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

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Ph.D Thesis

Szeged, Summer 2014

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1 Overview of the PhD

This PhD thesis explores the various conceptualisations of the right to a fair trial and particularly focuses on Article 6 (3) (c) of the European Convention on Human Rights. Particular attention is given to the the right to have counsel and representation at all stages of the trial. The thesis centres on the practice of plea bargaining and how this instrument is challenging the right to a fair trial.

The original hypothesis of the thesis was that the post-modernistic interpretation of the trial is in direct conflict with the right to a fair trial as the language of fundamental rights is couched in modernistic terminology.

The thesis discussed the relevant instruments which serve to protect and uphold the right to a fair trial. Both the national and regional documents are analysed from a comparative perspective. It was asserted that these practices which have developed 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 needs to be upheld. This thesis examined the tensions between the state and the defendant with respect to the protection of defendant's fair trial rights by employing a normative and comparative approach. The following countries were observed from a comparative perspective, the United Kingdom, Hungary, Germany, Italy, Serbia and the United States of America. These countries were selected on the basis that they all provide a working illustration of the different applications of the plea bargain.

The practice of plea bargaining challenges the very premise of the trial; which is to find the truth and see justice done. 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 also considered the relationship between plea bargaining and the principle of equality of arms. Equality of arms acts as a safeguard for the defendant. 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 argued that the current legal system is outdated when compared to current post- modernistic views of truth.

The thesis illustrated that it is becoming 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. The evident positives for engaging in plea bargaining practice do not address the numerous pitfalls with the most evident concern is that innocent defendants will plead guilty to a crime that they did not commit.

There is a need to re-evaluate the purpose of the trial and 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.

2 Scope of the PhD

In order to establish the scope of the PhD three key questions were raised.

2.1 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

¹H. L. A. Hart. "Are There Any Natural Rights?" In: *Philos. Rev.* 64.2 (1955), pp. 175–191.

²Ibid.

³Zhuk v Ukraine Application Number 45783/05, Judgment of 21 October 2010, para 26

⁴M. Fedorova. *The Principle of Equality of Arms in International Criminal Proceedings*. Intersentia, 2012.

S2.2 What safeguards are in place to protect the defendant's right to a fair trial?

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.

2.2 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.⁶ 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.

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'. 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.

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*.

2.3 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.

3 Structure of the PhD

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 equal 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 connection 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.

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.*⁷, 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 a need to address the fundamental violations. Plea bargaining in its original context is a good thing. Irrespective of this fact expansion to a wider sphere has resulted in an

⁷397 U. S. 742 (1970)

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.

4 Contributions of the PhD

The PhD thesis provides a novel contribution to the academic literature. The reason for this is that the literature has dealt with either questions of a fair trial or the conflicts of plea bargaining never together. Additionally, the thesis also discusses the related questions of effective defence in relation to the provision of counsel in the plea bargain. The thesis research question of does the expedited form of justice that plea bargaining offers, require a reconceptualisation of the right to a fair trial?

This question formed the heart of the thesis and it quickly became evident that the traditional picture of the trial had evolved into multiple forms. This phenomenon shows that law and justice are adapting to the times so as to ensure that the procedure remains 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. The thesis contributed to the overall literature on this topic by providing a critique of the current systems at play.

The PhD thesis contributed to the discussion on whether plea bargaining does have a place in our justice systems. It was concluded that plea bargaining does have an important role to play in our justice systems 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.

A further contribution of the thesis was to answering the question of what is the role of plea bargaining within the modern trial.

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.

5 The Recommendations of the PhD

This thesis has shown that fairness of the trial should encompass such elements as the right to access legal counsel, the presumption of innocence. 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 justice is 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. It was recommended in the thesis that the importance of truth must also be addressed.

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 pursuit of justice then becomes a fallacy behind which legal practitioners and scholars have hidden.

This thesis recommends that the principle of participation has two connected elements that 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 be sacrificed on the altar of costs benefits. Participation in criminal trials must be meaningful as well as effective. 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. 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.

It is recommended that the E.U. 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 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.

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*⁸. 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.

The thesis concludes 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.

6 Publications

1. Cheesman, S. J. (2014). An Overview of Fair Trial Standards and National Security from a Comparative Perspective **in** *Comparative Analysis of Fair Trial in Light of Judicial Independence*. Springer. ISBN: 978-3-319-01216-2
2. Cheesman, S. J. (2013). European Criminal perspectives on the right to a fair trial **in** *Szegedi Tudományegyetem Állam- és Jogtudományi Doktori Iskola Kiadványsorozata*. Ed. Fantolt Zs. and Gácsi A. E., Generál Nyomda Kft. Szeged, ISBN: 978-963-306-142-8
3. Cheesman, S. J. (2011). The Lisbon Treaty a Step Closer to making Europe more 'just'? *Rola Trybunałów i Doktryny w Prawie Międzynarodowym / Role of Tribunals and Doctrine in International Law*. Edited by Piotr Sosnowski and Anita Garnuszek ISBN: 978-83-931732-3-5.
4. Cheesman, S. J. (2011). Hungary's Presidency: Creating a Europe of Law and Justice, DOSZ Kiado Tavaszi Szél ISBN: 978 615 5001 33 8
5. Cheesman, S. J. (2011). The Right to a Fair Trial? A Comparative Analysis. Szeged. Gondolat Kiado ISBN: 978 963 693 290 9

⁸*Salduz v. Turkey* Application No. 36391/02, Judgment, Strasbourg, 27 November 200

6. Cheesman, S. J.(2010). Terrorism and the Right to a Fair Trial. Budapest. Hungarian Europe Society