The Proposed Plea Bargaining in Ethiopia:
How it Fares with Fundamental Principles of Criminal law and Procedure

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Abstract

The FDRE Criminal Justice Policy embodies multiple reforms that are meant to address the various problems in the Ethiopian criminal justice system. The reforms include the introduction of plea bargaining which represents an unprecedented and ambitious development in the realm of the criminal justice system in Ethiopia. This article examines plea bargaining as envisaged in the FDRE Criminal Justice Policy and the Draft Criminal Procedure Code, from a principle based approach and argues that it hardly lives up to many of the fundamental principles of criminal law and procedure recognised under Ethiopian law. The most affected principles/rights include: the principle of presumption of innocence, the principle of equality, the principle of equality of arms, the principle of truth discovery, the privilege against self-incrimination and the right to silence, and the right to appeal.

Key terms

Plea bargaining, models of plea bargaining, the proposed plea bargaining, efficiency, fairness, accuracy, Ethiopia

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Introduction

Plea bargaining not only occupies a central position in many adversarial jurisdictions,[1] but also transcends diverse jurisdictions including the inquisitorial

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[1] No jurisdiction relies on plea bargaining as the USA does –more than 90 percent of criminal cases are disposed of using plea bargaining. *See* United States Sentencing Commission, Statistical Information packet, Fiscal Year 2009 at: <http://www.ussc.gov/JUDPACK/JP2009.htm> (visited on July 14, 2010). While researches indicate that about 50% of cases have been settled through plea agreements in

structures. Ethiopia is not an exception. Inspired by such developments, it has adopted plea bargaining at policy level. It is also reflected in some proclamations, albeit not detailed. While defining the powers and duties of the Ministry of Justice (currently restructured as the Federal Attorney General), Proclamation No. 691/2010 and Proclamation No. 943/2016 entrust the latter with the power to plea bargain. This power goes to the newly established Federal Attorney General. This together with the policy represents a step towards providing a legal/policy framework for plea bargaining in Ethiopia, pending the issuance of the new criminal procedure code which is expected to address the concept in detail. However, this power of the Federal Attorney General is yet to be enforced.[2]

This is not to suggest that plea bargaining has no room for application in Ethiopia. Some studies reveal that an informal and rudimentary form of plea bargaining exists at the investigative stage, usually the suspect being unrepresented.[3] Prosecutors justify this practice in terms of efficiency and the difficulty in obtaining evidence in particular that of witnesses (*half a loaf is better than none*). The practice of plea bargaining has the following general features[4]: (a) it applies to any crime, (b) the defendant obtains a range of concessions from total immunity to sentence or charge reductions, (c) it does not involve defence attorneys, (d) it is not enforceable, nor does it form part of the record either in the investigation file or in the judgment.

What is more, cooperation agreements[5] are recognized through the Anti-Corruption[6], Anti-terrorism[7], and Witness and whistleblowers protection

Germany; around 90% of cases in magistrates' courts and 67 % in Crown courts get disposed of through guilty pleas without a trial. *See* Maike Frommann (2009), `Regulating plea bargaining in Germany: Can the Italian approach serve as a Model to guarantee the independence of German Judges`, *Hanse Law Review* , Vol. 5, p. 200; A. Ashworth and M. Redmayne (2010) , *The Criminal Process,* 4th ed, Oxford University Press, p. 418.

[2] Probably, the fact that the law is generic and the absence of procedural law on the subject matter could be partly responsible for this. As a law meant to define the power and duties of the AG/the Ministry, the proclamation simply lists the power and duties of the AG, the power to allow plea bargaining being one of them.

[3] *See* for example Alemu Meheretu (2014*), 'Introducing plea bargaining in Ethiopia: concerns and prospects',* (PhD thesis, University of Warwick, UK); UNODC (2011), 'Assessment of the Criminal Justice system in Ethiopia; in support of the Government`s reform efforts towards an effective and efficient criminal justice system', p. 54.

[4] Alemu M., *supra* note 3, ch. 5.

[5] *Cooperation agreements* are agreements whereby a defendant agrees to cooperate in the prosecution of co-offenders by supplying a testimony so that he/she receives lenient treatment or immunity. Some literatures see *cooperation agreements* as one form of plea bargaining. But this is not sound because *cooperation agreements* are about finding evidence that will be tested in full scale trials while plea bargaining is about avoiding full scale trials. However, it is important to note that the two may overlap in a sense that a

Proclamations.[8] Despite its practical significance in many jurisdictions, plea bargaining has been a subject of controversy since its inception. Detractors blame it for undermining fundamental safeguards, risking wrongful convictions, and eroding the purpose of criminal sanctions.[9] On the other hand, proponents dismiss such accusations altogether and capitalize on its positives.[10] Yet, some prefer to remain in the middle i.e., acknowledging the flaws of plea bargaining but at the same time enticed by its practical benefits uphold it and often propose reforms to rectify its flaws.[11]

Generally, proponents of plea bargaining praise it for its role in managing caseload, enhancing the efficiency of the criminal process, and sparing

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defendant may plead guilty and at the same time help the prosecution by testifying against his accomplices.

[6] Article 43(1), The Federal Anti-corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001.

[7] Article 33, The Anti-terrorism Proclamation No. 652/2009.

[8] Article 3, Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010.

[9] *See* for example Guidorizzi, Douglas (1998), 'Should we really ban Plea bargaining?: The core concerns for plea bargaining critics', *Emory L. J.* Vol. 47, p.753 ; Kipnis, Kenneth (1976) ,`Criminal Justice and the Negotiated Plea`, *Ethics* Vol. 86, p. 93; R.A. Fine (1987), 'Plea bargaining : an unnecessary evil', *Marquatte law Review*, Vol.70 No.4, p.615 (arguing that plea bargaining encourages crime by weakening the credibility of the system)**;** Sam W.Calan (1979) ,'An Experience in Justice without Plea Negotiation`, *Law & Society Review* Vol. 13 p. 327; Penny Darbyshire (2000), `The mischief of plea bargaining and sentencing rewards`, *Criminal Law Review*; Douglas Smith(1986) 'The Plea-Bargaining Controversy' *Journal of Criminal Law and Criminology,* Vol.77, No.3, pp. 949-968.

[10] *See* for example Joseph A. Colquitt (2000-2001), 'Ad hoc plea bargaining', *Tul. L. Rev*. Vol.75, p. 695 (who argues that plea bargaining is a necessary and a legitimate way of disposing criminal cases; the only problem lies on the practice where `many of the plea agreements struck are inappropriate, unethical, even illegal.`); John Bowers(2007-2008),'Punishing the Innocent', *U. Pa. L. Rev.* Vol. 156, p.1119 (Where the author argues that the innocence problem springs from misperceptions over: ` (1) the characteristics of typical innocent defendants, (2) the types of cases they generally face, and (3) the level of due process they typically desire`.); Thomas W. Church (1979), `In defense of pleas bargaining`, *Law & Society Review,* Vol.13, No.2, Special Issue on Plea Bargaining , pp. 509-525.

[11] For some detailed works in this regard *see* e.g. F.H. Easterbrook (1992), `Plea bargaining as compromise, *Yale L.J.* Vol.101, p. 1969; Oren Bar-Gill & Oren Gazal Ayal (2006), `Plea Bargains Only for the Guilty`, *J.L. & Econ*. Vol.49, p.353 (proposing a screening model to limit plea bargaining to the guilty); Note (1972), 'Restructuring the Plea Bargain', *Yale L.J.* Vol. 82, p.286 **(**arguing for judicial participation in plea negotiations*);* Note (1972), 'Plea Bargaining: the Case for Reform', *U. Rici. L. Rev.* Vol.6, p. 325 (proposing open, formalized plea bargaining procedures).

defendants and victims from the trauma of trials,[12] while opponents challenge the very foundation of plea bargaining as contrary to constitutional principles, ethics, and fair trial guarantees.[13] This article singles out one dimension of the controversy i.e., the debate on whether it is compatible with fundamental principles of criminal law and procedure and interrogates whether plea bargaining , as adopted by the criminal justice policy[14] and the draft criminal procedure code[15], lives up to the fundamental principles of criminal law and procedure recognised in Ethiopia. Whilst some of such principles are closely linked with plea bargaining, others are remotely associated with it. This article takes up only those principles (from the former category) which are designed to ensure the integrity of the criminal process. It is believed that the article can evoke debate and have positive contributions in shaping the proposed law on plea bargaining.

The first two sections of the article highlight the nature and type of plea bargaining and the models of plea bargaining in different structures of criminal justice. These sections explain plea bargaining, and its types and models. The third section briefly deals with policy justifications and the particular model that Ethiopia has aimed at. The last section examines whether this model is in conformity with principles and rights embodied in the Ethiopian legal regime such as the presumption of innocence, the principle of equality and non-discrimination, the principle of truth finding, the right to silence and the privilege against self-incrimination, the principle of equality of arms and the right to appeal. This involves analysis of policy documents (the Criminal Justice Policy being the main target), the proposed law on criminal procedure, the FDRE Constitution, criminal laws and the relevant literature.

1. Meaning and Types of Plea bargaining

1.1 Meaning

Definitions of plea bargaining vary considerably from one context to another. Some perceive plea bargaining broadly as any favorable treatment to a

[12] *See* for example K.V.K. Santhy (2013), 'Plea Bargaining in Indian and US Criminal Law: Confessions for Concessions' *NALSAR Law Review*,Vol.7,No.1, p.99; On the economic analysis of plea bargaining, *see* Landes, William M. (1971), 'An economic analysis of the courts', *J. L. & Econ.*, Vol.14, No.1, pp. 61-107; Kobayashi, Bruce H. and John R. Lott (1996), 'In defense of criminal defense expenditures and plea-bargaining', *Int'l Rev. L. & Econ.*, Vol.16, pp. 397-416.

[13] S. Schulhofer (1991-92), `Plea bargaining as disaster`, *Yale L.J*. Vol.101, p.1979.

[14] FDRE (2011), The Criminal Justice Policy of Ethiopia, (Here in after the Criminal Justice Policy).

[15] The Federal Democratic Republic of Ethiopia Draft Criminal Procedure Code, 2013 as was valid in June 2013.

defendant in return to not only pleading guilty but also waiving some rights as the right to appeal and the right to a preliminary hearing and testifying against other suspects.[16] However, this seems to unduly expand plea bargaining and confuse it with the broader spectrum of negotiated justice which involves many concessions. Simply put, all negotiated justice is not plea bargaining, but plea bargaining is one form of negotiated justice.

Plea bargaining has been defined as 'any agreement by the accused to plead guilty in return for a promise of benefit'.[17] In a similar fashion, plea bargaining is defined as 'the defendant`s agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state'.[18] In both definitions the defendant by pleading guilty (and not standing as a witness for fellow offenders, as some prefer to include) agrees to trade his/her right to full scale trial in exchange for 'some considerations from the state'. Some suggest that the phrase 'with reasonable expectation of receiving benefit' includes what is termed as *implicit plea bargaining* in a sense that the offer need not necessarily come expressly from the prosecutor. Instead, reasonable expectation of the defendant to be treated leniently by pleading guilty suffices to imply plea bargains.[19] In various literature, this is sometimes referred to as implicit plea bargaining

However, this conception unnecessarily expands the ambit of plea bargaining to include any guilty plea disposal of cases. This means that one can find plea bargaining in any jurisdiction which does not recognize or practice plea bargaining *per se* but simply allows guilty plea disposal of criminal cases. Such expansive conception overstretches the notion of plea bargaining off the mark.

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[16] *See* William F. McDonald (1979), 'From Plea negotiation to coercive Justice: Notes on the respecification of a concept', *Law & Society Review*, Vol. 13, pp.389-90.Testifying against other suspects, often known as *cooperation agreements* is different from plea bargaining. While cooperation agreements are about finding evidence and thus do not avoid full-scale trials, plea bargaining is about avoiding or shortening full-scale trials. "when one defendant agrees to testify against another … his statements will be subject to refutation and critical evaluation in the courtroom", a phenomenon alien in plea bargains. *See* Alschuler (1979) , `Plea bargaining and its History`, *Colum L. Rev.*Vol.79, p.4. On the contrary, some recognize cooperation agreements as one form of plea bargaining. See William F. McDonald, already cited.

[17] Joseph Di Luca (2005), 'Expedient MC Justice or Principled Dispute Resolutions? A review of plea bargaining in Canada`, *Crim. L.Q.,* Vol.50, p.14 [citing Law Reform Commission of Canada (1975), Criminal Procedure: Control of the process, working paper No 15, p. 45].

[18] William F. McDonald (1979), 'From Plea negotiation to coercive Justice: Notes on the Respecification of a Concept', *Law & Society Review*, Vol. 13, Special Issue on Plea Bargaining, p.388 [citing Herbert S. Miller et al (1978)*, Plea bargaining in the United States*].

[19] Ibid.

Another limitation of the above definitions is that they do not specify the considerations defendants get in exchange to pleading guilty. The broad nature of the definitions may create an impression that any form of concession even if unrelated to sentence or charge may be included. Nonetheless, it must be understood that such considerations should manifest themselves only in lower sentences or charges or some favorable facts.[20] Thus, plea bargaining can be defined as a form of negotiation/settlement between the state and the defendant whereby the latter agrees to plead guilty in return to charge or sentence concessions.[21] These concessions take the form of less severe charges or dropping of charges/counts (commonly referred to as charge bargaining) or some leniency regarding the punishment (sentence bargaining). It is this definition that will be employed in this article.

1.2 Types of plea bargaining: charge bargaining and sentence bargaining

Generally, the type of concessions a defendant gets in exchange for pleading guilty determines the type of plea bargaining. Plea bargaining that involves reduction of either the number of charges (counts) or the severity of charges (offences) is commonly referred to as *charge bargaining*; whereas, a type of bargaining which involves a recommendation of more lenient sentence is referred to *as sentence bargaining.*

Charge bargaining represents a kind of negotiation where a defendant agrees to plead guilty to a criminal charge in return for dismissal of one of the counts or the defendant pleading guilty for a lesser charge than he/she could otherwise face at the trial.[22] The former is known as *horizontal plea bargaining* and the latter *vertical plea bargaining.*[23] Charge bargaining does not directly involve the sentence the defendant receives although the driving force behind it obviously rests on the desire to get the least possible sentence for a reduced charge. Inquisitorial/mixed structures are generally skeptical of the virtues of charge bargaining. For instance, Germany and Italy, by expressly proscribing it, exclusively rely on sentence bargaining; and so does Russia. In contrast,

[20] For some detailed list of concessions that may accrue to a defendant see Cohen and Doob (1989-90), `Public Attitudes to Plea bargaining`, *C.L.Q* Vol.32,pp. 86-87.

[21] Black`s Law (8th ed. 2004), p. 3657, defines the term in a similar fashion as:

> A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges.

[22] Ibid

[23] While *vertical charge bargaining* relates to the severity of the charge (a charge of first degree homicide can be lowered to that of ordinary homicide), *horizontal charge bargaining* affects the counts (one or more of the several counts may be dropped).

adversarial structures such as USA consider charge bargaining as part of a prosecutor`s charging discretion and thus put very limited restraint on it. In England too, charge bargaining, which often takes place well before the charge is formally filed, is less objectionable than sentence bargaining which in some way involves the judge, and is in effect, believed to interfere with his /her neutrality.[24]

Under *sentence bargaining,* the prosecutor agrees to propose lenient sentence following the defendant`s guilty plea, and the concessions may include shorter prison terms, probation or referring to rehabilitation centers.[25] Some further expand the scope of sentence bargaining to include a wide range of concessions.[26] Sentence bargaining appears to involve an abandonment of the judge`s sentencing responsibility.[27] Nevertheless, at least in theory, this is not the case as it is up to the judge to endorse or reject such recommendations. It is interesting to note that sentence bargaining varies across jurisdictions. Unlike adversarial systems, its scope is much more limited in inquisitorial procedures. The limitation manifests itself in the type of the offense it applies to, the type of concessions involved and the amount of sentence that can be reduced by negotiation.[28]

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[24] Francoise Tulkens,(2005), 'Negotiated Justice', [in Demas–Marty and J.R. Spencer, Editors(2005), *European Criminal Procedures* 4th ed, (Cambridge University Press), p. 665].

[25] Larry K. Gaines and Roger Leroy Miller,(2009) *Criminal Justice in Action*, (Cengage Learning, Inc,), p. 295. For more discussion, *see* for example Sanders, *et al* (2007), Criminal Justice, (Oxford: Oxford University Press).

[26] Such concessions include:

> "judges agreeing to impose specific time limits on probation...;prosecutors refraining from raising special sentencing provisions for repeat offenders; prosecutors remaining silent at the sentencing hearing ;or not opposing defendants request for leniency or specialized rehabilitation program; prosecutors downplaying the harm to the victims; and agreement that a defendant serves sentence at a particular institution;..., imposition of a fine or restitution; prosecutors agreeing to schedule sentencing before a lenient judge."

See Kress(1980), *Prescription for Justice: the theory and the Practice of Sentencing Guidelines*, 87 cited in William W. Wilkins(1988), `Plea negotiation ,Acceptance of responsibility, Role of the offender and departures :Policy decision in the promulgation of Federal Sentencing Guidelines', *Wake Forest L. Rev.* ,Vol. 23, pp. 185-86.

[27] Ibid.

[28] While sentence bargaining in adversarial procedure in general applies across the board to all crimes and the amount of sentence concession is not limited (at least statutorily), it works otherwise in inquisitorial procedures- the type of offence and the amount of sentence concession are statutorily fixed. See Generally Stephen C. Thaman (2007), `Plea bargaining, Negotiating Confessions and Consensual Resolution of Criminal cases` Electronic Journal of Comparative Law, Vol. 11.

2. Models of Plea Bargaining and Structures of Criminal Procedure

Plea bargaining has its roots in the adversarial systems.[29] Some even go further to make it adversarial by nature.[30] Researches indicate that it is perceived as `the ultimate expression' of 'adversarialism', giving parties maximum control over the case outcome.[31] An intriguing question which is often raised is why plea bargaining has long characterized the adversarial structures and not the inquisitorial? Although it is difficult to label plea bargaining as adversarial as some suggest, studies show that it derives its existence from this structure of criminal procedure.[32] Relatively, this structure is configured and works in such a way to lend itself for negotiation in the context of a criminal process that involves a dispute between autonomous parties.[33] This together with the fact that resolution of disputes naturally involves negotiation makes adversarial structures suitable for plea bargaining to flourish.

This can be contrasted with the inquisitorial system`s official inquiry of the truth and their conviction that truth cannot be negotiated.[34] Moreover, the guilty plea procedure, the passivity of the judge and the nearly unfettered charging power of the prosecutor, which are some of the features of adversarial systems but non-existent in inquisitorial systems, afford a fertile ground to negotiate on

[29] *See* Lawrence M. Friedman (1978-79), 'Plea bargaining in historical perspective', *Law & Soc'y Rev*. Vol. 13, p. 247; A. W. Alschuler (1979), 'Plea bargaining and its History', *Colum L. Rev.* Vol.79,p.1 ; Malcolm M. Feeley (1997), `Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining`, *Isr. L. Rev*., Vol. 13, pp. 202-05.

[30] Some argue that the fact that plea bargaining places the adversarial trait of leaving the criminal proceeding to the party`s control than to the judge, makes it adversarial. On the other hand, others claim to the contrary –they maintain that plea bargaining collapses the power of investigation, charging, sentencing into the hands of one actor, the prosecutor– and relies on written evidence (the plea agreement instead of tested oral evidence). In this sense, it resembles inquisitorial structures. On these debates, *see* generally Gerard E. Lynch (1998), 'Our Administrative System of Criminal Justice', *Fordham L. Rev.*,Vol. 66, p. 2117 ; Maximo Langer (2005-06), 'Rethinking plea bargaining: the practice and reform of prosecutorial adjudication in the American Criminal Procedure', *Am. J. Crim. L*. Vol.33, p. 223.

[31] Jacqueline Hodgson and Andrew Roberts (2010), 'An Agenda for Empirical Research in Criminal Justice: Criminal process and prosecution', *Legal Studies Research Paper* No 2010-13, p. 25. (Showing their reservations on such labeling of plea bargaining).

[32] *Supra* note 29.

[33] *See* Mirjan Damaska (1975), 'Structures of Authority and Comparative Criminal Procedure', *Yale L.J*., Vol. 84, p. 480.

[34] Ibid.

guilty pleas and thus for plea bargaining to function.[35] What is more, unlike inquisitorial systems, the principle of discretionary prosecution forms an important source of discretion for prosecutors in the adversarial structures to choose whom to charge, what to charge, how much to reduce, and even to drop charges altogether. All these flexibilities, which are prerequisites for plea bargaining, are present in adversarial structures.[36]

In contrast, the continental rule of compulsory prosecution[37] seems to contradict the adversarial style of plea bargaining. So long as sufficient evidence exists, prosecutors must proceed to trial and defendants cannot abort the trial by just confessing or pleading guilty. Also, the guilty plea which is the subject of negotiation in plea bargaining is generally unknown in inquisitorial systems.[38] Confession by the accused may not exempt the prosecution from proving its case, and still the court may find the accused not guilty. It is also suggested that plea bargaining is ill-suited with the inquisitorial version of truth –substantive truth.[39] All these mixed with the negative stance of inquisitorial jurisdictions to plea bargaining[40] evoke the query as to how plea bargaining works in these jurisdictions.

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[35] Ibid. *See* also Thomas Weigend (2008), 'the decay of the Inquisitorial Ideal: plea bargaining evades German Criminal procedure'*[in* John Jackson *et al* editors, (2008), *Crime, Procedure and Evidence in a Comparative and international context*, (Hart Publishing), p. 63.

[36] Yet it does not mean that plea bargaining is something alien to the inquisitorial systems. Maintaining their inquisitorial nature to some extent, inquisitorial countries have been incorporating some adversarial elements including jury trials and plea bargaining. See generally Stephen C. Thaman, *supra* note 28; Mirjan Damaska, *supra* note 33.

[37] This is not to suggest that all continental systems adhere to this rule horizontally. Variations exist depending on whether a country follows 'the expediency principle' or 'the legality principle'. *See* Yue Ma (2002), `Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective` *International Criminal Justice Review,* Vol. 12, p.30.

[38] Stefano Maffei (2004), "Negotiations on 'evidence' and Negotiations on 'sentence` in Italy: Adversarial Experiments in Italian Criminal Procedure", *Journal of International Criminal Justice,* Vol. 2, pp. 1050-1069.

[39] *See* Thomas Weigend (2003) 'Is the Criminal Process about Truth? A German Perspective', *Harvard Journal of Law & Public Policy*, Vol. 26, p. 171 (`plea bargaining cannot be reconciled with the inquisitorial version of truth-seeking`).

[40] For instance in Russia, plea bargaining was met with strong opposition: 'In the Russian criminal justice an agreement (in Russian sdelka) –is an immoral, reprehensible, dishonest phenomenon; it is a bargain demeaning the government (vlast) suggesting its helplessness, its inability to solve crimes ... . Negotiations will demean the investigator, the prosecutor and the judge since they will have to bargain with the criminal...` *See* S Pomorski (2007) 'Modern Russian Criminal Procedure: The Adversarial Principle and Guilty plea' *Criminal Law Forum* Vol.17, p.129 [citing I. Petrukhin, 'Agreements Regarding Confession of Guilt Are Alien to Russian Mentality']. Here it is important to

Nonetheless, with an increasing demand for efficiency, the principle of compulsory prosecution has become liberalized in inquisitorial systems to accommodate some trial alternatives. The practice which once was described as typical of adversarial systems has become increasingly common in inquisitorial systems, although, in a different shape. The inquisitorial variant of plea bargaining exhibits marked differences from its counterpart in the adversarial system. Perhaps the difference starts from naming: most inquisitorial systems that introduced plea bargaining did not prefer to use the term plea bargaining.[41]

The inquisitorial variant of plea bargaining is very limited in scope.[42] It is applied to a limited range of relatively less serious crimes; it passes through strict court scrutiny;[43] the amount of sentence discount is usually statutorily fixed; and charge and fact bargains are outlawed.[44] In so doing, inquisitorial jurisdictions have tried to adopt plea bargaining in a controlled and cautious way so that the propensity of using wide sentencing differentials to induce a plea of guilty becomes minimal.[45] Conversely, plea bargaining in adversarial structures is generally wider in scope. It applies to all crimes and it involves all forms/types of plea bargaining (charge, sentence, and fact). Moreover, a

note that all the literature in inquisitorial structures is not repugnant to plea bargaining. Some argue that plea bargaining which provides defendants a new role of influencing the outcome of the case to their advantage, is preferable over the traditional inquisitorial systems which are dominated by a judge whose purpose is to get confession. For the presentation of some detailed accounts, *see* Markus D. Dubber and Mark G. Kelman (2009), *American Criminal Law, Cases, Statutes, and Comments,* 2nd ed., Foundation Press, p. 99.

[41] For instance, while Italy calls it 'application of sentence at the request of parties'; Russia and Germany use 'agreement with the field charges' and 'negotiated agreement' respectively. More than the naming, however, what is important is the content of plea bargaining.

[42] Civil law traditions such as France, Italy, Germany, Spain, Estonia, Poland, Colombia, and Russia all adopt the limited form of plea bargaining, though the scope of its application varies among them.

[43] In Italy for instance, the judge must supervise the Italian equivalent of plea bargaining – *patteggiamento* or party– agreed sentence and must give reasons for such settlements including the congruity of sentence with the crime. See Jeffrey J. Miller (1990),` Plea Bargaining and Its Analogues Under the New Italian Criminal Procedure Code and in the United States: Toward a New Understanding of Comparative Criminal Procedure`, *N.Y.U. J. INT'L L. & POL.* Vol. 22, p. 215.

[44] The most common discount in such countries is one-third reduction of the normal sentence which would have been imposed after trial. Such is the case for example in France, Italy, Columbia, Spain and Lithuania. See Stephen C. Thaman , *supra* note 28.

[45] These coupled with the nature of the public prosecutor in inquisitorial systems –the fact that s/he is not a party to criminal proceedings and thus would not strive to obtain convictions like its counterpart in adversarial systems, could serve as an important check on the prosecutor's discretion in plea bargaining.

statutorily fixed sentence discount is unknown in adversarial structures. A typical example is the USA`s model which takes an extreme form where prosecutors are often accused of threatening defendants with huge sentence differentials so that they plead guilty.[46]

From the foregoing discussions in general and based on its scope of application and the range of discretion it vests in the prosecution in particular, one can identify two models of plea bargaining: the unrestricted/ unlimited model and the restricted/limited model. The first model refers to the unlimited form of plea bargaining which is common in most adversarial systems. It usually involves broader prosecutorial discretion –unlimited sentencing concessions, all types of plea bargaining– sentence, charge, fact bargains, etc. On the other hand, the restricted model denotes a more restrained form of plea bargaining where the prosecutor`s discretion in plea bargains is limited. Under the restricted model, concessions are regulated (usually plea bargaining applies to limited range of relatively less serious crimes with a statutorily fixed discount and rigorous judicial scrutiny), charge and fact bargains are outlawed. This form of plea bargaining is quintessential to inquisitorial/mixed structures. Throughout this article, such distinctions will be used in the course of making reference to the models.

3. Policy Justifications and the Targeted Model in Ethiopia

3.1 Policy justifications of plea bargaining[47]

The FDRE Criminal Justice Policy embodies reforms aimed at:[48] (1) introducing plea bargaining and compensation for miscarriage of justice (2) strengthening alternative dispute resolution mechanisms (ADR), legal representation and the capacity of investigative organs, among others. Of these, the introduction of plea bargaining represents an unprecedented development in the Ethiopian criminal justice system. The Policy tries to justify the reasons that motivate Ethiopia to introduce plea bargaining. The policy tries to justify plea bargaining from diverse perspectives. The policy justifications that motivate Ethiopia to introduce plea bargaining include: efficiency for the justice system, remorse and

[46] *See* for example. Ronald F. Wright (2005), 'Trial Distortion and the End of Innocence in Federal Criminal Justice', *U. PA. L. REV*. Vol. 154 ,p. 79; Maximo Langer, *supra* note 30.

[47] Here the purpose is to briefly mention the policy justifications of plea bargaining as stated in the criminal justice policy. For an appraisal of the justifications. *See* Alemu Meheretu , *supra* note 3. *See* also Alemu M., *An appraisal of plea bargaining policy and purposes in Ethiopia*, forthcoming.

[48] The Criminal Justice Policy section 14, *supra* note 14, p. 30.

rehabilitation of offenders, and protecting victims and defendants from the trauma of trials.

a) Efficiency:

It is often submitted that plea bargaining offers efficiency advantage to the justice system. With the sophistication of criminal law, trials have become extremely complex and resource intensive. Plea bargaining by cutting short resources, time and energy consumed in the criminal process, expedites justice. The Criminal Justice Policy subscribes to this justification in providing that plea bargaining cuts costs and time spent in full scale trials; it also relies on the caseload management justification –that plea bargaining helps reduce case backlog and workload.[49]

b) Remorse:

The policy validates plea bargaining from remorse perspective –that by encouraging remorse, plea bargaining facilitates the rehabilitation of offenders.[50] Here the assumption is that a remorseful defendant will take lessons from his/her past wrong and is less likely to commit another crime, and hence deserves less moral condemnation than defendants who insist on challenging the prosecution`s case.

c) Avoiding the trauma of trials:

The Policy further tries to justify plea bargaining from the perspective of victims and defendants, claiming that it benefits both by shielding them from the trauma of public trials.[51] It is suggested that in addition to minimizing trial inconvenience, plea bargaining has the benefit of avoiding the stigma and embarrassment of going public in a trial both for the defendant and the victim. While the defendant, by pleading guilty to a lesser crime, avoids the high public sigma associated with serious crimes, victims are spared from facing the offender at the examination stage.

3.2 The Model targeted by Ethiopia

Although plea bargaining originated from common law legal systems (like the USA and the UK) that are adversarial systems, it has now been transplanted in varying degrees to other systems of criminal procedure including the classical inquisitorial systems. While most of these jurisdictions have adopted plea bargaining in its limited form, some have preferred to have it in its unlimited form. Ethiopia is not an exception to this. Enticed with such developments, Ethiopia has adopted plea bargaining at a policy level. The Draft Criminal

[49] Id., p. 36.
[50] Ibid.
[51] Ibid.

Procedure Code which is underway, at a very slow pace, has also incorporated plea bargaining. The reading of the provisions of the Draft Criminal Procedure Code and the Criminal Justice Policy[52] suggests that the targeted version of plea bargaining has the following general features:

First, it is broader in scope, covering any crime across the board and all the commonly known types of plea bargaining –charge bargaining, sentence bargaining and fact bargaining.[53] Unlike, most countries (especially those from the inquisitorial structure) that transplant plea bargaining in its restricted model, Ethiopia seems to prefer emulating plea bargaining nearly as applied in adversarial systems.

Second, the power to plea bargain vests in the public prosecutor, excluding the police and the courts. The Draft Code expressly reserves this power to the prosecutor.

Third, the Policy and the Draft Code provide legal conditions for plea bargaining. These include the voluntariness requirement, the duty of disclosure, the requirement of sufficient evidence, and in principle mandatory legal representation.[54] To the extent they are translated into action, these guarantees can influence plea bargaining positively, although they hardly ensure the fairness and accuracy of the system.[55] Here it is important to note that the `Ethiopian variant` though framed along the unlimited model, exhibits some variations on legal conditions. A case in point is the requirement of sufficient evidence. This requirement which apparently has no parallel in those jurisdictions that uphold the unlimited model, requires that plea bargaining can be validly made only after the investigation has produced sufficient evidence of guilt. If the enforceability of this requirement is ensured, [56] it could enhance but not guarantee the integrity of plea bargaining.

Fourth, as it stands now, the amount of concessions in plea bargains is left for the discretion of the prosecutor. In contrast to most inquisitorial jurisdictions

[52] *See* for example Article 219, 221 and 230 of the FDRE Draft Code, *supra* note 15 and section 4.5.4 of the Criminal Justice Policy, *supra* note 14, p. 36.

[53] The Criminal Justice Policy p. 37; *see* also Article 230 of the Draft code, *supra* note 15.

[54] Article 221 of the Draft Code, *supra* note 15.

[55] *See* section 4 below.

[56] As it stands now the requirement suffers from serious limitations that can reduce it to a mere formality. It is not clear whether the requirement is subject to *ex ante* judicial review. The standard used to measure sufficiency and reliability of evidence is not clear, either (it makes little sense if a standard higher than the one used to press for a charge is not used). Most importantly, pre-charge bargaining which is permissible under the Ethiopian variant of plea bargaining can be effectively used to circumvent the requirement of sufficient evidence and negotiate on weak cases.

which put a fixed discount of one-third,[57] the Ethiopian variant does not fix the amount of concessions. Yet, the possibility of having fixed discounts is not totally closed because the draft law or subsequent guidelines can still provide for fixed discounts.

From the above, it is plain that Ethiopia has, at least at a policy level, adopted the unrestrained model with minor modifications. This chiefly relates to the preconditions attached to the model under consideration: the requirement of sufficient evidence being the main one. The following section investigates the compatibility of this model with fundamental principles of criminal procedure enshrined in the FDRE Constitution and other Ethiopian laws.

4. Fundamental Principles of Criminal Law and Procedure at Stake

This section does not claim to discuss principles of Ethiopian criminal law and procedure in detail. Rather, it tries to briefly sketch those fundamental principles and rights which are likely to be affected by the introduction of plea bargaining and investigate how the proposed `Ethiopian version` of plea bargaining fares with them.

4.1 The presumption of innocence

The presupmtion of innocence forms one of the cardinal constitutional principles in many jurisdictions. The FDRE Constitution unconditionally guarantees the right of an accused person to be presumed innocent until guilt is established by a court of law.[58] Yet, the Criminal Justice Policy[59], the Draft Criminal Procedure Code[60] and some statutory laws such as the Anti-corruption law limit the scope of the right by shifting the burden of proof to the accused. The Policy envisions further limtations of the right by law. Such limitations, in addition to the doubts with regard to their constitutionalty, could pose a serious threat to the right.[61] This is not to suggest that the presumption should remain

[57] This refers to the maximum amount of sentence concession the prosecutor may grant to a defendant in exchange for pleading guilty.

[58] Article 20, The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995.

[59] The policy allows onus reversal in some serious crimes such as terrorism , corruption, organized crimes and crimes against constitutional order. There is one precondition for this –the prosecutor needs to establish basic facts first. *See* the Criminal Justice Policy, *supra* note 14, section 4.4 at 33.

[60] Article 5(3), the Draft Criminal Procedure Code, *supra* note 15.

[61] In particular, the permission of further limitations of the right by law could provide the executive impetus to further erode the right.

absolute. It can be limited in exceptional cases as is the case elsewhere,[62] provided that such limitations do not violate the Constitution. Apart from questions of constitutionality, the permissibility of further limitations, limitations of the presumption in serious crimes[63] and its propensity to wider interpretation and abuse evoke concerns.

Proponents argue that plea bargaining is in tandem with the presumption of innocence and serves as an effective tool to single out the guilty from the innocent.[64] The assumption for this argument is that innocent defendants would choose trial over plea bargaining and only the guilty would be targeted by plea bargaining. Yet, there is no conclusive evidence to support this; quite to the contrary empirical evidence elsewhere suggests that both the innocent and the guilty are indiscriminately targeted, if not the reverse.[65] With increasing

[62] Generally, for modalities of putting limitations to the presumption/onus reversal in Europe (presumption of intent in some crimes which requires the defendant to rebut this, defences and justifications, reversal of onus in specific minor crimes), *see* J.R Spencer (2005), 'Evidence' [in Mireillie Delmas–Marthy and J.R Spencer, editors (2005), *European Criminal Procedures* (Cambridge University Press), pp.597-99].

[63] As shown above, the limitation concerns serious crimes as terrorism, organized crimes, corruption and crimes against constitutional order. This seems worrying in Ethiopia for two reasons. First, unlike most jurisdictions where reversal of onus applies to less serious infractions of law (Example France), it works for serious crimes which carry capital or life punishments. In fact, in Italy there were attempts to introduce by law the reversal of onus in serious crimes (organized crimes and corruption). Nevertheless, it was soon rejected as unconstitutional. *See* Ibid. Secondly, our weak political culture means the limitations are susceptible to abuse by the executive. Indeed, there are reports of politically motivated prosecutions and convictions involving the above crimes. *See* for example, Country Report on Human Rights Practice for 2012, United States Department of State available at http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm,visited on 14/3/13. The report claims that there are about 400 political prisoners in Ethiopia. Recently following the Supreme Court`s upholding of 18 years and life sentences of one journalist and one opposition leader respectively, the US Government openly slammed Ethiopia of its politically motivated prosecutions of government critics; *See* also Assefa Fiseha (2011) , 'Separation of Powers and Its Implication for the Judiciary in Ethiopia`, *Journal of Eastern African Studies*,Vol.5, No.4, pp.702-715; *See* Linn A. Hammergren (2012), 'Justice Sector corruption in Ethiopia', [in Janelle Plummer, editors(2012), *Diagnosing Corruption in Ethiopia: Perception, realities and the way forward for key sectors*, p. 215.] (reporting concerns that: *Political authorities or higher-level officers* direct police to ignore complaints, undertake investigations, or arrest "suspects" without probable cause.)

[64] *See* Andrew Hessick and Reshma M. Saujani (2001-2002), 'Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defence Counsel and the Judge', *Byu J. Pub. L.*, Vol. 16, pp. 232. (Raising the argument and critiquing it).

[65] *See* John Baldwin & Michael McConville (1978), 'Plea Bargaining and Plea Negotiation in England', *Law & Soc'y Rev.*,Vol.13, pp.296–98 (discussing the innocence problem of plea bargaining in England)**;** Samuel R. Gross et al (2005)., 'Exonerations in the United

concessions tailored against the chance of acquittal[66] along with strong risk aversion desire of innocent persons (than the guilty)[67] and their mistrust of the system[68], innocents are likely to choose plea bargaining and plead guilty simply because they believe it is rational to do so. Most importantly, the argument seems to ignore the implicit presumption of guilt underlying the plea bargaining system without which the latter does not 'procedurally function'.[69]

Some proponents further argue that the onus of reversal involved in plea bargaining can be taken as an exception to the presumption: 'the presumption provides for interferences such as plea bargaining'.[70] However, it is unrealistic to label plea bargaining an exception –a dominant system in many jurisdictions (adversarial structures in particular) which induces every defendant, including the innocent, to plead guilty with attractive concessions on the assumption that they might be guilty. There is no support that plea bargaining forms one of the commonly recognised exceptions to the presumption.[71] The FDRE Constitution accommodates no exception to the presumption that it guarantees, and, in effect, the possibility of making such caveats seems closed at least for now.

Plea bargaining in general and the proposed 'Ethiopian version' in particular operates in disregard of the principle of presumption of innocence in two

States*:* 1989 through 2003', *J. crim. L. & Criminology* , Vol. 95, p.536 (finding 6 % (20 out of 340) of exonerated defendants pled guilty); Albert W. Alschuler (1981), 'The Changing Plea Bargaining Debate', *Cal. L. Rev*. Vol. 69, p.714.

[66] Studies in some jurisdictions document such trends and some argue that this is 'well-designed to produce the conviction of innocents'. *See* Albert W. Alschuler, *supra* note 65, pp. 714-15.

[67] Studies show that the innocent is inherently more risk averse than the criminal because the latter willingly assumes risk while breaking the law in the first place. Innocents mistrust the criminal process for charging them for a crime they did not commit. Unlike the guilty, they are not psychologically prepared to face the repercussions of public trials. Prosecutors offer innocents similar concessions as the guilty. However, because of difference in evaluating risk, the innocent attaches higher value for it and may choose the lesser evil –plea bargaining. *See* Andrew Hessick and Reshma M. Saujani, *supra* note 59, p.201; *See* also Michael K. Block & Vernon E. Gerrety (1995), 'Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk'*, J. Legal Stud.*, Vol. 24, p.138.

[68] Some innocent defendants are so mistrustful of the system that they believe their guilt is a foregone conclusion if they stand trial, and so they readily accept any inducement to plead. These feelings of mistrust are sometimes nourished by defence counsel who begin with a presumption of client guilt, and both begin and end the representation by looking for the best available bargain`. *See* Andrew D. Leipold (2005), 'How the Pre-trial Process Contributes to Wrongful Convictions', *Am. Crim. L. Rev*. Vol. 42, p. 1154.

[69] *See* Elizabeth T. Lear (1993), Is Conviction Irrelevant?, *UCLA L. REV.* Vol. 40, p.1222.

[70] *See* Samantha J. Cheesman (2014), A comparative Analysis of Plea Bargaining and the Subsequent Tension with an Effective and Fair Legal Defence, (PhD thesis), p. 231.

[71] For some notes on such exceptions, *supra* note 63.

respects. *First*, the plea bargaining offer from the prosecution presupposes an implicit presumption of guilt; i.e., in making offers to negotiate, the prosecutor assumes that the defendant is guilty.[72] This is plain in particular in pre-charge bargaining (which is permissible in Ethiopia) at which point the prosecution has no sufficient evidence to press for a charge. This clearly contradicts with the principle. Second, plea bargaining lowers the standard of proof. It relies not on evidence as such[73] rather on the admission of guilt which is likely to be tailored based on the strength of evidence –the probability of prevailing at trial and the weight of concessions.

Procedural requirements like presumption of innocence and heightened standard of proof are 'intended to prevent inaccurate convictions even at the expense of inaccurate acquittals'.[74] Plea bargaining defies this by trading-off the reliability of convictions to efficiency and economic gains. It permits the prosecution to evade rigorous standards of due process and proof.[75] This is alarming in jurisdictions like Ethiopia whose criminal process exhibits serious limitations in upholding due process and ensuring the reliability of convictions.

Apparently, the requirement of sufficient evidence, a legal condition put to the 'Ethiopian version' of plea bargaining, could enhance the standard of proof and thus outcome accuracy. Yet, this appears to be unrealistic. This is a determination made by the prosecutor based on untested evidence with little or no pre-trial safeguards to ensure its reliability –no lawyer present, little prosecutorial supervision, no defined standard to measure sufficiency,[76] no *ex ante* judicial review; even *ex post* review and its effects remains equivocal.[77]

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[72] *See* generally Sanders, Andrew *et al* (2010), *Criminal Justice* , Oxford University Press, p. 496.

[73] When one counts out the guilty plea as unreliable, at best a lower standard of proof which is required for pressing of criminal charges is used to convict the accused and at worst this requirement could be circumvented. Indeed, this possibility is very high in particular with pre-charge plea bargaining permissible. For more discussion on the standard of proof used in plea bargaining, *see* Gregory M. Gilchrist, Gregory M. Gilchrist (2011), 'Plea Bargains, Convictions and Legitimacy', *Am. Crim. L. Rev.* Vol.48, p.153 ('Where trials are avoided, the standard of proof required for a conviction can be reduced to mere probable cause'). On the other hand, some suggest that *beyond reasonable doubt* or even a higher standard of *beyond all doubt* can be comfortably met if defendants 'candidly' admit their guilt (plea bargaining). *See* Richard L. Lippke (2011), *The Ethics of Plea Bargaining*, Oxford University Press, p. 221. But, this is hardly ensured in plea bargains.

[74] George E. Dix (1977), 'Waiver in Criminal Procedure: A Brief for More Careful Analysis', *Tax. L. Rev*. Vol.55, p. 240.

[75] Douglas D. Guidorizzi, *supra* note 9 at 768.

[76] The standard is yet to be determined by the prosecutor general. *See* The Criminal Justice Policy, *supra* note 14, section 3.10 at 13 (which demands that the Prosecutor General issues directives that provide standards on this). Yet, such approach has its own limitations: First, given the policy's focus on efficiency, the office of the prosecution is

Nor is the possibility of using illegally or improperly obtained evidence ruled out. Indeed, the criminal justice policy envisages such possibility as an exception.[78] Thus, the likelihood of inducing guilty pleas with a prosecution having no prospect of success cannot be dismissed; if not highly probable. In fact, this is not mere speculation at least in trials because empirical evidence shows that prosecutors often institute charges without sufficient evidence and preparation.[79] Plea bargaining is conducive for this since prosecutors have little incentive to weed out weak cases.[80]

Specifically, pre-charge bargaining which is permissible under the proposed variant of plea bargaining can be effectively used to circumvent the requirement of sufficient evidence and negotiate on weak cases. All these coupled with institutional pressure to raise efficiency and own interest to maximize performance could provide prosecutors with good incentives to circumvent the requirement of sufficient evidence. In the circumstances, the requirement of sufficient evidence is likely to remain a mere formalism.

4.2 The principle of equality

Both the FDRE Constitution and the Criminal Code embody the principle of equality and proscribe discrimination among defendants 'on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status'.[81] However, by treating

less likely to restrain itself meaningfully using its own guidelines. Second, effective enforcement mechanisms of the rules may presuppose external review. But weak culture of judicial review would mean that the guidelines are rarely challenged before courts of law.

[77] It is not clear whether the court must review prosecution evidence before it approves the plea agreement. In fact, it is required to check the consistency of the agreement with the law and morals (Article 232 of the Draft Code). Agreements contrary to the law, code of ethics, morality, and rights and interests of defendants are inadmissible (*see* Article 229(3) and (5) of the Draft Code). From this, one may imply that the court is obliged to review the requirement of sufficient evidence –a requirement which is provided for by the law. And if the agreement is found contrary to the law, the court must reject it. But this depends on the court`s appreciation.

[78] The Criminal Justice policy, *supra* note 14 at 17.

[79] This practice is ironically labelled as 'charging to fail'. *See* World Bank (2010), *Uses and Users of Justice in Africa: the Case of Ethiopia's Federal Courts*. (Washington DC: World Bank,) <http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts> (7/10/14) ,p. xxi.

[80] *See* Oren Gazal-Ayal (2006), 'Partial Ban on Plea Bargains', *Cardozo L. Rev*., Vol. 27, p. 2299 (by diminishing the cost to the prosecutor of bringing weak cases, plea bargaining decreases the incentive to properly screen out weak cases through prosecutorial discretion at the outset).

[81] *See* Article 25, the FDRE Constitution and Article 4 of FDRE Criminal Code, 2004.

similarly situated defendants differently without any principled justification, plea bargaining collides starkly with the equality principle. This problem takes two forms: differential treatments inherent in plea bargaining and those based on invidious grounds.

4.2.1 Differential treatments inherent in plea bargaining

Differential treatments, inherent in plea bargaining, take two dimensions, namely between plea and trial defendants,[82] and differential treatments among plea defendants. Defendants accused of the same crime may be treated quite differently simply depending on their choice of plea. While those who waive trial for plea negotiation are privileged enough to benefit from the generous concessions of prosecutors and receive lesser punishments, those who insist on exercising their right to trial get harsh penalties thereby creating dual sentencing structures. In literature, this is known as *trial penalty*[83] –a notion which captures the fact that trial defendants receive severe punishment compared with plea defendants, simply for exercising their right to trial.

Even among those defendants who plea bargain, the result of the negotiation appears to be uneven and may perpetuate inequalities. The outcome of the negotiation depends on several extraneous factors of sentencing calculation as opposed to the degree of guilt –notably, the bargaining power of the defendant, the strength of the prosecution evidence, and other subjective considerations. In both cases, plea bargaining sustains differential treatment among similarly situated defendants, and this violates the equality principle and culminates in discrimination.[84]

It can be argued that so long as both options (the option to bargain and the option to go to trial) are readily available to defendants, one cannot speak of discrimination. Yet, this argument holds little water as the options are not comparable to enable one make a free choice. In light of compelling sentence differentials, possible pressure from the prosecutor and the attorney to plead guilty, disproportionate interests at stake and huge power disparity between the

[82] While the notion plea defendants refers to those defendants who plea bargaining, trial defendants connotes those who exercise their trial rights.

[83] For more on this, *see* Russell D. Covey (2008), 'Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings` *Tul. L. Rev*. VOL.82,P.1237 ("The ubiquity of plea bargaining creates real concern that innocent defendants are occasionally, or perhaps even routinely, pleading guilty to avoid coercive trial sentences."); Albert W. Alschuler (1983), 'Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System', *U. Chi. L. Rev.* Vol. 50. pp. 657-59.

[84] For more, *see* for example Stephen Bibas (2004), 'Plea bargaining Outside the Shadow of a Trial'.117 *Harvard Law Review,* Vol.117, p. 2468.

adversaries,[85] defendants would find it hard to go for the trial. As Gifford rightly observes[86]: '[t]he reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining.'

Some proponents of plea bargaining justify the differential treatment by making a distinction between rewarding waiver of a right and penalizing its exercise.[87] Thus, while defendants who waive their right and plead guilty are rewarded, those who prefer to stand trial fail to receive such rewards. However, it seems off the mark to make a distinction between the two notions: if pleading guilty is rewarded generously, the converse –pleading not guilty– is in effect penalized severely.[88] Besides, the distinction erroneously assumes that justice can be attained in isolation of the principle of equality,[89] while equal treatment is apparently an essential facet of procedural justice.

4.2.2 Differential treatments based on invidious grounds

Even though the conventional criminal justice system (trial) is not immune from this problem –at least in a different version than plea bargaining–, the concern is quite pronounced in plea bargains. The proposed version of plea bargaining which permits all sorts of non-transparent deals to drop or reduce charges, reduce sentence and manipulate facts, is prone to abuses and discriminations based on such invidious grounds as wealth, ethnicity, sex, religion, and political outlook, among others. This is not mere speculation.

For instance, the informal practice of dropping of charges and conversion of custodial sentence to fine indicate the fact that plea bargaining discriminates against poor defendants.[90] Though in a slightly different context, the informal 'plea bargaining' made with real estate developers accused of crimes relating to land abuse can illustrate this problem. In this case, while government employees

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[85] While the prosecutor risks losing its case, the defendant risks his liberty, if not his life. For debates on this problem, *see* Blumberg (1967), *Criminal Justice* (Where it has been argued that plea bargaining generates unequal treatment of defendants and that plea bargaining is unconscionable, Id., at 55); Note (1972), 'Plea Bargaining: the Case for Reform'*, U. Rici. L. Rev.* Vol.6, p. 334.

[86] *See* Donald G. Gifford (1983), 'Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion', *U. ILL. L. REV*., p.49.

[87] *See* for example Richard L. Lippke, *supra* note 73.

[88] *See* Albert W. Alschuler, *supra* note 83 at 657-59 (1983), (arguing that :

> If the concepts of reward and penalty are relative –if these concepts derive their meaning only from each other– the assertion that some defendants are rewarded and none penalized is simply schizophrenic. As Judge David L. Bazelon, referring to the implausibility of a system in which there are winners but no losers, once observed, "If we are 'lenient' toward [defendants who plead guilty], we are by precisely the same token 'more severe' toward [those who plead not guilty]."

[89] Ibid.

[90] *See* Alemu Meheretu, *supra* note 3.

who took part in the crime have been formally prosecuted, the affluent real estate developers benefited from the dropping of charges in favour of administrative measure of a payment of money. These differential treatments, though said to be justified in the public`s interest, [91] seem to enable wealth to buy justice.

What is more, it would be troubling if plea bargaining includes negotiation on fines which is increasingly used in Ethiopia thereby enabling the rich to easily avoid imprisonment and 'purchase freedom' while the poor desolately face imprisonment. Even worse, the rich could comfortably use plea agreements to cover up their criminal liability in exchange for a payment made to an innocent person who pleads guilty for their crimes.

4.3 The search for the truth/accuracy

Although the weight attached to the search for the truth in relation to other values varies across jurisdictions,[92] any system of criminal procedure targets truth seeking as its major objective. Ethiopia is not an exception. The search for the truth is one of the fundamental principles of Ethiopian criminal procedure law. It is expressly mentioned in the reform that the criminal process needs to be guided by this principle. The Draft Criminal Procedure Code specifically entrusts the judiciary with the duty to uncover the truth so that the criminal accounts for his wrong and the innocent faces no conviction. To this end, the court is allowed to go beyond the facts and arguments forwarded by the parties and call witnesses.[93] While guilty pleas may dispose of cases, the court is mandated, at its own motion, to conduct a full-scale trial.[94] In this sense, what is sought seems to be material truth as opposed to procedural truth.[95]

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[91] The notion of public interest is a fluid concept. Unless carefully construed based on defined standards, which is not the case in Ethiopia, it is open to abuses and discriminations. Perhaps, in the case at hand, one may invoke public interest. Yet, it does not seem consistent with public interest when one considers the seriousness of the crimes; the real estate business has been accused of an entrenched problem the governments vows to address. The concessions exchanged between the government and the suspects can erode public confidence in the justice system.

[92] The difference is visible in adversarial and inquisitorial conceptions of the truth. *See* generally, Weigend, *supra* note 39 at 157.

[93] *See* Art 369 of the Draft Code, *supra* note 15.

[94] *See* Art 334 of the Draft Code, *supra* note 15. This echoes Article 135 of existing criminal procedure code.

[95] While material truth is understood to mean an objective truth, procedural truth represents –truth obtained in a contest that involves opposing views of reality in a procedure which ensures the fairness of the process. *See* Rachel A, Van Cleave (1997), 'An offer you cannot refuse? Punishment without trial in Italy and the United States: The search for truth and an efficient Criminal Justice System`, *Emory Int'l L.* Rev.Vol.11, p.142; Maximo Langer (2004), 'From Legal Transplants to Legal Translations: the Globalization

It is interesting to see how the principle of search for the truth fares with the proposed 'Ethiopian version' of plea bargaining which involves exchange of concessions and negotiations on facts. Generally, some try to align plea bargaining with the search for the truth. For instance, one writer argues that plea bargaining can get at the truth: (1) where genuine guilty pleas are tendered; (2) in the inquisitorial versions of plea bargaining.[96] However, it is difficult, if not impossible, to link plea bargaining with the search for the truth for it inherently subverts the latter. While plea bargaining is about compromise and exchange of concessions, the truth is about fact finding regardless of the interest of the parties to strike a deal.

Plea bargaining in general and the proposed 'Ethiopian version' in particular undermine the truth. Trial and pre-trial procedures in any structure of criminal procedure target truth discovery as one major objective, albeit with variations in the conception of truth and methods of establishing it. In the inquisitorial systems, the procedures from investigation all the way to trial and post trial stages are designed in such a way that material truth can be established.[97] Unilateral and impartial investigation by the state (through the examination of evidence in support and against the conviction of a defendant), active judge, strict reviews, strong standard of proof, etc are designed to promote the truth finding exercise. Likewise, in adversarial systems, it is believed that the fight between adversaries in a structure that ensures fairness is the best way to unearth the procedural truth.[98] Cross-examination, strong standard of proof, the privilege against self-incrimination and extended exclusionary rules are all believed to be structured to this end.

By requiring a waiver of pre-trial and trial procedures designed to promote outcome accuracy at both criminal procedure systems (above) and substituting it with the haggling of the parties on the bargaining table, plea bargaining obscures the truth,[99] and it involves "a compromise between adversaries, reached when the parties each independently calculate the terms of the agreement to be preferable to the uncertainty of trial." Indeed, the primary concern of plea bargaining is not fact finding as such.[100] It is rather about case resolution through compromise and negotiation of facts at the expense of the truth.

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of Plea Bargaining and the Americanization Thesis in Criminal Procedure`, *Harvard International Law Journal*, Vol. 45, p.10.

[96] *See* R. L. Lippke, *supra* note 73, p. 233-34.

[97] *See* Rachel A, Van Cleave, *supra* note 95.

[98] Ibid.

[99] *See* DK Brown (2005), 'The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication' *California Law Review,* Vol. 93, p.1610. *See* also Gregory M. Gilchrist, *supra* note 73, p. 171); R. L. Lippke, *supra* note 73, p. 218.

[100] Ibid

In particular, this is for the most part true of the unlimited form of the proposed plea bargaining in Ethiopia where charge bargaining and fact bargaining are tailored to this end. The downgrading or dropping of charges and negotiation of facts, which are tenets of the unlimited model, are simply inconsistent with the truth-seeking objective of the system. In this sense, plea bargaining fails to not only accurately reflect the actual crime committed but may not also make offenders accountable to their crimes with the deserved punishment. The same holds true for sentence bargaining because the huge and uncertain sentence reductions involved in sentence bargains distort truth about what offenders have done.[101]

What is more, the structural problems surrounding the plea bargaining process include factors such as attorney competence, workloads, resources, sentencing and bail rules, information deficits, and defendants' preference to risk; and all these factors impinge on the outcome of plea bargaining.[102] Moreover, coercive sentencing differentials are issues of concern. In the circumstances, guilty pleas tendered following a bargain are less likely to be genuine.[103] This is particularly true of jurisdictions like Ethiopia where the above structural problems are quite pronounced while procedural safeguards remain scant.[104]

The clash between truth and plea bargaining is even more apparent where a criminal procedure, as is the case with Ethiopia, is designed to unveil the material truth. Research indicates that plea bargaining fundamentally subverts this version of the truth, in particular.[105] As shown above, the Ethiopian criminal procedure arguably targets the material truth, which necessitates the presentation of all necessary evidence at the trial. The court is required to examine the factual basis of every guilty plea, go beyond the facts and arguments forwarded by the parties and consider additional evidence. In the circumstances, it is questionable whether plea agreements, which naturally aim to avoid the complete presentation of evidence at trial and which involve exchange of concessions and compromises on facts, can go with the material truth.

A procedure can achieve the truth when it (a) singles out the offender from the innocent, and (b) punishes the former with a sentence proportionate to the degree of guilt. However, the proposed 'Ethiopian version' of plea bargaining (which adopts the unrestrained variant of plea bargaining) involves negotiation and misrepresentation of facts, massive sentence reductions and dropping of

[101] R.L. Lippke, *supra* note 73, p. 233-34.
[102] Stephanos Bibas (2004), 'Plea bargaining Outside the Shadow of Trial', *Harvard Law Review*, Vol.117, pp. 2468-69.
[103] For details see the literature on *the innocence problem*, *supra* note 9.
[104] Alemu Meheretu, *supra* note 3, pp. 172-83
[105] *See* for example, Weigend, *supra* note 39, p. 171.

charges meant to induce guilty pleas and thus promote efficiency, fails on both fronts. i.e., it is incapable of offering a reliable fact finding mechanism to arrive at the truth. Here a question remains[106]: Where is justice if truth is sacrificed to efficiency and legal expediency contrary to its core aspects of fairness?

4.4 The principle of equality of arms

Equality of arms, a fundamental principle of fair trial, involves giving each party a reasonable opportunity to present and defend its case, in those conditions that will not put any party at a disadvantage against its opponent.[107] This, among others, could relate to access to evidence and the right to review adversary evidence, opportunity to examine witnesses, time to prepare for defence, legal representation, rights of appeal.

Developed by the European Court of Human rights, the principle has now won international acceptance.[108] In Ethiopia, its components can be discerned from the relevant laws and the Constitution. The proposed Criminal Procedure Code has expressly embraced the principle of equality of arms in its latest version.[109] This principle aims at ensuring that both parties enjoy comparable opportunities so that the balance in the criminal process is enhanced. This is all the more important in criminal cases where the balance of power skews towards the prosecution.

The power disparity between the adversaries is quite pronounced in the Ethiopian criminal process. While the prosecution enjoys state resources and powers, the defence has none of these and remains very weak. Structural problems such as absence of defence investigation, inadequate public defender's services and the particular circumstances of defendants (who are mostly poor, uneducated, unrepresented and uninformed) exacerbate the situation. This creates an unbridgeable rift of institutional bargaining power. In the circumstances, plea bargaining, which involves disproportionate interests at stake,[110] aggravates the power imbalance and puts the defendant at serious disadvantage in relation to the prosecutor.

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[106] Ken Strutin (2013), 'Truth, Justice, and the American Style Plea bargain', *Albany Law Review,*Vol.77, No. 3, p. 834.

[107] Kaufman v. Belgium, App. No. 10938/84, 50 Eur. Comm'n H.R. Dec. & Rep. 98, 115 (1986) (establishing the principle of equality of arms standard).

[108] *See* for example *Human Rights Committee, General Comment No. 32***,** Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007); Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of Appeals Chamber (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[109] Art.15, the draft code, s*upra* note 15.

[110] While the defendant is under a threat of severe sanctions, the prosecutor runs the risk of losing at trial. The two are not comparable by any stretch of imagination.

In some cases, plea agreements can be inevitable consequences/ manifestations of the inequality of the parties. This may be the case where pre-charge plea agreements, which are allowed under the proposed 'Ethiopian version', are struck. In such cases, the defendant unaware of both the nature of the charge prepared and evidence marshalled against him, is simply in a disadvantageous position to make an informed decision. This leaves the defendant vulnerable to the manoeuvres of the prosecution and ultimately militates against fairness and outcome accuracy. The exclusive rights that the prosecution enjoys under the reform (the Policy and the Draft Code) on such matters as the right to appeal, the right to have the plea agreement approved by the court, the right to plea bargain anew or resubmit the agreement in case of rejection by the court, exacerbate the problem.

Apparently, the legal conditions to plea bargaining such as the duty of disclosure and the requirement of legal representation are meant to address the above concerns. But in reality, this seems unrealistic. *First,* these guarantees fall short of narrowing down the inherent power asymmetry that is created by plea bargaining. The coercive environment under which plea bargaining operates (i.e., high sentencing differentials, incomparable stakes involved –threat of severe punishment vis-à-vis losing at trial, unequal institutional bargaining power of the parties, among others) remains as a concern. This is particularly true of unlimited plea bargaining where the above safeguards are less likely to be effective.[111]

Secondly and most importantly, material and legal conditions specific to Ethiopia would render the guarantees less effective. For example, legal representation is not always mandatory; in less serious crimes bargaining with unrepresented defendants is allowed. Even in those mandatory cases, the quality and availability of legal service is severely constrained.[112] Legal aid is poorly organized and remains neglected. This means defendants are likely to negotiate without a lawyer or receive ineffective representation. Similarly, the duty of disclosure would be marred by the absence of effective defence investigation (it is unclear whether parallel defence investigation is recognized), and other

[111] *See* A. Alschuler (1986), 'Personal Failure, Institutional Failure and the Sixth Amendment', *N.Y.U. Rev. L. & Soc. Change,* Vol.14, p.149; Stephanos Bibas (2003), 'The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel', UTAH L. Rev., p.1.

[112] *See* for example 'UNODC Assessment of the Criminal Justice system in Ethiopia; in Support of the Government`s Reform efforts towards an Effective and Efficient Criminal Justice System' at 69*;* Access to Legal Aid in Criminal Justice Systems in Africa Survey Report`, UNODC, April 2011; *See* Abebe Asamere (2011) , "**የጠበቆች ሥነምግባር ችግሮችን በተመለከተ ለውይይት የቀረበ ጥናት**" (Concept paper on problems of ethics of advocates), *Wonber*, Alemayehu Haile Memorial Foundation Periodical.

problems include the timing of disclosure (which is apparently late during plea negotiation), absence of effective enforcement mechanism (no clear sanction on prosecution`s failure to disclose evidence), and the permissibility of pre-charge plea bargaining.

4.5 The right to silence and the privilege against self-incrimination

Both the privilege against self-incrimination and the right to silence are envisaged under the FDRE Constitution (Article19 (2) and 20(3)). The privilege as recognized under the Constitution appears to be limited in scope in two ways: *Firs*t, the Constitution mentions of the accused, leaving unaddressed, for instance, whether the privilege applies to witnesses. However, the 1961 Criminal Procedure Code allows witnesses under police examination to refuse to answer any question where they believe that it may expose them to criminal liability.[113] *Second*, the Constitution protects an accused person from any compulsion to testify against himself/herself, hence arguably limiting the scope of the privilege to testimonial communications as against any real or physical evidence.[114]

One dimension of the right to silence and the privilege against self-incrimination protects suspects from being their own accuser and from undue pressures meant to solicit self-incriminating statements. This is linked to the presumption of innocence. This principle requires the prosecution to prove guilt independent of the accused person's active participation so that defendants are

[113] *See* the 1961 Ethiopian Criminal Procedure Code, Article 30(2).

[114] Generally the privilege is understood in two senses: narrow and broad. In the USA it is understood in a limited sense to apply only to testimonial communications. While in UK (as well as in the eyes of the ECHR) the broader sense applies- it protects persons from producing documents (real or physical evidence) as well as testifying against themselves (testimonial communications). *See* generally Ian Dennis (2013), the Law of Evidence (London: Sweet and Maxwell).

Arguably Ethiopia seems to emulate the US approach. The Constitution under Article 19(5) provides :

> Persons arrested shall not be compelled to make *confessions or admissions* which could be used in evidence against them. *Any evidence* obtained under coercion shall not be admissible. (Emphasis added)

To be sure, the expression *confession or admission* refers to communications as opposed to real evidence. In this sense, *the narrower* version of the privilege seems to apply. Yet, one could also argue by emphasizing the phrase *any evidence* in the second limb of the provision that the privilege implies the protection of any evidence obtained under coercion, *real evidence* included.

protected from assisting their own prosecution,[115] and it protects the accused from coercion or compulsion.[116]

The existence of these rights requires the state to prove its case without the help of the defendant so that its superior power and resources remain counterbalanced. Nonetheless, plea bargaining undermines the right of silence and the privilege against self-incrimination.[117] Threats and rewards aimed at having a defendant waive his/her right to silence are generally prohibited so that the latter is protected from compulsion. Yet, plea bargaining by inducing, if not coercing defendants to plead guilty on the pain of severe punishment at trial, appears to negate the purpose of the right to silence and the privilege against self- incrimination. In particular, it tends to oppose the essence of the privilege – protection against compulsion from providing self-incriminating information.

The requirement of voluntariness, a pre-condition to plea bargaining, seems to offset the above concern. However, since the very concept of plea bargaining operates in sentencing differentials which could be threatening, if not coercive, the problem remains. The inherent coercions involved in plea bargains are beyond the reach of judicial scrutiny.[118] The coercive environment under which plea bargaining functions (i.e., high sentencing differentials, incomparable stakes involved –threat of severe punishment vis-à-vis losing at trial, unequal institutional bargaining power of the parties, among others) remains beyond their reach. This is especially true of their efforts to ascertain the voluntariness of the guilty pleas. Courts normally check if the guilty plea is free of physical coercion leaving the above coercive conditions (which may taint the outcome) unattended.

One may suggest that the defence counsel could play a role to enhance the fairness and integrity of the plea agreement. Nonetheless, that is not promising for three reasons: *First*, legal representation is not always mandatory –as indicated earlier, bargaining with unrepresented defendants is permissible in less serious crimes where the defendant consents to it.[119] *Second*, even in those

[115] This accommodates exceptions to the privilege/scope such as blood test, figure prints etc.

[116] S. Greer (1994), 'The Right to Silence, Defence Disclosure, and Confession Evidence' *J. Law & Soc.,* Vol.21, pp.107–9; Mike Redmayne (2007), `Rethinking the Privilege against Self-incrimination', *Oxford Journal of Legal Studies* , Vol. 27,No.2, pp.218-20.

[117] *See* for eg. Sanders, Andrew *et al*, *supra* note 72, p. 496.

[118] All the evidence and information remains at the hands of the parties. The judge is presented with the agreement. Although he may inquire information from the parties, the latter may have little/no incentive to provide him. Nor is the judge allowed to hear victims' account. The requirement of sufficient evidence as shown above is not promising either.

[119] *See* the Draft Code, *supra* note 15, article 224. Nonetheless, bargaining with unrepresented defendants is unreliable for: (a) it distorts the power imbalance further; (b) it is not properly sanctioned; (c) any guarantee to it is prone to circumventions.

mandatory cases, the quality[120] and availability of legal service is constrained by the limited recognition and respect of defence rights.[121] Above all, effective counsel is likely to be hampered in an unlimited plea bargains.[122] Thus, it is probable that many defendants go unrepresented or receive ineffective counsel.

4.6 The right to appeal

While the prosecutor is allowed to have appeal rights where the plea agreement is rejected, the defence has no appeal right at all.[123] One rationale for this seems that once the defendant is convicted based on his admission of guilt while concluding the plea agreement, there is nothing that he can challenge at the appeal stage.[124] A related rationale goes with the main terms/concessions of the plea agreement. In plea bargaining, a defendant enjoys the benefits of the agreement in exchange for waiving his right to challenge the prosecution evidence in the future, including appeal right. Nonetheless, waiver of the trial does not imply waiver of review by appeal. That is why express bans of appeal are often included by law or inserted in the plea agreement itself.

Perhaps another rationale could relate to the outcome of the rejection of the agreement in that where the agreement is rejected, parties are prompted to go to full-scale trials, in which case the defendant stands to enjoy his/her trial rights-including the right to appeal. Surely, this rationale would justify the ban only if full-scale trials were automatic to the rejection of the agreement. Nonetheless, that is not the case. The outcome of rejection of the plea agreement could be to prompt the prosecution to rectify the problem that caused the rejection, to plea bargain anew or to proceed to trial. Thus, to the extent that the outcome is other than going to the trial, the justification is less relevant. The need to appeal may arise where the plea agreement is accepted with modifications or erroneously approved by the court. In this case, the rationale is irrelevant. Some also suggest that the ban on appeal can be justified in the interest of finality and thus

[120] There are concerns as to the quality of legal representation defendants receive. See for example Abebe Asamere, *supra* note 112.

[121] The defence has no/little room to effectively participate in the pre-trial process. Interrogations are conducted in the absence of a lawyer, no parallel defence investigation as such exists, and there is limited defence access to resources and unparallel power between the prosecution and defence.

[122] *See* A. Alschuler (1986), *supra* note 111, p.149; Stephanos Bibas (2003), *supra* note 111.

[123] Art 234, the Draft Code, *supra* note 15.

[124] This rationale is commonly invoked to ban appeal in full-scale trials where a defendant is convicted based on his/her own guilty plea. As plea bargaining is a self-conviction method (i.e., a method which involves conviction based on admission of guilt), this justification is also valid to the ban of appeal in plea bargaining.

efficiency.[125] Yet, efficiency cannot be pursued at all costs in disregard of accuracy and fairness. Thus, there should be some room for appeal.

The ban of appeal leaves defendants with no opportunity to have their guilty pleas reviewed against any irregularity or unfairness in the process that are overlooked by lower courts.[126] Besides, it is inconsistent not only with the defendant's constitutional right of appeal but also with the principle of equality of arms.

In the foregoing discussion, it is shown that plea bargaining exhibits numerous inconsistencies and clashes with many of the fundamental values and principles of criminal procedure. This is primarily detrimental to defendants. Where a defendant is induced to forgo his/her right to trial and submit to plea negotiations, he/she surrenders several fair trial guarantees. As Professor William Stuntz states:[127] 'in criminal trials the constitution is omnipresent, in guilty pleas [plea bargaining] it is nearly invisible.'

However, due to its managerial and efficiency advantages, plea bargaining permeates many procedural systems pushing full-scale trials to the margin and making traditional values of fair trial give way for the new value of 'process economy'[128] – i.e., efficiency. As Damaska observes "the full adjudicative process is everywhere in decline", and he notes that "the novel mode is for authorities to offer concessions to defendants in exchange for an act of self condemnation which permits avoidance of the adjudicative process or at least its facilitation" and thus efficiency. [129]

Conclusion

Plea bargaining not only occupies a central position in many adversarial jurisdictions but also permeates diverse justice structures including the classical inquisitorial systems. Inspired by adversarial jurisdictions, Ethiopia has adopted the unrestricted or unlimited variant of plea bargaining, at least at policy level in addition to which a draft law is underway.

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[125] Juliet Horne (2013), Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales (Warwick School of Law Research Paper No. 2013/10 (Special Plea Bargaining Edition). Available at SSRN: http://ssrn.com/abstract=2286681 or <http://dx.doi.org/10.2139/ssrn.2286681>

[126] Perhaps the exception would be review by cassation. However, it is plain that review by cassation is very limited to fundamental errors of law and not facts erred by lower courts.

[127] William J. Stuntz (2006), 'The Political Constitution of Criminal Justice', *Harv. L. Rev*, Vol. 119, p. 791.

[128] *See* Regina Rauxloh (2010-110), 'Formalisation of Plea Bargaining in Germany- Will the New Legislation Be Able to Square the Circle?', *Fordham Int'l L.J.* Vol.34, p. 329.

[129] Mirjan Damaska (2004),'Negotiated Justice in International Criminal Courts', *International Journal of Criminal Justice* , Vol. 2, p 1019.

Although this variant of plea bargaining helps reduce case backlog to the extent that the problem correlates with full-scale trials, it is bound to pose its own tribulations which are either inherent to the institution, or typical to the version adopted by Ethiopia, or to the Ethiopian context. This author takes up one dimension of such issues: its relationship with fundamental principles of criminal law and procedure and argues that plea bargaining in general and the proposed Ethiopian variant, in particular is not consistent with such principles which are designed to ensure the integrity of the criminal process. The principles and rights that would be adversely affected include the presumption of innocence, the principle of equality, the principle of equality of arms, the privilege against self-incrimination and the right to silence. Nor is it compatible with one of the main purposes of any criminal procedure –uncovering the truth with the ultimate objective of making guilty defendants account for their wrong.

The magnitude of the problem is not similar in all models of plea bargaining. The problem exists in a mitigated form where plea bargaining is applied in the restricted or limited model which is characterized by statutorily fixed discounts, the ban of charge and fact bargains, and rigorous judicial scrutiny. That is why many inquisitorial/mixed jurisdictions such as Italy, Germany and Russia prefer this model over the unrestrained model, albeit with variations among them. However, this should not suggest that the limited model is capable of remedying the inherent flaws of plea bargaining, such as its inconsistency with fundamental principles and rights. Yet, sentencing differentials can be regulated by law under the limited model of plea bargaining thereby narrowing the gap between trial sentences and plea sentences. This model could also considerably mitigate the flaws of plea bargaining with regard to charge and fact bargains (which lack consistency and utterly defy the truth-finding endeavour). Moreover, rigorous review of the plea agreement applies under the limited model, and this enhances prosecutorial accountability. In this sense, should it be inevitable that Ethiopia uphold plea bargaining, this limited model could be a lesser evil. ■

Interactive Problem-Solving Interventions as Instrument of Conflict Transformation: Prospects and Challenges

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Abstract

Even though wars between states were historically the major forms of conflict, civil strife based on questions of identity, ethnicity, religion and other similar grounds has become the order of the day after the end of the Second World War. The complexity of mostly overlapping, social, economic, cultural, political and religious factors in these conflicts makes them difficult to deal with. This structural and conceptual metamorphosis in the international conflict paradigm has required the international community to rethink the traditional and formal conflict management and third party intervention techniques and instruments such as negotiation and mediation. In the course of achieving these goals, conflict scholars have focused on multiple but concurrent multi-track diplomacy instruments. Track II of this multi-track diplomacy and its conflict transformation instruments are based on the concerted efforts of unofficial actors to establish unofficial communication channels and facilitate the relations between the conflicting parties. One of the most commonly used instruments of Track II diplomacy is *interactive problem-solving*. The primary (but not the only) instrument of interactive problem-solving is a problem-solving workshop. This interdisciplinary comment deals with pertinent issues of relevance with regard to the nature and effectiveness of this conflict transformation instrument. In doing so, it makes a practical effectiveness assessment test against one of such methods, i.e., the *Kumi* method.

Key terms

Conflict, conflict transformation, multi-track diplomacy, Track II diplomacy, interactive problem-solving, problem-solving workshop, Kumi Method

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Introduction

The face of international conflicts has significantly changed after the Second World War and this has forced the international community to revisit the *status quo* of conflict management approaches. The traditional conflict management mechanisms that need revisiting include legal methods, peacekeeping, mediation and negotiation. Given the prevalence of inter-state, intra-ethnic and identity based conflicts, it has become an imperative to adopt a more comprehensive and robust third-party conflict intervention techniques.[1] These mechanisms are designed in a way that enables the international community to deal with the root causes of the prevailing intra-state, ethnic and identity based conflicts by putting the domestic actors at the center of the conflict resolution process.[2] One of such mechanisms is *interactive problem-solving* intervention which emphasizes on the close interaction of the conflicting parties through a bottom-up approach.

Some argue that this instrument of conflict intervention is a very effective tool in addressing the root causes of a conflict through facilitating a forum of open and honest dialogue among the members of the different conflicting parties, while others contend that the real impact of such effort is limited to the doors of the conference venue as it involves only a limited number of participants who cannot guarantee the dissemination of the outcomes to the rest of the society. Furthermore, the critiques point to the difficulty of measuring the impact of such efforts in the community and the temporal longevity of impact as the major drawbacks of this intervention method. Hence, this comment evaluates the relevance and effectiveness of this conflict resolution method in solving inter-group conflicts by referring to a modern case study where such method was used.

The first section of the comment is a brief elaboration on the evolution of third-party intervention. The second section briefly discusses Track-II diplomacy in light of interactive problem-solving method, and it highlights the theoretical basis of problem-solving method. The third section deals with problem-solving workshop as a specific method of interactive problem-solving, followed by the last section which briefly presents the Kumi method of interactive problem-solving as an empirical case study.

[1] Jacob Bercovitch and Richard Jackson (2012), *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches*, (University of Michigan Press), p. 8.
[2] Ibid.

1. The Evolution of Third Party Intervention: Emergence of Multi-Track Conflict Resolution Approach

Similar to other social discourse, the regime of third party intervention in conflict has undergone major stages of metamorphosis. The major transformative step to the discourse took place since the end of the Cold War. The main reason for this change in the framework is the change in the nature of conflicts following that era. Upon the unexpected collapse of the Soviet Union and the end of the bipolar world, there were high hopes for a peaceful world. These hopes mainly emanated from the minimized probability of a third nuclear World War. Expectations were also partially fulfilled through more coordinated international security policies, a sharp decrease in the frequency of interstate wars, and the emergence of the concept of state responsibility towards its citizens and the international community as a whole—as opposed to the traditional conception of strict state sovereignty.[3] Nevertheless, these hopes for a peaceful world have been shattered by the new faces of conflict.[4] At present, internal armed conflicts are the major threats to international peace and security.

1.1 The traditional state-centric approach

The original approach, which has dominated the regime of third party intervention since its inception, is the state centric Westphalian approach that emphasizes on the concept of state sovereignty.[5] This regime approached all activities and problems, including conflicts, in the international system from the sole perspective of power politics, i.e., with absolute exclusion of other actors and issues that were not the central concern of states.[6] This approach seems to have been well-suited for the period before the end of the Cold War as most of the conflicts during this time, including the First and Second World Wars as well as the proxy wars during the Cold War, were characterized by the involvement of formal actors, i.e. states or well defined non-state actors. Hence, the regime of conflict management was greatly influenced or informed by the traditional conflict management mechanisms such as legal methods, peace keeping, mediation and negotiation which put emphasis on maintaining the *status quo* and state security, rather than justice and human security.[7] During this era, the actors that were called to the table of conflict management were only states and well-defined insurgents as represented by diplomatic staff, head of states or the military.

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[3] Bercovitch and Jackson, *supra note* 1, p. 1.
[4] Ibid.
[5] Ibid. p.4.
[6] Ibid.
[7] Dalia Dassa Kaye (2007), *Talkingto the Enemy: Track Two Diplomacy in the Middle East and South Asia*, (RAND Corporation).

1.2 The changing faces of conflict and the paradigm shift in the notion of third party intervention

The changing nature of international conflicts from inter-state to intra-state wars and the resultant structural and conceptual metamorphosis has forced the international community to rethink the existing conflict management and third party intervention techniques and instruments. In the post-Cold War era intra-state conflicts are mainly characterized by a deeply rooted ethnic, religious, communal identity, cultural and resource-driven conflicts.[8] A majority of these conflicts mainly result from devastating poverty and weak or corrupt governance system, among others.[9] The complexity of these deadly conflicts that are mostly caused by overlapping social, economic, cultural, political and religious factors make them difficult to deal with.[10] This has led to the redefinition of international conflict with a view to embracing both intra-state and inter-state wars, thereby resulting in a paradigm shift from conflict management to conflict resolution and conflict transformation[11]

These mechanisms are designed to enable the international community to deal with the root causes of the prevailing intra-state ethnic and identity conflicts. Furthermore, these approaches, unlike the previous one, focus, not only on state security, but also on human security and justice. In doing so, conflict scholars have come up with new goals and approaches that suit the contextual flux in the conflict paradigm. These include the establishment of a just and democratic political order, the promotion of human rights, the creation of an emancipatory political system, reconciliation and truth commissions, international tribunals, and preventive diplomacy and early warning.[12] In the course of achieving these goals, conflict scholars have focused on multiple but coexisting multi-track diplomacy instruments. This has been found a very sound approach given the opportunity it provides to combine conflict resolution efforts at official and unofficial levels as well as traditional and modern approaches, where appropriate.[13] Hence, the new concept of multi-track diplomacy can be

[8] Rodney L. Petersen (2010), '*Religion and Multi Tuck Diplomacy'*, (Boston Theological Institute and Boston University School of Theology), p. 528.
[9] Bercovitch and Jackson, *supra* note 1, p. 2.
[10] Ibid.
[11] Ibid; Though the concrete distinctive meaning of these three phrases is far from agreement in the academia, Ramsbotham, *et al* have tried to make a fairly agreeable distinction among them as follows; Conflict management refers to the limited settlement and containment of conflict while conflict resolution implies that the deep-rooted sources of conflict are addressed and transformed, and conflict transformation indicates to the deeper level of conflict resolution. For further explanation *see,* Ramsbotham, *et al* (2011), *The prevention, management and transformation of deadly conflicts* (Polity Press).
[12] Id.p.6
[13] Ibid.

taken as a more robust and comprehensive extension of existing state-diplomacy (*First Track Diplomacy*) rather than a counter concept.[14]

It has to be noted that conflict management is a complex process that encompasses much more than negotiating an end to violence. It includes the prevention of new disagreement and reinstitution of relationships.[15] Richmond emphasizes this fact, noting that "[T]he new current approaches to conflict resolution have as their goal not just the cessation of violent behaviour but the establishment of new forms of interactions that can reflect the basic tenets of justice, human needs, legitimacy, and equality".[16] This can only be achieved through the involvement of all stakeholders in the process of dealing with conflict, which needs multiple avenues. The regime of conflict management has thus transformed itself into multi-track arena to respond to this need.

2. Track II Diplomacy: Interactive Problem-Solving

2.1 Core features of interactive problem solving

As mentioned above, Track II diplomacy is based on the concerted efforts of unofficial actors to establish unofficial communication channels and contribute to the resolution of the conflict. It provides an opportunity to explore opportunities for confidence-building measures and de-escalation of conflict.[17] Furthermore, it opens a window of opportunity for empowering citizens to participate in decision making processes.[18] Joseph Montville defines Track II diplomacy as: "unofficial, informal interaction between members of adversary groups or nations which aims to develop strategies, influence public opinion and organize human and material resources in a way that might help resolve their

[14] Daniel Wehrenfennig (2008), 'Multi-Track Diplomacy and Human Security', 7 *Human Security Journal*, p.81.;To give a brief description of the actors and elements of multi-truck diplomacy; Track I Diplomacy implies the effort of conflict management at state or official level; which usually relay on the traditional instruments of conflict management such as negotiation and mediation. Track II Diplomacy refers to the work done by non-elite actors representing non-governmental organizations, mostly with the ultimate purpose of creating an environment of receptivity for Track I activity. This embraces various interactive problem solving methods. Track III Diplomacy refers to "people to people" search for common ground undertaken by individuals or private groups. This type of activity may involve organizing meetings and conferences, generating media exposure, and political and legal advocacy.

[15] Wehrenfennig, Id., p. 82

[16] As cited in Bercovitch and Jackson, *supra* note 1, p. 9.

[17] Ibid.

[18] Ibid.

conflict".[19] The major input of this perspective is its objective to influence social constituencies and changing public opinion.

One of the most commonly used instruments of Track II diplomacy is *interactive problem-solving*. As stated above, the development of interactive problem-solving as an instrument of conflict resolution is part of the evolutionary process in the field after the end of the Cold War. These new instruments focus on addressing deep-rooted and structural issues.[20] This approach seeks to identify the root-causes of conflict relying on studies of human nature, human behaviour, and social structures.[21] It employs an inter-subjective approach of conflict which includes politics, especially in relation to representation and identity.[22] Hence, it has brought to light a new approach on human security and the role of states and individuals in world politics.[23] Accordingly, individuals matter, as do states, and human security is as important as state sovereignty.

2.2 The theoretical basis of interactive problem solving method

The theoretical foundation of the *interactive problem-solving* conflict resolution method was initially laid by John Burton. In developing his theoretical framework, Burton was guided by the principle that the best intervention is mainly about bringing together thoughtful action and reflection, so that action might be continually fine-tuned.[24] He traced the roots of persistent intergroup conflicts to the frustration of basic human needs.[25] He emphasized that a conflict analyst shall distinguish, both at the theoretical and empirical levels, between *interests*, which are open to negotiation, and *needs*, which are non-negotiable.[26] According to Burton, unless identity needs are addressed effectively, the recurrence of intractable conflicts is inevitable. Hence, the role of third-party interactive-problem solving is to channel the parties to a process in which they might come up with creative solutions to address their respective underlying needs and meet them in an interdependent relationship.[27]

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[19] Joseph Montville (1987), *"The Arrow and the Olive Branch: A Case for Track Two Diplomacy in Conflict Resolution: Track Two Diplomacy",* (Washington, DC: U.S. Government Printing Office.

[20] Bercovitch and Jackson, *supra* note 1, p. 8.

[21] Id., p. 9.

[22] Ibid.

[23] Ibid.

[24] Tamra Pearson d'Estrée (2009), "Problem-Solving Approaches", (in *The SAGE Handbook of Conflict Resolution*, ed. Jacob Bercovitch et al, Thousand Oaks, CA: Sage) p.13.

[25] John Burton (1969), "*Conflict and communication: The Use of Controlled Communication in International Relations" (*London: Macmillan,).

[26] Tamra Pearson d'Estrée, *supra* note 24, p.13.

[27] Ibid.

Burton's Basic Human Needs Theory was much influenced by Abraham Maslow's 'hierarchy of needs' –which states that human motivation is based on a hierarchy of needs, ordered from basic physical needs to psychological requirements such as recognition, achievement and fulfillment that are depicted as biologically innate.[28] Burton applied Maslow's hierarchy of needs theory to a conflict context. According to Burton, the list of basic human needs includes not only material needs such as food, shelter, physical safety and well-being, but also psychological needs such as identity, security, autonomy, recognition, self-esteem and a sense of justice.[29]

Burton contends that these psychological needs are even more fundamental than basic physical needs like that of food and shelter, hence people pursue them in one way or another.[30] He tells us that "[h]uman needs in individuals and identity groups who are engaged in ethnic and identity struggles are of this fundamental character".[31] Failure of recognition and denial of identity by a society would certainly lead to alternative behavior designed to pursue and satisfy those needs by all means available, be it ethnic war or any other type of violence.[32] Burton underscores that "deep-rooted conflicts cannot be contained or suppressed in the long term, but can be prevented or resolved only by the satisfaction of basic needs through conflict resolution".[33] Hence, Burton's theory indicates that although traditional power theory is correct in hypothesizing conflict over scarce resources, it had the erroneous conclusion that human behavior was determined primarily and solely by material benefits, and that the root causes of conflicts was over competition for scarce resources.[34] Burton rather points out that human behavior is mostly shaped by deeper concerns of identity and autonomy.[35]

Burton further notes: "A conflict is not resolved merely by reaching agreement between those who appear to be the parties to the dispute. There is a wider social dimension to be taken into account: the establishment of an environment that promotes and institutionalizes value relationships".[36] Hence, the role of conflict resolution and third-party involvement is to provide an

[28] Ülkü D. Demirdöğen (2011) 'A Social-Psychological Approach to Conflict Resolution: Interactive Problem Solving', 4:1 *International Journal of Social Inquiry*, p. 220.
[29] John Burton (1990), "*Conflict: Resolution and Prevention*" (London: Macmillan)
[30] Demirdöğen, *supra* note 28, p.220.
[31] Burton, supra note 29, p.36.
[32] Demirdöğen, *supra* note 28, p.220.
[33] R. Fisher. (1997), '*Interactive Conflict Resolution*', (New York: Syracuse University Press) p.6.
[34] Burton, *supra* note 29, p. 46.
[35] Tamra Pearson d'Estrée, *supra* note 24, p.14.
[36] Burton, *supra* note 29, p. 47.

opportunity for analysis and the use of this conscious and creative resource.[37] Methodologically, this theory relies on analytical problem-solving workshops and analytic dialogues in which the roots of conflict and the suppressed human needs of the conflicting parties can be analytically understood.[38] After the relationships of the parties have been well analyzed and each side is accurately informed of the perception of the other, alternative means of attaining values and goals that might be acceptable to all parties are revealed.[39]

This theme is further stated in the writings of subsequent theorists (Crocker *et al.,* 1999; Kelman, 1999, 2005; Lederach, 1997; Saunders, 2001). In particular, Kelman has further developed Burton's basic human needs approach to conflict resolution by injecting a social–psychological dimension to it. In agreement with Burton, Kelman reiterated that "identity, security and similarly powerful collective needs and the fears and concerns about survival associated with them, are often important causal factors in intergroup and inter-communal conflict".[40] He further identified the causes of conflict in general to be subjective and objective, which are interrelated.[41] Conflicts over objective factors, such as territory and/resources imply subjective fear or concern about security and identity.[42] And mostly conflicts are further fueled by other subjective psychological factors such as misunderstanding and distrust.[43] In this context Kelman contends that the main parameter for a successful conflict resolution is satisfaction of fundamental needs of the parties concerned.[44]

Extrapolating his social-psychological approach to international conflict, Kelman states that international conflict is not solely about intergovernmental or interstate relations; it is rather an inter-societal process.[45] Since conflict is inevitable, psychological, cultural and social-structural approaches must be embraced in the analysis and intervention in harmony with military, strategic and diplomatic paradigms.[46] Kelman gives due emphasis to the importance of multidimensional conflict intervention, including a psycho-social approach:

> Overcoming barriers requires the promotion of a different kind of interaction, one that is capable of reversing the conflict dynamics. At the micro-level,

[37] Tamra Pearson d'Estrée, *supra* note 24, p.14.
[38] Demirdöğen, supra note 28, p.220.
[39] Ibid.
[40] H. Kelman. "Social-Psychological Dimensions of International Conflict" In I.W. Zartman & J.L. Rasmussen (Eds.), (1997) '*Peacemaking in International Conflict: Methodsand Techniques'* (Washington, D.C.: United States Institute of Peace Press,) p. 195.
[41] Demirdöğen, *supra* note 28, p. 221.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

> problem-solving workshops […] can contribute to this objective by encouraging the parties to penetrate each other's perspective, to differentiate their image of the enemy, to develop a de-escalatory language and ideas for mutual reassurance, and to engage in joint problem solving designed to generate ideas for resolving the conflict that are responsive to the fundamental needs and fears of both sides. At the macro-level, reversal of the conflict dynamic depends on the establishment of a new discourse among the parties, characterized by a shift in emphasis from power politics and threat of coercion to mutual responsiveness, reciprocity, and openness to a new relationship. [47]

3. Problem-Solving Workshops

The primary (but not the only) instrument of interactive problem-solving is problem-solving workshop.[48] It is with the development of this concept that scholars such as Burton and Kelman introduced the idea of 'conflict transformation'.[49] The major points of divergence between problem-solving workshops and the traditional conflict management methods of official diplomacy, including negotiation and mediation relate to (a) the emphasis by the former on addressing poor relationships between parties; and (b) the latter's assertion that conflict can only be resolved through mutually accepted solutions; and (c) the unofficial small group discussion nature in problem-solving workshops.[50] Authors such as Ropers labelled this mechanism of dispute resolution as the most ambitious approach, in which the disputants organize their communication in such a way that they are able to systematically work through the substance of their differences.[51]

The typical workshop brings together unofficial representatives of conflicting groups in a private setting for them to engage in face-to-face communication.[52] This forum of discussion about the conflict is informal, off-the-record and low-

[47] Kelman, *supra* note 40, p. 233.

[48] Herbert C. Kelman, 'Interactive Problem Solving in Israeli- Palestinian Case: the Past Contribution and Present Challenges'. In R Fischer (2005), *Paving the way: Contributions of Interactive Conflict Resolution to Peace Making,* (Lamham, MD, Lexington Books) p.5.

[49] Bercovitch and Jackson, *supra* note 1, p. 9.

[50] Lisa J. Freeman & Ronald J. Fisher (2012), 'Comparing a Problem-Solving Workshop to a Conflict Assessment Framework: Conflict Analysis Versus Conflict Assessment in Practice', 7:1 *Journal of Peace building & Development*, p.68.

[51] Norbert Ropers (2003), '*From Resolution to Transformation: The Role of Dialogue Projects'*, (Berghof Research Center for Constructive Conflict Management) p. 3.

[52] Freeman & Fisher, *supra* note 50.

risk.[53] The objectives of the workshop include: attitude change, the generation of innovative solutions, and improvement of intergroup relationships. However, these rationales are not taken as the primary and sole end of the conflict resolution process in a given conflict; they are rather intended to provide an alternative but complimentary form of interaction to official peace process that focus on agreements and their implementation.[54] It is presumed that the betterment of the relationship amongst the unofficial parties will contribute to the resolution of the objective elements of the conflict.[55] Hence, the ultimate goal is to create an atmosphere for positive interaction between unofficial representatives of opposing parties that enable attitudinal change, and creative problem solving, which serve as an input in the official process and contribute to de-escalation.[56]

Kelman identified three basic rules for the workshop. It must be primarily intended to facilitate the free participation, privacy and confidentiality of the proceedings without the expectation that agreement will be reached. Balanced and equitable interaction among the parties is required. Moreover, participants of the workshop must come as private individuals rather than official representatives.[57] However, they must be politically involved or must be influential enough, so that they can easily disseminate the results of the workshop to the policy-making machineries of their respective sides.[58]

It is mostly facilitated by skilled and acknowledged third-party academicians, who are knowledgeable about conflict-resolution theories and the region in question.[59] However, the third party cannot propose a solution or employ leverage, rather only facilitates analysis of the conflict and the creation of possible solutions by creating a spirit of motivation for problem solving.[60] S/he also regulates the interaction between parties.

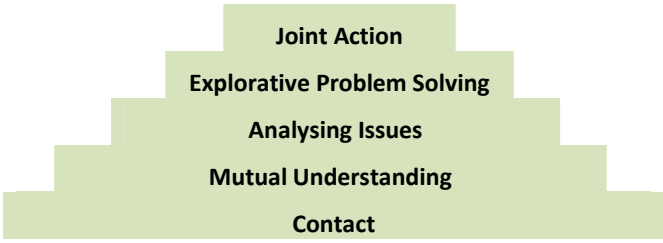
3.1 Steps in Problem-Solving Workshops

Most workshops generally last for three to five days, and although the agenda is not fixed, a general procedure has emerged.[61] In most cases the workshop starts

[53] Ibid.
[54] Freeman & Fisher, *supra* note 50, p.69.
[55] Ibid.
[56] Ibid.
[57] Kelman, *supra* note 40, p. 214.
[58] Ibid; Kelman states that in the Israeli- Palestinian workshops the participants have included Parliamentarians, leading figures in political parties or former movements, former military officers or government officials, and journalists or editors specialized on the Middle East.
[59] Demirdöğen, *supra* note 28, p. 222.
[60] Freeman & Fisher, *supra* note 50, p. 69.
[61] Ibid.

with the exchange of views and experiences of the conflict among the participants. This phase is concerned with the formulation of the different point of views of the various parties as clearly as possible and the identification of the substance of the conflict.[62] Rouhana (1995) calls this phase '*cognitive empathy'* –the process by which each party moves from expression of its own needs to comprehension of the needs of the other.[63] The second phase is called '*responsivity to the needs of others*'. This stage involves each party looking for an assurance that the other party does not only understand its needs but also recognizes its legitimacy and takes it into account in the course of developing solutions.[64] The third phase is about the identification of shared interests and similar needs and fears.[65] Furthermore, participants build a new group identity and mode of interaction that has the potential to develop ideas thereby contributing to a resolution.[66] The fourth and final stage is called phase of *'working together.'* In this stage, the group discusses ways of implementation of the ideas and also thinks about overcoming the obstacles to possible solutions while identifying the constraints on each side.[67]

Figure 1: Levels of Cooperation in Dialogue Process



Source: McCarteny 1986

These phases might be completed in a single workshop or may need several consecutive meetings.[68] This has to be decided by the third party after carefully assessing the readiness of the participants to move from one phase to another.[69]

[62] Ropers, *supra* note 51.
[63] Rouhana (1995), '*The Dynamics of Joint Thinking between Adversaries in International Conflict: Phases of the Continuing Problem-solving Workshop'* (16:2 Journal of Political Psychology) p. 325.
[64] Freeman & Fisher, *supra* note 50, p. 69.
[65] Norbert Ropers, *supra* note 61, p.4.
[66] Lisa J. Freeman & Ronald J. Fisher, *supra* note 50, p. 69.
[67] Ibid.
[68] Ibid.
[69] Ibid.

3.2 The limitations of problem-solving workshop

From the very beginning, this instrument of conflict intervention has been controversial. The primary limitations that have been raised by many scholars are the issues of relevance and effectiveness.[70] One of the earliest criticisms in this respect came from Ronald Yalem, who doubted the effectiveness of this methodology given the lack of assurance for transfer of the positive results gained in the workshop room to the society and the absence of concrete criteria of measurement in order to evaluate the actual impact of a given intervention.[71] He argued that, although such intervention might serve to build trust, it can only be a supplement to traditional methods of conflict resolution. These criticisms have been sustained for long by various scholars and have not yet been effectively addressed by the proponents of the methodology.[72]

Fischer, in his study on evaluation efforts of Interactive Conflict Resolution, found that few systematic and comparative analyses exist although several practitioners claim to have an impact on creating peace in different conflicts around the world.[73] In their effort to address the limitation of measurability of impact, d'Estrée *et al* underline that putting in place a framework for evaluation that allows tailoring to the specific emphasis of a process can help in identifying the actual achievement of a conflict resolution scheme.[74] In this regard, they pointed out two primary challenges that can be encountered in the evaluation of this specific intervention methodology.[75]

The *first* challenge has to do with the selection of the criteria. The concerns here are: who chooses the criteria for evaluation and on what ground; how can the criteria be contextualized based on actor, purpose and context? The selection of criteria might also be challenging as interventions might have multiple and mostly vague or unstated goals. The *second* and mostly cited challenge is the issue of linking the micro-changes to the wider and structural, macro-changes inherent in peace-making. The complicated nature of conflicts makes it difficult to pin-point the casual effect of one micro-level intervention on a macro-level. These challenges imply the fact that the theoretical investigation of interactive problem-solving or inter-group conflict management is still poorly developed.

To illustrate these challenges, d'Estrée *et al* have provided a practical example from the Israel-Palestinian dialogues, which have been considered as

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[70] Tamra Pearson d'Estrée, *supra* note 24, p. 18.
[71] R. Yalem, "*Controlled communications an conflict resolution",(8:3 Journal of Peace Research, 1971*) p. 266.
[72] Tamra Pearson d'Estrée, *supra* note 24, p. 18.
[73] Fisher, *supra* note 33, p.10.
[74] Tamra Pearson d'Estré et al (2001), 'Changing the Debate about "Success" in Conflict Resolution Efforts', *Negotiation Journal*, p. 102.
[75] Ibid.

intervention under the broader definition of interactive-problem solving.[76] Some considered these venues as important milestones to set the stage for peace-making through creating common understanding of the conflict among the people, while others criticized them for their limited focus.[77] Practitioners and others intended to come up with criteria to measure the success rate of the dialogue, which has brought to light the difference in perspective on this subject. This lack of agreement on the set of criteria to be used led to confusion and doubt over the entire relevance of the process.[78]

The Israeli-Palestinian dialogues are also good examples of the second limitation, i.e., linking immediate or short term micro-changes to long term, structural, macro-changes. The dialogues mostly took place in informal and closed environments and were structured in ways that they could establish trust and encourage new reflections and learning. Though it is probable that the participants developed a significant amount of trust within the group, the trust between the communities they come from might not be altered at all. In this context, d'Estrée *et al* ask: what kind of change can one expect as a result of the dialogue? How can the individual or mini-group change be effectively translated into a change in relations at inter-group level? Hence, as many other interactive problem-solving interventions, the Israeli-Palestinian conflict resolution evaluation is also stranded in the usual challenges of definition and criteria for success and the linkage between micro-and macro-level changes.[79]

4. Case Study: The Kumi Method

The meaning of the word Kumi is 'rise up' in both Arabic and Hebrew.[80] It is one method of interactive problem-solving in a workshop setting. Kumi is a method of conflict intervention enabling innovative social change through conflict transformation.[81] In other words, it is a mechanism that can be adopted by individuals and groups who work towards social and political reengineering so that they can reflect upon the root causes of the conflicts they are involved in and collectively march towards creative alternative solutions.[82]

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[76] Fisher, *supra* note 43.
[77] Tamra Pearson d'Estré et al, *supra* note 90.
[78] Ibid.
[79] Ibid.
[80] A Hand Book for practitioners, *'Building Networks of Kumi Learners in Europe: Working across geographic and cultural boundaries on issues of Islamophobia and migration'*, (Education and Culture Lifelong Learning Program, 2013), p. 6.
[81] Ibid.
[82] Transform, *'The Kumi Method: An Introduction'* (2013), The Interdisciplinary Center for Conflict Analysis, Political Development and World Society Research), p. 1.

4.1 The Metamorphosis of Kumi

The Kumi method was developed by a group of diverse scholars who shared a common sense of frustration over the sluggish progress and impact of Israeli-Palestine people-to-people programs.[83] After a long period of research on the way in which such programs were carried out, it was concluded that there were important flaws in the basic architecture and implementation of most of the programs which could be linked with their general understanding of conflict.[84] Since these programs primarily focused on staging dialogue between the conflicting parties, sometimes they presumed that the causes of the conflict mainly lay in the perception of individuals which could be solved by facilitating contact for people from both sides.[85] What this approach mainly missed was the recognition of the deeply-rooted social structures which were fuelling the Israeli-Palestine conflict. These range from power asymmetry between the two societies to the bigger geopolitical picture.[86] This had led to the superficial remedy of issues of identity.[87]

From the findings of the researches, it was deduced that for such initiatives to be fruitful, a new approach that would empower grassroots organizations and mid-level political leaders was needed for them to effectively challenge the bigger social structure perpetuating conflict.[88]A method was needed to put this approach on the ground. In order to achieve this goal, a coalition was created between three organizations: Transform (the Interdisciplinary Centre for Conflict Analysis, Political Development and World Society Research), IICP (Institute for Integrative Conflict Transformation and Peace building) and ICA (Institute for Cultural Affairs).[89] Each of them has its own approach of addressing conflict resolution and political organization.[90] The purpose of the coalition was to formulate a hybrid of these different methods and perspectives, so that it can be utilized to harness the efforts of grassroots organizations and mid-level societal leadership working in a conflict situation.[91] The final product of this effort was Kumi which has been further developed while it was put to use in years 2009-2010 in the context of the Israeli-Palestinian conflict.[92]

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[83] People-to-people program refers to a series of dialogue and encounter activities organized as a part of the Oslo peace process in the 1990s.
[84] Transform, *supra* note 82.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] This approach is referring to the theoretical basis of Kumi; which indicates that Kumi method operate simultaneously as Track II and Track III diplomacy instrument.
[89] A Handbook for practitioners, *supra* note 80, p. 6.
[90] Ibid.
[91] Ibid.
[92] Ibid.

4.2 Fundamentals of the Kumi Method

Unlike other problem-solving instruments emphasizing on mere face to face dialogue, Kumi targets the transformation of notions of identity based on exclusion through systematic streaming of the societies' thinking and action towards a set of goals extending beyond the end of the workshop. Hence, the fundamental goal of Kumi is to enable creative social change through conflict transformation or creative conflict transformation through social change.[93] Kumi pays great attention to the collective will of a group in order to make change happen. The Kumi process enables individuals and groups to work towards social and political change to reflect on the root causes and the social contexts of the conflicts in which they are involved.

Furthermore, unlike other mainstream people-to-people dialogue projects, this method emphasizes on the creative capacity of the grassroots and mid-level politicians, not just as accessories to official leaders, but as the main parties in demanding and creating socially-just peace.[94] This enables Kumi to simultaneously operate at different levels of the society.[95]

The method is usually applied in workshops settings that are organized by Kumi practitioners, who work with different conflicting groups over an extended period of time. The process involves a well-organized preparation and follow-up after re-entry.[96] The ideal transformative[97] end of the method is that participants will agree on a shared value reflected through concrete steps forward, collective action plans to which they commit themselves.

4.3 Structure of Kumi Workshop

Like any other interactive problem-solving workshop, participants in a Kumi workshop pass through different steps. These steps allow participants to engage in conflict analysis in order to (a) explore social and political failures that are inherent to intractable social conflicts; and (b) develop new awareness of reality to be attained in which negative stereotypes and antagonism are replaced by analytical empathy which facilitates transformative politics in which power over

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[93] Ibid.

[94] Transform, *supra* note 82, p. 4.

[95] This is one of the primary purpose of the method; which has been elaborated in the Kumi Hand Book as follows; "Kumi endorses a multi-track approach in order to contribute to the potentials of significant change across all dimensions of societal structures, cultures and politics in a complementary manner. Working in parallel on the level of grassroots and on the level of mid-level leadership in society increases the potential for creating impact on the ongoing conflict discourse and broadens the awareness of creative new approaches to the conflict that address the needs of all sides involved." P. 10.

[96] Ibid.

[97] According to the developers of this method, true transformation of conflict means distributing power more broadly within society.

is replaced by power with/for.[98] These steps enable the participants to effectively deal with different aspects of the conflict in a sequential manner in which each step builds on the results obtained in the previous one. These steps are:

i. *Preparation:* This involves identification of the target group and establishing contact; researching divisive issues and together with the target group, determining where, how and on what issues the workshop shall focus.[99]
ii. *Developing focus, context check and identification of contradictions:* In this stage, the issues of focus are identified and the facilitator makes sure that all the participants have general understanding of the issues to be raised in the workshop.[100] This enables the participants to put their goals on the discussion table and identify the contradictory goals.[101]
iii. *Dealing with the conflict in depth: conflict analysis, antagonism and resonance, transcendence:* After the identification of contradictory goals, the group directly deals with the central themes of the conflict. Participants deal with identities, and bring to light grievances and antagonisms.[102] They then deal with the conflict in a more analytical manner. After establishing a common understanding through critical analysis, they reframe the initial goals so that they can open a new avenue for transcending contradictions.[103]
iv. *Participatory strategic planning:* After achieving a common goal, participants identify a common practical vision depicting the ideal environment they would like to see in 5-8 years.[104] In this process, obstacles are identified, strategies are developed and detailed action plans are prepared on how to work together for conflict transformation.[105]
v. *Supporting implementation upon re-entry:* After the workshop, the facilitators continue tracking the progress made by the group and offer practical help while the group begins implementing its action.[106]

What has to be noted in the implementation of these steps is that it might not be a smooth process. Sometimes, facilitators might be bound to repeat steps or interrupt and proceed some other time in a situation where people are not yet ready. Furthermore, there is no guarantee of success, and people might fail to come up with a solution.

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[98] A Handbook for practitioners, *supra* note 80, p. 11.
[99] Transform, *supra* note 82, p. 5.
[100] Ibid
[101] Ibid.
[102] Ibid
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Id., p. 6.

4.4 Evaluation of the Kumi Method

As already mentioned, Kumi does not end the conflict transformation effort inside the workshop room; it rather tries to extend the achievements obtained to the real world through action oriented planning and networking the participants. Hence, this makes Kumi a bit different from other dialogue projects. However, even though the developers of this method claim that it has remedied the weak sides of other interactive problem-solving mechanisms, it still suffers from the same problem of evaluation and micro-macro change linkage in addition to lack of clear criteria for selection of workshop participants, especially at grassroots levels.

Evaluation of result is a very difficult task in Kumi because we cannot see the actual changes that are brought about in a given community as this may take years or even a decade. Moreover, there is uncertainty as to who chooses the criteria for evaluation and on what ground and how the criteria can be contextualized based on actor, purpose and context. Moreover, the issue of linking the micro-changes to (the wider and structural) macro-changes inherent in peacemaking arises in Kumi context. It is also difficult to establish causal link between the action and the results/changes.

Although Kumi seems to be different (in that it continues tracking the progress made by the group and offers practical help while the group begins implementing its action), given the very weak community networking system in developing countries, especially in conflict areas, it may not be feasible to track down and work with the participants after re-entry. Given the budget constraints and the probable lack of interest on the part of the donors to finance such projects, a question arises whether planning to support implementation after re-entry is attainable.

Conclusion

The nature and cause of conflicts have been dramatically transformed from the mid-1950s'. Civil strife based on questions of identity, ethnicity, religion and other similar grounds –strongly tied to the emotions and the person of individuals and communities– have become the order of the day. Unlike the 'old conflicts' grounded on questions such as sovereignty, territory or political economy, these 'new conflicts' need creative solutions that can address the root causes for a sustainable peace to happen. It is with this view that the regime of third party intervention has undergone a complete evolution from the traditional peace-making mechanisms such as negotiation and mediation, to the multi-track and multidimensional third-party conflict intervention techniques. One of the by-products of this evolution is *interactive problem-solving* instrument, mostly categorized as Track II diplomacy.

Scholars such as Burton and Kelman have applauded this mechanism as an efficient and effective method of intervention to address the root causes of protracted identity conflicts. This method is firmly grounded on the human security and basic needs approaches; and these questions mostly lie behind conflicts of identity, ethnicity and culture. Hence, the channel of face-to-face communication facilitated by these interactive problem-solving techniques will open an opportunity for the parties to communicate with each other, and to analyze and work out their conflicts by clearly exposing the grounds of contradiction.

However, other scholars doubt the effectiveness and relevance of this methodology –and rightly so, given its inherent nature and the related difficulty of evaluating impact, and the lack of efficient mechanisms to link the micro-results obtained at group level to macro-level outcomes. Hence, as long as these problems are not addressed properly, it will be difficult to use this methodology as effective third-party conflict intervention instrument.

Yet, the discourse on interactive problem-solving interventions has validly revealed that current conflicts are mostly attributable to questions of identity, ethnicity, religion and other similar grounds, and have greater complexity than the traditional wars between states. Conflicts that involve sense of identity, belief and emotions of individuals and communities should thus be addressed through means that accompany (and go beyond) traditional conflict management schemes. Unfortunately however, we are at a juncture whereby the traditional methods seem to be limited in scope in addressing current conflicts, while the new modalities of conflict transformation are yet in the making. This calls for enhanced empathy, creativity, critical thinking and reason on the part of communities, political actors and parties in conflict. ■

COMMENT

Some Remarks on Ethiopia's New Cybercrime Legislation

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Abstract

Ethiopia has been enacting various pieces of legislation, since recently, to regulate some aspects of the digital environment. The Cybercrime Proclamation of 2016 (Computer Crime Proclamation No.958/2016) is the most recent addition to the legal regime that criminalizes a range of cybercrimes. It has also introduced a number of novel evidentiary and procedural rules that will assist in the investigation and prosecution of cybercrimes. The law has, however, attracted criticisms from various corners mainly owing to some of its human rights unfriendly provisions. This piece provides brief comments on the cybercrime legislation and highlights some of the challenges that lie ahead in the course of implementing the law.

Key terms

Cybercrime, computer crime, the right to privacy, illegal online content, procedural justice, Ethiopia

Introduction: Ethiopia's new cybercrime legislation

Ethiopia introduced the first set of cybercrime rules with the enactment of the Criminal Code in 2004. The Code criminalizes a set of three cybercrimes namely 'hacking', 'dissemination of malware' and 'denial of service attacks (DoS)'.[1] Several cybercrimes have been perpetrated against the Ethiopian cyberspace since the enactment of the computer crimes rules, but there currently are only a few reported court cases.[2] In 2013, Ethiopia's cyber command –

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[1] *See* Criminal Code of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, Proclamation No. 414/2004, Arts 706-711.

[2] For a discussion on major cybercrime incidents in Ethiopia until mid-2014, *see* Kinfe Micheal Yilma (2014), 'Developments in Cybercrime Law and Practice in Ethiopia', 30

Information Network Security Agency (INSA)– released a draft comprehensive cybercrime legislation that not only extended the range of outlawed cybercrimes but also introduced crucial evidentiary and procedural rules for the investigation and prosecution of cybercrimes.[3]

After three years of hiatus –and new drafting (or redrafting) by the Ministry of Justice (currently Office of the Federal Attorney General), the second version of the bill has been adopted by the Council of Ministers in March 2016. The bill was subsequently submitted to the Ethiopian Parliament where it was discussed for unusually long duration.[4] The second version of the bill was, by and large, similar in content –in terms of both substantive and procedural provisions– with the initial version save some new provisions and minor structural as well as linguistic changes.

The Legal and Governance Affairs Standing Committee of the Parliament held a public consultation with stakeholders including relevant government agencies, academic institutions and members of the general public. The Ethiopian Parliament finally adopted the law in early June 2016 and has since been published in the official law gazette.[5] Despite reform suggestions put forward on the initial drafts, some provisions identified to be worrisome particularly those that encroach on constitutionally guaranteed rights are regrettably maintained.

It has, as a result, attracted widespread attention from various corners after the second version was unveiled. Numerous news reports, commentaries and editorials have been written about the law, most of which highlight its impact on human rights such as privacy and freedom of expression.[6] Global civil society

Computer Law and Security Review 720, 725-729. On a recent cybercrime case adjudged by Ethiopian courts, see Kinfe Micheal Yima and Halefom Hailu Abraha (2015), 'The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce and the New Media', 9 *Mizan Law Review* 108, 110-111.

[3] *See* A Proclamation to Legislate, Prevent and Control Computer Crime (Draft), Version 1.0, 2013 (On file with author).

[4] *See* A Proclamation to Provide for Computer Crime (Draft), Version 2.0, 2016 (On file with author).

[5] *See* Computer Crime Proclamation, *Federal Negarit Gazeta*, Proclamation No. 958/2016.

[6] *See*, for instance, Yonas Abiye, 'Controversial cybercrime draft proclamation tabled for approval', *The Reporter*, (Addis Ababa, 16 April 2016); New computer crime law hinders vibrant online discourse, *Addis Fortune* (Addis Ababa, 24 April 2016); Kinfe Micheal Yilma, 'Troubling aspects of Ethiopia's cybercrime bill' *The Reporter*, (Addis Ababa, 16 April 2016); Alemayehu Gebremariam, 'State terrorism and computer crime in Ethiopia', *Ethiopian Review* (California, 30 May 2016); Solomon Goshu, 'The computer crime law: another inroad on human rights?', *The Reporter* (30 April 2016);; Kinfe Micheal Yilma, 'Ethiopia's new cybercrime legislation: Government heard but only partially', (*The Reporter*, 11 June 2016).

organizations have also released reports regarding the law before and after its enactment highlighting its impact on human rights.[7] This comment is an overview on the new cybercrime legislation and highlights its major limitations as well as practical challenges that lie ahead in the course of putting the law into action.

1. Salient Features of the New Cybercrime Law

The cybercrime law recently enacted by the Ethiopian parliament has emerged with some changes to the initial versions of the law. It has made, for instance, provisions of the law notably detailed unlike the truncated nature of the initial draft, which generally works against requirements of precision in legislative drafting. Precision is a desirable virtue of legal provisions as it mitigates problems in judicial interpretation of the rules. In this sense, the present cybercrime law seems to have sacrificed precision for the sake of ensuring clarity by framing provisions in an excessively detailed manner.

A major shift in the new law concerns the reshuffling of the institutional arrangement in the investigation and prosecution of cybercrimes. Perhaps following change of hands in the drafting exercise from INSA to the Federal Attorney General, the law now puts the latter as the principal implementing body.[8] Unlike a leading enforcement role assumed by INSA and the Federal Police under the initial draft, the Federal Attorney General (that has drafted the second version of the law) has now come to be the principal enforcer of the law. And, INSA's role has largely been relegated to sheer provision of technical support in the course of cybercrime investigation and prosecution by the Federal Attorney General.[9] The only scenario where INSA would have some investigatory power, as shall be seen below, is with regard to sudden searches and digital forensic investigations for preventive purposes.

In terms of substantive criminal rules, the law maintains almost all items of cybercrimes incorporated both in the initial and second versions. One, however, notes some replication of crimes within the law. An example, in this regard, is the crime of 'causing damage to computer data' –or commonly referred to as 'spreading malware'.[10] A crime of almost identical sort is provided in Art 7(1) of the law which is captioned as 'criminal acts related to usage of computer

[7] *See*, for instance, 'Ethiopia: Computer Crime Proclamation – A Legal Analysis' (*Article 19*, July 2016) available at <https://goo.gl/azy3BP>; Kimberly Larcson, 'Ethiopia's new cybercrime law allows for more efficient and systematic prosecution of online speech' (*Electronic Frontier Foundation*, 9 June 2016), available at <https://goo.gl/RJaAfq> (Las accessed on 15 October 2016).

[8] *See Computer Crime Proclamation*, supra n 5, Arts 22-25, 30-31, 38.

[9] Id., Arts 23 and 39.

[10] Id., Art 6.

devices and data'. All the remaining sub-articles of Art 7 deal with what are normally called 'acts committed to facilitate the commission of cybercrimes'.[11] The same problem of unnecessary replication is discernible with respect to the 'crime against liberty and reputation of persons' where the first two sub-articles are essentially redundant.[12]

Redundancies are also present if one looks across other pieces of legislation. A case in point is 'cyber-terrorism' which Ethiopia's controversial Anti-terrorism law already outlaws, but again Article 14 of the Computer Crime Proclamation[13] essentially replicates it under the caption of 'crime against public security'. The provision reads:

> ... Whosoever intentionally disseminates through a computer system any written, video, audio or any other picture that incites violence, chaos or conflict among people shall be punishable with rigorous imprisonment not exceeding three years.

The only difference between this provision and that of the anti-terror legislation is that terrorist acts must be guided by a certain political, religious or ideological cause. But the crime against publicity is still couched in such neutral terms that it might very well embrace cyber-terrorist acts. That is, all acts that incite violence, chaos or conflict with or without some political, religious or ideological cause are potentially punishable under the cybercrime legislation.

The law also creates a new cybercrime scenario of 'aggravated cases' when cybercrimes are committed against 'top secret' military or foreign policy computer data, system or network at a time when the nation is in a state of emergency or threat.[14] In such cases, the punishment could go up to 25 years of rigorous imprisonment. Concerns are likely to arise here regarding the excessive length of the punishment. The provision states:

> Where the crime stipulated under Article 3 to 6 of this Proclamation is committed:
>
> a) against a computer data or a computer system or network which is designated as top secret by the concerned body for military interest or international relation, or
>
> b) while the country is at a state of emergency or threat,
>
> the punishment shall be rigorous imprisonment from 15 to 25 years.

When it comes to procedural and evidentiary matters, the law has incorporated provisions dealing with the preservation and production of computer data by

[11] Id., Art 7(2-4).
[12] Id., Art 13.
[13] Id., Art 14; *Cf*, Anti-terrorism Proclamation, *Federal Negarit Gazeta*, Proclamation No. 652/2009, Art 3(6) cum Art 2(7).
[14] Id., Art 8.

service providers, rules by which computer data or systems could be searched, accessed and seized by investigators, rules on the admissibility of electronic evidence and related authentication procedures.[15] The law also pays due attention to the importance of cooperation with law enforcement bodies of other countries and organizations, and requires the Federal Attorney General to facilitate such international cooperation.[16]

2. Problematic Provisions in the Proclamation

The Computer Crime Proclamation incorporates provisions that present potential threat to the right to privacy and age-old principles of procedural justice. The right to privacy is guaranteed under Article 26 of the Ethiopian Constitution and international treaties such as Art 17 of the International Covenant on Civil and Political Rights to which Ethiopia is a state party.[17] The initial versions of the law had some problematic provisions that potentially trample these constitutionally guaranteed rights. The second version of the draft, for instance, had authorized INSA to conduct digital forensic investigations against computers suspected to be sources or targets of cyber-attacks without judicial warrant where there are reasonable grounds to believe that computer crimes are likely to be committed.[18]

Moreover, it had empowered INSA investigators to conduct warrantless 'sudden searches' against suspected computers for preventive purposes.[19] Following criticisms against these rules, the final version of the law has mandated prior judicial warrant before such far-reaching measures are taken by INSA.[20] INSA, however, still wields the power to conduct warrantless virtual – not physical– digital forensic investigation under its reestablishment proclamation of 2013.[21]

It is to be noted that a recent subordinate legislation that furthers the 2013 reestablishment proclamation has included the requirement of judicial warrant for purposes of conducting forensic investigation by INSA.[22] According to the

[15] Id., Part IV, Arts 29-35.
[16] Id., Art 42.
[17] On sources of Ethiopian privacy law, *see* Kinfe Micheal Yilma (2015), 'Data Privacy Law and Privacy in Ethiopia', 5 *International Data Privacy Law* 177, 179-180.
[18] *See* Art 25, *The Draft Computer Crime Law*, Version 2.0, *supra* note 4.
[19] Ibid.
[20] *See* Computer Crime Proclamation, *supra* note 5, Art. 26.
[21] *See* Information Network Security Agency Re-establishment Proclamation, *Federal Negarit Gazeta*, Proclamation No. 808/2013, Art 6(8).
[22] *See* Council of Ministers Regulation to Provide for Execution of Information Network Security Agency Reestablishment Proclamation, *Federal Negarit Gazeta*, Regulation No. 320/2014, Art. 10(1).

Regulation, "the Agency shall carry out digital forensic digital investigation in cooperation with relevant investigating bodies pursuant with Article 6(8) of the (INSA Reestablishment) Proclamation and by the order of a court." The contradiction between the two laws is rather confusing in view of the fact that regulations are subsidiary pieces of legislation in Ethiopia's hierarchy of laws. This means that the Proclamation prevails at all times in cases of contradiction but the sheer desire to rectify a limitation of the Proclamation by a subordinate legislation leaves one wondering why. In any case, there is the need to attach the requirement of judicial oversight to the Proclamation's provision.

What makes such power of sudden searches and virtual forensic investigation chilling to privacy rights is the absence of any oversight mechanism by courts. The power of sudden search under the law would have been far more intrusive even when compared with other Ethiopian laws that envisage sudden search. The infamous Anti-terrorism proclamation, for instance, allows the Federal Police to conduct 'physical' sudden searches but only upon obtaining the approval of the Commissioner of the Federal Police or his delegate.[23] This form of oversight, although not as independent as judicial oversight, is preferable to random sudden searches without any form of oversight.

Another problematic provision of the Computer Crime Proclamation relates to the newly inserted 'duty to report' obligation on communication service providers, and government organs.[24] It further requires INSA to determine in a Directive the form and procedure by which the reporting will be carried out. Service providers are required to report to INSA and the Police when they come to know of the commission of cybercrimes or circulation of illegal content (such as child pornography) on their computer systems. The concern with such an obligation is that it has the potential to prompt service providers to preemptively monitor communications on their networks under the pain of facing penalties for non-cooperation.

Under such technically onerous statutory obligation –and under the pain of possible penalties, service providers could be prompted to employ algorithmic bots to automatically detect illegality which, as we know, could impact not just the right to privacy but also free expression online.[25] Countries with robust privacy regimes do not impose a general obligation to monitor communications by service providers.[26] It, however, remains unclear what penalties would follow when service providers disregard their 'duty to report'. One might envisage the

[23] *See* Anti-terrorism Proclamation, *supra* note 13, Art. 16.
[24] *See* Computer Crime Proclamation, *supra* note 5, Art. 27.
[25] *See* Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion Expression, Frank La Rue, UN Doc. A/HRC/17/27, 16 May 2017, para. 40.
[26] *See*, for instance, EU E-commerce Directive, *Directive 2000/31/EC*, 2000, Art 15.

possibility of applying penalties prescribed under the Criminal Code since the cybercrime legislation does not forbid this. But how government agencies would be held responsible for failure to report under the above rule is more puzzling. Perhaps, INSA might shed light on these points once it enacts the Directive that will regulate the manner and procedure of reporting.

What further compounds our concern is that the law also permits the use of a single judicial warrant issued with respect to a specific computer system to be used in conducting investigation into another computer system.[27] Art 32(2) of the Proclamation envisages a scenario of accessing computer data stored in computer systems that could be accessed through a computer system for which warrant has been obtained. This provision is borrowed from the Council of Europe (CoE) and AU Cybercrime Conventions but invites legitimate concerns, one being that such a vague and general warrant erodes individual rights of people whose computer systems would be accessed even without their awareness. Allowing extension of virtual or physical search warrant (initially granted to a specific computer system to another system) appears, therefore, to be a legislative overreach.

The cybercrime law also entails rules that negate crucial principles of procedural justice such as 'due process of law'. The law, for instance, allows courts to rule *ex parte* upon request by investigators for a production order against a person thought to be in possession of computer data needed for investigation.[28] Granting a production order even without the presence of the person concerned that could have legitimate reasons to protest an otherwise unreasonable request erodes due process rights. Disclosure of personal computer data in the course of enforcing such order also implicates data privacy rights.

Another important principle of procedural justice apparently abrogated by the law relates to burden of proof in cybercrime proceedings. The law states that where the Prosecutor has proved 'basic facts', the court may on its own motion shift the burden of proof to the accused.[29] This provision violates a long established principle of criminal justice which imposes on the government the burden to prove beyond any reasonable doubt. It also denies the right of the accused to be presumed innocent until proven guilty as the mere decision by the court to shift the burden sends the wrong message that a *prima facie* case has been established by the prosecutor.

What also lurks behind this provision is that given the little cybercrime investigation and prosecution experience in Ethiopia, prosecutors might often resort to such provision in the face of thin evidence against suspected

[27] *See* Computer Crime Proclamation, *supra* note 5, Art 32(2).
[28] Id., Art 31(2).
[29] Id., Art 37(2).

individuals. A prosecutor might plead the court to shift the burden of proof by simply adducing rather inconclusive evidence like appearance of a person's face in an illegal content or other criminal venture with which the suspect has nothing or little to do. This is more likely to occur when computers of innocent individuals are compromised and turned into 'zombies' by hackers remotely, and later used to commit cybercrimes like DDoS (Distributed Denial of Service) attacks. In such technically complex cases, ordinary individuals suspected of committing a cybercrime will, therefore, find it too cumbersome to refute the presumption of evidence once the burden is shifted.

3. The Challenges Ahead

The Computer Crime Proclamation is by and large modern and comprehensive. Compared to the initial draft versions, the law is relatively better particularly in eliminating some human rights-unfriendly rules –and adding some that uphold these rights. An example is that the new law carves a provision –captioned 'principle'– that requires provisions of the law to be implemented without contravening human and democratic rights enshrined in the Ethiopian Constitution and international human rights instruments ratified by Ethiopia.[30] Such a guiding principle, if properly complied with by our cybercrime investigators, would serve as an important safeguard to the rights of individuals suspected of being involved in computer crimes. But some areas of concern on the initial versions of the law, as alluded to above, are regrettably maintained.

The law has missed the opportunity to criminalize, among others, racist and xenophobic content, intellectual property related crimes, revenge, pornography and large-scale cyber-attacks through botnets. The Computer Crime Proclamation would have been the pertinent legal instrument to criminalizing these emerging cybercrimes that are regulated in many international instruments such as the African Union Convention on Cyber Security and Personal Data Protection, European Union (EU) Directive on Attacks against Information Systems and the Council of Europe (CoE) Cybercrime Convention and its additional protocol. Overall, the law as it currently stands has a lot to be rectified. One cannot but hope that the government considers ways to amend the law in due time. The Ethiopian Ministry of Communication and Information Technology has completed a study on the protection of intellectual property rights in the context of ICTs.[31] An upcoming law informed by this study might perhaps address IP related cybercrimes.

[30] Id., Art 21.

[31] *See* Ministry of Communication and Information Technology, *Development of Information and Communication Technology Intellectual Property Right Legal*

Ethiopian authorities will have to tackle two major challenges as they now move to implement the law. *First*, owing to the technical nature of cybercrime prevention, investigation and adjudication, capacity building must be taken as a matter of priority. Cybercrime units in the police forces, investigators and judges must be properly acquainted with the nature, scope and purposes of the law. Courses that introduce students to the new realities presented by the Internet including cybercrimes are not offered in any of Ethiopia's law schools.[32] In the absence of such formal education, the most feasible approach both in the long and short-term is to launch continuous capacity building programs in concert with partners.

International organizations such as the United Nations Office on Drug and Crime (UNODC) could be crucial partners in this regard particularly given UNODC's previous technical assistance to a number of developing countries. Such capacity building programs could also be useful in restructuring bodies involved in the field such as the cybercrime unit at the Federal Police, INSA and the Office of the Federal Attorney General. The government must also allocate sufficient resources towards raising public awareness about the law. This is not only to allow victims of cybercrimes to be vindicated by the law but also to avoid commission of cybercrimes due to lack of awareness. In a country, like Ethiopia, where the Internet is a recent phenomenon, unwary users are likely to engage in acts that might amount to crime under the cybercrime legislation. Recent awareness campaigners by INSA through radio broadcasts could very well be strengthened to introduce the law to the public.[33]

Secondly, the enactment of the law would mean little unless the government takes international cooperation seriously. This is because most cybercrime threats posed to Ethiopia are from abroad, at least at this point in time. A good illustrative example is the potentially criminal behaviour that can be transmitted through social media platforms. Potentially racist and extremist content in the social media can indeed provoke protesters to destroy property, incite ethnic-based violence and displace of a large number of people.[34] Before the United General Assembly, Ethiopia's Prime Minister Hailemariam Dessalegn noted

Framework for Ethiopia: A Situational Analysis Report, November 2015 (On file with author).

[32] For more on this, *see* Kinfe Micheal Yilma and Halefom Hailu Abraha (2015), 'The Internet and Ethiopia's IP law, Internet governance and legal education: An overview', 9 *Mizan Law Review* 154, 169-173.

[33] INSA runs a weekly radio show called 'cybergna' (literal rendition of the Amharic term would mean 'in the language of cyber') to educate the public about various aspects of ICTs. See details at <https://goo.gl/3CaAdS> (Last accessed on 15 October 2016).

[34] *See*, for instance, Samrawit Tassew, 'Destruction, Looting Mare Popular Oromia Protests', (*Addis Fortune,* 11 October 2016), available at <https://goo.gl/vrouUI> (Last accessed on 15 October).

that "social media has certainly empowered populists and other extremists to exploit people's genuine concerns and spread their message of hate and bigotry without any inhibition." [35]

Short of other means to tackle the problem, the Ethiopian government has increasingly been blocking access to social media platforms and had completely shut down mobile data services. Such drastic measures, it goes without saying, result in considerable economic losses. A recent report by the Brookings Institution, for instance, has indicated that Ethiopia has lost about 9 million US dollars due to frequent Internet shut downs.[36] This is also playing out in international relations fora where the UN is slowly moving to regard internet shutdowns as violation of international human rights law, a good case in point being the recent Human Rights Council Resolution.[37] Ethiopia had abstained from this Resolution.[38]

Concluding Remarks

Ethiopia does not have a full-fledged law that governs the regulation of problematic content on the Internet. Content regulation rules are scattered in various pieces of legislation including the cybercrime legislation, and these are hardly fit for purpose. There is, for instance, no known procedural law that governs the manner by which illegal, offensive and harmful content could be blocked, filtered or taken down. Where the government believes that certain content is problematic, it normally instructs the state-owned sole telecom provider –Ethio-telecom– to block access to content or block the website altogether.

The absence of clear legislative guidelines and oversight mechanism might, in some cases mean blocking of an otherwise innocuous website or content. And, there is no mechanism by which producers of the content or website administrators could challenge the measures. Recently, the Ethiopian Ministry of Communication and Information Technology has commissioned a comprehensive study on the development of online content regulatory framework. The Consultant, to which this author has been a lead investigator,

[35] 'Ethiopian leader at UN Assembly decries use of social media to spread messages of hate and bigotry', (*UN News Center*, 21 September 2016), available at < https://goo.gl/408Acs > (Last accessed on 15 October 2016).

[36] *See* Internet shut downs cost $2,4 billion last year, *The Brookings Institution*, 6 October 2016, p. 8 available at < https://goo.gl/dYq89i > (Last accessed on 15 October).

[37] 'The promotion, protection and enjoyment of human rights on the Internet', *Human Rights Council Resolution*, UN Doc. A/HRC/32/L.20, 27 June 2016, Para 10.

[38] *See* Yohannes Anberbir, 'Ethiopia abstains UN online freedom resolution', (*The Reporter*, 23 July 2016), available at < https://goo.gl/eqlIo0> (Last accessed on 15 October).

has presented a comprehensive report to the Ministry for further action.[39] A future law on the regulation of problematic content is expected to provide the manners through which problematic content will be classified and taken down.

But this would still require a robust international cooperation framework. The law, as noted above, rightly mandates the Federal Attorney General to facilitate international cooperation to successfully prevent and prosecute cybercrimes. Efforts of building cooperation could easily start with regional bodies such as the various economic communities in Africa that are increasingly building alliance in dealing with cyber criminality. The Federal Attorney General could also draw useful lessons from the European Commission which has recently joined hands with big tech firms such as Facebook to jointly deal with extremist and hate speech in online platforms through a sort of co-regulatory mechanism.[40]

Some form of working relationships with social media platforms especially those with huge consumer base in Ethiopia such as Facebook could be very crucial in tacking dissemination of potentially criminal content in the Ethiopian cyberspace. Another promising channel of cooperation is acceding to the CoE Cybercrime Convention, which is open for accession by any country. Given that the Convention envisages a robust cooperation regime, Ethiopia could benefit by acceding to the treaty.[41] Ratifying the AU Convention is also worth considering.

While many questioned the desirability of the Prime Minister's recent speech about problematic online content before the UN General Assembly, it might perhaps signal his government's determination to deal with the matter head on in the near future. We hope to see soon the establishment of the requisite institutional bodies envisaged in the law including investigators within INSA, prosecutors in the Office of the Federal Attorney General and a special bench within the Federal High Court. Also important is to set out the channel through which the efforts of these organs of the government could be coordinated and directed towards the same goal. ■

[39] Ministry of Information and Communication Technology, *Development of Online Content Regulatory Legal Framework for Ethiopia: Situational Analysis Report*, June 2016 (On file with author).

[40] *See* European Commission and IT Companies announce Code of Conduct on illegal online hate speech, Press Release, 31 May 2016, available at <https://goo.gl/FV9ARf> (Last accessed on 15 October).

[41] Council of Europe Cybercrime Convention, 23.XI, 2001, Arts 23-35 cum Art 37.