The Innocence Problem in the Context of the Proposed Plea Bargaining in Ethiopia

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Abstract

This article investigates the innocence problem in the context of the newly proposed plea bargaining in Ethiopia focusing on some specific features of the Ethiopian criminal justice system. It argues that the innocence problem of plea bargaining would be further exacerbated by such specific features of the criminal justice system as huge power asymmetry between adversaries, prolonged pre-trial detention, poor conditions of detention centres, weak fact-finding capacity, and scanty guarantees against wrongful convictions. Further, the article contends that the safeguards instituted against the innocence problem are likely to fall short of shielding the innocent from wrongful convictions.

Key terms: The innocence problem, wrongful conviction, plea bargaining, Criminal Justice Policy, Ethiopia.

Introduction

Plea bargaining, which involves charge or sentence concessions in exchange for the defendant's guilty plea, pervades criminal justice systems of diverse legal traditions. With a view to address efficiency related problems of the Ethiopian criminal justice system, a criminal justice policy which embraces plea bargaining, among others, has been adopted in 2011.[1] This is yet to have a legislative footing in the upcoming criminal procedure law, the draft of which mirrors the policy in this regard. Following the adoption of plea bargaining at a policy level, a former Supreme Court judge observed:[2]

> Ethiopia is a latecomer 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 consider our context …

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[1] See the FDRE Criminal Justice Policy, 2011.

[2] Interview with Judge 11, held on 17/04/2012 as cited in Alemu Meheretu, Introducing Plea Bargaining in Ethiopia: Concerns and Prospects, (PhD Thesis, University of Warwick, UK, 2014).

Nonetheless, Ethiopian reformers seem content with importing at a policy level unlimited plea bargaining, a model of plea bargaining typical in common law adversarial jurisdictions. This model is characterized by the fact that it leaves considerable discretion to the prosecution, the types and natures of concession and sentencing differentials are unregulated.[3] In general, the version adopted by Ethiopia has, *inter alia*, the following salient features:[4] it applies to any crime; it recognizes all forms of plea bargaining (fact, charge and sentence bargaining), it grants the prosecution exclusive power to plea bargain with almost unfettered discretion; it leaves sentence differentials[5] unregulated; and it does not recognize *ex ante* judicial review of the decision to plea bargain.

At the origin, although it triumphs for its efficiency gains, this form of plea bargaining attracts all sorts of criticisms including but not limited to wrongful convictions (commonly known as *the innocence problem)*, differential treatment of similarly situated defendants, problems relating to lenient punishment, and other due process concerns.[6] In emulating this model, Ethiopian policy makers seem to be simply affected by what A. Watson labels as *transplant bias*:[7]

> [o]ften 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.

This Article singles out the *innocence problem* as an inherent problem to the system of plea bargaining, in general and as it applies to the proposed version of plea bargaining in Ethiopia, in particular and investigates it in the context of some key specific features of the Ethiopian criminal justice system. It also appraises the substantive and procedural guarantees designed to fend off the innocence problem. Accordingly, it employs a thorough analysis of policy documents (the FDRE

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[3] For more on this, see Alemu Meheretu, *The Proposed Plea Bargaining in Ethiopia: How it fares with Fundamental Principles of Criminal Law and Procedure*, 10(2) MIZAN LAW REV. (2016).

[4] *See* Articles 219, 221 and 230 of the FDRE Draft Criminal Procedure Code, as was valid in 2017 and section 4.5.4 of the FDRE Criminal Justice Policy, 2011, p. 36. For more discussions see, Alemu Meheretu, *supra* note 3, at 411-413.

[5] 'Sentencing differential' refers to the difference between trial sentence and plea bargaining sentence.

[6] S. Schulhofer, *Plea Bargaining as Disaster*, 101(8) YALE L. J. 1979 (1992); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (Oxford University Press, 2012); Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, CRIMINAL LAW REVIEW *895* (2000); Douglas Smith, *The Plea-Bargaining Controversy* 77(3) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 949-968 (1986); Guidorizzi, Douglas, *Should We Really Ban Plea Bargaining? The Core Concerns for Plea Bargaining Critics*, 47 *EMORY L. J.* 753 (1998).

[7] *See* A. Watson, *Legal Change, Sources of Law and Legal Culture*, 131 U. PENNSYLVANIA L. REV. 1121, 1147 (1983).

Criminal Justice Policy; herein after the *ECJ Policy* and the 2017 proposed Criminal Procedure Code, being the main targets), laws and comparative literature drawn from foreign jurisdictions. As plea bargaining is yet to be formally implemented in Ethiopia, there is no available data to support or refute the innocence problem.[8] Hence, the Article is necessarily a prospective one addressing the proposed variant of plea bargaining in light of some salient specific contexts of the Ethiopian criminal justice system.

The Article starts with a discussion of the innocence problem as an inherent problem that accompanies the institution of plea bargaining in general. The second section details the specific features of the Ethiopian criminal justice system that may contribute to and exacerbate the innocence problem. The third section reviews the guarantees that are put in place against the innocence problem in the proposed plea bargaining law in Ethiopia. The last section concludes the Article.

1. The Innocence Problem in General

The need to manage caseload and enhance efficiency of criminal justice systems prompted many jurisdictions to experiment various policy options. Prominent among these policy alternatives is the use of plea bargaining; albeit it attracted intense debate among the academia and practitioners alike. While proponents try to defend and justify the institution of plea bargaining in terms of, among others, efficiency and autonomy,[9] detractors blame it as inimical to constitutional principles, morality and fair trial guarantees.[10]

Although, plea bargaining may deliver efficiency gains, albeit at the cost of fairness and accuracy, it remains a subject of controversy in many respects.[11] Leaving cost-

[8] Indeed, even if plea bargaining is applied, it is impossible to empirically test the innocence problem with studies of this nature. For that matter it is a daunting task to collect data on the extent of the innocence problem for any large scale study. That is why many researches try to establish it indirectly by examining the probability of conviction or acquittal of plea bargain defendants had their case been tried at trial. Others simply avail of the data generated through DNA exonerations, which is limited to only few categories of crimes suitable to DNA analysis. The technology is currently unavailable in Ethiopia.

[9] *See* for example Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101(8) YALE L. J. 1969 (1992) (defending plea bargaining based on autonomy and efficiency rationales); Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 (4) YALE L. J. 683, 685 (1975) (arguing that plea bargaining respects 'humans dignity by protecting the right of every adult to determine what he shall do and what may be done to him'); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 603 (2005).

[10] Stephanos, *supra* note 6; Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1364-71, 1384 (2000) (contending that plea bargaining unfairly punishes virtually everyone who insists upon trial).

[11] For more on this, see generally *supra* note 6 and note 9.

benefit calculus of plea bargaining aside, this Article investigates its treatment of innocents – the irresistible pressure it may put on them to plead guilty to a crime they did not commit, a phenomenon commonly referred to as *the innocence problem.*[12]

Although many agree that plea bargaining creates the innocence problem,[13] some proponents argue that the innocence problem is unrealistic or exaggerated at best. They surmise that plea bargaining is an option. Thus, innocent defendants can reject it and proceed to trial expecting an acquittal.[14] Yet the above claims seem to miss out the context in which plea bargaining operates and erroneously assumes that defendants possess real freedom of choice over their plea decisions. In the presence of coercive sentence differentials, power and interest imbalance between the prosecution and the defendant, possible pressures from the prosecution and their attorney, and other structural problems, innocents would find it difficult to forgo what plea bargaining offers them.

On the other hand, some proponents deny the innocence problem exists 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"[15] and thus can be well addressed through meticulous screening of cases prior to charging which produces only those who are factually guilty.[16] However, these assertions seem to ignore the

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[12] *See* Kenneth Kipnis, *Criminal Justice and the Negotiated Plea, 86 ETHICS 93, 98–99 (1976)* (comparing a prosecutor's plea offer to coercing someone to act at gunpoint*);* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (arguing that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2494–96 (2004); Dervan and Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem,* 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2012); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 72–73 (1988) (showing how innocent defendants can be encouraged to plead guilty when the plea offer is adjusted to the probability of conviction and expected post-trial sentence); Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 YALE L. J. 1909, 1935–49 (1992).

[13] *See supra* note 6, note 10 and note 12.

[14] *See* for example Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165 (2007–2008); Oren Gazal-Ayal & Limor Riza, *Plea Bargaining and Prosecution* 13 EUROPEAN ASS'N OF LAW & ECON., WORKING PAPER No. 013-2009, April 2009; Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 114 (2010); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) ("Defendants presumably prefer the lower sentences to the exercise of their trial rights or they would not strike the deals").

[15] John Bowers, *supra* note 14, at 1119 (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".)

[16] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 561-64 (4thed, 1992) cited in Jeff Palmer, *Abolishing plea bargaining, an end to the same old song and dance*, 26 AM. J. CRIM. L. 505, 519 (1998). 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

very purpose of plea bargaining in providing shortcuts in the legal process and prosecutor's disincentives to carry out rigorous scrutiny - by making convictions easy, plea bargaining reduces prosecutor's incentives to screen out weak cases.[17] Indeed, prosecutors are often suspects of extracting guilty pleas even in very weak cases simply by tailoring their bargaining offers to the chances of the defendant's acquittal.[18] Further, the above claims undermine the role of trials in fact finding; i.e., if pre-charge screening methods were to be relied on, full scale trials would be unnecessary from the outset. The proponents' arguments are also concerned 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 aspects of 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. Nevertheless, this objection is off the mark both in principle and in practice. While trials are about fact-finding and thus fare very well in terms of getting at the truth, plea bargaining which involves haggling and distortion of facts does not. Certainly, this impinges on outcome accuracy to the detriment of the innocent. What is more, even assuming wrongful conviction is commonplace in trials, the argument does not fare any better than a 'you too' fallacy. This does not justify the problem wherever it takes place.

Undeniably, trials are not immune from wrongful convictions. Indeed, scholarly works on the innocence problem elsewhere identify the following categories of irregularities as factors responsible for wrongful convictions in full scale trials: eyewitness misidentification, false confessions, flawed forensic science, and false informant testimony.[19] While these causes are not inherent to trial and thus can be remedied or at least mitigated using some corrective measures[20], the innocence problem attributed to plea bargaining is inherent and systemic. Unlike in trials, once

trial." *see* Thomas W. Church, *In defense of "Bargain Justice"*, 13(2) LAW & SOCIETY REVIEW, Special Issue on Plea Bargaining , 509-525 (1979).

[17] Oren Gazal-Ayal, *Partial Ban on Plea Bargains,* 27 CARDOZO L. REV. 2295, 2299 (2006).

[18] *See* for example James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1534-35 (1981) (explaining why prosecutors are likely to offer the greatest incentives for those defendants with the greatest chance of acquittal at trial).

[19] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (2011); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543–44 (2005); Innocence Project, The Causes of Wrongful Conviction, available at: *http://www.innocenceproject.org/causes-wrongful-conviction* (last visited Jan. 15, 2016).

[20] *Infra* note 50.

pleaded guilty, everyone including the innocent is convicted in plea bargains. As Alschuler succinctly puts[21]:

> 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.

One may still doubt whether innocents with a rational mind would ever plead guilty to a crime they have not committed and may simply reject the innocence problem as unrealistic. Nonetheless, there are theoretical as well as empirical evidence to support that innocent defendants are indeed trapped by plea bargaining. Researches indicate that plea bargaining, which operates on manipulation of charge and sentence concessions, is inherently prone to generate the innocence problem.[22] By creating compelling sentencing differentials between trial sentence and plea sentence (often known as trial penalty) in a setting epitomized by power and information asymmetry, and incomparable interests at stake[23] plea bargaining is likely to induce innocents plead guilty simply to avoid more severe punishment at trial.[24] As we shall see below, this is not a mere speculation. The problem prevails regardless of the availability of procedural safeguards such as legal representation.[25] It is also noted that plea bargaining which involves concessions and haggling over facts as opposed to fact-finding, subverts the truth and thus risks innocents pleading guilty.[26] Further, on top of coercive sentencing differentials, such triggering factors as

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[21] *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714 (1981); 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.")

[22] *Supra* note 6 and note 12; Russell D Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011).

[23] Apart from power and resources disparity between the two parties to the criminal proceeding, the interests at stake are so lopsided: whereas the defendant is under the threat of losing his freedom or even his life, the prosecution simply risks losing his case.

[24] The higher the sentencing differential the more coercive it becomes for defendants, innocents included. For more on this, *see* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings* 82 TUL. L. REV. 1237 (2008) ("The ubiquity of plea bargaining creates real concern that innocent defendants are occasionally, or perhaps even routinely, pleading guilty to avoid coercive trial sentences."); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, U. ILL. L. REV. 37, 49 (1983) ("The reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining"); Lucian E. Dervan, *Bargained Justice: Plea–Bargaining's Innocence Problem and the Brady Safety-Valve*, UTAH L. REV. 51, 56 (2012) ("Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.")

[25] Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1065-66 (2013) (noting that heavy trial penalties often pressure defendants into pleading guilty regardless of the presence of a legal counsel).

[26] *See* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 218 (2011).

innocents' strong risk aversion than the guilty[27], high process costs compared to the costs of a guilty plea,[28] 'cover-up' guilty pleas[29] and government misconduct/forced confessions[30] could aggravate the innocence problem.

More profoundly, empirical and experimental studies confirm that the innocence problem is a real concern for many justice systems. For instance, empirical studies carried out in jurisdictions with more established legal systems such as the USA and England reveal that plea bargaining results in wrongful convictions. In the USA, several empirical studies report that innocents pled guilty to crimes they did not commit.[31] One empirical study provides us with strong evidence that innocents pled guilty simply to escape a potential long sentence or death penalty at trial.[32] By

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[27] 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. But 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 Defense counsel and the Judge*, 16 BYU. J. PUB. L. 189, 201 (2001-2002); Michael K. Block & Vernon E. Gerrety, *Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 138 (1995) (finding prisoners, i.e. criminals less risk averse than students (innocents)); Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game* 85 CHICAGO-KENT L REV., 77 (2010) ("… our existing legal system places the risk of going to trial so high that innocence and guilt no longer become the real considerations").

[28] This is particularly the case with defendants held in prolonged pretrial detention, misdemeanor defendants, and so on. *See* Malcolm Feeley, *Plea Bargaining and the Structure of the Criminal Courts*, 7(3) JUSTICE SYSTEM JOURNAL 338–354 (1982); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50(3) UNIVERSITY OF CHICAGO LAW REVIEW 931–1050 (1983).

[29] Guilty pleas can be entered simply to cover up loved ones, a gang member or any other suspect in exchange for a consideration. *See* Cyrus Tata and Jay M. Gormley, *Sentencing and plea bargaining: Guilty pleas Versus Trial verdicts*, OXFORD HANDBOOKS ONLINE, Nov 2016 DOI: 10.1093/oxfordhb/9780199935383.013.40, p.5; See also Alemu Meheretu, *supra* note 1, at 178.

[30] John H. Blume and Rebecca K. Helm, *The Un-exonerated: Factually Innocent Defendants Who Plead Guilty*, CORNELL LAW FACULTY WORKING PAPERS, Paper 113. Available at: http://scholarship.law.cornell.edu/clsops_papers/113 at 21 (2014), (Last accessed 16 March 2019).

[31] Daina Borteck, *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.); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (noting that nine of the first two hundred individuals exonerated by the Innocence Project had pleaded guilty); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778–79 (2007); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 *AM. CRIM. L. REV.* 1363, 1395 (2000) ("Available data confirms the common sense proposition that not all guilty pleas are accurate, but it is difficult to pinpoint the precise dimensions of the problem"); Albert W. Alschuler, *supra* note 28, at 932-34; George C. Thomas, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 577–78 (2010).

[32] 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 pled guilty in order to avoid the risk of a death sentence); For some individual cases, *see https://guiltypleaproblem.org/* (For example John Dixon pled guilty to rape charges for fear that he would receive a harsher sentence if he proceeded to trial but was later exonerated by DNA evidence).

examining guilty plea practices in the US federal courts, another research concludes that more than two-third of plea bargain defendants would have been acquitted at trial.[33] Although this does not necessarily mean that all guilty pleaders were factually innocent, it can indirectly show a sense of the innocence problem. Further, Gross *et al* in their study of exonerations in the USA from 1989-2003, found out that six percent (20 out of 340) of exonerated defendants pled guilty.[34] Recent data from *The Innocence Project* shows that of the total DNA exonerations in the US so far, 41 defendants (out of 364) pled guilty to crimes they did not commit.[35] However, there are strong reasons to support that the magnitude of the problem cannot be captured by such data of exonerations.[36] First, this applies to limited cases where there is available DNA evidence (Murder and Rape), excluding the vast majority of crimes. Second, many defendants would be prevented from challenging their conviction once they pleaded guilty. That is why many scholars regard such wrongful convictions simply as the tip of the iceberg.[37] Many also believe that the 'true extent of plea bargaining's innocence problem is significantly underestimated by these studies'.[38]

Likewise, in the UK the innocence problem of plea bargaining has been acknowledged by several empirical researches.[39] One classical empirical research conducted by John Baldwin and Michael McConville investigated the probabilities of conviction or acquittal had the case gone to trial, and observed that some innocent defendants and many other defendants who would have been acquitted had the case gone to trial were induced to plead guilty.[40] Although it is difficult[41] to

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[33] Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975) (concluding that more than two-thirds of "marginal" plea bargain defendants would be acquitted or dismissed if they were to contest their cases).

[34] Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 536 (2005).

[35] Available at: *https://www.innocenceproject.org/dna-exonerations-in-the-united-states/* (last visited on 26/2/2019).

[36] Dervan and Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2012).(citations omitted)

[37] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 996 (2004); Samuel R. Gross et al., *supra* note 34, at 531; Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* INTERROGATIONS AND CONFESSIONS: CURRENT RESEARCH, PRACTICE AND POLICY 86, 91 (G.D. Lassiter & C. Meissner eds., 2010).

[38] *See* for example Samuel R. Gross et al *supra* note 34, at 536; Dervan and Edkins, *The Innocent Defendant's Dilemma*, *supra* note 36 at 21.

[39] *See* John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287, 296–98 (1978) (discussing the innocence problem of plea bargaining in England); Robertson and Mulcahy, A. (1994) *The Justifications of 'Justice'--Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts*, *34* B. J. CRIM. 411(1994); MCCONVILLE, M. SANDERS, A AND LENG, R., THE CASE FOR THE PROSECUTION (Routledge, 1991); Newman, D., *Still Standing Accused: Addressing the Gap Between Work and Talk in Firms Of Criminal Defence Lawyers,* 19(1) INT. JOURNAL OF THE LEGAL PROF. 3-27 (2012).

[40] John Baldwin & Michael McConville, *supra* note 39, at 296–98.

determine the extent to which innocent defendants are induced to plead guilty, 'the evidence is compelling that innocent persons are frequently placed at risk and that, on occasion, the weaker and less knowledgeable are wrongly persuaded to plead guilty'.[42] The problem was shared by the Royal Commission on Criminal Justice (RCCJ) established in 1993 to address problems of the UK criminal justice system. The Commission acknowledged the risk plea bargaining poses to innocents who plead guilty, yet, unfortunately, concluded that 'benefits to the system of encouraging those who are in fact guilty to plead guilty outweighed this risk'.[43]

Lastly, some researches which investigated wrongful conviction in Australia have identified plea bargaining as one cause for wrongful conviction.[44]

The innocence problem has also been established by several experimental studies.[45] In one experimental study involving 165 university students (composed of both the innocent and the guilty), all of them were accused of cheating on exams and offered a deal of working in the research lab for 20 hours or face a charge of academic dishonesty.[46] The result was that both innocents and guilty subjects accepted the deal: 75% of the guilty and 52% of the innocents.[47] In another experimental study involving 76 college students, about 89.2% of the guilty and 56.4% of the innocent were willing to admit guilt in exchange for a benefit.[48] Although not perfect analogies with plea bargaining, the above experiments provide insights on how innocents can be trapped and admit wrong for the crimes they have not committed. Albeit not conclusive, they also shed some light on the magnitude of the problem. At any rate, the bottom line is, empirical as well as experimental evidence exists to support the claim that the innocence problem is a real predicament for any system

[41] Allison D. Redlich & Asil Ali Ozdogru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 468 (2009) ("Determining the prevalence of innocents is methodologically challenging, if not impossible").

[42] John Baldwin & Michael McConville, *supra* note 39, at 298.

[43] RUNCIMAN, W. G., REPORT OF THE ROYAL COMMISSION ON CRIMINAL JUSTICE111 (HMSO, 1993).

[44] *See* for example Leynne Weathered , *Investigating Innocence : The Emerging Role of the Innocence Project in the Correction of Wrongful Conviction in Australia*, 12(1) GRIFFITH LAW REVIEW 64, 74(2003).

[45] In addition to the ones discussed below, *see* Russell Covey, *Mass Exoneration Data and the Causes of Wrongful Convictions* 1 (Georgia State University School of Law 2011), available at *ssrn.com/abstract=1881767. (Last accessed April, 2016)*.

[46] Miko M. Wilford, *Let's Make A Deal: Exploring Plea Acceptance Rates in the Guilty and the Innocent*, (Master's Thesis, Master of Science, Iowa State University, 2012) at 165.

[47] *Ibid.*

[48] Dervan and Edkins, *supra* note 36.

upholding plea bargaining. What remain less certain are the magnitude and the extent of the innocence problem which certainly vary across jurisdictions.[49]

The above experiences revealed that the innocence problem imputable to plea bargaining is a common problem in developed criminal justice systems. Perhaps, the difference among jurisdictions could be one of magnitude. Thus, it is probably true to maintain that in those inquisitorial jurisdictions, which regulate plea bargaining using statutorily fixed discounts, ban charge and fact bargains and apply rigorous judicial scrutiny, among others, the magnitude of the innocence problem is expected generally to be low.

As we shall see below, this Article argues that the problem would be more pronounced in less developed criminal justice systems such as Ethiopia. Acknowledging the real incidence of wrongful conviction in general and in the context of plea bargaining in particular, jurisdictions have responded by taking varied measures ranging from setting up review/innocence commissions and relaxing barriers in asserting new evidence of innocence, among others.[50] In the context of plea bargaining, proposals ranging from strict regulation of plea bargaining to its total abolition have been made.[51]

2. The Innocence Problem in Context

This section puts the innocence problem in perspective having regard to the specific conditions of the Ethiopian criminal justice system that are likely to negatively affect plea bargaining. It is important to note from the outset that since it is impossible to empirically test the innocence problem in Ethiopia in the circumstances where plea bargaining is yet to be formally applied, this exercise is destined to be simply a prospective one.

[49] In those jurisdictions where plea bargaining forms an integral part of the system, opinions on the magnitude of the problem remain divided. Some take the innocence problem as a substantial threat to the integrity and legitimacy of the justice system. Others simply see the innocence problem as a rare occurrence. *See* Dervan and Edkins, *supra* note 36, at 17-18.

[50] *See* Kent Roach, *Comparative Reflections on Miscarriages of Justice in Australia and Canada*, 17 FLINDERS L. J. 381, 381 (2015); Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153, 1154 (2013).

[51] From advocates of abolition see for example, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Among reformists see, Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings* 82 TUL. L. REV. 1237 (2008); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, U. ILL. L. REV., 49 (1983).

1. Huge power asymmetry between adversaries

Though structured mainly along adversarial lines, the criminal justice playing field in Ethiopia is very much asymmetrical. It is generally the case that in criminal proceedings the balance of power skews more in favor of the prosecution. This is more so in the Ethiopian criminal justice process where the power disparity between the adversaries is quite pronounced. While the prosecution enjoys state resources and powers, having none of these, the defence remains very weak. Structural problems such as absence of robust defence investigation, weak organization of defence service as well as vulnerable defendants (poor and illiterate) could exacerbate the disparity. While the current 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 defense. The defense remains intolerably weak: the defense service is poorly organized under public defender's office, and is impaired by budget and manpower constraints, poor salary, excessive workload and problems of mistrust.[52] The private wing is not free from defects, either: it is characterized by limited accessibility, problems of quality representation, and other agency costs.[53]

Consequently, most defendants will continue to go unrepresented or likely to receive incompetent representation.[54] This creates an unbridgeable rift of institutional bargaining power between the adversaries. This, coupled with the nature of interests at risk,[55] means fair negotiations and accurate outcome are less attainable; instead, prosecutorial manipulations and wrongful convictions are very likely.

2. Prolonged pre-trial detention and poor conditions of detention centres

Despite some improvements, longer pre-trial detention has remained a problem in Ethiopia.[56] Pre-trial detention covers a wide range of cases: defendants accused of

[52] *See* Alemu Meheretu, *supra* note 2, at 206.

[53] *Ibid.*, at 211.

[54] *See* section 3 below, *Legal Representation*.

[55] While the defendant is under a threat of losing his liberty or life, the prosecutor runs the risk of losing at trial. The two are not comparable by any stretch of imagination.

[56] 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*, (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 claims that the majority of criminal cases both at Federal and State level pending for less than 6

serious crimes to which bail is 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 the courts; and defendants temporarily detained - 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 unknown. From this, one can clearly see that the problem covers a broad category of defendants and suspects. Pre-trial detention puts such defendants in the dark. By hampering their ability to mount a defense, it increases the probability of convictions at trial[57], which in turn may lead them to an uninformed plea bargaining, notably pre-charge bargains. This would be alarming in Ethiopia where the majority of defendants are not represented.

Further, the state of pre-trial detention centers and prisons is reported to remain troubling and at times 'life threatening'.[58] Thus, pleading guilty would be the best way to end or at least to cut short further detentions under such conditions. In the circumstances, it is probable 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

months. *See* World Bank, *Uses and users of justice in Africa: the case of Ethiopia's Federal courts*. (Washington DC, 2010), Available at: http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts (7/10/14); *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.

[57] "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, *How the Pre-trial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1139 (2005). 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 (University Chicago Press, 1982); Stephanos Bibas, *Plea bargaining Outside the Shadow of a Trial*, 117 HARVARD LAW REVIEW, 2463, 2491 (2004).

[58] 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 non-existent 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* note 56, 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). One of the authors of this Article had also the opportunity to visit one penitentiary where he observed that male prison quarters are incredibly overcrowded. (Date of visit: April, 2013).

which they must await trial in a hostile detention center. Indeed, in practice some defendants pled guilty for crimes 'they have not committed' when they believed that the sentence they would ultimately receive at the end of the trial matches/compares with the time they spent at pre-trial detention centers; in which case, they got immediately discharged.[59] Hence, 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. In fact, experience elsewhere shows that innocents plead guilty in misdemeanor cases just to avoid costs of the legal process.[60]

3. Weak investigation /fact finding

One of the major problems that plague the Ethiopian criminal justice system is its weak fact-finding capacity.[61] The problem starts from the intake procedure. 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 provides 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 arrest should in principle be made with court authorization, the exceptions put to this principle are so broad and vague that in effect the exception becomes the rule.[62] Nonetheless, it should be acknowledged that the proposed law tries to narrow such gaps. However, police occupational culture (experience of arbitrary arrest in particular)[63]; courts' alleged reluctance to seriously scrutinize applications for arrest warrant; prosecutors' failure to supervise the police; absence/little pre-trial review of arrest in practice (some courts simply decide over the custody/bail issues leaving the legality of arrest aside)[64] and defendants' inability

[59] Alemu Meheretu *supra* note 2, at 174.

[60] *See* Malcolm Feeley, *Plea Bargaining and the Structure of the Criminal Courts,* 7(3) JUSTICE SYSTEM JOURNAL 338–354 (1982); Albert W. Alschuler, *supra* note 34, at 931–1050.

[61] *See* Alemu Meheretu, *supra* note 2, at 174.

[62] *See* Articles 26, 50 and 51 of the 1961 Criminal Procedure Code of Ethiopia.

[63] Arrest warrants are rarely sought; arbitrary arrests and detentions are reported. See for example Country Report on Human Rights Practice, *supra* note 23 ("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. Hammergren, *Justice Sector corruption in Ethiopia,* in DIAGNOSING CORRUPTION IN ETHIOPIA: PERCEPTION, REALITIES AND THE WAY FORWARD FOR KEY SECTORS, at 215 (Janelle Plummer ed., 2012).

[64] 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

to challenge illegal arrest[65] mean that more innocents could still be arrested, charged and subjected to plea bargaining.

The criminal investigation does not rely very much on scientific or forensic evidence; for example, no DNA evidence is yet made use of that may be helpful to exonerate the innocent and identify the real culprits.[66] Weakness in the investigation of crimes and collection of evidence is documented.[67] This adversely affects the quality and effectiveness of prosecutions. Prosecution of crimes is relatively cheap in Ethiopia.[68] With plea bargaining it becomes even cheaper.[69] This in turn would allow the prosecution of weak cases and channeling of same to plea bargaining deals to the detriment of innocent defendants. Here, one may take the requirement of sufficient evidence as a gate valve to screen out weak cases. Nevertheless, this guarantee remains unreliable as will be shown in the next section.

4. Forced confessions

The capacity of Ethiopian police to effectively prevent, detect and investigate crimes remains substandard. Police often rely on the suspect as a main source of evidence[70] and use improper methods including torture and other forms of cruel and inhuman treatments to extract confessions.[71] In the face of such practices and weak regulation of police misconduct and impunity[72], defendants are likely to be coerced

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 under Art 19 (3), and the Code mandates the court to grant or deny bail (Art 29 and 59).

[65] 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 don't 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".

[66] 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 per 100, 000 population in Ethiopia was recorded at 25.5 in 2008.

[67] *See* uses and users of Justice in Africa, *supra* note 56.

[68] This could be partly due to absence of strong standard for prosecution, lack of pre-trial reviews and weak defence.

[69] *See* Oren Gazal-Ayal, *supra* note 17, at 2299.

[70] Indeed, using defendants as a source of evidence is typical to inquisitorial systems, which to a limited extent inspired the Ethiopian criminal procedure.

[71] *See* The African Commission on Human & People's Rights, Resolution No. 218, 2012; Country Report on Human Rights Practice, *supra* note 37 (reporting investigators' use of physical abuse to extract confessions); 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).

[72] *Ibid* (the above reports).

to enter guilty pleas. Plea bargaining, which encourages the continued use of confessions/guilty pleas, is likely to sustain, if not intensify the practice.

Indeed, pre-charge bargaining, which seems allowable[73] can be effectively used by the prosecution to bargain with uninformed and unrepresented suspects. Informal bargaining over confessions with the police cannot be ruled out, either. Such bargains are unlikely to be fair and thus be able to yield accurate outcomes. Considerations of fairness demand that defendants be provided with adequate opportunities to understand the nature of the charge, evaluate the evidence and consider the available options before making any choice of plea. A legal system, which allows plea bargaining before the criminal investigation is over or for that matter before a criminal charge is instituted denies suspects such opportunities. It also denies them of important safeguards and undermines their bargaining power. This is exactly what the Ethiopian version of plea bargaining does, if adopted in its current shape. In the circumstances, plea bargaining appears to be more coercive especially to the innocent who are generally risk averse.

5. Sentencing structures and severe punishments

The sentencing structure under the Ethiopian Criminal Code involves quite broad ranges that leave considerable discretion with judges. Since this discretion has resulted in broad and arbitrary discrepancies in the sentencing of like cases, a sentencing manual has been issued and made operational. However, the unlimited form of plea bargaining, which in effect transfers sentencing discretion from judges to prosecutor's bargaining concessions, bestows the latter with unfettered discretion to increase the amount of concessions/sentence discount until it entices defendants to plead guilty. This could involve powerful sentencing differentials that place irresistible pressure on defendants, including innocents to plead guilty. The harshness of punishment at trial, which includes death penalty reinforced by coercive plea offers and such tactics as overcharging from the prosecution could risk innocents plead guilty. An aspect of this is empirically established - revealing that guilty plea rates are higher in countries which uphold death penalty than those which do not, and innocents pled guilty to avoid the risk of death penalty.[74] Albeit

[73] The draft Criminal Procedure Code recognizes plea negotiations with both suspects and defendants. See for example Article 189 of the draft Criminal Procedure Code (2017).

[74] *See* Kent S. Scheidegger, *The death penalty and plea bargaining to life sentences*, WORKING PAPER 09-01 available at *http://www.cjlf.org/papers/wpaper*09-01.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, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to*

death sentences are rarely executed, one may not rule out this possibility in Ethiopia. Some prosecutors may use death sentence as a bargaining chip to break any resistance from the innocent.[75]

The practice of overcharging cannot be ruled out for prosecutors in Ethiopia.[76] Plea bargaining creates a conducive environment for prosecutors to use overcharging and severe punishments attached to a given charge as a leverage to induce guilty pleas from defendants, innocents included. The informal plea bargaining practice provides us a glimpse of such trends. There is evidence that offense levels of the Federal Supreme Court sentencing guideline have been used as inducement arsenal for prosecutors at the investigative stage.[77] In some cases, the re-definition of crimes and punishment in a way that creates overlaps has been used as a bargaining chip for prosecutors.[78] At the investigative stage where defendants are unrepresented and uninformed of the charges, it is less likely that the negotiation produces accurate outcomes.

6. Pre-trial review

In the absence of trial safeguards for testing the reliability of evidence in plea bargains, the role of pre-trial review becomes even more important. Nonetheless, pre-trial review of the decision to plea bargain has not been expressly envisioned under the Policy and the draft Criminal Procedure Code. Indeed, sufficient evidence that justifies conviction is made a requirement for plea bargaining.[79] However, its enforceability remains elusive - its observance by the prosecutor is not subject to *ex ante* judicial review. Nor is the standard used to measure sufficiency of evidence regulated. Thus, plea bargaining decisions may well be based on unreliable and insufficient evidence.[80] Admittedly, albeit not expressly mentioned, *ex post* judicial review of evidence can be inferred from the judicial approval of the plea agreement, which involves ensuring that the plea agreement ticks all the requirements of the law, the requirement of sufficient evidence being one of them. However, there are

Apply to Prisoners Who Pled Guilty, 25 CARDOZO L. REV. 1429, 1442-45 (2004) (describing cases of defendants who pleaded guilty to capital offenses they did not commit.)

[75] This is not to imply that prosecutors will purposefully target the innocent. Some may genuinely believe that only the factually guilty prefers the bargain and the innocent can reject plea offers in favor of trials.

[76] Its probable existence can be inferred from some cases. For example, in *Demissew Zerihun Vs. the Federal public prosecutor*, a case involving acid attack on a woman, the charge was inappropriately bifurcated into bodily injury and attempted homicide which, given the facts of the case, are mutually exclusive.

[77] *See* Alemu Meheretu, *supra* note 2, at 149.

[78] *Ibid.*, at 150.

[79] *See* Section 3 below.

[80] This is very likely to be true of unrepresented defendants as they are too weak to challenge such evidence.

good reasons to doubt its effectiveness in general and in the Ethiopian setting, in particular.[81] This, reinforced by the certainty advantages of conviction plea bargaining offers to prosecutors and other disincentives involved in criminal investigation notably caseloads and resource limitations, mean weak cases are highly likely to find their way through plea bargaining.[82] This has a direct negative bearing on the innocent.

7. Ethics and professionalism

It is generally acknowledged that professionalism and ethics among justice sector actors are at their infancy stage in Ethiopia. Nor are robust ethical rules and standards put in place. Given this and the agency costs involved, it may be difficult to see interests of justice often prevail over personal interests and preferences. Plea bargaining deals that do not serve defendants' and public interest might simply be struck and thus endorsed for reasons extraneous to the requirements of justice such as mere convenience, expediency or other financial motives. Indeed, the desire to handle more cases and enhance performance provides professionals with strong incentives to plea bargain.[83] This is likely to be the case for prosecutors and judges, whose performance is principally measured based on conviction rates and the number of cases disposed of, respectively in a system which values efficiency over fairness.[84] Financial incentives may also play a role here, especially for private attorneys. The remuneration scheme for private attorneys, which is flat fee per case as opposed to an hourly rate, could drive those attorneys whose mind is eagerly fixed on money to heavily rely on plea bargaining and encourage their clients to plead guilty as early as possible so that they can handle more cases and thus make more

[81] *See* below the section on 'Judicial review and approval'.

[82] 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 to the inherent flaws of plea bargaining), *ex ante* review is likely to mitigate the problem by making prosecutors more accountable.

[83] 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 behavior. *See* for example Goriely C. Tata, et *al*, *Does mode of delivery make a difference to criminal case outcome and clients' satisfaction?,* CRIMINAL LAW REVIEW, 120-135 (2004). In Ethiopia, both the ideological and institutional drive tends to incline towards crime control and efficiency.

[84] *See* the discussion on 'Judicial review and approval' below.

fees.[85] Certainly, all these adversely affect innocents and thus contribute to the innocence problem.

8. Vulnerable defendants

Experience in some jurisdictions reveals that in plea bargaining certain defendants are more exposed to wrongful convictions. This concerns young offenders, intoxicated, insane/mentally retarded and low intelligence defendants.[86] With less developed material conditions and scanty legal procedures the vulnerability of this class of defendants exacerbates, which is more probable in Ethiopia. One may not expect voluntary and intelligent guilty pleas from these categories of defendants; instead wrongful convictions are very likely. It is a matter of fact that most defendants in Ethiopia did not receive legal representation or at least not fortunate to get competent and effective legal representation. Thus, legal representation is not reliable to safeguard them (for more, see Section 3 below).

In conclusion, with a less developed legal system and the inherent unreliability of the system of plea bargaining to screen out the innocent and other contributing factors attributed to the Ethiopian justice system, the proposed plea bargaining is hugely amenable to have innocents plead guilty. Those factors that could further undermine the integrity of the process and contribute to the innocence problem include huge power asymmetry between adversaries, prolonged pretrial detention, poor conditions of detention centers, weak investigation/fact finding capacity, and absence of pretrial review.

3. Guarantees against the Innocence Problem

With a view to addressing the dangers of plea bargaining, notably the innocence problem, several substantive and procedural safeguards have been provided for under the ECJ Policy as well as the draft Criminal Procedure Code. These include the requirement of sufficient evidence, the voluntariness requirement, the duty of

[85] This is empirically tested and valid elsewhere even in developed legal systems. *See* for example P. Fenn, N. Rickman and A. Gray, *Standard Fees for Legal Aid: Empirical Analysis of Incentives*, 59 OXFORD ECONOMIC PAPERS 662 (2007); F. H. Stephen, G. Fazio and C. Tata, *Incentives, Criminal Defense Lawyers and Plea Bargaining*, 28 INT. REV. OF L. AND EC. 212 (2008) (suggesting that the behavior of defense lawyers may be influenced by financial incentives); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 588 (1995).

[86] 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).

disclosure, legal counsel, and judicial approval of the plea agreement. Some of these guarantees are enshrined under the FDRE Constitution. This section reviews the efficacy of these guarantees in the Ethiopian context.

1. The requirement of sufficient evidence

The ECJ Policy and the draft Criminal Procedure Code require the prosecutor to make sure that there is sufficient evidence to warrant the defendant's guilt before plea bargaining.[87] In jurisdictions where the practice is established, this requirement is sometimes called a *partial ban* on plea bargaining.[88] The requirement 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, Ethiopian policy makers attempt to raise the fairness of plea bargaining and thus outcome accuracy.

Nonetheless, the requirement of sufficient evidence is open to circumvention. This involves a determination that the prosecutor makes based on untested evidence with little/no pre-trial safeguards to ensure its reliability, i.e. no lawyer present, little prosecutorial supervision, and no defined standard to measure sufficiency and reliability.[89] 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. It is also possible for prosecutors to induce guilty pleas using unfounded charges. In trials, they are blamed for instituting charges without sufficient evidence and preparation.[90] 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. Further,

[87] See The FDRE Criminal Justice Policy, 2011, Section 4.5.4.2, p. 36 and Article 189(4) of the draft Criminal Procedure Code, *supra note* 4.

[88] *See* Oren Gazal-Ayal, *supra* note 17, at 2299.

[89] The standard is yet to be determined by the Attorney General of FDRE. *See* FDRE, The Criminal Justice Policy, 2011, section 3.10 at 13 (which demands that the Prosecutor General issues directives that provide standards on this issue). Yet, such approach has its own limitations: First, given the policy inclination 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 be very rare.

[90] This practice is ironically labeled as 'charging to fail'. *See* Uses and Users of Justice in Africa, *supra* note 56 at xxi.

plea bargaining creates a good atmosphere for this to happen as prosecutors have little incentive to weed out weak cases.[91]

Particularly, pre-charge bargaining, which appears permissible under the proposed version of plea bargaining, can be effectively used to evade the requirement of sufficient evidence and negotiate on weak cases.[92] At this stage, the investigation might not be completed nor sufficient evidence might be gathered or at least a charge detailing the crime committed and the evidence forwarded, might not be instituted. Under such circumstances, the requirement for sufficient evidence remains a hollow one. Furthermore, institutional preoccupation on efficiency (much emphasis on conviction rates)[93], the instrumentality of plea bargaining to manage caseload and ensure certainty of convictions, and thus raising conviction rates all provide prosecutors strong incentives to circumvent the requirement of sufficient evidence. From the foregoing, it follows that the requirement of sufficient evidence is likely to remain a mere chimera and, therefore, incapable of properly safeguarding innocents against the wrongful convictions of plea bargaining.

That said, it can be argued that measuring prosecutors' performance using conviction rates may discourage them from pursuing weak cases. In particular, the method of calculating conviction rates at Federal level, which is based on the ratio of convictions over indictments as opposed to final judgments[94], could discourage the pursuing of weak cases. Nonetheless, this may not be always the case in the context of plea bargaining. Given the possibility of skirting the requirement of sufficient evidence, the relative certainty of convictions in plea bargains, vulnerability of defendants and most importantly the possibility of pre-charge bargaining wide open, prosecutors may still work on plea negotiations to raise conviction rates even in weak cases while strong cases go to trial. Further, the way conviction rates are calculated differs from one regional state to another; some of them using the ratio of convictions over judgments.[95] This would rather encourage the processing of weak cases via plea bargaining so that conviction is more or less ensured.

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[91] *See* Oren Gazal-Ayal, *supra* note 17, 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).

[92] *See* Alemu Meheretu, *supra* note 3, at 417.

[93] *See* Alemu Meheretu, *supra* note 2.

[94] *See* the Strategic Plan, *supra* note 58.

[95] 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 58.

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 pre-condition to initiate plea bargaining in that the defendant's willingness to bargain should be secured first. To this end, the defendant is required to express in writing that he/she has waived her/his rights.[96] Apparently, this requirement seems to solicit defendant's informed consent to engage in plea negotiations. However, it has far-reaching implications. By causing the surrender of his/her bargaining arsenal, it has a chilling effect on the defendant's bargaining power. It suffices that the defendant mentions in writing that he/she is willing to bargain, albeit this may not guarantee the genuineness of guilty pleas based on which the plea agreement is struck. This is mainly because the powerful (coercive) sentencing deferential, unparalleled bargaining power of the parties (the interests at stake, uneven resources, information deficit, etc.), overcharging, pre-trial detention[97], all put defendants under irresistible pressure with an effect that will taint the process as well as the outcome, i.e., to yield inaccurate guilty pleas from innocents.

Explicit in this requirement is the problem of post guilty plea negotiations. The draft law provides that plea bargaining shall be conducted where the defendant pleads guilty and accepts responsibility.[98] Unless taken as a poor drafting, this implies that plea negotiations are made after the defendant pleads 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 removes the defendant's bargaining power. Once pleaded guilty, the defendant loses his/her bargaining tool and thus may easily submit to the prosecutor's manoeuvres.

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 itself in a weak and vulnerable position. The notion of disclosure (prosecution disclosure in particular), which is inextricably

[96] *See* Article 189(5), The Draft Criminal Procedure Code (2017).

[97] For details see section 2 above.

[98] Article 186, The Draft Criminal Procedure Code (2017); translation by authors.

linked with the principle of equality of arms, aims to narrow down such a power imbalance.

The FDRE Constitution guarantees the accused to have full access to any evidence presented against him.[99] Although this can be construed as imposing a duty of disclosure on the part of the prosecution, it suffers from several limitations. First, it is limited in scope in that the wording: "evidence presented against him" excludes exculpatory evidence which normally forms part of duty of disclosure. Second, the timing for disclosure seems not regulated. For instance, it is not clear whether the duty applies at the pre-trial stage or is limited to the trial stage. Third, the way the right of disclosure (access to evidence) is framed gives a wrong impression that it is absolute, i.e. no room is left for non-disclosure which is necessary to protect some overriding interests such as national security. Finally, there is no enforcement mechanism should the prosecution fail to disclose relevant evidence. Admittedly, some of the above concerns can be addressed using relevant laws of evidence and procedure.

The ECJ Policy embraces the duty of disclosure in a relatively better fashion and calls for a legal framework imposing the duty on both the prosecution and the defendant. However, it 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.[100] However, the defence's duty of disclosure is limited to those evidences and laws he/ she intends to use at trial.[101] 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 justice 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.[102] Yet, unlike its earlier version (2013), the latest version of the

[99] *See* Article 20 (4) of the FDRE Constitution.

[100] The FDRE Criminal Justice Policy (2011).

[101] *Ibid.*

[102] *See* for example D. K. 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

draft Criminal Procedure Code (2017) fails to emulate the policy in this regard. It simply requires the public prosecutor to submit the charge and accompanying evidence to the defendant whenever he decides to plea bargain.[103] Ostensibly, this seems a form of disclosure. However, it is not clear whether the defendant has full access to the content of the evidence or just to the list of evidence as is the case with the existing practice. The omission of the mention of the duty and the language used in the latest draft seem to refer to the latter.[104] Further, unlike what is provided for under the Policy, the scope of disclosure seems to be limited only to incriminating evidence.[105]

Another cause for concern is the fact that the duty of disclosure is not sanctioned, i.e., the effect of prosecution's failure to discharge the duty of disclosure is left unregulated. Given prosecutors' pre-emptive opposition to the duty, problems of ethics among the parties, and the limited access to legal counsel, the possibility of failure to disclose evidence looms large.[106] 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 may raise concerns on the accuracy, fairness and reliability of the guilty plea, and hence the innocence problem.

Moreover, it is not clear whether disclosure rights can be waived as part of the plea bargaining deal. 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 of disclosure.[107] In Ethiopia, unless expressly proscribed, waivers can be easily obtained. 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 process and inaccurate outcome. In other words, with exculpatory

mechanism to improve the factual record's comprehensiveness and reliability, because it makes fact investigation and pre-trial … scrutiny of evidence easier").

[103] *See* Article 190 (2), The draft Criminal Procedure Code (2017). The article reads: "…. አቃቤ ህግ ድርድር አንዲደረግ መወሰኑን ወይም ለቀረበዉ ጥያቄ ፈቃደኛ መሆኑን በጹሁፍ በመግለጽ የክፈተውን ክስና ማስረጃ ክክስ መግለጫ ጋር ለተከሳሹ መስጠት ይኖርበታል።"

[104] This is just a draft law and thus it is possible the duty can be still fully recognized. The subsequent discussions are based on the content of the Criminal Justice Policy which sufficiently embraces the duty.

[105] Art 190, the draft Criminal Procedure Code (2017).

[106] *See* Alemu Meheretu, *supra* note 2, at 121-22.

[107] *See* for example Daniel P. Blank, *Plea bargain Waivers Reconsidered: A legal pragmatist's Guide to loss, Abandonment and Alienation* 68 FORDHAM L. REV. 2011, 2014 (1999-2000).

evidence undisclosed and with enticing concessions from the prosecution, innocent defendants are likely to plead guilty.

In conclusion, although disclosure may enhance the accuracy of guilty pleas in Ethiopia, it is likely to be hampered by a couple of factors and thus fall short of arresting the innocence problem: First, as shown above it is not fully recognised. Second, 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. Third, 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. Fourth, 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.[108] Finally, the limited access to legal counsel and the conditions of defendants (poor and uneducated) mean its applicability would be seriously curtailed.

4. Legal representation

The FDRE Constitution guarantees every accused the right to legal counsel of their own choice; and should they be unable to pay for legal services (the means requirement is established) and miscarriage of justice is likely to arise (the legal requirement is satisfied) they are entitled to legal assistance at state expense.[109]

Similarly, the ECJ Policy demands that the accused should be represented in plea bargains. The latest (2017) draft law, removing the qualification made by the earlier draft[110], echoes the policy to proscribe the prosecutor from making any plea negotiation with unrepresented defendants.[111] This is a noticeable development, albeit legal representation is not a panacea for the innocence problem, particularly in the Ethiopian context.

First, there is no guarantee that the right to legal representation cannot be erroneously waived by Ethiopian defendants, nor is there any sanction to that effect, i.e., bargaining with unrepresented defendants. For that matter, most defendants are not in a position to know that plea bargaining is permissible only with a legal counsel present or even their right to legal counsel in general. This means defendants could simply waive their right to legal counsel. Second, the availability and quality

[108] *See* Alemu Meheretu, *supra* note 2, at 182-3.

[109] *See* FDRE Constitution Art 20(5).

[110] The earlier draft allows plea bargaining with unrepresented defendants in less serious crimes.

[111] *See* Article 189, draft Criminal Procedure Code (2017).

of legal representation[112] is so meagre that defendants are less likely to receive competent representation, if not none at all. Third, structural problems would inhibit effective representation in the Ethiopian version of plea bargaining. The defense has either little or no room to effectively participate in the pre-trial process. Interrogations are conducted in the absence of a lawyer, no parallel defense investigation as such exists, and there is limited defense access to resources and unparalleled power between the prosecution and defense. Fourthly, and most importantly, plea bargaining is inherently inimical to competent and effective representation.[113]

Such *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[114] would taint legal representation thus raising real concerns whether competent legal representation can be ensured in plea bargaining. For instance, 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.[115] This is especially the case with regard to private attorneys.

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 Criminal Procedure Code expressly address the fate of plea agreements reached with unrepresented defendants. The presence of competent defence counsel in plea negotiations presumably enables the defendant make relatively informed choice. Where a defendant whose cause calls for legal representation goes unrepresented, miscarriage

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[112] *See* Abebe Asamere, *የጠቡቶቹ ሥነ ምግባር ችግሮችን በተመለከተ ለውይይት የቀረበ ጥናት*, WONBER, (*Alemayehu Haile Memorial Foundation Periodical)* (2011). In practice, it is available to the indigent only in very serious crimes such as capital offences. *See* also the UNODC survey report of 2011, which indicates that Ethiopia had only 4000 lawyers for a population of 81 million. Of course, the number might considerably change now.

[113] *See* for example Jane C. Moriarty and Marisa Main, *Waiving Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38(4) HASTINGS CONSTITUTIONAL LAW QUARTERLY (2011); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, UTAH L. REV. 1 (2003); Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*', 84 YALE. L. J. 1179, 1180 (1975) (who argues that [plea bargaining] subjects defense attorney to serious temptation to disregard their clients' interests.).

[114] A. Alschuler, *Personal failure, institutional failure and the Sixth Amendment*, 14 N. Y. U. REV. L. & SOC. CHANGE 149 (1986) (plea negotiation system insulates attorneys from review and often makes it impossible to determine where inadequate representation has occurred.); Stephanos Bibas, *supra* note 113.

[115] *See* Albert Alschuler, *supra* note 113 (who argues that [plea bargaining] subjects defence attorney to serious temptation to disregard their clients' interests.).

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 conditions 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 where the court is mandated to reject the plea agreement if it is contrary to the law and morals.[116] Form this one can infer that bargaining with unrepresented defendants, which is contrary to the law, is sufficient to reject the agreement. However, absent clear standard on this, it depends on the court whose decisions might be overshadowed by its own incentives and weak judicial review culture.

5. Judicial review and approval

Even though courts in Ethiopia may not partake 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.[117] In principle, the veto power courts exercise over the plea agreement maintains their conventional authority of determining guilt or innocence of the accused. Nevertheless, 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 the content of the agreement. However, this is less likely to be the case in Ethiopia for a couple of reasons. Put simply, judicial review may not effectively regulate the Ethiopian version of plea bargaining. The weak culture of judicial review[118], institutional drive towards efficiency[119], the tendency towards crime control ideology and lack of political independence[120] make effective reviews of prosecutorial discretion unlikely and the rubberstamping of plea agreements in overburdened courts is hard to resist in the context of scarce resources. The nature of review envisaged by the proposed law

[116] Article 194 and 195 of the Draft Criminal Procedure Code (2017).

[117] *Ibid.*, Article 194(3).

[118] *See* generally, Assefa Fiseha, *Some Reflections on the Role of the Judiciary in Ethiopia*, 3(2) ETHIOPIAN BAR REVIEW, 105, 110-11, (2009).

[119] Judges' caseload, institutional preoccupation with efficiency which is partly expressed in the judges' 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, and plea bargaining's instrumentality to manage caseload would provide judges strong incentives to rubberstamp plea agreements. *See* Alemu Meheretu, *supra* note 2, at 197-98.

[120] *See* Linn A. Hammergren, *supra* note 63, 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* Uses and Users of Justice in Africa, *supra* note *56*, (indicating political and other interference with judicial decisions and operations).

which, among others, recognizes limited appeal[121], the inherent coercions involved in plea bargains which are beyond the reach of judicial scrutiny[122], the weakness of defendants (in particular unrepresented ones) - all converge to make judicial review less reliable in protecting the innocent defendant.

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',[123] courts cannot modify its terms to impose a sentence other than the agreed one without triggering withdrawal of pleas.[124] 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, i.e., 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. However, this is moot for it compromises the principles of judicial independence as well as the courts' duty to discover the truth.

Under the Ethiopian variant, although courts are not empowered to modify the terms of the agreement directly, they can do so indirectly. The latest draft mandates courts to endorse, reject or to prompt the parties modify the terms of the agreement

[121] For example, the plea agreement is unreviewable by appeal once accepted by the court; grounds of withdrawal and available remedies are not provided. There could be a need to make appeal where the court errs and accepts the plea agreement.

[122] 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 is the judge allowed to hear victims account. The requirement of sufficient evidence as shown above is not promising either).

[123] This represents agreements where the prosecutor instead of recommending a particular sentence or range, agrees to a specific sentence. *See* Joshua D. Asher, *Unbinding the Bound: Reframing the Availability of Sentence Modifications for Offenders Who Entered into 11(c) (1) (C) Plea Agreements*, 111 (5) COLUMBIA LAW REVIEW 1004, 1023 (2011).

[124] *Ibid.*

and resubmit it for approval, as appropriate.[125] Thus, where courts find the plea agreement contrary to the law or morals, they may reject it or cause its modifications.[126] Yet, what is less certain is the vague phrasing: *contrary to the law or morals*. It is unclear which law is referred to here. Morality is also so impressionistic a concept to serve as a standard to measure the validity of plea agreements (plea bargains) whose underlying moral justification is under severe attack.

For instance, taking criminal law as a standard, it is not clear whether the proportionality of sentence to the criminal act and the degree of guilt, an established rule under criminal law and a test plea bargaining hardly passes, would trigger modification. To argue in the negative contradicts with the conventional role courts retain in determining the appropriate sentence. This cannot be aligned with the independence of the judiciary and the constitutional clause which demands courts to heed to only the law[127] and not to the terms of the parties.

Before concluding this section, two points deserve discussion. 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 it is not expressly indicated) in approving plea agreements. This represents one area of weakness the Ethiopian variant of plea bargain exhibits and where we missed out the advantages of victim participation[128] where it: serves as a check against prosecutorial excesses and manipulations of plea agreement; provides courts with information relevant to review the plea agreement; spares separate civil proceedings; fosters victim and public satisfaction and thus legitimacy and trust of the system.

The second point relates to the courts' power to oversee the defence attorney. Given the structural problems accompanying legal representation in plea bargaining (which is discussed above) this is all the more important. While claims of ineffective representation/incompetent representation have increasingly been construed expansively elsewhere - thereby enhancing judicial oversight of the role of the

[125] *See* Article 194, The draft Criminal Procedure Code (2017).

[126] *Ibid.*, Article 194(4).

[127] 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 a far-fetched venture for them.

[128] For more on this, *see* Alemu Meheretu, *supra* note 2, at 227-28.

defence attorney in plea bargaining,[129] the issue remains inexplicable in Ethiopia. For that matter, ineffective representation has not been recognised as a ground for appeal in full-scale trials.

To recap, one can see that court's decision to accept or reject the plea agreement hinges on its legality and morality. In some jurisdictions as in Germany and Italy, whatever the reasons for accepting or rejecting the agreement may be, it forms part of the judgment, i.e., courts are required to state their reasons explicitly.[130] This requirement is worth having in Ethiopia for, among others, it helps to discourage simple rubberstamping of plea agreements and increases judicial accountability. It also facilitates further reviews by appeal or cassation, as appropriate.

Conclusion

Whilst trials are prone to wrongful convictions that are largely imputable to extrinsic factors, i.e. irregularities in using some sources of evidence, plea bargaining is intrinsically exposed to resulting in wrongful conviction. Rather than risking severe punishment at trial, innocents may take the lower risk – plea bargaining. With compelling concessions/sentencing differentials along with other prosecutorial tactics such as overcharging, strong risk aversion than the guilty, innocents are likely to plead guilty simply because they believe it is 'rational' to do so. Indeed, empirical evidence elsewhere reveals that plea bargaining creates the innocence problem.

Though one cannot support the innocence problem with empirical evidence in Ethiopia at this particular time where plea bargaining is yet to be implemented, it is possible to claim that in the advent of plea bargaining the innocence problem would be a serious challenge to the justice system. Three counts can support this conclusion: First, in more established legal systems such as the USA and UK, the innocence problem represents one of the major inherent flaws of plea bargaining. This has already been empirically established. It would be more so in the Ethiopian criminal justice system, which lacks many of the features of established legal systems. Second, the nature of the model adopted by Ethiopia is prone to induce

[129] 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, *Regulating the Plea Bargaining Market: from caveat emptor to consumer protection*, 99 CAL. L. REV. 1117 (2011).

[130] Stephen P. Freccero, *An introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 375-76 1993-1994; Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective* 12(1) INTERNATIONAL CRIMINAL JUSTICE REVIEW 22, 48 (2002).

innocents to plead guilty. The unlimited model is characterized by the fact that it applies to any crime, vests with the prosecution broader and unregulated discretion, involves huge sentencing deferential and unregulated concessions, and that it is likely to distort the truth.

These traits of the model alongside scanty procedural safeguards against wrongful convictions mean innocents remain at risk and thus the innocence problem would be cause for real concern. Third, specific contexts and features of the Ethiopian criminal justice system would leave innocents at peril and contribute to yield false guilty pleas. Such features of the system as colossal power asymmetry between the parties, lack of legal representation, prolonged pretrial detentions, poor conditions of detention centers, weak fact-finding capacity, absence of pretrial review of evidence, among others, imply that the Ethiopian version of plea bargaining is highly amenable to have the innocent plead guilty. This, beyond jeopardizing innocents, would put the integrity of the criminal justice process into question and consequently to be met with further loss of public confidence in the system. As Schulhofer observes, justice and punishment are classic public goods and tolerating innocent defendants to plead guilty creates serious negative externalities.[131]

That said, with a view to address the blemishes of plea bargaining, notably the innocence problem, several procedural and substantive guarantees are put in place. These include the requirement of sufficient evidence, mandatory representation of defendants, disclosure rights, and judicial review of plea agreements. Yet, none of these guarantees seem prophylactic enough to ensure the fairness and accuracy of plea bargaining for reasons relating to: the nature of the guarantees which are prone to circumventions; and the Ethiopian context, viz., legal, material and structural problems as well as the nature of plea bargaining which involves powerful sentencing deferential and leaves considerable power asymmetry between adversaries. Put simply, the guarantees are less reliable to protect the innocent from wrongful convictions. To have a clear understanding of the nature and the magnitude of the problem, further research is needed in the future once the inevitable plea bargaining becomes formally operational.

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[131] Schulhofer, *supra* note 6, at 1985.