

A Comparative Analysis of Plea Bargaining and the Subsequent Tensions with an Effective and Fair Legal Defence

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Abstract

If we do not maintain justice, justice will not maintain us. - Francis
Bacon

This PhD thesis explores the various conceptualisations of the right to a fair trial. This thesis focuses on the right to a fair trial and more specifically on Article 6 (3) (c) of the European Convention on Human Rights which relates to the right to have counsel and representation at all stages of the trial. A central theoretical basis for this thesis is that the concept of what constitutes equality of arms is at a cross roads in the European legal tradition and it is by drawing on the experiences of other jurisdictions we might draw closer to understanding of this concept. Certain European States have better incorporated a system whereby access to legal representation is safeguarded. The thesis will also discuss other relevant instruments which serve to protect and uphold the right to a fair trial within their own jurisdictions as a means of comparative analysis. It will be asserted that practices which have developed so far as a means by which to secure a fair trial, if not appropriately handled will actually serve to undermine the sanctity of the right to a fair trial, the very thing that they are suppose to be upholding. One such practice which will form the basis of the comparative research of this paper is plea bargaining and its derivatives in Europe. The practice of plea bargaining challenges the very premise of the trial; which is to find the truth and see justice done. This thesis proposes to examine the tensions between the state and the defendant when it comes to the protection of defendant's fair trial rights. This was achieved employing both a normative and comparative approach to the subject. The normative methodology provided the basis from which the comparative approach was adopted. The comparative methodology took into consideration not only the legal principles which have developed with regards to plea bargaining but also considered the appropriateness of translations and transplants. The divergent implementations will be looked at in the wider European context as to what mechanisms have been put in place such as the European Union Stockholm

Programme (2009-2014) and its Roadmap which are being used as the vehicle by which to regain the ground lost to defendants right to legal representation.

The thesis will also consider the relationship between plea bargaining and the principle of equality of arms. Equality of arms acts as a safeguard whereby we try to protect the defendant from being incarcerated from something they did not do and or becoming the victim of a miscarriage of procedural justice. The ECtHR has established a two-stage test, the appearance test and the substantial disadvantage test, for assessing the adherence of the principle of equality of arms. Equality of arms establishes that access to a lawyer is an integral element of the right to a fair trial. The other two elements of an effective defence and participation are where the member states are becoming unstuck with regards to the practical application of the ECHR and the ECtHR's decisions. This PhD thesis will argue that we have a legal system which is outdated as compared to our now modernistic views of what constitutes truth. If this is the case then how or should the justice system adapt its pretence of pursuing the truth when it so clearly does not do this when employing alternatives to justice such as plea bargaining.

It is increasingly evident from the emerging case law of the ECtHR that the ECHR does not cover all aspects of effective criminal defence. This results in varying practices across the different member states. In the countries examined in this thesis there are shortcomings when it comes to ensuring an effective defence for the defendant. In addition to these discrepancies between the spirit of the ECHR and its application there have also developed other limitations on the effective criminal defence. Tactics have developed which are employed to emphasis the efficiency of the trial at the expense of the defendant's procedural safeguards or the use of pre-trial detention as a mechanism by which to secure an admission of guilt.

The ECtHR has addressed the issue of plea bargaining in terms of causing possible violation of the ECHR for the applicant rather than the content, matter and practice of plea bargaining .

Despite the evident positives for both sides engaging in this practice there still remain numerous pitfalls. The most evident concern is that innocent defendants will plead guilty to a crime they did not commit.

The thesis will conclude that the abrogation of the right to an effective and fair legal defense is an endemic issue which is rife not only throughout Europe but also in America. This practice also erodes the fundamental principle that trials as well as

the administration of justice ought to be public. Related pitfalls are that the bargain serves to reduce the impact of deterrence when the litigation moves from a question of whether to one of how much time the defendant should get in the particular circumstances. As will be noted below in the case analysis of plea bargaining the very term 'bargain' can provide an unhelpful impression. The reason for this is that the term does not reflect the unequal bargaining position of the defence and the prosecution.

Contents

1	Research Methodology	1
1.1	The Research Question	1
1.1.1	Positioning of the research	2
1.1.2	Purpose of the research	3
1.1.3	Research design and Methodology of the research	8
1.1.4	Structure of the thesis	9
2	Fairness: The Right to a Fair Trial	12
2.1	The Right to a Fair Trial	12
2.2	Fairness	18
2.3	Due Process	21
2.3.1	Packer's Criminal procedure models	25
2.4	The historical origins of the criminal procedural process	30
2.5	A Theory of Justice	35
2.6	Rights for all?	39
3	Equality of Arms	45
3.1	Equality of Arms	51
3.2	The development of the principle of equality of arms in Europe	53
3.3	The meaning of equality within equality of arms	55
3.4	The Belgian Cases: development of the equality of arms principle	59
3.4.1	Jespers v. Belgium: case analysis	60
3.4.2	Lamy v. Belgium: case analysis	62
3.5	Equality of arms in the U. K.	62
3.6	The U. S. situation: The development of equality of arms	65
3.7	Equality of arms in Germany	69
3.8	Italy's development of the principle of equality of arms	71
3.9	Hungary and the development of the principle of equality of arms	74

3.10	Serbian approaches to the principle of equality of arms	77
3.11	Concluding thoughts	79
4	Access to Justice	90
4.1	Defining access to justice in light of the Salduz v Turkey decision . . .	95
4.1.1	The right to assistance of counsel	100
4.1.2	The two stage test of waiver	103
4.2	Legal Aid	106
4.2.1	The right to counsel in the U. S.	109
4.2.2	Access to counsel and Legal Aid in the United Kingdom . . .	115
4.3	Case studies: Hungary and Serbia	120
4.3.1	Serbia	120
4.3.2	Hungary	125
4.4	Summary and Conclusions	128
5	Plea Bargaining: the pursuit of justice?	131
5.1	The presumption of innocence	140
5.2	Conclusion: Calling your bluff	151
6	Plea Bargaining: the Benefits as well as the Pitfalls	157
6.1	Defining plea bargaining	157
6.2	The Development of Plea Bargaining in the United Kingdom	161
6.3	The United Kingdom's Sentencing Guidelines.	165
6.4	The Development of Plea Bargaining in the United States of America	166
6.4.1	Strickland v Washington (466 U.S. 668 (1984))	174
6.4.2	Hill v Lockhart (474 U.S. 52 (1985))	176
6.4.3	Padilla v Kentucky (No. 08-651 (U.S. Mar. 31, 2010)	178
6.4.4	Missouri v Frye (No. 10-444 (U.S. Mar. 21, 2012))	179
6.4.5	Lafler v Cooper (No. 10-209 (U.S. Mar. 21, 2012))	183
6.4.6	Burt v Titlow (12-414 U.S. 6th Cir. OT 2013)	186
6.4.7	Summary of US cases	188
6.5	The European development of Plea Bargaining	189
6.5.1	Germany	193
6.5.2	Italy	207
6.5.3	Hungary	212
6.5.4	Serbia	218

6.6	Plea Bargaining in the ECtHR case law	222
6.6.1	Deweert v. Belgium (Application number 6903/75)	224
6.7	More pitfalls than benefits	230
7	Conclusions and recommendations	234
7.0.1	What constitutes a fair trial?	234
7.0.2	What safeguards are in place to protect the defendant's right to a fair trial?	236
7.0.3	What are those structures/practices which act as barriers to access to justice?	237
7.0.4	Does the expedited form of justice that plea bargaining offers, require a reconceptualisation of the right to a fair trial?	238
7.0.5	What is the role of plea bargaining within the modern trial? .	239
7.1	Recommendations: The Way Forward and Beyond	242
	Bibliography	247
	List of Cases	257
	List of ECtHR Cases	260

1 Research Methodology

1.1 The Research Question

The right to a fair trial and the practice of plea bargaining have, as of yet, to be discussed together. The academic literature has focused predominantly on each issue in isolation and thus the aim of the thesis is to fill this gap in the academic research of this field.

The comparative research approach seeks to draw parallels and contrasts between two similar or competing systems of thought, among several cultures or within cross-cultural societies. Comparative research methodology is carried out by using a variety of tools, including surveys, personal observation and analysis of national data and is useful for classifying shared social phenomena; placing cultural values in context and analysing cultural differences. The comparative approach was used in this thesis to research the practice of plea bargaining. An examination of the constitutional practices and case law of the selected countries from a comparative perspective shed a helpful and new light upon this topic. By analysing the case law of the countries concerned, it is possible to glean a picture of the practical interpretation of the right to a fair trial within the context of the practice of plea bargaining.

This thesis argues that the current focus of the international debate concerning the right to a fair trial and access to justice has overlooked the role of alternative practices to justice which are not necessarily institutional barriers.

The recent initiatives of the European Union in its Stockholm Programme and Roadmap, which includes a proposal for a directive on the presumption of innocence (which has far reaching implications for the practice of plea bargaining), present an important opportunity to consider the impact of the intense trend towards a prosecution-heavy armoury of the right to a fair trial. The historical development

of plea bargaining and its relationship with the right to a fair trial and access to justice will be considered within this context.

The following general research questions are an important aspect of this research and will act as signposts for the thesis. These research questions are:

1. What constitutes a fair trial?
2. What safeguards are in place to protect the defendant's right to a fair trial?
3. What are those structures/practices which act as a barriers to access to justice?
4. Does the expedited form of justice that plea bargaining offers, require a reconceptualisation of the right to a fair trial?
5. What is the role of plea bargaining within the modern trial?

These questions will assist with the unpacking of the fundamental legal concepts such as the principle of equality of arms; due process and the presumption of innocence and truth. They will also help to show that there is a lack in knowledge concerning the implementation, implications and instruction of plea bargaining.

In raising these questions it is hoped that a new understanding can be forged of the meaning of access to justice and effective defence within the context of the plea bargaining culture.

1.1.1 Positioning of the research

The current research is conducted against the backdrop of the economic recession which has far reaching global ramifications for justice. The justice system cannot escape the ever-encroaching cuts to funding in the name of a more efficient and expedient trial process. Expediency and efficiency are not necessarily negative movements rather it is when they are applied in a wholesale short-sighted manner and with no consideration for procedural safeguards of the defendant that they become an issue. It is within this climate that the research of this thesis is conducted. Unfortunately, the defendant is usually the casualty of reforms from the analysis of the tensions between the state and the individual.

In order to answer the question "why is it necessary to address the phenomenon of plea bargaining with relation to access to justice?", it is first of all necessary to engage with "what is a fair trial". The practice of plea bargaining may seem to be

ill-fitted to a access to justice and fair trial discussion as plea bargaining should be expediting the process and circumventing the workload of court rather denying access to justice . It is for these very reasons that it is imperative to discuss plea bargaining in conjunction with the right to a legal defense because in principle it is not a bad technique but there is a strong need for regulation and establishment of further safeguards. The European Court of Human Rights has yet to hand down any definite guidance concerning the use of plea bargaining amongst the member states. This omission will form a central argument of this thesis leading us to question the basic premise of the right to a fair trial.

The aim of the thesis is to show that by comparatively examining legal systems, it became apparent that there are more similarities than differences. It is this thesis' hypothesis that the similarities were based upon the commonality amongst the member states in their violations of human rights rather than their protection. It was apparent that member states use the same rhetoric in justifying their violations. The countries that have all struggled with the same conflicting issues were chosen for the comparative analysis. Each of them have adopted diverging mechanisms to reconcile their systems with the protection of fundamental rights. It is these different mechanisms that provide the impetus for examining the defendant's fair trial rights. This became an area where there was the most similarity amongst the member states. A recurring theme amongst the Council of Europe member states was the treatment of the indigent defendant and their subsequent barriers to justice. This thesis will give an insight into the mechanisms which block access to justice as well as some suggestions for alternative solutions.

These issues were then expanded upon in the five chapters. Each chapter is a self contained expose into a related area of the debate into the plea bargaining practice.

1.1.2 Purpose of the research

This thesis seeks to show that there have developed alternative practices to the trial which are now calling into question and challenging pre-existing ideas of what constitutes a fair trial. The ability for one to waive their right to a trial and opt for a plea bargain requires the question "is it possible for a defendant to revoke their right to the protection of certain human rights" to be answered. This situation also calls to the fore the need for the approaches to justice to change as the face of justice

and access to justice evolve. This must happen to ensure that the defendant remains protected at all stages.

Plea bargaining is a controversial practice which has undeniably worked to help the trial to be more efficient and expedient. Despite this, there remain several concerns over its practice and its adoption in several of the member states. The introduction of this predominantly Anglo-American model into continental Europe has not been without its difficulties. Its incorporation has once more highlighted the severe discrepancies between the member states in their procedural and constitutional guarantees of fair trial rights as well as the safeguards that they have in place to ensure that the defendant's rights are upheld. Within the Anglo-American context of the practice of plea bargaining, there have been several notable cases which have concerned the plight of the indigent defendant.

When conducting case law analysis, it quickly becomes apparent that the effects of the poverty gap become more pronounced when entering the legal and access to justice arena. It is in this space that the true citizens, those who have and can exercise their human rights, are revealed. The indigent defendant in the plea bargain process are completely at the bequest of the prosecution. This situation creates a dichotomy whereby the indigent defendant is placed in a position which is disproportionate to that of their opponent and the state. In Europe, plea bargaining was, like the Anglo-American model, introduced through the back door and developed parallel to the trial. This parallel development led, in some cases, to the overlooking of some of the entitled safeguards due to the defendant. In some cases, this protection is completely disregarded.

Attention is also given to the role of the ECtHR and why until recent times, relatively little attention has been given to plea bargaining. In particular, the case of *Natasvlishvili and Togonidze v. Georgia*¹ is considered in the context of the overarching problems concerning the infringements of the safeguards of the defendant. The ECtHR has up, until now, had very limited case law jurisprudence on the practice of plea bargaining which can help to inform regarding its compatibility with Article 6 of the European Convention on Human Rights (ECHR). This omission will form a central argument of this thesis leading us to question whether, *Will a black belt in Jurisprudence be the best self-defence from the machinations of the Kafkaesque Community?* Plea bargaining is now becoming a defining feature of the criminal

¹Application No. 9043/05, Judgment, Strasbourg, 29 April 2014

procedure and the omission of addressing its far reaching effects upon the fair trial is at best remiss at worst devastating for the criminal defendant.

The basic premise of this paper is that a new era of trials is dawning which is driven by the internalisation of criminal justice systems. One of several factors in the process is the move to foster mutual respect and trust in judicial decisions to create ease and coherency in the processing of criminals.

This progressive move has also forced the recognition that there is not a cohesive adherence to the ECHR by all member states and there are huge variations in the procedural applications of defendant's rights.

This thesis focuses on the right to a fair trial and specifically on Article 6 (3) (c) of the ECHR. Article 6 (3) (c) stipulates the right to have counsel and representation at all stages of the trial. A central theoretical basis for this thesis is that equality of arms is currently at a crossroads in the European legal traditions. A better understanding of this dynamic is achieved by using a comparative lens when drawing on the experiences of other jurisdictions. Certain European States have been more successful in achieving a system whereby access to legal representation is easier to secure. The thesis will also analyse the domestic legislation and case law which serve to protect and uphold the right to a fair trial within their own jurisdictions as a means of comparative analysis. Particular attention will be given to the constitution of the United States of America and the United Kingdom as both systems have enshrined and developed the concept of due process.

It will be asserted that practices which have been incorporated to help secure a fair trial, if not appropriately handled will actually serve to undermine the trial itself. This thesis proposes that there is a need for a re-conceptualisation of the right to a fair trial in order to continue to ensure that fundamental principles are adapted and that they continue to provide protection for the defendant.

Plea bargaining has become an internationally used tool in cases including Jacob Zuma² and O. J. Simpson³. The Council of Europe and the European Parliament have been encouraging harmonisation and mutual trust amongst the judiciary and it is never more pertinent to address this black hole which has been allowed to

²<http://constitutionallyspeaking.co.za/plea-bargain-for-zuma-maybe-not-a-bad-idea/>, (accessed on the 16th of May 2014)

³http://www.nbcnews.com/id/28083134/ns/us_news-crime_and_courts/t/simpson-plea-deal-wouldve-meant-less-time/#.U3Y-4h_U_q0 (accessed on the 16th of May 2014) and <http://www.bbc.com/news/world-us-canada-25117110> (accessed on the 16th of May 2014)

continue relatively unchecked. Courts are under increasing political, social and economic pressure to ensure that the court system is both efficient and expedient which sometimes results in human rights falling at the way side. This is ironic as the right to a fair and speedy trial forms one part of the Article 6 ECHR requirements.

At a heart of the right to a fair trial is the expectation that the guilty get punished, victims are vindicated and the state follows through with punitive actions. This state of affairs is very utopian as we are daily confronted with news which informs of the inadequacies of this system. There are two questions which can be asked of the criminal justice system

“could we convict fewer innocents without acquitting too many guilty?”⁴

This model is looking for ways to ensure that due process rights are not neglected in the quest for convictions. That is the due process rights of both the innocent and guilty defendant's. It can also be formulated as Thomas Jefferson expressed,

“It is more dangerous that even a guilty person should be punished without the forms of law than that he should escape.”

The view at the other end of the spectrum is that it is better to punish then allow the guilty to slip through the net.

The body of research within this thesis sadly shows that the right to a fair trial does not exist beyond certain barriers. One such barrier is the right to legal representation.

By comparatively examining legal systems, it became apparent that there were more similarities then differences. The similarities were unfortunately due to human rights violations. It was apparent that member states use the same rhetoric in justifying their violations. The countries were chosen for the comparative analysis based upon the fact that they have all struggled with the same conflicting issues. Each of them have adopted diverging mechanisms to reconcile their systems with the protection of fundamental rights. It is these different mechanisms which provide the impetus for examining the defendant's fair trial rights. This became an area where there was the most similarity amongst the member states. A recurring theme amongst the Council of Europe member states was the treatment of the indigent defendant and their subsequent barriers to justice.

⁴H. L. Packer. “Two Models Of The Criminal Process”. In: *U. Penn. L. Rev.* 113 (1964), pp. 1–68.

A significant problem for the indigent defendant is not being able to access adequate representation. This can result in protracted trials and appeals to rectify the pre trial abnormalities.

Member States are constantly pushing the boundaries of human rights protection. The ECtHR prefers not to interfere with the internal conduct regulation within the CoE member states but this approach has meant that the attempted E. U. harmonisation of criminal procedure has resulted in considerable variation in lawyers' conduct amongst member states. Member states choose to regulate the behaviour of counsel either by constitutional principles or through procedural rules. The current direction in which the member states are moving is creating an irreconcilable gulf between the indigent defendant and the rich defendants who can afford their justice.

This state of affairs invariably results in questions such as "Is justice always fair?" and "Should justice be fair?" are obvious questions which need to be answered. There are inevitably situations, in the exercise of the law, where individuals will feel that the law has not been fair to them but that does mean that the rule of law has been violated. The purpose of the law is to uphold the moral code which a particular society feels is important. If the people do not feel that the law reflects the societal needs, it becomes very difficult for the law to be enforced and followed. These kinds of situations lead to dictatorships and sometimes even revolutions.

The purpose of law is to maintain order and balance. This is achieved with varying degrees of success across the Member states which does not always invoke the greatest confidence. If an individual commits a crime, they should be tried according to the law of the land and then appropriately punished. This maxim fits with the general idea of society that the guilty should be punished and the innocent should walk free. In theory this should work well but the law does not always achieve its intended ambitions. The guilty can negotiate their justice and the innocent sometimes are placed in a situation where the best thing to do would be to plead guilty. This thesis examines these questions where the intersection of the indigent defendants and the criminal procedure law do not meet and results in miscarriages of justice.

The goal of the research was to shed light on and investigate why the academic literature has thus far not engaged in discussing the interplay between the access to justice and plea bargaining.

1.1.3 Research design and Methodology of the research

1.1.3.1 Sources

The research was conducted by predominantly considering primary sources such as the legislation of the European Union, especially the Roadmap and the Measures A to F. Additionally, the relevant legislation of the countries selected for the analysis were also included. Constitutional provisions and other similar founding documents such as the Magna Carta and the Bill of Rights were also taken into consideration.

Secondary sources were drawn from a wide pool and wherever possible literature pertaining to the relevant country was used in its native language and written by authors who originated from the countries in question. As the question of plea bargaining has been written about extensively in the U. S. a sizeable amount of the literature on this subject comes from the U. S. or from other Western authors commenting on the situation there.

1.1.3.2 Terminology

The practice of plea bargaining has become a well developed concept in the West and in particular the U. S. as such the terminology available is couched in the understanding of a common law system. This has repercussions for how the meaning of plea bargaining is understood in the varying systems. When referring to the practice of plea bargaining in the context of the U. S. , an explanation is given of the different types and methods which can be used as tactics. As this thesis takes into consideration the diverging practices of plea bargaining, the thesis, wherever it is possible, uses the language of the country being observed with the officially recognised translation of the term. Where appropriate explanation is given of the meaning of charge bargains and sentence bargains. Unless otherwise stated the use of the expressions plea bargaining and negotiated process are used as synonyms in connection to the practice on Continental Europe.

Terms such as fair trial, access to justice and legal aid have their understanding in international instruments such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights as well as the European Charter on Fundamental Freedoms. This is not an exhaustive list by any means but these three documents combined together provide a contextual understanding

of how the right to a fair trial, access to justice and legal aid should be understood. It is on this basis that reference is made to and expounded upon in this thesis.

1.1.4 Structure of the thesis

The thesis is made up of seven chapters. There are five core chapters which discuss the key matters central to the understanding of both the negative and positive aspects of the practice of plea bargaining. A common theme that runs throughout all of the chapters is the choice of five countries which were analysed and discussed in a comparative approach. In addition to the comparative approach, there are three overriding issues which are discussed in all of the chapters. These are the presumption of innocence; access to justice and the principle of equality of arms. Each of these topics is then discussed in light of the practice of plea bargaining and the right to a fair trial. It is central to the understanding of the structure of the thesis that it is understood that all five of the chapters should be read in a concurrent way. These three parallel themes should be considered of equally importance.

Chapter two provides the theoretical framework within which the question of what exactly is a fair trial can be addressed. The chapter provides an overview of the historical development of the right to a fair trial and how the concept of fairness has been interpreted by both the U. S. Supreme Court and the European Court of Human Rights (ECtHR). In conjunction with fairness, the concept of due process was introduced in the framework of Packer's dual demarcation of having either a crime control model or a due process model. These two approaches are then used to illustrate the competing theories of access to justice.

Chapter three then builds upon this theoretical framework to discuss the principle of equality of arms as developed by the ECtHR. The evolution of the concept of equality of arms is analysed in the context of the case law and legislation of the selected countries. This is done so as to provide a working theory within which to place the discussion of plea bargaining and its tension with the principle of equality of arms requirements.

Chapter four revolves around the question of access to justice. This chapter is both at the middle of the thesis and at the heart of the question over the practice of plea bargaining. In the middle between the trial and the plea bargain is the lawyer who is the conduit to access justice. The chapter discusses the problems both with the

U. S. Supreme Court's and the ECtHR's interpretation of effective defence as well as waiver. It is argued that in both cases the tests provided by both courts are not adequately clear. Based upon the preceding chapters the topic of plea bargaining is introduced in chapters four and five.

Chapter five raises the hypothesis that the role of plea bargaining in modern trials is challenging the concept of the search for the absolute or probable truth. It is this challenge which is forcing a reconceptualisation of the right to a fair trial as a new framework must be formulated to ensure that plea bargaining does not infringe the defendant's rights. It is argued that problems occur because there has of yet to develop an adequate jurisprudence which can effectively conceptualise the role of plea bargaining.

Chapter six builds upon the theoretical questions raised by chapter five and seeks to provide an explanation for and definition of plea bargaining. A historical and modern day account of the of the practice of plea bargaining development across the five selected countries is presented. Comment is made upon their similarities and differences in light of best practices which could be observed. Additionally, extensive case law is analysed so as to provide a working illustration of the practical application of plea bargaining in everyday situations. The ECtHR's recent decision concerning the practice of plea bargaining is also analysed as illustrative of the fact that there is yet still much misunderstanding about and over how this practice could be best monitored so as to afford the best possible safeguards for the defendant.

Chapter Six summarises these studies. The observations of the plea bargaining practice of several countries shows that practice of plea bargaining has drifted considerably from its creators and those who practiced it its original intention. The early requirements, as in the case of *Brady v U. S.*⁵, that there be overwhelming evidence of guilt have been replaced with approximation and expediency. As was illustrated in the German and Italian cases, plea bargaining has run into constitutional barriers which have resulted in creative application of the law. Italy is illustrative of a country where the practice of plea bargaining has morphed resulting in it no longer resembling the pure bargain relationship but rather an abbreviated trial. This situation is particularly troubling as it affords the defendant none of the benefits of a trial and neither the fair trial safeguards which they are due.

Plea bargaining is undeniably a dominant force in criminal cases and as such there is

⁵397 U. S. 742 (1970)

a need to address the fundamental violations. Plea bargaining is a major avenue for resolving conflicts which is not living up to the due process requirements and this is a trend which is now gathering momentum in the countries which were observed. Plea bargaining in its original context is a good thing. Irrespective of this fact expansion to a wider sphere has resulted in an uneven judicial process. It is evident that safeguards need to be reinforced to protect the defendant. It is in light of these problems that Chapter seven provides some conclusions and recommendation for the way forward and for forging a happy coexistence with the practice of plea bargaining.

2 Fairness: The Right to a Fair Trial

2.1 The Right to a Fair Trial

“If, in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised.”¹

The expression of overall fairness is frequently used by the European Court of Human Rights (ECtHR) when referring to the workings of the trial. The role of harmonising is an issue which has been occurring in the background. This is in part due to the fact that there are lots of conventions which have been signed so the Member states have all been inadvertently adopting provisions which are similar to each other.² It is not an easy process to harmonise criminal procedure and this is not helped by each criminal justice system having its own historical, political and socio-psychological contributing factors. The European Convention on Human Rights (ECHR) has had a considerable impact upon and has shaped the criminal procedure of the Council of Europe (CoE).³ The ECHR objective is to enforce substantive criminal law but also to arrive at conclusions in a factually accurate manner and in a way which respects basic human rights.⁴ The ECtHR's functioning has undeniably brought the criminal justice systems closer. The ECtHR's role is to ensure the preservation of the standard achieved and to make sure that it does not drop below the acceptable standard. One way in which the ECtHR can do this is by ensuring that their case law is followed. There is great power in their decision making as it leaves no room for alternative interpretation. Member states can pick up on how and what they should be changing in their national legislation. New countries, seeking the status

¹per Lord Bingham, *R v. Davis*, [2008] UKHL 36, (HL) [26 (2)]

²K. Bárd. *Fairness in Criminal Proceedings Article Six of the European Human Rights Convention in a Comparative Perspective*. Közlöny Budapest, 2008, p. 9.

³Ibid.

⁴Ibid., p. 14.

of accession, can access previously decided ECtHR case law this is a good starting place for determining whether they are in line with the human rights protection envisioned by the ECtHR.⁵

The role of the ECtHR is significant in that it determines the importance and weighting of the human rights in the ECHR that should be given by the member states. In relation to Article 6, the ECtHR has stated in its case law that a restrictive interpretation of Article 6 is not permissible.⁶ The ECtHR gives the impression that the fair administration “of justice is of utmost importance in a democratic society.”⁷ This fair administration of justice can only take place within an order where democracy, the rule of law and respect of human rights is upheld. Judicial recourse and the quality of the proceeding are very important for ensuring virtually all of the Convention’s provisions.⁸ In determining the overall fairness of the trial the ECtHR takes into consideration the democratic values which are reflected in the procedural law’s. As Trechsel has argued,

“that there is a link between the political system - or the political ideology underlying it - and the system of criminal proceedings.”⁹

This is supported by the values such as the right to express one’s position under identical conditions and to influence the decision on equal terms being deemed as being characteristic of democracy. The rule of law implies that there is a real access to justice where there is an adhesion to the principle of legality as well as judicial guarantees being in place.¹⁰

The ECtHR has created a strange juxtaposition of the proceeding where the trial may be considered to be overall fair even if there was an individual procedural irregularity. Whereas the procedure could have been adhered to but the trial will be considered unfair by the ECtHR case law jurisprudence. It is only possible to speak of the overall fairness of the trial being respected in an environment where the rule of law is also upheld. If access to justice and legal remedies are available and there are judicial proceedings which can ensure these guarantees then we can

⁵Bárd, *Fairness in Criminal Proceedings Article Six of the European Human Rights Convention in a Comparative Perspective*, pp. 25–27.

⁶Ibid.

⁷Ibid., p. 35.

⁸Ibid., p. 46.

⁹S. Trechsel. “Why Must Trials be Fair?” In: *Isr. L. Rev.* 1997 (31/ 1-3), pp. 95–119.

¹⁰Bárd, *Fairness in Criminal Proceedings Article Six of the European Human Rights Convention in a Comparative Perspective*, p. 45.

talk of a system which has the ability to protect the overall fairness of the trial.¹¹ In assessing the overall fairness of the trial, the ECtHR will also take into consideration how the truth was pursued and was the presumption of innocence respected. Both of these elements help to guarantee the right to a fair trial.

In a number of limited circumstances, the ECtHR is willing to apply different fairness safeguards and standards depending upon the gravity of the committed offence. The ECtHR is willing to accept a limitation upon those implied rights such as the equality of arms, the right to silence or the right of the defence to have access to all of the evidence gathered by the prosecution.¹² The ECtHR makes a very clear distinction between the implicit and explicit elements of the right to a fair trial. If an explicit right has been violated then the right to a fair trial, will normally be held, has also been infringed.¹³

“The right to a fair trial is therefore an unqualified right, in as far as there is no situation in which anyone might be deprived of this right. No other right or interest may be weighed against the right to a fair trial. Any balancing takes place within the context of the right to a fair trial.”¹⁴

The adjacent elements which may call into question the fairness of the trial must be considered when looking at the fairness rights as developed by the ECtHR interpretation of Article 6 of the ECHR. These phenomenon that challenge the fairness of the trial are the defendant’s right and ability to waive their right to both be present at the trial itself.

In the case of *Al-Khawaja and Tahery v The United Kingdom*¹⁵ the ECtHR explained what it meant by this expression of overall fairness of the trial.

The Court recalls that the guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court’s primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (para 118)

¹¹Bárd, *Fairness in Criminal Proceedings Article Six of the European Human Rights Convention in a Comparative Perspective*, p. 49.

¹²Ibid., p. 59.

¹³Ibid., p. 62.

¹⁴Ibid., p. 62.

¹⁵Applications Nos. 26766/05 and 22228/06, Judgment, Strasbourg, 15 December 2011

This statement of the court shows that all of the elements play a role in securing the overall fairness. It will be looked at in its entirety and also on a case by case basis.

The ECtHR specified that overall fairness will be looked at in light of any irregularities that may have happened such as the inability to question witnesses, the defendant not being present at their own trial or the lack of legal representation. The ECtHR will consider all of these factors when determining if a violation has impacted the overall fairness of the trial for the defendant. In most cases the ECtHR will hold that there has indeed been a violation of Article 6 when the infringement impacted upon the domestic court's final judgment. That is if it had not been for the infringement of the article the court would have ruled differently.

The expression overall fairness has since become the benchmark against which domestic court practices will be measured as to whether they conform to the Article 6 ECHR meaning of the right to a fair trial.

The establishment of basic legal standards of what constitutes a trial are needed in order to assess what makes a trial fair. Article 6 of the ECHR; Articles 47-50 of the European Charter and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provide a comprehensive understanding of the requisite standards needed in order for fairness to occur in the trial process. These standards include the right to legal representation and to be afforded a lawyer when you cannot afford one; the right to question witness, to be present at the trial; to have access to the file of the prosecution, and to have the trial conducted in a speedy manner.

Article 14 of the ICCPR coupled with Article 6 of the ECHR have together helped to develop what constitutes fairness in a trial. It is evident that there are several principles which have been used by the ECtHR to act as signposts for the various member states when determining if their domestic practices adhere with the necessary elements of fairness. The signposts which help to guide the member states, are the equality of arms and the presumption of innocence. Both of these principles will be dealt with in depth in this thesis. Article 14 (2) and (3) of the ICCPR provides that:

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Article 6 of the ECHR provides a very comprehensive protection for the European citizen for the right to a fair trial. Paragraph 3 of Article 6, and its constituent parts form the basis from which the principle of equality of arms can be drawn. If any one of them is infringed, depending on the circumstances of the overall case the ECtHR may determine that the right to a fair trial has been infringed. This right is an ever evolving concept, as we will see from the case law, the right to a fair trial now also extends to the pre trial phase.

Article 6 in its paragraph 1 states that *everyone is entitled to a fair and public hearing* within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press

1. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
2. *Everyone charged with a criminal offence has the following minimum rights:*
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) *to have adequate time and the facilities for the preparation of his defence;*
 - c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d) 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;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 (3) (b) and (c) further reiterates that member states ought to provide a framework within indigent defendants can access justice

Article 1 of the ECHR requires contracting States to organise their legal systems to be compliant with Article 6. There is much debate about when the protection of Article 6 begins. The case law of the ECtHR would appear to suggest that this begins from when an official notification of suspicion against the person is given as in the case of *Eckle v. Germany*¹⁶. Article 6 is particularly concerned with ensuring that the applicant is protected against the:

1. absence of lack of standing of the applicant to bring a criminal appeal (*Papon v. France*¹⁷)
2. procedural obstacles on access such as time-limits (*Hadjianastassiou v. Greece*¹⁸) and court fees (*Kreuz v. Poland*¹⁹)
3. practical obstacles on access, such as lack of legal aid (*Airey v. Ireland*²⁰)

These three possible barriers are what stand between the defendant and the fair trial. It is these barriers which challenge the overall fairness concept of the trial.

The right of access to a court is a qualified right. The fact that this right is qualified has enabled member states to justify either limiting or withdrawing funding from legal aid. This is further evidenced by the fact that Member States have not all be forthcoming in implementing the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.²¹

“Is justice fair?” is a multifaceted question which requires a definition of justice and fairness. One overriding factor for ensuring fairness as well as procedural safeguards is the right to legal counsel as provided for by Article 6 (3) (c) of the ECHR. Member States are granted wide discretion with determining the quality of legal counsel. This becomes an important issue when considering the effectiveness of the legal counsel that the defendant has received because the presence of a lawyer does not ensure

¹⁶Application No. 8130/78, Judgment of 15 July 1982 §§52-53,

¹⁷Application No. 54210/00, Judgment, Strasbourg, 25 July 2002, §§90-100

¹⁸Application No.12945/87, Judgment, Strasbourg, 16 December 1992, §§32-37

¹⁹Application No. 28249/95, Judgment, Strasbourg, 19 June 2001, §52-67

²⁰Application No. 6289/73, Judgment, Strasbourg, 9 October 1979, §§22-28

²¹The United Kingdom, Ireland and Belgium

complicity with the fairness requirement of the trial. The lawyer and subsequent advice must also be effective. This thesis seeks to demonstrate that infringements of the overall fairness of the trial can occur despite the fulfilment of procedural requirements because of the ineffectiveness of the legal representation.

Fairness has come to be understood through the guise of several elements. These elements become more important when considering the rights of the indigent defendant. The right to counsel and for it to be effective counsel form just a few of the bundle of rights which concern fairness. These are all subsumed under the umbrella of the principle of equality of arms which has quite a rich history of implementation in the case law of the ECtHR.

2.2 Fairness

If the legal community is truly concerned with the assessment of the fairness of a trial then the single most important element that must be satisfied is the criterion of equality of arms between the defense and the prosecution.

The concept of fairness is not static, not “frozen at any moment of time.”²² and is constantly evolving. The case law of the ECtHR and the E. U.’s Roadmap show that Fairness as an expanding concept as these initiatives provide more procedural safeguards for defendants. For example, at the beginning of the 20th Century it was still not common place to be awarded a lawyer in the U. K. and now it would be unthinkable not to have one present.

The Stockholm Programme (which in conjunction with the Roadmap) was an initiative which ran from 2009-2014. Its purpose was to help establish grounds for harmonisation of criminal procedure and mutual trust amongst the judiciary. This programme seeks to draw on the commonalities and to use comparative law as a means for greater harmonisation and unification.

The Stockholm Programme is just one method being used as a means of redressing the balance. It has reinforced some rights as well as adding protection to the criminal trial defendants. The six directives are a means to create a formal framework within which the member states must act. One of the six directives concerns the right to

²²T. Bingham. *The Rule of Law*. Penguin Books, 2011.

access counsel in criminal proceedings and is important because it reinforces the significance of legal counsel.²³

In attempting to address the issue of fairness, it is vital to consider how the ECtHR has chosen to interpret this principle. The case law of the ECtHR is indicative that the court has opted to use the overall fairness of the trial as its benchmark by which the whole criminal trial can be legitimised. This approach however, does leave certain aspects of the way in which a trial has been conducted out of scrutiny. This approach does not consider the principle of the right to a fair trial to have been infringed so long as it does not affect the overall fair outcome of the trial.

In the case of *Salduz v Turkey*²⁴, the ECtHR determined that the lack of access to a lawyer at the police interrogation stage was enough for the overall fairness of the trial being violated. Such broad and inclusive terms are illustrative of the fact that the ECtHR can adapt the concept of overall fairness to the times.

The ECtHR jurisprudence invariably affects the procedural law of the member states and the way in which they formulate and enshrine the right to a fair trial into their domestic law(s). The varying implementation of the right to a fair trial is due in part to the diverging concepts of what a European criminal procedural tradition²⁵ is. There is the argument that this European criminal procedural tradition has yet to emerge and this lack of a common procedural tradition in Europe is exploited by two predominant groups. The first makes a very strong distinction between adversarial and inquisitorial traditions. The second group, hide their own nationalistic ideals behind the shield of cultural relativism. Cultural relativism is then used as an excuse to explain continuous violations of fundamental human rights and then becomes a mechanism by which horrendous conduct can be resisted, even explained away or justified.

Summers argues, from the work of Esmein,²⁶ that criminal procedures are distinct is a myth.

²³Directive 2013/48/eu Of The European Parliament And Of The Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

²⁴Application No. 36391/02, Judgement, Strasbourg, 27 November 2008

²⁵S. J Summers. *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*. Hart Publishing, 2007.

²⁶A. Esmein. *A History of Continental Criminal Procedure with Special Reference to France*. Ed. by 1913 trans J Simpson Boston Mass Little Brown & Co. Union, NJ, The Lawbook Exchange, 2000.

The trend of the trial procedure in the various European countries is shown rather by common characteristics than by essential differences.²⁷

The French Revolution was the catalyst for other 18th Century European countries²⁸ to re-examine their criminal procedural practices in light of their neighbouring states as a way to inform and reform their own systems. Summers asserts, that during this time, there was a strong feeling of European procedural systems converging and if not converging, were then at least developing according to common principles.²⁹ Jurists were engaging in comparative law methodology in order to find the essence of a fair trial and were looking at each others systems as a means by which to find the best model .

The early 19th Century was the beginning of the introduction of fairer trials with a distinct move away from the Crown and the landed gentry being the law givers³⁰.

After the enactment of the French Code d'instruction criminelle in 1808, it became apparent amongst the nineteenth century thinkers that an entirely inquisitorial or accusatorial system would not be efficient to afford and protect the diverse interests of the individual involved in the trial and that a far better approach would be, the establishment of a mixed procedural system. This is expanded within the historic literature³¹, ³² and it can be seen that it was essential to establish a mixed procedural system³³. The best example of a mixed procedural system is at the ECtHR where all the different traditions collide and converge.

It is this very issue of access to counsel and the practice of plea bargaining that highlights the very present tensions in the equality of arms debate giving the message that some individuals are beyond the right to a lawyer because of their non-status in society.

“The insight of the latter recognises an underpinning reaction between the concept of equality of arms and Article 6(3), and introduces the key

²⁷Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

²⁸Germany, Austria and the United Kingdom

²⁹Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*, p. 23.

³⁰J. Hostettler. *The Politics of Criminal Law Reform in the Nineteenth Century*. Chichester, Barry Rose, 1992, p. 149.

³¹F Carrara. *Opuscoli do Diritto Criminali*. 5th. Vol. ii. Lucca, Tip. Giusti, 1877, p. 372.

³²J. Glaser. *Handbuch des Straftprozesses*. Leipzig, Duncker & Humbolt, 1883, p. 211.

³³P. Mahoney. “Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.” In: *JSIL* 4.2 (2004), pp. 107–129, p. 372.

argument in the thesis: *the European Court of Human Rights equates inequality of arms not with procedural inequality itself, which would be a dignitarian interpretation, but with procedural inequality that gives rise to actual or in some circumstances, inevitable prejudice.* This argument predominates the subsequent survey of case-law in which the Court's approach to procedural equality is demonstrated and assessed within the context of the right to challenge and call witness evidence (Article 6 (3)(d)) , the right to adequate time and facilities (Article 6 (3) (b)) and the right to legal assistance (Article 6 (3) (c))."³⁴ (own emphasis)

Despite the marked improvement that these early jurists set in motion, there is still a need for improvement of procedural fair trial rights. It is this flexibility of the ECtHR in interpretation; implementing the ECHR and the subsequent application of the judgments by States that leads to problems for accurate conceptualisation and consistent application of a fair trial.

This prompts the question of the role of due process and the rule of law in protecting the rights of the indigent.

2.3 Due Process

In his book *the Rule of Law*, Tom Bingham states that the right to a fair trial is a "cardinal requirement at the heart of the rule of law."³⁵

Lord Diplock aptly observed that no legal system is infallible and that is why safeguards, like an independent judiciary, are enshrined in nation states³⁶. The mutual goal of the member states is to work towards a systems of trials that are fair. It is the role of the member states to ensure that principles such as due process are in place. A government offends the principle of the rule of law when it infringes upon the fundamental rights of one of its subjects. This is known as a due process violation. Due process also guarantees that the law and legal proceedings should be fair within criminal proceedings and not conducted outside of the law. The concept of due process was first noted in the United Kingdom with the advent of the Magna

³⁴O. Sidhu. *The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights*. Intersentia, 2014.

³⁵Bingham, *The Rule of Law*.

³⁶R V. Deputy Industrial Injuries Commissioner ex parte Moore (1965) 1QB 450, 488

Carta (1215) which established the rule of law in the United Kingdom. The Magna Carta set out the rules which governed the relationship between the King and his subjects. The Magna Carta states that:

"No free man shall be seized, or imprisoned . . . except by the lawful judgment of his peers, or by the law of the land".

The Due process clause and the corresponding principles were exported by England to its North American colonies and became incorporated into their statutes.

In the U. S., the principle of due process is guaranteed in the the 5th Amendment and 14th Amendment. They prohibit the government from arbitrarily or unfairly depriving an individual of their basic constitutional rights such as liberty. The logical implication of the amendments is that the rigorous nature of due process procedures must scale accordingly with severity of the level of the deprivation of liberty. Thus, due process procedures for those charged with a crime would have to include the right to be represented by counsel throughout the proceedings, the right to cross-examine witnesses who have testified against him, and the right to a trial by an impartial jury of his peers. In order for criminal statutes to pass constitutional muster on these grounds, the law must be sufficiently clear so that citizens would understand the specific conduct that is prohibited. A law that fails to meet this standard, because it is too vague, would be deemed unconstitutional. Due process has both procedural and substantive rights. Substantive law creates, defines and regulates laws where as procedural law enforces those rights or seeks redress for their violation. In this context, procedural due process relates to the law itself as to whether it is clear, fair and does it contain a presumption of innocence.

There are competing concepts and philosophies within fair trial discourse, of what should be present in order for an individual to be guaranteed a fair hearing. The expansion of the European Union (E. U.) has resulted in increased pressure to reconcile various different conceptions of a fair trial. This pressure partially originates from the need to develop a legal system whereby states can be assured that their nationals will be afforded the guarantees of certain procedural rights in other member states. The current challenge before the Council of Europe (CoE) is to realise a consensus regarding what constitutes a fair trial and to institutionalise modalities that ensures a consistent application of a fair trial procedures throughout the E. U.

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The beauty of having different intersecting systems is that there is a rich source of

comparative literature to draw from when looking for examples of best practices. The importance of this nexus and its role in the development of a European jurisprudence with regards to fair trial concepts and practices, cannot be underestimated.

The ECtHR is the intersection between the civil and common law systems. The ECHR defines the minimum rights of the defendant at trial. It is these minimum rights that the ECtHR then expects the member states to put into practice. Each of the member states have placed different emphasis and importance on the principles of the equality of arms and the principle of adversarial trial procedure.³⁷ These differences are not negative in and of themselves but they do not help in working towards common standards.

What is understood as due process varies from state to state. Despite these differences, it is possible to define and identify features that form the basis for the right to a fair trial. The developing importance of the ECtHR and the ECHR to help bridge the gaps between the different systems.³⁸ The Rule of Law is not necessarily synonymous with democracy, justice, equality and human rights.³⁹ The scholar Joseph Raz asserted that in his opinion the reason for this was that, '[t]he law may, for example, institute slavery without violating the rule of law.'⁴⁰⁴¹ The primary role of the rule of law is to help guide behaviour and the rule of law helps the law to perform this function.⁴²

One of the most basic principles of the rule of law is the right to have legal counsel. This paper will also observe that the system of law is now failing indigent defendants as those processes which were first designed to deal with very serious or organised crime are now being applied to lesser crimes. The practice of limited and underfunded legal aid services coupled with the practice of plea bargaining is a growing trend which is causing great unrest amongst defence lawyers.

Most problems with procedural issues amongst the member states do not concern

³⁷J. Jackson. "Autonomy and Accuracy in the Development of Fair Trial Rights". In: *UCD Working Papers in Law, Criminology & Socio-Legal Studies* Research Paper No. 09/2009 (2008), pp. 1–19, p. 8.

³⁸Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

³⁹E. Fox-Decent. "Is The Rule Of Law Really Indifferent To Human Rights?" In: *Law Philos.* 27 (2008), pp. 533–581, p. 533.

⁴⁰*Ibid.*

⁴¹J. Raz. In: *Authority of Law; Essays on Law and Morality*. Oxford Clarendon Press, 1979. Chap. The Rule of Law and Its Virtue, p. 211.

⁴²Fox-Decent, "Is The Rule Of Law Really Indifferent To Human Rights?", p. 534.

the substantive matter as a precondition of joining the E. U., all the member states have agreed to protect these minimum standards .

The role of comparative law is at the centre of this debate as it has provided a mechanism by which academics and legislators can observe how similar problems are solved by other states. There are three criminal justice reform comparative law models: the Accusatorial (Anglo-American); the inquisitorial (Pre-French Revolution); and the Mixed (Contemporary European). Those in favour of these classifications, such as Pierre Legruand, strongly believe that there are real demarcations which separate legal systems. There are unique historical and cultural reasons as to why certain legal systems have developed the subsequent classification but comparative law has become a tool, ironically, for arguing for separation rather than uniformity of legal systems despite there being more similarities between modern legal systems.

The right to legal counsel forms an integral part of the right to a fair trial. The ECtHR has sent a clear message that if the right to legal counsel is infringed it may result in a breach of Article 6 . At the international level the Basic Principles on the Role of Lawyers principle 1, provides that;

“[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”⁴³

These Basic Principles are non binding but they provide a helpful guide for determining what is considered to constitute a fair trial. The Principles place a great emphasis on the securing of access to counsel at the pre-trial stage. Principle 7⁴⁴ states that governments should ensure that all persons are provided with a lawyer within 48 hours from arrest or detention. This issue has been hotly disputed amongst the various Member States where countries such as the United Kingdom (U. K.) have extended the periods whereby certain individuals, such as terrorists, could be detained for longer without the presence of a lawyer.

The basic principles also reaffirm that if an individual cannot afford their own counsel then the relevant authorities should provide a lawyer free of charge as long as it is in the interests of justice.

⁴³Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990

⁴⁴Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990t. T

It is a generally agreed principle that when counsel is awarded to an individual who cannot afford to pay for legal assistance themselves the domestic court should take steps to ensure that that legal counsel is effective.

It must be recognised that the nature of the prosecution's case is that the evidence that they produce will be damaging to the defense's case. The defense must be given an equal opportunity to rebut the evidence against them. The ability to rebut, causes the underlying problem as it becomes necessary to have a lawyer who can navigate the disclosure process and it is more difficult to prepare a defense when the nature of the allegations are unknown.

It is also important to know which crime control model is operating within a particular country as this will inform the approach which is taken towards the defendant's fair trial rights.

2.3.1 Packer's Criminal procedure models

Herbert L. Packer illustrates, that even within a functional system, that there are many competing goals. These competing goals, are at odds with each other, and fall within two camps the crime control model and the due process model.⁴⁵

The crime control model is described as the "assembly line". This model is concerned with the repression of criminal conduct.⁴⁶ This model is overtly concerned with the system's ability to apprehend, convict and dispose of a high proportion of criminal offenders.⁴⁷ The focus of this process is the securing of the guilty plea. As such the system becomes characterised by an administrative fact finding process leading to the exoneration of the suspect or to the entry of a guilty plea.

The due process model on the contrary focuses on the adversarial aspect of the trial. The perusal of the guilty verdict is an affront to this model. This model has been characterised as an obstacle course. The reason for this description is that at every stage of the process there are impediments designed to protect the accused defendant from progressing to the next stage. The due process model sees the crime control model as employing short cuts in the name of efficiency to get around reliability. At the heart of the due process model is the question of equality. Equality requests

⁴⁵M. M. Feeley. "Two Models of the Criminal Justice System: An Organizational Perspective". In: *Law & Soc'y Rev.* 7 (1973), pp. 407–426, p. 414.

⁴⁶Packer, "Two Models Of The Criminal Process", p. 10.

⁴⁷Ibid., p. 10.

that the process between the respective parties be one such, “...as to minimize the discrimination rather than a mere series of post hoc determinations of discrimination be made or makeable.”⁴⁸

Within the Due Process Model there is the pervasive reliance upon the fact that in order for the rules and sanction of the criminal procedure to be appropriately applied the representation of counsel is a necessity. Access to counsel must be available at all the different stages of the trial.⁴⁹ It is over the issue of access to counsel that the two model’s begin to diverge, the former considers it to be a mere luxury whereas the latter views access to counsel as being a crucial part of the process.

The supporters of the due process model’s critique of the crime control is that it is rather concerned with the plea than with the trial as the, “... dominant mode of guilt determination.”⁵⁰

“... the touchstone of the due process model is “legal guilt”, a determination which must never be sacrificed to mere expediency or result.”⁵¹

Packer’s two models of crime control have helped to identify the competing interests of society’s interests in convicting the guilty and the rights of the criminal defendant. The problem presents itself in the question is there a way in which fewer innocents could be convicted without the acquittal of too many guilty?

This is the question that drives the search for the next efficient system to answer it. Competing theorists have all attempted to find the best model but as of yet there is not universal agreement.

Keith A. Findley states that this is the wrong question. He uses the constitution of the U.S. as an example stating that it protects the innocent to the highest order.⁵² This conceptualisation, however, is misguided because even though the U. S. constitution may provide protection, creative ways have sprung up which have found a way of getting around this protection such as the practice of plea bargaining. This is not a phenomenon that is unique to the U. S. but also a creative practice which occurs in the member states. Packer also recognised this discrepancy named as the big gaps between the “Is” and “Ought”.⁵³ He stated that,

⁴⁸Packer, “Two Models Of The Criminal Process”, p. 15.

⁴⁹Ibid., p. 21.

⁵⁰Ibid., p. 47.

⁵¹R. L. Hoglar. “Conrad, Kafka and the Criminal Justice System”. In: *3 J. Contemp. L.* 75 (1977).

⁵²K. A. Findley. “Towards a new paradigm of criminal justice: How the Innocence Movement Merges Crime Control and Due Process”. In: *Tex. Tech L. Rev.* 41 (2009), pp. 1–42.

⁵³Packer, “Two Models Of The Criminal Process”.

“We learn that very few people get adequate legal representation in the criminal process; we are simultaneously told that the Constitution requires people to be afforded adequate legal representation in the criminal process.”⁵⁴

This illustrates that there are significant gaps between the theoretical and practical legal practice. This is a disconnect which resonates throughout this paper. Packer astutely observes that, “The kind of criminal procedure we have depends importantly on certain value choices that are reflected, explicitly or implicitly, in its habitual functioning.”⁵⁵

It is these value choices which illustrate the definition and emphasis that a particular society chooses to place of their criminal procedure rules.

The quest for the ideal criminal model also informs how one perceives of the purpose of the criminal sanction.

The practice of plea bargaining has an impact upon the administration of justice. It is evident that all parties to the proceedings have an administrative interest in saving time, effort, “getting a better and the actors all usually emphasize in deal” for the accused.⁵⁶ This practice runs the risk of removing the safeguard of the presumption of innocence and replacing it instead with a “presumption of guilt”.⁵⁷ This shift in the presumption does not necessarily impede upon the defendant’s quality of representation, if purely discussing the quality and access to counsel.⁵⁸ Packer recognised that the plea plays a fundamental role in that it is the plea rather than the trial which is dominant in determining the factor of guilt in criminal trials.⁵⁹

The criminal process should be able to provide clarity as to what rules should be applied and how they ought to be implemented.⁶⁰ Due process places the emphasis upon having access to legal counsel, in order to ensure that the rules are implemented fairly.

Despite due process being herald as the protector of human rights (more than the crime control model is) it can

⁵⁴Packer, “Two Models Of The Criminal Process”, p. 3.

⁵⁵Ibid., p. 5.

⁵⁶Feeley, “Two Models of the Criminal Justice System: An Organizational Perspective”.

⁵⁷Ibid.

⁵⁸J. H. Skolnick. *Justice Without Trial: Law Enforcement in Democratic Society*. Quid Pro, LLC, 2011.

⁵⁹Packer, “Two Models Of The Criminal Process”, p. 47.

⁶⁰Ibid., p. 21.

"function largely as hollow symbols of fairness or at best as luxuries or reserves to be called upon only in big, intense, or particularly difficult cases."⁶¹

This then presents us with a situation whereby due process, in reality, is a thin, shiny veneer that dresses up the ugly reality of crime control.⁶²

The due process model has not alleviated the growing numbers of the prison populations and instead a non-punitive model which focuses on the elements, role and rights of the victims is required. In the 60s the rights of the victims were taken to be subsumed within the correct workings of the crime control model. Roach posits adopting a non-punitive model whereby victims and offenders are able to, in his "circle model", reduce the pain "of both victimization and punishment."⁶³In this model, the emphasis is placed upon the using and workings of restorative justice. This model is dependent upon the offender participating voluntarily as well as accepting responsibility for their actions. In doing so, the need for the due process model of proof beyond all reasonable doubt is made redundant.⁶⁴

Roach suggests that the non-punitive model shows that only certain subsections of society are committing crimes against either their own communities or against the whole of society at large. It would seem that the optimum working of a restorative justice model needs "offenders and the victims who often come from similar populations and that these populations are disproportionately exposed to harm other than crime."⁶⁵Roach critiques Packer's work as Packer's conceptualisations limits the creative process of re-imaging criminal models. He states that Packer

"conceived of rights in a traditional liberal manner as a negative check on government. He did not imagine rights as a positive guarantee of security or equality or conceive the criminal sanction as a remedy required to respect the rights of victims and potential victims of crime."⁶⁶

Packer also wrongly assumed that the nature of most criminal justice systems are adversarial.

In complete contrast to both Packer and Roach is Malcolm M. Feeley approach to

⁶¹K. Roach. "Four Models of the Criminal Process". In: *J. Crim. L. & Criminology* 89 Issue 2 Winter (1999), pp. 671–716.

⁶²Ibid.

⁶³Ibid.

⁶⁴Ibid., p. 710.

⁶⁵Ibid., p. 709.

⁶⁶Ibid., p. 692.

the criminal justice systems from an administrative angle.⁶⁷ He created a “rational-goal model” whereby the means and goals of criminal justice are merged to form the goal of achieving justice.

These concurrent approaches of Weber and Feeley are challenged on the basis that if alterations are made to the criminal justice system then certain elements will inevitably be undercut. One such area is the issue of equality between the parties, as any modification of the well-thought out process as both Feeley and Weber conceive of it would inevitably result in the undercutting of the power of the defence. This would result in the destruction of the fundamental rule of, “balanced advantage” between the parties.⁶⁸

The fact that legal theory and practice do not correlate is not surprising considering the large volume of academic discussion regarding the substance of how a criminal justice system ought to look. The academic literature is indicative of the fact that a consensus is yet to be reached on what best forms a criminal trial.

The critical question which needs to be answered is “What is the purpose and role of a criminal trial?” Ultimately, the criminal trial is where social problems and issues are confronted in a formal solution by the courts. The role of criminal justice is to mediate the conflicts and intersections that arise between State, Community and the Individual, the three powerful social orders.

The division of the criminal trial into three parts has its roots historically in criminal procedures where the popular justice, which is the common sense of the people, is represented. The adversarial role, which emphasises the individual, gives priority to the rights bearer. The inquisitorial aspect of a trial focuses upon the verified confession. The decision making process needs a mixture of all three components where all voices must be equally represented and heard.

The inquisitorial system is characterised by a hierarchical, continuous and bureaucratic process. The adversarial system is characterised by the defendant being an active and rights-bearer participant at all stages of the trial process. Additionally, an adversarial methodology looks to prevent the State from distorting a free testimony; to prevent the State from using power to create an unfair trial and to see the defendant as an active individual.

This distinction has become characterised by a struggle for rights which is being

⁶⁷Feeley, “Two Models of the Criminal Justice System: An Organizational Perspective”.

⁶⁸Ibid., p. 411.

fought not only in Europe but also in the U. S. The competing demands of efficiency and justice are currently in conflict with each other and are pulling the E. U. in different directions creating gaps through which the indigent are falling.

The E. U. has recognised that there are problems with the lack of coherency when it comes to the application and usage of the plea bargaining mechanism.

The increasing need for uniformity and efficiency is placing pressures upon the prosecution to reach an agreement whereby there is no trial. The prosecution practice of avoiding the trial in the name of efficiency, most controversially occurs in the form of plea bargaining.

2.4 The historical origins of the criminal procedural process

It is important to realise that, despite the varying practices of adhering to human rights standards, there is not a huge divergence in terms of procedural criminal law amongst the member states. The underlying problems are not necessarily the theoretical conceptions of criminal procedural law but rather the importance they place upon protecting basic standards of human rights.

Summers claims that it is possible to talk about a common European criminal procedural system. She notes that amongst all of the jurists writing at that time that there was,

“(...) a distinct sense in many of the works of this time that the European procedural systems were, if not converging, then developing according to common principles.”⁶⁹

It was also during this time that there was a shift in the way the defendant was viewed in the trial process. Around the time of the Enlightenment and the reforms of liberal philosophers, the citizen was re-conceptualised as a participant in the proceedings rather than a passive object of the investigation.⁷⁰ In this way, the emphasis upon the fairness of the trial was refocused with a shift towards individualism and the focus of the human rights protection of the individual.

⁶⁹Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*, p. 23.

⁷⁰Ibid.

Summers points out it was the institutional guarantees that secured whether a trial would be considered to be fair but this resulted in the practice of the defendant not being secured a lawyer and thus an active role in the trial. The previous practice of the judge being the defense counsel meant that it was not seen that a lawyer ought to be appointed in that particular situation.⁷¹ These discussed reforms placed a greater weighting upon the impartiality of the judge over the appointment of legal counsel. So, it was the independence and impartiality of the judiciary which was viewed as being paramount.

Summers noted that prosecuting, defending and investigating, were the roles traditionally performed by the judiciary, diverged into three distinct roles with the relationship between the judiciary and the prosecution shifting to interactions between the prosecution and the defence.

“The evolution of the defence’s role was thus contingent across Europe on the definition of judicial impartiality. (...) Crucially it enabled, as part of the accusatorial trinity, the construction of a system of criminal proceedings that could be presented as both efficient and fair”⁷²

Alongside the development of the immediate and oral hearing also developed the principle that the defendant would have the right to be represented by his or her lawyer at all stages of the trial procedure.⁷³

2.4.0.1 The historical development in Europe of the rights of the defence

Voltaire notes that within English and Roman systems, the defendant was awarded the opportunity to question witnesses; to be present in person and to reply to questions. If they could not do so themselves, they were to be afforded a lawyer who would assist them in the making of their case.⁷⁴ The rights of the defendant also changed considerably with the development of the open and public hearing and in the wake of enlightenment movements the structural emphasis of the trial changed towards including the rights of the defendant. Defence rights became synonymous with fairness. Two Centuries later, there has been a shift to erode the elements which

⁷¹Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

⁷²Ibid., p. 38.

⁷³Ibid.

⁷⁴Ibid.

create a fair trial. New legal approaches which were adopted were not necessarily new concepts but rather a returning to ways of old.⁷⁵

Hélie stated that the right to be heard is a principle of natural justice⁷⁶ and the development of the open trial also had a knock-on effect upon laying the foundations for the active defendant's participation in the criminal trial process. Vargha stated that the presence of the accused and their counsel at the trial is essential in order to guarantee,

“ (...) the defence the opportunity to observe and to influence the taking and hearing of evidence.”⁷⁷

Summers shows that the reforms that occurred in the 19th Century highlight that there was, and could still be today, a common approach as well common elements to all criminal scholars in the reforming of the system.⁷⁸ These procedural reforms focused on rectifying the institutional discrepancies in power between the prosecution and defence and a reasserting of the principle of equality of arms.⁷⁹

“Only through the assistance of counsel would those accused of criminal offences be able to engage with these vitally important legal formalities and make proper use of the guarantees afforded them in presenting their defence.”⁸⁰

The right to be heard is a recognition that the defendant should be considered an active participant in their own trial. The Criminal Evidence Act 1898 of the U. K. included the right of the accused to defend oneself in person. J. F. Stephen was a strong proponent for the inclusion of the defendant as they were the individual, who when questioned, would be able to give the best evidence concerning the events regarding the alleged incident.⁸¹ J. K. Stephen's also identified the need for the right to have counsel.

⁷⁵Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

⁷⁶F. Hélie. *Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle*. Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle v. 5. H. Plon, 1867. URL: <http://books.google.hu/books?id=lGcOAAAAYAAJ>.

⁷⁷J Vargha. *Die Verteidigung in Strafsachen*. Vienna, Manz'sche k k Hof-Verlag und Univ Buchhandlung, 1879.

⁷⁸Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

⁷⁹Ibid.

⁸⁰Ibid.

⁸¹J. F. Stephen. *A History of the Criminal Law of England*. Macmillan, 1883.

“It must be remembered that most persons accused of crime are poor, stupid and helpless. (...) when prisoners are defended by counsel the defence is often extremely imperfect and consists rather of what occurs at that moment to the solicitor and to counsel than of what the man himself has to say if he knew how to say it. When a prisoner is undefended his position is often pitiable, even if he has a good case. (...) He is utterly unaccustomed to sustained attention or systematic thought, and it often appears to me as if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner *like a dream he cannot grasp*.” (*emphasis my own*)⁸²

These criminal proceedings reforms that occurred in England arose from a need for a re-conceptualisation of the role of the defence in the trial due to the the impartial judiciary and the more active engagement of the prosecution in the trial proceedings, rather than a perceived change in the the rights of the defence.⁸³

The giving of evidence was best heard in the institutional format of a trial. Hence the role of the defence and the right to counsel became more prominent. This coincided with the development of the importance of the principle of judicial impartiality with the active role of the prosecution mounting and bringing the case. This resulted in the realisation that it was necessary for the defendant to be given an equal chance at a mounting their defence. In these circumstances, it meant that the defendant needed to be awarded counsel in order to be able to effectively mount a defence.

In Germany, the ability to appoint counsel was held in such high esteem that it was incorporated into the Federal Code of Criminal Procedure in 1877 para 246 of the German StPO of 1877. This legal stance was further endorsed by the philosopher Vargha who stated that the presence of as well as the assistance of counsel was the mechanism by which the accused could be properly considered to be a party to the process.⁸⁴ Vargha states that without a lawyer, the defendant is effectively excluded and has no say in the proceedings whatsoever. It was recognised that the assistance of counsel was a fundamental principle to the overall procedural law and a trial could not proceed in the absence of the defendant being represented.

The approach of the U. K. to the right to counsel arose from fact that the prose-

⁸²Stephen, *A History of the Criminal Law of England*, p. 442.

⁸³Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

⁸⁴Ibid.

cution was being represented by solicitors and so to redress this imbalance counsel was allowed for the unaided defendant. A legislative attempt, in the form of the Prisoner's Counsel Act 1836, was made in the U. K. to rectify the fact that large numbers of prisoners were not allowed counsel. It was observed by Bentley who writes that this Act did little to make this right a reality for the prisoners,

“Whatever their legal rights, in practice they were denied counsel by their poverty.”⁸⁵

The development of legal aid in the U. K. occurred only after the institutional reforms took place and of the criminal procedure as well as the introduction of counsel for the prosecution.

It is now recognised that the pre-trial investigative stage of the proceedings has an inevitable knock on effect on the overall fairness of the trial. Despite this situation the historical development of the rights of the accused to have a counsel present at the investigative stage shows that it was not deemed as being necessary in the 19th Century U. K., Germany and France. The institutional guarantees included within the trial was an attempt to make the proceedings more efficient and that the presence of the counsel would undermine the overall effectiveness of the trial. Unfortunately, this is a view which is still held by some within Europe.

“Dissatisfaction with the nature of the investigation phase can therefore be seen as being based, not on the belief that it should have been public and oral, but rather on the knowledge that the activities of the investigation phase were of considerable importance and were providing the authorities with the opportunity to bypass the strict institutional guarantees afforded by the trial.”⁸⁶

This is the plea bargaining situation in a nutshell. It is somewhat disappointing to realise that there has not been much progress made concerning this problem at the pre trial stage.

This pre trial practice of the defendant being kept in the dark about matters concerning the material evidence against them was still prevalent throughout the 19th Century. Despite the recognition that it was wrong to conduct the pre trial investigations in this way and the fact that treatment of the accused was considered not

⁸⁵D. Bentley. *English Criminal Justice in the Nineteenth Century*. Hambledon Press, 1998.

⁸⁶Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

to be correct.

Summers states that;

“If fair proceedings are taken to be those in which those accused of criminal offences have the opportunity to know of and challenge the evidence against them, as well as to present their own evidence, then fairness depends not just on their ability to exercise these rights, but also on the context in which they can exercise them.”⁸⁷

The wording of the right to counsel in the ECHR in Article 6 (3) (c) states that the accused has “the right to defend himself in person or through legal assistance of his choosing.” Considerable attention has been paid to the conditional ‘o’r in the sentence as it could be interpreted that there is a right to counsel or the right not to have counsel. The ECtHR case law shows that under the ECHR, the state would be obliged to provide counsel even if the accused would prefer to have none.⁸⁸

If the presence of the defence lawyer was deemed to be so vitally important to ensuring adhesion of the institutional structural fairness of the process, what has gone so horribly wrong in the present practice of European criminal procedure?

From the theoretical discussions we can see that the defence lawyer is the guarantor, adhesive of the institutional structural fairness of the process. It has taken the ECtHR until *Salduz v Turkey*⁸⁹ to enshrine this principle.

2.5 A Theory of Justice

Interwoven with the recognition of the importance of the lawyer to the trial is a theory of justice.

What is a just society?⁹⁰ The answer to this question forms the central kernel to our approaches to a trial. In searching for the answer, the transcendental and the comparative approaches can be adopted.⁹¹

⁸⁷Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*, p. 93.

⁸⁸S. Trechsel. “The Significance of International Human Rights for Criminal Procedure”. In: *N, T, U, L, Rev*, 6.1 (2011), p. 177.

⁸⁹Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

⁹⁰J. Rawls. *A Theory of Justice*. Oxford University Press, 2000.

⁹¹A. Sen. “What Do We Want from a Theory of Justice?” In: *The Journal of Philosophy* 103 (5 2006), pp. 215–238.

The transcendental approach, to understanding justice, identifies the principles which help to ensure that a society is just. According to Rawls, this institutional structure would then lead to further decisions in the form of legislation.⁹² Sen unlike Summers observes that institutional changes do not automatically make a society more just as other institutional transgression could still remain.⁹³ This can be seen with institutional criminal procedure reforms that the Stockholm programme has sought to implement in the E. U. member states. It is apparent, despite the implementation of this package of directives, that the institutional transgressions still remain and do not move them automatically into the just category.

The comparative approach, is particularly useful when seeking to find different ways of 'advancing justice in society'⁹⁴. The comparative approach ventures where the transcendental approach cannot go as it is able to, 'address questions about advancing justice and compare alternative proposals for having a more just society', without having to make the theoretical leap to a perfectly ordered and just society.⁹⁵ This approach adopts the comparative approach to remedying injustices. The methods diverge as the comparative approach investigates the ways and means for instigating change rather than finding a perfect societal arrangement which would implement the required changes.

Transcendentalists⁹⁶ argue that there is no place for a comparative discourse as it leads to unhelpful conversations regarding the best way to have social arrangements and does not help with comparative assessments of justice.⁹⁷ Sen believes that the quest for transcendental justice is important but does not help to inform about the comparative merits of the different global social arrangements.

It is still important to identify the best alternative for justice when ranking the different systems of justice. Sen argues that if a comparative assessment can be made, then it must also be possible to identify the best option.

'the comparative ranking of the different alternatives must inter alia also be able to identify the answer to the transcendental question regarding a perfectly just society.'⁹⁸

⁹²Sen, "What Do We Want from a Theory of Justice?"

⁹³Ibid.

⁹⁴Ibid., p. 218.

⁹⁵Ibid., p. 218.

⁹⁶Ibid., p. 218.

⁹⁷Ibid.

⁹⁸Ibid.

It is not necessarily a negative that there is no answer to what the just society ought to be. There is universal agreement that injustices still pervade in our societies. The inability to provide a conclusive answer does not prevent us from striving towards ideals of justice.⁹⁹ Sen notes that this comparative exercise can be particularly helpful irrespective of the ability to fully answer the transcendental just society question.¹⁰⁰

The transcendental question raises the related issue of how does society generate the institutional structures in order to be just. This picture of a perfect and just society requires a vast number of institutional guarantees. These would be a necessity but they either simply do not exist or are either ineffective and/or corrupt. Sen sees the discussions about the absence of institutional guarantees and subsequent barriers to justice as a good exercise in comparative approaches to justice. It helps to explain the legal motivations and methods of particular countries but it is not very constructive with the advancement and solution of the transcendental question.

Sen states that it is possibly more fruitful to take on comparative questions of justice rather than focus on the just society question. The theory of justice needs to move outside of its confines of the transcendental contractarian theory of justice in order for progress to occur. Sen says that there is no shame in admitting that this new approach may result in some incompleteness but that comparative aspects will invariably show the gaps and that inviting in outside voices to the problems they may well be able to cast a new light on a previously unsolvable and deeply unjust situation.

Critics of both Sen and Rawls and their theories of justice discussions have emphasised that if a comparative approach is adopted, there is hope for a general consensus of justice. The big distinction between Rawls and Sen theories of justice is that Rawls is predominantly concerned with ensuring that the background processes are fair and just. A fair and just system does not mean that the automatic outcome is legitimised. Whereas Sen cares more about the consequences of said decisions rather than the institutional background.

Rawls' theory of justice has dominated the methodological approaches to conceiving of an ideally just society. Rawls' political philosophy is referred by Sen as "transcendental institutionalism".¹⁰¹ Sen argues for a more practically-orientated approach

⁹⁹Sen, "What Do We Want from a Theory of Justice?"

¹⁰⁰Ibid.

¹⁰¹L. Valentini. "A Paradigm Shift in Theorizing about Justice? A Critique of Sen". In: *CSSJ*

to justice which would take the form of being like “realization-focused comparison.” Valentini, however, is not convinced that such a paradigm shift in the conceptions of justice is truly warranted. The first key principle of Rawls’ theory of justice is the framing of the right to legal counsel in its wider context of fundamental rights necessary for a truly just society.

1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties are to be guaranteed their fair value.¹⁰²

The major failing of transcendental institutionalism is that it neglects to deliver conceptual tools which can help to advance real justice in the world.¹⁰³ The constructs and workings of a just society are not required in order to know that the lack of legal counsel; plea bargaining practices and the principle of the equality of arms erosions infringe defendants right to justice. A society is deemed just by ascertaining whether certain criteria are met and a full picture is not required. Valentini asserts that Rawls’ theory provides a good foundation for determining infringed fundamental liberties, on the basis of the basic liberties vis-a-vis fair equality of opportunity and the difference principle, and this allows, on a comparative scale, to determine which societies are more just than others.¹⁰⁴ Rawls’s theory is incomplete and as such requires some fine tuning in order for it to be able to deliver the requirements for a comparative theory of justice. Rawls’ view is that principles of justice can be applied only in certain social relations and these cannot necessarily be successfully exported to the global stage. Sen believes this to be the fundamental flaw within Rawls’ model as it cannot be applied beyond the domestic level. Despite the criticisms mounted against this theory, Rawls has always maintained that there is importance in being able to identify constitutional essentials and fundamental principles of justities which a ‘reasonably just society should satisfy’.¹⁰⁵

‘A theory of justice has to say something substantive about what justice requires in order to be of any interest in the first place.’¹⁰⁶

Unless an understanding of justice that is relevant to the local communities is

Working Paper Series SJ011 (2010), pp. 2–14.

¹⁰²Valentini, “A Paradigm Shift in Theorizing about Justice? A Critique of Sen”.

¹⁰³Ibid.

¹⁰⁴Ibid.

¹⁰⁵Ibid.

¹⁰⁶Ibid.

achieved then the leap to a global protection of justice for all will be impossible.

This thesis adopts a comparative approach to finding justice by examining the systems of four E. U. member states (Germany, Italy, U. K. and Hungary); one seeking accession (Serbia) and the U. S. as the external reference. The U. S. is particularly influential and has great interest in exporting its version of justice to Europe. These countries have been chosen so as to illustrate how different countries have sought to implement theories of justice which are exclusive of the indigent defendant.

2.6 Rights for all?

These debates on fairness, access to legal counsel, and justice bring us to the question are there really rights for all.

H. L. A. Hart's work focuses upon addressing the issue of what is a 'right'; the moral justifications for interfering with that right and the 'right' to a fair trial.¹⁰⁷ Rights are classified as special and general. These categories are based upon the premise that all men have the right to be treated equally free.¹⁰⁸

The real problem hiding behind the existence of the theories of justice is,

'the implementation and administration of justice requires resources'¹⁰⁹.

This is a sensitive political issue which is felt in the current climate of economic recession. The limited resources available for justice are felt most amongst the indigent of society. This is most evident in situations where the right to a fair trial guarantees are being eroded in favour of expediting the legal process. It is in these situations that the conceptions of a theory of justice are failing to reach those in need. Theories of justice do nothing to help the realities facing the indigent defendant as they are generally unattainable and of little or no practical or relevant consequence.

The ability to provide access to justice are two interconnected concepts. The levels of justice provided by institutional structures of justice are limited by the legal

¹⁰⁷H. L. A. Hart. "Are There Any Natural Rights?" In: *Philos. Rev.* 64.2 (1955), pp. 175–191.

¹⁰⁸*Ibid.*

¹⁰⁹A. Tucker. "Scarce Justice: The Accuracy, Scope, And Depth Of Justice". In: *Polit. Philos. & Econ.* 11.1 (2012), pp. 76–96.

infrastructure. These limits are grouped by Tucker into three and allocated the following names accuracy, depth and scope¹¹⁰. The accuracy of justice is when

guilty criminals should be convicted and innocents should be acquitted,
its accuracy is measured by the margins of error in the legal system¹¹¹

The accuracy of justice is called into question when considering the provision of legal aid for the indigent defendant and the practice of plea bargaining.

Tucker investigated the depth of justice by considering the difference between social norms and the theory or principles of justice. The larger the gap in the depth of justices means that it is normally more expensive to bridge the difference and to enforce the implementation.

Tucker strongly asserts that,

“All possible justice must come in three dimensions: scope, depth, and accuracy. Without these three dimensions, principles of justice are disembodied ideas floating in an ephemeral universe devoid of material existence. ‘Justice’ without scope does not apply to anybody. ‘Justice’ without depth is descriptive rather than normative. ‘Justice’ without accuracy is arbitrary.”¹¹²

The accuracy, depth and scope of Justice will be a major theme developed within this thesis with a special focus upon identifying the nuanced problems of access to justice for the indigent defendant with particular reference to the relationship dynamics in the practice of plea bargaining.

Tucker infers that securing justice is a give and take relationship limited by the scarcity of resources. The resulting development of theories of justice will invariably be dependant upon the different societal, historical and cultural contexts.

In an ideal justice system, the due and appeal process mechanisms would increase the accuracy of justice but the complete elimination of the margin of errors is not possible.¹¹³ These safeguards are removed when a system of appeals, one of the fundamental pillars of the due process process, is bartered away. The margins of error principle tries to ensure that the innocent are not convicted so that society is

¹¹⁰Ibid.

¹¹¹Tucker, “Scarce Justice: The Accuracy, Scope, And Depth Of Justice”.

¹¹²Ibid.

¹¹³Ibid.

not financially responsible for imprisonment costs and any extra substantial costs of rectifying mistakes.

This thesis will show that the indigent of society are the ones who suffer the most when it comes to miscarriages of justice and the judicial discrepancies that cause them to be falsely imprisoned. Gooding argues that in times of economic recession a society suffers and consequently there is an increase in the need for welfare. The State ought to be more generous with.

‘increasing the margins of error of distributive justice in the direction of generosity because the social cost of error is higher during economic downturns, when *poor people suffer more from denial of welfare*.’¹¹⁴(emphasis own)

In order to reduce errors in convicting the innocent the, common law has shifted the margin of error in the direction of acquitting the guilty. This supports the hypothesis that in retributive justice, the higher the standard of proof results in a higher ratio of erroneous convictions to erroneous acquittals.^{115, 116}

Variation in social standards and circumstances that affect the trial as alternative models of justice are being used to process defendants. These alternative methods are now being subsumed within the legal regulation with varying levels of success and are challenging the conceptions of justice and especially the rhetoric of access to justice for all.

Plea bargaining raises several questions which impact upon the fair trial of the defendant which include, the quality of representation; the ability to question witnesses; and the issue of the presumption of innocence of the defendant.

C. o. E member states have continued to make substantive law provisions without worrying about invoking the ECHR at every junction. Member states still have a wide discretion to create criminal offences which are compatible with the ECHR and their subsequent legal limits.¹¹⁷ Within the U. K., there is no general right that the substantive law should be fair but it just needs to recognise the principles of the

¹¹⁴Tucker, “Scarce Justice: The Accuracy, Scope, And Depth Of Justice”.

¹¹⁵M. DeKay. “The difference between Blackstone-like error ratios and probabilistic standards of proof.” In: *Law Soc. Inq.* 21 (1996), p. 95.

¹¹⁶L. Laudan. *Truth, Error and Criminal Law: An Essay in Legal Epistemology*. Cambridge University Press, 2006.

¹¹⁷V. Tadros. “Rethinking the presumption of innocence”. In: *Crim. L. & Philos* 1 (2007), pp. 193–213.

ECHR.¹¹⁸ It is important to consider the jurisprudence developed by the ECtHR concerning the right to a fair trial as

'There is little point in protecting procedural rights of defendants in the absence of fair substantive criminal law.'¹¹⁹

The presumption of innocence is built on the belief that it is better that ten guilty people go free than having one innocent wrongfully convicted. Tadros argues that this presumption should be viewed as a procedural right and as such does not require substantive law harmonisation rather that the member states ensure that the criminal convictions are only within the purpose of the legislation. The E. U. has struggled with the concept of within the 'purpose of the legislation' as it is hard to support when it comes to plea bargain convictions because the discretion of the prosecutor is the dominant factor in the convictions which can be meted out even though plea bargaining practices may be allowed for and legislated. There is a sliding scale of punishment resulting in a lack of certainty of treatment of the defendant. The presumption of innocence and plea bargaining come into conflict because the presumption of innocence

'ought to protect individuals from being convicted where their conduct is not the intended target of the offence created.'¹²⁰

There are two theories of the presumption of innocence. The classical model only protects a person from being convicted when it has not been proved beyond a reasonable doubt that their conduct falls within the particular criminal offence. Moral theory stipulates that a person is protected, innocence presumed, when their conduct is of a kind that ought not to be considered criminal.¹²¹ Tadros believes that Article 6(2) when interpreted by the courts should,

'consider the conduct that parliament was intending to control by creation of the offence.'¹²²

There is also the question of who should bear the evidential burden of proof. If it is the defence's responsibility, does this interfere with the presumption of innocence? There are two main grievances aired in many appeals of improper plea bargains. The first is that the counsel did not correctly and fully inform the defendant about

¹¹⁸Ibid.

¹¹⁹Tadros, "Rethinking the presumption of innocence", p. 194.

¹²⁰Ibid.

¹²¹Ibid.

¹²²Ibid., p. 198.

the implications of accepting or rejecting the plea. The second complaint is that the defendant was coerced into pleading guilty to something whilst they claim they are innocent. The role of the legislator and their interpretation of the presumption of innocence is very important with respect to plea bargaining. Within the context of the plea bargaining relationship, the presumption of innocence is frequently circumvented and the defendant is tasked with ensuring their own innocence often to a much higher extent than in other situations.

In what circumstances could the interference with the presumption of innocence be permissible? Human rights are frequently interfered with on the basis of necessity in a democratic state especially if the right is an unqualified one such as Article 6 (2).

If it is only permissible to interfere with the presumption of innocence in a democratic society then it would imply that no democratic society could function without the interference with this presumption of innocence.¹²³

Within the European context, member states violations of human rights standards are not in isolation and they are responsible and accountable to the wider European community for the violations of these rights. The margin of appreciation provides a degree of leeway with the application of these human rights standards. Member states should not be allowed to use this leeway as a shield from behind which they can hide from their responsibilities. Tadros argues that the presumption of innocence should be viewed as being a human right as it provides a threshold below which no member state should be allowed to fall.

This standpoint then needs to be evaluated in the context if in similar situations the interference would also be considered to be proportionate. Also, if the presumption of innocence is to be conceived of as a human right, then it is a Europe-wide right for E. U. citizens and as such should not be breached. The only exception would be a unilateral breach by all of the member states.¹²⁴

It is often asserted that the criminal trial serves the interests of the community by bringing to justice those who have committed the offence. Mechanisms, however, such as the plea bargain and the interference with the presumption of innocence only work to further degrade the collective interest of the community in having justice served. At a European level, the interference with the presumption of innocence

¹²³Tadros, "Rethinking the presumption of innocence".

¹²⁴Ibid.

should not be warranted if and when it would not be reasonable in some other member state of the E. U. and they would not warrant the interference with the presumption of innocence.¹²⁵

More often than not, the indigent defendant suffers a double discrimination. The first is that legal aid is either being withdrawn, or not available. The second is that because of their poverty they are unable to afford their own lawyer. Legal aid work is typically under funded with representation from inexperienced lawyers. These inexperience levels do not necessarily correlate with competence but can lead to ineffective assistance which can be potentially fatal in a criminal case. Working within this “pressure cooker” environment, plea bargaining can provide, for the indigent defendant, an alternative where they suffer bias and discrimination. It is in these pressure cooker environments that the importance of the principle of equality of arms comes to the fore. As George Orwell noted in his essay *England your England*,

“It is not that anyone imagines the law to be just. Everyone knows that there is one law for the rich and another for the poor. But no one accepts the implications of this, everyone takes it for granted that the law, such as it is, will be respected, and feels a sense of outrage when it is not. ... Everyone believes in his heart that the law can be, ought to be, and, on the whole, will be impartially administered.”¹²⁶

It is this state of affairs as put by George Orwell that the law ought to be impartially administered that forms the basis of the argument of this thesis. The argument is that the practice of plea bargaining creates a two-tiered justice system where the principle of equality of arms needs to be respected.

Fairness as defined by the ECtHR as in the overall fairness of the trial is expansive as it is flexible. This approach allows it to adapt to the changing times which is necessary.

Fairness will also be looked at in the wider context of the search for the material truth, the presumption of innocence and plea bargaining.

It will be argued that current modern interpretations of fairness are inadequate to deal with the very real pressures of the plea bargain. This was evidenced in the recent decision of the ECtHR concerning plea bargaining. In order to further

¹²⁵Ibid.

¹²⁶G. Orwell. *England Your England*. Secker and Warburg. London., February 19, 1941.

understand the need to reformulate fairness in the plea bargaining relationship, it is necessary to first examine the principle of equality of arms.

3 Equality of Arms

“Justice must not only be done, it must also be seen to be done ”¹

The principle of the equality of arms lies at the very heart of the debate over the right to a fair trial. As this is a principle it is necessary to clarify what is meant when referring to principles as opposed to rules. One way in which to understand the pivotal role played by the equality of arms is to look at the historical development of the trial. As the different concepts of how a trial should look developed so did the role of the defendant. The 19th Century Europe underwent a period of reforms concerning the criminal procedural rules. It is during this time that the defendant went from being the *object* of the proceedings to being considered a *participant*. This distinction is significant as it shapes the way in which the trial would be conducted. There are three models which have been identified as the form that a trial could possibly adopt, adversarial, inquisitorial and accusatorial. The accusatorial trial actually encompasses the adversarial mode as well. Within these different systems and the subsequent changes of the 19th Century it can be seen that the distinctions between the the accusatorial and the inquisitorial systems were not all that distinct from one another. This position is based upon the fact that both systems have incorporated a more of an accusatorial approach to justice in all of their trials.

Several theorist have argued for a new conceptualisation of the trial in particular Damska. Amongst these new conceptualisation several different models have been identified in which the principle of equality of arms applies and operates the best. Two ideal-types of criminal procedure stand out with respect to this. The adversarial fact-finding model or the inquisitorial fact-finding model.

Adversary means, “a method of resolving disputes and takes its contours from the contested trial.”²Whereas, accusatorial is, “a classic procedural model that encom-

¹R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)

²A. F. Breed, ed. *Institute of Judicial Administration American Bar Association Juvenile Justice Standards Standards Relating to Dispositional Procedures*. American Bar Association. 1979, p. 17.

passes not only an adversary trial procedure, but also other fundamental premises like the presumption of innocence as it is for the accuser to prove his case and until that time a defendant is to be treated as if he was innocent.” The accusatorial process refers to the victim-prosecutor relationship and the adversarial process refers to the prosecutor-defendant relationship.³

It is important what type of trial process one conceives of because it impacts upon the way in which the principle of equality of arms is conceived of as well as applied.

The ancient Roman principle of *audi alteram partem* which is widely accepted to be the modern day foundation for the principle of equality of arms has two parts to it. The first is that the court should be bias-free in substance and procedure. This is supported by there being an independent and impartial judiciary in the first place. Secondly, there is the right to an equal and effective access to the court.⁴ What is significant about the *audi alteram partem* principle is that it provides that a person hears both sides of the case because it is not fair to have one party unheard. This is not just because the situation would be unfair but more importantly because a mistake could be made. Within this is the inherent proposition that there should be provisions in place which secure a fair trial for both of the parties. As long as the judge is fair in their approach then it will be considered that both of the parties will have had a fair trial. It is evident that, “Procedural equality ensures that all parties can have their say.”

“As procedural principles, the overlapping content of the principle of adversary argument and that of participation discussed (...) is apparent. In fact, one element of the principle of participation, the opportunity to be heard, is incorporated in the principle of adversary equality, as it demand an *equal* opportunity to be heard.”⁵

It is agreed in the literature that there is an inherent inequality in the criminal trial. It is to some extent nonsensical talking about creating an equality of arms between the prosecution and defence. The reason for this is that the prosecution just by the very nature of their role have an advantage, they have the full force and the power of the State behind them in the making of their case. The defence does not have access to the same arsenal of tools. This is why there is a need for a “balance of

³M. Fedorova. *The Principle of Equality of Arms in International Criminal Proceedings*. Intersentia, 2012.

⁴Ibid.

⁵Ibid.

empowerment” between the parties. As the principle is an implied one this would mean that the defence should have access to certain provisions. These provisions are determined by looking at the content of Article 6 itself and the case law of the ECtHR.

Equality of arms acts as a safeguard whereby we try to protect the defendant from being either incarcerated from something they did not do and or becoming the victim of a miscarriage of procedural justice. Lurking in the background lies the question of how do we ensure that the innocent do not fall victim to the law machine, the answer is by ensuring that through these well built mechanisms that the truth comes out. In other words that justice is revealed as well as done. The route to finding justice is marked with finding the truth. The quest for the truth brings to light quite clearly the diverging opinions about how that should be achieved. This is particularly apparent when we are considering the divergent approaches of the inquisitorial and adversarial approaches to the trial. Within this there are diverging opinions about the truth between the inquisitorial and adversarial procedural approaches;

“(...) inquisitorial procedural approach is overly committed to this ‘substantive truth’. By contrast, it is said that the adversarial procedural system adheres to the opposing ‘procedural truth’ due to the historically entrenched scepticism about the ability to uncover ‘substantive truth’ in general and in a criminal process in particular, and, thus, “the fairness of proceedings becomes the main foundation of the verdict’s legitimacy, and any result that has been found in conformity with procedural rules becomes acceptable.”⁶

As such the inquisitorial process has become more extensively associated with the ‘truth’ and the adversarial procedure with ‘fairness’.

This situation leads us to the question of what is a principle. Because principles do have to be fair just like rules in their out workings.

A principle can be defined as follows,

“principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities.”⁷

Principles behave differently to rules in that principles can conflict with each other

⁶Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

⁷Ibid.

because of the weight they possess without removing the validity of the principle.⁸ This can be seen when we observe that it is agreed that a trial should be fair but the principle of the equality of arms and the margin of appreciation would sometimes appear to be working at cross purposes from one another. Despite this fact they both manage to maintain an equilibrium, on a theoretical level, whereby they are both pulling at opposite ends of the rope. It is when this tension becomes lax that we encounter problems and the equilibrium created by both of the principles disintegrates.

The equality of arms is a principle rather than a rule. It is necessary to establish its character because it affects the way we approach the implementation of principles.

Principles are seen as being abstract whereas rules are more concrete. As such legal principles act as signposts for showing the direction towards which one should head in order to achieve the desired affect of the particular legal principle in question. “Principles expressed as rights have more protection from interference from politicians and the electorate than norms expressed as mere laws.”⁹

“Arguments based solely or principally on ‘rights’ seem to ignore the possibility that procedural fairness may require something else.”¹⁰

This then begs the question what is this, “something else”? The principle of equality of arms does not provide any procedural guarantees or specific rights but rather it aims to ensure a substantive balance between the parties to the proceedings.¹¹ This relates not only to being able to be present at the proceedings but also to the ability to present evidence. In the case law of both the E. U. Commission and the ECtHR they recognise that in order to be able to present evidence on an equal footing with the prosecution the defence needs to have at their disposal all of the relevant information in the making of their case in order to comply with the equality of arms principle in line with Article 6 (3) (b). This is because the prosecution is in a position of authority over the defence by virtue of the fact that they represent the state they have more resources and information at their disposal. As such the ECtHR has recognised the need for the definition of the equality of arms to be expanded to include the fact that the prosecution should disclose to the defence

⁸Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

⁹Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

¹⁰*Ibid.*

¹¹J. Jackson and S. J. Summers. *The Internalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions*. Cambridge University Press, 2012, p. 85.

any relevant material in its possession. This expansion of the principle to include disclosure moves it towards a more substantive form rather than a formal definition. This expansion of the equality of arms to the inclusion of disclosure has meant that the scope of the equality of arms is extended to the pre-trial phase as well.¹²

When discussing the application of equality of arms invariably the two ideal-models of criminal procedure are presented as being juxtaposed against each other as adversarial versus the inquisitorial model. This adversarial/inquisitorial divide is somewhat outdated now in that there is scope for a third model as well. This third model, which is the participatory model, has been argued for by John D. Jackson. Jackson claims that the participatory model is being used by the ECtHR when they look to see whether procedural safeguards are being protected in accordance with the ECHR. When discussing this model of participation it is important to draw a distinction between the principle of equality of arms and the principle of being heard. This participatory model, however, does not take into consideration the effect that plea bargaining has upon the re-conceptualisation of the criminal procedure. The first relates to the procedural balances between the two parties whereas the latter refers to the adversarial rights that come with the right to be heard.¹³ This participatory model allows,

“ (...) the European states are given considerable freedom of manoeuvre in realigning their procedures in a manner that respects the rights of the defence.”¹⁴

This “considerable freedom of manoeuvre” finds its legal basis in the principle of the margin of appreciation. The margin of appreciation allows the member state the room to decide certain matters in line with their own national laws, if there are laws which govern the issue in case. This room for manoeuvre has led to some different interpretations and applications across the E. U. of the equality of arms.

The doctrine of margin of appreciation states that: “***It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence.***”¹⁵ It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any

¹²Jackson and Summers, *The Internalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions*, pp. 85–86.

¹³Ibid., p. 86.

¹⁴Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

¹⁵see, among other authorities, *Schenk v. Switzerland*, Application No., 10862/84, Judgment, Strasbourg, 12 July 1988, Series A Number 140, p.29, par.46

possible irregularities before the case was brought before the courts at trial and on appeal. As well as checking that the court had been able to remedy them if there were any.¹⁶

This doctrine has been applied by the E. U. so as to afford member states sovereignty over their domestic application of the ECHR fundamental rights. Unfortunately, it has become a shield behind which to shirk from responsibility of their ECHR obligations. This is apparent from the diverging practices amongst the member states of a fair trial.

The concept of equality of arms is very much at the heart of the right to a fair trial. This is never more so apparent then when considering the access of a defendant to legal counsel. This right is most often associated with Article 6 but the recent case law of the ECtHR has moved it into the territory of Article 5 as well. The fact that equality of arms arguments have been used in connection with Article 5 indicates a recognition that the right to a fair trial is also being extended to the pre trial stage. This fact has significant ramifications for when we come to discuss the role of plea bargains.

The essence of the principle is ensure that there is a fair chance for both parties to present their case in such a way that the overall fairness of the trial is not compromised.

Equality of arms only stretches so far as to give each party the reasonable opportunity to present their case in court in conditions which do not place the other side at a considerable disadvantage. If we were to apply this to the plea bargaining situation the fact that each party must be given a reasonable opportunity to present their case is something which is forfeited by this practice. There is the mistaken belief that procedural equality equates with actual and effective equality. This is not the case. In order to establish that the principle of equality of arms has been infringed the standard which must be reached is that of “substantial disadvantage”. It is a very low bar to overcome for the defendant in a plea bargain relationship. This standard must be shown to have been reached by the party alleging the infringement of the principle of equality of arms. That which constitutes a substantial disadvantage was set out in the case of *Dombo Beher B. V.*¹⁷ It was established that the requirement that parties should not be placed at a ‘substantial disadvantage’ as regards their

¹⁶Maline v. France (no.2) App. No. 18978/91, Judgement of 26 September 1996, par. 43

¹⁷Application No. 14448/88, Judgment Strasbourg, 27 October 1993

positioning in the trial. It is upon this basis that one can evaluate a particular situation so as to determine whether equality of arms has been respected.

that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent.¹⁸

The dual concepts of being afforded a reasonable opportunity as well as the substantial disadvantage test have far reaching impacts upon the fairness of the trial.

It is evident that the practice of plea bargaining so far, according to the standards set out by the ECtHR would be an infringement upon the principle of equality of arms.

3.1 Equality of Arms

The phrase principle of equality of arms is misleading as it implies that both sides are evenly and squarely matched, comparable to a medieval, fencing or shooting dual.¹⁹ The ECtHR has recognised that there is a discrepancy of equality between the two parties and has stated that, “the defense must have the possibility to fully present its case and not to be put at a substantial disadvantage vis-a-vis his opponent.”²⁰²¹

Article 6 (3) (c) provides that a defendant has the right to defend oneself in person or through legal assistance. Paragraph (3) (c) provides the guarantee that the accused has the right to defend themselves through legal counsel of their choosing. If they do not have the sufficient financial means to pay for the legal counsel then they should be provided and given it free when it is in the interests of justice.²² In the case of *Pakelli v. Germany*²³ the ECtHR, when referring to Article 6 (3) (c) stated that the, “object and purpose of this paragraph, which is designed to ensure effective protection of the rights of the defence,” opted instead for the French word “et” instead of the English “and”. Which meant that in this case the Court came up with the following conclusion:

¹⁸Application No. 14448/88, Judgment, Strasbourg, 27 October 1993, A.274, p.19

¹⁹Trechsel, “The Significance of International Human Rights for Criminal Procedure”.

²⁰*Bulut v. Austria*, 1996, Eur. Ct. H. R., 10

²¹Trechsel, “The Significance of International Human Rights for Criminal Procedure”.

²²P. van Dijk et al. *Theory and Practice of the European Convention on Human Rights*. Kluwer Law International, 1998. ISBN: 9789041105981. URL: <http://books.google.hu/books?id=SZnzQOfHuAUC>, p. 468.

²³Application No. 8398/78, Judgment, Strasbourg 25 April 1983

a 'person charged with a criminal offence' who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require.²⁴

The origins of the concept of equality of arms has its genus in Article 6 of the ECHR however, the concept does pre-date even the existence of the ECHR. The essence of the principle means to hear the other side of the question or "listen to what each party may be able to advance, otherwise you cannot be sure that your decision will be impartial or just."²⁵ This concept of equality of arms was introduced for the first time into E. U. jurisprudence in the cases of *Opfner and Hopfinger v. Austria*²⁶ and *Pataki and Dunshrin v. Austria*²⁷ Both of these cases centred around the problem of the fact that the accused had not been given the equal opportunity to be heard unlike the opposite side.

It was stated by the Commission that the legal basis for the equality of arms principle is to be found in paragraph 3 of Article 6. This is also dependant upon how the provisions in (b) and (c) are interpreted. The Commission was also of the opinion that the principle of equality of arms is to be found in the wider definition of a fair trial in Article 6 (1) of the ECHR. This position was later reaffirmed by the case of *Jespers v. Belgium*²⁸. The ECtHR expresses the importance of equality of arms by stating that,

"[i]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art.6-1) would not correspond to the aim and the purpose of that provision."²⁹

At what point of the trial does the principle of equality of arms apply? The answer to this question is far from simple. It has been asserted that the principle pervades all stages of the trial even the pre-trial stages. The case of *X v. United Kingdom*³⁰

²⁴Judgment of 25 April 1983, A.64, *Dijk et al., Theory and Practice of the European Convention on Human Rights*, p. 15

²⁵Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

²⁶Application No. 524/59, report of 23 November 1962, Yearbook volume 6, 1963, p. 680

²⁷Application number 596/59 and 789/60, report of 28 March 1963, Yearbook volume 6, 1963, p. 718

²⁸Application No. 8403/78, Commission's report, 14 December 1981, D & R 27, para 55

²⁹*Delcourt v Belgium*, Application No. 2689/65, Judgment, Strasbourg, 17 January 1970, para 25

³⁰Application No 9370/81, *X v. the United Kingdom* (not published) in *Dijk et al., Theory and*

highlighted that, “Article 6 in principle requires the assistance of a lawyer in the pre-trial phase.” The U. K. courts have struggled with at what stage legal counsel should be provided. The Court held that a determining factor in whether and at what stage counsel ought to be provided will be determined by the evidence. If the evidence was evaluated in the presence of the defendant and his counsel who then would have the opportunity to contradict the evidence the court will hold that any confession made must be proved by the prosecution to have been made voluntarily. Subsequently there will be no violation of Article 6.

The ECtHR in determining whether it would be in the interests of justice to provide counsel provides a two stage test which must be met:

1. 'the seriousness of the alleged offence in conjunction with the severity of the penalty that the accused risks,
2. the complexity of the case.'³¹

These two requirements act as a safety valve. The test helps member states to stay in line with the spirit of the ECHR. It is left to the discretion of the member states to regulate their own internal practices for awarding legal aid but it is confirmed by the ECtHR that this should be done by taking into consideration the principle of equality of arms and the case law of the court.

3.2 The development of the principle of equality of arms in Europe

When assessing whether the trial has been fair the ECtHR looks at, if , “taken as a whole, guarantees that a person charged with a criminal offence should ... be entitled to be present and participate effectively in the hearing concerning the determination of criminal charges against him.”³² Looking to the overall fairness of the trial the ECtHR will take into consideration the doctrine of margin of appreciation when the Court declares that it does not act as a court of fourth instance as the ECtHR does not assess whether the domestic law has been applied appropriately or to assess the facts.³³ The ECtHR will rather, in these circumstances, focus on, “The question

Practice of the European Convention on Human Rights, p. 468

³¹Dijk et al., *Theory and Practice of the European Convention on Human Rights*, p. 471.

³²Zhuk v Ukraine Application Number 45783/05, Judgment of 21 October 2010, para 26

³³Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.”³⁴ This notion of what constitutes fair is set out in Article 6 and enumerated in its paragraphs in the form of a non exhaustive list of minimum requirements.

The case of *Delcourt v. Belgium*³⁵ was the first to raise the importance of appearance as a test for ascertaining whether the equality of arms had been breached.

“each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent.”^{36, 37, 38}

These conditions are set out in Article 6 of the ECHR which was reaffirmed by the case law of the ECtHR. Because all that the defendant has to show is a disadvantage vis-a-vis his opponent it should be theoretically easier for the defendant to receive the protection of the principle of equality of arms. Despite this belief, the courts and the individual member states, still have the problem of quantifying the ‘disadvantage’ and determining whether a particular situation is worthy of protection or not. This endemic problem is most notable in the diverse protection of defendants right to fair trial human rights across the EU Member States.

The substantial disadvantage test is not the most accurate standard. In the case of *Airey v. Ireland*³⁹ the Supreme Court applied an objective test:

‘whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing.’⁴⁰

The *Airey v Ireland* case applied an objective test. This objective test presents its own problems as it relies upon the reasonable man test being applied. This was a foretaste of the appearance test which was built upon in the cases of *Delcourt v. Belgium*⁴¹ and *Brandstetter v. Austria*⁴² which both reaffirmed the importance of the appearance of fairness and equality of arms.

The equality of arms has expanded to include the right to legal assistance.

³⁴Allan v U. K. , Application Number 48539/99, Judgment of 5 November 2002, para 42

³⁵Application No. 2689/65, Judgment, Strasbourg, 17 January 1970

³⁶Bulut v. Austria, App. No. 17358/90 ¶ 47, Eur. Ct. H. R. (1996)

³⁷Lanz v. Austria, App. No. 24430/94 ¶ 57, Eur. Ct. H. R. (2002)

³⁸Öcalan v. Turkey, App. No. 46221/99 ¶ 159, Eur. Ct. H. R. (2005)

³⁹Application No. 6289/73, Judgment, Strasbourg, 9 October 1979

⁴⁰Bula Ltd. et al. v Tara Mines Ltd., 4 I. R. 412, 441(2000)

⁴¹Application No. 2689/65, Judgment, Strasbourg, 17 January 1970

⁴²Application No. 11170/84; 12876/87; 13468/87, Judgment, Strasbourg, 28 August 199

Despite the recognition of the right to legal counsel in the case of *Freixas v. Spain*⁴³ stated that,

‘Article 6 (3) (c) does not guarantee the right to choose an official defence counsel who is appointed by the court, nor does it guarantee a right to be consulted with regard to the choice of an official defence counsel.’

In a similar case of the Supreme Court of California it was stated that,

‘While it might be desirable to recognize [the right to choose legal aid counsel] as an abstract principle, its application in the real world of criminal courts procedure is fraught with complications ... Many a defendant charged with a commonplace violation, in the dreary solitude of his jail cell, contemplates his case as a cause celebre deserving representation by a Clarence Darrow or a Jerry Geisler.’⁴⁴

The judgments handed down in both of these cases are not unique. They illustrate how far we have yet to go in reaching an integrated application of equality of arms.

3.3 The meaning of equality within equality of arms

The wording of the principle of equality of arms is somewhat misleading as they are not applied in their strict meaning. The ECtHR has set out the standard against which the application of the principle should be assessed that being the substantial and appearance tests. Both of these tests help us to determine when an infringement has occurred but not what equality is.

In the context of a fair trial this can mean two different things. The first is the equality of parties before the law based on no discrimination. Secondly, the regulation of equality of the relationship between parties which are not on a similar footing with competing interests.

It is very difficult to talk about equality between the parties in the latter relationship when it is apparent that there is an inherent imbalance. The search for equality is significant for what theory of justice we choose to implement.

‘Theories of equality are usually linked to the concept of justice; through their role as principles of justice the equality principles receive their nor-

⁴³[2000] ECHR 53590/99

⁴⁴*Drumgo v. The People* (1973) 106 Cal. Rptr. 631, 940

mative significance and a theory of justice cannot be explained without the principles of equality.⁴⁵”

In order to establish the equality in an inherently unequal relationship between the defence and the prosecution one must locate the “reasonable opportunity” of the defence to present their case .

The phrase means no more than that every party to proceedings must have a “reasonable opportunity of presenting his case to the court under conditions which do not place him at a disadvantage vis-à-vis his opponent. ⁴⁶⁴⁷

This position again presents us with more questions than it solves. A façade has been created whereby we have overlooked the fact that equality is an illusory concept which is unattainable unless the defendant adopts a way in which they can bargain the best result for themselves. This position is not entirely satisfactory as we are allowing the defendant to relinquish fundamental rights, in order to serve a new interpretation of justice.

Article 6 (1) of the ECHR enshrines the principle of fairness requiring that the member states practices comply with the rule of law. The fact that several member states have signed the ECHR which includes the right to a fair trial presupposes the fact that the member states believe that their domestic laws already adhere to the rule of law. It is evident from the case law of the ECtHR that the application of the rule of law has far ranging interpretations amongst the member states. It is these variations that have caused problems recently when trying to work towards a harmonisation of the distinct criminal procedural rules.

The fairness requirement of Article 6 (1) as two distinct elements which must be protected;

1. a balance of procedural opportunities;
2. principle of adversarial procedure is both respected and upheld.

There are two distinct problems with the respecting of these elements of fairness as illustrated by the case law. The first is when the prosecution fail to reveal certain

⁴⁵Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

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Dombo Beheer BV v. Netherlands (1993) 18 EHRR 213

⁴⁷In the Supreme Court of Judicature High Court Civil Jurisdiction No. 2016 of 2006 Clyde Anderson Graze and The Attorney General 1st Respondent, The Director of Public Prosecutions 2nd Respondent, <http://www.lawcourts.gov.bb/Lawlibrary/events.asp?id=565>

evidence that they rely upon to form part of their case against the defendant. The second is the institutionally impartiality of some systems which could bring into question the reliability of the verdict in any given case.

The principle of adversariality and equality of arms have been accepted by most of the European member states. This is in part because most of the member states accept that the trial consists of two opposing parties and an impartial judge. All member states make provisions for defendants to respond to the accusations being brought against them as well as all of the member states asserting that their judiciary is impartial.⁴⁸

Despite this fact there are still tensions between what the ECtHR's says fairness is and that which is defined by the criminal procedure of the domestic law in the member states. The ECtHR has, until recently, failed to emphasise the impact that the pre-trial investigative stage has on the procedural fairness of the trial. The ECtHR has been slow to regulate the pre-trial proceedings which has resulted in this stage of the criminal proceedings, in several member states, being very ambiguous and resulting in grave infringements of the principle of fairness of Article 6. These instances have led to a widespread concern and call for renewed attention to the procedural irregularities amongst the member states when it comes to the application of the principles of adversariality and equality of arms.

The European member states do have a common heritage and understanding of Article 6 however the timidity of the ECtHR in its application has led to varying practices amongst the various member states (see: *Salduz v. Turkey*⁴⁹, *X. Y. v. Hungary*⁵⁰, *A. B. v. Hungary*⁵¹, *A v. SSHD*⁵²).

Summers argues for a strengthening of the institutional systems so as to ensure the consistent application of procedural rights as a means by which to pave the way for unifying the procedural guarantees across Europe.⁵³ Bárd states that one of the reasons that it is difficult to harmonise the criminal procedures of the member states is to do with the fact that the particular backgrounds of the criminal justice systems. The difficulties of harmonisation are due in part to the fact that the member states

⁴⁸Which is important for rendering the judgment fair as well as just.

⁴⁹Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

⁵⁰Application No. 43888/08, Judgment Strasbourg, 19 March 2013

⁵¹Application No. 33292/09, Judgment, Strasbourg, 16 April 2013

⁵²[2004] UKHL 56

⁵³Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

all have their own historical and political and socio-psychological factors. Despite these cultural differences which could form barriers the ECHR has exerted impact upon the national criminal justice systems. This fact shows that, “the objective of the criminal process is, besides enforcing substantive criminal law, to arrive at accurate factual findings in a manner by which basic human rights are observed.”⁵⁴

The relationship between the prosecution and the defence is central and critical to having, “an adequate understanding of the modern conception of fairness in criminal proceedings.”⁵⁵ This can also be noted in the judicial recourse and the quality of the proceedings which are very important when it comes to ensuring virtually all of the Convention’s provisions.⁵⁶

“The argument suggests that democratic values are reflected in the procedural law’s dealing with defendants by treating them not as mere objects of the proceeding but as active subjects involved in shaping the trial.”⁵⁷

The role of the ECtHR is to ensure that the preservation of the standard achieved and to make sure that it does not drop below the acceptable standard.⁵⁸ The ECtHR has great potential to shape the rules in the criminal procedure of the Contracting States by using the general measures mechanism. Bárd observes that there is great power in their decision-making because it leaves no room for alternative interpretations, the member states can pick up on how and what they should be changing in their national legislation.⁵⁹ Summer notes that the movement to increase procedural rights as if “throwing rights” at the problem will solve it could be more harmful than beneficial;

“Merely insisting on the creation of procedural rights without considering the context of their application could, moreover, reduce the guarantees afforded to some accused persons; in the absence of system-wide regulation, the creation of rights may cause unfairness instead of guaranteeing

⁵⁴Bárd, *Fairness in Criminal Proceedings Article Six of the European Human Rights Convention in a Comparative Perspective*.

⁵⁵Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

⁵⁶Bárd, *Fairness in Criminal Proceedings Article Six of the European Human Rights Convention in a Comparative Perspective*, p. 46.

⁵⁷*Ibid.*, p. 47.

⁵⁸*Ibid.*

⁵⁹*Ibid.*, pp. 25–27.

fairness.”⁶⁰.

It would appear that there is indeed a shift in how fairness is being perceived. In order to gather a better picture of how fairness is developing we need to look at the Belgian cases decided before the ECtHR.

3.4 The Belgian Cases: development of the equality of arms principle

The most striking development of the meaning of equality of arms in the context of defence rights were the two cases of *Delcourt v. Belgium*⁶¹ and *Borgers v. Belgium*⁶². The twenty years that passed between the two decisions had a significant impact upon how the fairness of a proceedings should be determined. In *Delcourt* the focus of the ECtHR was upon the fairness of the role of the Avocat Général, whereas in *Borgers* the ECtHR shifted its attention to the rights of the accused and the perceived procedural fairness of the adversarial parties. In subsequent cases the position of *Borgers* was reaffirmed where it was stated that, “[t]he principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial.”⁶³ The Court in *Borgers* also cited its previous decisions concerning equality of arms, “it is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements of such proceedings which relate to procedure, should be adversarial and there should be equality of arms between the prosecution and the defence.”⁶⁴

It is always important to remember that the principle of equality of arms does not confer specific rights but rather acts as a tool by which one can ensure that the form that the criminal process takes complies with ensuring the equal application of rights in a balanced way.

This concept of a fair balance is integral to understanding the way in which the principle of equality of arms should be applied. A fair balance implies more than

⁶⁰Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*, p. 174.

⁶¹Application No. 2689/65, Judgment, Strasbourg of 17 January 1970

⁶²Application no. 12005/86, Judgment, Strasbourg, 30 October 1991

⁶³*Brandsetter v Austria*, Application No. 1170/84, 12876/87, 13468/87, Judgment, Strasbourg, 28 August 1991, par 66

⁶⁴*Rowe and Davis v United Kingdom*, Application No. 28901/95, Judgment, Strasbourg, 16 February 2000, par 60

just having specific procedural rights enshrined. Rather it establishes that between the parties there ought to be a balance of fairness.⁶⁵

As we will see below the principle of equality of arms is closely linked to other individual rights of the defence such as the right to legal representation and counsel and the right to a fair trial. In the case of *Foucher v. France* the ECtHR stated that the, “ (...) principle of equality of arms is an essential guarantee of the right to defend oneself. (...) Its requirements also include the right to legal counsel, the right to call and examine witnesses and the right to present at the trial.”⁶⁶ This ability to present at the trial is also an interrelated to the waiver and the practice of plea bargaining.

The State has a positive obligation to ensure that the defendant is present and able to defend himself in person.⁶⁷ Similarly in the case of *Belziuk v. Poland* the ECtHR stated that Article 6 (1) and the principle of equality of arms had not been adhered to because the defendant had not been allowed to be present at the hearing.⁶⁸

3.4.1 *Jespers v. Belgium*: case analysis

The central facet of the equality of arms is the requirement of balance between the two parties to the proceedings. The principle does not necessarily ensure specific rights but it does seek to ensure that rights are applied fairly. That this principle has been applied across European countries demonstrates that the principle can be applied irrespective of cultural constraints.⁶⁹

The ECtHR delivered two distinct judgments in two cases where they concerned the same factual and legislative problems. Fourteen years passed between the judgment of the two cases. The ECtHR decided in *Borgers* that the principle of equality of arms had been infringed. At the time the judgment seemed to be inconsistent with its previous decisions and a break from the principle of fairness in European Criminal procedure. The decision in *Borgers* was instrumental in developing the understanding that the relationship between the prosecution and the defence is

⁶⁵*Gorraiz Lizzarraga and others v. Spain*, Application No. 62543/00, Judgment, Strasbourg, 27 April 2004

⁶⁶Application No. 22209/93, Judgment, Strasbourg, 18 March 1997

⁶⁷*Kremzov v Austria*, Application No. 12350/86, Judgment, Strasbourg, 21 September 1993

⁶⁸*Belziuk v Poland*, Application Number 23103/93, Judgment of 25 March 1998, par 39

⁶⁹Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

central to the equality of arms. It is to this procedural relationship that we now turn.

The case of *Jespers v. Belgium*⁷⁰ followed the decision reached in *Borgers*. This case illustrates how the ECtHR has further developed its jurisprudence. *Jespers* reiterates that the right to access the prosecution's file is an inherent part of the principle of equality of arms:

“(...) in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. (...) The Commission has already had occasion to point out that the so-called 'equality of arms' principle could be based not only on Art. 6 (1) but also on Art. 6(3), especially sub. para. (b).”⁷¹

Jespers created a general positive obligation on each State to adopt 'appropriate measures' to place the defence in parity with the prosecution.

In *Jespers* the ECtHR stated that the duty of disclosure extended to “any material to which the prosecution or police could gain access...” and that included “any material which may assist the accused in exonerating himself or in obtaining a reduction in sentence”. This was confirmed in *Edwards and Lewis v. UK*⁷² where the ECtHR stated that material which was for the defendant should also be disclosed and that measures to avoid disclosure should only be taken when strictly necessary.”⁷³

Since the Commission's decision in *Jespers*, the ECtHR has adopted a more restrictive definition of the principle of equality of arms. In *Jespers* the Commission applied equality of arms as a means by which to counterbalance the discrepancies between the individual and the State in a criminal trial. This counterbalancing has been reformulated by the ECtHR into requiring the presence of an objective element of reasonable opportunity and a subjective one of reasonable opportunity as compared to the adversary.⁷⁴ These elements are useful guideposts which work as

⁷⁰Application Number 8403/78, Commission's report of 14 December 1981. D & R 27

⁷¹*Jespers v Belgium*, Application Number 8403/78, Commission's report of 14 December 1981. D & R 27 par, 55

⁷²(2005) 40 EHRR 24

⁷³<http://cymraeg.sfo.gov.uk/media/113319/european%20convention%20on%20human%20rights%20web%201.pdf>

⁷⁴Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

indicators so as to determine if the parties are balanced. Despite this the ECtHR has developed their application in both a formalistic and restrictive way resulting in the scope not being as wide as it could be.

3.4.2 Lamy v. Belgium: case analysis

In *Lamy v. Belgium*⁷⁵ it was stated that the principle of equality of arms was not ensured if the counsel was denied access to the documents which are in the investigation file. As defence counsel would need access to them in order to effectively defend their client.

In the case of *Lamy* the ECtHR has applied the protection of fundamental rights in those circumstances where the defendant has been unable to prepare their case efficiently for the court. The decision in *Lamy* concerns the ability to prepare one's case for trial after the decision has been made to proceed to the trial stage. The case law of the ECtHR has yet to address the question of how practices like plea bargaining may contest the appropriate application of the equality of arms. It is as if the ECtHR has swept aside the issue by stating in its case law that when the rights of the defence are limited in some kind of way an analysis will have to be carried out as to whether the limitations in the particular situation were strictly necessary. This appears to be sending the message that the ECtHR will be looking at whether the restriction was kept to a minimum and whether the defendant was compensated in some way for the limitation of their rights.⁷⁶ The case law of the ECtHR establishes that member states must apply the least restrictive measure when it comes to the infringement of the defendant's rights.⁷⁷

3.5 Equality of arms in the U. K.

Before the U. K. was a signatory to the ECHR the principle of equality of arms had been recognised in the Magna Carta. The principle had been incorporated through the mechanism of habeas corpus. The very premise of the Magna Carta was to regulate the power of the King over his subject's so as to protect the people's

⁷⁵Application No. 10444/83, Judgment, Strasbourg, 30 March 1989

⁷⁶Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

⁷⁷*Van Mechelen v Netherlands*, Application No. 21363/93, 21364/93, 21427/93, 22056/93, Judgment of 23 April 1997, par 58

liberties from abuse. This was an early formulation of the equality of arms in the U. K. .

The Magna Carta established the fact that there will be no violation of the principle of equality of arms where both parties suffered an equal disadvantage in a matter. In the case of *Monnell and Morris v. United Kingdom* the ECtHR further iterated that,

“To begin with, the principle of equality of arms, inherent in the notion of fairness under Article 6 § 1 (art.6-10 (...)) , was respected in that the prosecution, like the two accused, was not represented before either the single judge or the full Court of Appeal.”⁷⁸

When considering the right to an equal defence access to the relevant documentation also should be taken into consideration. This right to disclosure plays a pivotal role in the plea bargain as it is to some degree this issue which is being played on by the prosecution. The limited access to the prosecution file inhibits the defence from building an effective defense and knowing whether the prosecution really has a case that can be answered. It is very difficult for there to be equality of arms when the defence does not have access to or at its disposal the relevant information upon which to build its case. When we consider the adversarial trial the defence must have the opportunity to challenge the prosecutor’s submissions. The prosecutor must also fulfil its obligations to disclose. This issue was raised in the case of *I. J. L. and others v. The United Kingdom*,

“The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence provided by the other party. In addition Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.”⁷⁹

The right to have access to the documents is intrinsically interwoven with the right to have adequate time and facilities to prepare their case. The right to have adequate time to prepare is reliant upon having adequate legal representation.⁸⁰ This position was further asserted in the case of *John Murray v. U. K.* this case illustrates

⁷⁸Application No. 9562/81 and 9818/82, Judgment of 2 March 1987, par 62

⁷⁹*I. J. L. and others v The United Kingdom*, Application Number 29522/95, 30056/96 and 30574/96, of Judgment of 19 September 2000, par 112

⁸⁰Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

the reasoning of the Court where they emphasised the importance of the access to counsel at the pre-trial investigative stage;

“The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”⁸¹

The U. K. recognised the importance of the pretrial phase to the overall outcome of the trial. Despite this fact there has been limited application of the equality of arms to practices which circumvent the trial as they do not impinge upon the overall fairness outcome of the trial because there is not one. This is an unsatisfactory conclusion as it does not address the fact that we have created a legal black hole where the principle of equality of arms does not reach where there is quite clearly an apparent unequal legal relationship. In the case of John Murray the ECtHR recognised two important aspects. Firstly, that wherever and whenever possible Article 6 may need to apply to the pretrial investigative stage as well⁸² and secondly, that the right to counsel will be deemed necessary where their absence,

“would adversely affect the fairness of the subsequent hearing.”⁸³

Lord Bingham, the advocate for the rule of law, stated in the case of *Brown v. Stott*⁸⁴ that,

“Equality of arms between the prosecutor and the defendant has been recognised by the court as lying at the heart of the right to a fair trial.”

These cases both at the domestic level and the ECtHR send the clear message that if one seeks to be protected by the principle of the equality of arms, then they must proceed to the trial or at least the end result must be a trial. If one seeks to bargain their justice then they lose their protective rights and shield we are all inherently entitled to as human beings. The sword/shield analogy used to describe the role of human rights in criminal proceedings has focused more on the prosecutorial sword than the defensive shield in recent years. That is why it is important to discuss the impact and the importance of the equality of arms. This integral concept, to the right to a fair trial, has been shifted towards a more prosecutorial (focused) model by the Member States. The ECtHR has sought to both extend its reach and interpretation to apply to the whole of the trial proceedings to include the pre trial investigative stage as well.

⁸¹Judgment of 8 Feb 1996, Reports 1996-I, 30, (1996) 22 EHRR 29 at para 63

⁸²*Imbrioscia v. Switzerland*, Judgment of 24 Nov 1993, Series A no 275, (1994) 17 EHRR 441

⁸³*Murray v. U. K.* Judgment of 8 Feb 1996, Reports 1996-I, 30, (1996) 22 EHRR 29

⁸⁴[2003] 1 AC 681 at para 106

In light of the above we start to develop the picture that the ECtHR, when considering the fair trial in the context of the equality of arms has focused on predominantly two aspects:

1. The right to hear; and,
2. The right to challenge evidence

Both of these elements apply to the trial stage. In order for them to be competently satisfied the ECtHR has established that trials should be conducted in an adversarial manner with respect for the constitute independent relationships which make it possible for a trial to be conducted fairly.⁸⁵

The U. K. has, for the most part followed the lead of the ECtHR in the development of its own jurisprudence. This is not the case though for all countries when it comes to the enshrining of the principle of the equality of arms. What better place to start then the U. S. where the practice of plea bargaining is prevalent.

3.6 The U. S. situation: The development of equality of arms

In the U. S., the evolution of the principle of equality of arms started to gain traction in the 1960s. During this time there were a series of reforms to the constitutional procedural rules which were instigated to help the prosecutorial load. The prosecution were overburdened and under financed also the increase in the caseload was not matched by an increase in prosecutors. The reforms of the Warren Court had little impact upon the practice of the prosecution in selecting those cases which they were sure that they could prosecute. The Warren Court's act of increasing procedural rights so as to further protect the rights of the defence did nothing in reality because, " the procedural reforms vastly increased the cost of prosecuting those able to exercise their procedural rights, this was kept in check by the low level of funding for defence counsel which limited the potential for poor defendants to 'litigate aggressively'".⁸⁶ This resulted in a widening of the gap between the rich and the

⁸⁵M. Wasek-Wiaderek. *The principle of "equality of arms" in criminal procedure under Article 6 of the European Convention on Human Rights and its functions in criminal justice of selected European countries A comparative view*. Leuven University Press, 2000.

⁸⁶Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

poor. It also created an uneven shift in the balance of proportional representation. This lack of proportional representation further exacerbated the gap of unfairness between the parties suspected of having committed a crime. It is here that we see the limits of the procedural law in securing the fairness of the trial for all involved.

The U. S. presents an interesting example of this question of inherent inequality between both the prosecution and defence when considering if a semblance of fairness can be established between the parties in a criminal trial.

In the case of *U. S. v. Tucker*⁸⁷ the court found that,

“A criminal prosecution [...] is in no sense a symmetrical proceeding [...] The principle of equality of arms may apply in certain international criminal law contexts, [...] but it has no place in our constitutional jurisprudence.”

The Court asserted that the due process clause only requires that the defence receive a constitutionally adequate defence

In the case of *Wardius v. Oregon*⁸⁸ the Supreme Court stated that,

“ [...] ‘due process’ is [...] designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.”

The Supreme Court further noted that despite the fact that the due process clause says very little about the amount of discovery which each party must give to the other but it,

“does speak to the balance of forces between the accused and his accuser.”⁸⁹

The U. S. judges have noted that the Bill of Rights does not envision an adversary proceeding between two equal parties. Rather the court recognises that in a criminal proceeding the parties have very distinct roles with an uneven distribution of power which does not lend itself to equalisation making it an unsound principle in the view of the Supreme Court of the U. S. ⁹⁰

⁸⁷249 F. R. D. 58, S. D. N. Y., 2008, February 07, 2008

⁸⁸412 U. S. 470, 474 (1973)

⁸⁹Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

⁹⁰*United States v Turkish*, 623 F.2d 769, 774-775 (2nd Cir. 1980)

The U. S. Bill of Rights as well as their constitution recognise that an inherent imbalance exists between the parties. This acknowledgement of the imbalance recognises that their adversarial system works upon the premise that, “ (...) fairness can be achieved only by recognizing the differences between the prosecution and the defence.”⁹¹ Goldwasser has also noted that within the U. S. system that it is not possible, to argue that both sides in the criminal trial should be afforded fairness. An argument for making the parties equal in symmetry, would not work in the U. S. criminal justice system.⁹²

Both the fifth and the fourteenth amendments provide protection of individuals due process rights and in particular the fact that in the criminal trial the defendant will not be compelled to be a witness against himself.

“nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The fourteenth amendment of the United States of America in section one specifies that,

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Both of these principles together form the basis of the due process protection.

Judge Learned Hand, in the case of *United States v. Garsson*⁹³, stated that in the U. S. criminal procedure the accused has every support needed so why should the prosecution then have to reveal their hand in order for the defence to be able to go over it and have an advantage. He went onto say that, “Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. *It is an unreal dream.*”(emphasis added)

In the case of *Weatherford v. Bursey*⁹⁴ the Supreme Court of the U. S. stated

⁹¹Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

⁹²Goldwasser, 1989, pp 825-826 in *ibid*.

⁹³291 Fed. 646, 649 (S. D. N. Y. 1923)

⁹⁴429 U. S. 545, 559 (1977)

that there was no overriding constitutional right to discovery in a criminal trial. Before this case was decided *Brady v. Maryland*⁹⁵ established that there was a constitutional right for the defence to have access to material from the prosecution which is favourable to their defence. This case was followed by *U. S. v. Agurs*⁹⁶ which further established that there is a duty upon the prosecutor to reveal exculpatory evidence.

As the above cases all illustrate equality of arms refers to three main areas, the duty to disclose, the ability to question and have witnesses questioned on your behalf, and the right to challenge evidence. In the context of plea bargaining both the discovery and disclosure stage become very important because it is here that the prosecution can mislead the defence as to the strength of the evidence against the defendant.

The defence also have to disclose and comply with the discovery stage as well especially when they are asserting a defence of alibi or insanity. The case of *Wardius v. Oregon* established (with regards to the issue of an alibi defence) that the, “Due Process Clause (...) does speak to the balance of forces between the accused and the accuser, (...) discovery must be a two-way street. (...) It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.”⁹⁷

The importance of confrontation is felt by the defence when preparing its case. The defence should be entitled to the natural benefit of being able to question witnesses at the trial stage, this forms the adversarial nature of the trial in the context of the accusatorial trinity.⁹⁸

The right to be protected from being compelled to be a witness against oneself, disclosure rules and the right to confrontation all fit into the framework of what constitutes the principle of the equality of arms. The U. S. has established, the position that those who engage in the trial will be afforded their constitutional rights. In the situation that one decides to opt out of the trial then the words of Judge Learned Hand coupled with the position of the U. S. Supreme Court that equality of arms has no place in domestic proceedings paints a very dreary picture

⁹⁵373 U. S. 83 (1963)

⁹⁶United States Supreme Court, 427 U. S. 97 (1976)

⁹⁷United States Supreme Court, 412 U. S. 470, 474 (1973)

⁹⁸Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

for the defendant.

Here as in the ECtHR case law we again see the limits of the application of the equality of arms.

3.7 Equality of arms in Germany

The right to a fair trial is enshrined in Article 20 of the German Constitution which draws upon Article 6 of the ECHR.⁹⁹

The principle of the equality of arms, in the case of Germany was first highlighted in connection with the right to be assisted by legal counsel.

The formal introduction of equality of arms was realised through constitutional provisions as well as E. U. human rights law in Germany

Germany had two predominant cases at the ECtHR which addressed this issue of the right to choose one's own legal counsel. The right to choose counsel was viewed as being critical to the application of a fully comprehensible equality of arms.

The first case of *Pakelli v. Germany*¹⁰⁰¹⁰¹ set out the following;

“31. Article 6(3)(c) guarantees three rights to a person charged with a criminal offence: to defend himself in person, to defend himself through legal assistance of his own choosing and, on certain conditions, to be given legal assistance free.

These three standards were a step forwards but they then became quickly qualified rights.

The second case, *Croissant v. Germany*¹⁰² further refined the right to choose who your legal aid counsel would be;

“29 ... It is true that Article 6(3)(c) entitles “everyone charged with a criminal offence” to be defended by counsel of his own choosing (see *Pakelli v Germany*). Nevertheless, and notwithstanding the importance

⁹⁹Wasek-Wiaderek, *The principle of "equality of arms" in criminal procedure under Article 6 of the European Convention on Human Rights and its functions in criminal justice of selected European countries A comparative view.*

¹⁰⁰Application No. 8398/78, Judgment, Strasbourg 25 April 1983

¹⁰¹which was not cited by the ECtHR in the case of *Freitas*

¹⁰²[1990] [1992] ECHR 13611/88

of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them.”

In this case we begin to see the erosion of the right to choose counsel.

The two cases concerned complaints alleging the breach of equality of arms. The breaches were based on the fact that because there was a lack of appropriate legal counsel there was a denial of access to justice. This was just a foretaste of the problem with the plea bargain and effective representation.

These cases were followed on by three further cases, *Schops v. Germany*¹⁰³, *Garcia Alva v. Germany*¹⁰⁴, and *Lietzow v. Germany*¹⁰⁵. Each of these cases concerned the infringement of Article 5 and the right of all of the defendants in the cases to consult or have access to certain information to help them prepare their case. They argued that the lack of information placed them at a disadvantage vis-a-vis the prosecution.

Article 3 of the German Constitution ensures that individuals are equal before the law. It is in this article that the German concept of the “equality of arms” principle is found. The concept of the right to a fair trial, *eines fairen Verfahrens*, is a constitutionally protected right. It is this *fairen Verfahrens* concept which forms the basis for the German concept of the equality of arms principle. Additionally, section 115 (3) of the Code on Criminal Procedure allows access to the file further aiding equality between the parties in the preparation of their cases before the court. Not only must the defendant be afforded legal representation of their choosing they must also be granted access to the file. Furthering strengthening this position the ECtHR stated that the equality of arms is central to the Convention’s concept of a just and fair criminal process.

German scholars have argued that the equality of arms concept (*Waffengleichheit* which means “equality of arms”) should be replaced by an equality of chances (*Chancengleichheit*) because it is a better and more accurate interpretation of the reality as it, “implies that all unequal treatment of one party vis-a-vis the other which is not justified by the natural role played by it in the procedure, is forbidden

¹⁰³Application No. 25116/94, Judgment, Strasbourg, 13, February 2001 para 48.

¹⁰⁴Application No. 23541/94. Judgment Strasbourg, 13, February 2001, para 42.

¹⁰⁵Application No. 24479/94, 13, February 2001, para 41

as a breach of the equality requirement.”¹⁰⁶

This approach by the German scholars is radically different from the approach adopted by both the U. K. and the U. S. in that it recognises that there may be some circumstances where the equality of arms may need to be extended.

It is indisputably mathematical nonsense to insist on the fact that there is a literal “equality of arms” between the parties as this would mean that the defence should be able to employ covert evidence gathering mechanisms just like the police do with the prosecution.¹⁰⁷ This is not the role of the defence and neither should it be as this would be a shifting of the burden of proof onto the defence to prove their innocence. The German approach of starting from their constitutional basis first and then applying the law is to be lauded unlike the approach adopted by both the U. S. and the U. K. where it is more about how to adapt the law so as to come under the constitutional principles.

3.8 Italy's development of the principle of equality of arms

Article 111 [Legal Proceedings] of the Italian Constitution concerns the elements of the principle of equality of arms. In its article 111 (2) Section II Rules on Jurisdiction the Italian Constitution specifies that;

“Trials are based on equal confrontation of the parties before an independent and impartial judge. The law has to define reasonable time limits for the proceedings.”

Despite this clear specification of the equality of arms principle Italy has found itself before the ECtHR numerous times concerning the infringement of this principle.

The case of *Colozza v. Italy*¹⁰⁸ concerned the issue of the defendant being tried in their absence on default because they were not notified of the documents of the case pending against them. The ECtHR stated that it is implicit to the Article 6 (1) conception of the right to a fair trial that the defendant is entitled to take part

¹⁰⁶Wasek-Wiaderek, *The principle of "equality of arms" in criminal procedure under Article 6 of the European Convention on Human Rights and its functions in criminal justice of selected European countries A comparative view.*

¹⁰⁷Ibid.

¹⁰⁸Judgment of 12 Feb 1985, Series A no 89, (1985) 7 EHRR 516, at para 27

in the hearing and as such the Italian government had infringed the defendant's right to exercise their right to a fair trial. This was followed by the case of *Goddi v. Italy*¹⁰⁹ in which they found a violation of Article 6 (3) (c). In this particular case the defendant was not informed about the trial which meant that they were unable to defend themselves against the charges as they were absent from the trial. Consequently, they were unable to adequately prepare their defence. The ECtHR's case law has conflated several different theoretical concepts when drawing a picture of what the right to being present should look like which has not been helpful.

This case was followed by that of *Isgró v. Italy*¹¹⁰ which concerned the fact that at the pre-trial confrontation stage the applicant's lawyer was not present, during the confrontation between the defendant and the witness. The defendant alleged that they were not granted a fair trial and that the equality of arms and the presumption of innocence had been violated because they were then unable to challenge the evidence of the witness at court because the witness had disappeared. The ECtHR held that despite the fact that the defendant's lawyer had not been present at the confrontation stage and that the defendant had been unable to question the witness at the trial this part of the evidence had not formed the sole basis of the judgment of the domestic courts. The applicant was said to have had the advantage of their Article 6 (3) (d) rights and as such there was no violation of Article 6. The fact that the prosecutor had also been absent met the requirement of the principle of the "equality of arms" in that neither party had had an advantage over the other in procedural terms. But it is incompatible with the adversarial procedure requirements. A lesser test of procedural fairness seems to be applied here at the pre-trial investigative stage than at the in trial stage, (itself).

Surprisingly before even either of the above cases were decided the ECtHR had already considered the matter of fundamental rights of the defendant in the case of *Artico v. Italy*¹¹¹ where the ECtHR concluded that the rights of the defence should not be illusory or theoretical but rather practical and effective. This case concerned the issue of the defendant being tried in their absence.

The right to be heard provides a bedrock against which all of the other due process rights flow to form the equality of arms.

¹⁰⁹Judgment of 9 Apr 1984, Series A no 76, (1984) 6 EHRR 457, paras 27-32

¹¹⁰Judgment of 19 Feb 1991, Series A no 194-A

¹¹¹[1980] ECHR 6694/74, para 33

Summers argues that if the right to be heard is to be considered as part of the equality of arms it could be problematic in that the principle only ensures that there is a procedural balance between both the defence and the prosecution. This is problematic because if the defence was absent the right would not be violated so long as the prosecution was also absent (as is seen in the case of *Isgró v. Italy*¹¹²). Hence, this does not solve the inherent prejudicial miscarriages of justice against the defendant when it comes to their right to be represented by effective counsel at all stages of their trial proceedings in line with the principle of the equality of arms.

The Right to a Fair Trial as set out by Article 6 (1) does not set out any specifics of how one might be able to determine what a fair trial looks like. Within the article itself there is no specific mention of the relationship between the prosecution and the defence in terms of defining what would be fair behaviour. This fact is not helped by fair being defined in a multitude of varying and different ways.

The language that the ECtHR used to describe what constitutes a fair trial under Article 6 and what constitutes equality of arms is very similar. This similarity could lead one to the conclusion that the equality of arms is central to what we know as being an adversarial trial.

This can be illustrated for example when looking at the judgments of the ECtHR. When the court states that;

“[t]he principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial.”¹¹³

and that;

“it is a fundamental aspect of the right to a fair trial that criminal proceedings, *including elements of such proceedings* which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence.”¹¹⁴

What is key in these remarks by the ECtHR is that the definition given of an adversarial trial is if not the same then very similar as to the one given for equality of arms. The conclusion can then be drawn that the ability to adduce evidence

¹¹²Judgment of 19 Feb 1991, Series A no 194-A

¹¹³*Belziuk v. Poland*, judgment of 25 Mar 1998, Reports 1998-II, 338, (2000) 30 EHRR 614, para 37

¹¹⁴*Rowe and Davis v. United Kingdom*, no 28901/95, ECHR 2000-II, (2000) 30 EHRR 1, para 60

against the other side as well as being given the opportunity to question witnesses is integral both to the adversarial trial and the respect of the principle of equality of arms.¹¹⁵

There is a fine line between the definition of the two concepts. Equality of arms refers to the fact that both parties must be placed on an equal balance with each other in the trial, that they both have equal opportunities to present at the trial as well as have equal access to the evidence which is being presented at trial against them. The right to a fair trial involves the procedural guarantee that both parties to the proceedings will have the opportunity to challenge the evidence of the other side. The adversarial guarantees of the trial also extend to the fact that the defence has the right to informed of as well as the right to challenge any of the prosecution's arguments.

There should be room for a cross-disciplinary approach which makes room for the realisation that different member states do have slightly varying practices at the pre-trial stage. Therefore, Article 6 should apply to the pre-trial stage as well and not only the in trial stage.¹¹⁶

The Italian constitution as well as the ECtHR have reaffirmed the fact that the right to be represented is the key fundamental right from which it is possible to ensure that one receives a fair trial in line with the equality of arms standards. It is very clear from the ECtHR case law that one can only benefit from these rights if they are within the context of the trial proceedings and they have adequate legal representation

3.9 Hungary and the development of the principle of equality of arms

Hungary has had several fundamental cases reach the ECtHR which concerned the issue of equality of arms at the pre trial stage of the proceedings. In Hungary most of the cases that deal with the equality of arms issues are cases which concern Article 5 (3).

¹¹⁵Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

¹¹⁶Wasek-Wiaderek, *The principle of "equality of arms" in criminal procedure under Article 6 of the European Convention on Human Rights and its functions in criminal justice of selected European countries A comparative view*.

They were the following cases, *X. Y. v. Hungary*¹¹⁷, *A. B. v. Hungary*¹¹⁸ and *Baksza v. Hungary*¹¹⁹, *Osvath v. Hungary*¹²⁰ and *Hagyó v. Hungary*¹²¹

In Hungary the question of the principle of equality of arms has been addressed in those cases concerning the appropriate use and length of pre trial detention.

The cases of *X. Y. v. Hungary* and *A. B. v. Hungary* are factually very similar. Both of the cases were decided within nearly a month of each other at the ECtHR. Both cases concerned the period of pre-trial detention, as well as the reason for its use. The grounds were based on the risk of collusion and the intimidation of witnesses. The defendants also asserted that the lack of access to the relevant documentation in their cases resulted in both of the applicants being unable to mount adequate and successfully challenges to their detention.

X. Y. 's case was particularly alarming in that he was detained in pre-trial detention for a long period of time whereas his co accused was released on bail. The defendant, unlike his co accused, has a family to support, and was not a flight risk. The prosecution maintained that there was a likely threat that he would interfere with and intimidate the witnesses but did not provide any evidence to the defence to support this argument.

In both cases the ECtHR held that the Hungarian government had failed to protect the principle of the equality of arms when they did not allow adequate access to the relevant documentation in both of the defendant's cases. In the case of *X. V. v. Hungary* the ECtHR found that there had been a violation of Article 5 (1), (3), and (4). In the case of *A. B. v. Hungary* the ECtHR found a violation of Article 5 (4). The ECtHR did not comment on the fact that in both cases the co accused who cooperated with the investigation was out on bail far quicker than the defendants who maintained and asserted their innocence. Both defendants were treated more harshly for wanting to exercise their constitutional right to a fair trial.

On the same day in April 2013 two other cases were decided at the ECtHR. Both cases were illustrative of the domestic courts adopting a heavily biased prosecution view not taking into consideration the individual nature of the situations presented before them. In each instance the defendants had been held on pre-trial detention

¹¹⁷Application No. 43888/08, Judgment, Strasbourg, 19 March 2013

¹¹⁸Application no. 33292/09, Judgment Strasbourg, 16 April 2013

¹¹⁹Application no. 59196/08, Judgment, Strasbourg, 23 April 2013

¹²⁰Application no. 20723/02, Judgment, Strasbourg, 5 July 2005

¹²¹Application no. 52624/10, Judgment, Strasbourg, 23 April 2013

for extensive periods of time. In the case of Baksza, the defendant was held for two years then placed on house arrest with no consideration of his personal circumstances and risk of him colluding and intimidating witnesses. The defendant was also not given proper access to the file against him and was thus unable to mount an effective defence. The ECtHR held that in this way the defendant had not been afforded the privilege of the protection of the principle of equality of arms and found a violation of Article 5 (3).

Similarly in the case of Hagyo the ECtHR deemed that the pre-trial detention had been excessive. The defendant had been denied access to the material upon which the evidence against him was based. Again the Hungarian government cited the reason, of fear of colluding and absconding as the reason for the excessive detention of the defendant. The ECtHR stated that there had clearly been a violation of the equality of arms when ,

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to effectively to challenge the lawfulness of his client’s detention.¹²²

As such the ECtHR held that there had been a violation of Article 5 (3).

Again in Osvath v. Hungary the risk of collusion and absconding were cited as the reasons for the prolonging of the pre-trial detention of the defendant. The defendant asserted that the fact that neither he nor his counsel had been consulted about the reasons for his pre-trial detention, and they were not provided in advance the motions by the prosecution and the fact that it was decided upon in camera violated the principle of equality of arms. As such the ECtHR concluded that the defendant, in the circumstance of their particular case had not had the benefit,

of a procedure that was really adversarial.¹²³

From this statement we can draw the conclusion that the principle of the equality of arms finds its true fulfillment as well as place in the context of an adversarial atmosphere, namely, the trial.

¹²²Hagyo v. Hungary, Application No. 52624/10, Judgment, Strasbourg, 23 April 2013, para 68.

¹²³Osvath v. Hungary, Application no. 20723/02, Judgment, Strasbourg, 5 July 2005, para 18.

These cases illustrate that in the Hungarian context there is an overall ease with which defendants are detained for excessive periods of time so that the prosecution can build their cases against them. While in this position the defendant is treated as being presumed guilty and is unable to access the relevant documentation which may serve to help them prove their innocence. Additionally, there is an underlying tendency to inadvertently punish those who would seek to maintain their innocence by crushing their spirits through the unnecessarily invasive and restricted measures of pre-trial detention or be that house arrest.

These cases illustrate that the ECtHR has determined that the State must show that they have clear evidence to support their reason for further detention and if they have evidence to show it to the defence. The State must not be allowed to use pre-trial detention as a mechanism by which to intimidate the defendant into giving up their right to presumption of innocence as well as the right to a fair trial.

3.10 Serbian approaches to the principle of equality of arms

The Serbian Constitution (adopted on the 28th/29th of October 2006) provides in its Article 19 Purpose of constitutional guarantees, that the

Guarantees for inalienable human and minority rights in the Constitution have the purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open, and democratic society based on the principle of the rule of law.

This is followed up in Article 32¹²⁴ which enshrines the right to a fair trial. Article 32 does not explicitly refer to the equality of arms but can be inferred from the rights that it protects such as the right to legal assistance. The right to legal assistance is further supported and enshrined in Article 67 which stipulates that

¹²⁴(1) Everyone has the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which pronounces judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them. (2) Everyone is guaranteed the right to free assistance of an interpreter if the person does not speak or understand the language officially used in the court and the right to free assistance of an interpreter if the person is blind, deaf, or dumb. (3) The press and public may be excluded from all or part of the court procedure only in the interest of protecting national security, public order and morals in a democratic society, interests of juveniles or the protection of private life of the parties, in accordance with the law.

(1) Everyone is guaranteed right to legal assistance under conditions stipulated by the law. (2) Legal assistance has to be provided by legal professionals, as an independent and autonomous service, and legal assistance offices established in the units of local self-government in accordance with the law. (3) The law stipulates the conditions for providing free legal assistance.

Article 35 (5)¹²⁵ further enshrines the principle of equality of arms in that it allows for the presenting of evidence and the bringing as well as questioning of witnesses. This is followed up by the provision of equal protection of rights before courts and other state bodies, in Article 36 (1)¹²⁶ of the Serbian constitution.

All of these articles, woven together work to protect the right and principle of the equality of arms before the courts.

The ECtHR has of yet to consider any cases brought against the government of Serbia concerning the issue of the infringement of the principle of the equality of arms. Despite this fact the ECtHR has had reason to consider issues where the right to a fair trial has been violated.¹²⁷

One example of this is the case of *Dermanovic v. Serbia*¹²⁸ where the applicant claimed that his Article 5 and Article 6 rights of the ECHR had been violated. The basis for his argument was that the period of his detention had been too long. He was remanded in detention because it was deemed that he was a risk for absconding. Eventually, this was relented upon and he was placed on house arrest. In this case the ECtHR held that there had been a violation of both Articles 5 and 6. Firstly, because the extension of the pre-trial detention was not justified and secondly because the applicant had not been brought before a court within a reasonable amount of time.

¹²⁵(5) Any person prosecuted for criminal offense has the right to present evidence in his favour by himself or through his legal counsel, to examine witnesses against him and demand that witnesses on his behalf be examined under the same conditions as the witnesses against him and in his presence.

¹²⁶Article 36 Right to equal protection of rights and legal remedy (1) Equal protection of rights before courts and other state bodies, entities exercising public powers and bodies of the autonomous province or local self-government are guaranteed.

¹²⁷The issue of the equality of arms and Serbia has arisen in the cases before the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic case (Case No. IT-94-1-T, 7 May 1997) where it was stated that whenever possible the defence will be granted the ability to call witnesses on the same footing as the State. This ability it was recognised was not always possible as sometimes the State would employ tactics which meant that the witnesses were obstructed from appearing before the Court.

¹²⁸Application No. 48497/06, Judgment, Strasbourg, 23 February 2010

Similarly in the case of *Vrencev v. Serbia*¹²⁹ the ECtHR had again to consider the question of the appropriate amount of time to be spent on pre-trial detention because of the possible risks of the absconding nature of the applicant. Here the ECtHR had to consider the question of whether,

Whenever the danger of absconding can be avoided by bail or other guarantees, the accused must be released, it being incumbent on the national authorities to always duly consider such alternatives (see, *mutatis mutandis*, *G. K. v. Poland*, no. 38816/97, § 85, 20 January 2004), notwithstanding the fact that it cannot be required of them that the examination of bail takes place with any more speed than is demanded of the first automatic review of the applicant's detention, which the Court has already identified as being a maximum of four days (see *McKay v. the United Kingdom*, cited above, §47). Where a lighter sentence can be anticipated, the reduced incentive for the accused to abscond should also be taken into account¹³⁰

As in the case of Hungary, the defendant by not cooperating with the authorities in their investigations because they want to try to maintain their innocence has been penalised. Heavy handed measures are employed which seek to silence and subjugate the defendant. These practice and tactics all serve to push the principle of the equality of arms to the periphery. The right to a fair trial is infringed when delaying tactics are put in place which seek to circumvent the trial. In doing so we create a legal culture which relies upon placing the defendant in intolerable conditions so as bring about a speedy resolution.

3.11 Concluding thoughts

In general terms two things can be observed when looking at the principle of equality of arms. Firstly, that the principle of participation has two main parts at its core, the right to notice and the right to be heard.¹³¹ These elements feed into how a trial is then considered to be fair. This leads us to the second element fairness. As was noted above there are several different concepts which abound when it comes to the

¹²⁹Application No.2361/05, Judgment, Strasbourg, 23 September 2008

¹³⁰Application No.2361/05, Judgment, Strasbourg, 23 September 2008, para 76

¹³¹Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

term fairness. The question what do we mean when we use the term fair should be looked at through the lens of procedural fairness.

The way in which we answer what is fair will be dependant to some extent upon the cultural and theoretical notions that drive that particular society.¹³² Fairness refers predominantly to the “quality of the procedure”, whereas justice is predominantly used to refer to the outcome(s) of results.¹³³

Fairness has a close connection to concepts such as equality before the law rather than to notions of individual rights or autonomy.¹³⁴ Equality before the law is a societal conception rather than one which is and can be regulated by the law.

“As long as the judicial ‘constitutional-type’ regulation extends only extends (sic) to regulating procedural rights, there will be potential for the legislature to interfere with the manner and the context in which these rights can be applied. This creates an imbalance that negatively impacts on procedural rights and on the potential for fair proceedings. This failure to appreciate the central importance of links between the institutional form of the proceedings and the extent of the applicable rights of the accused also highlights deficiencies in the understanding of the nature of procedural rights and their relationship to the procedural criminal law.”¹³⁵

The general reforms of the trial in the nineteenth century were not generally based on securing the “individual right to a fair trial” but rather that all be granted the equal before law status and that everyone brought before the law would be prosecuted on the same basis.¹³⁶ This is the very central argument of this thesis; that fairness ought to be as well as should mean being treated equally fairly before the law.

According to the Article 6 case law the conclusion can be drawn that the procedural forms do not have to be exactly identical in order for them to be considered “procedurally fair”. An approximation, however, is strived for that will at least maintain as well as protect the minimum standards.

In order to establish a violation the ECtHR employs a two-stage test. The first

¹³²Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

¹³³Ibid.

¹³⁴Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

¹³⁵Ibid.

¹³⁶Ibid.

element that has to be established is the lack of procedural or institutional balance. Secondly, the effect of this imbalance must be shown to have an impact upon the fairness of the trial as a whole.

In the case of *Lanz v. Austria*¹³⁷ it appeared that the ECtHR was stating that there was no need to show actual prejudice so long as it could be shown that the defendant had suffered some kind of a detriment which would lead to the trial not being fair. So once an imbalance between the parties has been established the ECtHR will look at the effect of this imbalance on the trial as a whole. The reverse, however, also works. In *Kremzow v. Austria*¹³⁸ the ECtHR stated that, 'single and minor inequalities during the procedure could be outweighed by the general fairness of the proceedings.'¹³⁹

Summers predominant argument is that it is incredibly misleading to talk about dividing criminal procedure into the adversarial and the inquisitorial. As she argues the 19th Century jurists show that the two main requirements constituting a fair trial, which must be met, are the adversariality principle (constituting the adversarial trinity) and the equality of arms principle. Further evidence of this inherent commonality is the relative ease with which Article 6 has been applied across the various extensive Member States criminal jurisdictions. The impact of Article 6 is that it has been instrumental in requiring the Member States to align their procedures. This is evident in part from the case law produced of the ECtHR as well as the initiatives of the European Commission to encourage the Member States to instigate procedural guarantees to ensure the rights of the defence. Jackson states that the ECtHR is helping to redefine the definition of criminal procedure and by doing so it is moving beyond the adversarial/inquisitorial divide. As a result of this the Member States have considerable room within which to create procedures or to further enshrine as well as respect the rights of the defence.¹⁴⁰ The European Commission has recognised that this process could be further encouraged by recognising the need to alleviate the importance of coherency as well as consistency in the application of the principle of equality of arms as well as the accusatorial trinity. We need to be able to move beyond the conceptualisation of the pre-trial investigative stage and the trial having no bearing on one another. This is unhelpful to the upholding

¹³⁷Application Number 24430/94, Judgment of 31 January 2002, par 58

¹³⁸Application No. 12350/86, Judgment, Strasbourg, 21 July 1994, par 75

¹³⁹Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

¹⁴⁰J. D. Jackson. "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment". In: *M. L. R.* 68 (2005), p. 737.

of the fairness of the trial as a sacrosanct concept.

Summers makes an apt observation that perhaps the unsettling problems of the consistent disregard of the pre-trial investigative stage is deliberate and emphasises overt preference of prosecuting crime as compared to the importance of maintaining an adversarial understanding of the trial as well as fairness and the legitimacy of the criminal procedural system.¹⁴¹ This would be a point that I agree with as I see that there is a move now to punish those who want to exercise their defence rights to have a fair trial. They are penalised for doing so. This is not a phenomenon which is just limited to Europe. America has also wide held practices which serve to disregard the adversariality as well as equality of arms of the criminal procedural system (such as the practice of plea bargaining).

Procedural fairness and cost requirements need to be balanced against each other in order to be able to reach a fair result. This is the current tension with regards to plea bargaining we should not sacrifice legal representation for cost benefits. We must ensure that participation in criminal trials is meaningful as well as effective.

“Meaningful participation requires notice and opportunity to be heard, and it requires a reasonable balance between cost and accuracy.”¹⁴²

So how does one achieve a system whereby a perfect balance is reached between all of the competing interests as well as theories? One starting place is to first of all recognise that accurate results are not enough as “[j]ustice has a price, and there is a point at which that price is not paying.”¹⁴³ Are we seeking accurate outcomes in a particular case or rather systematic accuracy whereby we seek to have a correct result in all future cases?¹⁴⁴ If the latter is the case then we have missed the mark of justice in our quest for perfection.

“(...) Solum argues that because perfection (in the sense of perfect accurate results) is an ideal best, “a fair procedure must, at a minimum, strike a fair or reasonable balance between the benefits of accurate outcomes and the costs imposed by the system of procedures.”¹⁴⁵

The criminal trial is often depicted as the example of an imperfect procedural justice.

¹⁴¹Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

¹⁴²L. B. Solum. “Procedural Justice”. In: *S. Cal. L. Rev.* 78 (2004), pp. 181–321.

¹⁴³Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

¹⁴⁴*Ibid.*

¹⁴⁵Solum, “Procedural Justice”.

Because it is evident that it is not possible to create a system whereby correct outcomes are always secured as well as achieved. An example of a correct outcome is convicting the guilty but this is not always achieved.

In order to reconcile ourselves with this position, Solum proposes a balancing model of procedural justice so as to overcome this evident impossibility of creating a perfect system. There are three ways in which the balancing model can be interpreted,

1. utilitarian view balances accuracy and costs,
2. rights-based approach “assumes that procedural justice requires attention to the fair distribution of the costs imposed by the system of procedure.”,
3. procedural justice is pure there is a correct or fair procedure that leads, if it is properly followed, to a correct outcome.¹⁴⁶

The rights based approach will be the one that is adopted in this thesis. Procedural fairness resulting in fair outcomes is predicated on the ability of individuals who are directly affected by the decision being able to participate in the process. Here it is important to remember the significance of the involvement of defence counsel in enabling an effective participation on the behalf of the defendant. “The key notion is that it is the process itself and not the outcome that defines procedural justice.”¹⁴⁷ Even still that is not enough, the Member States must also make sure to ensure that the minimum guarantees of Article 6 (3) (c) are adhered to in their application of their rights.

A good illustration of pure procedural justice is often referred to as Rawls gaming example. So long as the rules of the game are followed fairly, no matter what the result of the game is so long as the winnings are handed out fairly then the procedure will be deemed to have been fair. This analogy is often used to explain the adversary system but it fails in one critical aspect in that the defendant is forced to “play”. Sometimes the term “level playing field” derived from the gaming language, to explain the relationship between the parties must be one which is a “level playing field”. One side cannot be given an unfair advantage over that of the other.¹⁴⁸ This is obviously far from the reality as evidenced above in the case law of both the ECtHR and the domestic courts.

¹⁴⁶J. Rawls. *A Theory of Justice*. Cambridge, MA: Belknap Press of Harvard University Press, 1971, p. 86.

¹⁴⁷Solum, “Procedural Justice”.

¹⁴⁸Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

In connection with this emphasis upon the requirement of equal participation/equal playing field Solum developed three rules for establishing the best situation of communication,

1. Rule of Participation, “each person who is capable of engaging in communication and action is allowed to participate.”
2. Rule of Equality of Communicative Opportunity, “each participant is given an equal opportunity to communicate with respect to the following: each participant is allowed to (i) call into question any proposal, (ii) introduce any proposal into discourse, and (iii) express attitudes, sincere beliefs, wishes, and needs (...)”,
3. Rule against Compulsion, “no participant may be hindered by compulsion - whether arising from inside the discourse or outside of it - from making use of the rights secured under (1) and (2).”¹⁴⁹

These three rules reflect very well the ideology behind the principle of the equality of arms. We can see that this is the case from the elements that the ECtHR case law has identified as being necessary to be present in order for there to be equality between the parties to the trial. Despite these rules, it is argued as in the case of the U. S. and also the theorist Uviller that a literal balance of resources and power is something which is not attainable in a criminal trial. Rather that any entitlements, as Uviller calls them, should fit the distinct as well as different roles that the two parties play in the criminal trial. The American academic literature on this topic of equality of arms frames the discussion in terms of balanced empowerment. The balance of equality should fit the appropriate roles of the defense and the prosecution. But, this kind of an inequality only becomes unfair if it is disproportionate impediment to one side completing their task appropriately.

On the contrary Silver, argues that the proper application of the principle of equality of arms does not apply to ensuring that both parties have the same advantages but rather that it applies to the procedural rights of the prosecution and defence in advocating and presenting their case. Following on from Silver’s proposition it can be said that equality of arms is based on the premise that there is at least a theoretical equality between the two parties. Additionally, the main function of the principle is to ensure equal procedural opportunities. So the only procedural opportunities that need to be addressed are those ones which are reciprocal in nature as they are the

¹⁴⁹Solum, “Procedural Justice”.

only ones which can be applied equally. There are some non-reciprocal advantages which are essential and they cannot be applied equally as these help to offset the advantage that the prosecution has over the defence. For example, to have assistance of a counsel and adequate time and facilities to prepare a defence; to have the right to access and the ability to comment on the evidence against him, and to have the right to secure attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.¹⁵⁰

The main point of contention amongst the legal theorist concerning the principle of equality of arms is what are both parties entitled to and do these entitlements necessarily have to be the same.

It is accepted that this inherent inequality exists but the question should be what can we do about this inherent inequality or rather imbalance?

According to Fedorova,

“Much depends on the political climate at a particular time and whether there is dissatisfaction with the criminal justice system that brings along more ‘crime control’ voices that is capable of (temporary) silencing the ‘due process’ proponents.”¹⁵¹

This is sadly a state of affairs that is being felt across several member states that the due process proponents have been silenced.

One of the key facets of due process which is most often silenced (and also forms an integral part of the principle of the equality of arms and also in plea bargain) is the ability to access the relevant information and or documentation in the case in order to be able to mount an effective defence or even a prosecution.

Access to information is a central component of the equality of arms concept. The disclosure of evidence serves as a mechanism by which to equalize the powers between the parties. There is always debate over how much disclosure ought to be granted. As it is a fine balance on the part of the prosecution so as not to place the defendant in too favourable position.

The sticking point for the application of the principle of equality of arms is the pre-trial investigative stage. It is here that the way in which the defendant is viewed in the criminal procedure has changed drastically. The defendant went from being

¹⁵⁰Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

¹⁵¹Ibid.

viewed as an object of the proceedings to being viewed as a participant. In 2000 in France there was reform of the law and it introduced a legal right to be told the nature of the offence and the right to have access to a lawyer during custody. The Netherlands have also recently strengthened the position of the defendant in the pre trial investigative stage. The Netherlands have introduced measures which mean that the defendant can now access case files from the moment of first police interrogation after arrest.¹⁵²

“The developments at the level of the European Court of Human Rights have some challenging consequences for many continental procedures. In fact, it has been argued that the expansion of defence participation has not only influenced the judges’ approach to the protection of defence rights, but also set in motion several ‘neutralizing’ legislative approaches.”¹⁵³

The question then hangs in the air which of the two systems is the most appropriate as well as best suited for accommodating the principle of equality of arms. Lawyers whose background is in adversarial system, such as is mine, have a resistance to adopting a methodology that impacts upon their core values.

“Changes that implicate these core values, are difficult not only because they challenge deeply held notions of justice and fairness but because they pose a threat to us - for to consider the merits of another methodology is to critically reflect on whether our own method is truly fair,”

It is this very introspective thinking that Groome, states as being most difficult and revealing it is essential to evaluating whether one’s criminal procedure is up to the test. This is to some extent what the ECtHR does every time it hears a case on the right to a fair trial it is assessing whether or not the actions of the parties conform to the commonly accepted notions of fairness and justice. Which is stripping away of the titles of “inquisitorial” and “adversarial” and looking to the very make-up of the trial itself to ask the bigger question, egos aside, does this trial adhere to the principle of equality of arms?

The principle of equality of arms encompasses wider expectations of what a defence should be afforded both in its preparation of a trial and in the trial itself. Participation, accuracy and efficiency are all key elements which have developed out

¹⁵²Law of 13 December 2011, Stb. 2011, nr. 601

¹⁵³Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

of equality of arms. When considering the best model for incorporating equality of arms one has to take into consideration the distinct roles that the parties play in both of the systems. It has already been established that there is an inherent inequality in the criminal trial from the set go and as such it is possible to achieve some fairness by adhering to the minimum requirements that have been given to the defendant. The best way to be able to do this is through balanced empowerment. The balanced empowerment concept supposes that procedural requirements are handed out in light of the role of the party in the criminal trial.¹⁵⁴ Here we talk about non-reciprocal and reciprocal procedural entitlements. The equality of arms applies to reciprocal entitlements. “As a procedural device, the principle of equality of arms implies reciprocity in procedural possibilities and restrictions. (...) the principle of equality of arms implies formal procedural equality between two parties. (...) To the extent that the advantages are reciprocal, the principle of equality of arms applies.”¹⁵⁵

The effective participation of the defendant is connected to how one perceives a trial to be. This is because it is a place where one can express their autonomy as well as participate in their own defence.¹⁵⁶ Trials are essentially where the public can see that justice is done.¹⁵⁷

In light of this it can be stated that there are two parts which make up the whole of the complete concept of the right to a fair trial,

1. the expression of individual autonomy in the form of the right to be represented as well as take part in an active role in their own defence;
2. is the fact that in order for a trial to be conceived of as being fair it is necessary for it to be public and the verdict must be reached through either an accusatorial or adversarial method.¹⁵⁸

The right to an effective defence fits right between these two requirements. It acts as the conduit from which the access to justice requirements can be met and flow to the defendant.

“Article 6(3) protects the right of a defendant to legal assistance of his choosing, and for that access to be free if it is in the interests of justice

¹⁵⁴Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

¹⁵⁵Ibid.

¹⁵⁶Ibid.

¹⁵⁷Ibid.

¹⁵⁸Ibid.

and the defendant has inadequate financial means. Contact with legal representatives must not be restricted unless under exceptional circumstances. ”¹⁵⁹

One apparent reason for the confusion over whether the defendant should be present at trial is in part due to the conflicting nature of the case law. The general rule, which can be drawn from both the requirement that the trial be adversarial in nature as well as adhering to the equality of arms, is that where the appeal to be considered concerns issues both of law and fact the defendant should be present and has the right to be. The ECtHR case law appears to be saying that where there is an issue where the evidence will be discussed the defendant has the right to be present. Where there is no room or just simply will be no discussion and or examination of the evidence then there will be no corresponding right of the defendant to be present. Part of the problem with this right of the defence to be present is that it is not agreed upon in the case law as to how it should be applied.¹⁶⁰

The ECtHR has ruled that in cases where the prosecution has not revealed evidence or only at a late stage key evidence as having an impact upon the adversariality of the trial there will be a violation. If the prosecution relies upon documents that the defence has not had access to then it will be deemed as unfairly prejudicing their case. Where the defendant fails to challenge submissions or to examine the files submitted by the prosecution then there will be no breach of the principle of “equality of arms”.

“The adversarial proceedings requirement seems therefore to be not only the basis of the ‘right of the defence’ but also the product of a specific understanding of criminal proceedings, with its roots in the nineteenth century developments as governed by the accusatorial trinity and as comprising two distinct phases: the public trial and the investigative pre-trial phase. These defence rights must therefore be seen not only as guaranteeing the autonomy of the accused, but also as an important aspect of upholding the institutional basis of criminal proceedings.”¹⁶¹

These two distinct phases have now merged. Irrespective of this fact there still

¹⁵⁹<http://cymraeg.sfo.gov.uk/media/113319/european%20convention%20on%20human%20rights%20web%201.pdf>

¹⁶⁰Summers, *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*.

¹⁶¹*Ibid.*

remain questions over practices which are not adequately covered by the principle of equality of arms.

4 Access to Justice

“the law is a system that protects everybody who can afford a good lawyer.” - Mark Twain

The European Parliament and the Council, as a result of a series of ECtHR cases have set out guidelines for the member states when it comes to assuring access to justice for the defendant.

The European Parliament, Council and the ECtHR recognises that there is a three tiered approach which needs to be adopted when talking about access to justice. The three tiered approach includes taking a human rights approach when considering the following three areas; equality of arms, effective representation and effective participation. It is these three areas which the Stockholm Programme and the E. U. Directives have sought to harmonise through the procedural safeguards of the defendant in criminal trials.

The E. U., in recognising the need to work towards harmonising the access to justice of citizens issued a roadmap which was partly developed to help deal with the problems that arose in the aftermath of the European Arrest Warrant (EAW). The E. U. adopted three directives in its roadmap. The first two directives which have been adopted are the, Directive on the right to interpretation and translation in criminal proceedings¹ and the Directive on the right to information in criminal proceedings.² The third Directive which has caused some problems amongst the Member States when it comes to its adoption is the Directive on rights of access to a lawyer in criminal proceedings. The U. K. has all opted out of the latest Directive on the rights of access to a lawyer in criminal proceedings. The reason that the U. K. has opted out of the Directive is because of the ongoing cost cutting in the

¹Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

²Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

U. K. relating to the legal aid costs in the form of the Legal Aid, Sentencing and Punishment of Offenders Act (clause 12). This clause 12 concerns the opportunity to introduce at a later date secondary legislation removing the automatic right of those arrested and in police custody to have access to a lawyer at a police station. Currently everyone is entitled to free advice at the police station during the interview in more serious cases. The clause 12 proposal would make it so legal advice at the station would become means tested and only become available if the government deems it to be in the interests of justice to have legal aid. It was the Police and Criminal Evidence Act 1984 (PACE) that first secured the provision of legal aid because of high profile miscarriages of justice by the police in the 1970s and 1980s.

It is increasingly evident from the emerging case law of the ECtHR that the ECHR does not cover all aspects of an effective criminal defence. The ECtHR two-stage test for the equality of arms, establishes that access to a lawyer is an integral element of the right to a fair trial. The requirement of an effective defence and participation in the ECtHR's decisions have varying degrees of interpretation across the E. U. In both Germany, Hungary, Italy and England and Wales there are significant shortcomings when it comes to ensuring an effective defence for the defendant. In Germany there is no statutory right to free legal assistance during the provisional detention. Legal counsel is only provided after the first three months has lapsed. In Germany and Hungary the lawyer has no right to be present during the police interrogation. There are also practical impediments to access to justice in Hungary such as the fact that travel to a detention facility is not covered by legal aid. In addition to these discrepancies between the spirit of the ECHR and its application there have also developed other limitations on the effective criminal defence. Tactics have developed which are employed to emphasis the efficiency of the trial at the expense of the defendant's procedural safeguards or the use of pre-trial detention as a mechanism by which to secure an admission of guilt.

When access to justice is more closely examined in the European context it is necessary to address the ECtHR case law.

This principle is enshrined in article 6 of the ECHR and the Charter on Fundamental Rights and Freedoms (the Charter) articles 47 and 48. These instruments stipulate that the rights of individuals to access justice should be secured not only in rhetoric but also in practice. This protection is seen as an obligation of the State. It is here that the procedural and the substantive aspects of the right to a fair trial intersect.

The right to access to court is not expressly laid down in Article 6, however, in the case of *Golder v. United Kingdom*³ it was established that:

Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6, paragraph 1.

This right of access to court was recognised by the ECtHR not to be absolute in *Philis v Greece*⁴. The ECtHR established that;

This right of access, however, is not absolute but may be subject to limitations since the right by its very nature calls for regulation by the State. Nonetheless the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.⁵

The ECtHR in its case law should not be viewed as forcing new obligations on Member States. Rather it should be viewed that, Article 6 read in light of its object and purpose of the overall Convention is to ensure respect for the general principles of law.⁶

The right to access implies that the individual has the right to have their case brought before a tribunal as described by Article 6 paragraph 1. The right of (effective) access to court could be used as the standard against which it can be measured whether the granting of legal aid should have been made under Article 6(3)(c). Additionally, this standard could also serve to indicate whether the State, “should be held responsible for a manifest failure by a legal aid counsel to provide effective representation.”⁷

The development of the ECtHR case law has shifted recently to recognising the fact that the presence, or lack, of a lawyer at the interrogation stage can have an impact on the overall fairness of the trial.

There is a need for the member states to work towards ensuring both procedural and substantive rights to both victims and defendants in trials, in light of the *Pupino*⁸ case,

³Application No. 4451/70, Judgment, Strasbourg, 21 February 1975

⁴Application No. 12750/87; 13780/88; 14003/88, Judgment, Strasbourg, 27 August 1991

⁵Application no. 12750/87; 13780/88; 14003/88, Judgment, Strasbourg 27 August 1991, para 59

⁶Dijk et al., *Theory and Practice of the European Convention on Human Rights*, p. 419.

⁷Ibid., p. 422.

⁸C-105/03

'In these exceptional cases, the Union legislature is supposed to grant rights to individuals - the accused and the victims-in order to contribute to mutual trust and thus mutual recognition between the Member States, and the Court should arguably give a wide reading to those rights. In such cases, the Court would not be directly pushing one of the aims of integration (mutual recognition), but would be facilitating the creation of the necessary conditions to achieve it (mutual trust).'⁹

One attempt at aiding the integration and mutual trust has been made by the European Parliament and the Council proposing a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. This proposal was published in November 2013 by the European Commission. The proposal has been welcomed by the member states. Even though the Constitutions include the principle of the presumption of innocence the practice is lacking in implementation. There is a prevalent problem of, "the use of compulsory powers to obtain material evidence in violation of the privilege against self-incrimination."¹⁰

The right to effective participation is interlinked with the defendant being able to express their individual autonomy. The right to an effective defence is necessary in order to be able to have a public trial which is reached through an adversarial process. The right to an effective defence fits right between these two requirements. It acts as the conduit from which the access to justice requirements can be met. The right to have effective legal assistance is recognised by the case law of the ECtHR where they have held that the legal assistance that the defendant receives must be effective. This principle was set out in the case of *Goddi*,¹¹ and also *Ocalan*.¹² Despite this fact the ECtHR has maintained that the way in which the lawyer conducts themselves is a matter for both the client and the lawyer to discuss and to decide upon. It is necessary that the defendant should not be unnecessarily and unfairly burdened with the risk of ineffective representation. As such the ECtHR has held that,

"States are required to intervene only if a failure by counsel to provide

⁹ A. Hinarejos. "Integration in Criminal Matters and the Role of the Court of Justice". In: *Eur. Law Rev.* 36 (2011), pp. 420–430, p. 428.

¹⁰ A. Ashworth. "Self-incrimination In European Human Rights Law - a Pregnant Pragmatism?" In: *Cardozo L. Rev.* (2008).

¹¹ A 76, Judgment of 9 April 1984

¹² Application No 63486/00, Judgment, Strasbourg, 12 March 2003

effective representation is manifest or sufficiently brought to their attention.”¹³ (emphasis own)

As stated in the judgment in Imbrioscia the Member State is only required to intervene, in the case of a lawyer being ineffective in their role, if a failure by the counsel to provide effective representation is manifest or sufficiently brought to their attention. The illusive term effective representation needs to be clearly defined. The ECtHR has helped to determine its definition by establishing what the defendant need not show.

The defendant does not have to prove that they were prejudiced as a result of the ineffective representation (see the case of Artico¹⁴ as authority in this matter) and neither is it necessary that a damage resulted because of the said representation (see the case of Alimena¹⁵).

The obligation to assess the effectiveness of legal representation is not placed on the suspect. Rather, the ECtHR states that Member States should take the initiative and establish monitoring systems to assess the effectiveness of the legal representation. Even though the ECHR may not specifically stipulate for this the right to effective legal assistance it can be deducted from ECtHR case law.¹⁶

In the seminal case of Can v Austria¹⁷, it was established that the right to counsel begins from the moment one is charged. Article 6 (3) of the ECHR sets out those rights and it is stipulated that when someone is charged that they are entitled to these rights in particular. In addition to these minimum rights, the trial should be adversarial in nature and not infringe the principle of equality of arms. The case of Thorgeir Thorgeirson v. Iceland¹⁸ is a good illustration of this principle of adversariality. The prosecutor was absent from certain parts of the trial so the defendant argued that this meant that the trial had not conformed to the adversarial requirements. The ECtHR did not find that the absence of the prosecutor affected the adversariality of the trial as those parts of the trial that the prosecutor were absent from related to statements being read out which the prosecutor already knew the content of.

¹³Imbrioscia v Switzerland, Application No. 13972/88, Judgment, Strasbourg, 24 November 1993

¹⁴Application No. 6694/74, Judgment, Strasbourg, 13 May 1980

¹⁵Application No. 11910/85, Judgment, Strasbourg, 19 February 1991

¹⁶L. van Puyenbroeck and G. Vermeulen. “Towards Minimum Procedural Guarantees For The Defence In Criminal Proceedings In The Eu”. In: *ICLQ* 60 (2011), pp. 1017–1038.

¹⁷8 Eur. Ct. H.R. (ser. A) 14 (1986)

¹⁸Applications No. 13778/88 Judgment, Strasbourg, 25 June 1992

The ECtHR, in the watershed case of *Salduz v Turkey*¹⁹, established what has now become known as the Salduz Principle. The principle establishes the safeguards that the member states should implement in their criminal procedure so as to ensure that the right to access a lawyer is guaranteed to the defendant.

4.1 Defining access to justice in light of the Salduz v Turkey decision

Access to justice is a multi-layered concept. The various levels of access, unfortunately, present numerous obstacles that the defendant must overcome. These levels, without the aid of access to legal counsel, present for the defendant an infringement of safeguards that the ECtHR has established.

The watershed case of *Salduz v. Turkey*²⁰, decided 6 years ago, established the 'Salduz principle'. The case concerned a 17 year old boy who was accused of participating in an illegal protest and putting up protest placards. Both acts were considered to be terrorist activities by the Turkish authorities. The applicant was denied the right to a lawyer at the pre-trial investigative stage and made incriminating statements which were later relied upon in court by the prosecution. It was only at trial that the applicant had the benefit of a lawyer. The ECtHR first held on the 26th of April 2007 that there had been no violation. The Grand Chamber took a different view and determined that the appointment of the lawyer at the trial stage did not undo the infringement of the overall fairness of the trial within the meaning of Article 6. The applicant had been denied his right to justice and a fair trial because the ECtHR held that Article 6 applies to pre-trial proceedings. The Court held that Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation as the right to a fair trial should be practical and effective not theoretical and illusory. The ECtHR stated that contracting states must bear this in mind when determining the choice of application of the right to a fair trial.

This case brought about a shift in the focus of the trial. Salduz recognised that the role of the lawyer is key in ensuring that procedural safeguards are adhered to. The ECtHR distanced itself from the old test of determining whether the overall fairness

¹⁹Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

²⁰Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

of the trial had been infringed. The old test stated that the question was whether the restriction had been justified and if it was whether in light of the proceedings as a whole it had not deprived the accused of a fair hearing the reasoning being that even a justified reason is capable of, in certain circumstances, restricting the right to a fair trial.²¹

The ECtHR then outlined the new three stage test which has now become known as the Salduz principle.

The first limb of the test is that access to a lawyer must be granted from the first available opportunity, that any interference with this right must not affect the overall fairness of the trial. Secondly, if this right is restricted there must be compelling reasons to restrict the right. Thirdly, if exceptional reasons to restrict the right exist any such restriction whatever that be, “ ... must not have unduly prejudiced the rights of the accused under Article 6.”²²

It will ultimately be held that the rights of the applicant have been irretrievably prejudiced when incriminating statements which were made during a police interrogation in the absence of a lawyer are later relied upon on and used for the basis of a conviction.

Salduz was not the only case of the ECtHR which recognised that, “the right to counsel [is] a fundamental right among those which constitute the notion of a fair trial and ensur[es] the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention.”²³

The case of Panovitz²⁴ followed Salduz two weeks later at the ECtHR. It was held in this case that,

“... the obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the difficulties for the applicant, had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary.”²⁵

²¹Salduz v. Turkey, Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

²²Salduz v. Turkey, Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

²³Pishchalnikov v. Russia, Application No. 7025/02, Judgment, Strasbourg, 24 September 2009, para 78

²⁴Application No. 4268/04 (First Section) 11th December 2008

²⁵para 72, Application No. 4268/04 (First Section) 11th December 2008

It was from this statement that the European Parliament and Council later drew the need to create uniformity in informing applicants of their right to a lawyer in the form of the Letter of Rights.

Notably, the ECtHR adopts two approaches, the narrow approach which views that an issue under Article 6 will only have occurred if in the absence of a lawyer the suspect makes a confession or if the evidence (which is related relied upon in trial) is obtained in the absence of a lawyer in such a way so as to trigger the application of the Salduz principle. Alternatively, the ECtHR will apply a much stricter approach where it will only hold that they have found a violation, "... where the evidence obtained without the lawyer has a bearing upon the conviction."²⁶

The cases since Salduz and Panovitz have continued to build upon the Salduz principle. They also indicate that there is not uniformity with regards to the Salduz principle's application. In the recent case of *A. T. v. Luxembourg*²⁷ the ECtHR is being called upon to expand its meaning of legal representation and access to justice. This case now provides the ECtHR with an opportunity to bring some clarity to the limits of the Salduz principle. Clarity is needed with regards to which of the two approaches (narrow or strict) should be applied.

In the case of *Cadder v Her Majesty's Advocate*²⁸, the U. K. Supreme Court considered the cases of Salduz and Panovitz in determining whether the Scottish procedure following arrest was compatible with the ECHR. In this particular case the accused was questioned in the absence of their lawyer and made admissions which were later relied upon by the prosecution against him.

Lord Hope stated that,

"the contracting states are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning."²⁹

Since this decision the U. K. Supreme Court has also ruled in *Ambrose v. HM*

²⁶Fair Trials International, Third Party Intervention in the European Court of Human Rights, Application No. 30460/13, between A.T. v. Luxembourg, written comments by Fair Trials International March 2014

²⁷Application No. 30460/13

²⁸[2010] UKSC 43

²⁹para 48, *Cadder v Her Majesty's Advocate* [2010] UKSC 43

Advocate³⁰ that the *Salduz* line of jurisprudence does not apply to pre-detention questioning and that the use of the “fruits of questioning of an accused without access to a lawyer” do not necessarily amount to a violation of Article 6.³¹ In *Dayanan v Turkey*³² the ECtHR reiterated its position that , “an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned.”³³ The ECtHR determined that in this particular case the absence of a lawyer when the suspects statement was being taken by the police undoubtedly affected the overall fairness of his trial as the statement was then used as the main evidence in the case against him. In *Pishchalnikov v Russia*³⁴ soon after the *Salduz* and *Panovitz* decisions, the court stated that the denial of legal assistance would have dire consequences for the suspect as they would be, “ ... unable to make the correct assessment of the consequences his decision to confess would have on the outcome of the criminal case.”³⁵ The U. K. line of judgments are at odds with the ECtHR when it comes to the provisions of legal assistance.

The ECtHR has established in its jurisprudence that where there are restrictions upon the right to access legal assistance without compelling reasons they will consider that there has been an irrefutable presumption of a violation of Article 6. In these circumstances there will be no need to analyse the overall fairness of the proceedings if the first position has been established. There has of yet to be any case law from the ECtHR on those cases where the restriction has been with compelling reasons. Cases with compelling reasons would presumably only be allowed if they could pass the overall fairness of the proceedings test. These cases would also have to meet the *Salduz* principle test. It would be necessary to show evidence that there had been respect for the rights of the defence and that the use of the statements as a sole basis for a conviction did not occur.

It is with these cases though that it becomes quickly evident that the ECtHR has not been applying its own case law uniformly. There is sometimes reference to the confession made in the absence of the lawyer and then other times reference to the making of an incriminating statement in the absence of their lawyer. This then leads

³⁰[2011] UKSC 43

³¹Her Majesty's Advocate v P [2011] UKSC 44

³²Application No. 7377/03, Judgment, Strasbourg, 13 October 2009 (FINAL 13/01/2010).

³³*Dayanan v Turkey*, Application no. 7377/03, Judgment, Strasbourg, 13 October 2009 (FINAL 13/01/2010)

³⁴Application no. 7025/04, Judgment, Strasbourg, 24 September 2009 (FINAL 24/12/2009)

³⁵*Pishchalnikov v Russia*, Application no. 7025/04, Judgment, Strasbourg, 24 September 2009 (FINAL 24/12/2009), para 85

to confusion over the application of the law.

This is most apparent in the case of Ireland where the Irish Supreme Court has yet to recognise the *Salduz* principle in its case law. The Supreme Court of Ireland held in the case of *Lavery*³⁶ that there is no absolute right to have a lawyer present in the police interrogation. The decision of *Lavery* was followed by *Gormley* which has made it perfectly clear that the Irish state should overturn the case of *Lavery*. This position as well as statement of the Irish Supreme Court is even more shocking in light of the fact that the Irish state has chosen to opt out of the E. U. Directive on the right to access a lawyer in criminal proceedings. This is just one example of where there is a prevalent disconnect between the letter and word of the ECHR and its practical and procedural application by the member states. Since this decision the Supreme Court has heard two cases together on appeals. Both of these concerned similar issues; *DPP v White*³⁷ and *DPP v Gormley*³⁸. In *DPP v White* the Irish Supreme Court ruled that the defendant in police custody did not have the right to legal advice after the police had demanded forensic samples from them as the suspect was legally obliged to give them and this did not give rise to a legal obligation to have a lawyer present. As such an infringement was not found. In the similar case of *DPP v Gormley* the defendant who had requested that a lawyer be present before they were interrogated was interrogated in the absence of a lawyer and made incriminating admissions. In considering this case the Irish Supreme Court placed particular emphasis upon the jurisprudence of the ECtHR and the *Salduz* decision. The Irish Supreme Court in its analysis of the law determined that it had never before considered if the pre-trial investigative stage formed part of the whole trial. The Irish Supreme Court recognised that it was necessary for Irish law to come into line with the ECtHR case law and adopted the *Salduz* principle. They concluded that events that took place in the police station came within the meaning of the trial. Since this decision of the Supreme Court of Ireland it has been held that the present law in the case of *Lavery*³⁹ would not survive a challenge.

The cases all stem from the fact that the ECtHR has made a distinction between admissions made prior to access to a lawyer and where objective evidence is taken

³⁶*Lavery v. The Member In Charge, Carrickmacross Garda Station* [1999] IESC 29; [1999] 2 IR 390 (23rd February, 1999)

³⁷[2014] IESC 17

³⁸[2014] IESC 17

³⁹*Lavery v. The Member In Charge, Carrickmacross Garda Station* [1999] IESC 29; [1999] 2 IR 390 (23rd February, 1999)

such as samples. It is this very distinction which should be clarified so as to remove the confusion. In order for the taking of samples to amount to an infringement of Article 6 it must be “sufficiently invasive and unnatural” to amount to breach.

As mentioned above the directive on the right to access to a lawyer came about as a result of *Salduz*. Article 3 of the Directive codified the three steps of the *Salduz* principle; 1. access to a lawyer without undue delay before they are questioned by the police or by any other law enforcement or judicial authority, 2. access to a lawyer upon the carrying out of an investigative step, and 3. access to a lawyer after deprivation of liberty. These three steps are based upon the general presumption that the right to access a lawyer is a real and effective right. What the ECtHR has yet to consider is the intersection between effective legal counsel and the plea bargain.

4.1.1 The right to assistance of counsel

Under the first step of the *Salduz* Principle the right to assistance of counsel has to be considered. The right to representation by counsel is a human right that is continuously infringed at all stages of the trial process. This element of the right to a fair trial is always at tension with the interests of the state, and the police who are seeking answers for a crime. The pressure of wanting results can result in the lack of adherence to the safeguards in the criminal justice system. Without proper and effective counsel, as defined by *Salduz*, a key human right is infringed. Guaranteeing the right to counsel is not enough to secure that this right will be protected throughout all the stages of the criminal procedural justice system. The member state constitutions provide varying degrees of protection of the right to counsel in the trial proceedings only or at the detention and the trial.⁴⁰ It is not obvious from the wording of many of the constitutions if they guarantee the right to counsel.⁴¹

The right to appointment of counsel in case of indigence is not always an assured right. The right to representation is key to and at the very least the bare minimum

⁴⁰Bulgaria ch. 2, articles 30(4) and 54, Hungarian ch. XII § 57(3), Italy article 24, Netherlands ch. I, article 18 (1), Portugal pt. 1, § II, ch. I, article 32(3), Romania ch. II, article 24(1)(2) (only at trial), Spain ch. II, articles 17(30, 24(2) and the U. S. Constitution amendment VI.

⁴¹M. C. Bassiouni. “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions”. In: *Duke J. Comp. & Int’l L.* 3 (1993), pp. 235–297.

of which should be guaranteed in order to ensure that a fair trial is ensured to the indigent defendant.

The ICCPR and the ECHR secure the appointment of counsel for the indigent.⁴² Intersecting with the right to assistance of counsel is also the right to choose one's own counsel.

The right to counsel of one's choice is an element of the Article 6 (3) (c)

“to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

This poses an interesting problem for the United Kingdom in terms of its obligations under Article 6 (3) (c).

The application of Article 6 (3) (c) has become controversial in the United Kingdom with the reforms to the legal aid provisions. Chris Grayling, the Justice Secretary, has announced that “convicted criminals should be made to pay for their own legal costs.”⁴³

This is the first attempt of its kind to make criminals pay towards the overall running costs of the court. The Ministry of Justice, among many other proposals, is seeking to introduce a method of tendering for contracts to carry out criminal legal aid work in courts. The criticism of this proposal is that it removes the centuries old right to select one's own counsel. This right to be able to choose your own counsel has important ramifications for the plea bargain. The reason being is that if your counsel is appointed to you by the court then it significantly reduces the ability of the defendant to be assured an impartial process.

The new law concerning legal aid, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removes the right to choose one's own counsel. This removal of the right to choose one's own counsel arises from the fact that there will be a limited number of service providers who will have the monopoly of providing legal aid in a particular area. In this way it will be virtually impossible for a client to maintain or even establish a relationship with the legal counsel.

⁴²as well as the constitution of Italy pt. I tit. I, article 24

⁴³“Chris Grayling: criminals should be made to pay their legal costs. Justice secretary says convicted criminal may have to pay their own legal defence costs, as part of cuts to legal aid” by Owen Bowcott, Tuesday the 9th of April 2013.

This encapsulates in the most basic terms the right to defence. The indigent defendant is most often the victim of the infringement of Article 6 (3) (c) as they are appointed a lawyer over whom they very rarely have any choice .

The E. U. recognises the right to equal recognition before the law. This is protected in 14 constitutions of the member states of the E. U.⁴⁴ allowing for access to counsel. Despite this protection access to justice is limited for those who cannot afford legal assistance of their own. In such circumstances counsel is appointed. It is now clear from the ECtHR case law that there is an obligation upon the member states to provide a mechanism by which defendants can access justice via legal assistance.

In *Quaranta v Switzerland*⁴⁵ and *Benham v U. K.*⁴⁶ the ECtHR found in both of these cases that where deprivation of liberty is at risk then it is in the interests of justice to have and provide free legal assistance.

The ECtHR through its jurisprudence has set out several guarantees for ensuring that individuals are provided with free legal assistance in criminal trials in order to ensure that all of the fair trial provisions are applied equally to everyone. It is also in recent years that it can be seen that the CoE has become increasingly concerned with access to justice.⁴⁷ One mechanism by which to ensure this is legal aid. Defendants in plea bargains are normally the recipients of legal aid so the relationship between legal aid, access to justice and plea bargaining are intrinsically linked.

According to article 6(3)(c) the provision of legal aid is not unconditional. The ECtHR has stipulated three areas that must be taken into consideration when determining whether legal aid should be granted or not, the first is the seriousness of the offence and the severity of the potential sentence, secondly, the complexity of the case and thirdly, the social and personal situation of the defendant. These requirements were set out and stipulated in the case of *Quaranta*⁴⁸ .

“The ECtHR has held that the suspect does not have to prove beyond all doubt that he lacks the means to pay for his defence.”⁴⁹

⁴⁴Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions”.

⁴⁵Judgment of 23 April 1991, Series A, No 205

⁴⁶Judgment of 10 June 1996, Reports 1996-III

⁴⁷The Right to Access to Court under the Caselaw of the European Court of Human Rights – Topic Brief by Vessela Terzieva, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20760742~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>, accessed on the 17th of January 2013

⁴⁸Judgment of 23 April 1991, Series A, No 205

⁴⁹Pakelli, A 64, Judgment of 25 April 1983 paragraph 34

Member States are free to determine the way in which legal aid will function within their own independent jurisdictions so long as it remains available for all those when it is demanded in the interests of justice. This was reiterated in the directive of the Council on legal assistance and legal aid .

There are divergent practices across the E. U. member states in terms of both assuring and informing the defendant of their procedural rights. These procedural rights include the right to be informed of the charge being brought against them and also to have access to the evidence which is the basis of the charge and accusations being made against them. These procedural rights take the form of the right to remain silent and the right to have access to the file.⁵⁰ The right to have contact with a lawyer after arrest is a legal obligation placed upon all of the Member States. The right to be informed of this right has not always been forthcoming amongst the member states. This information is not always given after arrest. The same issue applies to having information on the right to have legal aid. There is no legal obligation to inform the suspect of their right to legal assistance (partially) free of charge. All of these factors have far reaching consequences for the plea bargain.

One way to avoid this problem of appointing legal representation and informing the suspect of their right to legal aid is to state that the applicant has waived their right to legal representation. This act of waiver is a controversial issue which is addressed below.

4.1.2 The two stage test of waiver

Waiver of access to and representation by a lawyer are particularly pertinent questions at steps 2 and 3 of the *Salduz* Principle.

The ECtHR when considering the question of waiver has stipulated two requirements which must be satisfied in order for the waiver to be deemed as being validly made by the applicant. The first requirement is that the legal advice be requested before the waiver was made and secondly if it is not found that a waiver was given then the ECtHR must determine whether or not the fairness of the proceedings have been compromised by the 'use' of an incriminating statement for a conviction within the meaning of the *Salduz* principle. It has yet to be seen how this two-stage test will

⁵⁰Puyenbroeck and Vermeulen, "Towards Minimum Procedural Guarantees For The Defence In Criminal Proceedings In The Eu".

be applied to the plea bargain as no cases have been brought concerning this issue. These questions become important to answer in light of the fact that since the case of *Salduz* was decided the E. U. Directive on the right to access a lawyer has been enacted. In its Article 9 the directive refers to waivers. It places safeguards around the use of waivers and it states that any waiver that is made must be given “voluntarily and unequivocally.” In addition to these requirements concerning the giving of a waiver the ECtHR has stated that they require concrete evidence that the waiver was given knowingly and intelligently. This directive enshrines the right to access a lawyer (in its Article 3) and reinforces the fact that the access to a lawyer is the right from which all other rights can then be unlocked and flow. The ECtHR must make it clear that;

“At its most scrupulous, the Court’s case-law suggests that a violation will be found unless the national decisions show that the decision on the merits of the case is free from any contamination by the earlier breach.”⁵¹

This is the approach that should be adopted in addition to the *Salduz* principle when determining if a breach has occurred. The ECtHR must be able to satisfy themselves that the effects of the restriction have been canceled out and that any significant disadvantage has been accounted for by the domestic national legislation. If this significant disadvantage cannot be remedied by the national legislation then a violation of Article 6(3)(c) ought to be found.

It must be established beyond a shadow of doubt that the accused received all of the information about the date and schedule, also the information must be given and received in a language which the accused can understand, of the trial in order for their waiver to be present at the trial to be valid. This is also a similar requirement which must be established with pleas, that the defendant was informed of the plea offer as well as the consequences of accepting the plea offer.

In the case of *Van Geyseghem v Belgium*⁵² it was mentioned that the ECHR confers rights and not obligations upon the individuals in reference to the right to a fair trial. In this kind of a situation it is up to the individual to choose whether they wish to exercise their right to a fair trial they are not obligated to do so. The question

⁵¹Fair Trials International, Third Party Intervention in the European Court of Human Rights, Application No. 30460/13, between A. T. v. Luxembourg, written comments by Fair Trials International March 2014, para 47

⁵²1999-II Eur. Ct. H. R. 128, 145

of whether that choice is a real one made with real options and choices may not be the case for everyone.

Due to the question of margin of appreciation the ECtHR has not been too prescriptive in the application of the ECHR to the question of the provision of legal aid to indigent defendants as well as securing their representation at all stages of the trial process. Despite this leeway afforded to member states, the case of *Poitrimol*⁵³, also sets out that

'Since the right to be defended by a lawyer is a fundamental element of a fair trial, the suppression of this right would be a disproportionate sanction.'⁵⁴

The ECHR maintains that nothing in the ECHR should be construed so as to be interpreted as derogating from any of the human rights and fundamental freedoms which are to be ensured by the laws of the Member States or any other agreement which they are party to.⁵⁵

In the ECtHR decision in *Tibor Cierny v Slovakia*⁵⁶ the court had to consider the question of whether a waiver of the right to a lawyer and the right to a silence were effectively, knowingly and willingly given. The ECtHR then stated that if it was found that the waiver was not given effectively they would need to determine whether there were any domestic remedies which could protect the applicant's overall fairness of their trial. The ECtHR stated this as they wanted to establish if the institutional framework existed whereby the infringement could then be rectified. This is important as rights should be more than "theoretical and illusory." This test established by the ECtHR bears striking similarities with the test for determining if a defendant received effective legal advice before they accepted a plea bargaining. Both tests require that evidence be shown that the applicant has waived their right knowingly and intelligently to legal representation and assistance. In these circumstances the court is then bound to find a violation of Article 6 where a waiver has not been given effectively and where the use of (but not limited to) the incriminating statement on the basis of the conviction has not been completely canceled out by the safeguards of the trial process. It is the institutional framework which will

⁵³Application No. 14032/88, Judgment, Strasbourg, 23 November

⁵⁴M. Bose. "Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia". In: *N. C. J. Int'L & Com. Reg.* 37 (2011), pp. 489–510.

⁵⁵Convention for the Protection of Human Rights and Fundamental Freedoms article 53

⁵⁶Application No. 6177/2010

form a determining factor in the ECtHR decision. Because it is necessary for the institutional framework to exist within which the defendant can have their rights remedied.

4.2 Legal Aid

Steps 1, 2, and 3 of the Salduz Principle become instantly unobtainable for a defendant who does not have the means to access legal assistance.

The above mentioned right to legal representation is nonsensical if you do not possess the means by which to access that right.

It has to be emphasised from the outset that no amount of legal aid will be able to make up for the lack of structure and proper safeguards in the criminal procedural fields.

Recommendation No. R (93) 1 of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the very Poor (hereinafter referred to as Rec. No. R (93) 1) was adopted by the Committee of Ministers on the 8th of January 1993 at the 484th meeting of the Minister's Deputies. The Rec. No. R (93) 1 formally recognises that there are indeed identifiable barriers that prevent certain categories of people from accessing justice. These barriers are not just within the justice system itself but are rather societal problems. These are problems that we cannot expect that access to justice will magically rectify. There is an endemic problem with the way in which society has structured itself, in that "the poor will always be with us".

Rec. No. R (93) 1 in its preamble notes that:

Reaffirming that attachment to human rights is linked to respect for human dignity, especially as regards access to the law and to justice for the very poor;

This statement recognises the importance of respecting the human dignity of the very poor by providing them with access to the law and justice.

The question of poverty and access to equal justice was addressed by Mauro Cappelletti in his book "*Towards Equal Justice: A Comparative Study of Legal aid in Modern Societies*". Cappelletti highlights the development of the varying views of

how to see poverty. In the early 19th Century poverty was viewed as being something which was an inevitable condition of humanity and indicative of an individual's own moral character.⁵⁷ The transition from this point of view occurred in the 20th century when poverty was viewed as being rather an economic phenomenon over which poor individuals are deemed to have no control and neither responsibility over their situation.

Cappelletti and Garth developed a theory of three waves when it came to the formulation of legal aid. They defined the first wave as being the actual development and advent of legal aid itself. It is said that legal aid first developed after WW II in the western world as a means by which to provide a more focused access to legal representation in courts for the poor of society who could not otherwise afford their legal representation. The second wave focused on the public interest which included the common well-being, general welfare of society. It is this area of the law which is generally understood to include civil representation through legal aid by some organisations aimed legal aid provided for criminal defense. The third wave is where the policies are put into practice. The legal aid provision can indeed become a reality. The third wave is concerned predominantly with the means by which accessibility to justice can be secured.

The right to access to justice in criminal law and provisions available of legal aid are important but meaningful only if the quality of the justice itself is below par.⁵⁸

Easy, access to legal aid cannot be expected to remedy on its own the equilibrium of access to justice. It must always be legal aid and the removal of further barriers that act as obstacles to people actively engaging in the criminal justice legal system.⁵⁹

It is not disputed that legal aid is central to enabling these changes to take place but other methods need to be employed in order to help this become a reality.⁶⁰

⁵⁷M. Cappelletti and J. Gordley. *Toward Equal Justice a Comparative Study of Legal Aid in Modern Societies: Text and Materials*. Studies in comparative law. A. Giuffrè, 1981. URL: <http://books.google.hu/books?id=JOTDkQEACAAJ>, p. 756.

⁵⁸Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework, Albert Currie
http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_5/p2.html accessed on the 11th of January 2013

⁵⁹Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework, Albert Currie
http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_5/p2.html accessed on the 11th of January 2013

⁶⁰Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework, Albert Currie

Access to legal aid in Europe centres around the tension between finances versus maintaining the equality before the law. Andrew Sanders, makes the point that it is important for any criminal justice system to be fair and democratic but the resources must be shared amongst other equally important services as well. He states that the statement that “you can’t put a price on justice” is a fallacy and that it is something that happens all of the time. Rather we should not be concerning ourselves about the fact that we do but rather with what priority do we give to efficiency?⁶¹ In the U. K. experience it is common for alternative dispute resolution to be seen as a viable option for those poorer defendants to access justice, particularly in civil cases.

These alternative methods of self-help seem to suggest that those who cannot afford legal representation have been abandoned rather than empowered.⁶² The goal of reducing costs for government spending in supporting legal aid services is in part to reduce the extent of the need for adversarialism however this approach does lead to an encouragement of surrendering one’s right to a trial. In the context of plea bargaining it is worrying that even though this action of waiving one’s right to a trial does not always infringe due process, there is the concern that if they accepted the plea bargain that they might be in a better off position.

Access to justice and miscarriages of justice are never far from one another. They are the two anchors which keep the tension of the criminal justice system tight. If one wanes in its support it creates a hole through which defendant’s can fall. Miscarriages of justice can be defined in the following way

“A “miscarriage of justice,” also known as a “failure of justice,” is defined as “[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.”⁶³

It is the position of this thesis that plea bargaining, without effective and appropriate safeguards is a “failure of justice” for the defendant.

It was only after a series of miscarriages of justice in the U. K. , such as the Birm-

http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_5/p2.html accessed on the 11th of January 2013

⁶¹A Sanders. “Core Values, the Magistracy and the Auld Report”. In: *29 J. of Law and Society* (2002), p. 327.

⁶²R. Moorhead and P. Pleasance. “After Universalism:Re-engineering access to justice”. In: ed. by R. Moorhead and Pascoe Pleasence. Blackwell Publishing, 2003. Chap. Access to Justice after Universalism: Introduction, pp. 1–9.

⁶³Black’s Law Dictionary 1019 (8th ed. 2004).

ingham Six and the Guildford Four that the Royal Commission on Criminal Justice was established to suggest ways in which to avoid such miscarriages of justice from occurring again.

The report of the Commission resulted in the disclosure of the prosecution being less and defence having to disclose more so as to avoid the use of the tactic of “ambush defences”. It was with the advent of the Commission’s report that the encouragement of plea bargaining was introduced. Its introduction marked the beginning of finding a means by which to expedite and keep down the costs of the trials.⁶⁴ Plea bargaining has always been a part of the criminal trial process but now with the Commission’s report it became an integrated and formal part of the criminal procedure within the United Kingdom.⁶⁵ It was almost as if the defendant was indeed being encouraged not to exercise their right to trial let alone a fair and just one.⁶⁶

4.2.1 The right to counsel in the U. S.

The sixth Amendment of the U. S. Constitution provides the guarantee of counsel and for state prosecutions, whereas the fourteenth Amendment, provides for, due process and the equal protection, clauses.⁶⁷ In the case of *Powell v. Alabama* in 1932 it was stated that,

“the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁶⁸

Commentators have suggested that the U. S. Supreme Court should look to ECtHR’s case law. More specifically the case of *Airey*’s decision to give civil litigants the right to counsel.⁶⁹ The U. S. is not bound by these decisions, however, it can take them into consideration as it has done in other of its decisions.

An avid critic of the U. S. system is Justice Earl Johnson Jr. who once raised the question:

⁶⁴J. S. Hodgson. “The Future of the Adversarial Criminal Justice in 21st Century Britain”. In: *N.C. J. Int’l L. & Com. Reg.* 35 (2010), p. 320.

⁶⁵*Ibid.*

⁶⁶*Ibid.*

⁶⁷D. L. Rhode. “Access to Justice”. In: *Fordham L. Rev.* (2001), pp. 1785–1819.

⁶⁸287 U. S. 45, 68-69 (1932)

⁶⁹J. S. Karich. *The Constitutional Divide: The United States and Europe’s Diverging Interpretations of Equality under the Law applied to Civil Cases involving Fundamental Rights*. Tech. rep. Institute for Cultural Diplomacy, 2010, pp. 1–16.

“Will there come a time when the issue addressed in *Lassiter* is no longer framed solely by the precedents and constitutional values generated by the U. S. Supreme Court, but also takes account of a broader global consensus about the meaning of fundamental concepts like a ‘fair hearing’ or ‘due process’, ‘equality before the law’ or ‘equal protection of the laws?’ In other words, when, if ever, will the U. S. Supreme Court begin looking at the decisions of the high courts of other nations and how they have interpreted constitutional concepts and indeed language also found in our constitution?”⁷⁰

The U. S. has yet to provide an answer to this question. There are still a plethora of cases which could help to inform the U. S. system but there is resistance against this approach. Until that time the U. S. Supreme Court will continue to apply its own law with little use for comparative analysis.

The U. S. system for regulating legal aid is heralded as being innovative. The U. S. ’s system regulates legal aid through a system of computers whereby the legislation can be monitored. This method of operating legal aid is not present in the systems of England and Germany or any other nations. Despite initial impressions of the system being independent and transparent the U. S. model of private lawyer programs enabling the choice of one’s own lawyer is illusory. For the sake of saving money, people are willing to relinquish a choice if the services cost much less.⁷¹

Attempts were made, via the establishment of the Assigned Counsel Systems to protect poor people from below par legal representation or no representation at all. The Assigned Counsel System established standards which helped to guide the functioning and practising of this system. One such standard is standard 2.1 which provides that the main goal is to ensure the provision of quality representation (standard 2.1. (a)). This quality representation which is provided must be ‘...equivalent to that provided by a skilled, knowledgeable and conscientious criminal defense lawyer to paying client’s. Assigned counsel are also required to provide,’... quality representation in all relevant legal proceedings involving their client’s.

The Standards determine the financial eligibility of an individual who will be eligible for legal aid provisions under Standard 2.3. This standard provides that any person

⁷⁰Karich, *The Constitutional Divide: The United States and Europe’s Diverging Interpretations of Equality under the Law applied to Civil Cases involving Fundamental Rights*.

⁷¹Cappelletti and Gordley, *Toward Equal Justice a Comparative Study of Legal Aid in Modern Societies: Text and Materials*, p. 756.

who cannot afford and employ a lawyer due to hardship reasons will be eligible for assigned counsel.

4.2.1.1 The Sixth Amendment

The Sixth Amendment sets out the following protections as well as requirements.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. (emphasis my own)

It is by adhering to these principles that one is secured the right to a fair trial.

Additionally, the 14th Amendment section 1 sets out the protection of due process of law as well as the equality of man before the law:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (emphasis my own)

Besides the constitutional protections for the right to a fair trial and legal counsel the Federal Rules of Criminal Procedure also provide in their Rule 44 for the right to and appointment of counsel. In Rule 44(a) the right to be appointed counsel is defined as being an entitlement for the defendant who is unable to obtain counsel themselves. Once awarded and appointed counsel the defendant is then entitled to their representation at every stage of the proceedings unless the defendant waives the right. Rule 44(b) provides that the appointment procedure and implementation of the right to counsel is governed by the federal law and local court rules

The U. S. case law has recognised that the allocating of legal representation is not enough. As the ECtHR in *Salduz* established, the lawyer must provide an effective defence.

4.2.1.2 Effective defence

The case of *Betts v Brady*⁷² in 1942 set the tone for the role of lawyers in court cases. It was not until 21 years later that the dissenting opinion in the case of *Gideon v Wainwright*⁷³ prevailed. In the case of *Gideon v Wainwright*⁷⁴ which overruled the previous decision of *Betts v Brady*⁷⁵, it was stated that free legal representation should be provided where it would be in the interests of justice to do so. This decision resulted in considerable debate in the court. Only one year before the case was decided the ruling in *Betts v Brady* was still law. The right to counsel in criminal cases was still being wrestled with.⁷⁶ The decision in *Gideon* is heralded as being the watershed case for indigent defendants. The case does not actually say or add anything new to the toolbox of the criminal defense lawyer. It simply reiterates in perhaps stronger terms that the mandate of the constitution has not changed. *Gideon* sets out what is stated in the constitution and in that sense there is nothing at all extraordinary nor controversial about the case of *Gideon*. Fifty years later the indigent defendant is still fighting for their constitutional right to counsel.

On the same day that the case of *Gideon v Wainwright* was decided the case of *Douglas v California*⁷⁷ was being considered. *Douglas v California* reaffirmed that the “Sixth Amendment’s guarantee of counsel is mandatory, not permissive.”

In 1972 the case of *Argersinger v Hamlin*⁷⁸ (following on from *Gideon v Wainwright* and *Douglas v California*) did as much to resolve ambiguities as it did to limit the access to legal representation. *Argersinger v Hamlin* set out that no defendant could be imprisoned for any offence whatever its classification unless they had been represented by counsel at the trial. Despite this the Supreme Court also went on to say that counsel was only necessary in those cases where imprisonment was a “possible result”.

Argersinger v Hamlin, was followed by the case of *Scott v Illinois*⁷⁹ which circumscribed the case of *Argersinger v Hamlin* when it stated that the right to counsel

⁷²316 U. S. 455 (1942)

⁷³372 U. S. 335 (1963)

⁷⁴372 U. S. 335 (1963)

⁷⁵316 U. S. 455 (1942)

⁷⁶Looking Back on *Gideon v Wainwright* By Peter W. Fenton & Michael B. Shapiro, <http://www.nacdl.org/Champion.aspx?id=24994>, accessed on the 18th of January 2013

⁷⁷372 U. S. 353 (1963)

⁷⁸407 U. S. 25 (1972)

⁷⁹440 U. S. 367 (1979)

only applied to those cases of actual imprisonment rather than in those cases where imprisonment is a possibility. This was a further narrowing of the application of the Sixth Amendment rights for indigent defendants. An artificial line has been drawn between those cases in which imprisonment is actual versus those in which it is possible. Your right to counsel is then dependant upon what side of the line you fall. It then becomes a question of luck. The original intention of the Sixth Amendment right would surely not have been to create such ambiguities in the applying of the individual's constitutional right(s).

These cases also concerned the question of what constitutes an effective defence. In that a defence can only be effective if one has access to a lawyer and that lawyer is allowed to do their job unhindered.

After the progressive movement of the Warren court came the U. S. Supreme Court decision of *Strickland v Washington*⁸⁰ which set out that not only should indigent defendants have the right to free legal representation but that it should be effective counsel. The case was also decided in light of plea bargain offer. Effective counsel was defined by the quality of the representation that is provided by the counsel. The effectiveness of the counsel was determined in light of the Sixth Amendment.

The case of *Strickland v Washington* interpreted the Sixth Amendment as recognising:

“the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.”

The case not only set out clearly that the quality of free legal representation matters it also created a two pronged test which the defendant would have to satisfy if they wanted to alleged that the legal advice and representation that they had received was below that which, was acceptable of efficient representation when accepting a plea bargain. The two pronged test places an obligation upon the defendant to show that the counsel's representation fell short of that which is acceptable.

The two following elements must be proved by the defendant:

1. the defendant must show that the “counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment”;

⁸⁰466 U. S. 668 (1984)

2. the defendant must show that, “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable”.⁸¹

The test set out in *Strickland v Washington* goes in the opposite direction of the spirit of *Gideon v Wainwright*. The decisions since *Gideon v Wainwright* have been back peddling defense rights. Part of the problem with the decision in *Gideon v Wainwright* was that it did not set out the way in which this free legal counsel should be provided. As such this allowed the Supreme Court to reinterpret the meaning and application of the Sixth Amendment.

Economic hardships have led to cuts in funds for lawyers. Cuts in vital funding and over criminalisation have put huge burdens on the criminal justice system making the crisis even worse. As a result of these demands the U. S. has developed the meet and plead practices (plea bargaining) which rob indigent defendants of their Sixth Amendment rights.

The impact of meet and plead scenarios was highlighted in the case of *Padilla v Kentucky*⁸².

4.2.1.3 *Padilla v Kentucky*

The case of *Padilla v Kentucky*⁸³ concerns Jose Padilla a permanent resident of the U. S. but not a citizen. Jose Padilla was found in possession of an illegal substance which is classified as an federal offence. As it was held to be an offence of such severity deportation was almost an inevitability due to the classification of the crime. This case illustrated the danger of the “meet and plead” type scenarios where the defendant is not fully informed of the possibility of being deported if they plead guilty to their charges. Jose Padilla appealed the decision handed down stating that if he had had proper legal advice then he would not have pleaded guilty in the circumstances to the charges being brought against him.

Padilla v Kentucky really brought to the fore the converging opinions over how the right to counsel as contained in the Sixth Amendment ought to be interpreted. It is a debate that is still raging not just in the U. S. but also in Europe as well. Up until *Padilla v Kentucky* there had been three different opinions with regards to how far the application of the Sixth Amendment ought to apply.

⁸¹466 U. S. 668 (1984)

⁸²130 S. Ct. 1473 (2010)

⁸³130 S. Ct. 1473 (2010)

The first opinion was that the Sixth Amendment protects against prosecution in those areas where it is only direct criminal consequence of a conviction and not to collateral consequences. The second view is the most extreme view in that the Sixth Amendment applies to all circumstances of a conviction whether direct or collateral. The third view which has been most widely adopted by the lower courts in the U. S. is that the Sixth Amendment does not generally apply to collateral consequences but that it does apply to affirmative misrepresentations regarding those consequences. Unfortunately the *Padilla v Kentucky* case did nothing to resolve these conflicting positions. The Court did not choose one of these previously commonly held positions. Rather the court just extended the application of the Sixth Amendment to deportation and other 'unique' cases, creating a fourth category.

Padilla v Kentucky is the first in the series of cases that must be considered when discussing the issue of the quality of and legal representation. In this case the duties of the counsel were extremely broad. The importance of *Padilla v Kentucky* is that it cleared up the law in areas in which it was unambiguous. It was reaffirmed that lawyers must advise their criminal clients that deportation "will" result from a conviction.

4.2.2 Access to counsel and Legal Aid in the United Kingdom

The U. K. sees the right of access to court as qualified. This position helps to explain the U. K. 's aversion to the E. U. Directive on access to a lawyer which stipulates that there should be legal counsel provided for at the trial stage. It is open to states to impose restrictions on would-be litigants, as long as these restrictions pursue a legitimate aim, are proportionate, and are not so wide-ranging as to destroy the very essence of the right (*Ashingdane*⁸⁴). The question remains whether restriction are acceptable under Article 6 and if so must they necessarily be "lawful", even though some cases suggest that they should be (*Kohlhofer and Minarik v. the Czech Republic*⁸⁵, §§91-102).⁸⁶⁸⁷

⁸⁴*Ashingdane v United Kingdom*, Judgment, Strasbourg, 28 May 1985, Application no. 8225/78

⁸⁵Judgment, Strasbourg, 15 October 2009, Applications nos. 32921/03, 28464/04 and 5344/05

⁸⁶D. Vitkauska and G. Dikov. *Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbook*. Council of Europe Handbooks 1st Printing, 2012

⁸⁷*Ibid.*, p. 24.

4.2.2.1 Historical developments

In the mid-18th century there were no lawyers in courts in the UK. The role of the defence was played by the judge with respectable members of society taking on the part of the prosecution. This situation did not last long. From 1752 to 1826 reforms occurred whereby the roles of lawyers was first introduced in criminal trials.⁸⁸ In 1836 lawyers were granted the right to address a jury on behalf of the defendant however this right only extended to those that could afford to instruct a lawyer.⁸⁹ The introduction of the Poor Prisoners Defence Act in 1903 allowed magistrates to order payment of legal help for the defendant.⁹⁰ The defendant was only entitled to this help if they were prepared to disclose their defence at an early stage of the case. As a result of this arrangement it meant that the provision of legal aid in criminal trials was indeed a rare occurrence. In 1930 the Poor Prisoners Defence Act introduced the concept of the interests of justice. This awarding of legal aid was to be determined on a merits based test and magistrates had a wider discretion when it came to awarding legal aid claims in cases.⁹¹ The interests of justice concept was further elaborated upon in the Widgery Report in 1954 where it set out that the test which must be met in order to be granted representation. The test stipulated that the offence would, if proved, result in the loss of liberty, loss of livelihood or serious damage to the defendant's reputation. Additionally, the case would involve a substantial question of law. The test also paved the way for the modern interpretation for legal aid requirements.⁹²

The Rushcliffe Committee report in 1945 on the state of legal aid in the UK in conjunction with Legal Aid and Advice Act 1949 lay the foundations for the development of the modern day legal aid system that the UK currently has in place. This system is being reformed again because of financial reasons by the U. K. Ministry of Justice. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) received royal assent in May 2012. This bill suffered fourteen defeats in the House of Lords and has been hugely unpopular due to its tightening of legal aid provisions as well as is removal of legal aid from certain situations altogether. Despite the fact

⁸⁸Great Britain: Department for Constitutional Affairs. *A Fairer Deal for Legal Aid*. Cm (Series) (Great Britain. Parliament). Stationery Office, 2005. ISBN: 9780101659123. URL: <http://books.google.hu/books?id=zs1CrKA04noC>, pp. 6–7.

⁸⁹Ibid., pp. 6–7.

⁹⁰Ibid., pp. 6–7.

⁹¹Ibid., pp. 6–7.

⁹²Ibid., p. 9.

that the Bill suffered fourteen defeats in the House of Lords, the highest number for many years the objections were defeated on the basis that the bill was primarily a financial measure on which the Commons could overrule the Lords' objections.⁹³ Most of these cuts will affect the civil legal aid budget but there are huge consequences for criminal legal aid as well. The Law Commission met 6 times to discuss written evidence and to hear oral evidence from invited guests. On the basis of this evidence it published its final reports in December 2013. The Act intends to save 350 million pounds from the Ministry of Justice's annual civil legal aid budget and in doing so reducing the 2.1 billion pounds per year legal aid bill for England and Wales.⁹⁴ The UK has the most expensive legal aid system to run in Europe with 2 billion pounds being spent annually, and in England and Wales 39 pounds per head of population as compared to 5 pounds per head in Spain, Germany and France.⁹⁵ The arguments of the UK government are that this amount of spending is not sustainable and that changes urgently need to occur. In May 2010 the coalition government of the UK set out their plans for the reform of the legal aid system to ultimately reduce the amount of expenditure. The aims of the reforms are to save 350 million pounds in the financial year of 2014/15. Among others the plans of the U. K. government is to encourage alternatives to the adversarial system and to have less defendants engaging in the trial process where and when they do not need to. The U. K. reforms of legal aid are parallel to that of the E. U.'s The similarity lies in the fact that there is a predominantly prosecution focused approach to the reforms. This is evident from the fact that huge emphasis is being placed upon the alternatives to trial and to solving disputes before they reach trial. Methods and techniques which are being encouraged are ADR, for civil cases, and plea bargaining and pleading early in the case so as to avoid clogging up the trial system. So as to avoid inefficiency and also reducing legal aid costs.

Where defendants plead not guilty, the way in which legal help is provided can help to ensure that the trial is focused on the key issues.⁹⁶

The government in making its changes has stated that the Criminal Justice System

⁹³Labour peer condemns legal aid cuts, by Owen Bowcott, Wednesday 2 May 2012, <http://www.guardian.co.uk/law/2012/may/02/labour-peer-legal-aid-cuts>, accessed on the 15th of April 2013

⁹⁴Constitutional Affairs, *A Fairer Deal for Legal Aid*, p. 9.

⁹⁵Reform of Legal Aid in England and Wales: the Government Response, June 2011 <http://www.official-documents.gov.uk/document/cm80/8072/8072.pdf> accessed on the 30th of January 2013

⁹⁶Constitutional Affairs, *A Fairer Deal for Legal Aid*, p 21–22.

(CJS) must be fair. In order to achieve this the objectives have been retuned to focus predominantly on the prosecution side of things.⁹⁷

The perspective of the government concerning the problem was not 'insufficient funding ... but overconsumption of legality'.⁹⁸ Seeing the indigent in terms of over consuming constructs a narrative of, "...legally-aided litigants as parasitic figures (rather than active citizens) whose access to public funds burdened the taxpayer and placed their opponents at an unfair disadvantage."⁹⁹

The pervading problem with legal aid systems is that there is the danger that the services that are provided end up being of a substandard nature. This may result in the need to regulate in order to ensure that the advice that is being given does not negatively impact on the defendant's defence. One of the objectives of legal aid, is to try and achieve the redistribution of wealth as a means by which the poor and the indigent can be active participants in society.

The U. K. does spend significantly more money on legal aid in criminal law than its European neighbours. Research has been conducted into the different spending habits of E. U. member states and it is recognised that the differences between adversarial and inquisitorial systems may be a reason for some of the differences in spending but it does not account for all of it.

The distinction between adversarial and inquisitorial criminal justice systems reflects fundamental differences of approach between common and civil law systems. However, on its own it does not necessarily explain large differences in spending. Although, adversarial systems spent significantly longer on jury trials, routine guilty pleas before summary courts can be disposed of as quickly, if not more quickly, than under the inquisitorial system. Nor can attribution of the expenditure differences to the inquisitorial versus adversarial distinction explain differences between adversarial jurisdiction. [Clearly] the notion that the adversarial/inquisitorial divide provides the full answer to the question of why international differences arise in criminal legal aid expenditure cannot be sustained. ... To try to understand the dynamics of spending we must

⁹⁷Constitutional Affairs, *A Fairer Deal for Legal Aid*, p. 21.

⁹⁸H. Sommerland. "Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid". In: *J. Law & Soc.* 31, Number 3 (2004), pp. 345–68.

⁹⁹*Ibid.*

consider explanations beyond simple constitutional requirements.’¹⁰⁰

The philosophy behind the legal aid reforms in the UK is that even though legal aid is important it does encourage people to take their case to court when sometimes it could be resolved without having to go to trial. The reforms are looking at better and more efficient alternatives to going to trial.

The Secretary of State Chris Grayling launched a series of consultations on the reform in an attempt to encourage public confidence in the legal aid system. “Transforming Legal Aid: Delivering a more credible and efficient system” is the name of the first consultation which ran from the 9th of April 2013 until the 4th of June 2013 the Government responded to the consultation in the autumn of 2013.

With the passing of LAPSO Lord Bach, a Labour peer announced that he was standing down from front bench duties. He has been the most outspoken about the LAPSO calling it a “bad day for the British justice system”.¹⁰¹ He has referred to LAPSO as, a rotten bill. This demeans our justice system and therefore our country. He went onto say that “These [cuts] are wicked, wicked in an old-fashioned sense.”¹⁰²

On 4th of June 2013 the last of the consultations were given to the Ministry of Justice on their report Transforming Legal Justice. In the lead up to the close of the consultation several organisations issued their comments on the proposed reforms as well as several people staged protests. The last of these protests was outside of the Ministry of Justice on the 10th of June 2013. Several prominent barristers spoke including Geoffrey Robertson QC, Dinah Rose QC and Michael Fordham QC. The latter of the three gave a very uproarious speech stating that the Ministry of Justice was not entitled to call itself as such because the cuts in legal aid would be such a disservice to the already marginalised and disadvantaged amongst us. He went on to say that the effective protection that a defense barrister provides would meet with further challenges.

“Legal aid is the beating heart of the rule of law.”- Michael Fordham

¹⁰⁰Goriely, T., Tata, C. and Paterson, A. (1997) Expenditure on Criminal Legal Aid: Report on a Comparative Pilot Study of Scotland, England and Wales, and the Netherlands Legal studies Research Findings No.9 (Scotland: The Scottish Office Central Research Unit) at 4

¹⁰¹Labour peer condemns legal aid cuts, by Owen Bowcott, Wednesday 2 May 2012, <http://www.guardian.co.uk/law/2012/may/02/labour-peer-legal-aid-cuts>, accessed on the 15th of April 2013

¹⁰²Labour peer condemns legal aid cuts, by Owen Bowcott, Wednesday 2 May 2012, <http://www.guardian.co.uk/law/2012/may/02/labour-peer-legal-aid-cuts>, accessed on the 15th of April 2013

He emphasised the fact that the State will have the lawyers that *they choose* every time that they bring a case but you will not get to choose.

This position is a clear infringement of Article 6 (3) (c). As the debate rumbles on in the U. K. it is yet to be seen what the repercussions, if any, will be at the ECtHR. What is clear is that the U. K. is moving towards a system of efficiency making use of early guilty pleas and plea bargains. It is in these efficiency driven systems where the role of defence should be paramount in order to help the defendant navigate their rights. Unfortunately access to justice is being curtailed in the very areas it is needed the most because of reforms in the U. K. and Supreme Court decisions in the U. S. to limit access to effective defence.

4.3 Case studies: Hungary and Serbia

Both Serbia and Hungary make interesting case studies with regards to their legal provisions concerning legal aid. Like the U. K. , Serbia has recently instigated reforms to its legal aid practices as it seeks accession to the E. U. Hungary is notable for its lack of transparency in the appointment procedure of its lawyers to legal aid cases.

4.3.1 Serbia

The importance of having a fair and efficient legal system becomes even more important for those countries which are seeking accession to the E. U. Serbia is in the process of adopting new legal aid systems so as to comply with the CoE's requirement that legal aid be seen as essential component of the rule of law. There are no fixed , harmonised standards or benchmarks upon which Serbia can draw from when creating their new legal aid laws. Despite this fact, within a EU context, there are examples of standards set down by the case law of the ECtHR which can help to inform their guidelines on the issue of legal aid.

Serbia has serious shortcomings with regards to its legal aid legislation in terms of how it has been formulated. Serbia has sought to limit the number of people who would be able to access legal aid by making extensive criteria for eligibility. Eligibility is limited by making a distinction between primary and secondary legal aid. Primary legal aid is given without the need for an eligibility check whereas

secondary legal aid requires the applicant needs to meet certain criteria for being in the right economic eligibility for legal aid.¹⁰³ Access to legal aid and any form of legal assistance is often only sought once the case is under way, this bring cases into conflict with Article 5. This situation exacerbates the problem of unnecessary litigation and delays in the court procedures.¹⁰⁴ The Serbian government adopted the Strategy on the Development of a Free Legal Aid System for the 2011-2013 period. A council was established in 2012 to help with the implementation of the strategy but it has yet to meet. Unfortunately the government did not include legal aid in its state budget for 2013. The defence have certain rights which are protected by both the criminal procedure code and the constitution. The defence rights which are of most interest for us are the right of the defendant to be afforded sufficient time to mount their case. This right means that they should be afforded 15 days if the crime that they are accused of will mean that they will serve a minimum of 10 years imprisonment.¹⁰⁵ The principle of equality of arms has also taken some knocks in the Serbian criminal system in that the prosecution have had new prosecutorial investigations introduced. In addition to the imbalance in the preparatory powers of both sides the law does not specify that defendants should be represented by defence counsel and the law on legal aid has yet to come into force.¹⁰⁶ The constitution does guarantee the right to defence in article 33. The criminal procedure code also confers on the defendant the right to defend themselves or to employ a defence lawyer of his own choosing. This provision only has meaning if one can afford to buy that kind of legal defence. The court can also appoint a defence lawyer ex officio until the judgment becomes legally effective.¹⁰⁷ Article 74 of the criminal procedure code specifies those instances in which the defendant must be assured a defence lawyer. There are certain brackets for when a lawyer must be provided and this depends upon the likely amount of imprisonment that the defendant will receive if the defendant

¹⁰³A. Uzelac and B. Preloznjak. "The Development of Legal Aid Systems in the Western Balkans. A Study of Controversial Reforms in Croatia and Serbia". In: *Kritisk Juss* 38.3-4 (2012), pp. 261–387.

¹⁰⁴Ibid.

¹⁰⁵Right to a Fair Trial, Yearbook of the Balkan Human Rights Network (Yearbook of the Balkan Human Rights Network), issue: 01/2012, pages: 159-176, om www.ceeol.com (accessed on the 6th of August 2013)

¹⁰⁶Right to a Fair Trial, Yearbook of the Balkan Human Rights Network (Yearbook of the Balkan Human Rights Network), issue: 01/2012, pages: 159-176, om www.ceeol.com (accessed on the 6th of August 2013)

¹⁰⁷Right to a Fair Trial, Yearbook of the Balkan Human Rights Network (Yearbook of the Balkan Human Rights Network), issue: 01/2012, pages: 159-176, om www.ceeol.com (accessed on the 6th of August 2013)

is convicted of the offence.

“The CPC lays down that defendant who cannot afford a defence counsel shall be appointed one at their request if they are accused of a crime warranting over three year’s imprisonment or in the interest of fairness (Art. 77).”¹⁰⁸

The Serbian legal aid provisions fall far short of the recommended international norms in that the focus of legal aid provisions are more upon the formal proceedings than upon the the actual legal advice given as well as upon information and preventive measures.¹⁰⁹

The high level of flexibility in the Serbian proposed legal aid legislation when it comes to assessing the financial eligibility of the individual is in line with the ECtHR but it also does serve to create a situation whereby the results may indeed be unpredictable because there is no uniform application of the law.

Uzelac and Preloznjak’s concluded that the Serbian system of legal aid does not conform with the international legal aid standards in that the provisions are not adequately accessible, do not provide citizens with effective means for accessing justice and that the process of accessing legal aid is unnecessarily complex. The major problem with regards to Serbia is that they have been granted funds for their legal aid systems but most of this funding has been paid to administrative purposes rather than into the legal aid budgets itself. What funding is available may in all reality take years for it to filter down to the lawyers who have provided the work pro bono. It is asserted that the way in which the funds have been allocated for legal aid further serve to create a system whereby monopolies of both access to the law and knowledge are formed. In doing so the poor, and disenfranchised are held at bay and their rights are trampled upon. This also discourages those organisations that would be willing to provide legal aid services from doing so because the process of registering is both complicated and inaccessible. Additionally a distinction is drawn between primary and secondary legal aid with primary receiving the least amount of support.

The Serbian Constitution of 2006 took into consideration the constitutions of other

¹⁰⁸Right to a Fair Trial, Yearbook of the Balkan Human Rights Network (Yearbook of the Balkan Human Rights Network), issue: 01/2012, pages: 159-176, om www.ceeol.com (accessed on the 6th of August 2013)

¹⁰⁹Uzelac and Preloznjak, “The Development of Legal Aid Systems in the Western Balkans. A Study of Controversial Reforms in Croatia and Serbia”.

member states when formulating its own inclusion of legal aid as a constitutional right. Article 67 ensures the right to legal aid for every individual. This provision means that the right to legal assistance is guaranteed according to the law.¹¹⁰ The State is under an obligation to provide legal aid. Despite this move forwards in terms of legal aid protection there still remain significant barriers to the realisation of this service in Serbia.¹¹¹

The Republic of Serbia is obliged, by the C. o. E., to ensure that there is easy and effective access to justice. The C. o. E. has enacted several documents which must be taken into consideration when formulating provisions of legal.¹¹² Despite the Republic of Serbia having constitutional provisions as well as laws concerning legal aid there still remain considerable barriers to accessing justice.¹¹³ The predominant issue is the level of poverty. In 2002, 10.6% of the population were living below the poverty line in addition to this 20% of the population have insufficient means for living.¹¹⁴ The major cause of poverty is unemployment which is only expected to be exacerbated in the years to come.¹¹⁵ Also, the Republic of Serbia has large groups

¹¹⁰Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, page 1

¹¹¹Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, page 1

¹¹²Resolution (76) 5 on legal aid in civil, commercial and administrative matters, from February 18, 1976, Resolution (78) 8 on legal aid and advice, from March 2, 1978, Recommendation No. R (81) 7 of the Committee of Ministers to member States on measures facilitating access to justice (adopted on May 14, 1981), Recommendation No. R (93) 1 of the Committee of ministers to member states on effective access to the law and to justice for the very poor (adopted on January 8, 1993). (<http://www.legislationline.org>), Charter of fundamental rights of the European Union, (2000/C; 364/01; Nice, 7/12/2000), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 - 0026, Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Official Journal L 26/41, 31/01/2003.

¹¹³Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, page 7

¹¹⁴Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, page 7

¹¹⁵Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY

of marginalised as well as vulnerable groups who suffer increased risks of exclusion from access to justice.

The need for legal aid that is both real and accessible is of increasing importance especially where individuals who are facing possible imprisonment of 10 years or more do not receive legal counsel. Statistics show that 54% of defendants have not had legal counsel by their side when giving a statement and 46% of defendants had not had legal representation during the investigative stages, and only 11% had received free legal aid because of their poverty.¹¹⁶

There are no safeguards in place to ensure quality control of the representation being provided. Access to justice and legal aid are seen as being dual tools with which to restore citizen's trust in the legal system, providing them with empowerment and a way to identify with the legal and political process. Many people are unaware of their rights and how they may exercise those rights and in which ways they ought to be protected. The Serbian Strategy for Free Legal Aid System Development (2006) identifies that despite the constitutional right there is a great need for an institutional framework which would regulate the implementation of a legal aid system ensuring that the quality of counsel being provided is secured ethically at the appropriate standard for all. There are no defined steps as of yet with regards to securing access to justice for all through the mechanism of legal aid in the Republic of Serbia.¹¹⁷

The Serbian legal system has what appears to be the requisite tools for establishing an effective and working legal aid system but what is lacking is the political will and foresight to see the programme through to fruition. This is why it is imperative that decisions such as *Salduz v. Turkey* be given there full weight and force.

FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, pages 7-8

¹¹⁶Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, page 9

¹¹⁷Pursuant to article 45, para. 1 of the Law on the Government (Official Gazette of the Republic of Serbia, No. 55/05, 71/05-correction, 101/07 and 65/08), the Government adopts STRATEGY FOR FREE LEGAL AID SYSTEM DEVELOPMENT IN THE REPUBLIC OF SERBIA, page 17

4.3.2 Hungary

In 2012 the Hungarian Helsinki Committee (HHC) carried out a survey of various police stations, public prosecutors as well as defence lawyers so as to ascertain how the legal aid system was functioning in Hungary. The report uncovered, that the legal aid system in Hungary is significantly lacking.¹¹⁸ Their findings are corroborated by other academic research conducted in Hungary.^{119, 120} The report reiterated the same problems which nearly all countries have cited as being a major obstacle, that there are more cases than there are legal aid lawyers who are able to work on their cases. This situation encourages the early resolution of cases before they even reach the trial stage through plea bargaining mechanisms. There were endemic problems of quality and of lawyers under performing. It was cited that in several cases that the legal aid lawyer sometimes did not even say a word throughout the entire trial or were not even present at the first police interview.¹²¹

The HHC stated that financial difficulties contributed to the quality of the legal aid services. Most defence lawyers are paid very little. This lack of adequate remuneration for work was not the only financial difficulty which contributed to a below par legal defence. A significant hindrance for basic defence rights is the lack of adequate funding available for an infrastructure to support a system of legal. Structural problems were cited as being the biggest barriers to detainees being able to make a phone call to their lawyer as there was not enough money available. The HHC identified the need for greater coherency and they suggested that this could be achieved through an independent monitoring body which would oversee the working of the system.

The question of who will be awarded legal aid counsel is answered by the law in Hungary.¹²² According to, “Az ügyvédekről szóló 1998. évi XI. törvény (Ütv.) 34. § (1)” it states that the selection of the legal aid counsel is dependant upon the law firm maintaining a list of those lawyers who are willing or have (already) undertaken legal aid work. In the criminal procedure code the law of 1998 of the year XIX states

¹¹⁸“A kirendelt Védő intézményének Szociológiai Elemzése” Nagy Zsolt Tanulmány a kirendelt védő jogintézményéről pp.1-15, 2000/4. szám tartalomjegyzéke.

¹¹⁹K. Bárd. “Access to Legal Aid for Indigent Criminal Defendants in Central and Eastern Europe”. In: *Parker Sch. J. E. Eur. L.* 5.1-2 (1998), pp. 1–224.

¹²⁰Cs. Herke. *Megállapodások A Büntetőperben*. Szerző, 2008.

¹²¹Cs. Fenyvesi. “Constitutional principles in the light of the defensive position”. In: *Jogelmeleti Szemle* 1 (2002).

¹²²Ibid.

that the organisation that regulates as well as controls the appointment of legal aid counsel to a particular case is the judge, the prosecutor or the investigating authority. This immediately brings to the fore the question of independence and impartiality. What is of particular concern is that it is most often that the prosecutor will select the legal aid defence lawyer. The allocation of legal aid lawyers to a particular case is not necessarily based upon the age of the lawyer but to some extent the seniority of the lawyer. As legally aided work is not very well paid the least senior lawyers are often allocated the work. This is most counter intuitive, as the least senior lawyers do not have as much experience. This results in the legally aided receiving, in some cases, below par representation. As they say, you get what you pay for, in the case of the legally aided, nothing.

There have been attempts to improve the legal aid system. It is recognised that the system as it currently stands is indeed lacking. Between 2004-2007 the HHC established the Criminal law assistance programme whose objective was to provide an alternative system by which legal aid lawyers can be provided to defendants. The system employed would be an automated computer programme which would at random select lawyers whose names had be uploaded to the system. A trial run was introduced to see how and if the system (called RobotZsaruba) would work. A positive outcome of the pilot programme was that the number of legal aid lawyers increased. It was also agreed upon by some of the Public Prosecutors that it was not the most fortunate of situations if they allocated the legal aid lawyer for the defence. The Ministry of Public Administration and Justice (Közigazgatási és Igazságügyi Minisztérium Igazságügyi Szolgálat (KIMSZ)), suggested an independent body should be responsible for the allocation of legal aid. KIMSZ would allocate finances ahead of time be that 3, 6 or 12 months in advance and they would set the budget for the lawyers. In June 2011 it was announced that it could be expected that KIMSZ would be responsible for playing a role in the allocation of legal aid. The question still remains as to on what basis this allocation of services would be conducted so as to ensure impartiality.

In order for one to qualify for legal aid support they must be indigent. Their status of indigence is determined by their financial situation. The common household per capita income is sometimes also considered (as like in the case of Serbia). This process is severely flawed because it is dependant upon the people living together agreeing to support one another financially. Most indigent individuals do live together because of their financial situation and therefore are not always necessarily

in a position to be helping one another.

The first real reforms to the criminal legal aid provisions were in 2003.¹²³ The new provisions resolved a matter of contention concerning the fee of the defence counsel as up until this point this was only advanced but not borne by the State.¹²⁴ The new provisions now provide for the exemption of legal aid costs for defendants who are indigent. These reforms only went part of the way in reforming the system of allocating the funds. The reforms mostly concerned themselves with the civil law aspects of things and providing indigent applicants with information about their rights. The system did not create a way in which to register lawyers so that they could be easily identified as providing legal aid. This is a issue which the HHC has been working towards encouraging the Ministry of Justice to reform.

As in the case of Serbia , Hungary's legal aid rules also went under extensive reforms before their accession to the E. U. The reforms occurred in 2004 and 2008 at around the time Hungary was seeking acquiescence in line with the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes. Most of the reforms focused on the civil law system. It was not really until the new Criminal Procedural Code reforms of 2012 which came into force in July 2013 that real impact to both the legal aid and plea bargaining mechanisms have been felt.

The European Commission in its decision of 26 August 2005 provided a template form of the transmission of legal aid applications under Council Directive 2003/8/EC (2995/630/EC). The Council Directive 2003/8/EC of 27 January 2003 takes into consideration the steps *“to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.”* The standard template form is an attempt to create a system whereby the form of applications for legal aid are standardised.

The reforms of 2004 and 2008 affected the requirements for eligibility for legal aid. The determinants were a means test for indigent defendants. Those who are automatically considered to be indigent will have to evidence this through the regular receipt of social and healthcare assistance, homeless, refugees, and those who are carers of children who receive some kind of child support.¹²⁵ If an individual's situation is only slightly better than that of an indigent applicant then they will be offered support on the basis of deferred payments. The state of indigence is deter-

¹²³Act XIX of 1998 on the Code of Criminal Procedure came into force.

¹²⁴M. Pardavi. *The Legal Profession in Hungary*. ODIHR, 2008, p. 15.

¹²⁵*Ibid.*, p. 12.

mined by the statistics provided by The Central Office of Statistics which sets out what the poverty line is for every year.

The right to choose is not a possibility and as we have seen from the above there are real problems with the impartiality of the appointment of the legal counsel as it is the prosecution, police or the court who appoint the legal counsel. A pervading problem throughout all of the systems is that of quality control. Quality control measures are completely lacking in the Hungarian system when it comes to criminal legal aid.

The combined issues of low eligibility and low income incentives for lawyers all serve to create a system whereby the lowest common denominator is consistently applied. The quality of this legal advice must be such that it enables the defendant to mount an effective defence against those charges which are being brought against them.

The pervading problem with these provisions is that there is a danger that they will never be anything more than conceptually and formalistic ideas which do not translate into real rights of access to justice for the indigent defendants. The Hungarian government ought to ensure that the rights that they implement are in the spirit of ensuring access to real human rights. If we consider access to the courtroom a human right, “then so must access to legal services be.”¹²⁶

4.4 Summary and Conclusions

The right to a legal defence is invariably connected with the right to access justice. This is evidenced by the ECtHR ruling in *Salduz v Turkey*¹²⁷. The ECtHR has established that the presence of a lawyer is vital in ensuring access to justice. Despite this there is still a lack of much needed clarity in the application of the requirements for what constitutes an effective defence across Europe. As we wait for the ECtHR to hand down their decision in the case of *A. T. v Luxembourg*¹²⁸ we can only hope that the ECtHR will send a definite message of what constitutes justice. Particularly concerning is the application of the narrow or strict rule. According to the narrow application of the *Salduz* principle it will only constitute an infringement of the

¹²⁶C. Harlow. “The EU and Human Rights”. In: ed. by P. Alston, M. Bustelo and J. Heenan. Oxford University Press, 1999. Chap. Access to Justice as a human right: The European Convention and European Union, pp. 187–213, p. 189.

¹²⁷Application No. 36391/02, Judgment, Strasbourg, 27 November 2008

¹²⁸Judgment, Strasbourg, 20 April 2013, Application No. 30460/13

effective defence requirement if the defendant gives a confession in the absence of their lawyer. The strict application states that there will be an infringement if the defendant makes statements which are of an incriminating nature in the absence of their lawyer. Both flagrantly disregard the procedural safeguards established by the ECtHR, however, there is yet to be any clarity over their application.

There are several obstacles both social and legal which work against the indigent defendant accessing justice.

There is not much distinction between the more developed and historically entrenched legal systems of democratic countries and those which have forged new countries out of a history of communism. One would have thought that it would be the legacy of the Magna Carta or even the U. S. Constitution which are champions for the importance of access to justice would provide fertile ground from which the right to counsel could grow. It would appear from the case law that this is not always the case. Worryingly the newly formed States then call on the example of these western countries practices as reasons and justifications for adopting practices which are below par in terms of defence rights. The pressure to conform to the standards of the E. U. is evident and understandable. What is not, evident and understandable, is that the E. U. has a high standard for those joining but those that are already in seem to be flaunting this position.

The U. K. 's reform of its legal aid has caused great controversy within its borders and has also attracted international attention. The U. K. heralds its legal system as being amongst one of the most developed in the world. The measures that are proposed by the Ministry of Justice are greatly misguided and are headed for a collision course with fundamental rights.

Just as the E. U. is coming to the end of its Roadmap under the auspices of the Stockholm Programme it calls into question how seriously the U. K. takes its obligations. The E. U. Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest, will be greatly hindered by the introduction of LAPSO in the U. K. The right to a fair trial, as has been recently interpreted by the court, hinges on the right to access to a lawyer.

The lawyer acts as a conduit through which access to justice can be achieved. Once the lawyer has been secured for the defendant their role just begins. In tangent with need for legal aid there also come other countervailing methods to undermine access to the trial.

As a result of the growing number of cases and the lack of resources to hear them adequately alternative methods to trials have been employed so as to ease this load. This has resulted in a drive for a more efficient and effective justice. One such method that is commonly used in both the U. S. and the U. K. is plea bargaining. The practice of plea bargaining has also been modified and applied on the continent. The law then becomes a barrier rather than the enabler of justice. It is this practice of circumventing the trial that will now be addressed in the chapters below .

“Before the law stands a doorkeeper” (Kafka 1992:285 *The Trial*)

This statement is true for all defendants without the ability to access an effective defence. Irrespective of the fact that it is favourable to resolve things outside of court as quickly and as amicably as possible there still remains the problem that defendants are being encouraged to opt for alternative methods to the trial.

There are several versions of what the message of Kafka’s *The Trial* is. One interpretation is that when the law starts to function as a machine, then justice gives way to necessity. Necessity is seen as the inevitable detention of the defendant. It is this fear of detention which quashes challenges to the way in which the justice system is set up. Giving way to necessity is the most troubling phenomenon of the criminal procedure which has been left hanging in the air in the context of plea bargaining. The defendant realising the limits of law to ensure their justice looks for ways to limit the damage by opting to use mechanisms which limit their right to a fair trial.

5 Plea Bargaining: the pursuit of justice?

“In all cases of penal procedure, the declared supposition is, that the party accused is innocent; and for this supposition, mighty is the laud bestowed upon one another by judges and law-writers. This supposition is at once contrary to fact, and belied by their own practice.... The defendant is not in fact treated as if he were innocent, and it would be absurd to deal by him as if he were. The state he is in is a dubious one, betwixt non-delinquency and delinquency: supposing him non-delinquent, the[n] immediately should that procedure against him drop; everything that follows is oppression and injustice” Jeremy Bentham¹

The practice of plea bargaining challenges the very premise of the trial; which is to find the truth and see justice done.

What does the practice of plea bargaining do for the quest, of the pursuit of truth and justice? At one level plea bargaining erodes and side steps the pursuit of truth and justice. Central to the practice of the plea bargain is the confession or admission of guilt. It would appear that we have overlooked to some extent this fundamental point. Everything up until now, in terms of reforms, have been window dressing. In order for a trial to be fair, it is important that the confession be given freely and voluntarily before it can be admitted as evidence. One determining factor of whether the confession was given freely and voluntarily is whether counsel was present. This principle is a fundamental component of article 6 (of the ECHR) principle of equality of arms. It is this question of a confession and a plea of guilty that must be given freely which is a crucial aspect when considering the practice of plea bargaining. Plea bargaining has developed as an informal, and to some

¹ J. Bentham. In: *Principles of Judicial Procedure* 169 (1829)

extent largely unregulated practice until recently which means that jurisprudential questions are still being formulated regarding its validity.

Plea bargaining was intended to target organised and serious crime but it, instead formalised the previous corruption. It formalised the corruption because plea bargaining gives organised crime a veneer of respectability as a serious or career criminal can arrange to buy a plea rather than having to orchestrate a more complex dismissal. It is this very concept that turns the law into a commodity rather than a given that all have access to justice irrespective of their position on the hierarchical ladder of society. This shift challenges the rule of law and due process basic intentions. The E. U. has been slow to respond to this endemic problem and has finally set about implementing a roadmap for justice. This roadmap, which runs until 2014 includes 6 Commission directives which all aim at improving the European harmonisation of defence rights. The directives were in part brought about by the fact that there were an increasing number of cases of foreign nationals within the E. U. who were being prosecuted but not necessarily being guaranteed their basic rights. Counsel have been incorporated into the E. U. directives² which requires subscription by member states. These two directives are part of a package proposed by the European Commission to improve the procedural rights of defendants. In November 2013 the European Commission proposed a further three directives; the presumption of innocence; special safeguards for children suspected and accused in criminal proceedings and access to legal aid. They are yet to be implemented. There are no directives which specifically address the practice of plea bargaining. Despite this fact the proposed directive on the presumption of innocence³ could have a significant impact upon the way in which member states use the practice of plea bargaining.

There are no adequate mechanisms in place to protect defendants from falling foul of the gaps between access to justice, like legal aid and the prosecuting models of plea bargaining.

²DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings and DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

³COM(2013) 821/2 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

These problems occur because there are no viable alternatives. There is a need to ensure, as far as it is possible that the truth be exposed for the sake of the innocent defendant, the victim and society.

5.0.0.1 The Truth and nothing but the truth?

The importance of truth and what is perceived as the truth varies depending upon the trial jurisdiction one is in. The inquisitorial process is interested in obtaining the absolute truth whereas the adversarial methodology is concerned with probable truth. This paradigm creates numerous problems as there is an inherent gap in the jurisprudential thought between the two systems when considering the practice of plea bargaining and the pursuit of the truth. Plea bargaining circumvents both the traditional inquisitorial and adversarial form of the quest for the truth at the trial. This practice challenges the belief that fairness is equated with truth because that is the objective of the trial. The search for the truth varies upon the context. Truth is important for all adjudicative proceedings but what is of incredible importance is ensuring that the fact finding process is accurate but this is far from constant across legal proceedings.⁴,

Research into plea bargaining has focused predominantly upon the travesty of convicting and persuading the innocent to plead guilty. This practice is prevalent as the importance of the truth is losing its centrality to the trial. Our societal views of what constructs truth have changed. As such we have a legal system which is outdated as compared to our now modernistic views of what constitutes truth. If this is the case then should the justice system adapt its pretence of pursuing the truth as it clearly does not do this when employing alternatives to justice such as plea bargaining.

Alternatives to justice is an expression used to draw a distinction between theories of justice which have a deeply embedded concept of finding the truth. When engaging in practices, however, which do not pursue the truth then they are juxtaposed as being something which is an alternative to justice, a lesser, watered down, “justice light” version.

The truth is no longer central to our workings and conceptualisations of a fair and just trial system, then what is? It could be suggested then that the phrase, “the

⁴M. R. Damaska. “Truth in Adjudication”. In: *Hasting L. J.* 49 (Jan. 1998), pp. 289–308.

whole truth and nothing but the truth so help me God”, is rather an unachievable state. The whole truth is a subjective state where one cannot really reach an objective stance. As such the pursuit of justice is a fallacy behind which legal practitioners and scholars have hidden. In reality they have been practicing a game of “almost truth” or in the worst cases the denial of the pursuit of the truth and justice altogether. This is being exposed via the plea bargaining model. This presents us with the problem of where does this leave respect of the right to a fair trial? Most research conducted into plea bargaining is concerned with its practice and the imbalance of power between the prosecution and defence. One study conducted by Deirdre Bowen looked at ways in which the practice of plea bargaining could be regulated by an independent body.⁵⁶ In the state of Seattle Early Plea Unit’s (EPU) were established so as to secure an “independent” prosecutor who has no vested interest in the case and is also not acting for the state. In this way it is argued that there is a fairer and more balanced plea bargaining relationship between the two parties⁷ This is a novel approach to making the plea bargaining process fairer. Bowen observes that the same tactics are used to encourage the defendant to plea guilty. For example, the fact that if they plea guilty early on in the case they will have a better chance at getting a lower sentence. In this way it was observed that sometimes the defence lawyer would advise the defendant to plea guilty as they were able to manipulate the system to ensure the best possible outcome for their client. One of the arguments in favour of this type of system was that it helped to balance the power more evenly between the parties. The system is seen as being neutral as the prosecutor does not have a vested interest in the case but this is not a true representation. It is very difficult to ensure that the interests of the defendant are properly protected. The EPU system only really works well with the least serious cases. In most cases there is pressure to go to trial but also a fear that if they do so their client, the defendant will not receive as good a deal if they had accepted the plea. In this way the activities of the EPU as well as the plea bargain are not so much about justice being done but rather the quest for efficiency.⁸

⁵D. Bowen. “Calling your Bluff: How Prosecutors and Defense Attorneys Adapt Pleas Bargaining Strategies to Increased Formalization”. In: *J. Q.* 26.1 (2009), pp. 2–29.

⁶The regulation of plea bargaining by an independent body is often referred to as being a good mechanism by which to ensure a curtailment of the bargaining position of the prosecution. Another advantage of an independent body is that it can perform a monitoring role of the plea bargaining process

⁷Bowen, “Calling your Bluff: How Prosecutors and Defense Attorneys Adapt Pleas Bargaining Strategies to Increased Formalization”.

⁸Ibid.

The U. S. practice of prosecutorial discretion means that they hold all of the cards. Once they have determined based upon the weight of the evidence to offer a plea it cannot be modified at a later date. It is a take it or leave it deal. The Prosecutor is also free to withdraw the plea bargain at any point in the proceeding. The judge can only review the charge files but cannot change the charges if they feel they do not adequately reflect the facts of the case.⁹ In cases such as the Dallas Morning News where in a series of homicide cases the prosecutors offered lesser charges of deferred adjudication and probation if they agreed to plead guilty. The prosecutors believed that all of the defendants were guilty but were concerned that the cases against them were weak and would not succeed at trial. This tactic is not in the pursuit of justice as it circumvents the interests of the victim and society. One of the most controversial issues with the use of prosecutorial discretion in the plea bargain is the weak evidence of guilt¹⁰ There are three main problems which can be identified in connection with the prosecutorial discretion that firstly the bargain is too generous which results in encouraging the defendant to plead guilty, secondly, if it is a generous offer it may let off too easily a guilty defendant resulting in a disservice to both the victim and the public, thirdly, if the parties debate the facts this could result in a distortion about the truth of the case.¹¹

In the case of Germany, the Federal Supreme Court expressly forbids the use of bargains concerning the verdict which include fact and charge bargains.¹²¹³ One reason that there is such a distinction between the U. S. and German practice of plea bargaining is because the Germans adhere to what is called the legality principle also known as the mandatory prosecution principle. Interwoven with the principle of legality, is the fact that the German prosecutors are devoted and also have a duty to uncover the substantive truth and in conjunction with this the German courts also have a duty to intervene where and when they believe that the precise truth of the case is not being accurately represented. All of these mechanisms and factors taken together work towards the pursuit of justice in Germany unlike in the U. S.

Another distinctive factor between the German and American systems is the acceptance of the confession which then supports the guilty verdict. The German

⁹J. I. Turner. "Prosecutors and Bargaining in Weak Cases: A Comparative View". In: *SMU Dedman School of Law Legal Studies Research Paper No. 87*. (2011), pp. 1–13.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Bundesgerichtshof [BGH] [Federal Court of Justice], March 3, 2005, BGH GSt 1/04

Federal Supreme Court has stated though that the acceptance of a confession cannot be accepted without it being, “at least so concrete that the court can determine whether the confession reflects the facts presented in the case file to such an extent that further examination of the matter is not necessary.”¹⁴ Despite the offering of the plea bargain in the German system the judge still has the ability to review the sentence and if they deem that it is not proportionate and does not reflect the blameworthiness of the defendant¹⁵ then the judge can change the sentence. Neither of the approaches of the American and German system is perfect in pursuing justice. Despite this, in the German system there is a process whereby the plea bargain is reviewable and subject to a result after a transparent public process.¹⁶

The tension between the pursuit of justice and truth is felt acutely when observing the role of the defense counsel in plea bargaining.

According to the works of Blumberg¹⁷, Skolnick¹⁸ and Cole¹⁹, the defence counsel

“is not so much an unwittingly co-opted agent used by the self-serving court bureaucracy, as he is one of the key figures in an elaborate system in which everyone, including himself, has certain commodities to exchange in the pursuit of his own interests.”²⁰

Cole asserts that displacing conflict with cooperation is the new language of the plea agreement as well as the plea bargain. This produces a system whereby administrative and personal goals are maximised rather than the “formal organisational goals of due process.”²¹

If the trial is circumvented then the truth is also not exposed. Plea bargaining then becomes about one person’s interpretation of the evidence and the truth by the prosecutor. This places the defendant in a perilous position as they are then unable to weigh up the evidence to determine what case they would like to build. A fundamental requirement of the principle of equality of arms.

The overall objective of the prosecutor is to match factual proposition with the

¹⁴BGH, Decision of March 3, 2005, BGH GSt 1/04

¹⁵Turner, “Prosecutors and Bargaining in Weak Cases: A Comparative View”.

¹⁶Ibid.

¹⁷A. S. Blumberg. “The Practice of Law as Confidence Game: Organizational Co-optation of a Profession”. In: *Law & Soc’y Rev.* 15:1 (1967), p. 20.

¹⁸Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*.

¹⁹G. F. Cole. *The American System Of Criminal Justice*. Duxbury Press, 1979.

²⁰Feeley, “Two Models of the Criminal Justice System: An Organizational Perspective”, p. 419.

²¹Ibid., p. 416.

overall story which then has to be matched with the reality of the way the world really is. It would seem to be logical then when one is trying to ascertain the truth that it ought to occur within the confines of a,

“properly structured discussion among people with different viewpoints. The more you let them argue, freely ask questions, and justify their positions, the more you can be confident in the accuracy of outcomes - not only in deliberating about values and rules, but also in determining the truth of factual claims.”²²

The problem is that this version of searching for the truth is not always what really happens rather truth and successful justification of knowledge are mixed up which results in circumstances like the plea bargain. In these circumstances truth is deemed as being anything which both of the parties have agreed to beforehand, very similar to the plea, here, “truth tends to be equated with whatever is agreed upon following the inquiry free of distorting constraints, or with whatever has been successfully defended against all comers.”²³. According to this theory fact finding rests upon a realists view of the truth. This theory underpins the theoretical premise of the plea bargain as,

“According to this theory, what is “really” true need not square with what has been decided to be true; factual findings need not match reality, even though inquiries leading to them were optimally designed.”²⁴

In this approach the question is also raised as to how to make the process of fact finding and ascertaining the truth more expedient. In essence how can the guilty criminal be given an incentive to plead guilty? Damaska here is concerned with the procedural steps that can be taken to ensure that in the collecting of evidence fundamental rights are not infringed. The danger with this approach of giving incentives for guilty defendants to plead guilty is the risk of evidence being contaminated and fabricated. A final danger with this approach of the anti-realist, as identified by Damaska, is that, “by blurring the lines between truth and successful justification, they obfuscate the distinction between procedural doctrines that were created to promote fact-finding accuracy and those rooted in considerations of fairness.”²⁵

This is apparent when considering that a trial in and of itself cannot guarantee that

²²Damaska, “Truth in Adjudication”, p. 294.

²³Ibid., p. 295.

²⁴Ibid., p. 295.

²⁵Ibid., p. 296.

the truth will successfully come out in litigation but that is why it is called in the “pursuit of the truth/justice”. A defendant normally finds themselves embroiled in a plea bargain situation where based upon the proof which is available to them at that juncture in the proceedings. Proof, is a complicated matter and it is entangled with how we perceive truth to be defined. One potential problem with the way in which conceptualise truth is also in part a linguistic one. As proposed in the case of *Williams v. Florida*²⁶ it is possible that the word “truth” is not entirely the best use of the word as it conjures up a specific view which is that there should be a particular procedural outcome. In this way the discovery of the truth is viewed as resulting in a just decision. As such adjudication becomes seen as a process whereby participation is integral, a principal which is upheld by the ECtHR, it is through participation where one can observe if there are tensions between the pursuit of truth and the considerations of truth.²⁷

“ (...) participation now also appears as the most conspicuous ingredient of procedural fairness. And when fairness is so conceived, it no longer appears as a constraint on decisional rectitude, but as a precondition for it. The greater the “voice” of the parties in proceedings, the more the resulting decision seems correct.”²⁸

It would appear to be apparent from the above that the active participation and the ascertaining of the “truth” are confined to the trial. As such, it is no wonder that the innocent defendant is particularly vulnerable to being convicted as the plea bargain is not interested in ascertaining the truth or preserving the presumption of innocence but rather replacing it with the presumption of guilt.

Within this debate comes the issue of adversarial versus the inquisitorial divide over which procedural practice is better for producing a fair result. The differences between the two systems appears to be minimal but after research conducted into which system a defendant would prefer the result indicated that an adversarial one was chosen.²⁹³⁰ The research indicated that the most appealing part, and the reason for selecting the adversarial process, was that defendants felt that they as participants would have more control over the process and the way in which the trial

²⁶399 U. S. 78, 82 (1970)

²⁷Damaska, “Truth in Adjudication”, p. 303.

²⁸*Ibid.*

²⁹P. J. van Koppen, ed. *Adversarial versus Inquisitorial Justice*. Springer Science+Business Media New York, 2003.

³⁰

was conducted as well as presented.³¹ The choice of the defendants would appear to be backed up by the ECtHR. Even though the ECtHR has tried to give neutral interpretations of the application of Article 6. It is unavoidable to notice that Article 6 quite clearly includes a due process clause. Despite the ECtHR's attempt at a neutral stance its case law has shown an indication of interpreting Article 6 in a fairly adversarial manner.

One of the defining features of the adversarial process is that the parties are essentially equal. This equality can only become a reality if both parties play in a fair way and this is determined by, "the formal equality of the contestants".³² This is a factor which is missing in a plea bargaining relationship.

The question that remains to be answered is whether the cost of the defendant cooperating with the prosecution and virtually relinquishing their 5th and 4th Amendment rights in the U. S. and their Article 6 of the ECHR rights, is to be encouraged as a means by which to prove their innocence.³³ A criticism of this system is that it requires too much of the defendant in that they waive their right to silence. The emphasis upon the fact and truth-finding process in the U. S. system is redundant in that most of the cases (95%) do not reach the trial stage but as we know are resolved by the means of the plea.

In the inquisitorial system emphasis is placed on finding the truth through an objective, and sharing of information process. The adversarial process places emphasis upon having advocates who are fighting to find the truth from the evidence which best supports their case in this way this system avoids the tunnel vision of the inquisitorial system. American scholars have argued for a combination of the two which reconciles the crime control and due process models with a bridge called "reliability". This approach serves the interests of all involved.³⁴ One of the suggested models is that the defendant should be able to elect to have an "innocence procedure" carried out. The benefits of this procedure is that it is suggested that the defendant will then be within a system which then is concertedly looking for the truth as opposed to the guilt of the defendant. There are several problems with this model in that firstly, any procedure should be looking for the truth, whatever that be or look like, also if a defendant elects to remain silent (which within the U. S. is

³¹Koppen, *Adversarial versus Inquisitorial Justice*.

³²*Ibid.*

³³K. A. Findley. "Adversarial Inquisitions: Rethinking the Search for the Truth". In: *N.Y.U. L. Rev.* 56 (2011/12), pp. 911–941.

³⁴*Ibid.*

their constitutional right) then it is possible they will be punished for not exercising their right to elect an “innocence procedure”. With this option of choosing to remain silent there is the inherent presumption that it is only the guilty who would choose to remain silent and not the innocent.³⁵³⁶ Additionally, an innocence procedure requires the defendant to waive some of their confidentiality rights so that the other side can better examine their documents so as to ascertain their innocence.

What both of these systems have in common,

“(…) is that the outcome of a case is usually determined long before the trial (or plea), that is, at the administrative investigation stages. If truth and reliability are the objectives, therefore, what really must be done is improve the quality of the evidence gathering and interpreting at the initial investigation stages.”³⁷

With this in mind it is also necessary to consider another element which plays an integral role with the gathering evidence, that of the presumption of innocence.

5.1 The presumption of innocence

The presumption of innocence has its beginnings in the French Declaration of the Rights of Man and Citizen (declaration des droits de l’homme et du citoyen) where it is stated that, “Every human must be presumed innocent until he is found guilty.” This was again reiterated in the Universal Declaration on Human Rights and then in Article 6 (2) of the ECHR.

The first tentative steps at interpreting the presumption of innocence have been particularly restrictive.³⁸ This restrictive interpretation limited the presumption to being applicable only to the trial proceedings. As the case law of the ECtHR developed it has become clear that in order to infringe the presumption of innocence the trial proceedings do not have to have commenced.³⁹ The European Commission

³⁵C. Durocher. “Are We Closer to Fulfilling Gideon’s Promise? The Effects of the Supreme Court’s “Right-to-Counsel Term””. In: *Issue Brief American Constitution Society for Law and Policy* 7 (2013), pp. 103–118.

³⁶Findley, “Adversarial Inquisitions: Rethinking the Search for the Truth”.

³⁷Ibid.

³⁸L. Blutman. “Az ártatlanság vélelmének hatóköre az európai alapjogokban”. In: *Acta Juridica Et Politica* Tomus LIII. Fasciculus 5 (1998), pp. 59–76.

³⁹Ibid., p.59.

on Human Rights in 1960 stated that the presumption of innocence is a guaranteed principle but it took them until nearly 10 years to establish that the presumption guarantees procedural safeguards.

Several of the cases before the ECtHR and the Commission applied a strict interpretation that the presumption of innocence is a rule of evidence and nothing more. In *Minelli v Switzerland*⁴⁰ it was deemed that because the application of Article 6 (2) is not clear “it could not be accepted that it extended to the establishment of the truth in a criminal prosecution for defamation.”⁴¹ In the case of *Funke*⁴² the right to be presumed innocent until proven guilty did not place a restriction upon the evidence given to the prosecution. This was controversial as the evidence was obtained in a way which could possibly have infringed Article 8. Both of these cases were followed by *Ribemont* which widened the interpretation of the presumption of innocence. The case concerned remarks that were made by the Minister of the Interior and Senior Police Officer in the media before the case was heard. The applicant argued that not only were their remarks defamatory they were also damaging to his right to the presumption of innocence. The Court held that;

“The presumption of innocence enshrined in paragraph 2 of Article 6 (art. 6-2) is one of the elements of the fair criminal trial that is required by paragraph 1 (art. 6-1) (see, among other authorities, the *Deweere v. Belgium* judgment of 27 February 1980, Series A no. 35, p. 30, para. 56, and the *Minelli* judgment previously cited, p. 15, para. 27). It will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion *that he is guilty before he has been proved guilty according to law*. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty (see the *Minelli* judgment previously cited, p. 18, para. 37).”⁴³

This opinion, “*that he is guilty before he has been proved guilty according to law*” reinforces the position that we can not speak about innocence (non-guiltiness at the most) and neither presumption for lack of a presumptive fact but “quasi presump-

⁴⁰Judgment, Strasbourg, 25 March 1983 Application No.8660/79

⁴¹*Minelli v. Switzerland*, Judgment, Strasbourg, 25 March 1983 Application No.8660/79, para 14

⁴²*Funke v France*, Judgment, Strasbourg, 25/02/1993, Application No. 10828/84

⁴³*Allenet De Ribemont v. France*, Judgment, Strasbourg, 10 February 1995, Application No. 15175/89, para 35.

tion” at the most according to Tibor Király.⁴⁴

Tibor Király is not alone in this opinion the loss of the right to the presumption of innocence as the consequence of the guilty plea and/or confession lends muster to his stance. The presumption of innocence (in common law systems) was introduced in part as a mechanism by which to counteract

“the overwhelming power of the state to shift the margin of error in the direction of convicting the innocent at the expense of acquitting the guilty.”⁴⁵

Tadros lists five different concerns which pertain to the interference with the presumption of innocence.⁴⁶ The most significant concern relates to the purpose of the criminal trial which is to convict those who are known to have committed an offence. In this way, the interference with the presumption of innocence is always a frustration of the purpose of the criminal trial.

The history of the application of the presumption of innocence in cases such as *Woolmington* and *Coffin* concerned a very narrow question of the use of evidence. The Supreme Court Justice Rehnquist further limited the application of the presumption of innocence to be below the burden of proof.⁴⁷

In the United Kingdom, the presumption of innocence has been interpreted as being one of the constitute parts of the right to a fair trial as determined by the case of the Attorney General’s Reference No 4 of 2002 [2004] UKHL 43. Lord Bingham, the great defender of liberty, stated that the,

‘presumption of innocence ought to be protected for the ‘essentially simple’ reason ‘that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so.’⁴⁸

The presumption of innocence is not to ensure that the prosecution and the defence

⁴⁴T. Király. “The Defence and the Defender in Criminal Cases”. In: *KJK, Budapest* (1962), pp. 11–48.

⁴⁵Tucker, “Scarce Justice: The Accuracy, Scope, And Depth Of Justice”.

⁴⁶Tadros, “Rethinking the presumption of innocence”.

⁴⁷L. M. Natali and E. D. Ohlbaum. In: *International Criminal Procedure Symposium*. Ed. by J. S. Greenberg. Temp. L. Rev., 1989. Chap. Redrafting the due process model: the preventive detention blueprint. P. 1236.

⁴⁸Tadros, “Rethinking the presumption of innocence”.

have equality in preparation but that it can be shown that the convicted person committed the correlating offence.⁴⁹

In the U. K., the House of Lords decision in the case of *Woolmington v Director of Public Prosecution*⁵⁰ it was stated that the presumption of innocence is like a golden thread which runs through the criminal law of England.⁵¹ In *Woolmington v DPP*⁵² it was firmly established that the burden of proving guilt was upon the prosecution. The appeal was granted in *Woolmington* as the judge had wrongly directed the jury that they could presume malice. This was incorrect as malice has to be proved. Lord Sankey's judgment contained, what has now famously become known as, the Golden Thread which runs through the English legal system. This Golden Thread is that the burden of proof is placed upon the prosecution (except for some circumstances such as the defence of insanity) and the defendant is presumed innocent.

In the midst of the quest for the truth is the ever pervasive concept of the presumption of innocence and beyond all reasonable doubt standard. In 1897 James Bradley Taylor wrote an article concerning the presumption of innocence in criminal cases where he asserted that very little of the American literature (up until that point) discussed this matter of the presumption of innocence but rather the importance that, "the rule that a party must be proved guilty by a very great weight of evidence."⁵³

Taylor discusses in length the importance of the trial and the role of the trials. Taylor also considers the impact upon as well as the need for guidance for the jury in remembering and determining the presumption of innocence. This concept of the trial, in the traditional meaning of the word, has changed significantly and it is no longer always necessary to remind the jury of the presumption of innocence as the defendant does not proceed to trial in all situations because of the practice of plea bargaining. Rather it is the prosecution and or the State that has to be reminded that a defendant is presumed innocent until proven guilty. This situation is becoming ever so farcical as we are no longer interested in the proving of guilt as we are in obtaining the admission of guilt or even a confession. As such the face of the criminal trial and its legal safeguards are being shifted but there are no adequate

⁴⁹Tadros, "Rethinking the presumption of innocence".

⁵⁰[1935] UKHL .1.

⁵¹A. Gray. "Constitutionally Protecting the Presumption of Innocence". In: *Tas. Univ. L. R.* 31 No 1 (2012), pp. 131–152.

⁵²(1935) AC 462

⁵³James Bradley Thayer. "The Presumption of Innocence in Criminal Cases". In: *Yale L. J.* Vol. 6, No. 4 (1897), pp. 185–212, p. 190.

ones to replace them that now make sense in the face of this new version of a trial. It was generally agreed upon by the legal scholars and academics of Taylor's time that the clearest, and possibly only, way to show guilt was through the, "... clearest evidence."⁵⁴ This element of having to show the, clearest evidence, is somewhat made redundant by the plea bargaining process and so also the, beyond all reasonable doubt standard does not also have to be met. In this way two fairly significant safeguards no longer apply for the criminal defendant.

"It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption - being a legal rule or a legal conclusion - is not evidence."⁵⁵

With regards to the presumption of innocence the maxim of Blackstone is most commonly evoked, "It is better that ten guilty persons should escape than that one innocent person should suffer." This maxim, however, has its historical roots dating back to the Emperor Trajan where it was stated, that it was better for a guilty person to be unpunished rather than an innocent one should be condemned.⁵⁶ A similar version was attributed to Fortescue in the 15th Century, where it was stated that he said, "Truly I would rather that twenty guilty men should escape through pity than that one just man should be unjustly condemned."⁵⁷

The picture that emerges from these legal theorists is that it is, far, better to run the risk of letting a guilty person or guilty persons go free than rather to convict an innocent person or innocent persons.

At an international level the principle of the presumption of innocence has been enshrined in international law in the ICCPR. Article 14 (2) of the ICCPR states that,

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law."

The right to the presumption of innocence is connected to the right to a fair chance to present a defence. These two concepts are rooted in the sanctity of the principle of the equality of arms which is the uniting cord through which the presumption of

⁵⁴Thayer, "The Presumption of Innocence in Criminal Cases", p. 203.

⁵⁵Ibid., p. 212.

⁵⁶Ibid.

⁵⁷Ibid.

innocence and the rule of law requirements flow. These principles are irrelevant if the right to have access and assistance to efficient counsel is contravened.

In the case law of the U. S. the case of *Coffin v. United States*⁵⁸ established the importance as well as the essential nature of the presumption of innocence.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”

This case however, did not do much address to the question of the presumption of innocence as it did the question of the Confrontation Clause which is enshrined in the 6th Amendment. This case was then followed by *Maryland v. Craig*⁵⁹ and *Coy v. Iowa*⁶⁰ both of which concerned similar issues both factually and legally. *Coy v. Iowa* established that the judge will be deemed as having discharged their duty of directing the jury if they inform them of the defendants right to the presumption of innocence. There would appear to be no need for a fixed formulaic direction to the jury. It will suffice so long as the judge mentions the right of the defendant to be presumed innocent unless the evidence, and based upon that evidence, beyond a reasonable doubt it is proved that the defendant is guilty of the charges with which he is charged.

The subsequent decisions in these cases asserted that the presumption of innocence is an illusion but rather that there is a presumption of guilt.

The defense then is placed in a position whereby they must bring the case and show that their client, the defendant, is not guilty.

In the midst of these arguments the point is made that there is a distinction between the “factually innocent defendant” and the “legally innocent defendant”. This distinction impacts upon the weight of the presumption of innocence requirements.⁶¹ Winter makes the argument that the practice of “bargain justice” is beneficial and that we should not be so quick to dispose of it as it serves a good purpose. Winter’s approach is favourable in that the practice of plea bargaining does have a role to play

⁵⁸156 U. S. 432; 15 S. Ct. 394

⁵⁹(89-478), 497 U. S. 836 (1990)

⁶⁰487 U. S. 1012 (1988) No. 86-6757

⁶¹T. W. Church Jr. “In Defense of “Bargain Justice””. In: *Law & Soc’y Rev.* Vol. 13,2 (1979), pp. 509–525.

but the reasons he gives for supporting these arguments are not particularly convincing. Winter states that the distinction between “factually” and “legally” guilty are important because they remove this tension of having breached the presumption of innocence.⁶² When someone is “legally” guilty the question of the presumption of innocence (so it is argued) loses its potency because the individual is guilty. Whereas when one is “factually” guilty then for this individual when they are deemed to be “factually” innocent it is presumed,

‘that such blameless defendants are necessarily exonerated at trial.’⁶³

The problem with the approach of the prosecution is that they start from the premise that the majority of criminal defendants are guilty and when they offer them the plea bargain they consider them to be at least factually guilty. This mindset of the prosecution is at complete odds with the presumption of innocence. More worrying is the fact that in the context of a plea bargain it is the factual guilt which is presumed resulting in a shift from the presumption of innocence as being a legal obligation to one which is factual. “The presumption of innocence is thus a normative directive to criminal justice personnel; it does not require legal officials to assume that all criminal defendants are factually innocent.”⁶⁴

In these situations both types of defendants, that is the “factually” as well as the “legally” guilty, “exchange their chance of complete exoneration for the security of a judgment less onerous than that which might be imposed after trial. Each party thus trades the possibility of total victory for the certainty of avoiding total defeat.”⁶⁵

Winter in the conclusion of his article when arguing not for the complete abolition of the plea bargain tool argues for the incorporation of, “a significant reallocation of responsibility for the conduct of the case from counsel to judge, possibly along the lines of the continental “inquisitorial” system.”⁶⁶

Winter’s position is interesting in that he posits the inquisitorial model as being a viable alternative. Winter views this model as a means by which the plea bargain can be effectively retained without conflicting with the due process of the defendant. This point of view is naive as it will be illustrated that the inquisitorial models have also had obstacles incorporating plea bargaining derivatives without conflicting with

⁶²Church Jr, “In Defense of ‘Bargain Justice’”.

⁶³Ibid., pp. 515–516.

⁶⁴Ibid., p. 517.

⁶⁵Ibid., p. 518.

⁶⁶Ibid.

constitutions.

The Supreme Court Judges have established that the presumption of innocence is a, “basic component of a fair trial under our system of criminal justice.”⁶⁷ Despite these broad sweeping statements that the presumption of innocence is integral to the trial and is the bedrock of fairness for the defendant in a trial there is very little consensus as to what exactly this presumption of innocence means. There are some, like Laufer, who take it to encompass a wide scope but it is generally agreed that, “the presumption is widely described as grounding the claim that the burden of proof falls exclusively on the prosecution in a criminal trial (...).”⁶⁸

The debate concerns to whom and when it applies as well as whether the principle has legal standing on its own or whether it is part of the standard of proof.⁶⁹

Additionally, the model federal jury instructions in the U. S. say specifically that, “The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant.”⁷⁰ This is quite a broad statement in which a juror would be entitled to acquit any defendant no matter how much evidence was against them if the juror were to take this instruction quite literally.

Laudan identifies the time scale for when the presumption of innocence applies as being determined by the Supreme Court as when the trial commences and how it also applies within the trial itself.⁷¹ This is vitally important for the application of the plea bargain for the defendant because he is being treated as if they were guilty of the crimes.

If Packer’s due process model was adopted it would come apparent that this model focuses on protecting the individuals freedom. As such the defendant’s presumption of innocence would only find it has or bears any advantage for the defendant when it comes to the acquittal stage rather than protecting their liberty.⁷²

When discussing the importance of the presumption of innocence for the defendant it quickly becomes evident that this is most often only discussed within the context of the trial. The presumption of innocence is not often perceived as applying to

⁶⁷*Estelle v. Williams*, 425 U. S. 501 st 503 (1976)

⁶⁸L. Laudan. “The Presumption of Innocence: Materail or Probatory?” In: *U. T. L. Sch.* (2008), pp. 1–36.

⁶⁹*Ibid.*, p. 2.

⁷⁰*Ibid.*, p. 3.

⁷¹*Ibid.*, p. 4.

⁷²S. Baradaran. “Restoring the Presumption of Innocence”. In: *Ohio St. L.J.* 72 (4 2011), pp. 724–776, pp. 756–757.

the pre-trial stage. Instead what becomes apparent is that there is a reverse onus provision where the defendant bears the obligation, as in the plea bargain, to prove their own innocence or not at all and just accept the determination of their guilt for a lesser sentence.

Invariably there are tensions between having an efficient and expedient trial. There is a need to find room for the safeguards which protect the sanctity of the trial and also those that apply to the pre-trial stages. It must then be decided whether the safeguards of the trial also apply to the pre-trial. The fallout of circumventing the trial is that the ECtHR requirement of an effective defence is called into question. The effective defence required by the ECtHR is the key intertwining concept that is pivotal. It is this practice which the ECtHR has and is clearly defining for the Member States. There is growing understanding as to how the defendants rights ought to be realised. The attention of the ECtHR has so far focused on the relationship between the lawyer and their client in terms of access to legal aid. The relationship between effective defence and plea bargaining has not been explored by the ECtHR. The opportunity to do so in the case of *Natasvlishvili and Togonidze v. Georgia*⁷³ was not seized upon by the majority apart from the partly dissenting opinion of Judge Gyulumyan. The U. S. case law (which is plentiful) illustrates that the problem of an effective defence has been and sadly still is a deeply prevalent problem when it comes to the practice of plea bargaining.

The lack of an appropriate consideration of an effective defence in plea bargaining leads to lack of depth in the administration of justice resulting in a variant of rough justice.

Rough justice is used when it is for the 'greater good' of the majority. This practice is most often used in the post-totalitarian regimes where it is the most appropriate tool for bringing to justice those who committed atrocities under the previous government. This mechanisms allows for the widest possible distribution for justice rather than conducting it on an individual level which would be virtually impossible to achieve for logistic and economic reasons.⁷⁴

Tucker asserts that societal changes have an positive affect upon the reducing the depth of justice and hence result in a release of productive resources which in turn will help with the expansion of the scope or accuracy of justice. These changes

⁷³ Application No. 9043/05, Judgment, Strasbourg, 29 April 2014

⁷⁴Tucker, "Scarce Justice: The Accuracy, Scope, And Depth Of Justice".

that have been implemented by the states to reduce the “roughness of retributive justice” would have not been possible earlier due to the fact that the administrative framework did not exist. This meant that there were not enough lawyers or public resources to ensure that every single defendant was granted the right to counsel.⁷⁵

There is a different agenda for the politician and the human rights lawyer when it comes to the implementation of indigent defendant protection laws. The politicians aim is to implement legislation which will satisfy the broadest electorate base whilst the lawyer, unaffected by public opinion, is solely concerned with the interests of their client. These competing interests are the ethics of social responsibility, a consequentialist approach which justifies means by ends versus “the ethics of moral conviction”, which is founded on the duty to respect the rights of others irrespective of the consequences.⁷⁶ Consequentialism is much more focused upon the effects and results that certain decisions would have on the population rather than the individual.

‘Rough justice offers a broader scope of justice by compromising on its accuracy.’⁷⁷

The proponents of plea bargaining, as shown in more detail later on in this thesis, support more of a consequentialist concept of justice where,

‘... in the rhetorical context of political arguments in favor of rough justice; crime prevention would be served by putting away the guilty, even if few innocents are also swept along.’⁷⁸

In order to be able to employ an effective consequentialist approach, a clear view of the results ensuing from the decisions of justice being made is required. Where it is impossible to know what the consequence might be, it is better to do the deontologically right thing rather than attempting to predict what the right result might be.⁷⁹

The central premise for an impartial hearing is that the innocent are not convicted.⁸⁰ All legal systems involve some mechanisms by which the innocent are convicted and

⁷⁵Tucker, “Scarce Justice: The Accuracy, Scope, And Depth Of Justice”.

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Ibid.

⁷⁹Ibid.

⁸⁰M. Bagaric. “The Right to an Impartial Hearing Trumps the Social Imperative of Bringing Accused to Trial Even ‘Down Under’”. In: *Crim. Law and Philos* 4 (2010), pp. 321–339.

safeguards have evolved in criminal justice systems to protect against this eventuality whilst preserving the impartiality of the trial. Bagaric argues that,

'guarding against wrongful convictions has been overstated at the same time as bring the accused to trial has been exaggerated.'⁸¹

Bagaric adopts a consequentialist approach for the securing of the right to a fair trial and recognises that in some cases, the innocent will be convicted. He takes the view that sometimes it will be appropriate or necessary for a government to infringe a right to protect a more important one. The example used is a terrorist case. Despite the pre judgment received by a suspect, this does not warrant a stay in proceedings as it will be difficult to have an impartial trial.⁸²

'The importance of a fair trial in the context of the criminal law system was underkined by Deane J in R v. Jago when he stated that: 'the central prescript of our criminal law is that no person shall be convicted of a crime otherwise than after a fair according to law '⁸³

Despite Deane J statement in the case of R v Jago⁸⁴, three years later in the case of Dietrich v R,⁸⁵ Deane J withdraws the certainty of his conviction, " that no person shall be convicted of crime otherwise than after a fair trial according to law." Deane J recognises that his previous position was that,

'While the law's insistence that there be no conviction without a fair trial according to the law has been long established, the practical content of the requirement that a criminal trial be fair *may vary with changing social standards and circumstances*.' (emphasis own)

If the right to a fair trial is sidestepped so are the procedural guarantees that protect the defendant. Even if a defendant makes it to trial, there are no guarantees that an innocent defendant will be found innocent. An empirical study conducted by the Royal Commission on Criminal Justice in 1993 revealed that 11% of people who plead guilty claim innocence. They pleaded guilty in response to institutional pressures and the guilty plea discount.⁸⁶ The benefits of an early stage guilty plea

⁸¹Bagaric, "The Right to an Impartial Hearing Trumps the Social Imperative of Bringing Accused to Trial Even 'Down Under'".

⁸²Ibid.

⁸³Ibid., p. 337.

⁸⁴168 CLR 1 at p 56.

⁸⁵[1992] HCA 57, [3]; (1992) 177 CLR 292

⁸⁶Royal Commission on Criminal Justice, U. K., 1993.

has institutional benefits which must be weighed against the fact that those who plead may not always be guilty.⁸⁷

5.2 Conclusion: Calling your bluff

The presumption of innocence can be divided into two elements. The first is that it can be used as an instrument of proof or a shield against premature punishment. Within the countries which legal systems follow a predominantly Latin root we find that there is an emphasis placed upon the presumption of guilt. Whereas within the Anglo-American systems it was traditionally accepted that there was the presumption of innocence.⁸⁸ This is not such a true distinction anymore as in the 19th Century the U. S. Supreme Court adopted a very narrow interpretation of the presumption of innocence.

Taking France as an example Quintard-Morenas sought to demonstrate that the Anglo-American approach to the presumption of innocence is not what it ought to be. France has two distinct functions for the presumption of innocence, one as a rule of proof and the second as being the shield against which one can be protected from being presumed guilty until proven innocent. In the Anglo-American context the presumption of innocence is seen as being an evidential doctrine with no application before trial.⁸⁹

The approach of the Anglo-American lawyer to the presumption of innocence as being a justified mechanism by which to portray the accused guilty would, in the French context,⁹⁰ be deemed as constituting a violation of the law. It was not always the case that the presumption of innocence did not apply before the trial. England's adversarial system lends itself to the use of the maxim both before and after the trial.

The approach that was subsequently adopted in the U. S. (and most of the common law countries), is asserted by Quintard-Morenas as going against the social contract, "in which society, by prohibiting private vengeance and guaranteeing the right to

⁸⁷Royal Commission on Criminal Justice, U. K., 1993.

⁸⁸F. Quintard-Morenas. "The Presumption of Innocence in the French and Anglo-American Legal Traditions". In: *Am. J. Comp. L.* 58 (2010), pp. 107–149.

⁸⁹*Ibid.*, p. 108.

⁹⁰*Ibid.*, pp. 108–109.

be tried by an impartial jury, acknowledging that there is a time for innocence and a time for guilt.”⁹¹

There is a general requirement that the defendant be considered innocent between the stages of accusation and judgment. It is this intermediary status which is lacking for those engaged in the plea bargain that they are not entitled to this status of innocence.

“Denying the accused the “intermediate process” between accusation and conviction is violating an elementary principle of justice.”⁹²

Johannes Monachus is most commonly associated with coining the term, “innocent until proven guilty”. It was he that argued the right of the accused to due process and that everyone is presumed innocent until proven guilty.⁹³

The development of the presumption of innocence has evolved into its current form where it predominantly focuses on the trial and the pre-trial labelling of the defendant. An apparent blind spot is the morphing of the trial into pre trial justice. Just as the presumption of innocence shifted to comply with the need to be heavy with crime it also has not morphed quickly enough with the need for pre-trial justice in light of the calls of modern day justice to be expedient and efficient. The current jurisprudential concepts are antiquated and are behind the times with respect to the presumption of innocence. The case law of the ECtHR illustrates that there is a time delay between the new implementations of justice and the procedural safeguards. The various interpretations of the Article 6 (1), (2) and (3) are obstacles to the realisation of a fair trial. The E. U. is seeking to find solutions to these discrepancies but not addressing the root problems is like conducting surgery while blindfolded. The only results possible are death and a malpractice suit. The practice of torture was seen as a very clear example of a contravention of the principle of the presumption of innocence for why would you torture an individual who is presumed innocent unless you were sending the very clear message that you indeed presumed them to be guilty. Those who managed not to confess under torture sometimes were released from jail and faced the same stigma attached to those who had indeed pleaded guilty, this way they were,

⁹¹Quintard-Morenas, “The Presumption of Innocence in the French and Anglo-American Legal Traditions”, p. 109.

⁹²Ibid., p. 112.

⁹³Ibid., p. 112.

“Neither perfectly innocent nor entirely guilty,”⁹⁴

This is a situation that the defendant who is offered a plea bargain finds themselves.

As has been noted above the position of Thayer in the 19th Century was that the, “presumption of innocence constituted nothing more than an instrument of proof casting on the prosecution the burden of proving guilt.”⁹⁵ This is a very narrow interpretation of the presumption of innocence which has been gaining ever increasing traction. Despite the overall recognition in the 19th Century that individuals, until they are proven guilty must be treated as if though they were innocent, the practice of torturing defendants and ill treating them had begun. In England the “rule of proof” was first formulated in the Woolmington case⁹⁶.

What started in the 19th Century with the presumption of innocence being viewed as nothing more than an evidential principle was reinforced by a series of cases which further embedded this mentality that, “the maxim as simply another way of expressing the traditional rule putting the burden of proving guilt beyond a reasonable doubt on the prosecution.”⁹⁷ In the U. S. Supreme Court case of *Bell v Wolfish*⁹⁸ and *Coffin* (see above) the court referred to the presumption of innocence as a doctrine which is an “instrument of proof” which is different from the “reasonable doubt” standard.⁹⁹ During this time in England it was recognised as being a substantive right. Several of the concerns over allowing the presumption of innocence to apply beyond the trial concern things such as the perception of the innocence of the yet to be proved guilty defendant such as what can the journalist print and write about the defendant. Are the rights of the defendant curtailed in anyway which could send the message that they are being presumed guilty before the prosecution has actually proved it? This approach has an impact upon the plea bargaining process which is not considered to be a practice which impinges upon the presumption of innocence as the plea bargain completely circumvents the whole trial process. As such the cycle is broken and taking the whole process outside of

⁹⁴Ibid., p. 121.

⁹⁵Quintard-Morenas, “The Presumption of Innocence in the French and Anglo-American Legal Traditions”, p. 123.

⁹⁶[1935] A. C. 462, 481, “Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt...”

⁹⁷Quintard-Morenas, “The Presumption of Innocence in the French and Anglo-American Legal Traditions”, p. 142.

⁹⁸441 U. S. 520 (1979)

⁹⁹Quintard-Morenas, “The Presumption of Innocence in the French and Anglo-American Legal Traditions”, p. 142.

the bounds of the normal rules of the trial procedure. There are questions which are raised in conjecture with this process in that what happens when the defendant upon appeal then seeks to assert that there was an irregularity which then nullifies their sentence for example ineffective assistance of counsel? How can they then be presumed innocent until proven guilty? The bias which is then presented before them is almost insurmountable. The presumption of innocence, is so often perceived as an evidential rule, the argument goes that it cannot be used nor does it have any application whatsoever to the pretrial stage of the trial.

The second limb of the presumption of innocence places plea bargaining in uncomfortable territory as,

“... it is also a shield that prevents the infliction of punishment prior to conviction.”¹⁰⁰

It is quite clear that this shield has not been applied and is not being applied to the defendant prior to conviction when the prosecution offers them the plea bargain. It makes it difficult to logically maintain the semblance of the presumption of innocence at this stage in the proceedings. This fallacy raises the question as to whether it has to be suspended for the sake of the overall trial and the securing of a subsequent conviction

The argument could be mounted that one of the reasons why the legal arguments against the practicing of plea bargaining have failed is because it has always been couched in terms rather of expediency than efficiency. This argument has resulted in limiting the debate to problem of “bargained justice”. It is time for a new angle as we have been approaching this problem from entirely the wrong perspective. This practice of plea bargaining is requires us to rewrite our jurisprudential thought on the application of the presumption of innocence. Effectively the presumption of innocence is being written out of our texts books and becoming a prehistoric dinosaur of the law. Our arguments should not be about expediency and efficiency because no matter how we look at the problem courts are backlogged. There is no denying that a solution is needed. The solutions which have been tried have resulted in the basic principles being sacrificed which is a far more dangerous route. Change is inevitable and good even but not when you have to compromise the basic principles upon which the very social contract that society engages in is based.

¹⁰⁰Quintard-Morenas, “The Presumption of Innocence in the French and Anglo-American Legal Traditions”, p. 149.

There are two key principles which can be identified that the accuser bears the burden of proving the guilt of the accused and that, “until guilt is established by conclusive evidence, society has no right to treat the accused as a criminal.”¹⁰¹¹⁰²

The conclusions all point to the fact that the role of the presumption of innocence in the plea bargaining relationship has been woefully overlooked. It has become a legal black hole which when entered into results in legal uncertainty whereby a defendant rather than enjoying the right to be presumed innocent is presumed guilty. It is the sad truth that some defendants plead guilty when in actual fact they are innocent. Others may be guilty but not of the specific question that they are being charged with.

The recommendations outline that the narrowing of the application of the presumption of innocence to just the in trial matters does not truly reflect the nature that over 90% of cases do not even reach the courts in the U. S. and in the U. K. The same number applies to the fact that most cases are disposed of in the magistrates courts, in the U. K., that is not before a jury. This narrow application of the presumption of innocence does not conform with the reality that most cases are decided before the actual trial itself. This has created a legal fallacy which is being perpetuated in that the defendant is sometimes being persuaded not to exercise their constitutional and fundamental right to a trial. Additionally and maybe even more worryingly is the fact that defendants are not only waiving certain procedural protections they are also waiving the right to be treated as innocent until proven guilty. This has far reaching consequences for the appeal procedure. If the defendant who accepts a plea bargain who is then declared guilty mounts an argument of ineffective defence they then will have to be presumed innocent on appeal. This creates a situation where we are asking our judiciary and juries to perform mental gymnastics in ignoring previous admissions of guilt.

These ideas prompt the question What is the current goal of justice systems? The thesis will detail and show that that there has been a seismic shift in the foundational practice of criminal law and that jurisprudential concepts are struggling to provide a satisfactory reaction. Academics and theoreticians are playing catch up to legal systems developing outside of the rule of law and due process. Parallel systems,

¹⁰¹Ibid., p. 112.

¹⁰²see Demosthenes in 352 B. C. , “for no man comes under that designation until he has been convicted and found guilty.” In Roman law see the Constitution of Emperor Antonin of A. D. 212 which states the following, “He who wishes to bring an accusation must have the evidence.”

masquerading as justice, have now been thrust into the limelight from the shadows. Their ascension in popularity has come from a host of miscarriages of justice and proposed reforms to the law in various countries.

It is nonsensical to talk of the defendant in the plea bargaining relationship having the right to be presumed innocent because part of the bargain is that they admit their guilt. This situation simply reinforces the fact that the presumption of innocence only applies to the in trial scenario.

6 Plea Bargaining: the Benefits as well as the Pitfalls

The natural progress of things is for liberty to yield and government to gain ground. - Thomas Jefferson.

6.1 Defining plea bargaining

It is generally agreed that plea bargaining takes the form of an agreement between the prosecution and defence upon which the defendant admits their guilt in return for a reduction in their charge or sentence. This form of plea bargaining is generally known as prosecutorial plea bargaining. This process can take place before the judge in their chambers with both the parties present and the judge will indicate what the probable charge will be in return for the guilty plea. This practice is known as a private chamber meeting.

Private chambers meetings run counter to the concept of Article 6, where justice should be administered in public save when it is not in the public interest to do so. It is publicity which ensures that all are subject to the rules of the trial and they themselves are subject to justice. Article 6 also provides further protection of the right to have a decision decided in public by stating that the ECHR has held to be applicable to the sentencing stage as well of the trial. Plea bargains that are decided in the privacy of the judge's chambers runs completely counter culturally to the legal principles that justice should be public, transparent as well as 'being seen to be done'. Central to the concept of the principle of equality of arms is that the case law has developed the appearance test. This seeks to ensure not only equality between the parties but also that the general public maintain and have their faith restored in the mechanisms of the administration of justice.

There are several reasons for plea bargaining being used as a tool by the prosecution as it has its advantages as a means by which to speedily dispose of a trial securing a favourable verdict. The prosecutor is the sole holder and controller of the criminal procedure.¹The attractiveness of this model for the prosecutor lies in three stages. Firstly, the prosecutor induces the defendant into engaging in the plea bargain with some offer, secondly, the defendant then admits their guilt to the crime and finally there is the waiver of their right to a fair trial.²The result of these three stages is that the prosecutor is then alleviated of having to prove guilt. The standard of “beyond all reasonable doubt” is sometimes a too high of a standard to reach.

A direct consequence of the use of plea bargaining is that in both the U.S and the U.K. the jury trial has been replaced by the reality that the courts need to make justice more cost effective. It is a sad reality where the cost of justice is too costly for defendants to claim their constitutional right to a trial. In this way the U.S. Federal Rules of Criminal Procedure enable the prosecution to use the sentencing differential as a means to being coercive in the plea bargaining process. Federal Rule 11 (d) of the Rules of Criminal Procedure set out certain guidelines for the court when accepting a defendant’s guilty plea. Firstly, the Court cannot accept a guilty plea without first determining, in open court, from the defendant, “that the plea has been made voluntarily and was not the result of threats or of promises apart from a plea agreement.”³

The problems with plea bargaining are multi-faceted, as we will see below, such as encouraging defence counsel to persuade their clients to accept offers which may not necessarily be the best (ineffective assistance of counsel claims). Defence counsel are notoriously underfunded and under resourced but if we are to adopt a system of plea bargaining into the justice system then there also needs to be an obligation placed upon the prosecution to document the plea bargains that are offered. The prosecution also have an obligation to the State to ensure that justice is served as such they too should also share the burden with the defence of seeing that justice is done.

It is naive to presume that there are not problems within the justice systems due to the present financial crisis. As such the plea bargaining model is becoming an

¹J. H. Langbein. “Torture and Plea Bargaining”. In: *U. Chicago Law Rev.* 46, No.1 (Autumn, 1978), pp. 3–22.

²ibid.

³FED. R. CRIM. P. 11 (d)

attractive one in times of austerity

There are also benefits for the defendant in accepting a bargain in that there normally follows a significant reduction in penalty as well as an agreement over the terms of the confinement. For most defendant's the fact that the case will speedily disposed of is an attractive option.

Despite the evident positives for both sides engaging in this practice there still remain numerous pitfalls. The most evident concern is that innocent defendants will plead guilty to a crime they did not commit. This practice also erodes the fundamental principle that trials as well as the administration of justice ought to be public. Related pitfalls are that the bargain serves to reduce the impact of deterrence when the litigation moves from a question of whether to one of how much time the defendant should get in the particular circumstance. As will be noted below in the case analysis of plea bargaining the very term 'bargain' can provide an unhelpful impression in that there is a very real bias towards the acceptance of a bargain because of the fact that the prosecutor has the weight of the State behind them. Consequently, the defendant waives their rights and privileges. As such it can be said this process serves to undermine the procedural safeguards of the defendant.

If plea bargaining is to be embraced as part of our modern legal systems then it will be necessary to remove issues of uncertainty with regards to the sentencing brackets. This is necessary to enable a defendant to make an informed decision concerning their acceptance of the plea bargain. This may serve to keep the offer of a plea within reasonable parameters and remove undue pressure and coercion by the prosecutor. Equally the defendant should not be allowed to manipulate the process by accepting or employing a strategic 'choice of the moment' tactic even though plea bargaining is invariably made up of tactics by both of the parties to the proceedings.

Article 9 of the Union Internationale des Avocats International Charter of Legal Defence Rights states that judicial proceedings must be in public and "Every sentence passed in a criminal or civil matter must be made in public, except where the interests of minors are concerned or where the trial is concerned with matrimonial differences or the care of children."⁴ The plea bargain can be broken down into four distinct areas: charge (this can be further divided into multiple and unique charge(s)), sentence, fact and Alford pleas. Alford pleas are when the defendant

⁴Constitutional Implication of Plea Bargaining by Peter Charleton SC and Paul Anthony McDermott BL <http://www.lawlibrary.ie/documents/publications/petercharleton.pdf> (accessed on the 22nd of July 2013)

pleads guilty; accepts the sanction and or the punishment but maintains their innocence throughout the whole of the proceedings. The phenomenon of Alford pleas originates from the U.S.

The immediate problem with plea bargaining is that it automatically assumes and portrays a relationship of equality, particularly with respect to bargaining power in that both parties have something that the other one wants. In reality, this is far from the truth.

There are several reasons for employing a plea bargain tactic. In most cases, it brings a speedy charge, it has financial benefits by not spending money on a full trial and other subsequent expenses, it improves the prosecution statistics for successful prosecutions and for certain types of crimes, it can help to catch the bigger fish. There are negative implications for adopting this methodology which include a higher risk of racial motivation and detriment for the indigent defendant. The plea bargain can sometimes be wielded as a means of threatening someone into pleading in a certain way.

Plea bargains, particularly in the U. S., have now become an integral part of the criminal justice system. Most Constitutions provide for the protection of individuals rights against arbitrary imprisonment by the State as well as ensuring that ones liberty is protected by certain criminal justice safeguards.

Adversarial systems of justice place greater emphasis upon the right against self-incrimination and the right to a jury trial. Within these systems, the plea bargain, has taken root as an inquisitorial tactic and, challenges the very conceptualisation of the appearance and behaviour of a trial. The presumption of innocence is being eroded by the use of plea bargaining. John Langbein documents in “Torture and plea bargaining” how the development of torture as a means by which to garner confessions has paved the way for development of plea bargaining.⁵ Langbein further argues that the flaws with plea bargaining are multiple. Stating that so long as we have a mechanism by which one can obtain an omission of guilt the need to overcome the presumption of innocence is redundant. Langbein is a strong supporter of the sixth amendment right to a fair trial. Lippke, however, concedes that in some circumstances the use of the plea bargaining mechanism does have benefits these are that the trial procedure is more expedient and efficient.⁶ Lippke, unlike Langbein is

⁵Langbein, “Torture and Plea Bargaining”.

⁶R. L. Lippke. “The Ethics of Plea Bargaining”. In: ed. by R. L. Lippke. Oxford University Press, 2011. Chap. Introduction, pp. 1–9.

of the opinion that there are elements of the plea bargain that are worth preserving.⁷

6.2 The Development of Plea Bargaining in the United Kingdom

The U.K. plea bargaining rules and practise were set out in the rules of the Turner case⁸. This case established stringent rules stating that it was unacceptable that,

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

There have been more recent calls to reform and relax plea bargaining rules in order that they better reflect the reality of current times. Schedule 3 of the The Criminal Justice Act 2003, implemented after the Turner decision, enables a defendant to request an indication of the maximum sentence, if they were to plead guilty at that stage. If an indication is given, it is binding on the court⁹. In the case of Goodyear¹⁰, the Court of Appeal set out additional guidelines for the issuing of an indication of the likely sentence in a particular given case. The Goodyear court held that,

“A judge should never be invited to give an indication on the basis of what would appear to be a ‘plea bargain’. He should not be asked or become involved in discussions linking the acceptability to the prosecution of a particular plea or bases of plea and the sentence which might be imposed and he should not be asked to indicate levels of sentence which he might have in mind depending on possible different pleas.”¹¹

The U.K. still maintains this false dichotomy that the indication of sentence has nothing to do with the plea bargain which is difficult to maintain when a defendant

⁷Lippke, “The Ethics of Plea Bargaining”.

⁸(1970) 54 CR App R 352

⁹D. Alge. “Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?” In: *Web. J.C.L.I.* 19 (2013). URL: <http://webjcli.org/article/view/203>.

¹⁰[2005] EWCA Crim 888, [2006] 1 Cr App R (S) 6

¹¹[2005] EWCA Crim 888, [2006] 1 Cr App R (S) 6 [67]

formulates his decision to plead guilty or not on the likelihood of the sentence that they are likely to receive as punishment.¹² Plea bargaining does occur in the U.K., but is viewed with suspicion and is not popular. A similar view has been held by the German academics and a model of plea bargaining implementation has been wrought with difficulties.¹³ In addition to the Goodyear rules, the Sentencing Guidelines Council Reduction in “Sentence for a Guilty Plea Guideline” (2004) establishes the practice of the defendant receiving a one-third reduction in their overall sentence if they plea guilty at the first available opportunity. Charge bargains, where the prosecution drop a charge, are additionally used by the prosecution to ensure a guilty plea¹⁴. The U.K. has also developed guidelines for the further regulation of plea bargaining in Serious Fraud Offences. The Attorney General has issued guidelines stating that the process should only commence once the defendant is under caution, with all discussions recorded and written. If an agreement is reached, this has to be submitted to the court in writing. This agreement, however, is not binding upon the court and can be overruled if deemed not appropriate for the situation particularly that the punishment does not fit the crime¹⁵.

These guidelines also establish the conduct of prosecutors during these sessions. They must act, “openly, fairly and in the interests of justice”. Justice is the key element to the plea being deemed by the court as being appropriate. The plea will be accepted if it reflects the seriousness of the offences and if it allows the victims and other actors in the criminal justice system to maintain faith in the outcome of the criminal justice proceedings.¹⁶ It is imperative that the ultimate plea that is reached does not make a mockery of the overall plea and it must not be illogical and inappropriate to the severity and seriousness of the committed crime.

The practice of plea bargaining is not highly regarded within the U.K. legal systems as it appears to dispense with the adversarial principles. It is strange that plea bargaining, which originated within an adversarial system, is difficult to apply in an inquisitorial system when it does not have any of the characteristics of an adversarial practice. The two main aversions to plea bargaining are that it degrades the rights of the defendants and that the practice allows defendants to evade stricter, harsher

¹²Alge, “Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?”

¹³R. E. Rauxloh. *Plea Bargaining in National and International Law*. Routledge, 2012.

¹⁴Alge, “Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?”

¹⁵Ibid.

¹⁶Ibid.

verdicts and ultimately sentences.

The thesis of the paper is that the practice of plea bargaining erodes the principle of equality of arms between the prosecution and defence. In doing so it works to undermine the right to a fair trial of the defendant. The plea bargaining process can indirectly punish the defendant for choosing to exercise their right to a trial. If the defendant opts for a plea bargain, then the prosecution does not have its evidence or case tested in open court against the defendant. The case against the defendant does not have to be proven. In this situation, the defendant has to determine if the plea offer is a rational choice¹⁷.

Critics such as Langbein, Rauxloh and Bibas allege that the argument that the defendant can advantageously use the plea bargain to avoid a stricter sentence can only be valid if the defendant has the ability to make an informed choice. This includes the ability to base their decision upon the relevant legal issues, the consequences of a higher sentence and so on. Unsurprisingly, there is a large discrepancy and scarcity in Europe for the defendant to access basic legal counsel. Quality legal counsel is even rarer and infrequent. This reinforces and strengthens the first plea bargaining criticism. As such the defendant is placed at a considerable disadvantage regarding fundamental rights and freedoms. Their principle of equality of arms is infringed. This is an universal problem and is irrespective of the type of legal system in place.

A grave concern regarding this system is that innocent defendants plead guilty. Also, a guilty defendant who chooses to not plead guilty faces the possibility that they will be meted out a harsher sentence than one rightly due. This is because the court could deem that its time has been wasted by exercising their right to a trial. One possible result could be that defendants are punished for wanting an open trial.

Plea bargaining is hugely unpopular in the U.K. press and public as it is viewed as being a loophole through which defendants can escape their due punishments.¹⁸

The UK Ministry of Justice, on the last day of its consultation on legal aid cuts announced that financial incentives will be given to lawyers who encourage their clients to plead guilty early. These financial incentives will affect both the magistrate and crown court cases. The London Criminal Courts Solicitors Association (LCCSA) has stated that there are some cases in the crown court where if the client pleads

¹⁷Alge, "Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?"

¹⁸Ibid.

guilty the lawyer will earn a 75% fee increase.¹⁹ In the U.K. lawyers are already obligated to inform their clients of the benefits of an early guilty plea. These new incentives and disincentives for a guilty plea and the trial are completely at odds with the principles of justice.²⁰ From the 2nd of December 2013 a 30% cut in very high cost cases was implemented. These cost cuts were felt most by the lawyers whose cases proceed to trial. A similar practice already exists in the U.S. A recent study completed by the National Association of Criminal Defense Lawyers implied that states which offer low compensation and pay caps for lawyers discourage experienced lawyers from taking on court-appointed cases.²¹ In this way it encourages lawyers to dispose of cases quickly often with guilty pleas. It was evident from the study that the pay caps significantly limit the number of lawyers available and willing to take on indigent defendants. In doing so the U.S. is creating a system whereby lawyers are underpaid and causes them to lose money every single time they represent an indigent defendant. This system, if left untouched, makes a mockery of the principle that all have equal access to the law.

Alge outlines the distinctions between the defendant in a serious fraud case and an individual charged with any other common criminal offence. There are certain safeguards available to the serious fraud defendant arising from the regulation of plea bargaining for this specific subsection of law. The most striking differences highlighted is that the serious fraud defendant will most likely be in a better legal position. The serious fraud defendant is more likely to have access to a team of legal experts able to outline and highlight the legal and factual nuances of the case resulting in the accused being able to make an informed decision. The defendant charged with a common criminal offence, say burglary, has a basic limited options for the the plea bargain: no prison time or a reduction in prison time. These defendants do not have the access to the same level of legal advice (due to financial limitations) to make an informed decision comparable to the defendant in the serious fraud case.

The U.K. model of plea bargaining has the defence and the prosecution entering into discussions over the type of sentence that the defendant ought to receive if he or she

¹⁹Lawyers to earn higher legal aid fees for early guilty please, Owen Bowcott, 1 November 2013, <http://www.theguardian.com/law/2013/nov/01/lawyers-higher-legal-aid-fees-early-guilty-plea> (last accessed on 19 November 2013)

²⁰Lawyers to earn higher legal aid fees for early guilty please, Owen Bowcott, 1 November 2013, <http://www.theguardian.com/law/2013/nov/01/lawyers-higher-legal-aid-fees-early-guilty-plea> (last accessed on 19 November 2013)

²¹Part I - Rationing Justice: The Underfunding of Assigned Counsel Systems, National Association of Criminal Defense Lawyers, March 2013

pleads guilty to a lesser offence. The discussions are, in part, led by the strength of the prosecution case and the quality of the evidence at their disposal. Prosecutors, currently do not have much power and influence in the sentencing process. In the case of *R v Goodyear*²² the Deputy Lord Chief Justice stated that a judge should not be invited to give an indication of what would be, or would appear to be a 'plea bargain', stating that:

'[h]e should not be asked or become involved in discussions linking the acceptability to the prosecution of a plea or basis of a plea, and the sentence which may be imposed. He is not conducting nor involving himself in any plea bargain.'

The U.K. as compared to the U.S., has less ability for formal plea bargaining regulation because of a lack of certainty of sentencing outcomes. The U.K. does have the Sentencing Guidelines Council which also includes areas such as Guidelines on Reduction in Sentence for a Guilty Plea:

'gauged on a sliding scale ranging from a recommended one-third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which the sentence is imposed), reducing to a recommended one-quarter (where a trial date has been set) and to a recommended one-tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).'

This is significantly different from the U.S. approach where the U.S. Sentencing Guidelines are more formulaic and therefore negotiation is possible for a reduction.²³

6.3 The United Kingdom's Sentencing Guidelines.

Section 144 of the Criminal Justice Act 2003 does not confer a statutory right to a discount. This remains a matter for the court's discretion. The court, as in most of the observed jurisdictions, still maintains the power to put aside the plea agreed upon by the prosecution and the defence. The U.K. also has comprehensive guidelines for the maximum reduction which can be offered to the defendant for a mandatory minimum sentence offence under section 110 or section 111 of the Powers of Criminal

²²[2005] EWCA Crim 888

²³J. Lawrence et al. "Hardcore bargains: What could plea bargaining offer the UK in criminal cartel cases?" In: *Comp Law* (2008), pp. 17–42, pp. 17–42.

Courts (Sentencing) Act 2000. The discount given cannot exceed one fifth of the prescribed minimum sentence: Criminal Justice Act 2003 section 144(2).²⁴ These Crown Prosecution Service Guidelines define how the prosecutor must act in a given situation with regards to the plea of the defendant. An acceptance of a suitable plea by the defence must be written down and the prosecutor is under no obligation to accept it.

Additionally the prosecutor,

“should not lend itself to any agreement whereby a case is presented to the sentencing judge on a misleading or untrue set of facts, or on a basis that is detrimental to the victim’s interests. Prosecuting advocates should not accept a basis of plea which is different from the case originally advanced by the prosecution without considering the impact on the likely sentence.”²⁵

The prosecution is also under an obligation to prepare a written statement of the plea and sentence to be provided to the court in order to assist the court with the sentencing of the defendant.

The U.K. Court of Appeal, in the case of *R v. Simon Roland Langridge*²⁶, again reiterated its disapproval of “closed” justice whereby the guilty plea was accepted by the prosecution after the judge, in his chambers, gave his views about the strength of the case.²⁷

6.4 The Development of Plea Bargaining in the United States of America

The U.S. model of plea bargaining is by far the most developed. There are various elements which can be the subject of a “bargain” and the U.S. model can be divided into three areas, concessions, contractual and consensual²⁸.

²⁴Crown Prosecution Service Sentencing Guidelines, http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a17 (accessed on the 23rd of July 2013)

²⁵Crown Prosecution Service Sentencing Guidelines, http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a02 (accessed on the 23rd of July 2013)

²⁶[2010] EWCA Crim 2055

²⁷Crown Prosecution Service Sentencing Guidelines, http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a04 (accessed on the 23rd of July 2013)

²⁸Alge, “Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?”

The U.S. Supreme Court set out in the case of *Brady v. United States*²⁹ certain safeguards for the defendant so as to protect against the previously mentioned infringements of their fundamental rights. These safeguards include that the hearing must take place in open court, and that the defendant must make the waiver of their right to a trial “intelligently”. Additionally the court must be able to satisfy itself that the plea was made by the defendant “voluntarily and knowingly”. There have been a series of cases where the defendant has effectively been punished for wanting to exercise their right to a jury trial.

Attorney Timothy Sandfeur argues, in defense of plea bargaining, that the defendant has the right to make a contractual agreement with the State as in other free-trade situations. Plea bargaining is more like forced association and as such once a person is charged with a crime they cannot simply walk away from the State.³⁰

The advent of plea bargaining becoming something which can be regulated by law was first introduced in the case of *Brady v. United States*.³¹ Plea bargaining had been previously been a frowned upon practice. The Supreme Court acknowledged the existence of the plea bargain and its necessity in an overloaded system. It considered plea bargaining as being a tool which could serve to protect the court system from complete collapse. The Supreme Court decision in *Brady v United States* concerning plea bargaining was envisioned as a tool to be used when and where there was evidence which pointed towards the overwhelming guilt of the defendant. It was considered appropriate in cases of overwhelming guilt to offer the defendant the opportunity to bargain which may afford them the some kind of a benefit. Plea bargaining was only ever meant to be used as a tool by the prosecution in those cases where the guilt of the defendant could be established with very convincing evidence. It was in these types of cases that the plea bargain was seen as being a way for the defendant to benefit from the opportunity to plea where the evidence was overwhelming against him. The increased practice of plea bargaining resulted in the need for establishing checks and balances to ensure that individuals would not be coerced into making bargains. The court would have to investigate the case to ensure that the guilty plea had not come from coercion, misrepresentation of promises or bribes.³²

²⁹397 U.S. 742 (1970)

³⁰T Lynch. “The Case Against Plea Bargaining”. In: *Regulation* 26 (2003), pp. 24–27.

³¹397 U.S. 742 (1970)

³²L. E. Dervan and V. A. Edkins. “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Project”. In: *J. Crim. Law Criminol.* 103.1 (2013), pp. 1–

Within the United States system plea bargaining has become an integrated part of the process with more than 97% of convictions in the federal system resulting from pleas of guilty rather than convictions by jury trial³³. The advent of sentencing guidelines have further helped to clarify what sentence a defendant could reasonably possibly expect but have also further exacerbated the problem of plea bargaining. Sentencing guidelines enable the prosecutor to play with the sentencing differentials which are, “the differences between the sentence a defendant faces if he or she pleads guilty versus the sentence risked if he or she proceeds to trial and is convicted.”. The danger with this situation is that all of the cards are in the hands of the prosecution.

At the heart of the debate over the appropriateness of the practice of plea bargaining are the associated risks of bargaining away one’s justice. Additionally, it is the innocent and not only the guilty who are being punished. There is an unhelpful prevalent myth that innocent people will not accept a plea to plead guilty in return for a lesser penalty. Hence the myth presumes that it is not possible to coerce someone who is innocent into pleading guilty of something which they are not. Much of the assertions placed forward as evidence are based on assumptions of how innocent people may behave in given circumstances. In a study conducted by the Innocence project into the effects of plea bargaining upon the innocent defendant revealed that more than half of the participants were willing to falsely admit something in order to obtain some perceived benefit.³⁴

In *Brady*, the Supreme Court made the observation that the assumption that the defendant would have been able to make an informed plea of guilty because,

“pleas of guilty are voluntarily and intelligently made by competent defendants *with adequate legal counsel* and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged.”³⁵ (emphasis own)

The Supreme Court has noted that a key element to the acceptance of a plea bargain being constitutional is the option as well as the possibility of the defendant to accept or reject the offer.

48.

³³Dervan and Edkins, “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Project”.

³⁴*Ibid.*

³⁵*Ibid.*

There have been several attempts at plotting the impact of plea bargains upon the criminal justice system. There are issues with the accuracy of the studies when determining what effect innocence has on choosing the plea bargain. Dervan and Edkins approached this issue from a psychological background. They conducted a study in which they had students signed up for a fictional problem-solving assessment. Students were placed in a room with one other individual who unbeknown to them was working for the study. The students were told that conferring was forbidden on the second set of questions. The examiner left the room and the “confederate” (the insider) would ask the student for their answers. Those students who offered assistance were placed into the guilty category and the others innocent. The examiner returned after an allotted time, gathered the papers only to return stating that the marked papers showed that the students had cheated.

The students were given an opportunity to confess their guilt. The consequences of the admission of guilt would be no compensation for their participation. However, if they did not plead guilty then they would have to appear before the Academic Review Board which would then rule on the matter after hearing both sides arguments. An unsuccessful appearance before the board would result in the the student losing their study compensation; their faculty adviser would be informed of the event and compulsory attendance to an ethics class. The percentage of innocent students who accepted the plea offer was 56.4% (that is 22 students) 43.6% rejected the offer. Whereas the percentage of guilty students who accepted was 89.2% and those that rejected was 10.8%.³⁶ These results confirm what is already known that innocents also confess to the misconduct. Guilty defendants are still more likely to plead guilty than innocent ones. What is most striking is the fact that the innocent individuals in this study were willing to admit guilt (falsely) irrespective of the leniency or harshness of the sentence to be imposed. What this shows us is that there are individuals who will plead guilt simply because they want the whole process over and done with. As such defendants may be falsely condemning themselves on matters which have nothing to do with their factual guilt.³⁷

The study revealed that the commonly held myth of only the guilty plead is not accurate.

This study shows that the Brady decision has far overstretched its remit. The use

³⁶Dervan and Edkins, “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Project”.

³⁷Ibid.

of plea bargaining is now being employed in scenarios where the evidence of guilt against the defendant is not overwhelming and compelling. This study established which was already well known, that guilty defendants are still more likely to plead guilty than innocent defendants. The results also showed that innocent defendants were still willing to trade their freedom for less harsh or more lenient sentencing.³⁸ It was noticeable from the outcomes of the study that the innocent defendants behaviour was one of high risk-aversion. The presentation of the statistically nature of the evidence resulted in the defendant choosing that route which gave the lowest personal penalty. This is an indication that the defendant is more vulnerable at the pre-trial stage of the justice process, even more than the police interrogation phase.

The Supreme Court also had to consider the case of *North Carolina v. Alford*³⁹ in the same year as the *Brady* case. Alford was advised by his counsel to plead guilty to second-degree murder after the lawyer had questioned the other witnesses and concluded that there was a strong indication of guilt. As a result of his counsel's legal advice, Alford pleaded guilty but throughout the trial protested his innocence. The Supreme Court stated that a defendant could plead guilty at the same time as maintaining their innocence.

The legal conundrum presented by the Alford case, of one pleading guilt but still maintaining their innocence was revisited in the case of the 'West Memphis Three'. This case concerned the murder of three eight-year-old boys known as the "West Memphis Three" in 1993. Three teenagers were convicted the murders and two received life sentences and the other the death penalty. They maintained their innocence throughout all of the proceedings. DNA evidence was found which linked one of the murdered boys stepfathers to the murders in 2007. After this revelation, a witnesses came forward claiming that they had seen the stepfather with the boys shortly before their murders⁴⁰⁴¹. It was deemed that there was indeed sufficient evidence to call a retrial in 2011. The prosecution determined that there was no longer enough evidence to convict the three men of the murders for which they had originally been incarcerated. In order to be released, the prosecution offered them a deal they would have to plead guilty to the murders and they would be released

³⁸Dervan and Edkins, "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Project".

³⁹400 U.S. 25 (1970)

⁴⁰Dervan and Edkins, "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Project".

⁴¹

immediately. They had all maintained their innocence for so long but they relented as one of the three was facing the death penalty.⁴²

The Supreme Court recanted on its ruling that there was not overwhelming evidence of guilt in the Alford case and hence a plea bargain should be only used in those cases where there is overwhelming evidence of guilt. Since *Brady v. United States*, the Supreme Court has not been consistent with its own plea bargaining rulings. The “West Memphis Three” case clearly shows that the defendants were indeed enticed and encouraged to plead guilty so as to walk free. The Brady decision supposedly introduced a “safety valve” whereby the Supreme Court has at its disposal the ability to, “reevaluate the constitutionality of bargained justice”. This is when and where it deems that the plea bargaining process has overstepped being persuasive into the realm of being coercive and works to entrap defendants. This safety valve is quite clearly broken as it would appear that far more innocent defendants are being captured by the lure as well as the temptation of the plea bargain. It is time to accept that the illusion that guilty pleas are the result of a defendant accepting their guilt and are being made freely with “intelligent” choice in the absence of coercion and pressure by the prosecution is a myth⁴³. The illusion that a defendant, guilty or not, is truly free to choose or reject an offer thereby removes the pressure to condemn themselves in the form of a guilty plea is blatantly not true as we can see evidenced by the case of the “West Memphis Three”.⁴⁴

There have been a series of U.S based campaigns to coincide with the 50th year anniversary of the *Gideon v Wainwright* case. These campaigns have sought to highlight the harsh reality that denying the poor adequate legal representation is a strategy for prosecutors in winning cases despite the principle of legal representation being a constitutional right⁴⁵. In the U.S. system, the prosecutor is the major driving force in the trial, particularly in plea bargaining situations. The legal environment follows an inquisitorial model, like the French system, within an adversarial system which prides itself on two equal but opposing counsels.

The inescapable fact of the provision of legal counsel is that the right to counsel and

⁴²Dervan and Edkins, “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Project”.

⁴³Dervan and Edkins, “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Project”.

⁴⁴*Ibid.*

⁴⁵S. B. Bright and S. M. Sanneh. “Fifty Years of Defiance and Resistance after *Gideon v Wainwright*”. In: *Yale L. J.* 122 (2013), pp. 1–20.

access to justice are unfortunately no longer synonymous. “You are only entitled to as much legal defence as you can afford” is the message that is being strongly sent to the indigent defendant. A price has effectively been put on justice.

An application for bail, pending the trial date, can be easily made for defendant, who can afford a lawyer, who petitions and argues on their behalf. If a defendant can not afford a lawyer, they are more likely than not to remain in pre-trial custody possibly until the date of the trial itself. It is during this time period that the counsel might consider trying to engage in a plea bargain. If an indigent defendant does not have at their disposal an appropriate counsel, the issue of effective advice and counsel comes into issue. This is an area which the ECtHR has stated quite clearly compromises the overall fairness of the trial. The defendant may also not have access to the same plea bargain benefits available to those released on bail.

The lack of effective representation is most strongly felt at the lower courts levels where there is a tendency to encourage a plea, in order to avoid a lengthy trial. The majority of cases (90%) within U. S. and the U. K. are dealt with at the low level courts. In the U. K. an early guilty plea submission is encouraged by sentence reduction by up to one third. In both jurisdictions, the right to a lawyer as well as the right to a trial are being denied. Both systems which pride themselves on their adversarial heritage have incorporated an inherent inquisitorial characteristic dispelling the myth that there is no way to cross the boundaries of the two systems.

The right to representation is normally deemed as being imperative in those circumstances where the loss of liberty is at the highest. The far reaching effects and impact of the *Gideon v Wainwright* case have subsequently been eroded by decisions and views which presume that counsel is fully aware and understands the implications of its actions. This presumption as well as deference to the counsel’s judgment is a position which is held by the ECtHR where they tend to err on the side of the principle of the margin of appreciation for the member states to determine what they deem to be appropriate conduct of counsel .⁴⁶

The dissenting judge in the case of *Stickland*⁴⁷, stated that this presumption is placed upon the defendant to prove when there has been a deficient performance by their counsel. The defendant should also not be required to prove that that performance was (also) prejudicial to them when arguing about the deficient performance of their

⁴⁶Bright and Sanneh, “Fifty Years of Defiance and Resistance after *Gideon v Wainwright*”, p 17.

⁴⁷*Stickland v Washington* 466 U.S. 668 (1984)

counsel.

“In this system, poverty, not justice, dictates outcomes. Inexcusable injustices occur every day in the criminal courts. As former federal judge and FBI director William S. Sessions has observed, the widespread resistance to Gideon and its progeny “should be a source of great embarrassment” to the judiciary, the bar and public officials because it has “created one of our legal system’s most shameful deficiencies, greatly exacerbated by the Court’s unrealistic and damaging 1984 decision in *Strickland v. Washington*.”⁴⁸

Trials are unfortunately expensive but so are re-trials, repeated appeal processes and possible compensation. Maintaining individuals in prison is costly but keeping non-guilty people locked up for offenses or the lack of viable incarceration alternatives transfers extra cost to the state.

In 2004, the American Bar Association revealed that thousands of defendants pass through the criminal justice system without any contact with a legal professional.⁴⁹ This was further reiterated by the Constitution Project in 2009 which found that the situation had not changed in 5 years.⁵⁰ The same issues which Gideon sought to relieve are being faced in 2013. Gideon’s argument was that without equal representation that there is no way that one can talk about the existence of the right to a fair trial. This very argument is at the central of the equality of arms concept.

The current global financial crisis also does not help the situation. This phenomenon has resulted in the reduction of the already limited funding available for indigent defendants counsel services.

There has been a movement to recognise, once counsel has been appointed, there is an overriding duty for that counsel to be **effective** and that the quality of counsel should not affect the overall fairness of the trial. This has been noted in the plea bargaining cases of *Missouri v Frye*⁵¹ and *Lafler v Cooper*⁵². This position is the

⁴⁸Bright and Sanneh, “Fifty Years of Defiance and Resistance after *Gideon v Wainwright*”, p. 17.

⁴⁹“Half a century after landmark ruling, we need to ensure counsel for all.” by Brian Gilmore, ADN.com, March 13, 2013, www.and.com/2013/03/13/2823264/half-a-century-after-landmark.html (accessed on the 26th of March 2013)

⁵⁰“Half a century after landmark ruling, we need to ensure counsel for all.” by Brian Gilmore, ADN.com, March 13, 2013, www.and.com/2013/03/13/2823264/half-a-century-after-landmark.html (accessed on the 26th of March 2013)

⁵¹No. 10-444 (U.S. Mar. 21, 2012)

⁵²No. 10-209 (U.S. Mar. 21, 2012)

same one that the ECtHR has adopted with regards to the provision of a legal defence for the defendant as well as the right to a fair trial. This is to do, in some part, with the margin of appreciation. The U.S. has adopted what is called “the critical stage doctrine” which reasserts the fact that the Sixth Amendment right applies to all “critical stages” of the trial process including those stages which are “critical” to ensuring that a trial is fair. For example, a lawyer should be provided at the interview stage and also in plea bargaining arrangements. Interviews and plea bargaining happen before the actual trial but as they have an overriding impact upon the overall fairness of the trial it was considered to be naive to completely ignore their impact. This is similar to the ECtHR position recognised in the case of *Salduz v Turkey*.

The result of *Gideon v Wainwright* case ensured that legal counsel should be provided and it was a Sixth Amendment right for plea bargaining cases. This situation ensured that legal counsel was imperative to the pretrial negotiation stage. It was the subsequent cases of *Frye* and *Lafler* that cemented that influence that effective counsel will have upon the plea bargain. It has since been determined that the provision of legal counsel is critical to the decision-making process concerning the plea bargain. The Sixth Amendment has been found to be applicable to all of the critical stages of the trial⁵³.

6.4.1 Strickland v Washington (466 U.S. 668 (1984))

This case concerned an individual who pleaded guilty to three counts of capital murder charges against his defense counsel advice. He admitted responsibility for the crimes and emphasised that he was stressed at the time of the incidents. He had committed the three burglaries as he was struggling to provide for his family. The appointed defense counsel was experienced and tactically chose, not to perform certain background checks on his client. As it was deemed that these background checks would be more detrimental to his client’s case. The defendant was sentenced to death for his crimes by the Trial judges and this sentence was upheld by both the Florida Supreme Court, District Court and the Supreme Court. The court’s reasoning was there had been no resultant prejudice to the defendant’s sentence resulting from the defense counsel’s error of judgment.

The two-stage test established by the case was the following:

⁵³*Montejo v. Louisiana*, 556 U. S. 778, 786

1. The defendant must show that the counsel's performance fell below an objective standard of reasonableness ("deficient performance")

and

2. there is a reasonable probability that the result of the proceeding would have been different if the counsel performed adequately ("prejudice").

"the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."⁵⁴

"The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."⁵⁵

The trial court found that the aggravating circumstances of the case were so overwhelming that if the counsel had followed up on all of the leads, it would not have made any significant or substantial difference to the case. The defendant's central argument was that he had received ineffective counsel as his defense counsel had not exhausted all lines of investigation. The Court held that even if the defense counsel does not conduct an in depth investigation into all lines of inquiry, their counsel will not necessarily be deemed as being ineffective. This arises because defense counsel have their own styles and strategic methods for the representation of their clients. Any material or avenue omitted from a line of defence will not necessarily be deemed as amounting to ineffective legal counsel which is contrary to the Sixth Amendment constitutional right as long as the defense counsel's assumptions as well as reading of the case is considered to be reasonable.

The U.S. Supreme Court focused on the meaning and purpose of the Sixth Amendment right to effective legal counsel. It stated that any error made by the legal counsel, so long as it had no overall impact upon the fairness as well as the overall outcome of the judgment of the criminal proceedings would not be deemed as having a detrimental impact upon the defendant. The Court also stated that the complete

⁵⁴at 466 U. S. 684-687

⁵⁵at 466 U. S. 696-698.

denial of counsel would amount to an infringement but in this case, the defendant had been awarded a very experienced defense counsel. The Court stated that the defendant would have to show that,

“... that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.”

The Court strongly emphasised that even though they were laying down standards for determining when counsel has been ineffective that these standards were not mechanical in their application as they should be considered to be principles which guide the whole trial process as the,

“ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”⁵⁶

As a result, the Court should decide in each case whether the breakdown of procedural observance has resulted in unjust result and an unfair proceeding.

6.4.2 Hill v Lockhart (474 U.S. 52 (1985))

The petitioner pleaded guilty to one count of murder and to one count of theft. A plea bargain was agreed upon in which the petitioner would serve his sentences running concurrently. After two years of imprisonment, the petitioner filed a federal habeas corpus petition stating that his guilty plea was involuntary due to ineffective legal counsel that he had received. The petitioner alleged that his lawyer had misinformed him that he would be eligible for parole after only serving one-third of his sentence. The petitioner, however, had already committed a felony offence in Florida state and was counted in Arkansas state as being a “second offender” and as such would be required to serve one-half of his sentence before eligibility for parole consideration. The petitioner requested that the state reduce his sentence to a term which would result in eligibility for parole in the time frame concurrent with his original expectations. The District Court dismissed the petitioner’s application without a hearing, stating that there was no requirement that the petitioner be informed of his parole eligibility prior to him pleading guilty in Arkansas or federal law. The rationale of the court was that the information regarding parole was not

⁵⁶at 466 U. S. 697

of such a high consequence that if there were any misinformation regarding it would render the plea involuntary.

The District Court stated that,

“even if an attorney’s advice concerning such eligibility is not wholly accurate, such advice does not render that attorney’s performance constitutionally inadequate.”⁵⁷

The Eighth Circuit Appeals Court made an interesting distinction in law between what the law will consider to be a “collateral consequence” and “direct consequence”. The Court stated that the issue of parole eligibility was a “collateral consequence” and a matter which did not impact upon the validity of the guilty plea of the petitioner. A dissenting judgment stated that the lawyer’s advice should be re-examined to determine whether the lawyer failed to inform the petitioner of the applicable law which would amount to ineffective assistance of counsel. If it did, then the guilty plea should be overturned. This was not the majority view.

The U.S. Supreme Court decided the case with Justice Rehnquist delivered the final opinion. The Court reiterated that the test for determining the validity of guilty pleas was that the plea had to be made both voluntarily and intelligently by the petitioner who came to that conclusion, after looking at all of the courses of actions available to them. In the case of Hill, the petitioner was not alleging that he accepted the plea bargain because he was not supplied with the appropriate parole eligibility information. The petitioner rather alleged that it was due to the ineffective assistance of counsel that the petitioner’s plea was involuntary, due to the fact that the information that he had received from his counsel was wrong. The question for the Court was whether the petitioner had received legal advice which, “was within the range of competence demanded of attorneys in criminal cases.”⁵⁸ The Court upheld its two-stage test, established in the case of Strickland, stating that the same principles were applicable in this case. This showed that some “prejudice” had been suffered by the petitioner as a result of the alleged ineffective legal counsel. With regards to its prejudice requirement the court stated that,

“[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”⁵⁹

⁵⁷Page 474 U.S. 55

⁵⁸Page 474 U. S. 56

⁵⁹Strickland v Washington, 466 U.S. 668 (1984), at 466 U. S. 691.

The Court stated that the Government is not responsible for counsel quality received by a defendant as the U.S. Constitution does not stipulate that the State should provide the petitioner with parole information in order to make their plea of guilty voluntary. The Court recognised that attorneys may make mistakes but the onus was upon the defendant to show that the errors of the counsel did indeed have an unreasonable and particularly adverse impact upon the defense. Ultimately, the Court affirmed the decision of the District Court on the basis that the petitioner had failed to satisfy the 'prejudice' test of Strickland. The petitioner had not established that he would have pleaded differently had he know the parole eligibility date. The petitioner had not alleged any special circumstances that supported the the conclusion that he had placed specific reliance upon his parole eligibility date and would have pleaded guilty. The petitioner failed to assert sufficient facts to substantiate the claim that but for the omissions of the legal counsel he received he would not have pleaded guilty and would have insisted on going to trial.⁶⁰

This case also established that the Strickland test for ineffective assistance of counsel applies to plea bargains.

6.4.3 Padilla v Kentucky (No. 08-651 (U.S. Mar. 31, 2010))

The case of Padilla concerned ineffective legal assistance given concerning the acceptance of a plea bargain. The legal counsel had failed to correctly inform Padilla about the risks of deportation if found guilty. The counsel was of the opinion that there was a minimal or no deportation risk as Padilla had lived in the United States of America for 40 years. However, the severity of the charges against Padilla for drug related offences meant that a guilty verdict would result in deportation. The Kentucky Supreme Court had held that the Sixth Amendment requirement of effective assistance of counsel does not protect against those issues which are "collateral" in nature. They also deemed Padilla's potential deportation to be a "collateral" issue.

The U.S. Supreme Court held that the Kentucky Supreme Court erred when it made a distinction between direct and collateral consequences when determining when legal counsel should be provided as the U.S. Supreme Court had never ever made such a distinction. The U.S. Supreme Court held that Padilla had sufficiently shown that his counsel's advice was deficient, satisfying the first condition of the Strickland

⁶⁰Hill v Lockhart (page 474) U.S. 60

test. The second element to be satisfied is that if it had not been for the deficient and unreliable advice then the defendant, would have behaved differently. If this can be shown then the Kentucky Court would have to determine upon this question. In their wisdom, they stated

“This decision will not open the floodgates to challenges of convictions obtained through plea bargains.”⁶¹

It was only in the companion cases of *Lafler* and *Frye* that the floodgates were opened much to the disgust of Justice Scalia. Once again, it is shown that the key issue of access to justice for all is not at the heart of the judiciary but the public appearance of crime control being maintained. This is a modern slavery, where the defendant is bound by the chains of inadequate and inferior advice and loses a freedom with no way of reclaiming a fundamental right.

6.4.4 *Missouri v Frye* (No. 10-444 (U.S. Mar. 21, 2012))

This case can be distinguished from that of *Hill* and *Padilla*, as *Frye* was not informed of the prosecutor’s plea bargain. *Frye* appealed against his conviction and “brought an ineffective assistance of counsel claim on the basis that his trial counsel’s failure to convey the plea offers to him was a violation of his Sixth Amendment right to counsel.”

The court applied the two stage *Strickland v Washington* test and investigated whether lapsed plea offers are part of the the *Strickland* requirement of deficient performance. It held in this case that:

“[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”⁶²

The *Frye* case resulted in the court set out the following test⁶³ for a defendant who wants to show or is asserting that there has been ineffective assistance of counsel from a lapsed or rejected plea offer. They must show the following:

⁶¹*Padilla v Kentucky*, 559 U.S. 2010

⁶²*Durocher*, “Are We Closer to Fulfilling Gideon’s Promise? The Effects of the Supreme Court’s “Right-to-Counsel Term””.

⁶³*Ibid.*

1. a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel;
2. a reasonable probability the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it if they had the authority to exercise that discretion under state law;

and

3. a reasonable probability that the end result of the criminal process would have been more favourable by reason of a plea to a lesser charge or a sentence of less prison time.⁶⁴

The U.S. Supreme Court upheld the Missouri court decision that the counsel's failure, to inform Frye of the plea bargain before it expired, fell below the objective reasonableness standard. The Missouri Court failed to show that the possibility of the prosecution acceptance of the plea bargain and the adherence of the Court to the deal would have resulted in Frye's acceptance of the offer. This was especially pertinent as one week before the trial, Frye was found to be driving without a licence and this would have meant that this violation would have been taken into consideration with all of his offences. The U.S. Supreme Court therefore postulated that the plea bargain would have been rejected by both the prosecution and the court. As such, the Supreme Court stated that this was a matter that the Missouri appellate court would have to initially rule upon.

“This application of Strickland to uncommunicated, lapsed pleas does not alter Hill's standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show “a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.”⁶⁵

Great scope as well as discretion is given, to how a defense lawyer can prepare their case and strategy. This is comparable to Europe and the ECtHR. It is rare that the Courts will directly chastise the practice of a counsel. The U.S. Supreme Court recognised that plea bargaining has become a central facet of the American criminal system and it would be remiss if a defence attorney did not consider and

⁶⁴Durocher, “Are We Closer to Fulfilling Gideon's Promise? The Effects of the Supreme Court's “Right-to-Counsel Term””.

⁶⁵566 U. S. (2012)

approach their client with the terms of any plea bargain. Based upon this reasoning, the judges determined that a defence attorney would not be working to the best of their professional capabilities and would not be in keeping with the spirit of the Sixth Amendment requirement of effective counsel. In order to ensure that the defendant is informed of the plea bargain, the American Bar Association has established standards which both the prosecution and the defence should follow. These standards require the registration of the presence, or lack, of a plea bargain agreement before any plea is entered. This ensures that the defendant is made aware of the fact before any proceedings have commence.

“The American Bar Association recommends defense counsel “promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney,” ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years.”

The dissenting judgment of Justice Scalia, as is mentioned in *Lafleur* focused on the fairness of the trial. In this particular case, he asserted that the defendant recognised his guilt as well as the fairness of the proceedings. The central point of Justice Scalia’s dissenting judgment was that,

“Counsel’s mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place.”

Justice Scalia maintains that his colleagues have misapplied the rule in *Strickland* as the matter is about whether the ineffective legal assistance received has deprived the defendant of the right to a fair trial as well as some procedural and substantive duties. The Justice takes issues with the point that defence counsel have their own personal style when it comes to plea bargaining and that it will not do to simply say that, “it will not be so clear that counsel’s plea-bargaining skills, which must now meet a constitutional minimum, are adequate.” Additionally,

“If an attorney’s “personal style” is to establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favorable plea offers? It seems inconceivable that a lawyer could compromise his client’s constitutional rights so that he can secure better deals for other clients in the future; does a hard-bargaining “personal style” now violate the Sixth Amendment?

The Court ignores such difficulties, however, since “[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects.” Ante, at 8. Perhaps not. But it does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.”

Justice Scalia agrees as well as accepts that the counsel’s advice was inadequate but he does not agree with the Court’s new interpretation of prejudice. Justice Scalia states that it is unwise to constitutionalise the practice of plea bargaining because he rather critically states that it would involve the very unwise practice of looking into the “crystal ball” of the past so as to postulate the long chain of possible acceptance events which would be needed from the defendant, Missouri state prosecution and Judge, with each link affecting the next decision. Also, would the appeal court process have accepted a withdrawal of the plea bargain by the prosecution. Justice Scalia asserts the fact that Frye was arrested one week before the trial for driving without a licence as evidence that it was probably very highly likely that the prosecution would have withdrawn their plea bargain and that the appellate court would have accepted this withdrawal. Justice Scalia predicted that after the handing down of this decision of the constitutionalisation of plea bargaining that there would be a whole host of new cases which would be addressing this topic.

The reasoning for his dissent was that it was inconsistent with the Sixth Amendment which assures the guarantee of the right to a fair trial. This does not apply to a plea bargaining process and also that the decision was inconsistent with the previous precedent’s of the court concerning this matter.

“Whatever the “boundaries” ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant’s constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, would have been exercised.

What is more worrying about this judgment is that Justice Scalia seems to be to be at odds with the general principle of a plea bargain as being promoted as part of the US justice system. His attitude and mannerism suggest that he sees plea bargaining as a slight addition not a core part of the process.

6.4.5 Lafler v Cooper (No. 10-209 (U.S. Mar. 21, 2012))

The cases of Lafler and Frye are often referred to as companion cases as they were both handed down on the same day by the court as well addressing very similar issues. This case was especially noteworthy because it enabled the U.S. Supreme Court to review as well as declare a new doctrine on habeas review.

The Court found that Cooper's lawyer had been deficient under the first prong of the Strickland test. This is a hard test to satisfy as there is a heavy emphasis upon the lawyer's strategic decisions and tactics. The Lafler case decision,

“appears to have loosened the “contrary to” standard a notch for future cases, encouraging petitioners to argue that the state court never applied the correct federal precedent (even when that precedent is cited or described), instead of arguing that the court's application of federal law was unreasonable.”⁶⁶

The dissenting judges stated that the Strickland test was not satisfied as Cooper had 'knowingly' and 'voluntarily' rejected two plea offers and chosen to go to trial. This was the reason for the rejection of the appeal by the Michigan Court of Appeals. The question before the U.S. Supreme Court was whether the advice of the counsel had fallen below the standard of acceptability as set out in the Sixth and Fourteenth Amendments. The U.S. Supreme Court, applying Strickland, found that there had been a deficient legal performance as the legal counsel had informed the respondent of “an incorrect legal rule”.

The Courts stated that,

“Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. During plea negotiations defendants are “entitled to the effective assistance of competent counsel.”

The Court agreed that the respondent's counsel was deficient when the respondent was advised to reject the plea bargain. The point of contention before the Court was how to apply the Strickland test of prejudice where a rejection of a guilty plea offer is the result of ineffective legal assistance. The court was divided 5-4. In order to satisfy the Strickland prejudice test, the respondent must show the following,

“that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.”

⁶⁶N. J. King. “Lafler v. Cooper and AEDPA”. In: *Yale L. J. Online* 29 (2012), p. 122.

This case is different from *Hill* as the ineffective legal assistance resulted in the rejection of a plea bargain. In determining what the scope of the application of the Sixth Amendment is,

“[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”

The question before the court relates to the pre-trial processes. The Court found that the same standards of fairness and reliability apply to the plea bargaining stage as well. The intended essence of the habeas corpus application is to protect against those incidents where the state criminal justice system does not behave in the way that it should.⁶⁷

The Court found that the respondent had shown that but for the deficient performance of the legal counsel he would have pleaded guilty, and received a lesser sentence. The solution in this situation was found to be that the State should re-offer the plea agreement. If the defendant accepted it, the discretion of the Court would determine whether to vacate the convictions and re-sentence according to the terms of the bargain or to leave the original trial conviction and sentence in tact and undisturbed.

Justice Scalia issued a rather scathing dissenting opinion stating that the Supreme Court had opened up plea bargaining as a whole new area of constitutional law. Justice Scalia raises the interesting question of whether it is constitutionally acceptable to make no plea offer at all, even though its case is weak - thereby excluding the defendant from the “criminal justice system”? He cynically states that the Court has erred in considering the respondent’s claim because ,

“The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney’s allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial.”

In his dissenting opinion, Justice Scalia sets out that the the right to effective legal counsel originates from of *United States v Wade* where it was held that,

“any stage of the prosecution formal or informal, in court or out, where

⁶⁷King, “*Lafler v. Cooper* and AEDPA”.

counsel's absence might derogate from the accused's right to a fair trial.”⁶⁸

The opinions of the dissenting judges in *Cooper* was that he had received a fair and just trial. He was accordingly convicted and sentenced freely so accordingly there had been no constitutional infringements in their opinions. They held the view that this decision worked to open up an unsafe interpretation of the effective assistance of counsel clause found in the Sixth Amendment and as such, the verdict which was reached in the case of *Cooper* was an unsound constitutional interpretation of the principle.

Another point of contention between the majority ruling and the dissenting judges was the appropriate remedy which should be offered in a case where it is deemed a defendant, with ineffective counsel, went to trial and received a longer sentence than if the plea bargain was accepted. The dissenting judges were of the view that if the trial was fair and just, then the results should not be changed as it could make a complete mockery of the justice system. The majority judges, however stated that the case should be sent back to the trial judges to rule, within their discretion, as to whether they would apply the plea bargain terms or to stick with the original trial result.

The positive attribute about the decisions in both the *Lafler* and *Frye* cases is that it establishes an onus upon the defence lawyer to take serious consideration of and diligence when dealing with plea bargains being offered by the prosecution in a particular case.

The significant legal outcome from both the *Lafler* and *Frye* cases is that the criminal courts have openly stated that plea bargaining is part of the integrated process of U.S. criminal justice system. The courts call for its official recognition so that it can be regulated, assured and the quality of the counsel representation monitored.

The legacy of *Strickland* remains despite the progress that was made in both the *Lafler* and *Frye* cases. The courts still give a wide deference to the counsel and find it hard to assert that the counsel had acted in a completely unreasonable way. As such the *Strickland* test will only allow for the kind of remedy that both *Lafler* and *Frye* provide if it is completely egregious behaviour.⁶⁹

⁶⁸*United States v. Wade*, 388 U. S. 218, 226 (1967)

⁶⁹Durocher, “Are We Closer to Fulfilling Gideon’s Promise? The Effects of the Supreme Court’s “Right-to-Counsel Term””, p. 7.

6.4.6 Burt v Titlow (12-414 U.S. 6th Cir. OT 2013)

Vonlee Nicole Titlow, a transgender individual, helped her aunt Billie Rogers murder her Uncle. In exchange for Titlow's guilty plea bargain she would see her sentence to manslaughter with a corresponding imprisonment between 7-15 years. She would have to submit to a lie detector test; give evidence against Billie Rogers and not challenge the prosecutor's sentencing range on appeal ⁷⁰. The Court accepted the plea agreement.

Whilst Titlow was in jail in between hearings, she spoke with the sheriff's deputy who advised her that she should not plead guilty if she believed that she was innocent and then referred her to another lawyer. Titlow subsequently discharged her initial lawyer and took on Frederick Toca. At the hearing, Titlow confirmed that she was freely and voluntarily withdrawing her plea; that she understood the consequence of withdrawing her plea would mean the reinstatement of the first-degree murder charge and she would be subjected to the possibility, if found guilty, of life imprisonment. Titlow was sentenced to 20-40 years in prison following trial.

Her case raises several ineffective assistance of counsel claims and prosecutorial misconduct claims. The United States Court of Appeals for the Sixth Circuit held that the Michigan Court of Appeals had erred when they had rejected Titlow's claim for ineffective assistance of counsel with relation to advice received concerning the plea bargain.

The Sixth Circuit appeals Court also deemed that it was reasonable to conclude that the second lawyer was at fault. They had failed to investigate adequately the case before advising her to withdraw the plea and this advice resulted in a longer sentence instead of the 7-15 years imprisonment agreed in the plea bargain ⁷¹. Toca's failures to obtain the relevant case information constituted a sizeable impact upon her plea negotiations and these research omissions did not come from a safe professional judgment or a strategic choice. The Appeals Court also took into consideration that Titlow did originally intend to accept the plea. The conclusion of the Appeal Court was that Titlo's Sixth Amendment rights were violated by receiving Toca's ineffective legal counsel. The Appeals Court ultimately held that the district court's judgment should be reversed and they should conditionally grant the petition for a writ of habeas corpus, giving the State 90 days to re-offer Titlow the original plea

⁷⁰<http://lawyersusaonline.com/wp-files/pdfs-5/burt-v-titlow.pdf>

⁷¹<http://lawyersusaonline.com/wp-files/pdfs-5/burt-v-titlow.pdf>

offer or release her.

This case shows the predicament which Justice Scalia warned would occur in the Frye and Lafler dissenting judgments. The case was decided by the Supreme Court on November 5 2013. This case raised three general plea bargaining related issues. The first was whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in holding that defense counsel was constitutionally ineffective for allowing the respondent to maintain his claim of innocence; a related point was whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea. The Court then considered the issue whether *Lafler v. Cooper* always requires a state trial court to re sentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right."⁷²

The central issue for the U.S. Supreme Court in this case is to determine the weighting which the ineffective legal counsel had upon Titlow's acceptance of the plea bargain. Is it really appropriate for the U.S. Supreme Court, in their judgments concerning ineffective assistance of counsel, to be creating solutions and thus more work for an overburdened defence system? It was hoped that the case of Titlow would bring some answers to further define the effective assistance of counsel question in plea bargaining cases but rather stated that "federal habeas law and *Strickland v. Washington* do not permit federal judges to so casually second-guess the decisions of their state-court colleagues."⁷³

It is recognised that the facts of the Titlow case were somewhat convoluted and did not help the Supreme Court in taking advantage of the opportunity to clarify this area of the law.⁷⁴

Unfortunately this most recent decision of the U.S. Supreme Court does not leave those unsure of their role in the plea bargaining process with further clarification of

⁷²<http://www.scotusblog.com/case-files/cases/burt-v-titlow/> (accessed on the 26th of July 2013)

⁷³*Sherry L. Burt, Warden, Petitioner v. Vonlee Nicole Titlow on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit* [November 5, 2013] No. 12-414 Supreme Court of the United States.

⁷⁴Rory Little, A messy follow-up to *Lafler* and *Frye*: Can "fun" facts produce "good" law?, SCOTUSblog (Oct. 7, 2013, 10:12 AM), <http://www.scotusblog.com/2013/10/a-messy-follow-up-to-lafler-and-fry-can-fun-facts-produce-good-law/> (last accessed on the 19th of December 2013)

how they ought to be conducting themselves.

The mantle is now for the taking and further clarification in this area of the law now relies upon those bringing appeals in those cases which are more straightforward and less wrapped up in a procedural quagmire.⁷⁵

6.4.7 Summary of US cases

The cases of Strickland, Hill, Padilla, Lafler and Frye show that the right to counsel derived from the Sixth Amendment, guaranteeing the right to a fair trial, is now included in the plea-bargaining process. Strangely, there is no constitutional guarantee of a plea bargain offer but only the regulation and fairness of the initiated process. In Lafler, the majority held in their decision that the right to a fair trial should be the goal when thinking about whether legal assistance was effective.

Frye and Lafler determined that the scope of the Sixth Amendment's applicability should be extended to include expired and rejected plea bargains. It was the most contentious point between the majority and minority judges. There was agreement between the justices that the Sixth Amendment extends to the plea bargaining process and that entering a plea deal does constitute a "critical stage" of the criminal proceedings. The minority judges asserted that the U.S. Supreme Court should have never extended protection to those who had rejected a plea offer as the right to a fair trial should be the goal. The majority judges, in reaching their decision, determined that there is a general duty imposed upon lawyers by the Court to inform their clients of favourable plea offers. Additionally, there is a right to a lawyer at all stages of the criminal proceedings. The Strickland test states that the failure to inform a client of the plea offer amounts to a defective legal performance.

The proper remedy for the problematic cases is for them to be remanded and for the State to re-offer the plea deal to the client. The trial court then can use its discretion to determine whether to apply the plea bargain and any subsequent re sentencing.

The majority judges found that the Sixth Amendment guarantee extends to stages where the defendant relies upon their lawyer's counsel and seeks their advice on

⁷⁵The Latest Supreme Court Case on Plea Bargaining, or Not, by Cynthis Alkon, November 9, 2013, <http://www.indisputably.org/?p=5185> (last accessed in the 19th of December 2013)

certain matters. The Court's focus should be on whether a fair trial cures "the particular errors at issue."⁷⁶

Justice Scalia in his dissenting opinion was particularly wary of opening up an area of law. This could create a floodgate whereby there would an influx of cases where defendants could, using this newly founded constitutional right, challenge their convictions despite having a fair trial. Justice Scalia was indeed correct in his summation that the Lafler decision would provoke a series of cases, include *Titlow*, to be re-opened and re-examined on the basis of plea bargains and fair trial requirements.

The U.S. Supreme Court, in the decisions it handed down in *Frye* and *Lafler*, has extended the right to legal counsel to the pre-trial arena and stages where the client relies upon the legal counsel of their lawyer. The reasoning of the U.S. Supreme Court was that even though one may be awarded a fair trial, the pre-trial procedural infringements as well as prejudices that one has suffered will invariably and inevitable damage the ability of the trial to be fair.

The decision in *Lafler* and *Titlow* have the potential to create a safety valve for those who received below par legal advice. The undeniable fact is that the defence lawyer is over burdened and under financed as such does not always have the ability to do their job effectively and well. So the Supreme Court has created a constitutional means by which to redress those who fall through the justice gap.

6.5 The European development of Plea Bargaining

In various countries, the main driving force for the adoption of a plea bargaining mechanism is the an increase in efficiency; the expense of trial avoided; as well as reduction in the case load work of the courts.

Within the discussion of plea bargaining there is also the accompanying debate relating to what form plea bargaining ought to take in the European context.

Maximo Langer investigated the appropriate mechanisms for the introduction of plea bargaining into civil law jurisdictions with three example countries, Germany,

⁷⁶C. S. McKay. "Recent Decision Constitutional Law—the Pleabargaining Process—mr. Counsel, Please Bargain Effectively For Your Client's Sixth amendment Rights, Otherwise The Trial Court Will Be Forced To Reoffer The Plea Deal and Then Exercise Discretion In Resentencing". In: *Miss. Law J.* 82.3 (2013), pp. 731–750.

Italy and France⁷⁷. Langer's central thesis is that it is incorrect to talk about the Americanisation of inquisitorial systems as it is unlikely that America's adversarial approach will be able to approximate the inquisitorial systems. The potential influences that the American form of plea bargaining can actually have on the civil systems may be rather limited. Divergences may be seen between civil law countries as each of them separately seeks to implement some form of plea bargaining.⁷⁸

Langer asserts that another reason for this inability to have a complete transport of the American model of plea bargaining into civil systems is because of the hindrances in terminology. Langer proposes a new way of thinking about legal systems and calls it "legal translation" and that its use is much closer to the truth than the commonly used expression "legal transplant". None of the studied systems have actually been 'transplanted', into an entirely new legal system but legal drafters who have to 'translate' the institution of plea bargaining from one system into another⁷⁹.

Plea bargaining can only be fully understood in the context of the actual dispute between parties. Langer argues that the method of legal transplant is ineffective as it is misleading because a "true" transplant of ideas does not always occur. Similarly, to Pierre Legrand,⁸⁰ who argues that legal transplants are impossible because of the very nature of the fact that when transferring a rule from one system to another it is never the same and also more importantly the context within which the rule is applied, is not the same.

Langer says that the labels of adversarial and inquisitorial represent systems which are inherently different and in this he oversimplifies the nuances of the two systems and keeps them as two very separate distinct entities. Despite this oversimplification the terms "adversarial" and "inquisitorial" are useful mechanisms and terms by which to explain two different procedural cultures.

One of the biggest distinctions between two legal systems is that the inquisitorial approach does not include a "guilty plea" concept but rather a confession. Plea bargaining is typically a product of the adversarial system. However, the very idea of denying an individual their right to a fair trial, by a pre-admission of guilt

⁷⁷M. Langer. "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure". In: *Harv. Int. Law J.* 45.1 (2004), pp. 1-64.

⁷⁸Ibid.

⁷⁹Ibid.

⁸⁰Pierre Legrand. "European Legal Systems are not Converging". In: *International and Comparative Law Quarterly* 45, Issue 01 (January 1996), pp. 52-81.

goes against the adversarial nature of a trial.

All of the analysed countries provide a statutory provisions which allows the court to reject the plea bargain if they deem that there was insufficient evidence upon which to base a conviction or if the court fundamentally disagrees with the charges agreed upon by the prosecutor and the defence.⁸¹

The central thesis of Langer's argument is that the various legal transplantations of plea bargaining will not result in a homogenised "Americanization" of systems but rather it will lead to more fragmented approaches. Reinforcing that all systems are very distinct. Three out of the four countries analysed would typically be described as countries which are stable, observe the rule of law and have a very strong and distinct conceptualisations of the rule of law.

It would appear that in systems where there is a rich heritage of Constitutional protections of the rule of law and public faith in the judiciary, the translation of plea bargaining into their systems will be more likely to be fragmented. Plea bargain frameworks will be made to 'fit' into the current system. It is easier to translate the concept of plea bargaining in newly formed countries, where there has been little time to develop an established system of constitutional protections. This comes hand-in-hand with the problem of little constitutional protection of human rights.

The position that countries with a rich cultural heritage have the most developed protection mechanisms for the rule of law is not necessarily accurate. This is could be particularly argued in the case of the U.S. which associated with the origin of plea bargaining and is considered, by most, to have a highly developed legal system. It is also the country with the highest incarceration rate in the world⁸². Is it more appropriate to label the U.S. as having a troubled criminal justice system? One of the inherent problems with plea bargaining is that it is often seen as a process which is beyond the law, despite great efforts to either incorporate this practice through codification or an abject rejection of the practice altogether.

How does plea bargaining impact upon the practice of the rule of law? The presumption is that the rule of law will guide and couch plea bargaining within human rights protections. As we have seen in the high profiles examples highlighted above the rights of the defence are frequently eroded. All observed countries include a test

⁸¹Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure".

⁸²C. Alkon. "Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?" In: *Transnat'l L. & Contemp. Probs* 19 (2010), pp. 355–418.

which tries to ensure that the judiciary will act as a fail safe against the coercion of defendants giving up their fair trial rights especially innocent defendants.

Langer suggests that it is helpful to adopt Damaska's model of ideal-type when considering how the criminal procedural systems of Germany, Hungary, United Kingdom, Serbia and Italy have adopted plea bargaining as it helps one to conceptualise and analyse the reasons for legal transplantation between common and civil law systems. This approach of Damaska also allows the identification of the incentives and logic behind the reasons why certain systems adopt or resist reform. The terms adversarial and inquisitorial describe two different structures used to understand the ways in which certain concepts are defined in distinct criminal procedural systems.

For example, the concept of truth has a different meaning in both of the systems⁸³. The inquisitorial lawyer perceives truth in absolute terms as the judge is supposed to determine what events have occurred. This decision is regardless of any agreement reached between the prosecution and the defence. The adversarial lawyer has a "relative and consensual" view of the truth. This means that facts and occurred events are what the opposite parties can agree rather than how the events truly occurred.

These differing opinions over what constitutes the truth also impact upon the plea bargaining process as the adversarial contains both concepts of "confession" and the "guilty plea" whilst the inquisitorial procedure places less of an importance upon the "guilty plea" but rather the confession. This means that the defendant cannot end proceedings by pleading guilty. If this happens at the pre-trial stage, then the judge still must ascertain the truth of the matter.⁸⁴

Langer further argues that these distinctions between the 'guilty plea' and the confession are part of the legal conditioning that plays a large role in determining the way individual criminal procedures are understood. In addition to this 'legal conditioning', the adversarial/inquisitorial divide provides two different norms through which direction is given upon trial conduct as well as which technologies are allowed during the procedure.⁸⁵ As the inquisitorial systems do not recognise 'guilty plea', this gives rise to plea bargaining being perceived as an improper practice.

Also, the guilty plea and the confession differ as the guilty plea system gives more

⁸³Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure".

⁸⁴Ibid.

⁸⁵Ibid.

room for the innocent to accept the plea bargain if they feel that the trial outcome will be unfavourable. However, the overwhelming pressure of ever growing caseloads, as mentioned above, has meant that some form of plea bargaining has been adopted throughout Europe.

6.5.1 Germany

The case of plea bargaining in Germany is distinct from that of the U.S.A. in that the introduction of Germany's plea bargaining into its legal system was done through the backdoor in the 1980s. German bargains are known as Absprachen, they concern confessions and do not replace the trial but generally shortens them. Unlike in the U. S. , where the prosecutor has vast discretion not to charge, the German procedure of Klageerzwingungsverfahren allows the aggrieved person or party to appeal to the judge to compel the prosecutor to pursue the case. The judge is the key player in the plea bargains as they are the final decision-maker. It is then the trial judge then who decides based upon the evidence in front of them in the case docket whether there is enough evidence to proceed to trial. This procedure though seriously undermines the principle of the presumption of innocence as the trial judge is the same person who then is usually the trier of the facts. This then creates an impossible situation whereby the defendant cannot be afforded a fair trial as the judge cannot possibly impartial in these situations. As Germany has sought to bring about reforms which might increase the immediacy and orality of the trial (as in the U.S.A) they have lost the benefits somewhat of the investigation dossier which is particularly useful for determining the guilt in the context of the plea bargain. In Germany there have been calls to move back to this practice of pre trial investigation which involves gathering a pre trial dossier. The argument for returning to this model is that the dossier then would be open to the defendant to test its validity and if a consensus is reached then a plea will be determined. In the case that a consensus could not be reached then it would proceed to a streamlined trial however this also presents its own whole host of problems in that if the pre trial investigative dossier is skipped then the trial judge would have a very difficult time knowing what to base his finding of guilt upon. The German system has particular problems with the practice of Absprachen because the German criminal system is centred around the obtaining of a confession and with a plea you do not necessarily achieve a confession. The question of what to base a finding of guilt is a central

problem for the German system. The problem originates from the fact that the finding of guilt has traditionally been built upon a confession and the finding of the substantive truth. The practice Absprachen now challenges this traditionally held ideal. There were three court cases in Germany which instigated the formal role of plea bargaining in the German system making it recognised by the German Criminal Legal System.⁸⁶ The introduction of these informal negotiations follows the same reasons that have been cited in other jurisdictions which include some form of plea bargaining. Namely that it helps to ease an ever increasing case load as well as financial constraints and the influence of the prosecutors office. However, after much dispute in Germany over the informal practice of plea bargaining, the German Federal Parliament passed legislation which now regulates the agreement and makes them part of a formal procedure known as Gesetz zur Regelung der Verständigung im Strafverfahren.⁸⁷ The move to regulate the practice was that it was recognised that informal agreements which encouraged a confession of some kind were becoming increasingly popular within the German process. It was in light of the fact that these informal agreements becoming so key to the criminal procedure that the German Federal Parliament acted. Despite the fact that the German criminal trial is concerned with ascertaining the 'material truth' or 'substantive truth'.

As with all of the other countries observed the rise of the plea bargain alternative is seen as a response to the way of dealing with the ever increasing case load of the courts as well the paperwork. Simultaneously, the way in which offences are being charged became more complicated and much more difficult to prove.

The complex German criminal procedure, with its manifold procedural safeguards is not well equipped to deal with the new requirement of substantive law.⁸⁸

In the 80s where it is generally agreed that some form of plea bargaining was creeping onto the scene in Germany, an individual using the pseudonym Detlef Deal stated that this widespread practice had turned the formal trial into nothing more than a theatre, "where the participants pretend to contribute to the finding of a sentence, which in reality has been agreed upon by all parties."⁸⁹ It is this very farcical act of theatre that the German criminal justice system has trouble reconciling with the

⁸⁶BverfG Judgment of 27th of January 1987 and BGHSt 43, 195 (F.R.G.) and BGH Judgment of June 10, 1998

⁸⁷R. E. Rauxloh. "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?" In: *Fordham Int'l L. J.* 34 (2010), pp. 296-331, p. 1.

⁸⁸Ibid., p. 3.

⁸⁹Ibid.

judge's role for investigating the substantive truth because by its very nature the plea bargain is not concerned with this but rather two things, firstly, the quick and short disposal of the case and secondly that the defendant confess not whether that confession be made by a contrite heart. This last matter also then has knock on consequences for the purpose of the justice systems, do we want punishment to deter and reform? Because if we do then plea bargaining is not the mechanism by which this will be achieved, it encourages the defendant to play Russian roulette where the prosecution holds all of the bullets. This sends the message that you can flaunt the system and not go to prison albeit still have a lesser punishment to your name. This is especially true in those systems where the death penalty is not on the cards. There has been a shift in ideas of punishment from the traditional concept which was one of retribution followed by deterrence to one where it is not about enforcing the criminal procedure but solving social problems. Part of the problem identified is in the increasing criminalisation of societal behaviours. The criminal law has been expanded to include areas which it did not before.

The German system is an interesting to observe because the criminal procedure does not recognise guilty pleas. As such the use of informal negotiations are linked to those procedures which provide the prosecutor with some already pre-existing negotiating powers. This is evident in section 407 of the Strafprozessordnung which gives the prosecutor the power to request an order imposing punishment from the judge if there is sufficient suspicion if this is not appealed against by the accused then it remains instated and the accused will receive either a fine or probation (this is set out in sections 407-412 of the Strafprozessordnung).⁹⁰ The benefit of this method is that there is no full trial (this is the closest it comes to a guilty plea which is used in the common law trials.) This use of a penal order is very popular as the defence and the prosecution agree upon the details with the judge and approximately 35% of cases are dealt with by this kind of order.

There are several provisions within the German Criminal Code (GCC) which allow for the prosecution to deal with a case before the trial. In section 153 of the GCC the prosecutor is given the possibility to dismiss the case on the grounds of insignificance so long as the court agrees with this assessment as well as the request. This provision is an exception to the principle of compulsory prosecution.⁹¹ Section 153a of the GCC

⁹⁰Rauxloh, "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?"

⁹¹Ibid.

was proposed by the judiciary (in 1974) as a way by which to fight non petty crimes. This tool allows the prosecutor to refrain from using all or some of the charges against the suspect but they can only make use of this option if the defendant agrees to make a payment of some kind to a charity. This provision was hugely criticised at the time as it was viewed as a mechanism by which to introduce the American version of 'plea bargaining' into the German system and seen as buying off the defendant. However, section 153a was not a new creation in that the principle had already existed in the German law it was just the German legislator incorporating it. As with most plea bargaining mechanisms section 153a has been used

far to liberally and is used frequently for the basis of informal settlements.

“Especially during the preliminary investigation, it is common for the courtroom actors to agree that the investigation will cease if the accused pays a fine.”⁹²

Section 153 can be used both for the advantage and disadvantage of the defendant. The disadvantages are obvious in that it violates their right when there is insufficient suspicion of a criminal act, and the presumption of innocence would mean that there would be no prosecution at all. The advantages for the defendant are that often times the case is redefined in order for it to be able to meet the requirements of section 153a. In these kinds of circumstances an application occurs where the evidence is complicated and overburdened. This provision allows the prosecution the opportunity to combine an offer for settling with a warning that this is the last chance for settling. In this way the prosecutor can indicate that, “a refusal to accept an agreement could lead to a higher sentence recommendation.” This approach is obviously unfair (and very similar to that adopted in the United States of America) approach of punishing the defendant for objecting to the negotiations. But it is very difficult to ascertain whether or not the final sentence would be anyway. As such it is difficult to directly link the higher sentence to the rejection of the defendant to negotiate. Rauxloh states that the use of section 153a works well in those situations where the parties know each other well. In these circumstances there is more likely to be a higher level of trust in the informal negotiations and plea bargaining will be employed successfully.

A common factor between the United Kingdom and the German system is that they

⁹²Rauxloh, “Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?”

both revolve around the confession. In the United Kingdom the confession has the effect of reducing the sentence by a certain amount. This amount decreases the longer it takes the defendant to confess. Ultimately a remorseful confession will have the affect of reducing the sentence but it is the element of remorse which the court views highly. In Germany the reason for the confession is the sentence reduction and not the need for showing remorse. Schünemann states that the confession depends upon an offer therefore there is no room for a remorseful confession to be made.⁹³ Additionally, the Federal High Court of Justice has held that a confession is a mitigating factor. There are critics, however of this process which declare that it undermines the principle of substantive truth as well as the presumption of innocence. This practice is in conflict with Article 103(2) of the German Constitution as well as §261 of the Code of Criminal Procedure where it enshrines the principles that the defendant may not be convicted by a court where there is doubt about their guilt. This draws its basis from the fact that innocent defendants sometimes confess when they have nothing to confess.⁹⁴ There are risks that juveniles will accept the offer and the upper or middle classes who are in the financial position to be able to pay the fine imposed. These offers are also favoured by defence lawyers where the possibility of a conviction is very high.

A very obvious similarity between the German and the American system is that section 153a allows the prosecution to make the offer for settling with a warning that if the defendant turns it down they will not be able to settle at a later stage in the proceedings. In this way the prosecutor can indicate that, “a refusal to accept an agreement could lead to a higher sentence recommendation.”⁹⁵ This is not a fair approach to punishing the defendant for objecting to the negotiation. But, it is very difficult to ascertain what the final sentence would be anyway so there is no way of knowing if the higher sentence was a direct result of the rejection of the informal negotiation.

As mentioned above the German system focuses on the judge determining the substantive truth, however the practice of informal negotiations bypasses this. This onus upon the judge means that they must then examine all of the necessary evidence at the trial. This requirement is part of the inquisitorial principle. This principle means that that the judge must consider all of the surrounding relevant

⁹³Rauxloh, “Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?”

⁹⁴Ibid.

⁹⁵Ibid.

evidence and not just that which the two opposing parties are presenting. The plea bargain is completely at odds with this process because by its very nature it shortens the process and requires less evidence to be examined. There are two central objections to the introduction of informal negotiations into the German system. The first is the slim confession and the second is the waiver of the right to appeal. A slim confession provides the defendant with the ability to conform but not introduce any new evidence. This mechanism protects the defendant from having to introduce any new facts which could result in a harsher conviction being brought upon them. This runs contrary to the theory that a confession of any sort ought to reveal the material truth and also it goes against the argument that a confession deserves a sentence reduction as it aids with fact finding is no longer applicable. The danger of the slim confession is that even though the prosecutor can make an offer the court is not generally bound by this agreement. As such the court is entitled to determine,

“if the evidence during the hearing shows that an act has to be evaluated on the higher charge the court has to convict accordingly. If however the court accepts a slim confession without further investigation it will not have any indication that a higher charge might be appropriate.”⁹⁶

Another issue is the requirement of the principle of individual guilt.⁹⁷ The principle states that, “only the offender’s blameworthiness - and not any arrangement among the parties or with the court - shall be the basis of the sentence.”⁹⁸ In light of this the concept of offering a mitigated sentence in return for the defendant’s negotiated confession it is doubtful that it will be possible to continue this practice in light of section 46 of the German Penal Code. According to section 46 of the German Penal Code, such a confession might indicate remorse but a negotiated confession is all about the rational calculation of the options and is therefore, based upon regret or the willingness to reform one’s behaviour.⁹⁹

As is the case with both the U.S. and the United Kingdom there has been much debate in Germany about the legality of plea bargains/negotiated settlements. One major concern from critics is the element of coercion and the revocation of the

⁹⁶Rauxloh, “Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?”, p. 14.

⁹⁷section 46 of the German Penal Code

⁹⁸V. J. Carduck. “Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany”. In: *Warwick School of Law Research Paper No. 2013-17 (Special Plea Bargaining Edition)* (2013), pp. 1–34, p. 14.

⁹⁹Ibid.

defendant's fundamental rights. The German Penal code as well as the German Constitution protect the fundamental rights of the individual which are sometimes questionable infringed when a plea or informal settlement is reached between the parties in a particular case.¹⁰⁰ As with U.S. and the United Kingdom there exist safeguards to protect against arbitrary conviction. In this way negotiated agreements conflict with article 103 (1) of the German Basic Law because they affect the right of the accused to be heard as well as participate in the trial. In Germany before 1982 no one had questioned the legality of the negotiated settlements. Debate then ensued raising issues that the practice was illegal because it was not included in the Criminal Procedure Code and as it did not expressly include the practice of plea bargaining it meant that the practice must be illegal. This very same point was used by proponents stating that just because it does not expressly mentioned plea bargaining does not mean that it is illegal. It was section 136a that was the catalyst for the debate. Section 136a forced both the Federal High Court of Justice and the Federal Constitutional Court (hereinafter referred to as the FCC) to consider the question of its legality in particular the principle of freedom from coercion. The landmark decision of BGHSt NStZ 1987, 419 the FCC considered the legality of discussions that had been made between the parties where they discuss the case. It was stipulated by the court that they are not forbidden so, "long as the law was respected." There was held to be no violation in this particular case as the final sentence which was received, "was commensurate with the offender's guilt." As such the free choice of the defendant had not been violated.¹⁰¹ Similar to the Court of Appeal's decision in the case of Turner the German FCC established a set of rules which were to be followed in the case of informal negotiations. By setting out these limitations upon the process the FCC seemed to be indirectly accepting their validity. This decision was then followed in 1998¹⁰² where the Fourth Senate of the Federal High Court of Justice stated that informal settlements are not prohibited so long as they remain within certain specified parameters. This case established that discussions held in the preparation stage are allowed so long as they can be revealed

¹⁰⁰these include but are not limited to the following; presumption of innocence, the right to a fair trial, the right to a lawful judge, the right to a judicial hearing, the principle of a public trial, the principle of substantive truth and court investigation, the principles of immediacy and orality, the privilege against self-incrimination, the compulsory prosecution, the duty of presence of accuse and the prohibition of waiver pressure.

¹⁰¹Rauxloh, "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?"

¹⁰²BGHSt NJW1998, 86

in the main trial. The trial court still had to investigate and find the objective truth and had to figure out the credibility of the confession. Since this case it has been recognised by the courts that informal negotiations are part of the German criminal justice system. The decision did not provide clarity on the matter of waiver of appeal being valid and the issue was brought before the Joint Senate of the Federal High Court of Justice in 2004. The court stated that if a judgment was based upon a waiver of the defendant it would only be valid if the defendant was informed of the fact that they are not bound by any promises to waive the right to appeal made previously as part of the agreement, the so-called 'qualified information'.¹⁰³

As a culmination of the incoherent case law and the decision of the Joint Senate of the Federal High Court of Justice the Plea Bargaining Act 2009¹⁰⁴ was introduced as a means by which to codify and also regulate the practice.¹⁰⁵ Up until this point judges had attempted to avoid stating point blank when and where they would deem a negotiated informal settlement to infringe upon the German law. After the Joint Senate issued their statement that plea bargaining was indeed legitimate within certain limits they then requested that the German legislature step in because the, "judicial limits of lawmaking had been reached."¹⁰⁶ Section 257c was introduced into the German criminal procedure which allows for as well as regulates agreements without infringing the German Criminal Procedure. This new provision means that an agreement becomes valid when, "the court announces the possible context of the agreement and both prosecution and defence consent."¹⁰⁷ Importantly, section 160b allows for the communication between both the prosecution and the defence before the trial so long as the communication, "is suitable to further the proceedings." These provisions both seek to reconcile the practice of informal settlements with the German procedure of searching for the substantive truth. An important step of moving plea bargaining practices out of the shadows and into the formalisation mode was the new requirement in section 273 (1(a)) that all negotiations made before the trial need to be recorded even the fact if they do not take place. Section 257c (4) tries to protect the rights of the defendant to a fair trial by stating that

¹⁰³Rauxloh, "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?"

¹⁰⁴Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, Drucksache 16/12310

¹⁰⁵Carduck, "Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany".

¹⁰⁶Ibid.

¹⁰⁷Rauxloh, "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?", p. 20.

unless new facts emerge the trial is to proceed and is bound by the initial prognosis of punishment. This seeks to provide some security as well as certainty for the defendant in terms of what the defendant can expect from the outcome. It is only if the defendant does not waive their right to appeal that there will be any formal control of the informal negotiations.¹⁰⁸

The new law has two parts which are of importance. The second part of the act deals with the importance of the waiver of the appeal in § 35a, 302(1) which states that a waiver of appeal cannot form any part of the agreement. A waiver would only be valid if it can be demonstrated that the defendant has received qualified information about it. This means that, “the court has to explain to the defendant that if his waiver was part of the deal they are not bound by it.” This only becomes valid if the defendant sticks to it after being informed by the court. But there are problems with this system as well because of the applicable time limits. If the defendant declares a waiver then changes their mind because they claim that they did not receive the qualified information they have one week after the pronouncement of the judgment within the ordinary time limits for appeals to bring their application. It was ruled that this could not be extended because it would place them at a better position than defendants who had not accepted or participated in the settlement. In light of the attempts to formalise a form of plea bargaining within the German criminal justice system Regina Rauxloh remains dubious as to whether the new legislation will help to lift a practice out of informality into the realm of the formal and whether formalisation will actually help the process at all.¹⁰⁹

Unfortunately, the plea bargaining act was not all that had been hoped for. The Act failed to aid with the much needed clarification of the law. As such the FCC was requested to review the law enacted in 2009 and its constitutionality. The FCC decision found the new law to be not yet unconstitutional. The FCC decision permitted the legislature to regulate plea bargaining. In addition to finding the new law not yet unconstitutional the FCC also stated that;

“The Court also called upon public prosecutors, as guardians of the law, to monitor negotiation practices.”

Making the prosecutor the “watchdog” of the procedure was not a good move as the prosecutor is generally concerned with the success of deals. The assignment

¹⁰⁸Rauxloh, “Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?”

¹⁰⁹Ibid.

of the prosecutor to this role does little to help the constitutionality of the legal arrangement.¹¹⁰ The judgment of the FCC shows that there is awareness of the plea bargaining because of the fact that the FCC is allowing the legislature to regulate plea bargaining. The judgment failed to address the elephant in the room of whether the practice of informal settlements is compatible with the inquisitorial principle. There was no detailed analysis of the compatibility question as was there no regard for the issues of lack of efficiency and practicability. Even though the court recognises that one of the main reasons for prosecutors not keeping with the law is because of the 'lack of practicability'.

In response to this dismissal and missed opportunity of the FCC Carduck suggests that there are only four alternatives left open with regards to the integration of the plea bargaining model into the German system. The first is that the status quo could be maintained, secondly, criminalise informal deals that do not conform with the law. The reasoning behind this would be that it would have a deterrent effect. In practice it would be not workable as it would depend upon colleagues reporting on each other and it would add to the already overburdened case load of the court. The third option would be to abolish plea bargaining altogether delete it from the CCP and argue for the implementation of the traditional inquisitorial procedure as it had been functioning well. The problem with this option is that it would just push the practice further underground. Finally, the fourth option would be for a reformed version of plea bargaining as well as an adversarial element to the German CPP. This would require a complete overhaul of the system and in this Italy could serve as an example of a best practice in this case.¹¹¹

The other alternative is the waiver in proceedings which means that the defendant generally gives up some of their procedural rights. This could be that the defendant agrees not to challenge the admission of certain evidence. The most common waiver though is that of the right to appeal. There are normally three reasons why the defendant will waive their right to appeal, they are happy with the agreed outcome, reluctant to spend more money and time on the process or the defence counsel fails to inform their client about the legal remedies against settlement or even that an negotiated settlement has taken place between the two opposing counsel. This last one is the most serious and has parallels with the U.S. cases of ineffective assistance

¹¹⁰Carduck, "Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany", p. 29.

¹¹¹Carduck, "Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany".

of counsel.

Germany's history of the development of plea bargaining is chequered with severe debates amongst the judiciary, legislators and academics. It was recognised that the practice of informal settlements developed because it was seen that the German criminal justice system was too complicated and congested to navigate. So in order to help keep the criminal justice system running the lawyers began engaging with these informal settlements. Regina Rauxloh states that the unpredictability of the legislation is a reason for the development of the informal negotiations as a means by which to establish some security in the outcome for the defendant.¹¹² Within this debate in Germany (which is still ongoing) several academics have voiced their opinions. One supporter of the informal negotiations, Hermann, argues that more justice is achieved through using them because when all parties are involved in the working towards an agreed outcome the defendant is more likely to be successfully rehabilitated as they accept the sentence.¹¹³ This concept that the defendant accepts the sentence as Hermann suggest embodies the overall problems with the system. This supposed acceptance raises questions relating to whether the acceptance was genuine and effective (a very similar problem to the U.S. problem of ascertaining whether the assistance gives rise to a claim of ineffective assistance of counsel), how involved is the defendant actually in the overall negotiation of the agreement? The picture painted by Hermann places too much power with the defendant which is unrealistic as the criminal law is not set up to look out for the interests of the defendant but that of the victim.

There have been several problems identified within the German system. There are two main problems which have been identified that of the conflict between practitioners claiming that it is a necessary mechanism by which to conduct informal procedures and the academics who point out that it is not compatible with the German Criminal Code. In fact there is a third problem and that is of whose task is it to bridge the chasm between the informal procedure system and the formal process? This question has been left unanswered by both the legislator and the courts leaving it up to the practitioners to forge the path ahead. Where two systems of law develop side by side (which is easier to do in the context of the common law where the judges are expected as well as allowed to develop the law) questions arise as to

¹¹²Rauxloh, "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?"

¹¹³Ibid.

who is allowed to pick which system to follow. The answer is that it is always the defendant who gets to choose between the safeguards and the sanction reduction. The reality is very far from the theoretical. There are two main problems with this theoretical idea of the 'choice' being vested in the defendant. The first group of problems are that the defendant does not have enough information to make a rational decision. Defendants generally lack insight into the court procedures, they have no access to the prosecution file and as such they are not in a position where they can evaluate the strength of the prosecution case against them. This places the defendant in a position where they are dependant upon the lawyer's decision. The problem with this power balance is that the lawyer is sometimes serving their own interests. The second group of problems resides with this myth of 'choice' on the part of the defendant. Giving the defendant the choice in an informal procedure silences the public as well as the victim

Within both the adversarial and inquisitorial systems the method of selection of cases deemed worthy of a trial by the legal profession are the same. There are no real guidelines for selection rather it is done at random, where the emphasis is placed more upon the defendant than the interests of the public. It is these very traditional fair trial principles which are having to make way for the redefining of a fair trial and sentencing for this new wave of "process economy"¹¹⁴.¹¹⁵ Carduck observes that one of the reasons that the German system has had such difficulty introducing a plea bargaining model is because of the inquisitorial structure of the German system. This has more to do with legal culture rather than a demarcation of being either in the adversarial or inquisitorial camp. Because of the judge having a central role this has a knock on effect on the impartiality of the judge. Because the court is no longer neutral and is pursuing their own interests which places an emphasis upon the defendant to accept the offer the court has proposed. The judge has a massive discretion in choosing which cases to pursue and which ones are 'suitable cases'. There is also no specified penalty range which can be offered. Hence a huge penalty gap between the sentence after the trial and the sentence offered to the defendant in case of a confession.. Also there is no mandatory requirement that the defence participate in the case which further serves to weaken the position of the defendant. What is really worrying is that the court is not bound by the negotiated agreement.

¹¹⁴Rauxloh, "Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?"

¹¹⁵Prozessökonomie

So the defendant could well shoot themselves in the foot by offering their confession if the court determines in line with section 257c (4) CCP that if,

“legally or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offender of guilt.”

Also if the defendant acts in a way which is inconsistent with the agreement it can be revoked however on the basis of what kind of behaviour is not specified. Problems arise if the defendant then appears before the same judge to whom they confessed. The judge then must remain neutral but it is hard to still maintain the presumption of innocence if you have already heard the confession of the defendant.¹¹⁶ Herein lies the biggest distinction between the Anglo-American system and the German. In the Anglo-American an admission of guilt or confession is required. Whereas in the German the confession should be an integral part of the defendant's conduct at trial but does not require a confession rather it was the substantial confession previously as set out in section 244 (2) of the CPP.

One of the main criticisms of the German legislation is that it is very ambitious as it aims to incorporate the practice of plea bargaining so as to benefit and profit from the informal procedure while still maintaining the main principles of the formal criminal trial. The legislation fails to cover those informal negotiations which take place before the main trial. Another problem is that of the confession (it is not sufficient to automatically establish the defendant's guilt). The court is still expected to study the dossier carefully to make sure that there are no factual or legal obstacles to the agreed outcome. This creates a paradox for the courts because the purpose of the Act was to shorten the proceedings rather than to lengthen but if the judge still has to examine the confession it is questionable how much shorter the proceedings will be in reality. The result is that the courts will be placed in a position where they will have to disregard the Federal High Court of Justice and the extension of the use of informal negotiations. This practice just goes to further demonstrate the ever widening gap between the substantive criminal law which is used to solve social problems and the fact that the expectation as well as the demands upon the criminal procedure and the role of punishment have well and truly shifted from what they used to be. The problem that the German system faces with this transplant of

¹¹⁶Carduck, “Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany”.

informal negotiations is that the criminal justice system is predominantly concerned with finding the truth of the confession. Up until now,

“The essential question is how the authenticity of the confession can be tested.”¹¹⁷

Both Rauxloh and Carduck identify that the confession of the defendant is a critical element to the German negotiated settlements. Carduck raises the question of the infringement of article 3 (1) of the German Basic Law’s principle of “equality before the law”.¹¹⁸ Carduck’s argument asserts that this principle is also being infringed because a distinction is being made at law between those defendants who want a trial (being treated less fairly) and those who enter into negotiations. The only real difference between them is that one has the right not to self incriminate. Also the defendant who wants and remains silent until a plea bargaining opportunity presents itself is in a much better position than the one who confesses at the very beginning of the interrogation.¹¹⁹

The law is far from the reality of the practice. This position was further supported by an empirical study which was conducted in 2012 where it was observed that both the judiciary and the lawyers disregard the application of the letter of the law altogether. The results were shocking. In blatant disregard of the law 35% of the judiciary confronted the defendant with a sentencing alternative whether they wanted a trial or not and 28% accepted a waiver of appeal contrary to section 302 (1) of the CPP.¹²⁰

The informal negotiation presents changes to the goal posts in this area of the law however, the German criminal justice system has not been able to shift gear in the same direction yet.

Bussmann made the following remarks reflecting on the practice of informal agreements within the German system:

“Through giving up the punitive, repressive paradigm in favour of an economic paradigm and abandonment of hierarchical, authoritarian form of interaction in favour of process, criminal procedures become increasingly

¹¹⁷Rauxloh, “Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?”

¹¹⁸Carduck, “Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany”, p. 16.

¹¹⁹Ibid., p. 16.

¹²⁰Ibid.

similar to administrative law procedures, solving conflicts of interests [...] by negotiation.”¹²¹

The German system can be split into two parts the search for consent or the truth.¹²²¹²³ Reformers in Germany have been pushing for the consent principle as opposed to truth and justice. The consent principle stipulates that, ‘the consent of the prosecution and the defence provides a sufficient basis for the court’s decision; if the parties have agreed on a disposition, the court can ratify that agreement without examining its basis. The court would then be relegated to the role of a notary public with very limited supervisory functions.’¹²⁴ This shift in approach would no longer require a confession. The criticism of this approach are that it turns the criminal process into one of finding an acceptable resolution which is then determined between the prosecutor and the defence.¹²⁵ This situation is unacceptable in that truth and consent are then lending legitimacy to criminal judgments. It is of course naive to presume that the truth can always be achieved but this is not a reason not to pursue it. As Sisyluss states we must make our best effort even if we cannot succeed.¹²⁶

6.5.2 Italy

Italy introduced a practice similar to plea bargaining in the 1980s in its new Criminal Procedure Code (1989) to cope with the rise of Mafia cases. The Italian system had become overburdened because of its strict adherence to the principle of legality¹²⁷¹²⁸¹²⁹ and this time there were no alternatives available to alleviate the case

¹²¹Kai-D Bussmann. *Die Entdeckung der Informalität: über Aushandlungen in Strafverfahren und ihre juristische konstruktion* (baden Baden: Nomos Verlagsgesellschaft). Nomos; 1991, p. 27.

¹²²T. Weigend. “Is the Criminal Process About Truth? German Perspective”. In: *Harv. L. & Pub. Pol’y* 26 (Winter 2003), pp. 157–173.

¹²³T. Weigend. “Crime, Procedure and Evidence in a Comparative and International Context Essays in honour of Professor Mirjan Damaska”. In: ed. by Maximo Langer & Peter Tillers John Jackson. Hart Publishing, 2008. Chap. The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure, pp. 39–64.

¹²⁴Ibid., p. 56.

¹²⁵E. Wesslau. “Konsensprinzip als Leitidee des Strafverfahrens”. In: *N. J. W.* 1 (2007).

¹²⁶Weigend, “Crime, Procedure and Evidence in a Comparative and International Context Essays in honour of Professor Mirjan Damaska”, p. 60.

¹²⁷A. R. O. Bagirov. *Support to the anti-corruption strategy of Azerbaijan (AZPAC) Technical paper on Plea Bargaining and issues related to its implementation in Azerbaijan*. Tech. rep. Council of Europe, 2008.

¹²⁸Ibid.

¹²⁹This principle states that no punishment shall be imposed other than upon assessment of the criminal responsibility within a criminal proceeding and that when determining this sentence

load of the courts. As a result the courts responded by issuing amnesties.¹³⁰ This practice, however, did not do much to help the situation as such Italy, unlike Germany, introduced a codified concept of plea bargaining as a new criminal procedural code with a strong due process focus which was adopted in 1989. This made redundant the previous criminal procedural code which was adopted in Mussolini's era¹³¹. This new code included two new methods for avoiding the trial, *patteggiamento* (party agreed sentences) which are also referred to in layman's Italian as 'merchandising' and the second is abbreviated trial.¹³² The introduction of these two alternatives to the full trial developed the practice of negotiated justice. Italy is distinct from its European neighbours in that it has set about trying to harmonise the constitutional principles of criminal law and procedure with the practice of plea bargaining. In order to achieve this parts of the Italian constitution were amended so as to ensure negotiated justice would not be regarded as unconstitutional.¹³³ The concept of negotiated justice was recognised in the late 80s as being a functioning and existing concept which was further emphasised by the Committee of Ministers in their Recommendation R (87) 1870 where they recognised that negotiated justice was indeed,

“a possible way to grant the simplification of criminal justice and therefore invited States, wherever constitutional and legal traditions allowed it, to introduce “guilty pleas”.”¹³⁴

Federica Iovene identifies three problematic areas with the Italian version of alternatives to the full trial they are the issue of the defendant's responsibility and how this ought to be assessed, the role of the judge and finally the determination of guilt.¹³⁵ She views these as being the most problematic areas because of the nature of the Italian constitution and the way in which the legislature has sought to reconcile them with the shortened trial. The legislature started the process of introducing plea bargaining by swapping the inquisitorial model for more of an accusatorial pro-

that the judge must only be guided by the law.

¹³⁰Bagirov, *Support to the anti-corruption strategy of Azerbaijan (AZPAC) Technical paper on Plea Bargaining and issues related to its implementation in Azerbaijan*.

¹³¹Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure”.

¹³²Bagirov, *Support to the anti-corruption strategy of Azerbaijan (AZPAC) Technical paper on Plea Bargaining and issues related to its implementation in Azerbaijan*.

¹³³*Ibid.*

¹³⁴F. Iovene. “Plea Bargaining and Abbreviated Trial in Italy”. In: *Warwick School of Law Research Paper No. 2013/11(Special Plea Bargaining Edition)* 11 (2013), pp. 1–14.

¹³⁵*Ibid.*

cess which was first piloted in 1981 in article 77 of law number 689 of November 4. It was during this time that it was realised that harmonisation of some sorts was going to be necessary in order for plea bargaining to be a practicable and viable option in Italy. If this was not achieved the practice of the plea bargain would contravene the follow principles ;article 112 mandatory prosecution, article 27 (2) presumption of innocence, article 25(2) no punishment shall be imposed other than upon assessment of the criminal responsibility within a criminal proceeding, and article 101 (2) the judge in the determination of the sentence shall be guided only by the law. All of these constitutional principles, depending on how you approach it, could either be obstacles to justice or safeguards for ensuring justice. It was the tension between these two points that plea bargaining finds itself. As in Germany where the constitutional court was requested to rule on the constitutionality of plea bargaining so was the Italian constitutional court. The two courts adopted two different approaches with the German one stated that it was “not yet unconstitutional” whereas the Italian Constitutional Court ratified the shift towards a more accusatorial model and therefore legitimised a model of consensual justice.¹³⁶ Article 111 (5) of the Italian Constitution provides this ‘legitimation’ by providing that the defendant may renounce their right of having evidenced challenged at trial according to the cross-examination rule and agree to be judged upon the investigative file records.¹³⁷

It was in 1990 that the constitutional court made it clear that a purely adversarial system is not compatible with the constitution. It was because of this declaration of incompatibility that the judge was then required to fulfil certain criteria so as to ensure that the practice would not become unconstitutional. The judge was then required to assure that the defendant had confessed voluntarily, what were the reasons for the acquittal and they must also examine the legal qualification of the facts charged against the defendant and also the application of the aggravating and mitigating circumstances.¹³⁸ As is the case in Germany, if the Italian judge finds a problem or irregularities of some kind then they must refuse the plea bargain and then the normal proceedings must go ahead.¹³⁹ This position is somewhat connected to the fact that the guilty plea does not really exist in the same way in which it does in an Anglo-American system. Rather the confession (which is a form of evidence

¹³⁶Iovene, “Plea Bargaining and Abbreviated Trial in Italy”.

¹³⁷Ibid., p. 4.

¹³⁸Article 144 (2) of the CCP

¹³⁹Iovene, “Plea Bargaining and Abbreviated Trial in Italy”, p. 6.

and as such allows the judge the ability to investigate the substantive truth) which was not included in the first round of reforms in 1989 was seen rather as the waiver of the right to silence and of the privilege against self-incrimination. There is a big difference, however, between the possibility to waive these rights versus making them part of a waiver through which the defendant gains advantages.¹⁴⁰ The German constitutional court had a similar issue to decide when they had to determine that, “a confession is only compatible with the constitution only when it is voluntary and spontaneously given.”¹⁴¹ This position goes back to the centrality of the judge to the trial as they have a duty to ensure that a false confession is not admissible as well as searching out the truth. Federica Iovene asserts that because in the Italian system there is the absence of a guilty plea this means that the trial is still an attractive alternative. As such this state of affairs then this serves to guarantee that the defendant’s right to choose a plea-bargain is “free and self-determined”.¹⁴²

The problem with the guilty plea being replaced by the confession is that it could serve to encourage a more passive judiciary who would then be free to rely upon the guilty plea with the agreement of the parties rather than fulfilling their duty of searching out the truth actively which would violate the principle of legality.¹⁴³ The role of the judge in this situation is then reduced to nothing more than ensuring that there are no reasons for an acquittal to take place however this was deemed to be unworkable and an infringement of the principle of the presumption of innocence. In order not to conflict with this principle it was stated that ‘bargained sentence presupposes an actual assessment of the defendant’s responsibility.’¹⁴⁴ Because of the lack of the guilty plea and the issue of how to determine the guilt of the defendant these combined issues raise questions about the role of the judge in these shortened trial proceedings. In particular that according to article 101 (2) of the Italian Constitution provides that the judge is independent and subject only to the law. In order not to contravene this principle that the determination of guilt should be by the law (in the course of the trial) and that the one-third reduction stands in opposition to the concept that reduction must be in proportion to the guilt, the Constitutional Court stated that a balance must be struck. They held that the judge must make sure that the negotiated sentence even though it is not the ‘just’

¹⁴⁰Iovene, “Plea Bargaining and Abbreviated Trial in Italy”.

¹⁴¹Ibid.

¹⁴²Ibid., p. 8.

¹⁴³see article 101 (2) of the Italian Constitution

¹⁴⁴Article 111 (5) of the Italian Constitution

punishment must be appropriate taking into consideration article 27 paragraph 3. This position of the court showed that they recognised the importance of plea bargaining as well as introducing a new alternative method for the determination of punishment.

The Italian reforms established alternatives to the full trial as a means by which to reconcile their judicial practice with the *patteggiamento*. The *patteggiamento* has a very limited application because it is only applicable to minor offences. Once applied the sentence cannot exceed 2 years of imprisonment. The prosecutor and the defence enter into an agreement as to what the appropriate sentence to be imposed upon the defendant should be without having to go to trial.¹⁴⁵ This procedure can be initiated by either side however if you did not start the proceedings then you must give your consent. If for some reason the prosecution opposes and does not give their consent then the judge is entitled to reject their opposition if they consider it to be unfounded. A distinction between the U.S. and Italian system is that the prosecutor has to consent to this procedure being initiated whereas in the U.S. the prosecutor has total freedom to refuse or offer a deal to the defendant any time after the initiation of the negotiation.¹⁴⁶ Within the Italian system the defendant is protected by section 448 (1) of the Code of Penal Procedure which states that the prosecution shall not withhold consent unreasonably. The prosecutor must justify their decision to reject a defendant's request for party-agreed sentences in writing and these reasons for their rejection are subject to judicial evaluation. Significantly the judge cannot impose a penalty other than the one agreed upon by the parties. The reduction in the ultimate sentence is one-third off what the final sentence would have been if imposed at the full trial. The second option available is the abbreviated trial (which was model to some extent upon the English summary judgment¹⁴⁷). This procedure authorises the judge to base his verdict upon the criminal case established by the prosecution. In this situation the accused renounces their right to cross-examine the evidence. This revocation is worrying as it is a major pillar of the right to a fair trial. Abbreviated trials can be applied to all sentences no matter what the offence is. However, they can only be requested by the defendant and it is not necessary to obtain the consent of the prosecutor (this is since the 2000 amendments). They can be made orally if during the preliminary hearing and then afterwards in writing.

¹⁴⁵Bagirov, *Support to the anti-corruption strategy of Azerbaijan (AZPAC) Technical paper on Plea Bargaining and issues related to its implementation in Azerbaijan*.

¹⁴⁶Ibid.

¹⁴⁷Ibid.

The extent of the judicial supervision is dependant upon the type and nature of the request. There are two that can be made either simple or conditional. Simple applications are formal in character whereas conditional applications and the extent of the judicial control are dependant upon whether or not the request has been properly constituted. The appeals possibilities are very limited and the prosecutor may only appeal against a decision which was given on the offences other than those which were not on the indictment.¹⁴⁸

The advantages of the abbreviated trial are that it spares the state a full trial. If the defendant is found guilty they will receive a one-third reduction of the sentence that the judge would have otherwise imposed upon them. Also, due to the recent amendments the fact that the consent of the public prosecutor is not needed also expedites the process. Additionally the defendant is in a position now that they can also request supplementary evidence however if new evidence is admitted it is only the judge who is permitted to cross-examine the witnesses.¹⁴⁹ This practice of the defendant revoking their cross-examination is underpinned by article 111 (5) of the Italian Constitution. The disadvantages are that when considering the request for a simple abbreviated trial it virtually places the defendant in a position whereby they actually obtain a sentence reduction upon request because the consent of the public prosecutor is no longer needed.¹⁵⁰ The major concern is that it has become an “alternative trial” as opposed to an “abbreviated trial”. Therefore not actually alleviating the trial burden of the courts. This is evidenced by the fact that in 2012 34% of cases were dealt with either by plea bargaining or abbreviated trial (86.583 plea bargaining and 46.713 by abbreviated trial).¹⁵¹

6.5.3 Hungary

Hungary’s criminal procedure follows a traditional inquisitorial model, heavily influenced by the German system. The prosecutor plays a pivotal role in the pre-trial investigative stage which can be divided into four parts, the investigation; prosecutorial phase; the court phase and the implementation phase.¹⁵² There is an emphasis

¹⁴⁸Bagirov, *Support to the anti-corruption strategy of Azerbaijan (AZPAC) Technical paper on Plea Bargaining and issues related to its implementation in Azerbaijan*.

¹⁴⁹Iovene, “Plea Bargaining and Abbreviated Trial in Italy”.

¹⁵⁰Ibid., pp. 11–12.

¹⁵¹Ibid., p. 13.

¹⁵²Herke, *Megállapodások A Büntetőperben*.

for the investigation to be completed within a two month period. This period can be extended up to two years from the start of the original investigation.¹⁵³ Within the Hungarian system, there are special procedural categories which confer on the prosecutor certain powers, without a formal indictment, to take the defendant to court within 15 days of the committed criminal offence. These expedited hearings occur when the defendant was caught red handed or has admitted to committing the act. The prosecutor is under an obligation to provide the defendant with counsel unless they have appointed one themselves. In this process, the only advantage for the defendant is an early hearing of their case. The prosecutor solely decides upon the process and does not need to obtain the consent or the approval of the defendant to pursue this option.¹⁵⁴

The Hungarian criminal system does include an abbreviated trial process somewhat similar to the plea bargain referred to as the 'waiver of trial'.¹⁵⁵ In Hungary, as with all of the other countries mentioned the ability to waive the trial¹⁵⁶ was introduced in the law of 1999 CX.¹⁵⁷ This practice is shorter and cheaper. As with Italian abbreviate trial, the Hungarian Btk allows for the a reduction in the imprisonment term according to Article 87/CCC, '*In the case of waiver of the trial the term of imprisonment may not exceed three years in case of committing a criminal offence punishable by more than five but less than eight years of imprisonment; two years in case of committing a criminal offence punishable by more than three but less than five years of imprisonment, or six months in case of committing a criminal offence punishable up to three years.*'¹⁵⁸ Similarly to the Italian system the articles 533-542 of the Be set out the procedural requirements for qualifying for the waiver of trial. They set out that the offence can only be punishable by a maximum of eight years, that the accused states formally that they waive their right to a trial and that they confess.¹⁵⁹ The waiver of trial follows a somewhat similar format to both the German and Italian systems in that it requires certain formalities to be met first before the 'waiver of trial' can be granted. The new legislation of Act LXXIII of

¹⁵³Klára Kerezsi. "Costs of Alternative Sanctions in Hungary". In: *European Journal on Criminal Policy and Research* 6 (1998), pp. 561–572.

¹⁵⁴T. Király. *Büntetőeljárás jog*. Osiris Kiadó, 2008.

¹⁵⁵K. Karsai & Zs. Szomora. *Criminal Law in Hungary*. Wolters Kluwer Law & Business, 2010.

¹⁵⁶tárgyalásról lemondás

¹⁵⁷F. Zsanett. *A Büntető Tárgyalási Rendszerek Sajátosságai És A Büntető Eljárás Hatékonysága*. Ed. by E. Bócz, P. Hack and Cs. Herke. HVG-ORAC Lap-és Könyvkiadó Kft, 2012.

¹⁵⁸Ibid.

¹⁵⁹Szomora, *Criminal Law in Hungary*.

2009 stipulates that the 'waiver of trial' has to take a written format which then constitutes the "deal" between the public prosecutor and the accused. Additionally, the defendant would then sign an agreement whereby they recognise that they have waived the right to a trial and ask the court to recognise this fact.¹⁶⁰ This written document which forms the basis of the deal must include the following things such as the facts of the offence which have been confessed, the way in which the offence is qualified as well as framed in terms of the BtK and the penalty to which the accused has consented. This sort of 'deal' will only have legal effect in one respect if it triggers the (process of) 'waiver of trial'.¹⁶¹ If the court agrees with the deal then it is obliged to implement the terms of the imprisonment and the mitigating factors as well. As is apparent from both the German and Italian systems the Hungarian one is not unusual in that it places the judge in a central role.¹⁶² The 'waiver of trial' mechanism is most often used in those cases where the offender has committed a criminal offence in the capacity of some kind of a criminal organisation. In these situations this type if the offender cooperates with the public prosecutor and the investigating authorities, they will be rewarded by a waiver of a trial and also the 8 year maximum imprisonment penalty does not apply here.¹⁶³ If the individual does not cooperated in such a way then the mitigation of the offences as well as imprisonment is not a viable option. The other exception to the rules for qualifying for a 'waiver of trial' is if someone dies as a result of the crime committed and if the offender cooperates then they will fall within the category of 'cooperating offenders' and qualify for an abbreviated trial.¹⁶⁴ In the Hungarian context it is the prosecutor who instigates as well as recognises the opportunity for there to be a 'waiver of trial'. The public prosecutor then informs the defendant of this opportunity. If the defendant consents to this procedure then the public prosecutor submits a written arrangement to the court and asks for a public session which would replace the trial.

"The public prosecutor may not withdraw the motion for the adjudication of the case at a public session."¹⁶⁵

Depending upon the outcome of the session if the public prosecutor thinks the defendant is guilty of a more severe offence or is guilty of some other crime then

¹⁶⁰Zsanett, *A Büntető Tárgyalási Rendszerek Sajátosságai És A Büntető Eljárás Hatékonysága*, p. 275.

¹⁶¹No other legal consequences are attached to the arrangement deal

¹⁶²Szomora, *Criminal Law in Hungary*.

¹⁶³see Article 534/A Be

¹⁶⁴Szomora, *Criminal Law in Hungary*.

¹⁶⁵Ibid., p. 199.

the public prosecutor can submit a motion to have a full blown trial.¹⁶⁶ It is then up to the court to decide if they agree with the assessment of the situation by the public prosecutor. The danger of this situation is that if the court agrees with the assessment of the prosecution or if they do not agree with the deal then the court can decide that the arrangement is no longer binding. This places the defendant in a very precarious position of uncertainty. The Court adjudicates upon the filing of the motion at which both prosecutor and the defence counsel must be present (this is a mandatory requirement). The onus is upon the court to establish the guilt of the defendant by taking into consideration the confession, the documents included in the investigation and the arrangement. The judge is still the central figure in the investigative stage searching out the substantive truth as in the German system. If the accused objects to the arrangement then the court refers the case to (a full) trial because no direct evidence procedure may take place at a public session.¹⁶⁷ If there is no confession of the defendant at the public session other evidence shall be examined at trial.

The Hungarian system dangerously includes a waiver of appeal in article 542/C, paragraph 1, Be. This waiver of appeal means that the defendant cannot appeal against the following issues; the establishment of guilt (the confession), the facts of the case, the qualification (that is if it is different from that which is included in the indictment) and the punishment. These are significant areas for the defendant not to be able to appeal against. As such this raises questions concerning what safeguards are put in place to protect the interests of the defendant. The waiver of appeal presents questions as to the procedural rights of the defendant, are they informed of the extent of what their waiver actually means? Also, with whom does the obligation to inform the accused of the extent of the waiver lie? This unanswered question presents a problem in terms of securing the fundamental rights of the defendant in Hungary. As of yet there have not been any steps taken to rectify this imbalance unlike in Germany.

The Public Prosecution Service (PPS) is an independent body from the government. It is stipulated in the Basic Law of Hungary in article 29 (1)- (7) that the General Prosecutor shall answer to the parliament and provide a report of his activities. The General Prosecutor is appointed for a six year term by the parliament who elects

¹⁶⁶Ibid., p. 199.

¹⁶⁷Szomora, *Criminal Law in Hungary*, p. 200.

them.¹⁶⁸ The prosecutor carries the responsibility for carrying out the investigation. The prosecutor wields a huge amount of power in that they normally set the trial to which the court will then play.¹⁶⁹ Mediation has only been a feature of the criminal code since the reforms in 2007. In order to qualify for mediation the offence must be punishable by a maximum of five years imprisonment.¹⁷⁰ The new code widened the role and the discretionary power of the prosecutor. The usage of mediation has not been very popular amongst academics as there was some scepticism as to its effective workings. The widening of the prosecutorial discretion also meant that the public prosecutor was then endowed with powers somewhat similar to that of the judge. The result of using mediation is that it means that you may terminate the procedure if the offence is punishable by a maximum of three years imprisonment. Also the accused may be released without being convicted and sentenced if they discharge their responsibilities. The advantage for the victim is that they get payment quicker and directly from the accused.¹⁷¹ The discretionary power of the prosecutor enables them to act in certain cases so as to avoid the full blown trial. In those cases where the offence is negligible, does not affect the society, or if the suspect collaborates with the authorities (e.g. becomes an undercover agent.) the prosecutor is within their discretionary powers to choose when to prosecute or to drop charges.¹⁷² The discretionary powers of the prosecutor can be applied at four different stages; the first is at the ordering and conduct of the investigation at this stage the prosecutor may opt to decide to dismiss before the trial even gets started, secondly, once the prosecution has begun here there are three options available to them 1.) terminate the prosecution, 2.) partially omit or postpone the indictment and 3.) suspend the prosecution where and when mediation seems the best solution, the third stage is when the prosecution reaches the court here the prosecutor can still opt to modify or drop the charge and the final stage is when the suspect pleads guilty at this stage the prosecutor can choose between an arrangement, the waiver of the trial or the omission of the trial.¹⁷³ In these situations the court normally accepts the motion of the prosecutor unless the preconditions are not met which then results

¹⁶⁸E. Róth. "The Prosecution Service Function within the Hungarian Criminal Justice System". In: *Eur J Crim Policy Res* 14 (2008), pp. 289–309.

¹⁶⁹*Ibid.*

¹⁷⁰Róth, "The Prosecution Service Function within the Hungarian Criminal Justice System".

¹⁷¹*Ibid.*

¹⁷²E. Róth. "Prosecutorial Discretion and its Limits". In: *Acta Juridica Hungarica* 43, Nos 3–4 (2002), pp. 387–399.

¹⁷³Róth, "The Prosecution Service Function within the Hungarian Criminal Justice System".

in the documents being returned and the case will then proceed to a full trial (this happens in the case of an attainment). The instances of when an application or motion by the prosecutor is rejected are very limited indeed. If the suspect does not agree to the reprimand then they have a legal remedy available to them called a 'complaint'. In these circumstances the prosecutor has to prosecute because the absence of the consent means that there has to be a court procedure.¹⁷⁴ A reprimand (which is somewhat similar to a warning) is used in those cases where the offence is negligible. Once the stage of prosecution has been reached the prosecutor is in a much better position to assess the situation as well as the seriousness of the crime and here may choose to exercise the omission of prosecution.¹⁷⁵ The postponement of prosecution is somewhat similar to that of a suspended sentence in the United Kingdom. They are most commonly used in juvenile cases as a means by which to avoid the criminalisation of juveniles from an early age. Within the Hungarian system Act XIX of 1998 enshrines the principle of legality. Because of this if there is enough evidence to support a prosecution then the prosecutor must prosecute. It is in these circumstances the prosecutor can use discretionary powers but in order to be able to postpone the prosecution the prosecutor must hear the accused's consent. Recommendation R (87) 18 enshrines the principle of discretionary prosecution. The ECtHR concluded that discretionary prosecution depends on the suspect's consent therefore does not infringe the principle of the presumption of innocence.¹⁷⁶

The principle of reformation in *peius* does link in with the practice of plea bargaining in that the concern is always about the unpredictability of the offer given by the prosecution; will they stick by it or in other cases will the court (which it is able to do in some jurisdictions) ignore the deal that has been reached between the two parties. In this situation the defendant is in a delicate position as they do not know if the court will either order a full trial or instate an even harsher penalty. In some jurisdictions in the E.U. there is a complete prohibition on the practice of reformation in *peius*. The reason for the prohibition is to ensure that the defence has the legal guarantee that they are able to file an appeal without the risk that the judgment might be altered to the detriment of the accused.¹⁷⁷ The general idea behind this theory is that the accused can rest assured that on appeal it would be

¹⁷⁴Róth, "Prosecutorial Discretion and its Limits".

¹⁷⁵Róth, "Prosecutorial Discretion and its Limits".

¹⁷⁶*Ibid.*

¹⁷⁷Cs. Herke and Cs. D. Toth. "The prohibition of reformation in *peius* in the light of the principle of fair procedure". In: *Int. J. Bus. Soc. Res.* 3.3 (2013), pp. 92–98, p. 93.

fundamentally unfair to impose a stricter penalty. The prohibition of this principle lies in the fact that amongst the E.U. Member States there is a general obligation to ensure that trials are fair. It is this concept of 'fairness' that prevails when ensuring that the minimum procedural rights are ensured. The principle of a fair trial has also been referred to as an 'universal principle' which is taken to be an all encompassing element meaning that there is a group of rights which make up what is to be considered a "fair trial".¹⁷⁸ Hence, the principle of equality of arms is at odds with the practice of plea bargaining because the presumption of innocence guarantee is bartered away by the defence and the defendant for some negotiated justice. The basic ethos behind the prohibition of reformation in peius is that the defendant should not suffer any prejudice because of a surprise during the appellate procedure. In this way the defendant can be free from having a further punishment placed upon them because they dared to file an appeal.¹⁷⁹ Herke rationalises that the step of prohibiting the practice of reformation in peius is akin to enshrining the principle of equality of arms in the criminal procedure.¹⁸⁰ The rationale behind this statement is that it enables both parties to be in an equal position before the law when it comes to the expectations of the appeal.

Basically the equality of arms is nothing but the equal distribution of risks and in constitutional law it is the manifestation of the requirement of equality.¹⁸¹

This statement about the 'equal distribution of risks' is interesting when we come to consider the plea bargaining relationship because the undertaking of a plea is indeed a risk. Can it really be said that there is an equal distribution of the risk in the plea bargaining dynamic? The practice also conflicts with the quest for searching out the substantive truth.¹⁸² Hungary's introduction of the waiver of trial presents more questions than it can answer. The Hungarian system is perching perilously close to the abyss where indigent defendants will fall and be forgotten. The system has indeed created an expedited process which does serve some of the Article 6 requirements of having a trial without unreasonable delay but the problems still remain of an underfunded and under-resourced defense lawyer who cannot embrace

¹⁷⁸Király, *Büntetőeljárási jog*.

¹⁷⁹Herke and Toth, "The prohibition of reformation in peius in the light of the principle of fair procedure", p. 98.

¹⁸⁰Ibid., p. 93.

¹⁸¹Ibid., p. 97.

¹⁸²Róth, "The Prosecution Service Function within the Hungarian Criminal Justice System".

the benefits of a plea bargaining system for their client.

6.5.4 Serbia

The Serbian Criminal Procedure Code was reformed in 2009 to both streamline the system and to make it more efficient in removing a vast backlog of cases. Rather than improving the situation, the reforms, in removing several courts, have exacerbated the problem. The effects of these reforms has been its encroachment on the right to a fair trial in its attempts to help foster a more efficient system. The realisation that the new system was inefficient led to another reform of the law in 2011.

The 2009 reforms introduced the concept of plea bargaining. The inclusion of plea bargaining into the procedural code was both welcomed and encouraged by the U.S. Justice Department representatives working with the OSCE, to bring efficient and equitable justice to the Republic of Serbia. The drive for the criminal procedure code reforms were, in part, to show to the E.U. that Serbia, as a potential new member state candidate, is serious about combating crime and bringing to account those who are still at large for the atrocities that they have committed.¹⁸³ As in the case of both Germany and Italy there are constitutional principles which are odds with the practice of plea bargaining. Article 36 of the Serbian constitution ensures the right to equal protection of rights in court proceedings to everyone.¹⁸⁴ Additionally the Serbian constitution also provides for the prohibition of self-incrimination¹⁸⁵. The protection from self-incrimination is an important provision to take into consideration when discussing the practice of alternative practices to trial which may indeed require the suspect to admit or confess to a particular crime in order to benefit from the shortened trial. In order to help these reforms and also to encourage a more transparent, impartial and independent judiciary, the High Judicial Council and the State Prosecutorial Council in 2012 took over the administration and the budget of the courts and prosecution services. This move was seen as a way by which to foster the appearance of independence and transparency. It was also hoped that this would expedite the reforms coming into force.

¹⁸³Right to a Fair Trial, Yearbook of the Balkan Human Rights Network (Yearbook of the Balkan Human Right Network), issue: 01/2012, pages: 159-176, om www.ceeol.com (accessed on the 6th of August 2013)

¹⁸⁴Right to a Fair Trial, Yearbook of the Balkan Human Rights Network (Yearbook of the Balkan Human Right Network), issue: 01/2012, pages: 159-176, om www.ceeol.com (accessed on the 6th of August 2013)

¹⁸⁵article 33 paragraph 7

In a 2012 report by the European Commission, to the European Parliament and the Council on Serbia's progress, it was noted that there was still an overwhelming number of outstanding cases which had not yet been brought before the courts;

“In 2011, following a new accounting methodology, the courts received 2.23 million new cases, resolved 2.65 million cases and were left at the end of the year with a backlog of 3.34 million cases. However, major imbalances persist in the courts' workload and a comprehensive analysis of the functioning of the new court network is needed. The quality of statistics needs to be improved. Amendments aimed at improving the efficiency of the Constitutional Court were adopted but the Court continued to face a significant and rapidly growing backlog of cases.”¹⁸⁶

This is still the case. The number of backlogged cases is still considerable despite the fact that the 2011 Criminal Procedure Code (CPC) improved upon the 2006 code and reformulated the practice of plea bargaining. The proposed reforms to the CPC warrant close inspection as they reveal the intention of the legislature when it comes to how the plea bargain process should operate. It is also an indicative picture of the Serbian interpretation of plea bargaining. Article 313 part two is entitled “Agreements of the Public Prosecutor and the Defendant” this contains the plea agreement particulars. It specifies that the defendant must have their lawyer present in order to complete a valid plea agreement. The law stipulates what the agreement must include and that, as with most countries with a plea bargain practice, the defendant must confess to the charged crime(s). Unlike the common law jurisdictions where a guilty plea is necessary a confession will suffice. Additionally, the prosecutor can make a statement that they will not pursue prosecution for those criminal offences which are not covered by the plea agreement (article 314 (6) (1)). A plea bargain can only be dismissed when the plea does not contain the specifics set out in Article 314 or if the defendant did not appear at the hearing and was unable to justify their absence (see Article 316). This offers some protection against the coercion as well as what the ECtHR refers to as a 'constraint' upon the exercising of the defendants due process rights. Following on from this article 306 (8) (1) uses the language of 'knowingly and voluntarily' when stipulating that the defendant must show they have admitted to the criminal offense and that they are fully aware of the consequences of admitting their guilt (Article 306 (8) (3)).¹⁸⁷ According to Article

¹⁸⁶the 2012 European Commission report on Serbia's progress

¹⁸⁷Article 306 strongly follows the American plea bargaining model that the court has the right to

307, the public prosecutor; the defendant as well as the defense counsel can appeal against the decision of the court denying the plea agreement within 8 days of the ruling.

The parameters of what the content of a plea bargain should be are set in article 305.

As mentioned above there are certain conditions which must be met before a plea agreement will be considered not to infringe the defendant's fair trial right. The proposed articles follow closely the U.S. model this is evident from the fact that a plea agreement will only be accepted if the defendant 'knowingly and voluntarily' confessed to the criminal offence or criminal offences; that the defendant is also fully aware of the consequences of waiving their right to a trial, and most importantly that the evidence available does not run contrary to the defendant's confession. As is the case in Hungary a defendant will be considered to be a 'cooperating defendant' where, as part of the plea agreement, they will testify against a fellow defendant or give evidence concerning criminal activity in return for a sentence reduction.¹⁸⁸ This will only occur if the 'proving or preventing the criminal offence referred to in Article 162 (paragraph 1 item 1) of this Code outweighs the consequences of the criminal offence he had committed (cooperating defendant)' (see Article 320).

In connection with ensuring that the defendant has 'knowingly and voluntarily' entered into the plea agreement a further safeguard is provided for in the form of the preparatory hearing. This is a mechanism by which the president of the court can hear from all of the parties to ensure that all of the procedural steps have been complied with so that the case will be able to proceed to trial without any problems. The article 348 specifically provides that the prosecutor and the defendant have to notify the president of the panel that a plea agreement has been reached. They must also make it clear to the president of the panel if the plea agreement refers to all or some of the charges on the indictment if only to a few then the indictment must be severed so as to reflect this fact. Once the plea agreement has been announced and the charges presented to the president of the panel the president will then ask the defendant if he understood the charges. If the president is not convinced that the defendant has understood the charges against him the president of the panel is then within his remit to read the charges again in such a way in order to make them understandable to the defendant. The president will then ask the defendant if

not necessarily implement the agreed plea bargain (Article 306 (1))

¹⁸⁸Article 320 part b

they want to state their position in relation to the charges and to state his position regarding the restitution claim that is if there is to be one filed. Finally, the president of the panel will turn to the question of the defendant's confession. If the president of the panel is not convinced that the defendant has understood the gravity of their confession as well as the meaning and its consequences for them then the president is within their powers to relay to the defendant in such a way that they would understand the meaning and consequences of their confession. At this stage the defendant is not required to state their position with regards to whether or not they confess to the alleged charges.¹⁸⁹

Serbia is at a unique crossroads but instead of seizing the opportunity to underpin some much needed fundamental trial rights it is following the example of its European neighbours. Here we can truly see a case of copy paste of legislation into a system which lacks the historical guarantees of the rule of law to ensure that the indigent do not slip through the safety net. All is not lost yet but much work must be done to ensure that justice is not sold for some cheap and not so cheerful negotiated justice.

In order to better understand the placing of plea bargaining it has to be understood in the context of the dispute between parties. Langer argues that the method of legal transplant is ineffective as it is misleading because a "true" transplant of ideas does not always occur. Similarly, to Pierre Legrand, who argues that legal transplants are impossible because of the very nature of the fact that when transferring a rule from one system to another it is never the same and also more importantly the context within which the rule is applied, is not the same.

6.6 Plea Bargaining in the ECtHR case law

The ECtHR itself is no stranger to the use of methods to expedite its own backlog of cases. One of the major criticisms of the ECtHR is the fact that it has too many cases resulting in prolonged waiting. As a result of the ECtHR being under considerable pressure to work its way through its backlog of cases in an expeditious manner the mechanism of friendly settlements and unilateral declarations have arisen. The practice of friendly settlements is more widespread in the use of civil proceedings.

¹⁸⁹Article 392 of the criminal code

The principle of unilateral declaration operates where a 'friendly settlement' has not been successful between the ECtHR and the State. In these kinds of situations, the government may choose to make a declaration whereby they recognise that they have committed a violation in contravention of the ECHR and then undertake to provide the applicant with redress¹⁹⁰. This procedure is governed by Rule 62A of the Rules of Court. The declaration, unlike the friendly settlement, must be made in open court with the opportunity for the applicant to present to the ECtHR any reasons why the ECtHR should refuse the declaration¹⁹¹. If the applicant is satisfied with the terms of the unilateral declaration then the case will be struck off the list. If the applicant would like further consideration on the case by the court then the Justices will have to determine if the extra proceedings are justified. If the Court determines that it is no longer justified to pursue the case¹⁹², then the unilateral decision must satisfy the following non-exhaustive list:

- Existence of sufficiently well-established case-law in the matter raised by the application.
- Clear acknowledgement of a violation of the Convention in respect of the applicant – with an explicit indication of the nature of the violation.
- Adequate redress, in line with the Court's case-law on just satisfaction.
- Where appropriate undertakings of a general nature (amendment of legislation or administrative practice, introduction of new policy, etc.)
- Respect for human rights: the unilateral declaration must provide a sufficient basis for the Court to find that respect for human rights does not require the continued examination of the application.¹⁹³

This resolution process is also attractive for all involved parties as the government issues a public apology and avoids having to go to trial. Most of the ECtHR case law dealing with the application of the unilateral declaration have concerned cases with extremely long proceedings. The ECtHR has focused mainly on the procedural relief for the applicant rather than plea bargaining practice as it relates to the equality of arms between the parties.

¹⁹⁰http://www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf

¹⁹¹http://www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf

¹⁹²Article 37 (1) (c)

¹⁹³http://www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf, accessed on the 30th of July 2013

There are a few cases where the court has addressed the question of whether the plea bargain practice infringes the right to a fair trial of the individual and these are discussed in the following sections.

6.6.1 Deweer v. Belgium (Application number 6903/75)

In the case of *Deweer v Belgium*¹⁹⁴ the applicant died during the application process but his widow and his three daughters continued the application as they considered themselves to have a moral and material interest in seeing the proceedings through to completion. The deceased applicant owned a shop employing several member of staff. His shop was the subject of an Economic Inspectorate General inspection where it was found that there was an infringement of the Ministerial Decree of 9 August 1974 for fixing the price of selling beef and pig meat. The applicant, when questioned, made a statement in which he declared that he had made a mistake, in good faith, by mixing up the meat category. This accounted for the difference in the price of the meat. He mentioned that as soon as he was made aware of this fact he subsequently corrected the prices.

After the Inspection and the statement was taken from the deceased applicant, the Louvain procureur du Roi ordered the closure of the shop within forty-eight hours of the notification of the decisions. The applicant was given two options, the first was a friendly settlement which involved paying 10,000 BF and the enforced closure would cease the day after that payment was received or to make the payment on the date that the judgement was passed on the offence. The applicant was given eight days to show whether he accepted the settlement. It was recognised that the offence would not constitute imprisonment but if the settlement was not accepted greater fines and a trial would incur. The settlement was a way to avoid the trial and the closure of the applicant's shop. The applicant accepted the settlement and responded by letter. In the letter, he also outlined several problems with the handling of his case and also reserved the right to pursue restitution in the civil courts. He stated that the only reason that he paid the settlement money was to limit the damage suffered by him and the prejudice that he had also suffered which came from the shop closure.

The payment which was made by the applicant,

“Although often referred to as a fine by way of settlement, the payment

¹⁹⁴Application No 6903/75, Judgment, Strasbourg, 27 February 1980

thus made was not regarded in Belgian law as a penalty. Consequently, the payment could not be taken into consideration when dealing with further offences and was not entered on the judicial records.”¹⁹⁵

The Commission was of the opinion that it was the combined use of the offer of settlement or the closure decisions which would infringe Article 6 (1). The State submitted that the order of the *procureur du Roi* used to provisionally close the applicant’s shop was a ‘control and safety measure’ and it was not intended to, in the wording of Article 6 (1) to be a determination of his criminal or civil rights and obligations¹⁹⁶. The State further argued that whatever was reached in the settlement could not have affected the applicant’s right to a fair and public hearing.

“there is nothing in the ... Convention ... to prohibit the combined application of the friendly settlement and provisional closure procedures.”¹⁹⁷

The ECtHR stated that it considers cases on an individual basis and will limit itself to the discussion of the facts raised by the case. The ECtHR determined that the issue before it is to be decided in relation to Article 6 (1) was whether the rule and provisions set out in paragraphs 1 and 2 of section 11 of the 1945/1971 Act were applied in the ‘specific circumstances’ in a combined way that is compatible with the ECHR¹⁹⁸. It was agreed that criminal proceedings had been instigated against the applicant. The applicant did not have the status of the ‘accusé’ at the time the *procureur du Roi* instigated the proceedings. There was no arrest or official notification of the impending prosecution. The applicant was presented with the available options and it was up to him decide his course of actions. When the *procureur du Roi* wrote to him, he offered the option of avoiding prosecution by paying the sum of money. There were a string of events which led the ECtHR to conclude that there could be a “charge” determined in line with Article 6 (1).

The charge could be said to be the official notification given The ECtHR considers that to be from the 30th of September 1974 that the applicant was under a criminal charge.

During this process the *procureur du Roi* held back the threat of an even greater penalty as well as trial to persuade the applicant not to go to trial. This is a very similar situation to the use of plea bargaining in criminal cases.

¹⁹⁵at para 15, Application number 6903/75

¹⁹⁶see para 39, Application number 6903/75

¹⁹⁷see para 39, Application number 6903/75

¹⁹⁸see para 40, Application number 6903/75

The State argued that settlements of all kinds take place with some form of constraint or a threat of escalation with the result of serious prejudice for the applicant. The State also outlined that in most cases, that the mere possibility of a criminal trial is a sufficient enough of threat to encourage applicants to forgo their right to a trial. Even though the ECtHR recognised that this practice does occur the pressure which is sometimes applied, is not in contravention of convention so long as the requirements of both Articles 6 and 7 are not infringed. In this way, the member states are, “free to designate and prosecute as a criminal offence conduct not constituting the normal exercise of one of the rights it protects.”¹⁹⁹

It was the threat of the closure order and the subsequent acceptance of the settlement that was the real issue of the applicant’s complaint. It was asserted that even though the applicant paid 10,000 Bf, the Act enabled a possible range of fine from 3,000 BF to 30,000,000 BF.t. This disproportion between the two amounts added to the pressure for the acceptance of the settlement. Unsurprisingly, in these circumstances, the applicant accepted the settlement.

The ECtHR ultimately held that the practice of the settlement in the Belgian context was,

“To sum up, Mr. Deweer’s waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention *was tainted by constraint.*” (emphasis mine)²⁰⁰

The ECtHR stated that there was no need to consider whether or not the waiver of the right to a trial had also infringed paragraphs 2 and 3 of Article 6 as the question was entirely subsumed by Article 6 (1). It was agreed that the applicant was completely deprived of the right to a fair trial because, “under constraint, he agreed to its waiver.”²⁰¹. The ECtHR held unanimously that there had indeed been a breach of Article 6 (1).

6.6.1.1 Natsvlishili and Togonidze v Georgia (Application Number 9043/05)

In the more recent case of Natsvlishvili and Togonidze v Georgia²⁰² the court addressed for the first time the specific question of plea bargaining as it applies to

¹⁹⁹see para 51

²⁰⁰see para 54

²⁰¹see para 56

²⁰²Judgment, Strasbourg 29 April 2014, Application No. 9043/05

Article 6. This is the first case where the court had to discuss the question of compatibility with the ECHR.

The ECtHR considered that there had been no violation of Article 6 (1), or (2) of the ECHR holding that plea bargaining between prosecution and defence [was said to be] a common feature of European criminal justice systems. It has become a widely accepted practice but not uniform in its implementation. This lack of uniformity also means that its application is not always compatible with the ECHR. The Natsvlishvili case stated that so long as plea bargaining is accompanied with sufficient safeguards against abuse, its application is not open to criticism before the ECHR. The court based its decision heavily upon the fact that Mr Natsvlishvili entered into the plea bargain voluntarily and having understood its consequences. The ECtHR also noted the fact that within the Georgian legal system plea bargaining was a procedure that was integrated into its criminal system and as such there were safeguards in place to protect the defendant. The ECtHR relied upon this fact when coming to the conclusion that it was not considering the compatibility with the ECHR. Mr Natsvlishvili's complaint is, unfortunately not uncommon, he alleged in his application that the circumstances of his arrest (the fact that he was made to share a cell with the man that kidnapped as well as four other for murder was intimidating), the fact that his conviction would not be examined on the merits and that the decision of the court would be final and not subject to an appeal, and finally that he was threatened by the Georgian authorities not to pursue an application with the ECtHR otherwise they would annul the plea bargain and reinstate criminal proceedings against him, all amounted to a situation where he was left in a position whereby he had no other choice but to accept the plea bargain.

The circumstances of the complaint are not unique but how the ECtHR decided is. The court first considered that under Article 6 (1) that the practice of obtaining a lesser sentence via a plea bargain by waiving certain procedural rights did not present a problem under Article 6 but it must be established that the defendant has, entered into the plea bargain voluntarily, having understood its contents and consequences. If this is the case then the plea bargain cannot be discussed before the ECtHR. The court also considered the application made under Article 2 of Protocol 7 and held that so long as Mr Natsvlishvili had waived his right knowingly then his waiver of the right to appeal was not in contravention of his procedural rights.

Concerning the question of his presumption of innocence the ECtHR looked solely

at the statements that had been made to the media concerning the case in the lead up to the trial. As stated elsewhere the presumption of innocence has been defined very narrowly by the court. They determined that there had been no violation of his presumption of innocence as all statements made to the press had not directly and specifically referred to Mr Natsvlishvili. The court did not consider whether the practice of plea bargaining itself interfered with the presumption of innocence. The ECtHR here missed the opportunity to address this question.

It is essential that the safeguards that are in place be analysed by the ECtHR to see if they have been included and are in place at the time the plea bargain was entered into so as to really determine whether the defendant entered into it voluntarily.

Article 6 (3) entitles the defendant to a lawyer at all stages of the trial and the plea bargain unless they waive their right. This was another argument mounted by the applicant that he had not been entitled to legal representation from the beginning of the trial.

There was one dissenting judge, Judge Gyulumyan who stated that he was particularly concerned with the fairness of the plea bargain in the Georgian system. His remarks are true and are real concerns not just for the Georgian system but for the application of the plea bargain in any system. The judge's remarks concerned the fact that the plea bargaining system operated on the basis that, "allowed some alleged offenders to use the proceeds of their crime to buy their way out of prison and, on the other, risks being applied arbitrarily, abusively and even for political reasons."²⁰³ He cited the fact that there had been "several shady factual circumstances", in the lead up to the acceptance of the plea bargain namely the conditions of his detention which called into question the, presumption of equality between the parties pending the relevant negotiations.²⁰⁴

Judge Gyulumyan agreed with the majority that there had been no violation of Article 6 (2) or Article 1 of Protocol No. 1 to the Convention. However, he did find several factors which led him to the conclusion that the plea bargain had violated Article 6 (1) of the Convention and Article 2 of Protocol No. 7.

One factor which he highlighted was the issue that Mr Natsvlishvili agreed to a bargain with the prosecution in respect of the sentence and did not plead guilty to the charges. This was a distinction that the majority had failed to make. The

²⁰³para 1. of the partly dissenting opinion of Judge Gyulumyan

²⁰⁴para 3. of the partly dissenting opinion of Judge Gyulumyan

fact that there was no guilty plea would indicate that a higher standard is required because the applicant had not admitted guilty. Therefore the domestic courts should subject the evidence to a much higher level of scrutiny than that which is required for those who admit their guilt.

Despite the fact that Judge Gyulumyan made the statement that he did not want to make observations about plea bargaining in general but rather limit his comments to the Georgian system there are five points which can be highlighted that have a general application.

Firstly, when determining whether the safeguards have been adhered to the ECtHR must see if there is a written record of the negotiations, this record will ensure that there are no procedural irregularities. Secondly, there must be no coercion or intimidation, thirdly that the principle of equality of arms is respected. fourthly, that there should be judicial supervision and finally that there should remain the right to appeal against a plea bargain. The last two points are interconnected in that without the judicial supervision (as in the case of Germany and Italy) it limits the fairness of the plea. Additionally, the right to appeal should not be used as a bargaining chip by the prosecution to secure a waiver of procedural rights. The right to appeal and plea bargaining do raise complicated question concerning the presumption of innocence especially if the case is tried before the same judge.

The approach of the ECtHR in this case raises fundamental questions as to what message is being sent concerning the presumption of innocence. This model and shift in approach has resulted in not only the national level but also at the ECtHR in no longer looking for the truth and justice as the goal but guilt and moving the case forwards quickly. As a result plea bargaining still has a long way to go before it is compatible with the ECHR.

The presumption of innocence is deemed to secure the fairness of a conviction and to provide a base for the right of the defence. The reverse onus of proof that plea bargaining incurs would only be compatible with article 6 (2) of the ECHR if both fairness and rights of the defense are observed. The truth is established between the arguments of the two equal parties. The ECtHR case law has held that it requires three key elements to be protected according to the interpretation of Article 6 (2). Firstly, that the right not to be publicly presented as convicted by public authorities before the final judgment, secondly, the fact that the burden of proof is on the prosecution and that any reasonable doubt or guilt should benefit

the accused and finally the right of the accused to be informed of the accusation.

The decision in *Natsvlisvili* concerning the question of the presumption of innocence comes at an important time when the commission is proposing the directive on presumption of innocence. The European Parliament and the Council had to take into consideration the subsidiarity and proportionality principles when it comes to the approximation of the rules across the member states so as to enhance mutual trust concerning the right to be presumed innocent. The lack of coherency leads to a lack of mutual trust between judicial authorities. The aim of the directive is to complement the pre-existing safeguards and to ensure that the presumption of innocence is protected from the very beginning of the criminal proceedings. So as to ensure that the directive does not conflict with the principle of proportionality it is stipulated in the directive that it only deals with, “certain aspects of presumption of innocence, that are more directly linked to the functioning of mutual recognition instruments and to police and judicial cooperation in criminal matters,”²⁰⁵ this is why it does not conflict with the purpose and spirit of the proportionality principle.

There is an undeniable link between plea bargaining and the presumption of innocence. What plea bargaining and the ECtHR are asking us to do is to take sides when it comes to the reverse onus of proof. The one version is that plea bargaining is indeed compatible with the rationale of presumption and that the presumption is not an absolute one in that the right may be waived making it not an inalienable right. Alternatively, it could be held that the presumption provides for interferences such as plea bargaining. Plea bargaining could be compatible with the ECHR if the whole process is fair. In these instances waiver becomes the pivotal point in the debate over compatibility. Despite this it is impossible to deny the fact that the presumption of innocence is a safeguard against the presumption of guilt. What must be clearly established is the waiver of rights. It must be ensured that procedural safeguards such as the presumption of innocence are respected to ensure that the plea bargain does not violate them.

²⁰⁵Proposal for a Directive of the European Parliament and of the Council on the Strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821/2, para 49

6.7 More pitfalls than benefits

This chapter has provided an in depth discussion of the key tensions which arise when plea bargaining is used in the Justice process in various different jurisdictions.

It has been illustrated, particularly in the case of the U.S., that plea bargaining and the access to effective legal counsel have become truly intertwined with respect to ensuring a fair trial. The U.S. has focused upon fairness in plea bargaining by considering whether the defendant had adequate legal advice when they considered accepting the plea bargain. The utmost concern of the U.K. and its European counterparts is ensuring that the procedural elements are fair. The role of the lawyer to the plea bargaining process is a concept which is becoming more important in Europe. The slow increase in lawyers present at the pre-trial investigative stage, when the plea bargaining occurs, has happened as a result of ECtHR judgments. The benefits of the plea bargain are as the ECtHR describes them to be the benefits of speedy adjudication of criminal cases which results in the workload of both the prosecutors and courts being less. Additionally, it is a very successful tool which can be used to combat corruption and organised crime and also help to reduce the number of prison sentences.

Unfortunately the benefits do little to counter the pitfalls which are experienced in a plea bargain.

The U.K. has developed a plea bargaining model whereby defendants are encouraged to plead guilty at an earlier stage of the proceedings and in return the defendant will receive up to one third reduction off their sentence. There is a general disapproval of parties meeting with the judge in chambers to discuss the case as it erodes the transparency as well as public nature of the trial. It is inappropriate for a judge to give the impression to the defendant that the submission of a plea results in a certain sentence. The U.K. does allow for the judge to make an indication of sentence using the sentencing guidelines. In this respect, the U.K. has less opportunity than the U.S. for formal plea bargaining regulation because of the lack of certainty over the overall awarded sentence in a particular situation. The U.S. sentencing guidelines allow for more room for arguing for a sentence reduction. Plea bargaining, for the most part, is unregulated in the U.K. however serious fraud offences are subject to the regulation of legislation partly to do with the fact that the bargain involves large amounts of money. Despite this, there is a general distaste towards plea bargaining practices as it erodes the principles of an adversarial trial which has as its focus of

the attainment of justice. The dislike also arises as plea bargaining degrades the rights of the defendant(s) as well as affording the possibility of stricter and harsher sentences evasion.

The U.S. has the most developed system of plea bargaining. The original purpose and intention of plea bargaining has morphed from its conception in *Brady v. United States*. It was originally intended as a mechanism to be used when an individual, who has overwhelming evidence of guilt against them, to plead guilty and to be afforded the opportunity to “bargain” something out of the situation. The practice in the U.S. has become so far removed from this original position that many critics now argue that the practice is employed rather as a deterrent to deny people their right to a fair trial. This is done by imposing upon them a harsher penalty than the one received under the terms of the plea. The prevalent myth that those who are innocent do not plead guilty has been challenged by several studies most notably that of Dervan and Edkins. Their study indicated that the innocent do plead guilty because they do not want to face jail time so they would rather admit guilt than risk being sent down. Ineffective assistance of counsel cases have led the U.S. Supreme Court to decide that the Sixth Amendment assures both the right to legal counsel as well as the right to a jury trial. The U.S. Supreme Court has now extended the right to effective legal assistance to the pre-trial phase including the plea bargaining process. In addition to this, if the defendant rejected the plea offer on the basis of ineffective legal counsel then the defendant may have recourse to have their case reopened and the plea re-offered to them.

The European development of plea bargaining has developed in a multifaceted way which is highly dependant upon the studied country. The countries selected for the study have developed a legal system which all have introduced a version of plea bargaining so as to make their systems more efficient. These countries require that the defendant must, to some extent, either admit guilt, confess or waive their right to a trial in order to receive the benefit of the plea. This practice does raise questions about the sanctity of the presumption of innocence as well as the fact that once one admits guilt to a crime should it be possible for that individual to later upon appeal revoke their admission of guilt on the premises that it was achieved through coercion of the plea bargain? This is a question that the U.S. Supreme Court Justices are currently grappling with. The other issue is that plea bargaining makes a mockery of a system where it is intended to deliver justice but how can it be justice when it can be traded and given away in order to produce a result.

The ECtHR has addressed the issue of plea bargaining in terms of causing possible violation of the ECHR for the applicant rather than the content, matter and practice of plea bargaining. The ECtHR does have a vast backlog of cases and this is used by those who would seek to undermine and highlight the ineffectiveness of the ECtHR. Plea bargaining exists at the ECtHR in the form of “friendly settlements” and “unilateral declarations” which are used by the court to encourage the accused State to reach a favourable settlement. The use of these practices invariably brings up the question of what about the principle of equality of arms as the bargaining position between the applicant and the State this situation is invariably even more extreme. Despite these practices employed by the ECtHR to reduce its own caseload, the court will frown and inevitably find a violation of the ECHR if the use of a plea bargain will mean that the defendant was coerced into waiving their right to a trial (*Deweert v. Belgium*). Where the defendant’s ability to make an informed decision both about the plea bargain and the option of going to trial is tainted by constraint of any kind then it will be deemed that their Article 6 (1) right has been infringed.

There are undeniable benefits of plea bargaining, it reduces costs, brings cases to a speedy conclusion, reduces the backlog of cases and helps to bring those guilty of crimes to justice. In all the countries studied, the drive for adopting plea bargaining was the increase in efficiency and effectiveness of the Judiciary. Despite these benefits, the elephant in the room still remains. What happens to those who are innocent of the crime(s) with which they are charged? We trust in a system which protects the innocent and punishes the guilty. The criminal justice system is reliant upon people having faith in the system that is why it is essential for trials to be transparent and public. People need to know what happens in courts. When the innocent are punished for exercising their fundamental right to a trial it does beg the question of who does the criminal justice system serve? Have we sold out true justice for the cheap convenient fast-food of plea bargaining McJustice?

7 Conclusions and recommendations

The original overarching hypothesis of the thesis was that there is now a post-modernistic interpretation of the trial and that the conflict with the right to a fair trial originates from the problem that the language of fundamental rights is couched in modernistic terminology.

As such there is a need to re-evaluate the purpose, if any, of the trial in this setting. Critical to this debate is the question of how should plea bargaining be understood in the language of modernism when in actual fact it is a post-modernistic practice. This position informed the research questions which were first posed in the research methodology. The questions to consider were,

1. What constitutes a fair trial?
2. What safeguards are in place to protect the defendant's right to a fair trial?
3. What are those structures/practices which act as barriers to access to justice?
4. Does the expedited form of justice that plea bargaining offers, require a reconceptualisation of the right to a fair trial?
5. What is the role of plea bargaining within the modern trial?

7.0.1 What constitutes a fair trial?

This was established on the basis of the ECHR, the ICCPR, and the case law of the ECtHR. Additionally the concept of overall fairness of the trial was considered in this respect because it was important to identify the parameters of fairness in the trial. The reason for the need to establish the parameters was due to the fact that it was necessary to decide where if at all did plea bargaining fit into the discussion about what constitutes a fair trial. It was concluded that a fair trial must be considered to be by the ECtHR as expansive as it is flexible. This approach allows it to adapt

to the changing times which is necessary. These debates on fairness, access to legal counsel, and justice bring us to the question are there really rights for all.

H. L. A. Hart's work focuses upon addressing the issue of what is a 'right'; the moral justifications for interfering with that right and the 'right' to a fair trial.¹ Rights are classified as special and general. These categories are based upon the premise that all men have the right to be treated equally free.²

It was argued that current modern interpretations of fairness are inadequate to deal with the very real pressures of the plea bargain. This was evidenced in the recent decision of the ECtHR concerning plea bargaining.

When assessing whether the trial has been fair the ECtHR looks at, if, "taken as a whole, guarantees that a person charged with a criminal offence should ... be entitled to be present and participate effectively in the hearing concerning the determination of criminal charges against him."³ Looking to the overall fairness of the trial the ECtHR will take into consideration the doctrine of margin of appreciation when the Court declares that it does not act as a court of fourth instance as the ECtHR does not assess whether the domestic law has been applied appropriately or to assess the facts.⁴ The ECtHR will rather, in these circumstances, focus on, "The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair."⁵ This notion of what constitutes fair is set out in Article 6 and enumerated in its paragraphs in the form of a non exhaustive list of minimum requirements.

In light of this it can be stated that there are two parts which make up the whole of the complete concept of the right to a fair trial,

1. the expression of individual autonomy in the form of the right to be represented as well as take part in an active role in their own defence;
2. is the fact that in order for a trial to be conceived of as being fair it is necessary for it to be public and the verdict must be reached through either an accusatorial or adversarial method.⁶

¹Hart, "Are There Any Natural Rights?"

²Ibid.

³Zhuk v Ukraine Application Number 45783/05, Judgment of 21 October 2010, para 26

⁴Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

⁵Allan v U. K. , Application Number 48539/99, Judgment of 5 November 2002, para 42

⁶Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

It was on the basis of these principles that the idea of what constitutes fairness in the context of the plea bargain was then later expanded and developed upon.

7.0.2 What safeguards are in place to protect the defendant's right to a fair trial?

It was established that there are extensive rights set out in the domestic legislation and constitutions of the countries analysed in this study. For the three member states of the E.U. there is the additional provision of minimum standards set out in the ECHR. Additionally there are the E.U. directives which in the spirit of mutual trust and harmonisation seek to establish a common standard of protection for the rights of the defendant in the trial.

It is important what type of trial process one conceives of because it impacts upon the way in which the principle of equality of arms is conceived of as well as applied.

The ancient Roman principle of *audi alteram partem* which is widely accepted to be the modern day foundation for the principle of equality of arms has two parts to it. The first is that the court should be bias-free in substance and procedure. This is supported by there being an independent and impartial judiciary in the first place. Secondly, there is the right to an equal and effective access to the court.⁷ What is significant about the *audi alteram partem* principle is that it provides that a person hears both sides of the case because it is not fair to have one party unheard. This is not just because the situation would be unfair but more importantly because a mistake could be made. Within this is the inherent proposition that there should be provisions in place which secure a fair trial for both of the parties. As long as the judge is fair in their approach then it will be considered that both of the parties will have had a fair trial. The fact that mistakes could be and are made was illustrated by the study of Derven and Eakins where innocent students pleaded guilty. They were also not provided with the dossier of the information against them when reaching their decision to plead guilty or not.

Equality of arms only stretches so far as to give each party the reasonable opportunity to present their case in court in conditions which do not place the other side at a considerable disadvantage. If we were to apply this to the plea bargaining situation the fact that each party must be given a reasonable opportunity to present

⁷Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*.

their case is something which is forfeited by this practice. There is the mistaken belief that procedural equality equates with actual and effective equality. This is not the case. In order to establish that the principle of equality of arms has been infringed the standard which must be reached is that of 'substantial disadvantage'. The principle of equality of arms does indeed have several elements which must be met, safeguards, so as to ensure the minimum standard are not slipped below. But what was found in the case of plea bargaining was that because it did not fit within the natural and traditional boundaries of a trial several of the safeguards were not applicable to it.

7.0.3 What are those structures/practices which act as barriers to access to justice?

The first such barrier that was identified was the institutional weaknesses and lack of political will which serve to limit accessibility. In conjunction with this barrier is the ineffective implementation of ECtHR decisions, or the incorrect interpretation of fundamental principles by the domestic courts. One such example is the U.S. Supreme Court concerning the exact interpretation of the sixth amendment in relation to access to counsel and its interplay with the right to a fair trial.

A second barrier to justice is the availability of legal aid at the domestic level. Within the E.U. member states they are awarded the margin of appreciation when it comes to the internal regulation of the appointment and allocation process. Not a single country in the study had a legal aid system which functioned in such a way that it would not be a barrier to justice. Two countries the United Kingdom and Hungary stood out particularly for their legal provisions being far below par. In the case of the United Kingdom it is a matter of balancing the tension between the financial need for reforms and the loss of representation for certain groups of people. In Hungary the concern with legal aid relates to the lack of impartiality in the allocation process. In both scenarios defendant's are opting for the plea bargain due to financial constraints. It is important to note that this trend is not necessarily because individuals want to but rather there is a lack of institutional frameworks to provide the financial support for them to take their case to trial. As such the plea bargain is the best viable option available for them sometimes.

The E. U., in recognising the need to work towards harmonising the access to justice

of citizens issued a roadmap. The E. U. adopted three directives in its roadmap. The first two directives which have been adopted are the, Directive on the right to interpretation and translation in criminal proceedings⁸ and the Directive on the right to information in criminal proceedings.⁹ The third Directive which has caused some problems amongst the Member States when it comes to its adoption is the Directive on rights of access to a lawyer in criminal proceedings. The U. K. has all opted out of the latest Directive on the rights of access to a lawyer in criminal proceedings. The reason that the U. K. has opted out of the Directive is because of the ongoing cost cutting in the U. K. relating to the legal aid costs in the form of the Legal Aid, Sentencing and Punishment of Offenders Act (clause 12). This clause 12 concerns the opportunity to introduce at a later date secondary legislation removing the automatic right of those arrested and in police custody to have access to a lawyer at a police station. Currently everyone is entitled to free advice at the police station during the interview in more serious cases.

7.0.4 Does the expedited form of justice that plea bargaining offers, require a reconceptualisation of the right to a fair trial?

This research question formed the heart of the thesis. It was around this question that all of the other aspects of the research questions were informed. As the research progressed it quickly became evident that the traditional picture of the trial had evolved. It still existed but albeit in more than one form. This is a good phenomenon as it shows that the law and justice are adapting to the times so as to ensure that the procedure remain relevant and applicable. Invariably expedited forms of justice do require a reconceptualisation of the way that the trial works. In several of the countries observed plea bargaining had developed as an outsider to the proceedings because of constitutional conflicts. Because of this fact several reforms had to be undertaken so as to ensure compatibility or failing that judicial ingenuity was employed.

Plea bargaining does have a place, an important role to play in our justice systems

⁸Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

⁹Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

but it must be invited in so that it can be better regulated and safeguards ensured for the defendant. The plea bargain is forcing a rethinking of not necessarily the format of the trial itself but the core jurisprudential concepts which form the basis of the trial. In particular the pursuit of truth, the presumption of innocence and the right to appeal. Each of these concepts plays an integral role in the trial process and each has extensive protections to ensure that they are respected. In the context of the plea bargain it was found that these three concepts are considered, wrongly, to be on the periphery.

7.0.5 What is the role of plea bargaining within the modern trial?

This question was posed more as to see if there is actually a place for it within our trial systems. Unsurprisingly, the research revealed that plea bargaining does have a role and an important one at that. There is an undeniable need for expedient and efficient justice and plea bargaining is an excellent tool by which to achieve the desired outcome. Despite this fact there is a need to approach its application with caution.

This thesis has shown that fairness of the trial should encompass such elements as the right to access legal counsel. Limited resources and the global economic recession has meant that the indigent defendant has felt the negative repercussions, particularly in situations where the guarantees such as the right to a fair trial have been eroded in favour of expediting the legal process. Competing theories and concepts of justice have been explored which expose the reality that the practice of plea bargaining has far reaching inadequacies. Solutions to these grievances have been explored and it has been shown that the conviction of the innocent is higher in systems in which the presumption of innocence and the burden of proof are not upheld. This factor has been recognised by the European Parliament and Council in that they have proposed the directive on the presumption of innocence and the right to be present at trial.

The role of plea bargaining within the modern trial has the function of challenging the way in which view justice to be done. Its role if nothing else will be to push the envelope concerning the debate about the direction of the modern trial. Plea bargaining provides an excellent measurement by which to gauge the climate of

modern trials.

All the countries studied have the practice of plea bargaining as an integrated part of the criminal procedure systems. Some benefits of plea bargaining include the expedition of the trial; an increase in court efficiency and it also reduces the number of prison sentences handed out. These benefits do not outweigh the pitfalls. The fundamental problem with plea bargaining is the impact it has on the right to a fair trial. Much has been said about its shortcomings with few effective suggested solutions. Plea bargaining strongly impacts upon the presumption of innocence and the equality of arms. The presumption of innocence is built upon the belief that it is better that ten guilty people go free than having one innocent wrongfully convicted. The discussion of the overall fairness of the trial is a pivotal factor where the ECtHR used it as a means by which to determine adherence to the procedural safeguards. . There has yet to be proper discussion of the use of waivers of procedural safeguards as the ECtHR will not discuss the matter of compatibility if it views the defendant made their decision voluntarily to accept a plea bargain. This point leads to the fundamental case of *Salduz v Turkey* where it was deemed necessary for the defendant to have an effective defence. The same terminology is used in plea bargaining cases in the U.S. Despite this there has yet to be made a coherent connection between the two practices. The right to an effective defence is pivotal to the plea bargain and the right to a fair trial.

The truth is no longer central to the workings and conceptualisations of a fair and just trial system, then what is? It could be suggested then that the phrase, “the whole truth and nothing but the truth so help me God”, is rather an unachievable state. The whole truth is a subjective state where one cannot really reach an objective stance. As such the pursuit of justice is a fallacy behind which legal practitioners and scholars have hidden. In reality they have been practicing a game of “almost truth” or in the worst cases the denial of the pursuit of the truth and justice altogether. This is being exposed via the plea bargaining model.

This thesis shows that the principle of participation has two interrelated conditions of the right to notice and the right to be heard. According to the Article 6 case law, the conclusion can be drawn that the procedural forms do not have to be exactly identical in order for them to be considered procedurally fair. Procedural fairness and cost requirements need to be balanced against each other in order for a fair result to be reached. Legal representation should not sacrificed on the altar of costs

benefits. Participation in criminal trials must be meaningful as well as effective. When discussing effective participation it is necessary to discuss the principle of equality of arms. The ECtHR has developed this principle over the years to be more expansive. Effective participation has a rich history in the case law of the U.S. Supreme Court where the court has established that in the context of plea bargaining the onus is upon the defendant to establish that the assistance they received was ineffective. The defendant in plea bargaining experiences not only has to prove ineffective assistance of counsel but also bears the reverse presumption of innocence. Both of these elements and in particular the latter of the two seeks to erode their fundamental rights. The ECtHR has yet to consider the presumption of innocence in the context of the plea bargain relationship. This is in part due to the fact that they will not consider a plea bargain where they can be satisfied that the defendant has knowingly and voluntarily waived their right to a fair trial. The ECtHR holds a similar position to that of Justice Scalia of the U.S. Supreme Court, when if it can be established that the process was fair and the defendant was awarded the opportunity the right to a fair trial they will not consider the plea itself.

The principle of equality of arms encompasses wider expectations of what a defense should be afforded both in preparation and duration of trial proceedings. Participation, accuracy and efficiency are all key elements which have all developed out of equality of arms. Effective participation is being eroded by the plea bargaining practices and a new era is dawning whereby the face of the trial is shifting. The E.U. is seeking to find solutions to redress these discrepancies especially the way that the presumption of innocence in the plea bargaining relationship has been woefully overlooked. It has become a legal black hole which results in legal uncertainty where the defendant is presumed guilty rather than rather than enjoying the right to be presumed innocent. It is the sad truth that some defendants plead guilty when they are innocent or others may be guilty but not of the specific charge. This shift is perceived as a necessary casualty of the efficient trial rather than a terrifying and alarming problem. It is nonsensical to talk of the defendant having the right to be presumed innocent because the plea bargain requires an admission of guilt. This situation shows once more that the presumption of innocence only applies to the in trial scenario.

The right to a legal defense is invariably connected with the right to access justice. This is evidenced by the ECtHR ruling in *Salduz v Turkey*. The ECtHR has es-

established that the presence of a lawyer is vital in ensuring access to justice. The lawyer acts as a conduit through which access to justice can be achieved. Necessity is seen as the inevitable detention of the defendant. It is this fear of detention which quashes challenges to the way in which the justice system is established. Giving way to necessity is the most troubling phenomenon of the criminal procedure which has been left hanging in the air in the context of plea bargaining. The defendant, realising the limits of law to ensure their justice, looks for ways to limit the damage by opting to use mechanisms which limit their right to a fair trial. These practices invariably raise the question of what about the principle of equality of arms as the bargaining position between the applicant and the State which is invariably even more extreme. The ECtHR has yet to provide clear signposts as to what direction the member states should be heading with the implementation of safeguards for defendants in the plea bargaining process. In addition to the lack of clear signposts the decision in *Salduz v Turkey* also needs to be clarified. There have arisen since its ruling, inconsistent practices concerning the implementation of when and how an individual should be informed of their right to access to counsel. The E.U. recognising that there is still a deficit in the provision of counsel issued in the remit of the Stockholm Programme and its Roadmap the Letter of Rights which is a template which can be used by the member states. The idea behind the Letter of Rights was to create a unified document which could then be given to the individual in their own language informing them of their rights. In principle the idea is to be lauded in practice it has several shortcomings. These shortcomings are that because the document is a template it does not specify what exactly should be included in the letter. Also because there is not a fixed format it results in a lack of uniformity in the information being provided to suspects and defendants. In addition to the practical information the ECtHR also needs to ensure consistent application of its principles across the member states by ensuring uniformity in its implementation.

7.1 Recommendations: The Way Forward and Beyond

The practice of plea bargaining is here to stay and there is no indication that any of the countries studied have plans to reduce its use within their systems. All of the countries investigated have stated that the reason for the use of plea bargaining was

to ensure a more expedient and efficient criminal justice system. It is also evident from the cases analysed that plea bargaining is not exempt from abuse. It can often be manipulated to serve the interests of the criminal. The criminal defendant can bargain for their justice reinforcing the standpoint of this thesis that the rich can buy their justice. Alternatively, the prosecutor can use it as a tool to intimidate, bully and coerce the defendant into giving them the desired result. Plea bargaining's strengths and weaknesses are well known and it would be acceptable to presume that solutions to these problems would be easy to identify and rectify. This is not the case. The use of plea bargaining has not featured in the ECtHR case law until April 2014 where it was only in the partly dissenting opinion of Judge Gyulumyan that the possibility that plea bargaining could infringe Article 6 was considered.

The ECtHR, in this case, did not address the question of a plea bargain in respect of the sentence alone and not pleading guilty. A distinction arises between pleading guilty to the charges or where the bargain relates solely to the guilty plea. This creates an uncertainty amongst the member states in the correct application of the plea bargaining mechanism.

The following recommendations are proposed, based upon the research contained within this thesis, as a means by which to direct the use of plea bargaining to ensure the utmost protection of the defendant's rights.

There is a need to keep a record of all of the negotiations between the prosecutor and defendant. This is a record which will ensure that the terms of the agreement are not deviated from without the express agreement of both of the parties. These pre-trial negotiations must be accessible and a copy given to the court so that the judge can also ascertain whether both sides are willing entered into the bargain. This requirement for the recording of plea bargains will only be effective if there are no procedural irregularities which form barriers to its realisation. This will require reforms in the legal culture of the practice of plea bargaining. In the U.S.A. the American Bar Association encouraged the registration of plea bargains so as to ensure ineffective assistance of counsel claims were avoided. This move for registration was motivated purely from the position that the courts wanted to reduce the amount of unnecessary time spent on ineffective assistance of counsel claims. Additionally, the registration was more of an act of awareness raising amongst the judiciary and legal profession than act for protecting the fundamental rights of the defendant. Similarly, the example of the U.K. shows that there is indeed a statutory

requirement to write the plea down by the defence according to the Criminal Justice Act 2003 Section 143(2). The Prosecution also has an obligation to write and prepare a statement concerning the plea and sentence to be provided to the court in order to assist them in the sentencing of the defendant. Again the provisions in the U.K. pertain more to administrative ease rather than the safeguarding of the procedural rights of the defendant.

In the case of Italy there is also a system of reporting plea bargains (this is conducted by the defence) in situations where the prosecutor must justify their reason to reject a defendant's request for a party agreed sentence. This is then sent to the judge for their consideration in the matter. The situation in Italy is the closest to providing a means of checks of balances to protect the defendant from the arbitrary dismissal by the prosecutor of a good plea bargain just because they do not like it.

Section 273(1)(a) of the German Criminal Procedure requires the fact that all negotiations before the trial are recorded. Both Hungary and Serbia require the documenting of the plea bargain so that the judge may be aware of the plea that was made.

All of the above methods for documenting the plea bargain are on paper correct and should be effective, however, the problem lies in the fact that the motivation is not necessarily the protection of fundamental rights and safeguards.

The attitude of "take it or leave it" plea bargains creates a tension of coercion. Too often the cases analysed were littered with instances of the defendant being detained; in deliberately stressful conditions; not being informed of the plea bargain on offer; lack of understanding of the other viable alternative options available to them or because of the lack of sentencing guidelines a real uncertainty as to the maximum imposable sentence. The prosecutor should not be allowed to threaten the defendant with charges which are unsupported by *prima facie* evidence. The fact that the prosecutor is and will always be in a more superior position is not disputed. What is disputed is the unfettered control of this power.

This practice does not allow the defendant to assess the value of the evidence against them and to mount a counter argument. An aspect which is integral to the equality of arms. This is counter to the fairness requirement of the right to a fair trial in that it has been established by the case law of the ECtHR that there is no safeguard if there is only a mere possibility to consult the documents. In this instance, there is not even a mere possibility to consult the documents containing the evidence. The

ability to consult the documents is likely to be an uphill struggle as the very purpose of the plea bargain is to circumvent the disclosure procedure.

The fairness of the trial will be assessed by taking into consideration the proceedings in their entirety. The ECtHR has stressed the importance of appearance in the administration of justice. It is important that the fairness of the proceedings is apparent. This element is currently not observed in plea bargaining as the bargain process itself is not open to scrutiny. Additionally, the ECtHR holds the principle of adversariality in high regard and in order to abide by this principle the member states must ensure that there is an opportunity for both parties to have knowledge of and comment on all of the evidence with a view to influencing the ECtHR's decision. The parties must be provided with a realistic opportunity of challenging the evidence in satisfactory conditions. As the fairness of the proceedings are assessed in their entirety an isolated irregularity may not be sufficient to render the proceedings as a whole unfair. All of these aspects serve to create an intimidating environment in which the defendant must make a decision this is often not helped by the lack of willingness on the part of both the defendant and the prosecution to go to trial. In the midst of this is the fact coercive techniques erode the presumption of equality of arms principle. It is vital for the C.o.E. to reinforce the sanctity of these principles. Initiatives such as the proposed directive on the presumption of innocence are welcomed.

In several of the jurisdictions discussed the defendant, as part of accepting the plea bargain, was required to revoke their right to appeal. This practice removes the possibility of judicial supervision of the fairness of the plea bargain. The requirement of waiving the right to appeal is also in part to do with the presumption of innocence. Once the defendant has pleaded guilt in relation to the charges against them it becomes very difficult for them then to perform the psychological gymnastics required to ignore the fact that they are appealing against their admission of guilt. Irrespective of this awkward positioning the right to appeal should not be used as a bartering chip. The significance of the right to appeal should not be underestimated. This works to reinforce the importance of safeguards being set in place so as to chart the process of the plea bargain from its inception to its acceptance.

There is also a further dimension to plea bargaining that has been left unaddressed. It concerns the situation when the defendant agrees to enter into a plea bargain with the prosecution concerning the sentence but does not want too plead guilty to the

charges. This occurred in the West Memphis Three case and in the U.S. it resulted in the phenomenon of the Alford pleas. This issue was not address fully by the ECtHR in the case of Natsvlashvili and Togonidze v. Georgia. In these circumstances it becomes even more important that the safeguards for the defendant ensure that basis for the charges against the defendant are well founded.

It is necessary to re-evaluate the current mechanisms in place which allow the defendant to waive their right to appeal. The presumption of innocence is being eroded on a wave of judicial efficiency reforms and equality of arms, the central component for justice, needs strong implementation to save it from the brink of extinction.

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M

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