**Application for the 8th Global Conference of the American Society of Comparative Law Younger Comparativists Committee to be held in Montreal, Québec on May 10-11, 2019**

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**Title** Can we afford our Constitutions? The justifications for plea bargaining through comparative lenses.

**Keywords** Criminal trial; plea bargaining; rule of law; procedural safeguards; voluntariness.

**Abstract (750 words)** The paper will deal with the justifications given for the steady rise of plea agreements in criminal justice systems in North America and in some European countries. The United States Constitution poignantly provides any accused in a criminal investigation with prominent rights, especially procedural rights: in Article II, the right to a trial by jury, reinforced by the Sixth Amendment; in the Fifth Amendment, the right to an indictment by a Grand Jury; in the Fourth Amendment, the right against unreasonable searches and seizures, protected by the exclusionary rule, with the impossibility to introduce in trials illegally obtained evidence; again, in the Sixth Amendment, the right to a defense and to a speedy and public trial. One of the most prominent features of the current criminal procedure in the United States obviously is the preponderant role in the solution of criminal cases awarded to agreements between the accused and the public prosecution representatives, known as “plea agreements”. Although initially deemed controversial, as courts’ caseloads grew heavier, they have been considered, even by the Supreme Court, necessary to keep the architecture of the criminal justice system standing, on grounds of expediency and efficiency. In all cases when this solution averts the orderly development of a trial, most of the rights enshrined in the Constitution necessarily have to stand down, as a trial will not take place. The traditional argument supporting this deviation from constitutionally prescribed trials, and the sacrifice of procedural safeguards on which the rule of law is based, is that the consent given by the defendant to the plea offer also constitutes a waiver of all related constitutional rights. It remains then to be determined whether a true consent occurred, to be defined through categories already developed in the context of the Fourth Amendment. It has been argued that the freedom of choice of the accused in taking the plea offer is by all means limited, in the encumbering presence of a so-called “trial penalty”: if an accused decides to exercise their constitutional rights and go to trial, and is later found guilty, the amount of punishment they will face will geometrically increase if compared to any possible pre-verdict plea offer.

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Since the 1980s, due to the legislative introduction of mandatory minimum sentencing, any accused needs to weigh the risk of a conviction against the higher sentences they will receive if found guilty. In addition, case law has stated that there is a duty on the lawyer to comprehensively explain the functioning of trials and of mandatory minimum sentencing, and consequently the failure to advice the client upon the reception of plea offers on that regard constitutes ineffective assistance of counsel. The “trial penalty” is made possible by the huge discretion given to prosecutors in overcharging and in keeping exculpatory evidence from defendants even in advanced phases of negotiations. Plea agreements have extended their scope of application beyond the Atlantic and have permeated the legal systems of several European countries, which did not employ such a tool until recent years. The story of the introduction of plea agreements in Italy and in Germany shall be examined, to unravel the justifications proposed for their introduction and for giving up on the traditional procedural safeguards of criminal trials. In addition, it should be assessed how in practice the American model in this field has been “transplanted” to other legal systems: moving beyond the theoretical justifications, its actual use has not reached the proportions nowadays characterizing the United States system. It shall be argued that the tool of plea bargaining may be justified, even at a constitutional level, only if and when negotiations will have been fairly conducted and consent will have been given free of any impairment. A preventive judicial check should be introduced, and it should not be limited to passively endorsing whatever may have led to the offer, but it should also involve a determination of grounds to dismiss and an assessment of the evidence collected up to that moment; there should be a chance to later appeal on voluntariness grounds or petition for habeas corpus on factual innocence claims. Thanks to the comparative lenses, it can be noted that these are corrective actions that have been introduced by other legislation bodies purporting to introduce plea agreement in systems that have not historically used them. In conclusion, a set of structural safeguards concerning the propriety of plea agreements need be implemented in the United States to bring the criminal law system back to justice and back to its Constitution.

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