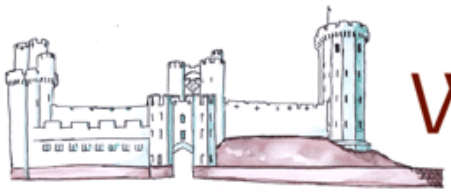

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Special Plea Bargaining Edition

Plea bargaining in a context of budget cuts
The example of England and Wales

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Abstract

Historically, guilty pleas have always been considered a way of rationalising criminal procedures. Recent budget cuts have pushed the Crown Prosecution Service to find new solutions to save money. Two main saving measures could potentially affect plea bargaining in practice: maximising the use of paralegal staff and the Early Guilty Plea Scheme. Based on empirical observations and interviews, this paper examines the practical and theoretical consequences of these money-saving measures on plea bargaining.

Introduction

From the very start, guilty pleas were a way of rationalising criminal procedures. Although there was always the possibility for a suspect to plead guilty in Anglo-American courts, this was rarely used and was actually discouraged by judges until the 19th century.[1] In particular, Alschuler states that there is evidence to "strongly suggest that the courts would have condemned the practice of plea bargaining had they had occasion to do so."[2] Langbein argues that guilty pleas were introduced in nineteenth century common law procedure because "the rise of adversary procedure and the law of evidence injected vast complexity into jury trial and made it unworkable as a routine dispositive procedure."[3] His analysis is supported by other authors[4] who contend "that

[1] Alschuler, A. W. (1979) Plea Bargaining and Its History, *Law & Society Review* 13(2), pp. 211-245.
[2] *Ibid*. p. 219.
[3] Langbein, J. H. (1979) Understanding the Short History of Plea Bargaining, *Law & Society Review* 13(2), p. 261.
[4] Friedman, L. and Percival, R. (1981) *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910*, Chapel Hill: University of North Carolina Press; Friedman, L. (1983) 'Courts Over Time: A Survey of Theories and Research' *in* Boyum, K. O. and Mather, L. (eds.) *Empirical Theories About Courts*, New York: Longman, 38; Feeley, M. (1982) Plea Bargaining and The Structure of The Criminal

the guilty plea system emerged to displace jury trials when professionals, police and lawyers, entered the fray and set the system right, i.e. with due regard to notions of cost efficiency and justice."[5]

Beside caseload pressure, other research suggests that the rise of plea bargaining can also be linked to "changing ideas of punishment and sentencing, as well as expansion of the criminal law".[6] For Mather who looked particularly at California's criminal courts, plea bargaining was used more frequently from the mid-nineteenth century because it "facilitated the individualization of punishment".[7] McConville and Mirsky, studying decisions of the leading criminal court in New York City between 1800 and 1865, refuted the argument of professionalisation to explain the rise in guilty pleas. Instead, they showed that lesser plea convictions came to dominate for political and societal reasons: "clientilism and legitimation were incorporated within the larger framework of societal concerns over the foreign born as a suspect population which served to underpin a new criminology and the emergent state system of crime control."[8]

Nevertheless, the recent push in England and Wales to formalise and regulate plea bargaining can clearly be linked to efforts to rationalise criminal procedures. Sentence reductions were given a statutory footing and there has been a continuing focus of the government and the courts on increasing the number of guilty pleas, including the introduction of advance indication of sentence, plea discussions in serious fraud cases, minimum sentencing and the government's proposals (subsequently abandoned) to increase the maximum discount for a guilty plea to 50%. The Royal Commission on Criminal Justice made clear that "[t]he primary reason for the sentence discount is to encourage defendants who know themselves to be guilty to plead accordingly and so enable the resources which would be expended in a contested case to be saved".[9]

In strict theory, in the adversarial system where the judge is limited by her role as an umpire and thus cannot go beyond what the parties present to her, it does indeed make sense not to run a full trial if the accused admits her guilt. If there is no debate about guilt, there is no need for each party to present evidence in this regard or for the judge to decide upon it. By contrast, guilty pleas did not emerge in continental Europe where systems have inquisitorial roots because, in an inquisitorial system, the judge does not only have an adjudicative role but also actively seeks the truth. In these circumstances, it can be understood that the role of continental judges would not allow a simple

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Process, *Journal of Justice Systems* 73, p. 338; Feeley, M. and Lester, C. (1994) 'Legal Complexity and the Transformation of the Criminal Process' *in* Gouron, A.; Mayali, L.; Padoa Schioppa, A. and Simon, D. (eds.) *Subjektivierung des Justiziellen Beweisverfahrens*, Frankfurt: Klostermann, p. 334; Fisher, G. (2000) Plea Bargaining's Triumph, *Yale Law Journal* 109, p. 857.

[5] McConville, M. and Mirsky, C. L. (2005) *Jury Trials and Plea Bargaining*, Oxford and Portland, Oregon: Hart Publishing, p. 327.

[6] Mather, L. M. (1979) Comments on the History of Plea Bargaining, *Law & Society Review* 13 (2), p. 281.

[7] *Ibid*., p. 282.

[8] McConville, M. and Mirsky, C. L. (2005) *Jury Trials and Plea Bargaining*, Oxford and Portland, Oregon: Hart Publishing, p. 325.

[9] Runciman, W. G. (1993) *Report of the Royal Commission on Criminal Justice*, London: HMSO, p. 110.

confession by the accused to remove the judicial power to investigate the facts of the case and to decide on the guilt of the accused.

Continental Europe resisted for many years the introduction of a formal guilty plea procedure. However, the ever-growing burden on criminal justice systems overcame this resistance. In France, the introduction of guilty pleas was progressive and emerged from prosecutorial practice before being introduced in law.[10] From the 1980s, prosecutors started to innovate to diversify the responses they could provide in cases of minor offences. Prior to that, if there was enough evidence to prove the accused's guilt, they could only decide either to prosecute or not to prosecute for reasons of public interest. They now have a vast array of alternatives to prosecution (caution, mediation, conditional caution), when the suspect admits her guilt.[11] Since 1999, the *composition pénale* allows prosecutors to give small penalties (e.g. a fine) to the accused if she admits her guilt. Finally, in 2004 a formal guilty plea procedure called the *comparution sur reconnaissance préalable de culpabilité* was introduced.[12] The circular issued by the Ministry of Justice for the application of the 2004 law does clearly state that the new "guilty plea" procedure "should allow a better management of criminal cases, giving criminal courts more time to dedicate to the most complex cases".[13]

The CPS and the 2010 Spending Review

In October 2010, the new government announced the outcome of its Comprehensive Spending Review: all agencies in the criminal justice system would see their budgets cut. The Ministry of Justice budget was to be cut by 23%, the central Government grant to the police by 20% and the Crown Prosecution Service budget by 25%.

For the CPS, this meant a reduction in overall staffing: in 2009-10, the CPS employed 8,283 staff; in March 2013, only 7,329 employees worked at the CPS.[14] This is the result of a recruitment freeze and of voluntary redundancies. Electronic case files have started replacing paper-based files. The headquarters in London were relocated in less expensive premises and their size was reduced. This paper will concentrate on two important saving measures which have consequences on the way plea bargaining is conducted by the CPS: maximising the use of paralegal staff and the Early Guilty Plea scheme.

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[10] See Saas, C. (2004) De la composition pénale au plaider-coupable: le pouvoir de sanction du procureur, *Revue de science criminelle et de droit pénal comparé* 2004 (4), pp. 827-843.
[11] *Ibid*.
[12] See Hodgson, J. (2012) 'Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice' in Luna, E. and Wade, M. (eds) *The Prosecutor in Transnational Perspective*, Oxford: Oxford University Press.
[13] Circular of 2nd September 2004 available at: http://www.justice.gouv.fr/bulletin-officiel/3-dqcg95e.htm [Last visited: 14th May 2013].
[14] CPS Workforce Management Information available at: http://www.cps.gov.uk/data/expenditure/index.html#workforce [Last visited: 15th June 2013].

This paper is based on ethnographic observations carried out during four months at a CPS office. During these four months, interviews with CPS staff (Crown Prosecutors, Associate Prosecutors, Crown Advocates, etc.) were also undertaken.[15] Quotes in this paper are from interviews or from conversations during the observation phase.

Plea bargaining and paralegal staff

Efficiency concerns and money saving measures do not only date back to 2010. Already in 2008, Sir Ken Macdonald QC, the Director of Public Prosecutions (DPP)[16] at the time, stated: "The current economic environment means that public bodies have to become leaner and smarter. The CPS has already begun this work."[17] He added: "This means that we are always looking for ways to do things more effectively and efficiently."[18]

One of the ways the CPS profess to save money is "maximising the use of paralegal staff".[19] Nowadays, Associate Prosecutors (APs) prosecute almost all cases at magistrates' courts, except for contested hearings, despite not being legally qualified. This is the result of progressive legislative extension of their powers over several years. APs used to be called designated caseworkers and Section 53 of the Crime and Disorder Act 1998 increased their powers beyond the presentation of bail applications to the conduct of certain criminal proceedings in magistrates' courts. They were renamed Associate Prosecutors under the Criminal Justice and Immigration Act 2008. These changes also have the advantage of providing new career progression opportunities for non-legal staff at the CPS.[20]

APs are selected amongst CPS staff who have "experience of casework within the criminal justice system or of lay presentation"[21] and "a working knowledge of criminal law and its application, magistrates' courts procedure and the criminal justice

[15] I am very grateful to the CPS for allowing me to complete this fieldwork. Confidentiality rules do not allow me to name them but I would like to thank all the staff who welcomed me in their office and agreed to be interviewed. This research would not have been possible without their help.

[16] The DPP heads the CPS under the superintendence of the Attorney General, who is accountable to Parliament for the prosecution authority.

[17] Macdonald, K. Letter from the Director to the Attorney General, in *CPS Annual Report and Resources Accounts 2007-2008*, available at: http://www.cps.gov.uk/publications/reports/2007/ [Last visited 1st August 2013].

[18] *Ibid*.

[19] "The responsibility for continuous improvement in the coming year lies primarily with the 13 Areas, which will be looking to further increase efficiency by reducing the number of administrative tasks that need to be undertaken and maximising the use of paralegal staff to support our prosecutions", Optimum Business Model and Paralegal Career Family Structure, in *CPS Annual Report and Resource Accounts 2010-2011*, available at: http://www.cps.gov.uk/publications/reports/2010/optimum_business_model.html [Last visited 15th May 2013].

[20] See, for example, http://www.cps.gov.uk/careers/legal_professional_careers/legal_trainees/salma_yousef_profile/index.html [Last visited 31st July 2013].

[21] Annex D – Associate Prosecutors Training and Selection, in *CPS Annual Report and Resource Accounts 2010-2011*, available at: http://www.cps.gov.uk/publications/reports/2010/annex_d.html [Last visited 15th May 2013].

system".[22] Typically, they have worked for a number of years for the CPS as administrative/paralegal staff. In the CPS office I observed, several APs had been working for the CPS for over 25 years, none of them had less than 7 years' experience at the CPS.

Once selected, they undertake two weeks of training: the first week is a foundation course in legal principles and the second week is an advocacy course. They have to pass an independent assessment of competence before being authorised to practice as an AP. They also undertake further training for bail applications, youth courts and domestic violence.

Section 7A of the Prosecution of Offences Act 1985 states that APs have "the powers and rights of audience of a Crown Prosecutor in relation to (...) the conduct of criminal proceedings in magistrates' courts other than trials".[23] The law specifies that APs "shall exercise any such powers subject to instructions given to [them] by the Director".[24] The Director mentioned in this section is the Director of Public Prosecutions (DPP) who heads the CPS. The DPP has thus published instructions to Associate Prosecutors to frame their role.[25] According to paragraph 3.5 of these instructions, "APs exercise these powers and rights of audience **on the instructions of a Crown Prosecutor** (...)" (emphasis added). In reviewing straightforward magistrates' court cases, Schedule 4 states that APs have the power to make only minor amendments to the charge or summons. Thus, APs are not permitted to make decisions about accepting pleas or bases of plea that differ from the original charges. This denies them any plea bargaining role in theory.

Although authorising APs to engage in plea negotiations would be consistent with efficiency, this is outweighed by concerns to ensure that major legal decisions and those around case disposal are taken only by Crown Prosecutors. However, I have observed on several occasions that APs do take on a plea bargaining role in practice. This is driven by the practical reality of magistrates' courts' listings. In theory, if a defence lawyer offers a plea for a lesser offence than charged or offers a plea on the basis of different facts than on the prosecution file, an AP must ring a lawyer at the CPS office to ask for authorisation to accept it. If plea bargaining is anticipated by the AP when she prepares for court, she can discuss the case with a lawyer and obtain authorisation a priori for accepting a specific plea. But where this has not been anticipated, it is not practical for APs to ask the court for time to consult with a superior every time a plea is offered by the defence. Even when the AP is able to consult with a CPS lawyer to obtain authorisation, the impact of this as a form of supervision is limited. In practice, it is

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[22] *Ibid*.

[23] Section 7A of the Prosecution Of Offences Act 1985, available at: http://www.legislation.gov.uk/ukpga/1985/23/section/7A [Last visited: 29th June 2013].

[24] *Ibid*.

[25] These instructions have been published on the CPS website and are available at: http://www.cps.gov.uk/publications/directors_guidance/dpp_instructions.html [Last visited: 29th June 2013].

unlikely that the CPS lawyer will be able to review the file fully before giving her advice. It is therefore likely that she will take her decision on the summary that the AP will give her orally. In other words, even when lawyers are consulted, the influence of the AP on the decision should not be underestimated.

APs rarely initiated plea bargaining. In most instance, it was defence lawyers who offered a guilty plea to lesser charges or on a different factual basis.

For example, in a case where a defendant was charged with common assault on his partner, the defence lawyer approached the AP at court to ask whether she was prepared to accept a plea on part of the facts. The AP responded favourably as she wanted to avoid trial where a 7-year old witness would have had to give evidence. She told the defence lawyer that she wanted an admission to a serious enough assault, so that the sentence could reflect the seriousness of the facts. In the end, the defendant entered a guilty plea on the basis of a defence statement admitting to all facts as set in the prosecution file, except for a headlock.

Even when a District Crown Prosecutor was on duty to answer queries from APs at court, which was every day in the area I observed, APs confirmed in interviews that practical constraints meant they had to bend the rules.

> "We're not meant to accept any basis of plea. (...) That's a technicality. The thing is you've got to use your common sense over there because, to a certain degree, you just have to, otherwise you'd be stopping every two minutes to make a phone call to the office." [EW12_AP4]

Several APs told me in interviews that, with experience, they knew which pleas were acceptable. They were confident that their managers would back them up when they returned to the office.

> "We're quite lucky that our management back us up completely. Basically, you can make decisions at court, even though you're probably not supposed to make decisions at court, but you can in the knowledge that you're going to be backed up on it. Because clearly, we're all stretched, there's not enough staff, you can't always get hold of somebody. They might be talking to someone else and you might only be allowed to stand the case down for five minutes.(...) I think when you've been in the job long enough you know what would rock the boat and what wouldn't." [EW12_AP5]

As can clearly be seen in this last comment, resource constraints limiting the availability of CPS lawyers are also part of the reason why APs do make decisions at court instead of asking for prior authorisation from a lawyer as they are legally required to, along with the reality of court listings which preclude APs being given the time to ring the office.

Guilty plea rate: a prosecutorial target?

The guilty plea rate in the magistrates' courts and the Crown Court has remained relatively stable over the past few years. Although the rate remains stable in the tables below, a decline in the number of cases going to court can be observed, especially at the magistrates' courts. This could be explained by a rise in out-of-court disposals, which also require an admission by the defendant. This would actually mean a rise of consensual justice as a whole. This observation was made by several legal actors at the magistrates' court during the observational phase of my fieldwork. Defence lawyers, APs, but also legal clerks mentioned the fact that the police were sending fewer cases to court. This became apparent to them because the court's workload was lighter, meaning that some courtrooms remained closed some afternoons. They attributed this to budget cuts, i.e. the police lacked resources to investigate all crimes, but also to growing numbers of out-of-court disposals, such as fixed penalty notices and cautions. Other reasons could also be put forward to explain why the caseload is diminishing, such as an actual fall in the crime rate.

Table 1[26]

Magistrates' courts: case outcomes	2009-2010	%	2010-2011	%	2011-2012	%
Guilty Pleas	589,789	67.6	570,073	67.8	538,568	68.4

Table 2[27]

Crown Court: case outcomes	2009-2010	%	2010-2011	%	2011-2012	%
Guilty Pleas	81,000	73.5	84,742	72.5	78,106	72.8

It is clear that an increase in the guilty plea rate would mean great savings for the CPS: the DPP indicated that "[t]he average cost to the CPS to prepare a case for guilty plea in the magistrates' court is around £160. The average cost to prepare a trial is around £850. And, of course, there is the time factor: it takes a good deal longer to prepare a

[26] Data from CPS annual report 2011/2012 available at: http://www.cps.gov.uk/publications/reports/2011/annex_b.html [Last visited 15th May 2013].
[27] *Ibid*.

case for trial than it does to prepare a case for a plea."[28] However, an increase in the guilty plea rate is not a target for Crown Prosecutors. Instead, the focus has been on the timeliness of these guilty pleas.

In November 2010, following the Spending Review, Her Majesty's Inspectorate of Constabulary (HMIC) suggested solutions to reduce waste in the Criminal Justice System. It clearly stated that late guilty pleas were part of the problem: "The majority of defendants plead guilty (67%), but 41% do so late in the day, when large quantities of paperwork have been prepared and duplicated by agencies, the hearing has been scheduled and victims and witnesses have arrived in court to give evidence. A conservative estimate of the cost of this additional nugatory work is in the region of £150 million. The money saved by a 25% reduction in late guilty pleas could fund Victim Support for one year."[29]

The Director of Public Prosecutions discussed the impact of the Spending Review on the CPS and endorsed this idea of timely pleas in saying: "Now, most cases – the vast majority of cases – are guilty pleas. That means that we need to get those cases on and disposed of as swiftly as possible, and I'm a big fan of the work that's being done in Liverpool, with the Early Guilty Plea Scheme, where the aim is to have just one hearing to dispose of a case."[30] During my fieldwork at a CPS office, I was given access to a document entitled "Efficiency & Effectiveness Measures 2012/13 Performance". It detailed CPS "key priority targets". One of them was entitled "Guilty plea rates and disposals" and detailed the average number of hearings for contested cases and for guilty pleas in the area. The national target for the average number of hearings for guilty pleas is 2.1. The area I was observing was well within the target at 1.98. Also a "key priority target" is "Trial effectiveness and timeliness". Within this section, the "cracked trial rate" is a local indicator and the target is 30%. A cracked trial is a case listed for trial but then a guilty plea is entered or the prosecution offer no evidence. The area I observed was well above the target at 47.74% of cracked trials. As a result, the reasons for cracked trials were scrutinised in more detail, showing that late guilty pleas were the main reason for cracked trials (26.44% of cracked trials). Thus, although the guilty plea rate in itself is not a prosecutorial target, prosecutors are told to improve the timeliness of guilty pleas.

Prosecutors seem to have integrated this and their attitudes to guilty pleas are in phase with these targets. Thus, when a senior judge complained to a CPS manager that there were not enough guilty pleas in cases in an undercover investigation, Crown

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[28] Starmer, K. QC, DPP, "Challenge and opportunity – DPP's address to the London Justices' Clerks' Society", 11th March 2011, available at: http://www.cps.gov.uk/news/articles/challenge_and_opportunity/ [Last visited 15th May 2013].

[29] *Stop The Drift: A Focus on 21st-century Criminal Justice*, HMIC, November 2010, p. 4, available at: http://www.hmic.gov.uk/publication/stop-the-drift/ [Last visited 14th May 2013].

[30] Video interview available at: http://www.cps.gov.uk/news/articles/dpp_discusses_impact_of_spending_review_on_cps/ [Last visited 14th May 2013].

Prosecutors did not consider that it was their job to put pressure on the defence to plead guilty, even when they thought the prosecution case was very strong and it would be in the defendant's interests to plead guilty, with one prosecutor saying:

> "You can't tell defence lawyers how to do their job" [CTL4].

However, another prosecutor said to me:

> "It is very frustrating to have to go through all this work for the defendant to plead guilty at PCMH [Plea and Case Management Hearing]" [SCP14]

The Early Guilty Plea (EGP) scheme has been designed to answer these concerns of timeliness of pleas at the Crown Court.

The Early Guilty Plea Scheme

The EGP scheme was introduced by the Senior Presiding Judge for England and Wales.[31] The rationale for the EGP scheme is to secure a guilty plea at an earlier part in the process rather than on the day of trial. This may result in some saving of CPS/police resource and it could be argued that there are also benefits for defendants who will spend less time on remand and will receive a sentence discount. It is also contended that it reduces anxiety of victims and witnesses by early notification that the case is not contested or that their evidence is not required.

Pilots were run in several areas before the scheme was rolled out across the whole country in 2012. The DPP stated that: "As a large proportion of cases committed and sent to the Crown Court result in guilty pleas, the scheme (...) aims to identify these at an early stage, separate these cases into bespoke Early Guilty Plea Courts and expedite the plea and sentence, thereby producing a just, expeditious and cost effective outcome. (…) It also, especially, prevents unnecessary police and CPS file build in preparing a trial file."[32]

The EGP scheme encourages the CPS to have a more proactive role in plea bargaining. It is mainly targeted at either-way offences not suitable for summary trial and is linked to the abolition of committal hearings at the magistrates' courts. After the first hearing at the magistrates' court and if it was decided that the case was not suitable for summary

[31] See http://www.justice.gov.uk/downloads/legal-aid/early-guilty-plea-scheme.pdf [Last visited 1st August 2013].

[32] Starmer, K. QC, DPP, Police Superintendents' Association of England and Wales Annual Conference 2010 Lecture, 15th September 2010, available at: http://www.cps.gov.uk/news/articles/dpp_s_annual_lecture_to_the_police_superintendents__2010_conference/ [Last Visited: 15th June 2013].

trial, the file is given to a Crown Advocate[33] for review instead of going directly to the Crown Court team for a committal file to be prepared.

The Crown Advocate reviews the charges and should check what pleas would be acceptable to the prosecution. She then telephones the defence solicitor to speak to her about it. The EGP scheme therefore encourages communication between defence and prosecution about plea bargaining. The idea is to encourage defence and prosecution to discuss possible pleas at an early stage and not to wait until the last minute, i.e. at trial, to have this discussion. The problem is that, at this stage, the defence does not have full disclosure of the prosecution file. They only receive initial disclosure before the magistrates' court's hearing. The Crown Advocate also only has the initial file as the full file from the police will be received later on.

This means that this form of plea bargaining, which takes place by telephone discussion, occurs between people who have not got all the cards in hand to make a fully informed decision. Clearly, this could potentially be quite detrimental to the accused. In particular, neither the Crown Advocate, nor the defence solicitor have access to fully transcribed interviews of the defendant at the police station, they only have Short Descriptive Notes (SDN) taken by the police during the interviews. Similarly, they do not have any of the unused material. All these documents will be sent later on by the police to the CPS who will then disclose all relevant material to the defence.

In their research partly based on interviews with defendants, Hedderman and Moxon suggest that "[i]t seems that decisions to plead guilty were largely based on a realistic assessment on the chances of acquittal, and the potential benefits in terms of sentence severity."[34] This 'realistic assessment' is not possible without sufficient information on the prosecution file. Hedderman and Moxon found that "over a third of those questioned said that there had been some change in the charges against them after the case was committed to the Crown Court, of whom almost two thirds said that they had had one or more charges dropped or less serious charges substituted."[35] Timeliness of guilty pleas is therefore not simply a defence issue but might also result from inadequate prosecution disclosure or a deal being offered by the CPS late in the day.

In order to maximise the use of paralegal staff, the CPS have had to adapt their working procedures. In particular, Crown Prosecutors do not have ownership of the files they deal with. Instead, several members of staff deal with the same file at different stages of the process. Thus, a Crown Prosecutor will make the initial decision about charging, an Associate Prosecutor will attend the first hearing at the magistrates' court, another Crown Prosecutor will prepare the committal file and a Crown Advocate will prosecute

[33] Crown Advocates, previously known as Higher Courts Advocates (HCAs), are the in-house CPS lawyers who are entitled by professional qualification and CPS designation to appear in the Crown Court.
[34] Hedderman, C. and Moxon, D. (1992) Magistrates' court or Crown Court? Mode of trial decisions and sentencing, *Home Office Research Study No. 125*, London: HMSO, p. 25.
[35] *Ibid*., p. 23.

the case at Crown Court.[36] This makes it difficult for the defence to find the right person to speak to at the CPS if they wish to engage in plea bargaining. The Early Guilty Plea scheme offers defence and prosecution the opportunity to speak about the case and might prevent some late guilty pleas that currently arise because of communication difficulties. However, it also encourages a discussion to take place between two parties who do not have all information on the case.

The rules governing the pre-trial disclosure of evidence impose extensive obligations on the CPS at a number of stages in a criminal case, obligations that are critical to a defendant's right to a fair trial. Understandably, those rules entail a great amount of work for the police and the CPS and, consequently, a high cost is associated with respecting them. However, the right to a fair trial requires that the defendant be provided with the evidence that will be given in support of the allegations against her as well as the evidence that weakens the prosecution case or assists the defence case. The defence should not be encouraged to enter a guilty plea without having been able first to check the strength of the prosecution case fully without risking compromising the fundamental principle of the presumption of innocence.

Conclusion

Plea bargaining has developed dramatically in the past few years. The starting point was the view that if the suspect/accused recognises her guilt, there is no need to have a judicial debate about it. The overload of modern criminal justice systems meant that it became necessary to divert more and more cases from trial and defendants are strongly encouraged to plead guilty through sentence incentives. Indeed, the system would simply not work if all cases went to trial.

The current context of budget cuts forces criminal justice agencies to go a step further and to make sure that defendants plead guilty as early as possible. This has been done through gradual sentence incentives – the earlier the defendant pleads, the greater the discount is – but also by encouraging the CPS to become more proactive in the plea bargaining process through the EGP scheme.

In the original theory of plea bargaining, the defence would take the initiative to start plea bargaining through a spontaneous confession. This confession became gradually less and less spontaneous, as defendants were strongly encouraged to plead through various incentives. With the EGP scheme, plea bargaining is now clearly initiated by the prosecution at a very early stage, thus pushing the defence to make a decision even before they have received full disclosure of the case against the accused.

[36] For most cases, different Crown Advocates are in charge of the plea and case management hearing and trial.