Appraisal of Plea-Bargaining in the Criminal Justice Policy of Ethiopia

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Abstract

The administration of justice in Ethiopia has been under reform for the past fifteen years. As part of the reform, the system of plea bargaining was introduced within the first ever criminal justice policy in 2011. The policy states that the prosecutor would drop (a) count(s) of a charge or alter a charge to a lesser crime or drop certain facts of a crime and guarantee an accused a lenient sentence in return for the plea deal. Theoretical and practical controversies on plea- bargaining is still ubiquitous among researchers and practitioners. Thus, the main objective of this article is to examine and weigh the advantages and the pitfalls of the system of plea bargaining so as to bring it to the attention of the legislature. In doing so, the writer examined the theoretical aspects of plea bargaining and the contexts of criminal justice administration in Ethiopia as well as experiences of some selected countries. It is identified that plea bargaining helps reduce case backlogs and reduce costs to the state and to the defendant. It also avoids pretrial detention and severe penalties to the defendant. However, the findings also indicate that the very nature of plea bargaining, particularly the informal negotiation, would worsen the existing corruption or perceived corruption in Ethiopia so that powerful criminals may avoid punishments or may be punished with a lenient sentence which may cause for impunity. This may also deteriorate public confidence on the formal criminal justice system which could consequently hinder crime reporting. The associated trial penalty of plea bargaining also likely coerces an accused to relinquish his due

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process rights. Therefore, the writer fears that plea bargaining would be a viable solution, at least for the time being, to the criminal justice problems of Ethiopia except may be for minor crimes.

***Key words**: corruption, criminal justice, plea bargaining, public trust*

Introduction

Maintaining law and order, as well as ensuring justice, are the main functions of a state.[1] Thus, designing a functioning criminal justice system remains a common practice of states. However, adopting a particular type of criminal process which is efficient, effective and capable of identifying truth is still a challenge for states due to the implications of different values and concerns of a country. Despite such challenges, various criminal justice policies have been put in place in various jurisdictions.

Plea-bargaining has been ubiquitous in the contemporary practical, as well as theoretical, spheres of criminal justice systems. However, controversies have persisted over its merits and pitfalls. Despite the debates, a numbers of countries, including those who were suspicious of it,[2] have adopted it for pragmatic reasons. Indeed, it is argued that plea bargaining is important to ensure efficiency of the criminal justice administration by reducing case

[1] Joseph, Rosie Arhulya, Plea Bargaining: A means to an end, 2006, P.1., at WWW <http://www.manupatra.com>, (accessed on 3 January 2015).

[2] Langbien, John H., Understanding the Short History of Plea Bargaining, Law and Society Review, Vol.13, No. 262, 1979, at 268. In the middle of the nineteenth century, when German criminal procedure was being given its modern shape, German scholars routinely studied English procedure as a reform model. They found much to admire and to borrow (including the principle of lay participation in adjudication and the requirement that trials be conducted orally and in public), but they were unanimous in rejecting the guilty plea. It was wrong for a court to sentence on 'mere confession' without satisfying itself of the guilt of the accused (Arnold, 1855:275; see also Walther, 1851; Goltdammers Archiv, 1870).

backlogs, maximizing conviction rate and enabling the prosecution to access evidences for some kinds of crime to which the perpetrator could not otherwise be identified and even to reduce costs for the accused. To the contrary, numerous studies criticize the use of plea bargaining in a criminal justice administration to the extent that some justice systems have abolished[3] it or some jurisdictions have limited its application to certain kinds of crimes. Plea bargaining is criticized for subjecting justice to barter and therefore violating the due process rights of accused persons.

Despite its controversial nature, plea bargaining was introduced in the criminal justice policy of Ethiopia in the first ever criminal justice policy in 2011. The system of plea bargaining is the process in which a defendant agrees to plead guilty to an offense in exchange for a reduced number of charge(s) or facts, a lower sentence, or other considerations. Moreover, the issue of human rights protection, particularly the due process rights, is a recent phenomenon to Ethiopia. Citizens are looking for the proper enforcement of fundamental human rights granted under the FDRE constitution. How can plea-bargaining be a suitable solution for the criminal justice problems of Ethiopia while it has even been a subject of criticism[4] in well developed legal systems where it was conceived and dominates the system is the focus of this article.

[3] Some states and counties in U.S. including Alaska and some counties in Louisiana, Texas, Iowa, Arizona, Michigan and Oregon have abolished plea bargaining.

[4] Wan Tina, Unnecessary Evil of Plea Bargaining: an Unconstitutional Conditions, Problem and a Not-so-Least Restrictive Alternative, Review of Law and Social Justice, Vol.17, No.1., 2007, at 33.

The first section of this article discusses the notion and development of plea bargaining. As the plea bargaining originated in the USA, how and why it was conceived is examined in this part. Furthermore, the meaning, basic forms and elements of plea bargaining is also discussed here. The second section provides the merits and shortcomings of plea bargaining and deals with the inherent problems of plea bargaining, particularly in relation to corruption, public trust of the formal criminal justice administration, the protection of due process of rights, the trial penalty, its basic feature of subjecting justice to barter etc. The practices of some selected countries are highlighted; including USA, where plea bargaining originated. Germany and Italy, civil law countries, more or less resemble the Ethiopian legal system. The practice of Nigeria, a country which introduced plea bargaining while there is serious corruption, is also briefly examined to see the practical impacts of plea bargaining on the crusade against corruption. The third section briefly examines the situations in Ethiopia against the very nature of plea bargaining so as to see if plea bargaining is a viable solution to the problems in the administration of criminal justice. The ever first criminal justice policy dealing with plea-bargaining and other relevant laws incorporating ideas resembling plea bargaining are also discussed here. Finally, the author concludes by showing the incompatible features of plea-bargaining, in majority of the cases, to the criminal justice administration of Ethiopia; however, perhaps not to less serious crimes.

1. The Notion, Genesis and Development of Plea-bargaining

"Plea" in the legal phraseology refers to the accused persons' formal response of "guilty," "not guilty" or *nolo contendere* to a criminal charge,

and the phrase to "bargain" refers to "negotiate" or to "agree".[5] The combination of these two concepts gave the phrase "plea-bargain". Therefore, plea-bargaining is defined as "the process in which a defendant agrees to plead guilty to an offense in exchange for a lower charge, a lower sentence, or other considerations."[6] Plea- bargaining is also defined as "the process by which the defendant in a criminal case relinquishes the right to go to trial in exchange for a reduction in charge and/or sentence."[7] This definition is narrow as the only return to plea-bargaining seems to be reduction in charge or sentence or both. More importantly, Black's Law Dictionary defines plea-bargaining as "a negotiated agreement between a prosecutor and a criminal defendant whereby a defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or dismissal of the charges."[8] This definition is more comprehensive which consists of the foundational elements as well as forms of plea bargaining.

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[5] Ted. C Eze and Eze Amaka G., A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria, Global Journal of Politics and Law Research, Vol.3, No.4, 2015, at 42.
Yekini, A. Olakulehin, The Practice of Plea Bargaining and its Effect on the Anti-Corruption Crusade in Nigeria, at WWW < http://dx.doi.org/10.2139/ssrn.1279003>, (accessed on3 April 2015).

[6] Del Camen and Rolando V., Criminal Procedure: Law and Practice, 7th edition, Wadsworth Publishing Co., USA, New York, 2007, at 48, (hereinafter Del Camen, Criminal Procedure: Law and Practice)

[7] McCoy, Candace, Plea Bargaining -as- Coercion: The Trial Penalty and Plea Bargaining Reform, Criminal Law Quarterly, Vol. 50, No.41, 2005, at 450.

[8] Garner, Bryan A., Black's Law Dictionary, 7th edition, West Publishing Co, United States of America, 1999, at 1173.

The evaluative genesis and development of plea bargaining is mostly associated with the U.S. criminal justice system. Legal historians agree that plea bargaining evolved in the nineteenth century in America as it "…first emerged in force from deep within the bowels [of] urban American courts. [9] Teeming with case load, tainted by corruption, and staffed largely by ethnics with little professional training, these courts were considered to be ideal breeding grounds 'for bargaining with crime'."[10]

Before the eighteenth century, there was little problem of inefficiency in the administration of justice in the common law tradition in general and in the American justice system in particular as the then jury trial was a summary proceeding when dozens of cases were processed within a day. For this reason, adjournment of cases was not known until the year 1794.[11] During those times, professional policing and prosecution were unknown so that there was no fear of abuse of power by such organs. The right of accused to have legal counsel was also unknown, and there was no *voire dire* against the prospective jurors.[12] In addition to absence of appeal right, the only efficient evidentiary resource was procured through the confession of a defendant that may not require time and resource. Through time, the development of the adversarial system and the law of evidence with the view to provide safeguards to the defendant transformed the nature of trial by jury; as a result, the summary proceeding of trial by jury diminished.[13] Consequently, trial by

[9] Langbien, Supra note 2.
[10] Padgett John F., Plea Bargaining and Prohibition in the Federal Courts, 1908-1934: Courts as Complex Organizations, Law & Society Review, Vol. 24, No. 2, 1990, at 414.
[11] Langbien, Supra note 2, at 263.
[12] Ibid, at 265.
[13] Ibid, at 261.

jury became more complicated and expensive which caused the American criminal justice system to become "unworkable". [14]

Jury trial, after such transformations, has been complex and burdensome to the U.S. criminal justice system.[15] It involves the summoning of prospective jurors among whom twelve jurors are selected with two backups and followed by *voire dire*, extensive instructions by a judge, jury sequestration for weeks in a locked session and the stringent voting requirement where there is high possibility of *jury nullification*, *missed jury* or *hung jury* all which are time taking and resource intensive.[16] For instance, the number of people summoned for jury service in each year in U.S. is estimated to be 32 million.[17] One can imagine how the resources needed and what procedural hurdles may be confronted.

One may ask why the Americans insist on such burdensome criminal justice process of jury trial instead of bench trial. Due to the long lasting British colonial administration in America, the American legal system absorbed the British model of trial by jury. [18] Though independence was proclaimed in 1773, trial by jury has been preserved as "a centerpiece of its justice system" due to its ideological role to which the Americans have strong sentiments.[19] Their historic persistence on jury trial by their own "peers" served them as a

[14] U. S. Department of State, Anatomy of Jury Trial, at WWW <http://www.america.gov/publications/ejournalusa.html>, (accessed on 15 April 2015).
[15] Ibid, at 17.
[16] Langbien, Supra note 2.
[17] U.S. Department of State, Supra note 14.
[18] Ibid.
[19] Ibid.

"shield" to resist the oppressive British administration and even guaranteed them certain fundamental rights including the right to Freedom of Press since 1735.[20] It is for this reason that trial by jury is said to have been "…serving as rallying point for American colonists against unpopular British laws".[21] Thus, the patriotic role of the jury led the "founding fathers" of the U.S. to make trial by jury a constitutional right.[22]

The writer has devoted time and space on the issue of trial by jury not because it is the focus of this article but to make clear that trial by jury is a root cause for the rise of plea bargaining in USA which is helpful for the purposes of this article.[23] Hence, plea bargaining is a means to maintain the popular sentiment to jury trial at least for very few cases.[24] Studies confirm that 90% of the worlds' trial by jury exists in the U.S. criminal justice system, and 90% of cases also end up through plea-bargaining in that country. [25] Hence**,** the transformation of trial by jury into its adversary nature and the insistence of Americans on it can be taken as a root cause for plea bargaining. Howe identified that "[l]arge caseloads and the promise of cumbersome and expensive jury trials help explain the appeal of plea bargains from a societal perspective".[26]

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[20]American Bar Association (ABA), History of Jury Trial, at WWW <http://www.jstore.org/stable/4187109>, (accessed on 20 September 2014).
[21] Ibid.
[22] Langbien, Supra note 2, at 269.
[23] McConville Mike et al., Jury Trial and Plea Bargaining, Hart Publishing, Oxford, London, 2005.
[24] U.S. Department of State, Supra note 14.
[25] Ibid.
[26] Howe, Scott W., Value of Plea Bargaining, Oklahoma Law Review, Vol. 58, No. 599, 2005, at 611

The ruling of the U.S. Supreme Court in 1978 [27] is considered as a "watershed" precedent for plea bargaining in US. The decision of the court, though it has been criticized, upheld the constitutionality of plea bargaining and followed by various policies whereby general principles have shaped the operation and elements of plea bargaining. [28]

2. Advantages and Disadvantages of Plea-bargaining

2.1. Advantages of Plea Braining and the Underlying Factors

Proponents justify plea-bargaining based either on theories or other pragmatic reasons. According to routineization theory, the professionalization of police and prosecution and transforming them to serve full time is what made the practice of plea bargaining inevitable.[29] Supporters claim that the accustomed acts of 'repeat players' of the full time working groups in a courtroom make them able to foresee trial outcomes and set sentences based on probabilities of what would happen if the cases went through trials. Thus, it is meaningless to pass through criminal trial process if the outcome of the process is predictable.

Another theoretical justification is on the basis of either Utilitarian[30] or Deontological[31] points of view. From the deontological perspective, if a

[27] United States of America, Federal Supreme Court, Bordenkircher v. Hayes, Judgment 434 U.S. 357, 1978, at WWW http://supreme.justia.com/cases/federal/us/434/357/case.html > (accessed on 31 March 2015.

[28] Vinegard Alan, Department's New Charging, Plea Bargaining and Sentencing Policy, New York Law Journal, Vol. 243- No.110, 2010, at 2.

[29] McCoy, Supra note 7, at 8.

[30] Ibid, at 7.

[31] Ibid.

defendant has pleaded guilty, after negotiation, he is assumed "blameworthy".[32] This perspective includes that the defendant is remorseful while he is pleading guilty. Such justification assumes that it is out of his own free will to repent to the crime committed and believes that he "deserves punishment" through pleading guilty. According to this view, there shall be leniency of penalty or framing a lesser charge and a chance to clean-up his sin on others as a reward for the defendant's willful repentance. If so, trial is meaningless while the defendant is sincerely willing to accept the punishment which is the goal of the extended trial.[33]

The utilitarian theory (justification) claims that plea bargaining is essential because of its greater good to save court time and money which outweighs the costs associated with the loss of due-process of rights.[34] It is claimed that plea-bargaining is most efficient and expeditious type of criminal justice system.[35] It is this economic analysis of law that dominates the argument in favor of plea bargaining. Posner propounded that judges "…should use economic principles to inform their decision-making" so as to enhance the "economic efficiency of the law".[36] According to him, a judge is a forward-looking "rule-maker," from the common law legal perspective, who should decide cases on the basis of the "most efficient outcome". "Efficiency," from the economic perspective of law, refers to "…the allocation of resources in which value is maximized … [or] resources are in the hands of those who

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Langbien, Supra note 2, at 261.
[36] Zywicki, Todd J. and Sanders, Anthony B., et al.,'Posner, Hayek & the Economic Analysis of Law.' Iowa Law Review, Vol. 93, No., 1, 2008, at 4.

value them most."[37] The concept 'value' is also understood to be 'measured by willingness and ability to pay.' According to utilitarianism, if parties in a negotiation are willing to consent to it, it is reasonable to assume that the bargaining process is to the interest of the parties to maximize values. Thus, the accused and the prosecutor, in a criminal case have incentives to avoid the uncertainties of litigation through the help of plea bargaining. Therefore, the uncertainty of the prosecutor to secure punishment, the high costs of the trial process and the public's expectation on high conviction rates are the utility factors pushing the parties to resort to plea bargaining.

Moreover, plea bargaining helps defendants avoid the risks of a heavier sentence which is probable after the full trial process as long as the prosecutor has enough evidence to prove the case.[38] It is also believed to help defendants reduce pre-trial detention and its associated injustices.[39] Accordingly, proponents argue that plea bargaining advances the interests of both the state and the defendant and promote efficiency.

Other utilitarian thinkers also argue that the concept of individual autonomy and freedom of contract should not be confined to the civil matters but can also serve in the settlement of disputes between the criminal defendant and a

[37] McGregor, Joan L., The Market Model of Plea Bargaining. Public Affairs Quarterly, Vol 6. N0. 4, 1992, at 386.
[38] Bordenkircher, Supra note 27. In this case the prosecutor offered to recommend a sentence of 5 years imprisonment in exchange for a guilty plea. But, he was convicted, after full trial, for life imprisonment for Hayes refused to plead guilty.
[39] Joseph, Supra note 1, at 3.

state.[40] This understanding of plea bargaining has been supported in the common law courts' practices. For instance, in the Hayes case the U.S. Supreme Court described plea bargaining as 'give and take negotiation…"'[41] The court considered plea bargaining as a contract by which parties to it (the prosecutor and the defendant) are free to bargain, and in this respect the parties are assumed to have equal bargaining power. In doing so, consquentialists argue, plea bargaining benefits the state to conserve its limited resources and facilitates the rehabilitation of defendants.[42]

Another influential theory, a variant of utilitarian theory, is the theories of tort liabilities developed in response to the industrial revolution which has made courts overburdened due to the law suits associated with industrial hazards and product liabilities.[43] Hence, plea bargaining has predominated the criminal justice system in the common law industrial states as it would have been unlikely for courts to process cases with the limited time and resources. In fact, a recent study by the World Bank also shows that various jurisdictions have recognized that the fair and timely disposition of cases is an important condition for economic development.[44]

As the system of plea bargaining abridges the criminal process, it undeniably alleviates the work load of judges, prosecutors and defense lawyers as well as

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[40] McGregor, Supra note 37, at 388.
[41] Bordenkircher, Supra note 27.
[42] The Law Reform Commission of Australia, The Use of Alternative Dispute Resolution in the Criminal Justice System, 2002, at WWW <http:// www.restorative>, justice.org>, (accessed on 25 January 2015).
[43] McCoy, Supra note 7, at 9.
[44] The World Bank, Comparative International Study of Court Performance Indicators: A descriptive and
Analytical Account, The World Bank, Washington, D.C, U.S.A, 1999, at 1.

reduces the time spent to dispose every criminal case and increases the elasticity of courts' services at least to those limited number of cases when a defendant insists to his trial rights.[45] The longer a case is pending in courts (inevitable in U.S. if every case is brought for full trial process), the greater the drain on the judicial resources.[46]

Plea bargaining also enables prosecutors to concentrate power and resources on those limited and high profile cases which enhance the effectiveness of the prosecution's office in achieving higher conviction rates.[47] That means the prosecutor avoids the risk of acquittal and saves trial resources which can be used in other cases so that settlement costs are lower while the trial costs are higher.

2.2. Pitfalls of Plea-Bargaining and the Underlying Factors

Despite the advantages of plea bargaining as discussed so far, numerous studies have criticized the use of plea bargaining in the criminal justice administration. Most of the criticisms are founded on the belief that plea bargaining is a result of coercion and it offers justice as a commodity subject to barter. Opponents argue that the process of plea bargaining is a "…forced association…" as the option of the defendant is either to accept the offer by the prosecutor or to wait for more severe punishment after a full trial process;

[45] ABA, Supra note 20, at 24.
[46] World Bank, Supra note 44.

[47] Lynch Timothy, the Case against Plea Bargaining.' Cato Institute, 2003 (note), at WWW <http://www.Jstore.org>, (accessed on10 December, 2015).

and the mere fact that such an option is offered never excludes duress.[48] In this regard, McCoy raised an interesting question of whether "…a confession [plea of guilty after bargaining can] really be voluntary if it is given to avoid harsher punishment that will accrue after trial."[49] Indeed, it is inappropriate to extend the application of a contract theory to a situation where a powerful state is negotiating with the powerless individual. McGregor also identified that the disparity between what the state and the defendant would lose as a result of refusal to enter into plea-bargaining are incomparable. Because the defendant may lose his fundamental freedoms to the extent of loss of life while the prosecutor would loss nothing in "comparative value".[50] According to him, the prosecutor is conferred with an 'unfair bargaining advantage' over the defendant as a result of which the defendant would never have equal bargaining position with the prosecutor.

The administrative theory of plea bargaining also supports the above assertion that plea bargaining is not a real consensual result of a defendant with the prosecutor. It is rather the prosecutor who "dictates the terms of the plea agreement" that the prosecutor, who unilaterally determines the extent of blameworthiness and the "appropriate" punishment for it.[51] According to Dervan, the practice of plea bargaining is similar to shopping for a commodity from a supermarket but with no freedom to search for a lower price than to accept the only leniency offered by the prosecutor to escape

[48] Klein, Richard, Due Process Denied: Judicial Coercion in the Plea Bargaining Process, Hofstra Law Review, Vol.32 No.1349, 2004, at 1352.
[49] McCoy, Supra note 7, at 8.
[50] McGregor, Supra note 37, at 394.
[51] Dervan, Lucien E., The Surprising Lessons from Plea Bargaining in the Shadow of Terror, Georgia State University Law Review: Vol. 27: No. 2, 2010, at 9.

from the harsh sentence.[52] It is true that the leniency offered by the prosecutor is a payment to the defendant to induce him not to go to trial. Moreover, the current practice of plea bargaining is considered as a 'refined version of torture' by which the defendant is induced to waive the complex and expensive trial rights to which Langbien equates with the medieval European law of torture.[53]

The desire and practice of a state to reduce the cost of trial may also lead to inaccurate outcomes regarding wrongful convictions which may, in fact, make the system cost efficient but at the expense of innocent persons' interest.[54] It is clear that the evidence a public prosecutor alleges to have against the innocent defendants is always weaker when compared to the evidence to be presented against the truly guilty defendant. Thus, such weaker evidence urges the prosecutor to offer more elaborate incentives to the innocent defendants which in turn induces him/her to plead guilty.[55] That is the reason plea-bargaining can result in wrongful conviction as both the prosecutor and the defendant are not sure as to the outcome of the trial.[56] The acts of prosecutors may result in unwelcoming consequences on the justice system. On the one hand, wrongful conviction in itself is unjust which counters the very purpose of criminal justice system. It also counters the

[52] Ibid, at 11.
[53] Langbien, Supra note 2, at 13.
[54] Klien, Supra note 48, at 7.
[55] McGregor, Supra note 37, at 393.
[56] Joseph J. Senna, and Larry J. Siegel., Introduction to Criminal Justice, 9th edition, Wadsworth, Washington DC, USA, 2002, p.135, (hereinafter Joseph J. Senna, and Larry J. Siegel, Introduction to Criminal Justice)

whole purpose of the theories of punishments as the wrongfully convicted persons are being punished without mental culpability. On the other hand, if a system puts the innocent person in its custody, the truly guilty person is left free and perhaps committing more crimes and also may be encouraged by the thought that the criminal justice system is too inefficient to apprehend him. In such instances, both the wrongfully convicted and the truly guilty person would develop distrust on the criminal justice system.

Furthermore, studies also found that legislatures who are aware of the practice of plea bargaining incline to assign an undeserving or heavier penalty to a crime.[57] A defendant who demands his or her trial rights may encounter more severe and disproportionate punishment after being convicted.

Another inevitable downside, somehow similar to the above one, at least in effect, of plea bargaining is sentencing disparity between/among similarly situated defendants who differ only in the willingness or refusal to enter into plea bargaining. In this regard, chief judge William G. Yong described that plea bargaining results "…stark, brutal and incontrovertible… sentencing disparity of about 500%" between similarly situated persons but one entered into plea negotiation and the other demands his due process rights.[58] Timothy Lynch, similarly, argued that such sentencing disparity is a form of retaliation by a state against defendants who demand their constitutional rights. This is, therefore, a clear case of psychological coercion which makes the system of plea bargaining undesirable. Analogizing such sentencing disparity with the

[57] McGregor, Supra note 37, at 390.
58 Lynch, Supra note 47.

medieval continental torture system,[59] Langbien described it as "…limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind; hence, plea bargaining, like torture, is coercive."[60]

Even the lenient sentence that may be offered by a prosecutor is always below the level of the deserved penalty to which the legislature is supposed to stipulate. In principle, the prosecutor is duty bound to make the outcome "just" by ensuring that the defendant receives a sentence that "appropriately reflects the seriousness of the offense."[61] However, practically speaking "…only when improper bargaining tactics are employed by the prosecutor to secure a guilty plea can a proper sentence be meted out."[62] Here, if the prosecutor is lying to make the sentence proper, the act prejudices the interest of the defendant and it becomes injustice. On the other hand, if he does not employ such improper methods of persuasion, the system fails to impose a deserved punishment against the defendant. This is the greatest evil of the economic analysis of criminal law in general and the utility perception of plea bargaining in particular.

[59] Langbien John H., Torture and Plea Bargaining, The University of Chicago Law Review, Vol. 46, No. 1, 1978, at 12. He analyzed the medieval history of Europe when torture was legally administered to procure confession which he analogized it with the current practice of plea bargaining.
[60] Langbien, Supra note 2, at 13.
[61] Hails, Judy, Criminal Procedure, 3rd edition, Copper house Publishing Company, Boston, United States of America, 2003, at 17, (hereinafter Hails, Criminal Procedure)
[62] McGregor, Supra note 37, at 390.

It can also be argued that interests protected under the criminal and civil law vary due to the nature of those interests and their respective sanctions. As far as their basic difference is concerned, Hart describes that "[t]he core of the difference between a confined mental patient and an imprisoned convict" is that the patient has not incurred the moral condemnation of his community, whereas the convict has.'[63] It is true that every criminal act contemplates the moral judgment of the general public. Social condemnation refers to "[d]eciding that particular actions should be criminally punishable is an act of collective moral judgment and condemnation."[64] Thus, theories of punishments are important guidance to those stakeholders in charge of enforcing the criminal law thereby achieving its purpose. A criminal law has its own objectives, the realization of which requires the adherence of those governing principles of criminal law. The principle of legality, in this case, is not in line with the nature of plea-bargaining. It is because the principle requires a state for advance specification of crimes and the corresponding penalties to which a potential criminal shall take notice of it. [65] In doing so, most criminal laws aim to prevent crime through deterrence by means of notifying the probable consequences. If such purpose fails, it also justifies in making offenders answerable for their acts by imposing proportional punishment to the crime committed which is already notified to him.[66] But, if

[63] Langbien, Supra note 2, at16.

[64] Andrew Ashworth, Conceptions of Over criminalization, Ohio state journal of criminal law, Vol.5, No. 408, 2008.

[65] Wetsen, Peter. Two Rules of Legality in Criminal Law, Law and Philosophy, Springier, Vol. 26, No.3, 2007, at 236-238.

[66] See e.g., Federal Criminal Code, Proc. No. 414/2004, Fed. Neg. Gaz, 2004. The preamble part and Article 1 of the 2004 FDRE Criminal Code stipulates its aim of preventing crimes both by notifying crimes and corresponding penalties to potential offenders and by imposing proper punishment to those who transgressed the law.

the murderer is convicted for wounding, or the thief for attempt or a rapist for battery, the purposes of the principles of legality, particularly the purpose of advance notice, remain meaningless.

The very purpose of a state to induce/coerce a defendant either through leniency (peaceful means) or through a threat of a highly disparate sentence is to realize the defendant's waiver of his constitutional rights.[67] Many ask whether coercing defendants to waive their due process rights is just to the state. The defendant "has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury[judge] through its own resources….the defendant has a fundamental right to remain silent, in effect challenging the State at every point to 'Prove it!'"[68]

The defendant who entered into plea negotiation is also denied of the right to confront prosecution evidences. In general, all the constituent fair trial rights of a defendant are denied due to the practice of plea bargaining. Above all, the right of public trial by an impartial tribunal is lost through the process of plea bargaining. As far as the due process rights are concerned, scholars have defended the practice of plea bargaining by arguing that there are good reasons by which contractual freedoms must be restricted. To this effect, they maintain that those inalienable rights cannot be bought or sold and it is not

[67] Lynch, Supra note 47.
[68] Ibid.

legitimate for a state to buy the inalienable rights of individuals as "voluntary slavery contract" is a prohibited act.[69]

Interestingly, the very nature of plea bargaining and the receiving countries' legal culture, the value choices of the society as well as the state of criminal justice administration are also important as far as plea bargaining is concerned. Similarly, the level of development of rule of law and the state of corruption in the criminal justice administration including the perception and trust of the public towards the same are also crucial concerns.

As is pointed out above, every criminal act contemplates the moral judgment of the general public. According to Hickman, "…deciding that particular actions should be criminally punishable is an act of collective moral judgment and condemnation."[70] To the contrary, plea bargaining is a clandestine and private negotiation between the offender and the prosecution so that charges may be altered, a numbers of counts or facts, possibly the most relevant part that determines the seriousness of a crime, may be dropped in exchange for the plea deal. A charge containing a strong negative label may even be altered to a more socially acceptable one in exchange for the plea bargaining.[71] Consequently, a dangerous offender may be sentenced, after some of the charges or counts are dropped and some important facts are disregarded, to the most lenient or disproportionate penalty. Such negative effects of plea bargaining would be problematic where public legal literacy is very low and the value for the "truth" during criminal proceeding and public condemnation

[69] Ibid.
[70] Andrew, Supra note 64.
[71] Josep J Senna and Larry J. Siegel, Supra note 56, at 350-351.

of crime is very high. It further erodes the public confidence when the offender is given favors, in the process of plea bargaining, for his/her misdeed against the public interest for the mere fact that s/he entered to plea bargaining .

Another disadvantage of plea bargaining is related to the transparency and corruption or perceived corruption in the administration of criminal justice. Although lack of transparency is a problem in criminal justice administrations in general, "it is also of particular importance when it comes to plea bargaining."[72] Plea bargaining is an informal negotiation behind closed doors and with little transparency. Alkon, in his study, identified that plea-bargaining carries the potential to change how the general public views the criminal justice administration and the legal system in general with a serious concern in countries struggling to establish the rule of law. He found that the informal negotiation during a plea deal "may look like another form of corruption in countries whose legal systems already suffer from endemic corruption and serious legitimacy problems."[73] According to him, plea-bargaining itself can also contribute to a public perception that the legal system is corrupt and that powerful people are not bound by the law. From the outside, this process may look like the same informal, extralegal practices

[72] Shivani Pal, Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals, University of Central Lancashire Publishing, Preston, England, 2013.

[73] Cynthia Alkon, Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems? 19 Transnational Law & Contemporary Problems, Vol. 19, No. 355, 2010, at 356-357.

in countries that are highly corrupt.[74] Thus, Alkon warned that countries with "troubled criminal justice" should abstain from importing plea bargaining. To him, a troubled criminal justice refers to a system where the judiciary is not independent or is widely perceived not to be independent; or a country suffers from endemic corruption and the public widely perceiving that government officials, including law enforcement personnel, act contrary to the law. [75]

3. Concerns and Lessons from Some National Systems

We have seen that plea bargaining is still controversial in the practical and theoretical spheres. Irrespective of the debates, some states which have already introduced the system, like the U.S., have relegated the due process rights to a secondary position for the mere fact that an accused waives the same. The U.S. Supreme Court admitted that "…for reasons of expediency American criminal justice cannot honor its promise of routine adversary criminal trial…"[76] To the contrary, some of the American states have abolished the system for its various downsides to the criminal justice system. However, other states which have adopted plea bargaining have been trying to maintain the concern of due process rights, the views of the public to crime and the search for truth as well as other contexts so that legitimacy is said to be maintained..[77] Some other states are yet at the stage of proposing the system of plea-bargaining as a policy alternative, such as Ethiopia.[78]

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[74] Ibid.
[75] Ibid, at 359.
[76] Langbien, Supra note 2, at 20.
[77] The Italy system of plea bargaining allows only sentence bargaining, and no explicit admission of guilt as they think that it undermines presumption of innocence and also allows

Legal reformers, who are determined to adopt plea-bargaining, can take valuable lessons from Langer's works on how some selected civil law countries "translated"[79] plea bargaining into their criminal justice system. Despite the fact that plea bargaining has been imported in many jurisdictions, the practice has not been simply "transplanted", instead it is "translated" into the "languages" of the respective criminal justice systems. Policy makers should take into account the importing states' prevailing social, economic, political and legal culture rather than to "copy and paste" the American system. This is what countries can take as lessons from Germany, Italy, France, and Argentina regarding how and why the system of plea -bargaining has transformed in such jurisdictions.

The system of plea-bargaining translated in each of these jurisdictions manifests "substantial differences from the American model, either because of decisions by the legal reformers in each jurisdiction or because of structural differences between American criminal procedure and the criminal procedures of the civil law tradition." [80] The reason is that such jurisdictions

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only the form of nolocontendere; In Germany, a judge should involve in the process and plea bargaining process does not avoid trial. See e.g., Langer, infra note 79, at 39 & 50 and 63.

[78] Ministry of Justice, The Comprehensive Criminal Justice Policy of the Federal Democratic Republic of Ethiopia. (Unpublished policy document), Addis Ababa, Ethiopia, 2011, at 35 & 36.

[79] Langer, Máximo, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure Plea Bargaining in Capital Cases, Harvard International Law Journal, Vol. 45, No 1, 2004, at 64. .According to him, the circulation of legal concepts from one jurisdiction to another jurisdiction requires translation by the legal reformers as the languages of importing country in terms of contexts and values are quite different certain than the exporting country of the concept. It is to mean that prevailing situations of a country to which a new legal rule is imported should not be overlooked.

[80] Langer, Supra note 79.

have "translated" plea-bargaining into the "languages" of their respective criminal justice systems is dictated by concerns of due process rights, difference in legal cultures between the exporting and importing countries and the countries' prevailing conditions and values. Langer, warned that if reformers fail to take into account the merits of "translation" in situations of legal circulation by simply confining oneself into the traditional metaphor of "transplantation," the imported system of plea-bargaining would act as a "Trojan horse that can potentially bring, concealed within it, the logic of the adversarial system to the inquisitorial one."[81] In Germany, a judge is an active player in the process of criminal proceeding to search for the truth. Such a role of a judge has been maintained even after the introduction of plea-bargaining into the system as the bargaining process has made it mandatory to involve a judge together with the prosecutor and the defendant. In doing so, the practice of plea-bargaining in Germany maintain legitimacy by checking the possible encroachment of the rights of defendants by the executive organ during the process of plea negotiation. Similarly, as a unique feature to the inquisitorial system, a confession by the defendant never terminates the trial process. Hence, legal reformers in Germany do not apply the practice of the American plea-bargaining to convict the defendant automatically after pleading guilty.

Not only has each of these jurisdictions adopted a version of plea-bargaining different from the American model, but also, the forms of plea bargaining each one of these jurisdictions has adopted are also different from one

[81] Ibid, at 38.

another.[82] This shows that how such jurisdictions are careful concerning their respective country's circumstance and the values of their communities.

Unlike the U.S. system, in Italy plea-bargaining is applicable only on those offenses entailing not more than seven years term of imprisonment and also not applicable on economic crimes, crimes entailing death penalty and crimes related to domestic violence and children.[83] This means, in most cases, plea-bargaining is limited to minor crimes – similar to the practice in most countries in the civil law traditions. Furthermore, like Italy, the only legally accepted type of plea bargaining in India is "nolocontendere," which does not amount admission believed to have taken into account the social and economic prevailing contexts conditions of the country.[84]

The very purpose of plea bargaining in Nigeria is found to have been undermining the crusade against corruption and has even resulted in more corruption. Many of corruption cases by higher officials end up with plea deals and consequently with substantially reduced and disproportionate terms of imprisonment or fines which benefit the criminals at the expense of the public interest in Nigeria.[85] The recent case on Cecilia Ibru, in 2010, the former Chief Executive Officer and Managing Director of Oceanic Bank, ended-up with a six month term of imprisonment for the whole of three

[82] Ibid, at 3.
[83] Joseph, Supra note 1, at 3.
[84] Ibid, at 2.
[85] Egwemi, Victor, Corruption and Corrupt Practices in Nigeria: An Agenda for Taming the Monster, Journal of Sustainable Development, Vol. 14 No. 3, at WWW <http://www.journals.iimu.edu>, (accessed on10 February 2015), p.82.

counts he pleaded guilty after the prosecution dropped 22 other corruption counts (a total of 25 counts). Similarly, in the case of John Yusuf who embezzled N27.2 billion, with two counts, he was sentenced to two years imprisonment or a fine of N750, 000.00, after pleading guilty that being the maximum punishment provided in the law. Serving a two year term of imprisonment or alternatively forfeiting N750, 000 is nothing for the public compared to the looting he did. Surprisingly, Lucky Igbinedion who was formerly charged with 191 corruption counts, after plea-bargaining, was charged with only one count charge of corruption so that he was sentenced for only six months imprisonment or alternatively N3.5m fine.

4. Overview of Plea-Bargaining in the Criminal Justice System of Ethiopia

The judicial and legal sectors of Ethiopia have been manifesting a variety of challenges.[86] This does not mean, however, that the country is doing nothing to reform the criminal justice administration. There have been reforms including conducting studies as well as legal and institutional improvements. In 2002, the Justice System Reform Program (JSRP) was established 'to assess the performance of justice institutions and to propose appropriate reforms.' Following the initiation by JSRP, comprehensive and substantial studies were conducted and many intertwined problems were identified concerning the justice system of the country in general and the criminal justice system in particular. Thus, three core problems in the Ethiopian justice system were identified: (1) the system was neither accessible nor

[86] Ministry of Capacity Building, Comprehensive Justice System Reform Program Baseline Study, (unpublished), Addis Ababa, Ethiopia, 2005.

responsive to the needs of the poor (2) serious abuse of power and political interference as well as serious corruption offenses exist, and (3) there is inadequate funding and meager resource allocation for the justice system.[87] The program made reforms in the justice system.

The Federal Government criminal justice administration business process was established as part of Business Process Re-engineering (BPR) so that important activities, actors and the time required for investigation, trial and decision were identified in 2010.[88] The BPR study suggested that there needs to be the system of plea-bargaining so as to overcome the identified problems. Accordingly, the first ever comprehensive criminal justice policy was introduced as a response to those problems and incorporates some recommendations from the prior studies. The policy is meant to foster "efficiency, expediency and fairness" in the slow and weak administration of the criminal justice system.[89] For this reason, the policy introduces alien concepts and processes among which the concept of plea bargaining[90] is of utmost importance. The policy states that every actor is interested to get a defendant admit his act. The policy stipulates that plea bargaining would reduce the number of criminal caseloads which would pass through the full process of the criminal proceeding and to lessen backlogs so that the criminal

[87]Vibhute K.I., Federal Democratic Republic of Ethiopia comprehensive Justice System Reform Program: Baseline study report, 6 US-China Law Review, Vol. 6, No. 8, 2009.
[88]Ministry of Justice, Criminal Justice Administration: Investigation, Litigation and Judgment, (unpublished BPR Study), Addis Ababa, Ethiopia, 2010.
[89] Supra note 78, See Section4.5.4.2.

[90] Ibid, See Section4.5.3.

justice administration will be effective and efficient.[91] It specifically states that plea bargaining, between a defendant and a prosecutor, shall be conducted to prosecute the defendant for a lesser charge, or to drop some of the charges or imposing lenient sentences or intentionally missing some of the facts or on all of them.[92] It also provides that the prosecution by no means continues in any court if the process of plea-bargaining ceases without achieving the intended result for any reason or if a court refuses to approve, for any reason, the plea agreement submitted to it.[93]

4.1 "Plea-Like" Procedures in the Various Laws of Ethiopia

To start with, the 1960 "obsolete" Criminal Procedure Code of Ethiopia,Articles 98 and Articles 132- 135 stipulate some sort of "pleas" of the accused. However, such "pleas" are referring to the accused person's formal response of "guilty" or "not guilty" to a criminal charge before the court. According to Article 132, the trial court to which the charge shall be submitted is required to ask the accused whether he is willing to admit or not to the court regarding the crime he is charged. It does not allow a prior agreement between the prosecutor and the defendant regarding certain promises/ benefit by the former and agreement of the latter to plead guilty. No chance for the accused to negotiate with the prosecutor and to know what benefit s/he will be granted in advance. The role of the court, in this case, is to use the plea of the accused as evidence to convict the accused and mitigate the penalty instead of ascertaining the prior agreement. [94] Though plea of

[91] Ibid, See Section4.5.4.1.
[92] Ibid, See Section4.5.4.2-D.
[93] Ibid, See Section4.5.4.2-E
[94] Criminal Procedure Code, 1961, Art 123, Proc 185/1961, Neg. Gaz. (Extraordinary Issue No. 1), year 32, No.1.

guilty may have a predisposition effect, "plea of guilty" under the Ethiopia criminal procedure code by no means is similar to plea-bargaining because none of the elements of the later are satisfied in those provisions.

Another area of law worthy of inquiry is article 8 of the anti-corruption Proclamation No. 881/2015. The law provides immunity to a co-offender who discloses "substantial" evidence concerning another co-offender. If so, the commission or the "appropriate organ" may offer to him/her immunity not to be prosecuted at all and such offer is required to be certified by those same organs. However, for enforceable plea -bargaining to exist, the defendant should have knowingly waived his trial right and agreed to plead guilty without coercion and after thorough negotiation that would enable the defendant know what advantage he would get.[95] Furthermore, no literature or practices recognize an agreement as a plea-bargaining if concluded between persons other than a prosecutor and a defendant (or his defense). It is also identified that "…unlike most contractual agreements, it [plea-bargaining] is not enforceable until a judge approves it."[96] A judge should effectively determine the factual basis of the agreement to protect the defendant's, the victim and the publics' interest.[97] It is upon the satisfaction of such bedrock elements that a plea-bargaining is said to be concluded and can be enforceable. The provision under discussion, of course, shows the possibility

[95] Scheb, John M., et al., Criminal Procedure, 4th edition, Wadsworth, Washington DC, United States of America. 2006, (hereinafter, Scheb, Criminal Procedure)
[96] Ibid.
[97]Starkweather, David A.,(nd) The Retributive Theory of 'Just Desserts' and Victim Participation in Plea Bargaining, Indiana Law Journal, Vol. 67, No. 3, at 869, at WWW http://www.repository.law.indiana.edu/ilj/vol67/iss3/9 , (accessed on23 April 2015).

where the person would be exempted from prosecution provided that s/he is willing to provide substantial evidence. But, with whom such person is required to enter into agreement is not clear. What if the defendant is required to negotiate with the Commissioner or head of the organization? The authority who is empowered to approve the agreement is also the Commissioner or the Head of the organization who offered immunity. The ascertainment and approval of the agreement by the court is lacking. This is against the elements of enforceable plea bargaining as there is no requirement of courts' approval of the deal to safeguard the rights of individuals from encroachment by the executive organ. Therefore, as far as the writer is concerned, the Anti-Corruption law does not satisfy those minimum elements of enforceable plea-bargaining.

In this regard, the practice of Pakistan in its Anti-Corruption law, which is the only law allowing plea-bargaining, stipulates that the agreement between the suspect and prosecutor/investigator should be endorsed by the National Accountability bureau and must be approved by the court to be enforceable.[98]

Another Law of the Country worth of assessment is the Anti-Terrorism proclamation No.652/ 2009 which allows mitigated punishment if the accused is willing, upon request by the prosecutor, to repent and cooperate according to the manner of the commission of the crime as well as the identities of other participating criminals. [99] However, the prosecutor is

[98] National Accountability Bureau, "The Plea-Bargain in Pakistan.", at WWW <http://www.icac.org.hk/newsl/issue14eng/button3.htm>, (accessed on3 May 2016).
[99] Anti-Terrorism Proclamation, 2009, Art 33, Proc No. 652/2009, Fed. Neg. Gaz, year 15, No.57.

not required to make sure whether the defendant is aware of the returns of his plea in advance so that willing to agree to disclose the facts of the case. The law simply guarantees the suspected person mitigation if he agrees to enter into plea deal.

4.2 Implications of Plea-Bargaining to the Criminal Justice Administration of Ethiopia

Unlike the adversarial system, the inquisitorial systems make identification of truth the concern of official investigation instead of a matter of parties' negotiation. Much literature claims that "criminal trials in civil law countries are often viewed as a truth-telling process and plea bargaining rarely contributes to a deeper understanding of the "truth" of the events of the crime itself, therefore, it may not fit well in a legal culture that looks to formal trial processes to determine the truth of the events underlying a criminal case."[100] This is true in the Ethiopian criminal justice system as the search for truth is given emphasis in the criminal proceedings. It is clear from the policy that fact bargaining allows defendants to plead guilty to only to some of the facts which substantially affects not only the ultimate penalty but also the search for truth.

Moreover, the FDRE Constitution is meant to further the due process aspect of the criminal justice administration i.e., determination of the truth, as the

[100] See International Network to Promote the Rule of Law (INPRL), Introducing Plea Bargaining into Post-Conflict Legal Systems, 2014, at WWW <http://www.inprol.org/system/files force/.../introducing_plea-bargaining_0.pdf?>, (accessed on 31 March 2015).

foundation of justice, in the events of a crime. According to Article 19, an arrested person have the right to remain silent and shall not be compelled to make confessions or admissions which could be used in evidence against that person so that any evidence obtained under coercion shall not be admissible.[101] Additionally, the constitution provides that a court shall ensure that the responsible law enforcement authorities carry out the investigation, in searching for the truth, respecting the arrested person's right to a speedy trial. This is a clear stand of the law towards truth and the due process rights. The due process rights are recent phenomenon in the Ethiopian criminal justice system. If the government "buys" these constitutional rights in return for the defendant's consent to plead guilty, it may deteriorate the hope of the individuals for the protection of human rights in the country. It is indicated above that plea bargaining may be viewed like coercion which induces a defendant to waive his constitutional rights. Investigating police officers and prosecutors may always focus on inducing a defendant to plead guilty instead of diligently investigating crimes. The nature of plea bargaining, therefore, would make the fundamental due process rights futile.

Furthermore, pursuant to Article 20, accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged and they have the right to be informed with sufficient particulars of the charge brought against them. Interestingly, they have the right to be presumed innocent until proved guilty as well as not to be compelled to testify against themselves. As explained above, letting an accused to choose either lenient sentence or stricter penalty for the fact that

[101] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art 9, Proc. No. 1/1995, Fed. Neg. Gaz, year 1, No.1.

the defendant insists on constitutional due process guarantees an amount of coercion, and if so, coercing an accused to plead guilty is contrary to the due process rights of an accused which may also result in wrongful conviction.

A similar emphasis is also given, in many provisions of the FDRE Constitution, to the detection, apprehension, prosecution, and punishment of offenders so as to promote public security. In doing so, the constitution tries to balance the interest of arrested/accused persons and the public in general. Such constitutionally guarantees interests may be affected by the process of plea bargaining as dropping of some of the charges or prosecuting a defendant with a lesser crime than the facts testifies or/and intentionally missing some of the facts of a crime is contrary to such constitutional guaranteed interests of the public. Furthermore, imposing disproportionate and more lenient sentence for a serious crime is contrary to the very interest of public order and security. The private negotiation between prosecutor and the defendant may not balance the interest of the community with the defendant so that the public may believe that the prosecutor is not representing the community and justice is not achieved.[102] What the public might feel if the negotiation does not reach to an agreement, for any reason, is that it is not effective and the suspect is set free as provided in the policy despite that there exists sufficient facts to which the public knows. This is a clear instance of causing insecurity to the public which may also encourage citizens to break laws. There is also a concern that plea bargaining defeats

[102] Jay S. Albanese, Criminal Justice, 3rd edition, Pearson Education, Inc. United States of America, 2005, pp 332 & 339, (hereinafter Jay, Criminal Justice)

the essence of the constitutional duty of the state to prove each ingredient of a crime.

The implication of plea-bargaining shall also be seen in relation to corruption. Transparency International reported that corruption is a problem for every country, though may vary in terms of magnitude.[103] The same organization, in its 2014 published annual corruption index, reported that Sub-Saharan African countries have been suffering from severe corruption crimes.[104]

Ethiopia has been striving to tackle corruption by providing legal and institutional frameworks such as the establishment of the Federal and Regional Anti-Corruption Commissions and the laws criminalizing corruption. Measures have also been started against corrupt officials or individuals as well as organizations. Yet, the effectiveness of the crusade against corruption remains to have been ineffective. For instance, the Office of Global Financial Integrity (GFI) reported that the amount of money that Ethiopia lost to smuggling of cash out of the country, both by the government and private sector between 2001 and 2010, was worth of 16.5 billion US dollars.[105] Similarly, according to Transparency International, 44% of surveyed respondents in Ethiopia, who had come into contact with one of the surveyed public service institutions, paid bribes.[106] A recent report by the same organization also reported that Ethiopia ranks 110 out of 175 surveyed

[103] See. e.g., Transparency International, Corruption Perceptions Index, at WWW <http://cpi.transparency.org/cpi2013/>, (accessed on 3 December 2014).
[104] Ibid.
[105] "How big is Corruption in Ethiopia?" Tadias Magazine, May 13th, 2013.
[106] Transparency International, Supra note 103.

countries.[107] The report, in fact, indicated improvements compared to the previous records though some have challenged this stand as the level of corruption in the country is still serious.[108]

The impact of corruption particularly in the criminal justice administration undermines not only the peaceful resolution of conflicts but also destabilizes the control of corruption in other sectors and makes the rule of law futile.[109] The World Bank added that many judges and court officials were taking advantage of the procedural deficiencies to the point that, in terms of probity, more corruption occurs then than before 1991 in Ethiopia. [110] The FDRE comprehensive justice system reform program baseline study also identified that there was serious corruption offenses.[111] Recent studies similarly reported that corruption in the administration of justice is still rampant even after the justice reform programs since 2002.[112]

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[107] Ibid.

[108] Ibid, the report clearly states that countries scoring less than 50 out of 100, about 70 percent countries, are perceived to have serious corruption problems. As Ethiopia scores 33, it is one among those countries which are perceived to have serious corruption.

[109]Gloppen Siri, Courts, Corruption and Judicial Independence, at WWW <http://www.cmi.no/publications/publication/?5091=courts-corruption-and-judicial-independence> ; See also Plummer, Janelle, Diagnosing Corruption in Ethiopia: Perceptions, Realities, and the Way Forward for Key Sectors, in Plummer Janelle, (ed), Justice Sector Corruption in Ethiopia, The World Bank, Washington DC, USA, 2012, at WWW <http://www.worldbank.org.>, (accessed on15 February 2015).

[110] World Bank, Ethiopia Anti-Corruption Report, 6, site resources.world bank.org/CFPEXT/.../ETHIOPIA Justice_Ireland.pdf/.

[111] Vibhute, Supra note 87, at 36.

[112] In 2002, the Government of Ethiopia established, under the authority of the FDRE Ministry of Capacity

The Ministry of Justice and Justice Bureaus, in 2010, confirmed that criminal investigation, by the police and the public prosecutor, was not effectively undertaken and disciplinary problems in prosecution process remains widespread.[113] According to the report, the most common form of corruption involves bribes solicited by or offered to police to ignore a criminal offense, not to make an arrest, or not to bring witnesses or suspects to court.[114]

The private negotiation between a suspected individual and a prosecution makes the criminal justice administration vulnerable for abuse in the context of already existing corrupt practices. It also looks like defendants are negotiating their way out of criminal responsibility. Thus, introducing plea bargaining in Ethiopia in the current state of corruption, though in majority of the cases are petty, in the justice administration may create the impression that plea bargaining allows defendants to "pay their way" out of jail or drastically reduce prison time or lesser charges. Studies identified that countries facing larger governance and rule of law deficits like corruption, poor respect for human rights, or lack of independence in the judiciary may find that plea bargaining reflects and amplifies these problems.[115] Thus, introducing plea bargaining in such situations in the criminal justice administration of Ethiopia may reinforce the existing corruption in the criminal justice administration.

Building, the Justice System Reform Program (JSRP) "to assess the performance of the various institutions of

justice and to propose appropriate reforms". The government has been doing lots of reforms though the perception of corruption and transparency is still very high.

[113] Ministry of Justice & Region Justice Bureaus (Justice Sectors), Five Years (2010/11-2014/15), Strategic Plan, 2010, at 24.

[114] Ibid.

[115] INTRL, Supra note 100, at 11.

It is undeniable that plea bargaining is important to get evidences which otherwise would be unlikely but through the help of a co-offender after plea negotiation. Yet, the informal negotiation between the prosecutor and the accused and consequently dropping of some of the charges or missing some facts of a case or granting disproportionate sentence may counter the crusade against corruption.

Another issue to be considered is the state of public confidence on the criminal justice administration. If a criminal justice system permits perpetrators to go unpunished, victims of crimes are denied access to justice and inequality would be amplified. This undermines good governance, fuels impunity, undercut the rule of law and ultimately erodes public trust.[116] Public trust may be lost also due to the low quality of criminal justice as a public service, the incapacity of legal institutions to exact retribution from offenders and expressively condemn crime, and the disparities in the administration of criminal justice.[117] It is claimed that "the justice system is one of those public institutions that inherently relies on public confidence…. the crisis of public confidence is almost as serious as a breakdown in the system itself…"[118] If the system is not trusted, people do not prefer to go to the justice institutions when they are injured so that crimes may continue to go unreported. Instead, people may get angry, cynical to the system and jaded of it as well as needlessly afraid of it. In

[116] Ibid.
[117] Wesly G.Skogan, cited in Jeffrey Fagan, Legitimacy and Criminal Justice, Ohio State Journal of Criminal Law, Vol. 6, No.123, 2008, at 124.
[118] INTRL, Supra note 100.

this regard, Harvey Sims identified that criminal justice system that has lost public trust is itself a lost system.[119]

Wandell found that there is very low public trust in the criminal justice system of Ethiopia.[120] Similarly, the Ministry of Justice BPR study indicates that the level of public trust on the criminal justice system is 33%.[121] The Ministry of Justice and Justice Bureaus also indicated that it has been impossible to ensure the interest of government and the public from crime threat so that the public feels a lack of credibility toward the justice administrations.[122] These examples show that the majority of the people do not have confidence in the justice system. The general public lacks confidence in the justice system because crimes are not properly investigated so that criminals are not brought to justice in return for bribes or other kinds of corruption or reluctance of the police and the prosecution. There is no room for the public, unlike the court trial, to observe while the accused agrees with the prosecutor.

The clandestine negotiation between the accused and the prosecutor may tempt them to get into some kind of unwanted negotiation or people may not trust such kinds of deals even though parties acted properly. Studies found that plea bargaining is vulnerable to abuse of power by the investigating

[119] Sims Harvey, Public Confidence in Government, and Government Service Delivery, at WWW < http://www.ginareinhardt.com/.../Public-Confidence-in-Government-and-Gove>, (accessed on 31 March, 2015).
[120] Rasmus Wandall, Trust, Law, and Functionality in Criminal Justice, at WWW <http://www.uib.no/prosjekt/srf/73199/trust-law-and-functionality-criminal-justice>, (accessed on 31 March 2015).
[121] Ministry of Justice, Criminal Justice Administration, Supra note 88.
[122] Ministry of Justice & Region Justice Bureaus, Supra note 113, at 26.

officers.[123] Prosecutors may concentrate on inducing suspected individuals rather than to properly investigate the crime which may backfire if plea bargaining is entered after proper investigation[124] so that the role of the public prosecutor may be under question. More importantly, prosecuting a criminal with less serious crime than what the fact manifests or dropping some of the charges or some of the counts as well as intentionally missing some facts of a crime make people to develop distrust towards the criminal justice system. If so, crimes may not be reported and self help could dominate the system. Thus, the informal nature of plea bargaining in such a state with low public trust in the criminal justice administration could have a serious impact on the overall perceptions of the legal system as it helps reinforce existing lack of trust in the criminal justice administration. Tyler found that people who distrust the justice institutions and their decisions are less likely to obey it.[125] While the police, the prosecution and the courts depend heavily on the voluntary cooperation of citizens to fight crime, a decline in public trust and confidence would undermine such cooperation so that law breaking could worsen.

An interesting issue that shall be considered while talking about plea bargaining is the tendency of the general public towards customary justice systems. As pointed out above, the formal justice sector has been viewed as corrupt, as removed from local sensibilities and solutions, and as failing to

[123] Josep J. Senna & Larry J. Siegel, Supra note 56.
[124] Jay S. Albanese, supra not 102, at 332
[125] Tom Tyler, Why People Obey the Law, cited in Jeffrey Fagan, Legitimacy and Criminal Justice, Ohio State Journal of Criminal Law, 2006, Vol. 6, No. 123, at 126.

act due to chronic inefficiency. There has been deep rooted mistrust of the formal justice system in Ethiopia.[126] To the contrary, local customary justice system is considered as accessible, cost effective, appropriate and more trusted to the majority of the public. Thus, studies hold that if plea bargaining is introduced in a criminal justice system where there is low public confidence due to corruption or perceived corruption, the public view it, due to its very nature discussed so far, as another example of the failure of the formal justice system.[127] The International Network to Promote the Rule of Law (INPRL) warned that "…countries with a tradition of using customary justice processes for criminal cases may face additional challenges in adopting and implementing plea bargaining".[128]

Similarly, the study by Macfarlane indicated that the criminal justice system was highly inefficient as it took second place to informal systems in many parts of the country. Moreover, he found that most of the rural and village communities did not refer complaints to the police or prosecuting authorities, but preferred to deal the matter using traditional tribal processes.[129] Even in many parts of the country, neither the commission of crime is reported to the police nor are witnesses willing to testify against the offender due to strong attachment of the public with the customary justice system.[130] Thus, introducing plea bargaining in the formal criminal justice system of Ethiopia,

[126] Macfarlane Julie, Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System, Cardozo J. of Conflict Resolution, Vol. 8, No., 487, 2007, at 497.
[127] INPRL, Supra note 100, at 19.
[128] Ibid.
[129] Macfarlane, Supra 126, at 500.
[130] Jetu Edossa, Mediating Criminal Matters in Ethiopian Criminal Justice System: The Prospect of Restorative Justice System, Oromia Law Journal, Vol. 1, No. 99, 2012, at 125 .

where there is low public confidence and high inclination to the local customary criminal dispute resolution, would not only amplify the public's distrust towards the formal criminal justice administration but also amplify the existing state of low level of crime report. This is extremely counterproductive to the role of the formal criminal justice system at least in those serious crimes.

4.3. The Choice of Viable Solution to the Criminal Justice Problems in Ethiopia

The major reason that is always mentioned for plea-bargaining is in relation to its role to reduce caseloads and contributes to reduce backlogs so that enhance efficiency and effectiveness of the criminal justice administration. The same justification is clearly provided in the criminal justice policy of Ethiopia as far as the adoption of plea bargaining is concerned.[131] Based on the very nature of plea-bargaining as discussed so far, INPRL in its study warned that importing plea- bargaining may not remedy the criminal justice problem if case backlogs are due to delayed investigations, or lack of cooperation or meager resources allocation etc.[132] As reaffirmed in the policy, studies found that high backlogs of cases have been common in the criminal justice administration of Ethiopia.[133] Thus, the criminal justice administration remains to have been costly, ineffective and inefficient. However, this does not mean that the justice system is as it was. Studies have shown that improvements have been observed, especially when BPR

[131] CJP, Supra note 78.
[132] INPRL, Supra note 100, at 20.
[133] Ministry of Justice, Criminal Justice Administration, Supra note 88.

was introduced, in various aspects of the justice administration including from the perspective of time, cost, quality, accessibility etc.[134] However, the root causes to court backlogs is due to various factors; not necessarily and exclusively relating to court time shortage for trials. In fact, the writer is not dismissive of the real time shortage of court time for trial at least in some courts in Ethiopia. However, the problem of caseload and the consequent backlogs is, in majority of the cases, a function of various other factors. Even studies came up with a surprising finding that caseloads pressure is not a necessary factor for plea bargaining as courts with low case loads were found to have higher plea bargaining instances than courts with higher caseloads.[135] This is to mean that plea bargaining appears to come from other factors, at least partly, than caseloads. Studies, commissioned by the FDRE government or international research institutions, confirmed that case backlogs is the function of delayed investigations, weak institutional capacity and limited resource allocation. According to CJSRP baseline study, the response of the police, while ordered by the prosecutor for further investigation manifested prolonged delay to the extent of five years time span.[136] This is also confirmed in the Ministry of Justice BPR study that about four years and a month could take for investigation, trial and conviction a criminal.[137] There was, in practice, "…a permanent lack of PPS [Public Prosecutors] supervision over the police during the investigative process."[138] The study further reported that at the High Court and First

[134] Ibid.
[135] Jay, Supra note 124, at 332; and see also Joseph J. Senna and Laay J. Siegel.
[136] World Bank, Supra note 110, at 100.
[137] Ministry of Justice, Criminal Justice Administration, Supra note 88.
[138] World Bank, Supra note 110, at 100.

Instance Court levels, there were no formal communications and cooperation about problems of the criminal justice administration such as backlogs and the summoning of witnesses. Instead, it was reported that, the relations were often negative and lacking mutual respect.[139]

The Ministry of Justice five year strategic plan study document, even after considerable years and so many reforms, also admitted that criminal investigation, by the police and the public prosecutor, have not yet been effectively undertaken to meet deadlines of the standard time.[140] To believe that there is no real court time for trials resulting in case backlogs, there must be proper resource allocation and coordinated effort with in the criminal justice process so as to meet deadlines within the standard time. However, the study acknowledged that citizens used to spend on ample-time without responses to their cases owing to lack of cooperation among the justice organs, especially, the police and the prosecutors so that the number of cases discontinued due to the non appearance of the accused and witnesses before a court have been increasing so that inefficiency and ineffectiveness would come.[141] It added that the system designed to enable prosecutors work with police in collaboration is not sufficient. Additionally, failures of prosecutors to appropriately examine police files and prepare quality charges are important factors for inefficient criminal justice administration. The study document further makes clear that, for a long time, prosecutors' performance

[139] Ibid, at 99.
[140] Ministry of Justice & Region Justice Bureaus, Supra note 122, at 26.
[141] Ibid, at 26 and 24.

has been ineffective and inefficient.[142] Nonetheless, readers should note that the writer does not disregard the improvements particularly after BPR though the measures taken were not based on binding legal frameworks.

All these examples show that what exists as a problem in the criminal justice administration of Ethiopia is inefficient investigation, meager resource, and lack of cooperation among justice organs. Though there may be shortage of time for trials in some instances, this is not well supported by the aforementioned studies or may not be a significant problem, at least for the time being. Studies identified that even though plea bargaining was introduced in some jurisdictions as a means to lessen caseload, so many courts have practiced plea bargaining in the absence caseloads.[143] In this case, plea bargaining by no means is a solution to ease caseloads, instead the justice machineries may be encouraged not to handle their responsibility as diligently as possible or it may encourage the government to allocate the required resource and infrastructure. If so, other kinds of alternative way outs, with insignificant potential downsides, may be suitable to overcome the existing problems. Indeed, since recently substantial improvement on court backlogs in the criminal justice administration has been recorded wherever BPR and RTD (Real Time Dispatch) systems have been properly administered in the criminal justice administration of Ethiopia.[144] This

[142] Ibid, at 28.
[143] Josep J. Senna & Larry J. Siegel, Supra note 56
[144] Supra note 68: according to the report some Supreme Courts in five states in Ethiopia including Harari, Gambella, Tigray, Amhara and Benshangul and the state of case backlogs in High and First instance courts in Tigray, Amehara and Bensgangul Gumz did not have backlogs and have no cases pending longer than a year respectively owing to the introduction of BPR and RTD.

indicates the possibility to minimize or even avoid case backlogs in the criminal justice administration so that efficient and effective justice administration could be achieved without exposing the system for serious risks through plea bargaining.

If root causes of huge caseloads and backlogs are relating to the aforementioned problems, plea-bargaining can by no means be a solution to such critical problems. Importing plea-bargaining, in the context of diverse problems in the current Ethiopian criminal justice administration may backfire and destabilize the system. Langer, in his well known article, cautioned that legal reformers must carefully consider the situation and context of the receiving criminal justice administration and the legal cultures before introducing plea bargaining.[145] He suggested that careful analysis concerning both the original and receiving legal systems must be made. According to him, plea-bargaining may potentially act as a Trojan horse by bringing the logic of a foreign system concealed within it to the receiving system may be quite different from the former one in various aspects.[146] The power relations among justice organs, the societal conception of crime, the criminal justice administration, and the overall value choices is quite different in Ethiopia from America where plea-bargaining was originated and developed. Thus, in addition to being not a real solution to the problems, introducing plea bargaining in the FDRE criminal justice system may counter, with unbearable social consequences, everything relating to the

[145] Langer, Supra note 79, at 30.
[146] Ibid, at 38.

criminal justice administration. However, it may be possible to apply plea bargaining at least to minor crimes which may help the prosecutor to concentrate energy and resource on serious crimes and where the negative effect of the system may not be as such significant.

Conclusion

The policy of plea bargaining allows the prosecutor to prosecute defendants with less serious charges or may drop some of the charges or may intentionally miss some of the facts as well as to guarantee with the defendant more lenient sentence. The policy urges the legislature to amend the existing laws in order to incorporate plea bargaining into the upcoming draft criminal procedure code.

Letting defendants negotiate with the prosecutor to waive constitutionally protected due process rights is not proper to the government and would be against the various rights of accused persons including the right to presumption of innocence, the right to public trial, and prohibition against self incrimination. Furthermore, prosecuting a criminal for a lesser charge while the facts support for more serious crime in return for a plea negotiation, such as homicide for bodily injury or rape for assault is quite against the principle of legality. This also hinders the societal role of condemning a criminal act and culpability. Interestingly, the improportionality of the seriousness of a crime and the corresponding penalty, after plea bargaining, is an instance of deterrence and may serve as a breeding ground for repeat offenders. It may also cause a public to be cynical to the formal justice system as such more lenient and disproportionate sentence disregards the just

desert function of punishment and such lenient sentence is a result of informal negotiation between a defendant or his counsel and the prosecutor.

That is the reason why many empirical studies have warned governments to be careful for the potentially negative outcomes of plea bargaining to the existing administration of justice. Principally, plea bargaining, by its nature, should not be taken as a proper solution to the problem of caseloads and the consequent backlogs in the Ethiopian criminal justice administration in the face of corruption or perceived corruption within the sector and in the state of very low public confidence on the same. In addition, the general public has a trend to resort to customary criminal dispute which is highly incompatible with the nature of plea bargaining. Needless to say, the problem of efficiency and effectiveness in the criminal justice administration is mainly due to lack of proper investigation of crimes, lack of coordination among the justice machineries and meager resource and inadequate infrastructure. Moreover, problems relating to poor case management, poor resource allocation, lack of integrity within the justice organs and executive interference might have resulted in the existing caseloads. Shortage of time for court trial is not a significant problem at least for the time being. It is likely to have effective and efficient criminal justice system if concerted efforts will be excreted to improve the aforementioned root causes of inefficient justice administration together with restorative justice on some kinds of crimes. Allowing informal negotiation between the accused and the prosecutor and letting the suspect free if the negotiation is not ended with agreement would push the public to insist on customary justice systems in which there may be a possibility of

achieving retribution through forgiving the perpetrator or if it fails self-help may take the system away. Therefore, the writer suggests that plea bargaining is not a viable option for Ethiopia at least for the time. If legislatures insist on it, it must be limited to minor crimes which must also be made after thorough public discussion.