GLOBALISATION OF PLEA BARGAINING: AN IMPERATIVE REFORM OR A COMPROMISE OF IDEALS?©

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INTRODUCTION

Contemporary criminal justice procedures are revealing some unprecedented contours towards what some scholars term as 'new managerialism', a multidirectional transition from the orthodox idea of retribution to one that is driven by economic interests (Damaska, 2004: 1018-1019). In its most simplistic form, plea bargaining is a process where the defence strikes a deal with the prosecution or the judge to plead guilty in exchange of some penal concession or the dropping of some charges.[1] Proponents of this idea argue that it brings efficiency to a system bedevilled with slow and protracted court processes. Others, however, caution that this desperate need for efficiency and exaggerated sense of urgency lacks perspective and context.[2] This system, it has been argued, is a form of revolution in criminal justice changing the engagement and relationship between the traditional all-powerful state and the weak citizen. By placing more negotiation power in the hands of the defence, the opportunity to negotiate criminal charges and sentence can be seen as a phenomenon that has redeemed the interest of parties by altering "the traditional subordination of the defendant under the powerful judge."[3]

THEORETICAL EXPLANATIONS

Numerous juxtapositions have been put forth to try to explain the relationship between the state, the individual and the community when considering the reasons for legal transformations.[4] Perhaps the utilitarian theme is that which gives a clearer idea about the practice of plea bargaining in ways that are easy to

[1] GA Ferguson "Role of the Judge in Plea Bargaining" [1972]. *The Criminal Law Quarterly* pp. 15, 26; HS Miller, WF Donald and JA Cramer, "Plea Bargaining in the United States." [1978]. *Washington, D.C.: National Institute of Law Enforcement and Criminal Justice*.
[2] M Feeley. "Plea Bargaining and the Structure of the Criminal Process" [1982]. *Justice System Journal* p. 388
[3] R Rauxloh "Plea Bargaining in National and International Law: A Comparative Study" [2012]. *Routledge* p 84
[4] M McConville and CL Mirsky "Jury Trials and Plea Bargaining: A True History" [2005]. *Portland: Hart Publication, p 5*.

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understand and to criticise; hinging the debate on the notion that plea bargaining as an effective and less costly process than conventional criminal trials. However, there are numerous variables that drive and influence the application of plea bargaining all which have caused a gravitation away from the idea of an adversarial trial.

UTILITARIAN THEORY

While judges and legislators do not often contemplate the economic costs when making decisions on crime and penology, high costs often influence legal reforms, leading to the adaptation of new approaches to justice administration. Diverse interests and reasoning for its increased use include institutional constraints, organisational incentives and the prevailing socio-economic objectives of the state. For instance, Einstein and Jacob describe plea bargaining as a product routine practice and the quest for incentive by the principal participants in criminal justice administration.[5] This argument suggests that plea bargaining is a system driven mainly by the overriding interests of defence attorneys, judges and prosecutors to foster the replacement one procedure (trial) with another (negotiation).[6]

Evidently, encouraging offenders to plead guilty lessens the burden of long and costly procedures as much as it lessens the nuances of legal technicalities, especially of adversarial proceedings. This argument goes further to stress that without some of these unconventional procedures, the entire criminal justice system risks being overwhelmed by inefficiency. In the words of Chief Justice Berger, "if every criminal case were to go through a full trial procedure", the states "would need to multiply by many times the number of judges and court facilities."[7] However, some refute this contending that it is not caseload but the length of individual proceedings that strains the justice system. Plea bargaining, they argue, is a system mostly promoted by legal practitioners for the purpose of convenience,

[5] M Feeley "Plea Bargaining and the Structure of the Criminal Process" [1982]. *Justice System Journal,* p. 341.
[6] *Ibid*
[7] *Santobello* v. *New York,* [1971] 404 U.S. 257

which often has little to do with the general interest of all the parties that have a legitimate stake in criminal justice.[8]

Cooper suggests that the prevalence of this practice is a reflection of the conflicting trajectories of procedural adjustment based on the representations of subsisting socio-legal philosophies that often necessitate the introduction of new methods to relieve the functional aspects of the justice system.[9] In this respect, one is bound to look beyond the simple caseload and utility argument to the general perspective that explains the changing nature of penal policies. Offences that were traditionally treated as minor civil violations have now been elevated to become criminal responsibilities e.g. tax-related offences and environmental misconducts.[10] In today's criminal justice system of England and Wales, there are more than 8000 offences of strict liability,[11] and in the US, there are over 4,000 existing federal crimes.[12]

Aware that securing a conviction for these offences is often difficult, especially with a jury that is becoming increasingly reluctant to understand how some of these minor offences should lead to a jail sentence. Prosecutors have often resorted to plea bargaining with the assurance of certainty, since the accused is expected to plead guilty without contest. It is, however, important to state that, in some instances, plea bargaining presents bipartisan benefits in the form of penal concession for the defence and resource management for the state. These benefits, according to Caldwell, were among the key factors that give plea bargaining its legitimacy and keep all of its lapses within constitutional limits.[13] Hence,

[8] R Rauxloh "Plea bargaining in national and international law" [2012]. *Routledge*, p. 45.
[9] HHA Cooper "Plea bargaining: A Comparative Analysis" [1972]. *New York University Journal of International Law and Politics*, 5, p. 427.
[10] S Maffei "Negotiations 'on Evidence' and Negotiations 'on Sentence': Adversarial Experiments in Italian Criminal Procedure" [2004]. *Journal of International Criminal Justice*, 2(4), p 1051.
[11] R Rauxloh "Plea bargaining in national and international law" [2012]. *Routledge*, p 65.
[12] *Right on Crime Report*, November, 2010.
[13] HM Caldwell "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System" [2011]. *Catholic University Law Review*, 61 (63), p 68.

proponents emphasise any significant retreat from summary procedures will have a negative effect on the efficiency of the criminal justice system.[14]

These notions reflect the 'Economic Theory', which sees plea bargaining as an imperative mechanism that relieves the state of the enormous economic and administrative pressure by avoiding resource-consuming full trials.[15] Hence, even the critics of this practice have conceded that it is flexible and faster. Alschuler was quick to point out that the notion of flexibility is perhaps an advantage that all lawless systems exhibit in comparison with systems of administering justice by rules.[16]

Whatever utility it presents must therefore be balanced against the utility of pre-ordained rules, which can limit the importance of subjective judgments and promote equality.[17] Any system that promotes guilty pleas must also replicate the same pattern of outcomes that trials would have produced.[18]

Samaha also refutes the caseload theory, emphasising that the notion is empirically incorrect.[19] The caseload theory he argues, is over amplified by courthouse workgroups i.e., prosecutors and judges who are the main beneficiaries of plea negotiations. Yet, the utilitarian school strongly insist on the position that even if courts have the capacity, disallowing plea bargaining will see the ratio of prosecutions and convictions becoming extremely small because "sentences could not be raised high enough to maintain deterrence, especially not when both economics and principles of desert call for proportionality between crime and punishment."[20]

[14] FD Cousineau and SN Verdun-Jones "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers." [1979]. *Canadian Journal of Criminology*, 21, p 299
[15] NA Combs "Copping a Plea to Genocide: The Plea Bargaining of International Crimes" [2002]. *University of Pennsylvania Law Review*, 151 (1), pp. 1 157; WJ Stuntz "Plea bargaining and criminal law's disappearing shadow." [2004]. *Harvard Law Review*, 2548-2569; J Bowers "Punishing the innocent." [2008]. *University of Pennsylvania Law Review*, 1117-1179.
[16] AW Alschuler "The Prosecutor's Role in Plea Bargaining" [1968] *The University of Chicago Law Review*, 36 (1), p 71.
[17] *Ibid*
[18] RF Wright "Trial Distortion and the End of Innocence in Federal Criminal Law" [2005]. University of Pennsylvania Law Review, 154, p. 83.
[19] J Samaha "Criminal Justice" (with Infotrac) [2005]. *Cengage Learning*.
[20] FH Easterbrook "Plea bargaining as compromise" [1992]. *The Yale Law Journal*, 101(8), p. 1975.

Beyond the relevant points raised in the much-discussed utility of plea bargaining, there is another important theoretical context that strongly influenced any kind of negotiation with an offender; that which is embedded in the individual decisions that parties make while negotiating. As shown in a study by Wright, both criminal justice institutions and parties are often influenced to enter into plea bargaining based on the individual benefits that such negotiation presents.[21]

DECISION THEORY

Scholars have attempted to explain what factors motivate parties to reject trials and enter into plea bargaining.[22] Earlier models include the Economic Model of Landes, in which he described plea bargaining as synonymous to a market transaction in which the prosecutor buys the guilty plea of a defendant in exchange for a promise to pay with sentence leniency.[23] This theory suggests the motivation is to maximize the expected sentences subject to procedural constraint. The theory further suggests that the likelihood of the prosecution agreeing to a plea bargaining is higher when the expected penalty on trial is smaller.[24] Nagel and Neef supported this position in their 'decision theory and equilibrium model', in which they indicate that parties enter a plea bargaining 'in the shadow of expected trial outcomes', focusing mainly on the probability of acquittal and the proportionality of sentence discount.[25] This suggests that in the cause of plea bargaining, each of the parties is driven by the sentiment of risk and reward, and by what they are willing to take or compromise. Although this does not take away the relevance of other factors in plea bargaining, it shows that risk sentiment and foreseen benefits play a key role in the success of a plea bargain.

Landes's theory, however, has its critics who contend that the theory was not clear about how the individual decision-making accounts for certain aggregate, or macro,

[21] RF Wright "Trial Distortion and the End of Innocence in Federal Criminal Law" [2005]. *University of Pennsylvania Law Review*, 154, pp. 79 156.
[22] RE Scott and WJ Stuntz "Plea Bargaining as Contract" [1992]. *The Yale Law Journal*, 101(8), pp. 1909 1968.
[23] WM Landes "An economic analysis of the courts" [1971]. *The Journal of Law and Economics, 14*(1), 61-107.
[24] *Ibid*, p 64.
[25] SS Nagel and M Neef "Plea Bargaining, Decision Theory, and Equilibrium Models: Part II" (1976). *Indiana Law Journal*, 52(1), pp. 1-61.

aspects of criminal justice.[26] What Rhodes claims instead was that, "the ratio of guilty pleas to trials is negatively correlated with the severity of the sentence exchange for guilty pleas, significant at a one percent level of confidence."[27] The outcome illustrates that defendants' demand for a trial is inversely related to the concessions gained for accepting a guilty plea offer.[28]

Reinganum also claims that Landes theory has weakness as it only focuses on plea bargaining without looking at it side by side with trials therefore assuming that all defendants are guilty.[29] In response, Reiganum brought an argument in line with what was previously discussed by Grossman and Katz,[30] his argument was based on the conclusion that:

> Sufficiently weak cases are dismissed, where this sufficiency does not depend upon the resource cost of trial but upon the social costs and benefits of punishing the innocent and the guilty, respectively; that defendants against whom a sufficiently strong case exists are offered a sentence (in exchange for a plea of guilty) which increases with the likelihood of conviction at trial and the defendant's anticipated disutility of trial and conviction; and finally, the defendants are more likely to reject higher sentence offers, so that the likelihood of trial is an increasing function of the strength of the case.[31]

In whatever context these theories hinge, the underlying rationale is that the individual decisions parties make have a strong impact on the success of plea bargaining. However, external factors such as access to information, strength of evidence, time constraint, and legal representation cannot be ignored.[32] Scott and Stuntz pointed out that the psychology of framing and the weak sense of judgment, especially in respect of poor and less educated defendants against experienced and well-informed prosecutors may sometimes have effect on decisions and even the outcome of plea bargaining.[33]

[26] WM Rhodes "The Economics of Criminal Courts: A Theoretical and Empirical Investigation" [1976]. *The Journal of Legal Studies*, 5(2), p 312.
[27] *Ibid*.
[28] *Ibid,* p 331.
[29] JF Reinganum "Plea bargaining and prosecutorial discretion" [1988]. *The American Economic Review* p 714.
[30] GM Grossman and ML Katz "Plea bargaining and social welfare" [1983]. *The American Economic Review*, *73*(4), 749-757.
[31] JF Reinganum "Plea bargaining and prosecutorial discretion" [1988]. *The American Economic Review*, p 723.
[32] JS Lerner and PE Tetlock "Accounting for the effects of accountability" [1999]. *Psychological bulletin*, *125*(2), p 255.
[33] RE Scott and WJ Stuntz "Plea Bargaining as Contract" [1992]. *The Yale Law Journal*, 101(8), p 1912.

In an elaborate discussion of the decision theory, Bibas presented the 'shadow of trial' model, which he premised on the broader structural impediments that distort plea bargaining.[34] These factors include agency costs, poor lawyering and the contingencies of bail and pre-trial detention. Beyond these specific elements, there are also factors that hinge on the broader 'behavioural law and economics' theory such as risk preference, overconfidence, biases, framing, denial mechanisms, anchoring, penal concession rate etc. which all affect plea bargaining.[35]

In understanding, these extended factors discussed by Bibas, one also has to understand the 'Functionalist Theorist' which suggests that the choices and decision to offer or accept plea bargaining has a close relationship with the strength of evidence as a result of the advancement in institutional working strategies such as sophistication in investigations and forensics.[36] This advancement has led to the possibility of extensive pre-trial screening that gives prosecutors telling evidence while leaving the defendant with little room to contest culpability.[37]

Both the utilitarian theory and the decision theory add to the complexity and diversity in understanding or at least holding on to any particular theory or factor that is most relevant to plea bargaining. What is rather clear is that plea bargaining, unlike a trial, is a convoluted practice defined by a constellation of factors that are dependent on individual trajectories as well as institutional objectives. Because of the informality and fluid nature of negotiations, often done in private, every case of plea bargaining has its own distinct characteristics.

COMPROMISING CRIMINAL JUSTICE'S BEST PRACTICES: A CRITIQUE

Conventional trials have evolved over the centuries to become more adversarial, emphasising on the principles of transparent engagement before an independent

[34] S Bibas "Plea Bargaining Outside the Shadow of Trial" [2004]. *Harvard Law Review*, 117 (8), p 2465.
[35] *Ibid* p. 2467.
[36] LM Mather "Comments on the History of Plea Bargaining" [1978]. *Law and Society Review*, 13, p 284.
[37] *Ibid*.

judge along with the guarantees of subjecting every piece of evidence to open and rigorous scrutiny. It has also become an aspect that upholds the principle of the right to be presumed innocent until proven guilty. These elements are central in the principles of due process and are arguably suppressed under the guise of plea bargaining. But criminal justice should not forget too soon that process rights, as Justice Felix once emphasised, are necessary compendious expression for all those rights that must be enforced in criminal justice of all free societies.[38] It is this aspect of what scholars term as 'constitutional criminal procedure' that all societies should aspire to achieve through clearly defined procedural codes that protect the fundamental values of legality and equality.[39]

In the context of international law, for example, the consensus is to have a system of criminal justice that is largely free, open and adversarial. The Universal Declaration of Human Rights (UDHR) is one of the leading international documents that explicitly enumerate these principles. The European Convention on Human Rights (ECHR),[40] as well as the International Covenant on Civil and Political Rights (ICCPR) also contains similar provisions, which are considered the bedrock of a fair criminal justice procedure. Article 14 of the ICCPR for instance states that every accused person has the right to be tried before an impartial tribunal under the assumption of innocence, and the right to examine the witnesses that are against them. Moreover, research has shown that these principles are captured in the constitutions of most countries around the world, especially in the provisions that relate to the rule of law and fair trials.[41]

[38] *Wolf* v *Colorado*, 338 U.S 25 (1949).
[39] DM Amann "Harmonic Convergence? Constitutional criminal procedure in an international context" [2000]. *Indiana Law Journal*, 75, p 814.
[40] Art. 6(2) of the ECHR states clearly, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." and Art. 6(2) (d) went further to state that every accused person has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The ICCPR provided in Art. 14 of the ICCPR gave similar provisions.
[41] MC Bassiouni "Human rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions" [1992]. *Duke Journal of Comparative and International Law,* 3, p 267.

However, others are of the opinion that, where properly administered, plea bargaining enhances the productivity of courts.[42] Yet, it is apparent that subjecting criminal cases to some kind of commercial haggling in the offices of prosecutors is an 'anti adversary' method[43] that accommodates unrestrained discretion that often affects the "accurate separation of the guilty from the innocent."[44] What most courts do in the end is to administer their verdict based on what the prosecution present and often on the things they 'do not say'.[45]

Another problem with plea bargaining is that it is based on a culture that assumes the defendant to be factually guilty and therefore expected to plead.[46] Blumberg describes it as "a contrived, synthetic, and perfunctory substitute for real justice."[47] It is however not accurate to have a balanced argument without admitting that plea bargaining, certainly brings some degree of procedural economy to the criminal justice system. However, in the quest for procedural economy, legal practitioners can become bound and fail to uphold the moral responsibility of ensuring justice.[48] In the end, it becomes a system driven by arrangements and cooperation at the expense of the defendant.[49] The view therefore that plea bargaining is an exchange of official concession for a defendant's act of self-conviction is not out of place.[50]

It is important however to have a retrospective look at the development of criminal justice as very few scholars seriously contemplate that there was a period in which

[42] NA Combs "Copping a Plea to Genocide: The Plea Bargaining of International Crimes" [2002]. *University of Pennsylvania Law Review,* 151 (1), p 157.
[43] AS Blumberg and ML Barron "Current Perspectives on Criminal Behavior: Original Essays on Criminology" [1974]. *Knopf.* p 29.
[44] SJ Schulhofer "Plea bargaining as disaster" [1992]. *The Yale Law Journal, 101*(8), p 1979.
[45] RE Scott and WJ Stuntz, [1992]. "Plea Bargaining as Contract" *The Yale Law Journal*, 101(8), p 1912.
[46] Mcconville in R Rauxloh "*Plea bargaining in national and international law"* [2012]. *Routledge*, p 53.
[47] AS Blumberg "Practice of Law as Confidence Game - Organizational Cooptation of a Profession" [1966]. *The Law and Society Review*, 1, 15-39, p 24.
[48] M Feeley "Plea Bargaining and the Structure of the Criminal Process" [1982]. *Justice System Journal*, p 341.
[49] WM Rhodes "The Economics of Criminal Courts: A Theoretical and Empirical Investigation" [1976]. *The Journal of Legal Studies*, 5(2), p 336; See also: e.g. Blumberg [1966] where he espoused these kinds of cooperation, saying, "Indeed, the adversary features which are manifest are for the most part muted and exist even in their attenuated form largely for external consumption. The principals, lawyer and assistant district attorney, rely upon one another's cooperation for their continued professional existence, and so the bargaining between them tends usually to be "reasonable" rather than fierce."
[50] AW Alschuler "Plea Bargaining and Its History" [1979]. *Columbia Law Review*, 79 (1), p 3.

neither some form of guilty plea or summary trial was absent.[51] Langbein, for example, reveals how the period preceding the mid-eighteenth century had proceedings in common law that were extremely hasty, quite a departure from adversariality.[52] Feeley also discovered similar patterns from the transcripts of the mid-nineteenth century proceedings in London where "defendants were not represented by counsel; they did not confront hostile witnesses in any meaningful way; they rarely challenged evidence or offered defences of any kind.[53] Research by Friedman and Perceival on proceedings in the US revealed similar patterns, where in some cases the defendants simply told their story, with or without witnesses; the jury retired, voted and returned immediately.[54] Hence, as Feeley argues, "when trials were once extensively relied upon, they were perfunctory affairs that bear but scant resemblance to contemporary trials. They were not often deliberate and painstaking affairs.[55] Yet, it is important to stress that plea bargaining is a different kind of approach entirely. It is at best an administrative form of approach to crime and sentence embedded in mutual compromise where every player has his own inner motive for avoiding trial.[56] Summing up these inherent conflicts between personal ambitions and the need for fairness, Vogler and Jokhadze state, "avaricious and overcommitted defence lawyers, incompetent trial lawyers, lawyers anxious about their success rate or simply those lawyers wishing to curry favour with their opponents or the court" are likely to pressure defendants into pleading guilty.[57] The complexity of these multifaceted situations have made plea bargaining operate as a system that creates situations of coercion, imposing demands upon the accused, who is expected, at all costs to plead guilty.

[51] WT Pizzi and M Montagna "Battle to Establish an Adversarial Trial System in Italy" [2003]. *The Michigan Journal of International Law*, 25, 429; S Thaman "Plea bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases" [2007]. *Electronic Journal of Comparative Law*, pp. 1-54.
[52] JH Langbein. "Land without Plea Bargaining: How the Germans Do It". [1979]. *Michigan Law Review*, 78(2), p 206.
[53] M Feeley "Plea Bargaining and the Structure of the Criminal Process" [1982]. *Justice System Journal*, p 345.
[54] LM Friedman and RV Percival "The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910" [1981]. *Chapel Hill: University of North Carolina Press*, p 194.
[55] M Feeley "Plea Bargaining and the Structure of the Criminal Process" [1982]. *Justice System Journal*, p 346.
[56] J Vorenberg "Criminal law and procedure: cases and materials" [1981]. *St. Paul, Minn.: West Pub. Co,* p 888.
[57] R Vogler and G Jokhadze "Plea Agreements in the Georgian Criminal Justice System: A Utilitarian Perspective. A Report Prepared for the Georgian Ministry of Justice for Review and Consideration by the Georgian and International Rule of Law". [2011]. *Tbilisi, Georgia*, p 29.

The broad range of discretionary powers that the prosecutor wields has resulted in a deep imbalance of power that often undermines process rights. They decide "who to charge, what charges to bring, whether to permit a defendant to plead guilty, and whether to confer immunity."[58] In many instances, they unilaterally fit in same kinds of charges; they are deemed appropriate to different kinds of offences.[59] Hence, the system grows into a practice that is penologically and morally prejudicial, subjecting the accused to condemnation without proper adjudication.[60] Although many prosecutors rely on the strength of evidence to coerce the defendant, such discretionary powers facilitate rather than hinder the cause of justice.[61] However, it is safe to also argue that neither the strength of evidence nor the utility of discretion permits coercion in criminal justice.

Whenever defendants are coerced to plead guilty, the process becomes prone to inaccuracies that almost unavoidably result in wrongful convictions.[62] Perhaps some may argue that the law often puts anti-duress mechanisms in place, but even that has been found not to be sufficient in protecting a defendant whose fate is decided behind closed doors. When coercion occurs, the threatened party is unfortunately limited to only two choices: (1) surrender to the threat, or (2) refuse to surrender and suffer the threatened adverse outcome.[63] Where the threat is legitimate, it cannot be ignored without consequences. If the threat were to be ignored, it would be in the interest of the threatening party to carry out the threat, rather than retreat.[64] Scholars have also found that in plea bargaining, prosecutors are likely to exaggerate the strength of evidence in order to secure the accused person's plea.[65] The threat against the defendant becomes even more lethal because the leniency, which was promised, is the only reliable means to avoid

[58] Gersham in BG Stittand, RH Chaires "Plea Bargaining: Ethical Issues and Emerging Perspectives" [1992]. *The Justice Professional*, 7(2), p 72.
[59] Y Ma "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective" [2002]. *International Criminal Justice Review*, 12(1), p 22.
[60] JH Langbein "Land without Plea Bargaining: How the Germans Do It" [1979]. *Michigan Law Review,* 78(2), p 204.
[61] Y Ma "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective" [2002]. *International Criminal Justice Review*, 12(1), p 22.
[62] O Bar-Gill and O Ben-Shahar Credible coercion. [2004]. *Tex L. Rev*., 83, p 1.
[63] *Ibid*.
[64] *Ibid.*
[65] JI Turner "Judicial Participation in Plea Negotiations: A Comparative View" [2006]. *The American Journal of Comparative Law*, 54(1), p 206.

punitive measures and he/she is therefore left with no option other than to accept guilt.[66] A major implication of this is that the prosecutor and the judge become agents of the powerful state, whose task is to obtain the defendant's plea and ensure his/her conviction.

These unethical and often misleading conducts have made plea bargaining work effectively, especially on the risk-averse defendant, guilty or innocent.[67] Vogler and Jokhadze, however, casted doubt on this notion, contending that the empirical evidence to support the argument that innocent, risk-averse defendants are often coerced; especially by their representatives to plead guilty, is notoriously unreliable.[68] What disrupts the separation of the guilty from the innocent is not only a flaw in plea bargaining but also a flaw common in trials.[69] Others argue that, when a prosecutor threatens to go to trial, he is only exercising a lawful power in an effort to seek a legislatively authorised outcome.[70] Yet, one cannot rule out as problematic any system in which the prosecutor or the judge act as a party eager to convict. However strong may be his belief of the person's guilt, justice must be done.[71]

A recent work by Rakoff *et al.* indicates how the situation of innocent defendants pleading guilty is widespread, mostly through plea bargaining. Their evidence has shown that about 10% of innocent people in rape and murder cases plead guilty, presumably due to fear of capital punishment.[72] They further cited similar examples from the records of the National Registry of Exonerations,[73] which indicates that out "of 1,428 legally acknowledged exonerations that have occurred since 1989 involving the full range of felony charges, 151 (or, again, about 10

[66] MM O'Hear "Plea Bargaining and Procedural Justice" [2007]. *Georgia Law Review*, 42, p 425.
[67] O Bar-Gill and O Ben-Shahar "Credible coercion" [2004]. *Tex L. Rev.*, 83, p 1.
[68] R Vogler and G Jokhadze "Plea Agreements in the Georgian Criminal Justice System: A Utilitarian Perspective. A Report Prepared for the Georgian Ministry of Justice for Review and Consideration by the Georgian and International Rule of Law" [2011]. *Tbilisi, Georgia*, p 28
[69] FH Easterbrook "Plea bargaining as compromise" [1992]. *The Yale Law Journal*, 101(8), p 1971.
[70] S Bibas "Bringing moral values into a flawed plea bargaining system" [2003] *Cornell Law Review*, 88. P 1427.
[71] *State* v *O'Neil*, 189 Wis. 259 (1926).
[72] JS Rakoff, H Daumier and AC Case "Why Innocent People Plead Guilty" [2014]. *New York Review of Books*, 61(18), p 7.
[73] This is a joint project of Michigan Law School and Northwestern Law School in the United States of America.

percent) involved false guilty pleas."[74] Similar findings by Gross[75] also revealed that in allegations for offences that attract the death penalty, prosecutors use the threat of capital punishment to secure a guilty plea. Ehrhard also showed evidence to suggest that the death penalty is a strong incentive that puts the prosecutor in a unique position of power and it is often used to secure guilty pleas.[76] Although capital punishment is not common in all jurisdictions, the findings suggest how harsh penalties are used to compel accused persons into pleading guilty. In the end, it is bound to result in inappropriate situations where the innocent defendant pleads guilty. This situation becomes even more complicated owing to the empirical studies that suggest defendants who seek trial may be acquitted while those who plead guilty forfeit this possibility.[77] Hence the argument that plea bargaining is a process that flourishes in judicial blindness. Nevertheless, plea bargaining has overtime proven to be a process that has the tendency of dealing with accused persons unequally.

CONCLUSION

The best universal practice in criminal justice is that which is shared on the notion of procedural justice. This becomes increasingly relevant as plea bargaining succinctly becomes an acceptable norm, often displacing the traditional concept of free and open adjudication before a neutral judge. Promoting a system that inhibits some of the lofty values of constitutional criminal justice such as transparency, consistency and freedom from coercion is a dangerous trend. Despite the incentives it provides, it is also important to balance these benefits with the aim of ensuring justice at all costs.

[74] *Ibid*
[75] SR Gross "The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases," [1996]. *Buffalo Law Review* 44. 469.
[76] S Ehrhard "Plea Bargaining and the Death Penalty: An Exploratory Study" [2008]. *Justice System Journal*, 29(3), p 316.
[77] GD LaFree "Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials" [1985]. *Criminology*, 23(2), p 291.

Most problematic is the situation of accommodating bureaucratic and corporative ethos between officials to place organisational interest on the same pedestal with the interests of justice. This reconfiguration of ideals of procedural justice is undoubtedly leading to a fluid contour in justice and penology that exposes how the debate on the relationship between law and economics is lacking in perspective. It also highlights questions on the essence and significance of some far-reaching reforms in contemporary criminal justice such as preventive detention, offender profiling and other questionable characters that are invading the field of crime and penology.

The field of criminal justice is witnessing an emerging conflict between the traditional principles of fair trial and that of negotiation. The implication of this is the way practitioners give prevailing attention to resource management, leading to controversy in the way pleas are secured and inconsistency in sentencing practices. Incidentally, the appealing incentives of certainty and finality that plea bargaining presents, makes it very unlikely that officials will be completely deterred from acting obnoxiously in order to secure a guilty plea. These overarching problems call for a rethink among scholars and practitioners on how to ensure that equality and fairness will always remain a cornerstone and bastion in the development and legitimacy of legal reforms.