textit{Pro bono}, Supra note 61 at 17. Perhaps another noticeable development has been the provision of free legal aid service to the needy by some local NGOs (APAP and EWLA in particular). Currently, such efforts appear to be constrained by a new law that limits finance sources to domestic sources.

\textsuperscript{80} There are however encouraging moves in some law schools. For example, teachers at Jimma law school appear before court in some selected cases representing indigents.
entity - be it the legal aid commission or legal aid board - should run it. This arrangement is also strongly favoured by justice actors in Ethiopia. However, the status quo is likely to remain for some time, and present serious challenge to the functioning of plea bargaining. Put simply, the lack of a well-organised/ autonomous, accessible and effective legal aid system will frustrate the efficiency and fairness of plea bargaining. As shown elsewhere, although unlimited form of plea bargaining impairs competent and effective legal representation, the need to ensure legal services to the indigent cannot be overemphasized in plea negotiations. At least, defendants could draw benefits from ethical attorneys or in the regulated forms of plea bargaining.

7.1.1.6 Problems of Co-ordination among Legal Institutions

A problem characteristic to the Ethiopian criminal justice system is the weak co-ordination among the various institutions responsible for the administration of justice: investigative, prosecution and enforcement organs. On the contrary, sometimes one can see antagonism between justice institutions. Though problems of co-ordination are acknowledged by several reforms including the reform under consideration and steps have been taken to remedy them

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81 This works in many countries. In England and Wales, legal service commission and in Scotland legal aid board are established to handle the matter. In Costa Rica, an autonomous and well-organized public defender's office is established along with the office of the public prosecutor. See James L. Bischoff, 'Reforming the criminal procedure system in Latin America', 9 Tex. Hisp.-J.L. & Pol'y 46 2003.

82 They observe that legal aid and the public defender program should be moved away from the court and the Ministry/Bureaus of Justice, and set up as an independent entity. See UNODC Assessment, supra note 33.

83 Similar observation is made elsewhere. See Nuno Garoupa and Frank H. Stephen, 'why plea-bargaining fails to achieve results in so many criminal justice systems: a new framework for assessment' 15 Maastricht J. Eur. & Comp. L. 323,327 (2008) (arguing that the way criminal legal aid is implemented, the way public defenders are organized explain many of the difficulties encountered by plea bargaining in England and Wales, as well as France or Italy).

84 For instance, the executive in particular the Ministry of Justice and the Anticorruption Commission publicly denouncing judges; tension between the police and prosecutor. See for example National Judicial Institute of Canada, supra Note 21 at 117 (reporting Government officials making comments that damage the impartiality and integrity of the judiciary; Ministry of Justice admonishing courts for alleged assuming of jurisdiction outside their mandate).

85 See The Federal Democratic republic of Ethiopia Comprehensive Justice System Reform Program, base line study, 2005 (reporting poor relations among justice actors). The draft criminal procedure code imposes a duty to cooperate among justice institutions in enforcing the criminal justice policy, criminal laws and administrating the
notably through the BPR reforms, the outcome remains limited\textsuperscript{86}. This lack of cohesion could affect the implementation of new reforms such as plea bargaining and thus the desired efficiency from the latter.

### 7.1.2 Power disparity between the Adversaries

#### 7.1.2.1 Access to Legal counsel and free Interpreter

Most defendants in Ethiopia are poor and uneducated or less educated. This creates an impregnable barrier for the exercise of their rights. Thus, the need for legal counsel cannot be overemphasized. Nonetheless, legal counsel is extremely limited. In practice, it is available to the indigent only in very serious crimes such as capital offences. As a result, most defendants go unrepresented and thus are unable to present and defend their case properly. Even for those who can afford to pay a lawyer’s fee, the service is inaccessible. The UNODC survey report of 2011 indicated that Ethiopia had only 4000 lawyers for a population of 81 million\textsuperscript{87}. This limited number of lawyers is available in urban areas, making legal services in rural and remote areas virtually non-existent\textsuperscript{88}.

Defendants’ access to legal counsel is not only affected by the limited availability of the service or resource limitations but also by their perception of legal counsel. Studies show that

\textsuperscript{86}For instance at Federal level, the BPR reform established one unit to coordinate the judiciary, the prosecution office, the police and the prison administration. Yet, this effort appears to be largely less successful perhaps because of, among others, absence of any legal framework and concerns of independence. That said it would be unfair to ignore some encouraging achievements in related aspects. Although chronic has been the poor coordination of the police with the prosecutor, significant progress is made following the involvement of the prosecutors in the investigation of crimes. For details, see chapter 3.

\textsuperscript{87}See “Access to Legal Aid in Criminal Justice Systems in Africa Survey Report”, UNODC, April 2011. This figure is modest compared to the majority of African countries. Yet, it is extremely low compared 40,000 lawyers for a population of 82 million in Egypt and 20,000 lawyers for a population of 49 million in South Africa. See Id.

\textsuperscript{88} See UNODC Assessment, supra note 21 at 69.
defendants’ conception of the need for legal counsel is low. The following accounts from two defendants also support this:

Defendant 12:

_I submitted myself up to the police and confessed forthwith. When I appeared in court I pleaded guilty to the crime of murder out of repentance, but there was no evidence against me. I did not want to have a lawyer, as it serves no purpose once I pleaded guilty._

Defendant 04:

_I had a defence attorney appointed by the state, but he did not help me as such. Had I known the importance of legal counsel I would have retained one from my subsistence._

While defendant 12 misperceives that legal counsel is unnecessary after pleading guilty, defendant 04 prefers retained attorneys to public defenders and regrets he did not have the benefit of privately retained counsel.

Defendants’ access to legal counsel is also constrained by their knowledge of the existence of a free legal service as well as their perception of public defenders. One defendant opines:

_I did not have legal counsel; nor did I request for it since I thought it is available only for a payment._

Defendants’ perception of public defenders appears negative. Some defendants consider public defenders as agents of the state- their accuser and hence do not trust them to confide their secrets. This impairs any legal representation to the extent of making such defendants as good as, if not, worse than unrepresented ones.

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89 Interview with defendant 12 and defendant 04, interviews held on 09/07/2012. (translation mine)

90 Interview with defendant 11, held on 09/07/2012. (Translation mine).

91 For some detailed accounts on this, see the section on institutional problems.

92 Such defendants treated as though effectively represented, may be credited with a benefit they have not in fact received.
Further, the problem of access to legal counsel is exacerbated by the judiciary’s effort to process cases more quickly. The institutional and individual (self) pressures to end cases quickly could impede access to legal counsel⁹³.

From the forgoing, it follows that allowing unrepresented defendants to bargain in an unlimited form of plea bargaining dominated by the prosecutor even as an exception⁹⁴ ignores particulars of defendants in Ethiopia and thus consideration of fairness.

That said, on the flipside of this argument lies the risk of discriminating against indigent defendants who cannot benefit from the limited legal aid scheme. The argument goes: while the rich, by hiring the best lawyers available, can benefit from the generous concessions of the prosecution, the poor will remain excluded unless permitted to bargain alone. This argument is, nonetheless, flawed for it ignores the weak bargaining position of unrepresented defendants, which leaves them in a disadvantageous position than their counterparts at the trial⁹⁵. Therefore, the problem is not as worrying as allowing unrepresented defendants to bargain alone is. Moreover, this kind of discrimination characterizes mainly unlimited plea bargaining and thus its impact can be limited by putting substantive guarantees that narrow down sentencing differentials.

Even with represented defendants, the quality of legal representation is not satisfactory, either. Though I could not make a comprehensive inquiry on this, the little survey I did shows complaints among defendants that they do not receive competent and proper legal representation⁹⁶ a complaint confirmed by some judges and attorneys. One study also lends

⁹³Identifying this as a problem one writer suggests that: ‘in light of the huge challenges to providing comprehensive access to legal aid, it would be useful to have specific training for judges to assist them to deal effectively and fairly with unrepresented litigants’ see L. Hammergren Final Evaluation: Justice Subprogram of PSCAP, October 2009 at 29 as cited in UNODC Assessment, supra at note 21 at 16.

⁹⁴See chapter 4, legal conditions to plea bargaining.

⁹⁵Unlike plea bargaining trial is about fact finding- a task fairly distributed among various actors. Trial defendants thus are better protected than their counterparts in plea bargaining. See below.

⁹⁶Among 18 defendants 6 were unrepresented. Of the 12 represented defendants, about half of them bitterly complain about this. The complaints include: lack of adequate preparation for the case, little or no contacts/meetings with clients, failing to promote clients interest.
support to this. This applies to public defenders as well as private attorneys, though in varying degrees. With regard to the services of the former, defendant 03 says:

*I had an appointed public defender. However, I had received no advice from him. We had very limited contact - he met me only twice out of 18 appearances. At the second meeting, he asked me to plead guilty but then I told him I already did.*

Perhaps this may not be that surprising, if one looks at the state of public defenders - overburdened with cases, required to take up cases and stand trial immediately without any preparation, low salaried, under-resourced and less organized. Nor is incompetent and ineffective counsel recognized as one ground for appeal so far. Surely all these would undermine the quality of legal representation. Such state of affairs unless curbed, may affect plea bargaining to the detriment of defendants. This could be an incentive to make public defenders engage in plea bargaining, even contrary to defendant’s best interests.

If not a matter of degree, the quality of legal representation is also a concern with private attorneys. Several factors could influence the quality of their services including: problems of access to resources and evidence, own incentives and the limited number of lawyers.

The quality of legal service in plea bargaining may also be affected by the particulars of defendants. Defendants’ weak social, economic and educational status leaves them in poor command of their defence. In particular, lack of expertise to appreciate their own case as

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97 Though not as such conclusive (because of limited participants involved in the study), one empirical study documents similar problems with the services of retained attorneys. See Abebe Asemare, ‘Yetebekoch sinemigbar chigrochin betemelekete lewuyiyit yekerebe tinat’ (concept paper on problems of ethics of advocates), Alemayehu Haile memorial foundation periodical, December 2011

98 Interview with Defendant 03, interview held on 09/07/2012.

99 Public defenders in some regions such as Oromia are better in terms of payment and budget. See UNODC Assessment, supra note 21.

100 See above, the organization of legal aid.

101 See Abebe Asemare, supra note 97.

well as opponent’s case means defendants could easily be dominated by their attorneys, if not entirely excluded, in the plea bargaining decision. Nor are they in a position to monitor the performance of their attorneys.

Further, the remuneration scheme in place could also affect the quality of representation. A case in point is private attorneys. The payment scheme, which is flat fee per case as opposed to an hourly one, is likely to push them to dispose of cases by encouraging their clients to plead guilty as early as possible. The more cases attorneys take and quickly and early dispose them of via plea bargaining, the more fees they can collect. Because a trial will almost invariably take much longer than a plea bargain, the fee structure gives the attorney disincentive to pursue it. Although, this is not to suggest that professionals will simply trade ethical values for financial gains, the possibility is there. Indeed, some attorneys admit that they would consider their financial incentives in their plea bargaining decisions. While earlier disposition might increase efficiency, it is likely to affect sentences and verdicts adversely. The problem would be exacerbated by limitations in the availability of review and the difficulty of reviewing attorneys’ plea bargaining decisions.

That said some take issue with this argument and claim that due to the financial disincentives it involves, defence attorneys may not encourage defendants to plead guilty. Proponents of this

103 In fact, there exists empirical evidence to support this from the developed jurisdictions. For example See Rodney J. Uphoff & Peter B. Wood, ‘The Allocation of Decision making Between Defence Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decision making’, 47 Kansas L. Rev. 1, 6 (1998) (studying five public defender offices with 700 attorneys and finding that majority of the lawyers take lawyer-centred approach). For stronger reason this is likely to be the case in Ethiopia.

104 On the effect of payment system on public defenders, see the section on organization of legal aid.


106 See Albert W. Alschuler, ‘The Defence Attorney’s Role in Plea Bargaining’, 84 Yale L.J. 1179, 1182 (1975). See S.J. Schulhofer, plea bargaining as disaster, 101 Yale L.J. 1979, 1988(1992) (‘Attorneys compensated on an hourly basis generally do not face financial pressure to minimize the time spent on a case, so they do not have a personal incentive to settle quickly’). See also Stephanos Bibas, supra note 75 at 2479.

107 Asked to rate the role of set of factors on their plea bargaining decisions (making or accepting plea offers) about a third of the participants (20) rate financial incentives as important.
view support their argument by producing empirical evidence from ADR cases. Because of financial considerations, the argument goes; defence attorneys are reluctant to advise defendants to settle cases via ADR, at times even discouraging them to take this trajectory. Yet, this is less convincing, for the analogy of plea bargaining with ADR is weak. In the latter case, once the case is diverted to ADR, in the main the attorney gets out of the picture; s/he has no participation and hence no financial incentive. Thus, it is logical to say that attorneys may discourage settlement of cases through ADR, ceteris paribus. However, in the case of plea bargaining (where the attorney's payment scheme is by case), there is not such financial disincentive to discourage attorneys from taking the option of plea bargaining. Conversely, there is a financial incentive in quickly processing cases via plea bargaining.

Though not as pervasive as legal counsel (only in terms of scope and not relevance), the availability and quality of interpreters, by creating an impenetrable language barrier, may well interfere with the operation of plea bargaining in Ethiopia. In a Federal system which embraces more than 80 languages- some of them being working languages in the respective states, effective plea negotiation with a defendant who is not versed in the language of the proceeding cannot be conceived unless an interpreter assists him. That is why the draft code provides for free interpreter in plea bargains\(^\text{108}\). Yet, despite the fact that it is constitutionally guaranteed, a free interpreter remains the most neglected service on the ground- neither accredited interpreters nor a dedicated budget exists for it so far, thereby forcing the court to use anyone around as an interpreter. If this trend continues, it will be an obvious barrier to plea negotiations for it is impossible to effectively negotiate with an amateur interpreter.

The limited resources available and the low priority given to strengthening the defence - legal assistance and free interpreter in particular\(^\text{109}\) in the reforms mean the above problems are less likely to be addressed in the foreseeable future, and thus remain formidable challenges to the operation of plea bargaining. This is further intensified by the inherent problem of

\(^{108}\) See Article 228 of the Draft Code.

\(^{109}\) The limited Legal assistance available in Ethiopia is delivered in a precarious fashion. See the section on legal aid.
unlimited plea bargaining - a form of plea bargaining highly impaired in affording effective legal counsel to defendants, if not promoting inadequate representation 110.

In conclusion, the interaction of the above concerns of availability and quality of legal representation as well as particulars of defendants on the one hand, and the nature of legal counsel in unlimited plea bargaining on the other hand, all increase the risk that plea bargaining will produce unfair and inaccurate outcomes.

That said one last remark deserves mention. It should be noted that problems of access and quality of legal representation are not unique to plea bargaining – they are a common problem with trials in Ethiopia too. Yet, the problem is less vexing compared to that which prevails in plea bargaining at least for two reasons: In trials, Ethiopian courts are more active than envisaged by the law to investigate facts by, _inter alia_, putting to prosecution witnesses any question any time, calling their own witnesses and even at times helping unrepresented defendants examine prosecution witnesses. Secondly, unlike plea bargaining, trials vest no excessive discretion in the prosecution that threatens defendants’ rights to the full. In trials, the responsibility to ensure the integrity of the process is fairly distributed among many actors. However, this is not the case in unlimited plea bargaining – only the prosecutor takes the upper hand.

7.1.2.2 _Inequality of arms / power imbalance between the parties_

Though the Ethiopian criminal procedure is structured substantially along adversarial lines and is now moving completely to that direction 111, the balance of power is still much more skewed in favour of the prosecution and to the detriment of the defence. While the prosecution

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110 See A. Alschuler, 'Personal failure, institutional failure and the Sixth Amendment', 14 N.Y.U. Rev. L. & Soc. Change 149 1986 (arguing plea bargaining falls short of providing effective legal counsel for two reasons: 'First, a system of plea negotiation is a catalyst for inadequate representation it subjects defense lawyers to serious temptations to disregard their clients' interests, engenders suspicion of betrayal on the part of defendants, and aggravates the harmful impacts of inadequate representation when it occurs. Second, plea negotiation system insulates attorneys from review and often makes it impossible to determine where inadequate representation has occurred').

111 See chapter 3. Perhaps the exception is the absence of complete separation of investigation and prosecution stages of the criminal process. (Since following BPR reforms investigations are carried out jointly by police and prosecutors).
enjoys state resources and powers, the defence remains very weak due to problems relating to structure, poor organization of defence service\textsuperscript{112} as well as particulars of defendants in Ethiopia—mostly poor, uneducated, unrepresented and uninformed defendants\textsuperscript{113}.

While the reform significantly expands the power of the prosecutor, notably through plea bargaining to have a quasi-judicial role, it has not given sufficient attention to the defence—it remains poorly organized and having limited role in the pre-trial stage\textsuperscript{114}. While the trial stage in the Ethiopian criminal process seems to incorporate the principle of adversarialism, the pre-trial stage, in particular, the investigation stage does not. With no defence investigation recognized at this stage (unilateral yet partial investigation by the state prevailing), it is difficult to take the defendant as a strong adversary. The anomaly in the Ethiopian criminal investigation is that the unilateral investigation is neither impartial nor is its outcome accessible through pre-trial disclosure\textsuperscript{115}. Surprisingly, the reform seems to overlook this anomaly. It is not clear whether the defence can conduct its own investigation, and interrogate the prosecution witness (without the pain of sanction). In such a setting, the unlimited variant of plea bargaining Ethiopia adopts (which inherently involves high sentencing differentials, overcharging, and other prosecutorial leverages to induce guilty pleas) simply polarizes the bargaining disparity of the prosecution and the defence. Here, though the recent incorporation of a duty of pre-trial disclosure is a good step towards tapering this gap and ensuring the principle of equality of arms, its effectiveness is likely to be undermined by the absence of defence investigation, the timing and scope of disclosure\textsuperscript{116}, absence of regulation of failure to discharge the duty as well as other implementation problems\textsuperscript{117}. Currently, the prevailing

\textsuperscript{112} For details see above, the organisation of legal aid.

\textsuperscript{113} See above the section on access to legal counsel and free interpreter.

\textsuperscript{114} In an adversarial system as the prosecutors role expands so too the role of the defence correspondingly. Nevertheless, this is not the case in Ethiopia.

\textsuperscript{115} It is recently that the duty of disclosure is introduced at policy level.

\textsuperscript{116} The prosecutors duty to disclosure is to be discharged during negotiations, a timing that is not sufficient to enable the defence make informed decision.

\textsuperscript{117} The negative perception of prosecutors on the duty, ethics of the parties, the limited access to legal counsel, etc could be challenges for implementation.
practice is that defendants are not often aware of the specific charges levied against them until the trial starts; nor are they allowed to access government’s evidence. All these are likely to create massive asymmetry of information\textsuperscript{118} and leave the defence in a weak condition and thus barely fits with the unlimited variant of plea bargaining. In other words, the prosecutor would virtually dictate the terms of any negotiation unilaterally, without meaningful participation of the defence thereby tainting any negotiation and outcome thereof. At best, this process would be described as “capitulation to government’s [prosecutor’s] best offer”\textsuperscript{119}.

7.1.3 Delay in Context and Options to Manage it

As shown elsewhere in chapter one, caseload pressure/delay and thus the need for efficiency is the major explanation for most jurisdictions to resort to plea bargaining\textsuperscript{120}. Ethiopia is not an exception to this. However, the context of caseload pressure/delay in Ethiopia differs significantly. Unlike other jurisdictions (adversarial jurisdictions in particular) which apply plea bargaining in its unlimited form, the cause of delay in the criminal justice system rests neither on over-procedures in the criminal process nor on jury trials (an institution having no place in the Ethiopian criminal justice system). The criminal process in Ethiopia is less constrained by procedures both on paper and in practice. No complex procedures of investigation, prosecution or trial are involved in the process. It is largely unconstrained by such procedures as exclusionary rules and other strict rules of evidence, disclosure rules, pre-trial hearings and reviews and strict standards of prosecution. The trial process is much simpler and less costly compared to other adversarial variants. Though largely adversarial in theory, it mainly remains less adversarial in practice. This is so owing to the huge asymmetry of power between the parties, among others. (i.e. the defence’s limited access to evidence and the defendant in the majority of cases standing trial unrepresented). This manifestly makes

\textsuperscript{118} This gap exists in trials as well, but in a more mitigated form. (On the role of courts to mitigate the problem see the section on power disparity between the adversaries).


\textsuperscript{120} Although, delay and the need for efficiency appear to be underlying and ultimate justification to have plea bargaining in any system, the cause of delay and the context in which plea bargaining developed, differs significantly. See chapter one.
lawyerly combats, protracted exchange of arguments, and complex interpretation of issues a very rare event. Nor is there any legally defined standard of proof, though *beyond reasonable doubt* is used in practice under the risk of inconsistent (too lenient or too stringent) interpretation. Further, there are limitations on the quality of judgment; it is difficult to find a well researched and substantiated judgment\(^{121}\). All these, albeit, having their own downsides, make trials less demanding (simple), less costly and less time consuming, *ceteris paribus*.

Consequently, the cause of delay in Ethiopia largely rests elsewhere. In the main, it is imputable to the capacity of legal institutions (the way the investigation, prosecution and adjudication organs function). Specific interrelated causes of delay include: frequent and longer adjournments (both judge initiated and party initiated i.e. following witness or defendant disappearance); excessive appeal rate and its use for dilatory tactics (court statistics showing increasing appeal rates)\(^{122}\); gaps in the legal framework (for example no limit on remands, no limit on how long a case should last); limited man power (judges in particular); deviation of the practice from the law (much reliance on written submissions as opposed to oral arguments, less continuity of trials and more intermediate steps than envisaged by the law)\(^{123}\); reduced role of prosecutors in investigation and supervision of police- which is responsible for ‘extremely low conviction rates’, and ‘enormous backlog in the prosecutorial offices’\(^{124}\).

\(^{121}\) Judges themselves admit that their focus is largely on case management. One Judge observes that some judgments do not properly substantiate the facts of the case with the law. Interview with Judge 05, interviewed on 05/04/12.

\(^{122}\) In criminal cases it was 25 percent in 2005-06 and rose to over 40 percent in 2008-09. Yet, reversal rate is very low i.e. below 5% which is far below the standard for efficient appeal system i.e. low appeal rate and 50 % reversal rate. See uses and users of justice in Africa, supra at note 42, at 73-84.

\(^{123}\) See Menberetsehai Tadesse, ‘Yetzenegu yewonjel fitihe sera`at dingagewoch’, (The forgotten provisions of the law in criminal justice) 4(1) *Ethiopian Bar Review* 1, 11(2010); See also Menberetsehai Tadesse, 2009 *Judicial Reform in Ethiopia*, dissertation to be presented to the University of Birmingham, United Kingdom, in partial fulfilment of a PhD, cited in uses and users of Justice in Africa, supra note 33 at 16.

\(^{124}\) See Uses and users of Justice in Africa supra note 42, at 11. While joint investigation of crimes by the police and the prosecution has been introduced, the impact seems uneven. See chapter 3, organization and functions of Justice Actors.
An important development regarding delay is, however, the general tendency of its reduction despite the growth of caseload. For instance, a survey in Federal courts covering mid 2005-mid 2009 observes:\textsuperscript{125}

As a result of their programs, and the use of the database, the courts not only keep track of disposition times, but also have succeeded in reducing them for the most part, both in original jurisdiction cases and at the appellate levels.

The survey also indicates that clearance rates fall between 90 and 115; congestion rates dropped from 2.0 to 1.5, figures which show that courts are ‘doing well in reducing backlog’.\textsuperscript{126}

Here to the extent the clearance rate surpasses 100 percent, the court is reducing its pending caseload.

Some of the major causes of delay such as the length and frequency of adjournments are fairly addressed\textsuperscript{127}. Prosecutors investigate crimes with police thereby avoiding the earlier back and forth of the investigation file between them, and thus contributing to the reduction the ensuing delay. Moreover, the wide application of alternative case disposition mechanisms and forms of abbreviated trials take substantial credit to have a reduced delay.

All these ought to be seriously mulled over before rushing to adopt the unlimited form of plea bargaining. In other words, delay in the Ethiopian criminal justice system is not of such a nature and magnitude to necessitate unlimited form of plea bargaining. Given its context, nor is it going to be considerably addressed using plea bargaining or by avoiding full-scale trials. In the presence of indigenous alternatives of case disposition which occupy an overwhelmingly

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{125}Id, at xxiii.
\item \textsuperscript{126}Congestion rates are calculated as follows: Congestion Rate = \[(\text{number of pending cases plus new and reopened filings) divided by annual dispositions]} \text{minus 1.} \text{ Ratio of 0 representing best (no congestion); ratios over 1 indicating backlog is accumulating; ratios between 0 and 1 backlog reduction is going; While clearance rate of over 100 percent shows a reduction of caseload. Id, at 30 -33.
\item \textsuperscript{127}To reduce delay, Federal Courts adopt the following policy on adjournments: No judge-initiated adjournments are allowed; where the defendant does not appear, the hearing will go on without him/her; the general aim is to have hearings continuous without any intermediate recesses. Moreover, judge’s performance is measured based on the number of cases disposed per month. Id, at 78.
\end{enumerate}
\end{footnotesize}
dominant position in the Ethiopian justice system\textsuperscript{128}, forms of abbreviated trials such as RTD, and tendency of reduction of delay (at least from the currently available data), the need to have unlimited form of plea bargaining, a form of plea bargaining which is fraught with a host of problems, should have been given a second thought.

7.1.4 Legal Culture

Legal culture is a fluid and debated concept\textsuperscript{129}. Here it is used as defined by Legal sociologists\textsuperscript{130} – values and attitudes with respect to law and legal institutions-‘... the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole’. Freidman identifies two types of legal culture\textsuperscript{131}: internal and external. The concept is used here in both senses.

Admittedly, measuring legal culture is difficult- some even argue that the concept is too vague and impressionistic to construct explanations\textsuperscript{132}. Yet, others including Friedman - the father of the term, suggest that aspects of it can be measured directly using survey methods and

\textsuperscript{128} Various forms of ADR do in Ethiopia slightly lower than what plea bargaining does in the USA i.e. 85% of cases are disposed out of court (notably though ADR). It should be noted however that the demand for Ethiopian courts is showing progress.

\textsuperscript{129} Some understood it narrowly as: ‘...the culture and traditions of lawyers and must be understood within the context of applying law through legal reasoning’. (Alan Watson). Others use the term to refer to a ‘living law’, or ‘law in action’; others take it as ‘law in the minds’; it is also used to mean ‘legal system or legal tradition’. See Ralf Michaels, ‘Legal Culture’, in \textit{Oxford Handbook of European Private Law} (Basedow, Hopt, Zimmermann eds.,Oxford University Press, forthcoming) available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3012&context=faculty_scholarship.


\textsuperscript{131} Freidman distinguishes internal legal culture from external legal culture: “The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks.” Friedman (1975) supra note 130 at 223. While Formalists tend to emphasize the role of internal culture than the external one in legal transplants, Freidman takes the opposite.

indirectly by observing individual behaviour\textsuperscript{133}. Applying survey method, two writers developed components of legal culture to include support for rule of law, perceptions of the neutrality of the law, and the subjective significance of individual liberty\textsuperscript{134}, rights consciousness and modes of dispute settlement\textsuperscript{135}. Other aspects of legal culture embrace public confidence in the legal system, perceptions of procedural justice, attitudes towards equality and justice\textsuperscript{136}, values on legitimacy and acceptance of authority, obedience to the law\textsuperscript{137}, norms on sanctions/ punishment\textsuperscript{138} and many more.

It is generally acknowledged that the success of a legal transplant depends on whether it comports with the existing legal culture in the receiving state\textsuperscript{139}. Here the assumption is that the Ethiopian legal culture is fundamentally distinct from the culture of the donors-North America and Europe\textsuperscript{140}. Thus, any inquiry whether plea bargaining transplant will take root in

\textsuperscript{133}See Lawrence Friedman, 'The Concept of Legal Culture: A Reply' in David Nelken (ed), \textit{Comparing Legal Cultures} (1997) at 33; Lawrence M Friedman (1994), supra Note 130; James L Gibson and Gregory L Caldeira, 'The Legal Cultures of Europe', \textit{30(1) Law and Society Review} 55, 1996


\textsuperscript{135}On the latter component see Günter Bierbrauer, 'Toward an understanding of Legal culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans' \textit{28 Law & Soc'y Rev}. 243; Julia Shamir, supra note 134.

\textsuperscript{136}See Gibson and Caldeira, supra note 133 at 58; See also Tom R. Tyler, \textit{Why People Obey the Law}. New Haven, CT: Yale Univ. Press; David S. Mason, (1992) "Attitudes towards the Market and the State in Post- Communist Europe." Presented at American Political Science Association Annual Meeting, Chicago. (Both cited in Gibson and Caldeira, supra note 133 at 58).


\textsuperscript{138}See V. Lee Hamilton \textit{Et al}, `Punishment and the Individual in the United states and Japan` ,\textit{22 Law and society Review} 301-328, 1988.(` Social norms about sanction are important elements of legal culture"

\textsuperscript{139}See Friedman (1994), supra note 130.

\textsuperscript{140}In fact, this cannot be disputed. Unlike the donor states, the foundation of the Ethiopian legal tradition rests on communalism (law developed for the group, not for the individual), law is not autonomous (mixed with religious and moral values), empericalism (law not conceptualized). See Franz Wieacker, 'Foundations of European legal culture' \textit{38 Am.J.Comp.Law} 1990, at 4-29 cited in Muradu Abdo, \textit{Introduction to Legal History and Traditions}, 2010 at 28. Although this aspect of legal culture (which is dubbed by Gibson and Caldeira, as `general cultural values`) is important, the focus would be on specific attitudes on law and legal institutions). (On such distinctions see Gibson and Caldeira, supra note 133 at 59.) Differences are also visible with respect to the known aspects of Ethiopia legal culture from the later sense.
Ethiopia or how it will fare in the Ethiopian legal culture implies the investigation of the concept against the dimensions of Ethiopian legal culture. To this end, my original plan was to apply the first four aspects of legal culture to plea bargaining in the Ethiopian context. Such aspects are selected for they are not only considered as basic components but also proved to be measureable. However, this did not work as intended. With the exception of few (see below), aspects of Ethiopian legal culture remained unexplored. To be sure, such an exercise cannot be accomplished by this work—it needs a separate nationwide survey or ethnographic study.

Consequently, this work focuses on some aspects of legal culture to the extent they are surveyed in the Ethiopian context. That said, with respect to some specific components that have a direct bearing on the application of plea bargaining, I have tried to investigate them using my fieldwork data (e.g. defendants’ guilty plea attitude). Thus, a reticent endeavour is made to assess whether the legal culture prevailing in Ethiopia is receptive of unlimited plea bargaining, focusing on such aspects of legal culture as public attitude to the justice system, preferable mode of dispute settlement and other specific aspects as guilty plea culture/trend and perceptions of justice actors on plea bargaining. In this sense, attempt is made to include attitudes and perceptions of defendants, victims, justice actors and the public, devoting one aspect of legal culture each. Other broad aspects, which in one way or another have to do with legal culture, are discussed elsewhere.

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141 These include support for rule of law, perceptions of the neutrality of the law, the subjective significance of individual liberty and preferred modes of dispute settlement.

142 Indeed, a comprehensive examination of the interplay between the Ethiopian legal culture and the introduction of plea bargaining is difficult to achieve in this kind of study. Several factors conspire to this: First legal culture is so complex and overarching a concept, that it cannot be effectively explored just by a legal professional. The concept of culture is related to such disciplines as anthropology and sociology, disciplines I am not familiar. Second, as shown above there is no literature on the aspects of the Ethiopian legal culture.

143 See for example the section on institutional/structural problems.
7.1.4.1 Victims: preference to dispute settlement and their role

Society’s preference to use one mode of dispute resolution over the other (informal over formal or vice versa) is an expression of legal culture. Anthropologists and sociologists have long suggested that procedural preferences are conditioned by cultural factors. Studies show that most Ethiopians prefer informal legal avenues to the formal ones: informal negotiation over the formal litigation. What explains this trend? Albeit, other forces such as procedural barriers could shape such a trend, the role of legal culture is pervasive. This can also be implied from the collectivist culture of Ethiopia. Further, ADR projects in Africa (Ethiopia included) lend support to this conclusion—suggesting that ADR comfortably fits within the African sense of justice—its core value of reconciliation.

144 See for example V. Lee Hamilton et al, supra Note 138. See Günter Bierbrauer, supra note 135.


146 See Gebre Yntiso, etale (eds.), Customary Dispute Resolution Mechanisms in Ethiopia (2011; 2012, vol. 2). at xii; UNODC Assessment, Supra note 21 at 10 and 71; See also Alula Pankhurst and Getachew Assefa, supra note 2.


148 Studies have shown colorations between collectivist culture and preference to informal dispute settlements, on the one hand and individualistic culture and preference to formal adjudications, on the other hand. See Günter Bierbrauer, supra note 135 at 255-257; V. Lee Hamilton Et al (1988), supra note 137; Joseph Sanders, & V. Lee Hamilton (1992), supra note 147. On the collectivist nature of Ethiopian legal culture, see footnote 140 above.

Thus, informal settlement as opposed to formal adjudication forms the predominant legal culture in Ethiopia. In criminal matters, this involves negotiation conducted in a setting where victims play a significant role in the settlement of the case. Indeed, it is a well-entrenched culture that victims dispose of criminal cases using various forms of dispute resolution based on customary laws\textsuperscript{150}. Because of this, indigenous norms are said to have prevailed over imported norms in Ethiopia\textsuperscript{151}. In this sense, apparently plea bargaining which involves negotiation may not be that repugnant to this culture. This is simplistic a conclusion, however. This is because the two operate in an entirely different setting involving different actors with a distinct role in the process. For example, while victims usually veto the informal process, the prosecutor does the plea bargaining with the former having no meaningful role in shaping the outcome. Further, although both involve negotiations and compromises they vary on their outcomes. Whilst the outcome of informal settlements is compatible with the collectivist value of preserving social harmony – the very reason it is preferred over the formal one\textsuperscript{152}, the formal one (plea bargaining included) hardly achieves this purpose. All these mean plea bargaining is less likely to be preferred by victims.

On the contrary, preference to informal settlements could inhibit plea bargaining in many ways: First, in the circumstances it is plain that most cases will not flow to the formal system; limiting the application of the official processes including plea bargaining. Second, even with crimes that take the formal trajectory, plea bargaining in general and the Ethiopian variant in particular, ensures no effective victim participation in the process. As a result, victims are likely to see their assailer get off cheap or even escape punishment. This would adversely

\textsuperscript{150} It is estimated that up to 85 percent of the population rely on alternative, largely traditional Mechanisms to resolve disputes and provide security See UNODC Assessment of criminal justice, supra note 21; Alula Pankhurst and Getachew Assefa (Eds.), 2008. Ethiopia at a Justice Crossroads: The Challenge of Customary Dispute Resolution, Document in draft, Centre Français des Etudes Ethiopiennes, Addis Ababa cited in Uses and Users of Justice in Africa supra note 42. Customary dispute resolution applies even to most serious crimes such as murder. Traditionally in murder cases, payment of blood money (compensation) to the family of the deceased would prevent criminal prosecution. Currently, though it has no effect on criminal prosecution, it is still practiced underground in states like Oromia and Amhara.

\textsuperscript{151} See J. W. Van Doren, supra note 2 at 180.

\textsuperscript{152} See Günter Bierbrauer, supra note 135 at 250.
affect, among others, the legitimacy and effectiveness of plea bargaining among both victims and the general public.

Admittedly, the prosecutor is required not only to consult victims in his/her plea bargaining decisions but also where necessary to let them attend the process\textsuperscript{153}. While this is a positive development compared to the earlier version of the proposed law, which completely marginalizes victims in the process, it nonetheless, falls short of ensuring meaningful participation of victims. To be sure, the right to be consulted is not as such a significant right for it does not include the right to actively participate in the process of the negotiation or even the right to information. Whether to have victims attend the process is entirely the prosecution’s discretion; no duty exists on the part of the latter. Even then, victims remain a passive spectator- they may not directly participate in the process. Nor are they provided with a forum in which their voices will be heard before court; nor is there any obligation on the part of the court to consider victims interests and needs while endorsing plea bargaining agreements. Of course, victims have the opportunity to reflect their views to the prosecution. Yet, this view may or may not influence the outcome of plea bargaining – this depends on the prosecutor’s will. Besides, prosecutor’s duty to consult victims lacks enforceability. What if the prosecutor fails to do so? The proposed law does not explicitly provide any remedy for this\textsuperscript{154}.

In providing little attention to ensuring meaningful victim participation in the process, the reform refuses to recognize the well-entrenched culture of victim-oriented disposition of criminal cases (which prevails over the formal system) and overlooks the advantages of meaningful victim participation. Though not a veto power as in the informal system, plea bargaining should offer victims enough space to influence the terms / outcome of the plea agreement. This could be done in two ways: demanding the prosecutor to have victims participate in the process and requiring judicial review of plea bargaining in light of victims’ interest, which allows them to make oral or written submissions.

\textsuperscript{153} See Article 226 of the Draft Code.

\textsuperscript{154} A remote implied inference could be made from Article Articles 232 and 29(3) 29(5) of the draft procedure code to sanction it with a rejection of the agreement. Nevertheless, the soft nature of the provision on victim consultation does not suggest this. For more discussions on the problem of such construction see chapter 4, sections on the requirement of sufficient evidence and judicial approval of plea bargaining.
Although often downplayed for efficiency reasons ensuring effective victim participation, beyond its compatibility with the well-entrenched culture of victim-oriented disposition of criminal cases serves other important advantages: First, it serves an important check against prosecutorial and/or defence manipulations of the plea bargaining process. Second, it provides courts important information to check the proportionality of the sentence or the charge with the degree of guilt. Moreover, victim participation in plea bargaining process can raise victims’ satisfaction with the justice system, ceteris paribus and may in turn enhance the legitimacy and effectiveness of plea bargaining among both victims and the general public. Further, by avoiding the possibility of revenge it is also important to facilitating the healing process and bringing lasting peace among victims and the offender. Finally, the victims’ participation could also facilitate speedy and effective resolution of civil claims, where appropriate, sparing injured parties from initiating separate civil proceedings thereby saving courts’ time and resource. Admittedly, to a certain extent the draft code tries to address this (See Art 226).

On the flipside of this argument lies the counter claim that victim participation, on top of promoting personal vendettas, would skew the principle of equality and the adversarial nature of the criminal process to the detriment of the defendant. Many also suggest that it undermines the efficiency of plea bargaining. Yet, this ignores the increasing place victims have won in the criminal process and their vital role in checking prosecutorial excesses in plea bargaining, as well as the nature of plea bargaining in that it involves negotiation- rather than the testing of evidence in an adversarial fashion. Any possible impact on the efficiency of plea bargaining is vindicated by an overriding principles of fairness, accuracy and thus public confidence.

155 Here lies the problem of plea bargaining – its obsession on efficiency in disregard of other important values of fairness and accuracy.

156 An empirical study carried out in the USA revealed that: a) Victims who were informed of their rights were more satisfied with the justice system than those who were not. b) Victims who thought their participation had an impact on their cases were more satisfied with the system. See D. Kilpatrick et al, The Rights of Crime Victims - Does Legal Protection Make a Difference? (Washington, D.C.: National Institute of Justice, U.S. Department of Justice, 1998) at 7-8 cited in Simon N. Verdun-Jones and Adamira A. Tijerino, 'Victim Participation in the Plea Negotiation Process: An Idea Whose Time Has Come?' 50 Crim. L.Q. 190, 2005; see also J.A. Wemmers, "Victim Notification and Public Support for the Criminal Justice System," 6 International Review of Victimology 167, 176 1999.

157 See Simon N. Verdun-Jones and Adamira A. Tijerino, supra Note 156 at 209-10.
To conclude, cultural preferences of victims to informal settlements could limit the use of plea bargaining significantly. Further, plea bargaining in general and the Ethiopian variant in particular attach lesser importance to victims’ participation. Given the central position victims occupy in the justice system (informally) and interests at stake, this sounds unjustified and is likely to adversely affect the reception of plea bargaining by victims and thus their use of the formal system/report of crimes.\textsuperscript{158}

7.1.4.2 The public: Public confidence in the justice system

Historically, there has been a deep-rooted respect for justice among the Ethiopian people.\textsuperscript{159} This sense of justice is believed to have endured time to hold true now. Nevertheless, the justice system falls short of living up to this sense of justice. Although, I could not find reliable figures that measure public confidence of Ethiopian legal institutions\textsuperscript{160}, qualitative reports document that the Ethiopian justice system wins little public confidence. One report shows that lack of access, lack of transparency and excessive delay in the justice system has resulted in about only 15 percent of the population using the formal justice system.\textsuperscript{161} Another

\textsuperscript{158}As shown earlier, one of the main reasons for the 1950-60’s reforms (codification) not to take root was their failure to accommodate customary norms. That is why such norms are still applying transcending the formal (imported) norms or at best implemented in their ‘corrupt forms’. The fate of plea bargaining would not be any different, if it remains detached from local norms.

\textsuperscript{159}See Robert A. Sedler, The Development of legal systems: the Ethiopian Experience 53 Iowa L. Rev. 562,635 (1967-1968). The following adages can provide a sense of such respect: dashing water ceases to flow when so requested in the divinity/ name of the law; A chicken lost without justice is more worrying than a mule lost because of justice.

\textsuperscript{160}One study (2008) claims that Ethiopian Legal Institutions (courts and police in particular) enjoy higher public confidence of 65% and 68% respectively. See Ethiopian opinion pull survey Report by Inter Africa Group, 2008 at 37. This is inconsistent with subsequent studies, which document that only a few Ethiopians use the formal system, a trend affected by lack of public trust and procedural barriers. See UNODC Assessment, Supra note 21 at 10 and 71; See also Alula Pankhurst and Getachew Assefa, supra note 2. Moreover, it is not clear how public trust and confidence was measured in the study. It seems that a simple ‘do trust’/‘do not trust’ scheme is used without measuring the aspects of trust and confidence). Further, this figure is difficult to attain even in most advanced and democratic nations. One study revealed that only Denmark, Iceland and Austria managed to score more than 68% of public confidence in the justice system; the rest of the world trailing this figure. See Julian V. Roberts, ’Public confidence in criminal justice in Canada: a comparative and contextual analysis’, 49(2) Canadian Journals of Criminology and Criminal Justice 153,167, 2007.

\textsuperscript{161}See UNODC Assessment, Supra note 21 at 10 and 71; See also Alula Pankhurst and Getachew Assefa, supra note 2.
study conducted as a prelude to prepare the new draft criminal procedure code also captures this problem as:

As indicated by several reform oriented studies, the criminal investigation, prosecution, adjudication process, and sentencing practices are characterized by massive problems of expediency, access, quality, fairness, transparency and accountability. This erodes public participation in the criminal process as well as public trust in the system.

Judges are generally perceived by the society not to be impartial in cases involving government interests. Many justice actors particularly in tax related, corruption and terrorism crimes also share this. There are also serious allegations of corruption among justice actors. True or not the above perceptions on legal institutions have the potential of damaging the integrity and trust in the justice system and thus its use by the public.

Although it is difficult to pin down its effect with certainty, the introduction of unlimited plea bargaining which is so unpopular in several jurisdictions in such a little trusted justice system could produce any of the following consequences. It could happen that with this variant of plea bargaining involving haggling and exchange of (large) concessions that may culminate in inappropriate punishment, wrongful conviction or impunity, public confidence in the justice system is eroded further. One judge suggests:

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162 Yewongelegna mekicha sine seraat hig kidme rekik report, 2010 at 10.

163 One writer observes that ...the major charge [against the judiciary ] was that in cases important to the government, judges were more likely to sway their decisions (a) in line with explicit instructions, or (b) still more likely, with what they believed the government wanted. See Linn A. Hammergren, supra note 21 at 219.

164 See the section on abuses and corruptions below.


166 Interview with Judge 10, held on April 5/12
Plea bargaining may erode public confidence in the justice system. While prescribing penalties, the existing criminal code does not seem to have taken into account plea bargaining. The public strongly believes severe punishment serves deterrence. Plea bargaining lowers this legislatively prescribed sentence. This could affect deterrence and erode public confidence.

In fact, studies seem to confirm this by showing strong correlation between sentencing practices with levels of confidence among courts: too lenient sentencing matching with less positive views\textsuperscript{167} and/or negative publicity\textsuperscript{168}.

On the other hand, lack of trust may lead to avoiding the formal system (plea bargaining included) and using other informal methods. To the extreme case, it may push one to individualized justice in the form of political connections, bribery, taking the law in to one’s own hands and so on\textsuperscript{169}.

Once the case takes the formal course, problems of trust in the justice system may well affect the integrity of plea bargaining decisions in that by making defendants risk averse (indeed as shown in chapter 6, innocents are more risk averse), it could push them to prefer even inaccurate plea agreement over a lengthy, expensive, little trusted trial with a risk of harsh treatments\textsuperscript{170}. This situation would give prosecutors and defence attorneys\textsuperscript{171} ample room to manoeuvre even if law regulates all aspects of the agreement.


\textsuperscript{169} See Sara E. Benesh and Susan E. Howell, supra Note 168 at 200.

\textsuperscript{170} See DK Brown ‘The decline of defense counsel and the rise of accuracy in criminal adjudication’ 93 California Law Review 1585, 1612 (2005) (observing that: ‘[d]efendants who are risk-averse, or who plausibly distrust adjudication’s capacity to vindicate false charges, can sensibly accede to inaccurate pleas to avoid the risk of graver consequences...’)

\textsuperscript{171} Defence attorneys will find easy to convince the defendant pleads guilty rather than facing severe punishment at trial.
That said, one might argue that plea bargaining by enhancing the efficiency of the justice system would raise public confidence. However, this argument seems to ignore the off-balanced costs paid for efficiency and root causes for lack of public confidence that have more to do with fairness and accuracy (lenient treatment of offenders, impunity and wrongful convictions, among others). This argumentation makes sense if the cause of loss of trust were down to inefficiency or delay alone.

7.1.4.3 Legal professionals: Reception and Internalization

Among the factors that affect the success of a legal transplant is its possible reception by the legal actors and the society in general. Aspects of this are explained by legal transplant scholars using the interplay between what is called `pressure force' (persons who see the change as good) and `opposition force' (persons who are hostile to it)\textsuperscript{172}. Thus, the stronger the motivation and the ability of the legal actors with the potential to make use of the new law, and the weaker the opposition, the more likely it is that the transplant will be successful, all else being equal\textsuperscript{173}.

Legal professionals in Ethiopia are largely trained and predisposed to civil law traditions. This exposure, which is dubbed by some the dimension of internal disposition,\textsuperscript{174} may clash with what plea bargaining brings in and negatively affect the internalization process. This internal disposition of professionals as it was not built overnight obviously takes time to change, if not, it becomes insensitive to change. For instance, in the switch from mandatory prosecution to discretionary one (plea bargaining included), prosecutors may find it difficult to conceive and internalize the latter, and thus it could be vulnerable to misapplication or abuse.

\textsuperscript{172} See Alan Watson, 'Comparative Law and Legal Change', 37 Cambridge L.J. 313,324 (1978); Khan-Freund indentifies this as `the interest group factor. See Otto Kahn-Freund, 'On Use and Misuse of Comparative Law', 37 Mod. L. Rev. 27 (1974).


However, my survey shows that the professionals’ reception of plea bargaining seems generally positive. The research reveals that about three-fourth of criminal bench judges and prosecutors and four-fifth of defence attorneys favour plea bargaining.

Judge 01:

_Plea negotiation... has many advantages to offer to Ethiopia. It helps to uncover the truth. If the defendant is well informed of the advantages and disadvantages of plea negotiation, he may plead guilty. It enables courts to easily dispose of cases without the need to hear prosecution witness. This saves time and resources. For the defendant it increases outcome certainty. Plea bargaining also speeds up the criminal process and may reduce appeal._

Prosecutor 05:

... plea bargaining is important to Ethiopia... it helps save resources which otherwise would be used for the prosecution of crimes, saves time, expedites the criminal process and helps realize the right to speedy trial. It can also help us manage our case backlogs. This is important in particular to our office where we have many case backlogs. Guilty plea shows repentance. Treating such defendants harshly and jailing them to serve severe punishments would not serve the purpose of criminal law. It is not economical both from the perspective of the defendant and the state. Plea bargaining helps manage such problems.

Defence attorney 01:

_I believe that the introduction of plea bargaining would bring significant improvements in the criminal justice system. I was a prosecutor for a long time. ... In 2003, the prosecution office in Addis Ababa was clogged with huge backlogs. There were about 110 thousand files waiting prosecutorial decision. Here two things were shocking: First, the period of limitation of some 55 thousand files was expired. You can imagine the resources invested on the investigation of such files and victim’s interest in seeing justice served. This was terrifying!_

_Another shocking thing was that suspects were detained waiting trial. Some of them were granted bail from Birr 50-100 (£1.6-3.33). However, unable to furnish it, some 400 remained in detention for more than 2 years. The crimes were minor ones (defamation, insult, battery, etc)._
Finally, such cases were handled administratively; cases whose period of limitation has expired were dismissed.

Why is all this backlog and mess? The system was so ambitious; the criminal procedure code requires prosecution in as long as there is sufficient evidence. There is no room for the prosecutor to exercise discretion. However, it is difficult to investigate and prosecute each minor crime in a city as big as Addis. This is impossible!

Plea bargaining is ideal for such a system. It helps ensure the efficiency of the justice system and helps the prosecution focus on those crimes that pose direct threat to the public. This is an advantage from the state’s perspective. From the defendant’s side, since plea bargaining protects the defendant from public stigma it will be preferable over trials. In crimes such as rape, theft, and other heinous crimes, the public stigma is high in Ethiopia. For the defence attorney, plea bargaining may bring in outcome certainty. The outcome of trial depends on many factors- the ability of the prosecution, the attorney, the availability of witnesses etc. The outcome of plea bargaining is more or less certain.

However, this stance of plea bargaining is not expressed without qualifications and concerns. Accordingly, proponents raise such concerns: plea bargaining may involve corruption, risk conviction of innocents, undermine the purpose of punishment and erode public confidence in the justice system.

Judge 01:

Plea bargaining may involve problems as well. In this country, most justice actors are unethical. Bribes are common. Plea bargaining may intensify this problem. There will be wider rooms for abuse of power and corruption. Where defendants are unable to defend, they may bargain on crimes they have not committed. Lenient treatment of defendants may also provoke public dissatisfaction.

Prosecutor 05:

To say that plea bargaining has benefits does not mean that it is free from problems. Plea bargaining as apply in Ethiopia could raise many concerns. The first worry is that the process of
bargaining can be abused. In a fight for crime prevention, and for the sake of saving resources and raising efficiency, I am afraid that investigators may commit another crime – corruption. Public confidence on the system of plea bargaining would be another challenge. For example, take a person who commits a horrendous crime of first-degree homicide. If this case goes to plea bargaining, it is possible that this person is charged and convicted with ordinary or negligent homicide, and receives a sentence as low as 5 years. If such cases were investigated and handled via the formal trial, they could have attracted death sentence. This is inconsistent with the purpose of criminal law. The public and victims who are aware of the seriousness of the crime would obviously react negatively to such deals. They will not trust courts and the justice system and this may influence their respect for law. Here my concern is that the notion of plea bargaining may clash with the purpose of criminal law.

Judge 03:

Plea bargaining is alien to the Ethiopian legal system. Thus unless properly contextualized, it may turn out to be a liability. The question whether plea bargaining fits into the Ethiopia legal system needs to be carefully investigated.

Despite the above concerns, proponents still believe that the problems can be addressed with proper contextualization and safeguards. Almost all emphasized the need to have sufficient safeguards and specifically recommended such guarantees as the establishment of strong defence and legal aid system, limiting the scope of plea bargaining to less serious crimes and/or to those cases for which evidence cannot be found, regulating prosecutors’ discretion, recording plea negotiations, consolidating the capacity of justice institutions, working on crime prevention, indigenizing/integrating plea bargaining with traditional ADR methods etc.

However, the above view of plea bargaining should not be taken for granted. Among the concerns found are some principled ones. Thus, one may wonder whether just safeguards or contextualization can control principled concerns. Further, as shown above the Ethiopian

\[175\] Take for example the objections relating to fair trial rights and the purpose of punishment.
variant of plea bargaining can insulate any safeguards. Incentives or disincentives could also affect justice actors’ positions (see below).

On the other hand, the minority, which constitutes about one-fourth of judges and prosecutors and one-fifth of defence attorneys, objected plea bargaining as inappropriate on the ground that it may, among others, defeat the purpose of punishment, erode public confidence, undermine fair trial rights and breed corruption.

Here one can observe that both proponents and detractors of plea bargaining express more or less similar concerns on it. Their difference is down to the question whether such concerns can be effectively regulated. While the former believe that the concerns can be rectified or perhaps should be accepted as a price worth paying for efficiency, the latter do not and implore for the dropping the notion of plea bargaining altogether.

Apparently, the fact that most actors are positive to plea bargaining represents an encouraging step for its reception and internalization. Four important caveats should be made, however: First, as the professionals’ interest in plea bargaining might have shaped their views, it could be difficult to get their objective and unbiased assessment of plea bargaining. In fact, on the face of institutional preoccupation in case management and efficiency putting mounting pressures on them as well as problems of openness/self-censor, this is very likely. The fact that justice actors favour plea bargaining while acknowledging fundamental objections to it, reinforces such scepticism. Second, most of the participants warn that plea bargaining should be approached cautiously, stressing the need for both procedural and substantive safeguards; a warning which seemed to have been taken very lightly by reformers-wherein very little is done in terms of addressing the accompanying concerns of plea bargaining, and reflecting the Ethiopian reality. This has its own implications on not only the fairness and propriety of the Ethiopian variant of plea bargaining but also on its reception by justice actors.

176 See the above quotations.

177 Some of such suggestions include establishment of strong legal aid system, limiting the scope of plea bargaining to less serious crimes, regulating prosecutors discretion with such methods as fixed discounts, recording the plea negotiation, consolidating the capacity of justice institutions, working on crime prevention, indigenizing/integrating plea bargaining with traditional ADR methods etc.
Third, the views of those who are opposed to plea bargaining cannot be dismissed lightly.178 Moreover, the weak internalizing experience exhibited in earlier criminal justice reforms,179 could operate here too, to slow down the absorption process further. These in the final analysis may retard the degree of reception of plea bargaining and thus its internalization.

On the other hand, my survey reveals that there is huge gap in terms of readiness of actors.180 Only prosecutors are relatively in a better position in terms of understanding the concept of plea bargaining, the complexities and the prospects associated with it when applied to Ethiopia as well as familiarity with the ongoing reforms. Perhaps, the underground practice of plea bargaining and training might have contributed to this end. Yet, this should not suggest that they are well equipped with what is necessary for the operation of plea bargaining – a lot remains to be done to enhance their ability in weighing appropriate courses of action (plea/trial) and skills of negotiation, among others. In contrast, attorneys (both private and public) are in the worst position; most of them are completely uninformed of the reforms/plea bargaining,182 while judges are only slightly better than attorneys are. It follows that sufficient notice of implementation date should be available to ensure that actors are well equipped with the necessary skills and knowledge to apply plea bargaining. A drastic change could reduce the most experienced practitioner almost to the level of a beginner.183

Equally important is public awareness and reception of plea bargaining. In Ethiopia, laws/statutes are not adequately accessible to the general public. Even justice professionals have

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178 They not only consider plea bargaining incompatible to Ethiopian reality but also warn that it will bring several undesirable consequences such as corruptions.

179 One writer also acknowledges this problem as: Ethiopia lacks the tradition of applying [imported laws] because of the historical reluctance to be bound by an application of the existing rules. See Norman J. Singer, ‘Modernization of law in Ethiopia: a study of process and personal values’, 11 Har. Int’l L.J. 98 (1970).

180 Most of them expectedly indicating that they are unfamiliar with plea bargaining and hence not ready to assume their roles in plea bargaining.

181 Training of prosecutors on the criminal justice policy was underway during my fieldwork.

182 In this regard, the Bar was not informed either. They have not participated in the reforms.

limited access to them. Justice reforms held on several occasions have not been consulted and communicated to the public and stakeholders affected by it properly and sufficiently. Public legal education initiatives are very scanty. This is also the case with plea bargaining reforms. On the other hand, though at a risk of overgeneralization, there appears a tendency of maintaining the status quo among the Ethiopian society. Such tendencies, gaps in communicating reforms and public trust problems of plea bargaining, in particular the society’s sheer rejection of lenient treatment of offenders, may undermine the reception of plea bargaining among the public. This could present a challenge for the success of the reform.

One judge expresses his concern on this as:

How the public receives plea bargaining? This could be a serious challenge. Unless the public properly understands the benefit of plea bargaining, it may consider the concept as something that allows criminals escape punishment following negotiations. Absent proper understanding and internalization I am afraid that plea bargaining may remain a legal jargon unknown and unaccepted by the public.

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184 See for example See National Judicial Institute of Canada, supra note 21 at 137 (indicating that judges have limited access to amended laws, international conventions as a result they sometimes deliver judgments based on repealed laws.)

185 Despite four years have elapsed since the adoption of plea bargaining at policy level, no organized attempt is made to communicate and consult the public with such developments. For that matter, only few media gave little coverage for it. Nor is there any academic writing on it to date.

186 On this, see the section on inappropriate sentence above. Research carried out in many jurisdictions show the public’s disapproval of plea bargaining. See for example Julian V. Roberts, supra note 165 at 149 (discussing studies that have shown that a majority of Americans and Canadians disapprove of plea bargaining).

187 Indeed this has been acknowledged as one important factor for successful legal transplant. For example See James Thomas Ogg: Italian criminal trials: Lost in transition? Differing degrees of criminal justice convergence in Italy and Australia, 36(3) International Journal of Comparative and Applied Criminal Justice, 229, 241-42 (2012) (suggesting a gap in consultation and communication could impede successful implementation ); See Alan Watson, ‘Comparative Law and Legal Change’, 37 Cambridge L.J. 313, 324 (1978)( acknowledging such status quo as one condition for successful legal transplants ).

188 Interview with judge 03, held on Apr. 02/12.
To enhance the prospect of plea bargaining, in addition to adapting it to the Ethiopian context and mitigating its evils, the criminal justice system needs to find ways of educating the public about it.

7.1.4.4 Judges: Sentencing practices

In the main, the need for individualization of punishment to the circumstances and particulars of each offender/offence vindicates the conferring of broad sentencing discretion to judges. It seems based on this understanding that the Ethiopian criminal code bestows considerable sentencing discretion to judges. Nonetheless, as this has led to broad and arbitrary discrepancies in sentences\textsuperscript{189}, a sentencing manual has been issued in 2010. Yet, my interview with judges and prosecutors suggests that this manual had very limited success in terms of bridging sentencing disparity\textsuperscript{190}. That is why it is revised recently and entered into force as of October 2013. While effectiveness of the new manual in addressing problems of sentencing practices (unpredictability, lack of transparency, accountability and proportionality) remains to be seen, the adoption of unlimited plea bargaining would certainly be a blow to this endeavour. Before the sentencing manual is fully implemented to ameliorate sentencing disparities, the unlimited form of plea bargaining, which in effect transfers sentencing discretion from judges to prosecutor’s bargaining concessions, is endorsed at policy level.

\textsuperscript{189} See a study by justice professional training centre: Yewonjel kitat awosasenin Betemeleketete Betezegajew Memerialay Yetezegaje Yesiltenatsuf, 2010, translated to mean ‘Training manual on sentencing guidelines’. This document shows that similarly situated defendants and similar cases are being treated differently thereby making the sentencing exercise unpredictable. It further adds that the sentencing practice is not transparent, and fails short of making justice professionals accountable.

\textsuperscript{190} Three factors could be responsible for this: that judges do not strictly adhere to the manual; that there is inconsistent application of general mitigating and aggravating circumstances among judges (in particular Article 86 of the criminal code, which authorizes judges to expand general aggravating and extenuating circumstances other than those listed by law, is interpreted unevenly. While some interpret this article broadly to include even erroneous factors (some prosecutors told me that currently being a student is one major mitigating ground), others construct it narrowly); that the manual does not cover most crimes (it only addresses ten most common crimes as a template, leaving the rest for judges to calculate based on the template). All these invite inconsistent application of sentences.

its high sentencing differentials, this variant of plea bargaining frustrates the purpose of the sentencing manual to intensify the problem of sentence disparity further. In this form of plea bargaining prosecutors enjoy unfettered discretion to increase the amount of sentence discount until it entices defendants to plead guilty.

Granted, the amount of sentence used as a leverage to entice a defendant varies considerably depending on several extraneous factors of sentencing calculation – notably the bargaining power of the defendant, his / her aversion to risk, the strength of the prosecution evidence, and other subjective considerations. This creates sentence disparity among those defendants who pleaded guilty / plea bargain. Moreover, simply depending on whether a defendant chooses trial or plea bargaining, sentences may vary considerably. This is commonly referred to as the sentencing differential, which plea bargaining in particular the unlimited form of it, is often accused of creating. In both ways, the unlimited form of plea bargaining Ethiopia adopts, sustains if not broadens sentence disparity among same crimes / similar defendants. While it is true that no criminal justice system is completely immune from sentencing disparities, massive sentencing disparities are indefensible and could damage the effectiveness and moral legitimacy of punishment, and thus the criminal justice system.

7.1.4.5 Defendants: Rarity of guilty pleas / Low guilty plea rates

My fieldwork reveals that there is a common misunderstanding among justice professionals that guilty pleas are extremely rare- most defendants contest prosecution and insist on their innocence. Just to quote two of them:

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191 In fact, one may say that a new sentencing manual, which takes plea bargaining into account, could mitigate the problem. Yet, this would bring no or little change for the very institution of plea bargaining exists / works on sentence differentials. Moreover, in practice this has proved a futile exercise even in those jurisdictions with developed criminal justice system. See for example USA’s Plea bargaining in Chapter 1. On the flipside, sentencing manuals could facilitate plea bargaining. By enabling the parties to more or less predict the likely sentence at trials, provides them impetus to engage in plea bargaining. Further as shown in Chapter 5, the sentencing manual is being used as one form of bargaining chip among prosecutors in the informal plea bargaining and is likely to continue with the formal one as well.

192 The ideal way to verify whether such pattern exists would be to investigate the percentage of cases ended with a guilty plea as compared with the totality of cases i.e. guilty plea rates. However, unfortunately no data is available on this. Consequently, attempt is made to include judges’, prosecutors’, and defendants’ views.

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Prosecutor 05:

There seems an accord among defendants that they should not plead guilty. As I told you earlier, advised by their prison mates or lawyers, defendants often deny any connection with the crime they are charged with. Pleading guilty is a very rare event.

Judge 03:

Defendants` `guilty plea culture` may pose a challenge to plea bargaining. Defendants are not open and wise when it comes to guilty pleas. Even if concrete evidence is produced against them, instead of pleading guilty and drawing the benefits attached to it, they categorically and blindly deny any responsibility.

This takes me to the question: why do defendants exhibit such an attitude? Why guilty pleas are extremely rare? Attempt is made to briefly look at this both theoretically and empirically. First, to some extent theories on defendants` risk preference may explain this. Indeed, theories disagree on criminals risk attitude: while at one end, some suggest that criminals are risk averse\(^{194}\), at the other end, others posit that criminals are risk-seekers/takers\(^{195}\). In the middle

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That said one may wonder what is unique of defendant’s guilty plea attitude in Ethiopia. Though it is rational for defendants to defend themselves, guilty plea rates are higher in many jurisdictions. Granted, the role of plea bargaining would be substantial here. Yet, defendants also plead guilty out of pure remorse or lack of defence or simply out of the desire to avoid process costs. See for e.g. Albert W. Alschuler, ‘Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System’, 50 U. Chi. L. Rev. 931, 949-52 (1983) (where the writer identifies three types of guilty pleas: "no dispute" guilty pleas (guilty pleas not disputed as the defendant pleads guilty out of remorse or for lack of defence), "process cost" guilty pleas (guilty pleas triggered by material and emotional costs of trial), and "bargained" guilty pleas (guilty pleas induced by sentence differentials). see also, Ramseyer, J. Mark, and Eric Rasmusen. "Why Is the Japanese Conviction Rate So High?" 30 Journal of Legal Studies 53,57 (2001). (showing that in the absence of formal plea bargaining most defendants do confess in Japan: ‘Of the 49,856 criminal cases in Japanese district court in 1994, defendants contested prosecution in only 7.3 percent [92.7 percent confessing]. Of course, one cannot deny the role of informal plea bargaining here.

In contrast, evidence from my fieldwork suggests that defendants hardly plead guilty. This means `no dispute` guilty pleas and `process cost` guilty pleas are rarely tendered while bargained guilty pleas are yet to be fully tested after the formalization of plea bargaining.

\(^{193}\) Interview with prosecutor 05, interview held on 07/05/12 and Interview with Judge 10, held on April 5/12.


\(^{195}\) Studies suggest that criminals are generally risk-taking both in the commission of the crime and thereafter: with penalties higher than the true price of the crime, they commit crimes; they do whatever possible to avoid capture and punishment that ultimately increases their punishment. See Richard Birke, ‘Reconciling Loss...
are advocates of risk neutrals, and those who suggest that criminal’s risk attitude is context dependent. Of these, apparently the risk seeking theory seems to better explain defendants’ behaviour in the studied area. Put simply, defendants tend to take risk at full-scale trials than accepting a certain loss – pleading guilty; or at least they are less risk averse. However, here two caveats are necessary: First, it is less clear whether risk-seeking behaviour lasts throughout the process, in particular with respect to punishment. Second, these theories assume that criminals are rational actors in weighing the cost of punishment – which may not be always the case. This opens up a room for other theories to step in. The empirical aspect highlights on this dimension.

At empirical level, a definite answer to the issue presupposes a separate comprehensive investigation on the defendant’s psyche. Here attempt is made to show possible explanations/hypothesis based on the actor’s reflection as well as my own observations. Probably, weakness in fact finding/ in the pre-trial screening procedures - those who contest could include the factually innocent; the absence of incentives - the extent of reward for pleading guilty / no formal plea bargains; tactical reasons - e.g. unpredictability of trials; cultural reasons - litigious culture, among others, may explain this trend.

Actors’ opinion seems to be divided on the factors which explain the rarity of guilty pleas: some consider the trend culturally conditioned – the extreme rarity of guilty pleas is a reflection of the fact that the Ethiopian society is litigious – in support of which they linked it to the old traditional system of litigation - bella libelha; and that there is a winning mentality among the

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196 See Stephanos Bibas, supra note 75 at 2507-12 (Risk preferences vary with one’s personality (overconfidence and impulsiveness) demographics (including sex, age, wealth, social class, self-employment, and education; church attendance, and marital status). See also generally Richard Posner, Economic Analysis of Law 461-63 (4th ed. 1992) (distinguishing risk attitudes of those in different social arrangements) cited in Richard Birke, supra note 195 at 246.

197 The costs of punishment involve the probability of apprehension, the probability of conviction and the severity of the crime. Nevertheless, it is not always the case that crimes are committed with motives and calculations.

198 This litigation, translated to mean: present your case/argument then I will refute it, was made in an artistic way – arguments are framed in verses / poetry.
society. That is why; the argument goes, currently many cases exhaust all available appeals and reviews up to cassation review\(^{199}\). One writer posits that `litigation is the prominent feature of Ethiopian scene\(^{200}\).

On the other hand, some actors suggest that the society has a cultural preference for informal methods of dispute settlement- that is why most Ethiopians use informal dispute settlement that do not usually involve litigation. The reason for a very low guilty plea rate rests elsewhere- tactics. The argument goes: low predictability and low conviction rate and high discontinuance rate of the Ethiopian criminal justice mean defendants are less likely to plead guilty. Thus, pleading not guilty is purely tactical. However, this argument explains only part of the problem. In the absence of a comprehensive study over the matter, the role of culture cannot be ruled out. For example, to some extent institutional factors-problems of fairness and efficiency of the justice system could affect dispute settlement preference. Thus, preference to informal negotiation alone may not disprove claims of litigious culture and thus its influence on guilty pleas. Put simply, guilty plea attitude cannot be purely tactical. Further, conviction rates (though the mode of computation varies) are uneven ranging from 97 percent in some regions to 59 percent at the Federal level. Thus, conviction rates may at times encourage guilty pleas, but defendant guilty plea behaviour tends to contradict this. Moreover, given the weakness of defendants in Ethiopia, it is less likely that they are capable of exploiting the above gaps i.e. the unpredictability of the system.

The fact that pleading guilty is not that rewarding is also identified to be responsible for persistent denials of guilt among defendants\(^{201}\). This has to do with both the amount of sentence mitigated following guilty pleas- that it is insignificant and the absence of practice of

\(^{199}\) However, it should be remembered that appeals could be used as a dilatory tactic. Indeed, there are reports to this effect. See uses and users of justice in Africa, supra note 42 at 73-84.

\(^{200}\) See Robert A. Sedler (1967-1968), supra at note 159 at 622.

\(^{201}\) Interview with defence attorneys and judges. For instance, one lawyer says: 'Generally our courts do not encourage defendants to plead guilty by rewarding them very well. Nor do they inform them the exact sentence discount they obtained by pleading guilty. This leaves the defendant in dark and unable to appreciate the advantages of pleading guilty'. Interview with defence attorney 04, interview held on 09/05/12.
informing defendants the benefit (the exact sentence discount) they obtained as a result of pleading guilty.

My interviewees\textsuperscript{202} also indicate that lawyers as well as prison mates do influence defendants’ decision on the choice of plea. Some lawyers advise defendants to plead \textit{not guilty}. In one case, a defendant amended his plea of \textit{not guilty} to that of \textit{guilty plea} openly blaming his lawyer for having him changed his original decision to plead guilty\textsuperscript{203}. Here one may wonder what incentives lawyers get in advising defendants to plead \textit{not guilty}. On the contrary, there are disincentives in doing so. Since the payment scheme is by case, the disposition of the case via full-scale trial does not increase lawyer’s payment or efficiency. Thus, it would be in the advantage of the lawyer to dispose of the case via guilty pleas. Perhaps an indirect and remote incentive could be winning the case and establishing ones repute. This cannot be demanding. Lawyers know the weakness of the criminal justice system and they are well positioned to appreciate the likely of conviction, if the case goes to full-scale trial. Thus, instead of making conviction 100 percent by having the client plead guilty, a lawyer may prefer to exploit the unpredictable criminal justice system.

Similarly, prison mates often advise defendants to plead \textit{not guilty} and the latter often welcome such advices. Defendant 04: ‘I was contemplating to plead guilty. However, following my prison mates’ advice, I pleaded \textit{not guilty}’. My interviewees with judges and prosecutors in particular, suggest that as opposed to bailed defendants or newcomers, remanded defendants do everything possible to escape punishment; at times with the help of prison mates, they fabricate false stories. This makes judges and prosecutors wonder whether prisons are serving their rehabilitative purposes. Because of this some believe that the ideal time to get guilty pleas is before defendant’s remand. This perception would encourage investigators to make plea offers at the early stages of the investigation, possibly following arrest. Surely since

\textsuperscript{202} Interview with judges and prosecutors. For example, one judge observes: ‘suspects from prison are well trained by their prison mates on how to evade responsibility. Because of this, they hardly plead guilty. You may get surprised to see an illiterate farmer invoking self-defence’ Interview with judge 01, interviewed on 08/05/12.

\textsuperscript{203} Interview with Judge 10, held on April 5/12.
defendants are uninformed and unrepresented at this stage\textsuperscript{204}, such negotiations are likely to be unfair and the outcome inaccurate.

Partly, defendants mistrust over legal professionals can explain the rarity of guilty pleas. In particular, the poor quality of service public defenders provide and the fact that they are perceived as agents of the state by defendants, mean guilty pleas would be rare\textsuperscript{205}.

To recap, the above factors may not explain guilty plea attitude fully. For example, the trend may have to do with the criminal justice’s fact finding capacity / pre-trial screening capacity. Weakness in fact finding means innocent defendants could be targeted and hence they are expected to contest prosecution. Whatever the reason - be it tactical, cultural, lack of incentives or both\textsuperscript{206}, or something else, at least one thing seems clear: that most defendants are `not guilty` pleaders. This may present a challenge for the very use and smooth flow of plea negotiations, albeit, with a varying degree depending on the reasons behind. In particular, to the extent that it is cultural, the challenge would be overwhelming. Obviously, it will take time to change this culture and even worse, it could be change resistant. Interestingly, to the extent it is related to lack of incentive, plea bargaining seems to be a good panacea. With its tantalizing offers, it can induce, if not coerce more defendants to plead guilty. That is why the innocence problem comes into picture\textsuperscript{207}. This is very likely within the context of weak fact finding. To the extent the pattern is tactical it could involve both pros and cons. Before

\textsuperscript{204}At this stage, defendants are not in a position to understand the nature of the charge, evaluate the evidence and consider the available options before deciding to enter into plea negotiations.

\textsuperscript{205}For details, see above the section on public defenders.

\textsuperscript{206}Apparently the first two (cultural and tactical reasons) seem be mutually exclusive. However, this depends on the unit of legal culture one uses. Thus, if one speaks of legal culture at national level and attributes guilty plea culture at this level, the two reasons may be mutually exclusive. However, if the culture is attributed to anything less than this (i.e. sub-national, local or institution level) both reasons can work parallel. Here with respect to the issue at hand I am not claiming a national culture (no extrapolation applies). It is limited to the study area, which is not a representative at all. Thus, it could be the case that whilst guilty plea aversion is culturally conditioned for some it remains tactical for others.

\textsuperscript{207}Ostensibly, the innocence problem identified earlier appears to be inconsistent with the problem of guilty plea `averse` defendants. However, both can happen depending on defendant’s aversion to risk. While it may be true that some defendants may resist any temptations of plea concessions and other coercive environments (risk seekers), others could simply avoid risk by pleading guilty even with modest concessions (risk averse defendants). Further, prosecutors may tailor their offers to break any resistance even among factually innocent defendants.
choosing to bargain and pleading guilty, defendants would calculate their advantages and disadvantages. Should they find it to their advantage they will plead guilty. In this sense, *ceteris paribus*, defendants are likely to arrive at informed decision on the choice of plea. This is positive and may raise the fairness of the process. However, it is unrealistic to expect that such tactics will always impact plea bargaining positively. It could impede the use and flow of plea negotiations. For example, for tactical reasons guilty pleas may be deliberately delayed and ultimately result in what is called cracked trials. This undermines the efficiency of the system.

7.1.5. Incompatibility with Principles of Criminal Law and Procedure

The fundamental principles of Ethiopian criminal law and procedure have already been briefly outlined under chapter three. Whilst some of such principles are closely linked with plea bargaining, others are remotely associated with it. This section takes up only some of the principles from the former category.

Arguably, plea bargaining in general and the Ethiopia variant in particular is not consistent with principles of criminal law and procedure that are designed to ensure the integrity of the criminal process. Such principles include the presumption of innocence, the principle of equality, the principle of equality of arms, the privilege against self-incrimination and the right to silence. Nor is it compatible with one of the main purposes of any criminal procedure – uncovering the truth with the ultimate objective of making guilty defendants account for their wrong.

1) *The principle of presumption of innocence*

The FDRE Constitution unconditionally guarantees the accused the right to be presumed innocent until proved guilty by a court of law208. Plea bargaining seems to operate in disregard of this fundamental constitutional principle in two respects. First, plea offers from the state presuppose an implicit presumption of guilt. i.e., in making plea offers the prosecutor assumes that the defendant is guilty. This is a clear contradiction with the principle. Second, plea

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208 See Article 20 of the FDRE Constitution.
bargaining lowers the standard of proof. It relies not on evidence as such rather on the admission of guilt, which is likely to be tailored based on the strength of evidence and the weight of concessions.

Procedural requirements like presumption of innocence and heightened standard of proof are...`intended to prevent inaccurate convictions even at the expense of inaccurate acquittals`210. Plea bargaining defies this by trading-off the reliability of convictions to efficiency and economic gains. This is alarming in jurisdictions like Ethiopia, which still struggle to uphold due process and to ensure the reliability of convictions.

2) The principle of equality

The general principle of equality is embodied under article 25 of the FDRE Constitution. Similarly, the criminal code guarantees the rights to equality and proscribes discrimination among criminals. Yet, by treating similarly situated defendants differently without any principled justification, plea bargaining collides starkly with this principle. This problem takes two forms: differential treatments inherent in plea bargaining (which in turn takes two dimensions: differential treatments between plea and trial defendants and differential treatments among plea defendants which operate depending on such factors which are far from being principled as the strength of the prosecution case, the negotiating power of the defendant, etc) and those based on invidious grounds (such as ethnicity, sex, religion, political outlook etc)211.

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209 When one counts out the guilty plea as unreliable, at best a lower standard of proof which is required for pressing of criminal charges is used to convict the accused and at worst this requirement could be circumvented. Indeed, as shown earlier on, this possibility is very high in particular with pre-charge plea bargaining permissible. For more discussion on the standard of proof used in plea bargaining See Gregory M. Gilchrist, supra note 18 at 153('Where trials are avoided, the standard of proof required for a conviction can be reduced to mere probable cause'). On the other hand, some suggest that beyond reasonable doubt or even a higher standard of beyond all doubt can be comfortably met if defendants ‘candidly’ admit their guilt (plea bargaining). See Richard L. Lippke, The Ethics of Plea Bargaining (Oxford University Press 2011) at 221. Nevertheless, this is hardly ensured in plea bargains.


211 For some details, see the section on differential treatment of similarly situated defendants.
3) The search for truth/accuracy

The search for the truth lies among one of the fundamental principles of Ethiopian criminal procedure law. As such, it is expressly mentioned in the reform that the criminal process needs to be guided by this principle. The draft criminal procedure code specifically imposes the duty to uncover truth on the judiciary so that the criminal accounts for his wrong and the innocent faces no conviction. To this end, the court is allowed to go beyond the facts and arguments forwarded by the parties and call witnesses\(^\text{212}\). While guilty pleas may dispose of cases, the court is mandated, at its own motion, to conduct a full-scale trial\(^\text{213}\). In this sense, what is sought seems to be an objective truth\(^\text{214}\). However, plea bargaining which involves exchange of concessions and negotiations, hardly goes with this principle. By requiring a waiver of procedures designed to promote accuracy, it rather obscures truth\(^\text{215}\). Its primary concern is case resolution and not fact finding as such\(^\text{216}\). In particular, this is for the most part true of the unlimited form of plea bargaining\(^\text{217}\) where charge bargaining and fact bargaining are tailored to this end. Put simply, downgrading or dropping of charges and negotiation of facts\(^\text{218}\), which are tenets of these forms of plea bargaining, are simply inconsistent with the principle.

\(^{212}\) See Art 369 of the Draft Code.

\(^{213}\) See Art 334 of the Draft Code

\(^{214}\) On the general distinction between objective and formal truth, see chapter 1.

\(^{215}\) See DK Brown, supra Note 170 at 1610. See also Gregory M. Gilchrist, 'Plea Bargains, Convictions and Legitimacy', 48 Am. Crim. L. Rev. 143, 171 (2011) ('A guilty plea in a system that permits plea bargaining has nothing to do with finding truth. It is a compromise between adversaries, reached when the parties each independently calculate the terms of the agreement to be preferable to the uncertainty of trial.'); R.L. Lippke, supra note 209 at 218 (Discussing the problem of getting at the truth in the robust form of plea bargaining).

\(^{216}\) Ibid

\(^{217}\) See R.L. Lippke, supra note 209 at 216-40 (Robust forms of plea bargaining are unreliable mechanisms of for getting at the truth).

Nevertheless, this is not to suggest that sentence bargaining is immune from the problem. In the advent of huge and uncertain concessions, `...the falsehoods perpetrated by sentence bargaining... are also readily apparent`\textsuperscript{219}.

4) \textit{The principle of equality of arms}

This principle aims to ensure that both parties enjoy comparable opportunities so that the balance in the criminal process is enhanced. This is all the more important in criminal cases where the balance of power skews towards the prosecution. The power disparity between the adversaries is quite pronounced in the Ethiopian criminal process. While the prosecution enjoys state resources and powers, having none of these, the defence remains very weak. Structural problems such as absence of defence investigation, poor organization of defence service as well as particulars of defendants (mostly poor, uneducated, unrepresented and uninformed defendants) exacerbate the situation. This creates an unbridgeable rift of institutional bargaining power. In the circumstances, plea bargaining, which involves disproportionate interests at stake\textsuperscript{220} elevates the power imbalance further. The exclusive rights the prosecution enjoys under the reform on such matters as the right to appeal, the right to have the plea agreement approved by the court, the right to plea bargain anew or resubmit the agreement in case of rejection by the court, add to the problem. This is not in line with \textit{the principle of equality of arms}, a principle explicitly incorporated by the reform.

5) \textit{The right to appeal}

While the prosecutor is allowed to have appeal rights where the plea agreement is rejected, the defence has no appeal right at all. The rational for such foreclosure seems that once a defendant is convicted based his admission of guilt; there is nothing that he challenges at the appeal stage. However, this leaves defendants with no opportunity to have their guilty pleas

\textsuperscript{219} R.L. Lippke, supra note 209 at 233-34 (`Sentence discounts of 50-75 percent badly distort truth about what offenders have done`).

\textsuperscript{220} While the defendant is under a threat of severe sanctions, the prosecutor runs the risk of losing at trial. The two are not comparable.
reviewed against any irregularities overlooked by lower courts. Besides, it is inconsistent not only with the defendant’s constitutional right of appeal but also with the principle of equality of arms.

7.2 Other Undesirable Consequences of Plea bargaining

7.2.1 Violation of defendants rights

A rights perspective into plea bargaining suggests that plea bargaining offends several of the defendant’s rights. Rights compromised in plea bargaining include the right to be presumed innocent, the right to equality, the right to appeal, the right to silence, among others. With a poor human rights record in general and weak protection of defendants’ rights in the criminal process, in particular, together with the high propensity of plea bargaining to interfere with defendants rights, the introduction of unlimited plea bargaining in Ethiopia is likely to result in and to perpetuate violation of defendant’s rights, unless measures are taken to remedy this problem. My field investigation of the views of justice actors on the possible impacts of plea bargaining on defendants’ rights is also consonant with this, most of them expressing concerns on this (in particular on unrepresented defendants) seek for a strict regulation.

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221 Perhaps the exception would be cassation review. However, its application is very limited to fundamental error of law. See Chapter 4.

222 Andrew Sanders et al, Criminal Justice (Oxford University Press, 2010) at 491-92.

223 One writer notes that ‘human rights in Ethiopia is a luxury which the government doesn’t take seriously and their inclusion in the constitution is simply a matter of formalism’ see John Marakakis, Ethiopia: Anatomy of a traditional polity (Addis Ababa, shama books, 2006) at 333 cited in Asefa, supra note 11 at 124; See also reports of human rights groups as Amnesty International, Human Rights Watch, US State department (all accusing the government of human rights violations) supra Note 53 and 48. However, the Ethiopian Government categorically rejects all the accusations.

224 One former prosecutor rightly observes: in practice the Ethiopian criminal process is ‘highly protectionist’ in that it focuses on crime prevention, protecting individual rights being a least priority. Interview with Attorney 01 held on March 30, 2012. Further, though the constitution guarantees suspects/defendants several rights including the right to presumption innocence, the right to appear before court within 48 hours of arrest, the right to habeas corpus etc, such rights are frequently disregarded. Reports also show that there are illegal detentions and due process violations. See for example Agrast, M., Botero, J., Ponce, A., and WJP Rule of Law Index 2011. Washington, D.C.: The World Justice Project.
Further, several defendants allege torture and forced confessions, which some judges seem to agree with. Various overseas reports also lend support for this and on several occasions expressed concerns over the problem. This practice of extracting forced confessions, though its magnitude is yet to be investigated, is likely to overshadow plea bargaining. Plea bargaining which encourages the continued use of confessions/guilty pleas, is likely to sustain, if not intensify the practice, absent any meaningful guarantee.

The informal plea bargaining provides a sense of the impacts of plea bargaining on defendants’ rights. The practice is held at the early stage of the investigation with unrepresented suspects—a possibility which is open under the formal variant of plea bargaining. Suspects are interrogated without a lawyer present in an environment where investigative officers may be tempted to use coercive techniques to extract a confession. The informal plea negotiation, by exploiting suspects’ vulnerability at the investigative stage, leaves them to possible manipulations and coercions. As such, this is likely to lead to uninformed and involuntary confessions. Similar problems could arise in the formal pre-charge negotiations too. i.e., prosecutors may negotiate pleas with unrepresented defendants at the early stage of the investigation and obtain involuntary guilty pleas.

7.2.2 Abuses and corruptions

Despite noticeable improvements from the preceding years, Ethiopia remains among the significantly corrupt countries on Transparency International’s Corruption Perception Index 2012. On sector specific survey, it is revealed that the general public perceives that legal

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225 See UN Committee against Torture, supra note 53; Human rights reports by US state department, all documenting the problem. See supra Note 53 and 48.

226 Certainly, this endeavour would be extremely difficult, if not impossible, for among other things, police interrogations are inaccessible; nor are they recorded.


228 On a scale of 0 to 100, with zero indicating high levels of corruption, and 100 least corrupt, Ethiopia scored 33 and ranked 113th out of 176 countries (with a score below 50 representing significant corruption). Compare this with other African countries: Botswana (scoring 65 ranked 30th); Rwanda (scoring 53 ranked 50th);
sectors including the judiciary and law enforcement are corrupt. There are also serious allegations of corruption within the justice system by the public and the media. Indeed, though not grave as perceived, studies confirm incidents of corrupt practices among justice actors; so do prosecutions of corruption cases.

The survey I conducted on justice actors indicates that corruption presents a major threat in implementing plea bargaining in Ethiopia. Presented with a scale from `strongly agree` to `strongly disagree` to the question: whether plea bargaining invites corruption in Ethiopia, justice actors rate the problem as follows:

Kenya and Nigeria (both scoring 27 ranked 139), and unstable states like Somalia are put at the bottom. See Transparency International’s Corruption Perception Index 2012 available at http://www.transparency.org/cpi2012/results (06/11/2012).

There are credible allegations that police do involve in various forms of corruptions especially in drug related crimes (`chat` and `shisha` houses). Some allegations of corruption also exist among prosecutors while handling criminal cases with ADR. There are also allegations that bail rights in corruption charges are being used as a bargaining chip for corrupt practices. The anti corruption law denies bail automatically for corruption crimes punishable with more than 10 years of imprisonment. Where a defendant agrees to pay some money to the prosecutor, he will be charged with a crime of corruption punishable with less than 10 years so that he will be released on bail.

The following account from The Reporter, a weekly newspaper appears disturbing: ‘Corruption is spoiling the justice system. It has become common that cases are hijacked from trials and subjected to corrupt deals. Cheques and other assets prevailed over provisions of the law. We are in a justice system wherein money takes primacy over the constitution, criminal law, civil laws, and evidences’. (translation mine) See Reporter, SUNDAY, 17 JUNE 2012 available at www.ethiopianreporter.com (June 18, 2012).

One study observes: `Corruption, where it occurs, takes one of two forms: (a) political interference with the independent actions of courts or other sector agencies, or (b) payment or solicitation of bribes or other considerations to alter a decision or action`. In particular this study labels `bribes solicited by or offered to police to ignore a criminal offense, not make an arrest, or not bring witnesses or suspects to court` as `the most common form of corruption`. With a caveat on its frequency the study documents `prosecutors’ misuse of their powers, in response to bribes or political directives, to advance or paralyze a case` as well as `lawyers solicitation of bribes` See Linn A. Hammergren, supra note 21 at 183-4 and 214-17. See also The Federal Democratic republic of Ethiopia Comprehensive Justice System Reform Program, base line study, 2005, at 14 (where corruption, abuse of power and political interference are identified as core problems of the Ethiopia criminal justice system).

In the past two years, 6 Federal prosecutors and 3 Federal judges have been investigated and prosecuted of corruption. See Ibid at 209. Currently at Federal level, the head of prosecution service of Customs Authority, and the director general of the authority, his deputy and dozens of individuals are prosecuted for crimes of corruption.

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Table 7.1 Criminal Justice Actors’ Views on the risk of corruption where plea bargaining applies in Ethiopia.

<table>
<thead>
<tr>
<th></th>
<th>Total No. participants</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>No view</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors</td>
<td>46</td>
<td>11</td>
<td>20</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Judges</td>
<td>29</td>
<td>6</td>
<td>15</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Defence attorneys</td>
<td>20</td>
<td>4</td>
<td>9</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>95</td>
<td>21</td>
<td>44</td>
<td>8</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Percentage</td>
<td>100</td>
<td>22.1</td>
<td>46.3</td>
<td>8.4</td>
<td>1.05</td>
<td>1.05</td>
</tr>
</tbody>
</table>

As can be understood from the above table, of the participants more than two-third of prosecutors; about three-fourth of criminal bench judges; and two-third of defence attorneys (on average more than two-third of the justice actors participated in the study) believe that plea bargaining in Ethiopia is likely to invite corruptions. Among these, the thoughts of two judges merit mention. Judge 11: ‘in the absence of an honest accountability system, the incidence of corruption will be a serious concern in plea bargaining’. Judge 10:

Problems of abuse and corruption are most likely to arise in plea bargaining. We justice professionals are financially insecure. Our salary is very low. Professional ethics is not strong. On the face of this, affluent defendants could exploit any gap.

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234 Not all participants rate the problem of corruption. 7 prosecutors, 7 judges, 6 defence attorneys did not respond. Yet this does not suggest that they disagree with the problem.

235 Interview with Judge 11, held on 17/04/2012(translation mine).

236 Interview with Judge 10, held on 05/04/2012(translation mine).
The unlimited form of plea bargaining, which permits all sorts of non-transparent deals to drop or reduce charges, reduce sentence and manipulate facts, is prone to corruption. Even worse, it may seem another form of corruption in those jurisdictions that are hit by severe forms of corruption. The worry with the unlimited form of plea bargaining is not only its vulnerability to corruption but also the difficulty of regulating it. Given its opaqueness and the type and amount of concessions involved, it is virtually impossible to ensure that deals are immune from corruptions and abuses. The inherent vulnerability of plea negotiations to corrupt practices interacted with problems/perceptions of corruption, weak system of accountability, and absence of independent and vibrant media mean the Ethiopian variant of plea bargaining is likely to involve corruptions and abuses. This could create public perception problems, which may further deteriorate public trust and ultimately undermine the purpose and objective of plea bargaining and that of the justice system in general.

I will conclude this section by briefly outlining the place of fines in plea agreements in Ethiopia and its propensity to corruptions. Currently, there is an increasing shift of using fines as a supplementary, an alternative as well as standing-alone punishment in the Ethiopian criminal justice system. It is not clear whether parties can negotiate on such fines. Nevertheless, in practice, fieldwork sources indicate that in some regions even custodial sentences are converted into fines following informal plea negotiations that sometimes involve

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238 The 2011 Rule of law index puts Ethiopia at the bottom in terms of accountability among the 66 surveyed countries. The report states: Accountability is very weak by regional standards (ranking 63rd globally and second to last among low income nations). See M. Agrast et al, supra note 221; See also Linn A. Hammergren, supra note 21 at 184 (who observes: Internal review mechanisms in the justice sector (complaints and disciplinary offices) suffer weaknesses.)

239 Currently the country is accused of putting heavy restrictions on freedom of speech and the press. This definitely affects the flow of information from the justice system to the public. Moreover, the media in Ethiopia lack the required legal expertise to oversight the criminal process and evaluate the justice system critically.

240 The Sentencing Manual expands the use of fines significantly. Normally fines are applicable as lone punishment to such crimes as corporate crimes and traffic violations.

241 Yet, with no limitations are made as to the type of punishment or crime, one can argue that it is permissible to negotiate over fines.
corruptions\textsuperscript{242}. This is a signal, if not a tip of the iceberg, that plea bargains in general and negotiations over fines in particular are indeed exposed to abuses and corruptions. To be sure, plea bargaining cannot achieve its purpose unless the criminal process and its actors operate with integrity.

\section*{7.3 Conclusion}

In this chapter attempt is made to posit the nature, magnitude and implications of the limitations that might be involved in the Ethiopian variant of plea bargaining. Plea bargaining is imported into Ethiopia with its problems and without meaningful adaptation to local contexts. The existing circumstances in the Ethiopian legal system appear to provide no conducive platform for the operation of unlimited plea bargaining. In particular, the underdeveloped capacity of legal institutions, the huge disparity of power between the parties, the precarious legal aid system and the particulars of defendants (poor and illiterate) and risks of abuses and corruptions mixed with weak legal culture mean this form of plea bargaining hardly fits into the Ethiopian legal system.

\textsuperscript{242} Interview with Judges. In particular, one judge observes “...in one region there are reports that some unethical prosecutors are using plea bargaining for personal gains (corruption)... [Raising concerns] that instead of benefiting the public (saving resources, time etc), plea bargaining may be used as a ‘cash cow’ for prosecutors”. Interview with judge 03 held on 02/04/2012. There are also complaints that some prosecutors abuse their power while using ADR.
Chapter Eight: Conclusion

Although it generates considerable debate, with its practical benefits (in particular as a caseload management tool), plea bargaining continues to permeate criminal justice systems across jurisdictions. Indeed, currently there is live evidence that the practice is transcending most structures of criminal procedure across the globe in varied forms. A case in point is its spread into classical inquisitorial systems. It should be noted, however, that the approach taken by the latter is extremely cautious. Jurisdictions from the inquisitorial origin have not imported the unlimited variant as apply in most adversarial structures. Rather, they have engineered a limited variant of plea bargaining which is believed to suit their context. In this variant, concessions are regulated by law; a strict scrutiny by the judiciary which goes to the extent of reviewing the congruity of sentence with the degree of guilt applies; and some forms of plea bargaining (fact and charge bargains) are outlawed.

This (inquisitorial) approach hardly remedies the inherent flaws of plea bargaining, though it could considerably mitigate them. In this sense, it is a lesser evil and can be illuminating for jurisdictions like Ethiopia that insist on introducing plea bargaining. Nonetheless, Ethiopian reformers seem content simply to import unlimited plea bargaining, as it applies in adversarial jurisdictions. This model seems to have been picked even without a thorough comparative analysis of the alternative models.\(^1\)

The contextual interrogation of this model of plea bargaining suggests the following major arguments and observations, around which the thesis is constructed: that the model is less desirable and feasible when examined in light of the major components of the Ethiopian legal system; that though the model hardly drew its inspiration from it, it is preceded by a rudimentary form of informal plea bargaining; that the model is likely to entail such perverse effects as: violations of defendants’ rights, wrongful convictions, abuses and corruptions; and

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\(^1\) The only document available in this regard is a piece of policy note which discusses a ‘framework for plea bargaining’ based on the Canadian model. This discussion is too brief and lacks depth (only 15 pages). It is not representative either as it ignores other models. For example, the inquisitorial models and other adversarial models are not covered or insufficiently covered.
that plea bargaining may not be a universal solution for problems of inefficiency / delay, particularly in less established legal systems.

The first major argument the thesis advances relates to the desirability of plea bargaining. The contextual appraisal of the policy justifications, i.e. the purposes plea bargaining is said to achieve, suggests that the latter is less defensible and hence less desirable to Ethiopia. Apparently, of all the justifications, the expediency/efficiency justification seems to have a special force in jurisdictions whose criminal justice is poorly resourced. Yet, this is less compelling at least for two counts: First, the reasoning is divorced from being principled in that lack of resources cannot vindicate an encroachment of fundamental rights and freedoms. Human life and liberty are values that any society should cherish irrespective of its economic status. Second, the contextual investigation of the trial and delay in Ethiopia lends very little support to this. The fact that trials are exceptions, simple or at least not complex mean they are not resource intensive and thus are manageable even with limited resources. No complex procedures of investigation, prosecution or trial are involved in the process. The process is largely unconstrained by such procedures as exclusionary rules and other strict rules of evidence, disclosure rules, pre-trial hearings and reviews, strict standards of prosecutions (for that matter absent formal standard of proof, beyond reasonable doubt applies inconsistently). Compared with other adversarial variants, the trial process is much simpler and less costly both in law and practice. What is more, as delay is not correlated much with the nature of trials, plea bargaining (avoiding trials) would not be of much help to address it. Unlike most jurisdictions (adversarial jurisdictions in particular) which apply plea bargaining in its unlimited form, the cause of delay in the criminal justice system is linked neither to over-procedures nor to party autonomy/control of the criminal process. Nor do complex and organized crimes apply as is the case with some inquisitorial systems. No party autonomy which causes `a drain of resources` applies as it does elsewhere. Parties, in particular the

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2 McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition’ 31 Legal Studies 519,544 (2011). (Noting that `...the managerialist persuasion of criminal processes in this county [England and Wales] will continue, and possibly strengthen, because of the drain on resources that party autonomy entails`.)
defence, have very little control of the process, if not essentially none\(^3\). Delay is rather down to the capacity of legal institutions (see Ch 7).

Other justifications of plea bargaining are not compelling either. Defence and victim oriented justifications are based on assumptions of their meaningful participation in the process - assumptions which are largely romantic than real, in particular in the unlimited variant of plea bargaining and within the Ethiopian context. The limited role of defendants in plea negotiations in general\(^4\) (which is constrained by the institutional imbalance of bargaining power, disproportionate interests at stake, among others), the possibility of competent representation less likely in plea bargains\(^5\), and coercive sentencing differentials mean meaningful participation of the defence is less probable. This is likely to be exacerbated by the particulars of defendants in Ethiopia (mostly poor, illiterate or less educated and unrepresented defendants), dire resources and partisan but unilateral nature of the criminal investigation. Given this context, the justification of party (defendant) autonomy does not work: it remains a chimera\(^6\). Further, the policy overstates the advantages of plea bargaining while ignoring the pressing problems it may create for defendants and victims. No thorough consideration is made on its implications and the principles affected (see below and chapter 7). The remorse justification also remains problematic for it is impossible to distinguish remorse motivated guilty pleas from tactical guilty pleas. It is losing its force even in jurisdictions like the USA and UK which cherished it for long (For more, see chapter 4).

\(^3\) This is for example true of the investigation stage. As shown in chapter 7 the investigation is partisan but unilateral (by the state); yet no duty of discovery of evidence by the prosecution so far (it is only recently that this duty is recognized at policy level and by the proposed law); most defendants are unrepresented.

\(^4\) See for e.g. Frank H. Stephen, et al, ‘Incentives, Criminal defence lawyers and Plea bargaining’, 28 Int’l Rev. L. & Econ. 212 (suggesting ... qualitative evidence exists on the passive role played by criminal defendants in the plea bargaining process).

\(^5\) With financial and non-financial incentives involved, the defence counsel may find it difficult to choose trial against plea bargaining even if his client’s interest so suggests. See for example Albert Alschuler, ‘The Defense Attorney’s Role in Plea bargaining’, 84 Y. L.J 1179, 1180, 1975(who argues that [plea bargaining] subjects defence attorney to serious temptation to disregard their clients interests ..) For further discussions on financial incentives see chapter seven.

\(^6\) McEwan, Supra note 2, at 526.( suggesting that : 'Should ... [full disclosure and legal counsel] absent, the appearance of defendant autonomy is an illusion, and control over the case non-existent'
To recap, with jurisdictions like Ethiopia whose legal institutions and legal culture are not
developed, whose trial tends to be simple, less costly and an exceptional mode of dispute
resolution and thus manageable, plea bargaining, which evades fundamental safeguards that
jurisdictions like Ethiopia are struggling to uphold, is less desirable. In other words, the nature
of trials and delay in Ethiopia means plea bargaining would not offer the desired/ substantial
efficiency gains even at all costs. To a limited extent, it promotes efficiency this comes at a
greatest cost- by trading off the most needed values of criminal justice (namely ensuring due
process/fairness and accuracy) for a reduced efficiency. Put simply, efficiency is not an
objective to be pursued at all costs- a balance needs to be struck with other essential fairness
values, values plea bargaining hardly lives up to.

The second main argument the thesis upholds is this: the Ethiopian variant of plea bargaining,
which is constrained by inherent and serious due process concerns as well as institutional and
cultural limitations, is less feasible. Put simply, plea bargaining’s incompatibility with the
Ethiopian criminal justice has to do with both the institution itself, institutional capacity and
legal culture.

   a) Due Process Concerns

Plea bargaining which inherently relates less to evidence and circumvents fundamental
safeguards against wrongful convictions (such as presumption of innocence, strong standard
of proof) would generate inaccurate outcomes in any system.7 This is even more so in an
exacerbated fashion in a less developed legal structure and weak legal culture/rule of law like
Ethiopia. In particular, the problem of access to legal counsel, prolonged pre-trial detention
and poor conditions of detention centres, and fact finding problems - abuses of arrest and
remand, lack of scientific and forensic evidence, absence of pre-trial review of evidence - all
conspire to aggravate the flaws of plea bargaining. The prevailing institutional preoccupation
with efficiency and case management, shared incentives of legal professionals to shortening

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7 See chapter 7, principles of criminal law and procedure. See also Gregory M. Gilchrist, 'Plea Bargains, Convictions
and Legitimacy', 48 Am. Crim. L. Rev. 143, 160-61 (2011). (Where convictions are too easy to secure because of
lax plea bargaining rules, the number of innocent persons charged could rise).
the criminal process and weak ethics\textsuperscript{8} mean the concern would be heightened further. This is likely to make the Ethiopian variant of plea bargaining a more worrisome and a less feasible option.

Admittedly, inaccurate outcomes are unavoidable in trials too. Yet, it is hard to see the benefit of a more efficient process outweighing the costs to the system of avoiding inaccurate outcomes. This is what plea bargaining does; it leads to the manipulation of the judicial process for reasons of economy. In addition to problems of outcome (distributive justice), the process of plea bargaining is defective i.e. it operates in disregard of the requirements of procedural justice\textsuperscript{9}: it treats similarly situated defendants differently (under-punishing, over-punishing or no punishment at all/impunity), fails to apply objective and uniform rules (lacks neutrality), denies the defendant meaningful voice (in particular in the Ethiopian context, see chapter six and seven).

Certainly, this has far reaching implications not only on the innocent\textsuperscript{10} but also on the entire criminal justice system. As shown elsewhere in chapter six and seven, there are considerable efforts in Ethiopia to grapple with outcome unpredictability/inaccuracy\textsuperscript{11} and win public confidence in the justice system which is essential to its proper functioning\textsuperscript{12}. Nonetheless,
plea bargaining has the potential to obstruct this and undermine further the legitimacy of the criminal justice system\(^\text{13}\), which has a direct bearing on the use of the system and its endeavour to control crimes.

\textit{b) Structural Limitations}

The unlimited form of plea bargaining tends to assume effective and competent legal institutions as well as ethical and sophisticated actors. Yet, the Ethiopian reality hardly goes with such assumptions. The way legal institutions are structured and operate provide no conducive platform for the operation of plea bargaining. While the reform massively expands the power of the prosecution\(^\text{14}\) – vesting it with three mega functions of investigation, prosecution and quasi-adjudication\(^\text{15}\) with little checks on it, the other wing – the defence - remains intolerably weak and neglected. Legal aid, organized through a public defender’s office which is constrained by, inter alia, dire resource limitations, problems of trust and excessive workload, remains very limited (only covering capital cases) and intolerably substandard. The private wing is not any better either. In addition to its inaccessibility to defendants it impaired by problems of access to resources and evidence, and that of organization (no recognized Bar and concerns of independence-attorneys accountability to the Ministry of Justice). Neither parallel defence investigation nor impartial investigation by the state exists- only unilateral but partisan investigation by the state prevails. While the prosecution benefits from state resources and full access to any evidence, the defence lacks comparable opportunity. All these


\(^{13}\) Gregory M. Gilchrist, supra note 7 at 163 (arguing that plea bargaining undermines the perceived legitimacy of the criminal justice in three ways: by producing less reliable outcome than trials; by treating a bargained-for convictions and trial convictions alike (the deference being – sentencing and post conviction reliefs); and by creating incentives for dishonesty).

\(^{14}\) This is not to claim that the traditional functions /jurisdictions of prosecution are expanded. Conversely, in this respect, the move is in the opposite direction. Several government entities /authorities are made to exercise prosecution powers. For details see chapter 3, organizations and functions of justice actors.

\(^{15}\) This role of the prosecution in the unlimited variant of plea bargaining is elaborated by one writer as: ‘[T]he prosecutor is the central adjudicator of facts … [and] arbitr of most legal issues and of the appropriate sentence to be imposed. The defendant presents potential defences... to a prosecutor, who assesses their factual accuracy and … then decides the charge of which the defendant should be adjudged guilty.’ See Gerard E. Lynch, ’Screening Versus Plea Bargaining: Exactly What Are We Trading Off?’, 55 Stan. L. Rev. 1399, 1403-04 (2003).
create a huge rift and unbridgeable barrier for the defence. Plea bargaining further distorts the balance of power between the prosecution and the defence.

The chronic resource limitations on the part of the defendant and the state mean most defendants would go unrepresented in plea bargaining. (Indeed it is allowable to plea bargain with unrepresented defendants). To the rare extent legal services are available, competent legal representation would be difficult to attain in plea bargains. A host of factors could be responsible for this: the coercive plea offers from the prosecution, agency costs (both financial and non-financial), problems of access to resources and evidence, limited prosecutorial disclosure whose enforcement is not properly guaranteed, absence of robust ethical standards, weak ethics and professionalism, the vulnerability of defendants to manipulations, lack of proper review and the difficulty of reviewing attorneys’ plea bargaining decisions.

All these make the defence ill-suited for plea bargaining. “In the absence of vigorous defence... [a defendant] relies heavily both on the objectivity and the efficiency of state agencies”\(^{16}\), the judiciary being at the forefront. But this tends not promising either. Affected by concerns of political independence (institutional and personal independence), weak culture of judicial review, and caseload pressure\(^{17}\) courts are not in a position to ensure the fairness and the accuracy of plea bargaining. Even assuming courts are able to beat these odds, the inherent problems of plea bargaining (its coercive elements as huge sentencing differentials) remain beyond their reach. Absence of review of plea agreements by appeal also adds to the problem, limiting judicial guarantees further in the process.

c) Fundamental Principles of Criminal Law and Procedure

Plea bargaining is incompatible with fundamental principles of Ethiopian criminal law and procedure. Ethiopia’s recourse to an unlimited plea bargaining signals the further marginalization of requirements of fairness/accuracy. Procedural safeguards that aim at

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16 J. McEwan, Supra note 2, at 545.
17 As shown in chapter six, institutional pressure to end cases quickly is so strong. This emphasis on efficiency may put pressure on the judiciary to process cases quickly in disregard of other adjudicative responsibilities and thus may affect its independence. This pressure, be it internal or external constitutes an interference to judicial independence. But this is not to undermine accountability. For that matter accountability cannot be ensured by simply using a managerial criterion (rather judicial integrity, competence, fairness, etc are all even more relevant).
ensuring the integrity of the process and the accuracy of verdicts are being traded-off for efficiency and economy - such guarantees as the presumption of innocence, strong standard of proof, the principle of equality of arms, the search for the truth/accuracy, the principle of equality, the right to appeal and other fair trial guarantees are likely to be undermined. In fact, as a poor nation resource constraints may necessitate efficient methods of case disposition. But such a radical shift especially in a country with a less developed legal system cannot be vindicated. Given efficiency problems are less correlated with the nature of trials, plea bargaining (avoiding trials) would not be the appropriate recourse either.

d) Legal Culture

It is submitted elsewhere that the Ethiopian legal culture is fundamentally distinct from the culture of the donors- North America and Europe. As legal transplants are culturally conditioned, the import of plea bargaining into Ethiopia would not fare well both in terms of efficiency and fairness, in the absence of proper contextualization. However, this should not suggest that it is doing very well in the donor jurisdictions, jurisdictions with a strong legal culture/rule of law. Even there, it sacrifices sacred values of accuracy and fairness for mere economy and expediency. In Ethiopia, as trials are simple and inexpensive and delays have less to do with them, plea bargaining is less likely to yield the desired efficiency gains even with such a trade-off. In general, on the face of weak legal and political culture (rule of law and accountability, in particular), less established legal structure and other material conditions (see Ch 6), plea bargaining is unlikely to take root in Ethiopia at least in its proper form. The limited role of victims in plea bargains as opposed to the prevailing legal culture in the informal justice system, problems of legal penetration and internalization, weak culture of judicial review and systems of accountability, defendants’ guilty plea attitude and low public confidence in the justice system, reveal that the prevailing legal culture may not accommodate

unlimited plea bargaining, if not, any form of plea bargaining. The defendants` guilty plea attitude (rarity of guilty pleas) could affect plea bargaining in many ways. In particular, to the extent to which this attitude is linked with defendants` culture, mistrust over legal professionals (defence counsel and the prosecutor), or the attitude is uninformed, it would be detrimental to plea bargaining in terms of its utility and propriety. Likewise, the limited space for victims` participation impinges on the preferred and culturally embedded victim oriented dispute settlement. With such values not sufficiently accommodated in plea bargaining, the potential use of plea bargaining by the victim and the public could remain limited. Similarly, public confidence in the administration of justice is a matter of interest for policy makers. As such the latter need not only to respond to low levels of public confidence but also make sure that a specific policy does not undermine it. Yet, importing the unlimited variant of plea bargaining in a little trusted justice system, as is the case in Ethiopia, seems to ignore this. Low public trust to the criminal justice system could affect plea bargaining in the following senses: exacerbating further the trust problem and discouraging the use of the formal system thereby plea bargaining or should the formal system is preferred, inducing defendants to choose an unfavourable plea agreement over little trusted trials.

The thesis further argues that in Ethiopia whose criminal justice system lacks many of the characteristics of more established systems of criminal justice, plea bargaining would be more of a liability than an asset at least in three senses: First, where the capacity of legal institutions is less developed, the prevailing legal culture, in particular rule of law is not strong and accountability is intolerably low, the excessive discretion involved in the unlimited variant of plea bargaining interacted with the lack of transparency in plea negotiations, is likely to leave a room for abuses and corruptions. Although, prosecutors are more exposed to the problem, it could also affect all justice actors including the defence counsel, defendant and the judge. As shown in chapter six, this concern is also shared by justice professionals themselves. Second, weak legal institutions and legal culture mixed with the inherent due process concerns of unlimited plea bargaining mean plea bargaining is likely to yield inaccurate outcomes—wrongful convictions and acquittals. This plainly defeats the very purpose of the criminal process.
Thirdly, with its inherent dissonance to human rights of defendants\textsuperscript{19} reinforced by the prevailing poor human rights record (weak protection of defendants' rights in the criminal process, in particular), plea bargaining would leave defendants' rights at a greater risk. Simply put, a criminal justice system which ordinarily marginalizes defendants' rights would continue to do so in an exacerbated fashion with plea bargaining, an institution which circumvents fundamental safeguards. A case in point is confession. As it is reliant on confessions/ guilty pleas whose reliability cannot be properly tested, plea bargaining could reinforce the use of coerced confessions.

The thesis also reveals that though it hardly inspired the Ethiopian model, an informal plea bargaining exists at the investigative stage. This arrangement where prosecutors strike a deal in return to granting suspects some form of sentence or charge concessions, immunities and diversions, apparently looks to comport with internal legal culture and facilitate the use of plea bargaining in Ethiopia. Nonetheless, in reality with the magnitude of the practice is very limited both horizontally and vertically (only prosecutors in rare circumstances applying it), this would not constitute a representative legal culture and thus its impact would be insignificant. Neither the defence nor the court plays any role in the process, with few exceptions to the latter (see Ch 5). Further, even though its positive impact cannot be ruled out, its debilitating effects tend to be substantial and quite pronounced. A contextual look at the practice provides a sense of some of the practical problems of plea bargaining. While the practice may help to reduce the caseload to a certain extent, its undesirable consequences outweigh this. Apart from being illegal, the practice signals a change of paradigm that the need for efficiency is taking primacy over requirements of fairness and accuracy. As an informal practice, it is not enforceable – not subject to either external (judicial) or internal reviews. As such, it is exposed to prosecutorial abuses- be that coerced guilty pleas, guilty pleas based on false hopes, discrimination against defendants or corrupt practices. It is also worrisome to learn that the informal agreement is made at the early stage of the investigation with unrepresented suspects before they are formally charged and being unaware of the nature of the charge against them. Given pre-charge plea bargaining with unrepresented defendants is

\textsuperscript{19} Plea bargaining is inherently incompatible with such rights of defendants as the right to be presumed innocent, the right to equality, the right to appeal, and the right to silence. See chapter 7.
allowable, this concern looms large even in the formal (Ethiopian variant of plea bargaining). This makes a good synergy with the paucity of pre-trial guarantees to produce plea agreements based on an uninformed, if not involuntary, admission of guilt. Further, the practice is likely to invite not only circumvention of a thorough investigation of crimes but also that of impunity. Again in the absence of sufficient review and thus the possibility of circumvention of the requirement of sufficient evidence wide open, this could be true of the formal plea bargaining.

Finally, it seems of some interest to reflect on the possible lessons which can be drawn from the import of plea bargaining into jurisdictions like Ethiopia. Admittedly, drawing a comprehensive and definite lesson presupposes the testing of plea bargaining in practice. Absent this, this exercise is destined to be prospective. Thus, the major lesson suggests that plea bargaining may not be a universal solution for problems of inefficiency; nor can it ensure efficiency in any system. Albeit, it apparently looks elementary, this is very important. The context of delay/inefficiency matters most. Plea bargaining is incapable of addressing all problems of efficiency across the board. It helps to manage caseload and enhance efficiency albeit, at the expense of fairness and accuracy, provided that the main cause of delay is connected with full scale trials or Jury trials. In the event where Jury trials are absent and trials are exceptions, simple and less costly, as is the case in Ethiopia, it helps very little. In jurisdictions where litigation rates are very low as Ethiopia, the problem of delay can be addressed by modestly enhancing the capacity of justice institutions rather than avoiding the less utilized and struggling trials altogether. Of course, this is not to suggest that the status quo remains forever. But as low litigation rate or mode of dispute settlement is largely connected with legal culture, it is unlikely to change any time soon.

Another major lesson the thesis draws attention to has to do with the dangers of plea bargaining in less established legal systems as Ethiopia. The thesis suggests that plea bargaining would not fare well in such systems where legal institutions are not developed, the prevailing legal culture, in particular rule of law is not strong and accountability is intolerably low. On the contrary, it could entail such perverse and undesirable effects as: violations of defendants’ rights, wrongful convictions, abuses and corruptions.
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281


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Appendices

i) Sample Research Tools

a) Judges

1. Do you think that plea bargaining is important to Ethiopia? Why? Why not?
2. What challenges may it involve in the Ethiopian context, if any?
3. Are you ready to assume your new role in the process of plea bargaining? Explain.
4. To what extent the new sentencing guideline is mandatory and how it affects your sentencing discretion? What is its possible impact on plea bargaining?
5. Is there any practice of Informal plea bargaining for example in RTD cases; informal cooperation agreements (explicit or inferred from the conduct of parties). If yes, how often? Any case of this sort?
6. In Ethiopia defendants are exceptionally reluctant to plead guilty. Do you agree? If yes, what do you think is the cause?
7. Some judges advise defendants over the choice of plea. Your experience?
8. What is the time of pleading guilty and its rewards? Does the reward depend on the time/stage of tendering?
9. Have you ever allowed a change of guilty plea to that of not guilty – at which stage and on what grounds?
10. What is the weight of the testimony of co-offenders on their accomplices?
11. In your opinion how important is the defence attorney in plea bargaining?
12. What role victims need to have in plea bargaining decisions?
13. Are there any standards/rules to ensure the voluntariness of guilty pleas? If yes, would you mention the basic ones? If not, how do you ensure it?
14. How do rate your relationship with prosecutors, police and defence attorneys?
15. In your view what are the main problems of Ethiopian criminal justice system?

1 A separate tool was prepared for each justice actor. These are just representatives.
b) **Defendants**

1. Do you think that plea bargaining is important to Ethiopia? Why? Why not?
2. What challenges it may involve in the Ethiopian context, if any?
3. Have you ever been involved in the practice of informal plea-bargaining for example in RTD cases, informal cooperation agreements etc?
4. If so, can you describe the process briefly?
5. What factors influenced/ would influence your plea bargaining decision?
6. In such deals did prosecutors live up to their promises? If not, what recourses did you have?
7. Have you ever received any advice about the choice of plea? From whom? What did they say to you?
8. Why you pleaded guilty (only for those who did so)?
9. Have you ever changed your plea (of not guilty) to guilty plea? Why?
10. Has anyone attempted in any way to force you to plead guilty? If yes, who and how?
11. While plea bargaining/ pleading guilty were you represented by a defence attorney? If so, did you get satisfied with the legal counsel, representation, and advice you received?

c) **Questionnaires for Prosecutors**

Dear participant,

Plea bargaining (where sentence or charge are reduced or dropped in exchange for a guilty plea) has recently been introduced into the Ethiopian criminal justice system (Proclamation 691/ 2010 entrusts the ministry of justice with a power to allow plea bargaining; A quasi- plea bargaining is recognized both under the anti-corruption and anti-terrorism laws; the criminal justice policy introduces plea bargaining for all crimes across the board and so does the draft criminal procedure code). This study (PhD) aims at assessing the challenges and prospects of this new concept within the Ethiopian context. You are kindly requested to help the research achieve this objective by filling out this questionnaire. (In answering the (few) open ended questions you may use Amharic). I guarantee that any information you supply is used only for research purposes and remains confidential.
Thanks for your cooperation!

I. Background information

Your position: ------------------------
Sex: Female ☐  male ☐
Relevant experience (in terms of years) -----------

II. Your view of plea bargaining( please tick as many as apply )

1. Plea bargaining is important to Ethiopia: Yes ☐  No ☐

<table>
<thead>
<tr>
<th>S. No</th>
<th>Yes it may</th>
<th>Yes</th>
<th>No It may</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Save time and cost</td>
<td>☐</td>
<td>Undermine the purpose of punishment</td>
<td>☐</td>
</tr>
<tr>
<td></td>
<td>Manage caseload</td>
<td>☐</td>
<td>Undermine truth finding</td>
<td>☐</td>
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<tr>
<td></td>
<td>Expedite justice to defendants</td>
<td>☐</td>
<td>Bring involuntary confessions/ wrong conviction</td>
<td>☐</td>
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<tr>
<td></td>
<td>Facilitates defendants rehabilitation</td>
<td>☐</td>
<td>Ignore victims interest</td>
<td>☐</td>
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<tr>
<td></td>
<td>Enhance justice to victims</td>
<td>☐</td>
<td>Invite corruption and abuse</td>
<td>☐</td>
</tr>
<tr>
<td></td>
<td>Serve as evidence gathering tool</td>
<td>☐</td>
<td>Undermine fair trial rights(^2) ( ex. pre.of innocence , right to confrontation )</td>
<td>☐</td>
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<tr>
<td></td>
<td>Facilitate truth finding</td>
<td>☐</td>
<td>Erode public confidence on cr. Justice( commercializing justice )</td>
<td>☐</td>
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<td></td>
<td></td>
<td>☐</td>
<td>Usurp judicial power</td>
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<td></td>
<td></td>
<td>☐</td>
<td>Result in prosecution <code>tyranny</code></td>
<td>☐</td>
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</tbody>
</table>

\(^2\) The persecutor makes offer to plea bargain assuming that the defendant is guilty- an assumption contrary to the presumption of innocence.
2. Rate the following prospects and challenges of plea bargaining as applied to Ethiopia:

<table>
<thead>
<tr>
<th>Challenges/ prospects</th>
<th>Strongly agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>No view</th>
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</thead>
<tbody>
<tr>
<td>Increases court and/or prosecution efficiency</td>
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<td>Reduces caseload</td>
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<td>Allows for more flexible and predictable outcome/certainty advantage</td>
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<td>Encourages guilty plea and facilitates rehabilitation</td>
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<tr>
<td>Leads to conviction of innocent defendants&lt;sup&gt;3&lt;/sup&gt;</td>
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<tr>
<td>Undermines fair trial rights (right to confrontation, presumption of innocence, etc)</td>
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<tr>
<td>Undermines the purpose of punishment</td>
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<tr>
<td>Reduces courts to case management tools</td>
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<td>Gives too much power for Prosecution</td>
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<tr>
<td>Opens room for corruptions and</td>
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</table>

<sup>3</sup> By making inductive offers it leaves innocent defendants with no rational choice but to plead guilty.
3. How can such (specific or common challenges) be remedied:
   i. The problems are inherent and can only be addressed by avoiding/ not adopting
      the system of plea bargaining altogether.

   ii. The problems can be addressed by putting several safeguards including ( tick the
        appropriate ones ):

<table>
<thead>
<tr>
<th>SN</th>
<th>Guarantees</th>
<th>Tick</th>
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<tr>
<td></td>
<td>Judicial supervision/ review</td>
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<td>Victim participation</td>
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<td></td>
<td>Judicial participation</td>
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<td></td>
<td>Recording negotiations</td>
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<td></td>
<td>Fixed discounts (^4)</td>
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<tr>
<td></td>
<td>Mandatory legal representations of defendant in plea</td>
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<td>negotiations</td>
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<td>Pre plea duty to disclosure (^5)</td>
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</tbody>
</table>

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\(^4\) Fixed discounts refer to the legislative fixing of the maximum amount of sentence the prosecutor may offer defendants. Many countries fix this amount at 1/3 of the potential sentence the defendant receives after trial.

\(^5\) This refers to the imposition of a duty on the prosecution to share its evidence to the suspect as a precondition to the decision to plea bargain.
4. From your point of view how important are the following factors to accept plea bargain offers (offers from the defendant to plead guilty in return for some concessions):

<table>
<thead>
<tr>
<th>Factors</th>
<th>very important</th>
<th>important</th>
<th>Less important</th>
<th>Not important</th>
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</thead>
<tbody>
<tr>
<td>1 Your caseload</td>
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<tr>
<td>2 The complexity of the case</td>
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<tr>
<td>3 The likely sentence at trial</td>
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<td>4 The seriousness of the crime</td>
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<td>5 The probability of conviction/ strength of your case</td>
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<tr>
<td>6 Whether the defendant is represented</td>
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<tr>
<td>7 The position/ status of the accused</td>
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<tr>
<td>8 Work relation with the judge / defence attorney</td>
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<td>9 Time and cost spared</td>
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<tr>
<td>10 Victims interest</td>
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<tr>
<td>11 Your financial incentives</td>
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<tr>
<td>12 The attractiveness of the offer from the defendant</td>
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</table>
5. What about to make plea bargaining offers:

<table>
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<th>Factors</th>
<th>very important</th>
<th>important</th>
<th>Less important</th>
<th>Not important</th>
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<tr>
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<td>2  The complexity of the case</td>
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<td>3  The likely sentence at trial</td>
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<tr>
<td>4  The seriousness of the crime</td>
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<tr>
<td>5  The probability of conviction or weakness / strength of your case</td>
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<tr>
<td>6  Defendants desire to plea bargain/ go to trial</td>
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<tr>
<td>7  The position/ status of the accused</td>
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<tr>
<td>8  Your financial incentives</td>
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<td>9  Time and cost spared</td>
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<td>11 Work relation with the judge / defence attorney</td>
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<tr>
<td>12 Whether the defendant is represented</td>
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III. Guilty pleas

1. Guilty plea is accepted by courts: any time before judgment ☐; any time before sentence ☐; only at the defendant’s first appearance to court ☐; Any other ---------------
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300
2. Distinction on sentence is made depending on the time/stage of pleading guilty: Yes □ No □

3. The final decision as to the plea rests on: The defendant □; The defence attorney □; the prosecutor □; Any other-----------------------

4. In Ethiopia defendants are exceptionally reluctant to plead guilty: Yes □ No □
   If yes, the reason is: purely tactical □; cultural □; both □; any other ------------------

IV. Readiness and experience

1) Are you ready to assume your new role in the process of plea bargaining: Yes very ready □ ready □ partly ready □ not ready at all □
   If not, why: not familiar with it □ against it □ no training □ other ------------------------

   If yes, please explain---------------------------------------------------------------------------------

   ------------------------------------------------------------------------------------------------

   ---------------------------------------------------------------------------------------------

2) Have you ever received offers to plea bargain from the defendant or his/her counsel? Yes □ No □
   If yes how often? --------------------------------------------------------------------------------

3) Sometimes where, among others, it is difficult to find evidence, prosecutors (in Ethiopia) encourage suspects to plead guilty by offering/promising some sentence/charge concessions. Have you ever tried this to settle criminal cases? Yes □ No □
   i. If no, why?
      a) Unaware of its existence/applicability in Ethiopia □
      b) No adequate legal framework exists for it □
      c) Defendants are not willing □
d) Any other reasons, please specify them  

(If your answer to Qn. 3 is No, move to sect. V below)

ii. If yes, how often? Can you put it in percentage from the totality of cases you prosecuted? 1-5% □  5-10% □  10-15% □  15-20% □  over 20% □

iii. Defendants satisfaction with such settlements: very high □  high □  low □  very low □

4) My earlier field investigation suggest one or either of the following form of (informal) plea bargaining. Tick the one/ones which apply to you:

   a) A co-offender is immune or charged less aggravated upon cooperating to provide information on his accomplices.
   b) Defendants are encouraged (with some sentence benefits) to plead guilty in RTD cases.
   c) One or more count is dropped from multiple charges if defendant pleads guilty.
   d) Promise to ask for sentence mitigation or suspension of sentence in return for defendant’s pleading guilty
   e) Any other you experienced

5) Under what condition/ conditions you proceed to plea bargain?
   a. When the defendant is represented
   b. Where the defendant is willing to plead guilty
   c. After exchange of evidence with the defence / his attorney
   d. unconditionally
   e. Any other, please specify
6) Crimes (informal) plea bargaining applies to:
   - Any crime
   - Medium crimes (3-15 years)
   - Less serious crimes (less than 3 years of the potential sentence)
   - Serious crimes (more than 15 years and death)

7) At which stage of the criminal proceeding plea bargaining (informal) applies to?
   - Any stage before the hearing of evidence
   - From the investigative stage to the sentencing stage
   - Only at the trial stage
   - Only at the prosecution stage
   - Only at the investigative stage
   - Any other

8) Where negotiation starts, how long it lasts on average to have the defendant plead guilty:
   - Less than 30 minutes
   - up to 1 hr
   - up to 2hrs
   - Any other

9) What is the scope of plea negotiations/ what are the subject matters of the negotiation?
   a. Defendant’s guilty plea
   b. Defendant’s cooperation to provide information on other co-offenders
   c. Apology and victim compensation
   d. Any other, specify

10) In what form the agreement with the defendant was made? In writing, Orally

11) Which one of the following bargaining tools/tactics you employ to bring the defendant to your terms/agreement:
   a) Overcharging/informing the suspect that he may face severe charge/sentence
   b) High (attractive) sentence discounts, dropping of most serious charges
   c) Withholding information (exculpatory evidence)
   d) Put pressure on the defendant or his counsel
   e) Dropping of less serious charges
   f) Any other, please specify
12) Any instances where agreements / negotiations fail or abandoned?
   Yes ☐ No ☐

   If yes, what are the main causes?
   a. Defendant withdraws his/her plea ☐
   b. Court rejects the prosecutor's proposal ☐
   c. Valuable evidence discovered later ☐
   d. Victims complain ☐
   e. Any other -----------------------------------------------

V. Miscellaneous

1. In your view what are the main problems of Ethiopian criminal justice system?
   Delay/caseload ☐ unpredictability /wrong conviction ☐
   Lack of fairness to defendants ☐ Ineffectiveness in discovering truth
   Low conviction rate
   Any other -----------------------------------------------

2. What role victims have/ need to have in your plea bargaining decisions?
   No role at all ☐ they are consulted
   They have veto power over any plea agreement
   They directly participate in the process ☐ any other ---------------

3. The new sentencing guideline by limiting discretion helps ensure predictability of sentences: Yes ☐ No ☐ If No, why -----------------------------------------------

4. Its possible impact on plea bargaining:
   a. By providing prosecutors some sort of certainty on the potential sentence after trial, it facilitates plea bargaining. ☐
b. It denies prosecutors and judges room for flexibility in plea bargains. □

c. It helps defendants predict the outcome of trial and make informed decisions over the choice of plea. □

d. Any other ____________________________________________________________
__________________________________________________________

5. Your relationship with:

a. Judges: extremely positive □ positive □ negative □ extremely negative □

b. Police: extremely positive □ positive □ negative □ extremely negative □

c. Defence attorneys: extremely positive □ positive □ negative □ extr. negative □

6. How independent (functional) are you and the prosecution office from the executive?

Completely sufficiently somewhat not independent at all

Please explain__________________________________________________________
__________________________________________________________
__________________________________________________________

7. Any comment you may have__________________________________________

__________________________________________________________
ii) Tables

Table 6.1: Criminal Justice Actors’ Views on the Risk of Miscarriages of Justice Where Plea Bargaining Takes Place.

<table>
<thead>
<tr>
<th></th>
<th>Total No. participants</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>No view</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors</td>
<td>46</td>
<td>9</td>
<td>15</td>
<td>10</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Judges</td>
<td>29</td>
<td>8</td>
<td>10</td>
<td>6</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Defence attorneys</td>
<td>20</td>
<td>2</td>
<td>7</td>
<td>3</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Defendants</td>
<td>18(^6)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>113(^7)</td>
<td>19</td>
<td>32</td>
<td>19</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>

\(^6\) Almost all them are interviewees and thus are asked whether plea bargaining is liable to create the innocence problem where quite many of them (12) responded in the affirmative.

\(^7\) Of these, 5 prosecutors, 3 judges and 6 defence attorneys do not respond to this particular question.
Table 7.1 Criminal Justice Actors’ Views on the risk of corruption where plea bargaining applies in Ethiopia.

<table>
<thead>
<tr>
<th></th>
<th>Total No. participants</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>No view</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors</td>
<td>46</td>
<td>11</td>
<td>20</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Judges</td>
<td>29</td>
<td>6</td>
<td>15</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Defence attorneys</td>
<td>20</td>
<td>4</td>
<td>9</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>95</td>
<td>21</td>
<td>44</td>
<td>8</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Percentage</td>
<td>100</td>
<td>22.1</td>
<td>46.3</td>
<td>8.4</td>
<td>1.05</td>
<td>1.05</td>
</tr>
</tbody>
</table>

All participants don't rate the problem of corruption. 7 prosecutors, 7 judges, 6 defence attorneys did not respond. Yet this does not at least suggest that they disagree with the problem.