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# The administratization of criminal convictions worldwide: History, extent, and consequences

Gabriele Paolini

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# **The administratization of criminal convictions worldwide: History, extent, and consequences**

**Gabriele Paolini\***

## **Abstract**

*A global trend towards the imposition of criminal convictions without trial has been described as one of the key features of contemporary criminal procedure. Such phenomenon is referred to as “administratization” of criminal convictions, and it is characterized by the reliance on plea bargaining and penal orders as ordinary means for disposing of criminal cases. The present paper first describes the history, current adoption, and variations in the legal design of such procedures. Later, it provides original data about the extent of administratization of criminal convictions in fifty-nine jurisdictions worldwide. Finally, it discusses possible beneficial and adverse effects of higher administratization rates on key aspects of criminal justice systems, and the challenges to the empirical assessment of such effects.*

## **1. Introduction**

### **1.1. Motivation**

The imposition of a criminal conviction is typically considered as the act of a judge, at the end of a trial, in which both the prosecutor and the defendant had the chance to produce evidence in support of their case. However, in the last three decades a global trend has been described towards the increasing imposition of criminal convictions without trial (Langer, 2004; Turner, 2006; Thaman, 2010; Luna and Wade, 2012; Fair Trials, 2017; Langer, 2021). In particular, two institutions of criminal procedure allow for such result: penal orders and plea bargaining.

Despite the growing importance of such mechanisms in practice, and their long-lasting success as legal transplants, the effects of their extensive use on criminal justice systems have not been discussed systematically, neither in the comparative nor in the Law and Economics literature. With the support of an original dataset about the legal design and use in practice of plea bargaining and penal orders, the present paper aims at filling this gap.

### **1.2. Plea bargaining and penal orders**

Some literature has emphasized the consensual element of plea bargaining and penal orders, studying them in connection with other mechanisms of criminal procedure, which do not result in a conviction, like conditional dismissals and mediation (Thaman, 2010). In other cases, penal orders and plea bargaining have been considered together with simplified trials, because of their common underlying economic rationale (Dušek & Montag, 2016). However, following Langer (2021), this paper deems the imposition of a criminal conviction without trial as the main distinguishing feature of plea bargaining and penal orders, thus considering them worthy of specific consideration.

Through plea bargaining a defendant pleads guilty, or otherwise waives his right to a full-scale trial,<sup>1</sup> in exchange for some benefits from the prosecutor or the judge, typically in the form of a diminished sentence. Penal order, in its basic form, consists in the imposition of a criminal conviction by a judge upon request of the prosecutor,<sup>2</sup> that becomes final unless the defendant opposes it and asks for a trial

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<sup>1</sup> This is the case in jurisdictions that do not provide for a specific pleading stage in the criminal procedure.

<sup>2</sup> In some jurisdictions a penal order can be issued directly by a prosecutor without any judicial involvement, or even by police or other authorities, such as the coast guard or tax authorities.

within a specified time period. Thus, in plea bargaining the consent of the defendant is explicit and it precedes the imposition of the criminal conviction; instead, the issuance of a penal order can even precede any formal contact with the authorities, and it is implicit, consisting in the lack of action within the specified time frame. Besides this structural difference, both penal orders and plea bargaining result in the imposition of a criminal conviction without any trial activity. Usually, such conviction carry a less severe sentence than the one that would be imposed at trial, providing the defendant with an incentive towards accepting the conviction itself. Even in the absence of a sentencing benefit, the defendant is spared from the economic and psychological costs of an ordinary trial, making these mechanisms an attractive option. At the same time, the State secures a criminal conviction with a limited use of resources compared to a normal trial, thus enabling the prosecution of more cases or a more thorough investigation of the more complex ones.

### **1.3. Expected contribution**

The present paper aims at contributing to three different streams of literature.

First, it can contribute to the legal comparative literature on trial-avoiding mechanisms. An original dataset provides comprehensive information about both the legal design and the rates of use in practice of plea bargaining and penal orders in a large number of countries worldwide. To date, the majority of comparative papers have discussed the phenomenon only in a handful of countries<sup>3</sup>, and they were nearly exclusively focused on plea-bargaining mechanisms. An exception is Thaman (2010), which studies plea bargaining, penal orders, and other consensual mechanisms in a greater number of countries. However, that paper does not provide a systematic empirical assessment of the use of such procedures in practice; furthermore, given some recent developments, it is partly outdated. Fair Trials (2017) in a survey of 90 jurisdictions finds that 66 of them have introduced “trial waiver systems”<sup>4</sup> and provides some institutional details about such institutions. The rates of convictions imposed through trial waiver mechanisms are reported as well (Fair Trials, 2017, p. 34) but only for 20 countries, and they are not referred to one single year, but rather they span from 2008 to 2015, thus hindering the possibility of a meaningful cross-country comparison. Langer (2021) surveys 60 countries, finding that 57 of them allow for either penal order or plea bargaining. The paper also reports the administratization rate for 26 jurisdictions,<sup>5</sup> but again not with reference to the same single year. The present paper reports the result of a survey of 173 jurisdictions, of which 115 have introduced a plea bargaining or penal order procedure, or both. The paper also reports the administratization rate for 59 of those jurisdictions in the year 2019.

Coming to the Law and Economics literature of criminal law enforcement, the contribution can be twofold. On one hand, this paper systematically discusses the possible impact of different administratization rates on several aspects of criminal justice systems. On the other hand, it also provides an original dataset that can enable the empirical testing of such effects.

Lastly, the present paper aims at contributing to the stream of literature studying the expanding role of prosecutors worldwide (Tonry, 2012; Luna and Wade, 2012). The different extent of the administratization of criminal convictions can indeed show how much the core of criminal procedure has shifted from trial to pre-trial phases, and hence from judges to prosecutors.

### **1.4. Structure of the paper**

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<sup>3</sup> For example, Ma (2002) compares United States, France, Germany, and Italy; Langer (2004) Germany, Italy, Argentina, and France; Turner (2006) Germany, Connecticut, and Florida.

<sup>4</sup> Under such definition Fair Trials (2017, p.2) includes both proper plea bargaining and cooperation agreements, which sometimes do not result in the conviction of the defendant. Hence the object of that research is to a large extent overlapping with that of the present paper, but not identical.

<sup>5</sup> The administratization rate is computed as the percentage of criminal convictions imposed through plea bargaining and penal orders over the total number of criminal convictions. The same measure is used in this paper in order to assess the prevalence of plea bargaining and penal orders in practice.

The paper is organized as follows. Section 2 describes the history and current diffusion of both penal orders and plea bargaining. Section 3 reports the variation in the legal design of such procedures in different jurisdictions, as well as their rates of use in practice. Section 4 describes the expected effects of greater administratization rates on criminal justice systems, distinguishing between beneficial and detrimental effects. Section 5 concludes.

## **2. History and current diffusion of penal orders and plea bargaining**

Penal orders and plea bargaining share the same economic rationale (Dušek & Montag, 2016) and are aimed at the same practical result, namely the imposition of a criminal conviction without trial (Langer, 2021). Nevertheless, they have known a different destiny, both in terms of scholarly attention and of success as a legal transplant. In the following, I will first discuss the history and current diffusion of penal orders, and later those of plea bargaining.

### **2.1. Penal orders**

The institution of penal order is far more ancient than plea bargaining, at least if one looks at statutory legislation. Indeed, the first formalization of penal order dates back to the Prussian procedural law of July 17, 1846, with the name of *Mandatsverfahren* (mandate procedure). Such procedure was first limited to the police courts of Berlin, but in 1849 it was extended to all criminal proceedings before a single judge in the entire Prussian territory (Thaman, 2012, p.159).<sup>6</sup> In 1877 the institution was then incorporated in the Code of Criminal Procedure of the German Empire, with the different name of *Strafbefehlsverfahren*, which is the current name of such institution in Germany.

However, already in the XIX century the penal order procedure was object of legal transplant. In Switzerland, Canton Aargau was the first to adopt the procedure in 1868 (Thommen, 2013, p.25), Austria adopted it in 1873 (Lasser and Kager, 2021, p.575),<sup>7</sup> Japan introduced it in 1885 (Langer, 2021, p. 380), while Norway in 1890 (Svedrup, 2022, p.9) and Hungary in 1896 (Bárd, 2007, p.231). After this very first wave of adoption, Italy was the first jurisdiction of the French civil law group to introduce the institution. The first trace of penal order in the Italian law is the Code of Criminal Procedure for the Italian colony of Eritrea of 1908. In 1909 an emergency legislation provided for the possibility of penal orders in Messina e Reggio Calabria, following the earthquake of 1908 (Nicolucci, 2008, p.2), while the institution was incorporated into the national Code of Criminal Procedure in 1930.

In the first half of the XX century the adoption of penal order continued with Poland in 1928 (Langer, 2021, p.380) and Taiwan in 1935 (Su, 2017, p.209). In the second half of the century the success of penal order as a legal transplant declined, probably also because of the increasing adoption of more adversarial principles in criminal procedure, often in friction with the archetypical penal order procedure.

However, a new wave of vitality of the institution was registered between the end of the XX century and the early 2000s, in conjunction with the modernization of the criminal justice systems in many former Socialist countries. Despite the slowed-down rhythm, penal order is still a vital legal transplant, with recent adoptions e.g. by Spain in 2015, United Arab Emirates in 2018, and Greece in 2019.

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<sup>6</sup> In the Kingdom of Prussia itself the *Mandatsverfahren* had a precedent in the emergency legislation related to the Polish uprising of 1830 and 1831, when Prussian police needed a swift procedure for disposing of minor criminal cases linked to political unrest. See Thaman (2012), p.159.

<sup>7</sup> In Austria the penal order procedure still retains the Prussian denomination of *Mandatsverfahren*. However, the history of *Mandatsverfahren* in Austria is not a continuous one. The institute was indeed repealed in 1999 (öBGBI I 1999/55) and later reintroduced, not without controversies, in 2014 (öStPÄG 2014, in öBGBI I 2014/71, entered into force on January 1, 2015). See Lasser and Kager (2021, p. 575).

Figure 1 shows the diffusion of penal order in 2022 (N. 41), with darker colors marking an older introduction of the institute.<sup>8</sup> As it can be noted, the vast majority of jurisdictions adopting penal order are located in Europe, with few exceptions, notably in East Asia.

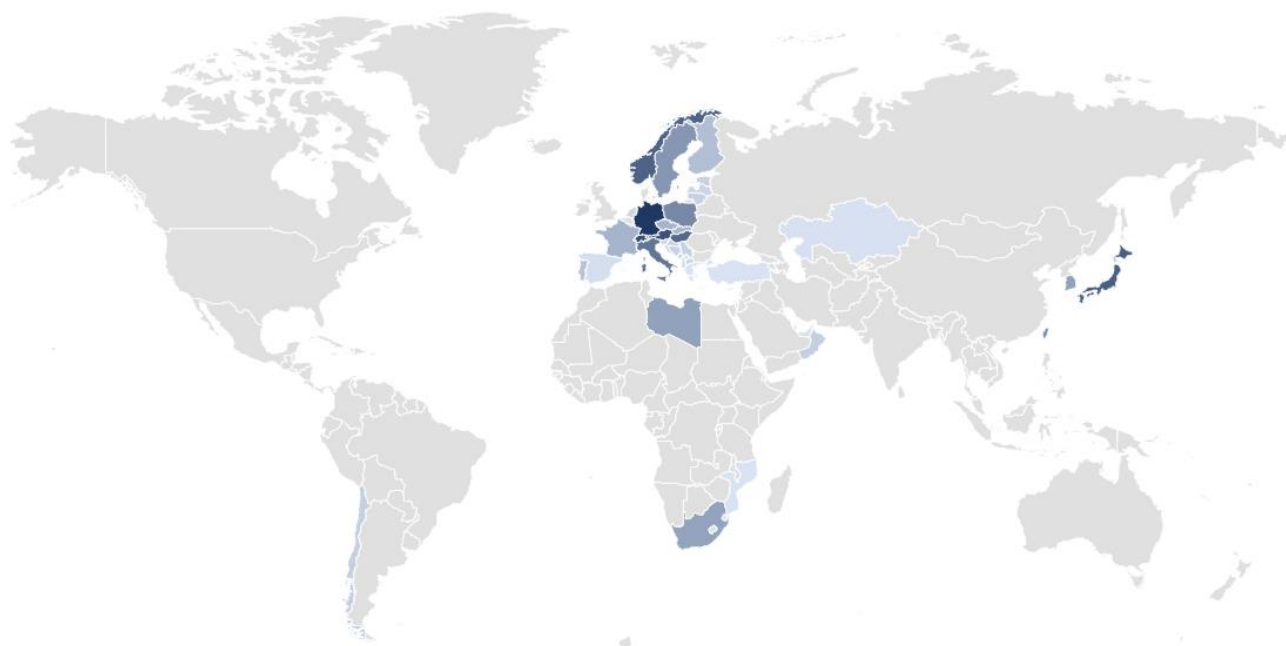


Figure 1 Penal orders in the world: Year of first regulation.

## 2.2. Plea bargaining

Compared to penal orders, plea bargaining has received far more attention in the comparative (Ma, 2002; Langer, 2004; Turner, 2006, 2016; Thaman, 2007; Alkon, 2010; Hodgson, 2015; Fair Trials, 2017), legal empirical (Boari and Fiorentini, 2001; Semukhina and Reynolds, 2009; Wu, 2020; Malone, 2020)<sup>9</sup> and Law and Economics literature (Landes, 1971; Adelstein, 1978; Easterbrook, 1983; Grossman and Katz, 1983; Reinganum, 1988; Scott and Stuntz, 1992; Franzoni, 1999; Adelstein and Miceli, 2001; Bibas, 2004; Garoupa and Stephen, 2008). This can be partly attributed to the importance of plea bargaining in the criminal justice system of the United States, and also to the more limited global diffusion of penal orders.

The U.S. plea bargaining has been traditionally considered the model for trial-avoiding conviction mechanisms based on the consent of the defendant.<sup>10</sup> However, the first countries to formally regulate a plea-bargaining mechanism were Spain with *conformidad* in 1882 (Varona et al., 2022, p.309) and Philippines in 1940 (Langer, 2021, p.381). In the USA a statutory regulation of the practice only took place in 1975,<sup>11</sup> after the Supreme Court upheld the constitutionality of the practice in 1970.<sup>12</sup> Nevertheless, in the USA plea bargaining represented an essential part of the administration of criminal justice long before its formal recognition.

<sup>8</sup> The map considers the first introduction of the institute, even if it was not applicable to the entire and modern national territory e.g. for Germany the reference is Prussia in 1846, for Switzerland it is Canton Aargau in 1868, and for the United Arab Emirates it is Dubai in 2017. Furthermore, sometimes the date of first introduction does not equal the date of the current regulation.

<sup>9</sup> For a review of the legal empirical literature about the factors affecting the likelihood of plea bargaining, especially in the United States, see Subramanian et al. (2020).

<sup>10</sup> The influence of the American model can be also traced in the use of the term “plea bargaining” itself in the scholarly literature, even with reference to jurisdictions that do not provide for a pleading stage in criminal procedure, or for systems that do not involve a real bargaining between the defendant and the prosecutor.

<sup>11</sup> Federal Rules of Criminal Procedure, Rule 11(c).

<sup>12</sup> *Brady v. United States*, 397 U.S. 742.



Traditionally, both English and US judges were reluctant in accepting guilty pleas, and usually persuaded the defendants into changing their pleas from guilty to not guilty (Alschuler, 1979). Still in 1897 the US Supreme Court clearly stated that a guilty plea could not be admitted if made in exchange for favors.<sup>13</sup> Despite this, already at the end of the XIX century in New York around 85% of all convictions in felony cases were the result of guilty pleas (Moley, 1928) and during the early years of the XX century it was clear that such guilty pleas were the results of negotiations between defendants and authorities (Alschuler, 1979). Plea bargaining became a necessity for dealing with the increasing number of criminal cases in urban overcrowded and overburdened courts,<sup>14</sup> and it dominated the practice long before its public discovery through the reports of the Crime Commissions in the 1920s and 1930s (Moley, 1928; Illinois Association for Criminal Survey, 1929; American Law Institute, 1934). Because of the consensual nature of plea bargaining, the convictions imposed through this procedure were not often challenged in appeal, hence the Supreme Court did not have the chance to evaluate the constitutionality of the practice until 1970 (Alschuler, 1979; Langbein, 1979). Despite widespread criticism of the practice already at that time (Schulhofer, 1984, 1992) the Supreme Court upheld its constitutionality. The decision was probably grounded also on economic considerations. Indeed, in 1971 the Supreme Court stated that without plea bargaining “the States and the Federal Government would need to multiply by many times the number of judges and court facilities”.<sup>15</sup>

The “triumphal march” (Thaman, 2007) which rendered plea bargaining “probably the most transplanted instrument of criminal procedure” (Garoupa and Stephen, 2008) only began after the pronouncement of the Supreme Court in *Brady v. United States* (1970), and initially at slow pace. The first European country to formally introduce a plea-bargaining mechanism was Italy in 1988, in the context of a greater transition from an inquisitorial to and accusatorial system of criminal procedure (Pizzi and Marafioti, 1992; Grande, 2000; Pizzi and Montagna, 2004; Illuminati, 2005).<sup>16</sup> During the 1990s several Common Law countries formalized pre-existing plea-bargaining practices through Sentencing Guidelines, generally providing differentiated sentencing discounts based on the stage of procedure in which the guilty plea was entered (England and Wales in 1994; Canada and Scotland in 1995; Northern Ireland and Australia in 1996).<sup>17</sup> Between the late 1990s and the 2000s and increasing number of civil law jurisdictions adopted plea-bargaining mechanisms, especially in Eastern Europe and Latin America, with the aim of modernizing and increasing the efficiency of their criminal justice systems. Since then, the adoption of plea-bargaining procedures remained vital, and it constitutes an ongoing trend.<sup>18</sup>

<sup>13</sup> *Bram v. United States*, 168 U.S., 532, reported in Alschuler (1979).

<sup>14</sup> Ortman (2020) reviews the literature about the origins and causes of the rise of plea bargaining, mentioning caseload pressure, increasing trial complexity, the professionalization of police and prosecutors, and contextual theories focused on the interaction between law enforcing authorities and voters.

<sup>15</sup> *Santobello v. New York*, 404 U.S. 257 (1971). In that occasion Chief Justice Warren Burger during the speech declared that the “system of courts—the number of judges, prosecutors, and of courtrooms—has been based on the premise that approximately 90 percent of all defendants will plead guilty, leaving only 10 percent, more or less, to be tried.” Excerpts of the speech are available at <https://www.nytimes.com/1970/08/11/archives/excerpts-from-burgers-talk.html>

<sup>16</sup> It is interesting to notice that the Italian legislator introduced the plea-bargaining mechanism informally called “patteggiamento” considering it as an essential part of an adversarial system of criminal procedure. See *Relazioni al progetto preliminare e al testo definitivo del codice di procedura penale*, in G.U. n.250 del 24 ottobre 1988, Suppl. Ordinario n.93.

<sup>17</sup> For a comparative review about the practice of plea bargaining in several Common Law jurisdictions see Brook et al. (2016). It is worth noting that many of these jurisdictions strongly refuse the term plea bargaining, preferring the more neutral “sentencing discount for guilty plea”. See e.g. the Advocacy Standards of the Public Prosecution Service of Northern Ireland, available at

<https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Advocacy%20Standards.pdf>.

<sup>18</sup> Among the most recent adoptions: China in 2018; Cuba, Greece, and Kyrgyzstan in 2019; Türkiye in 2020; Ghana in 2022.

Figure 2 shows the adoption of plea bargaining in 2022 (N. 102), with darker colors marking an older introduction of the institute.<sup>19</sup>

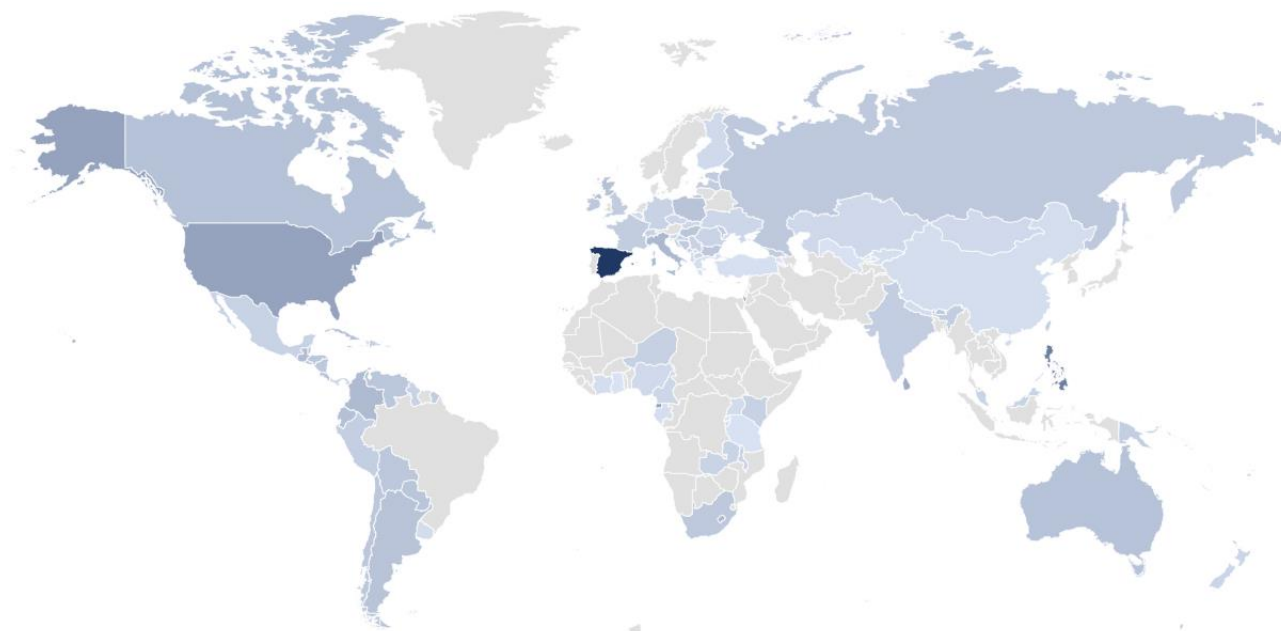


Figure 2 Plea bargaining in the world: Year of first regulation.

### 3. Current extent of administratization

This subsection first discuss the legal variability in the design of plea bargaining and penal orders in different jurisdictions. Indeed, some differences in the regulation of such procedures should result *a priori* in different extents of administratization of criminal convictions. The second part of the subsection documents instead the actual administratization rate of criminal convictions in several jurisdictions.

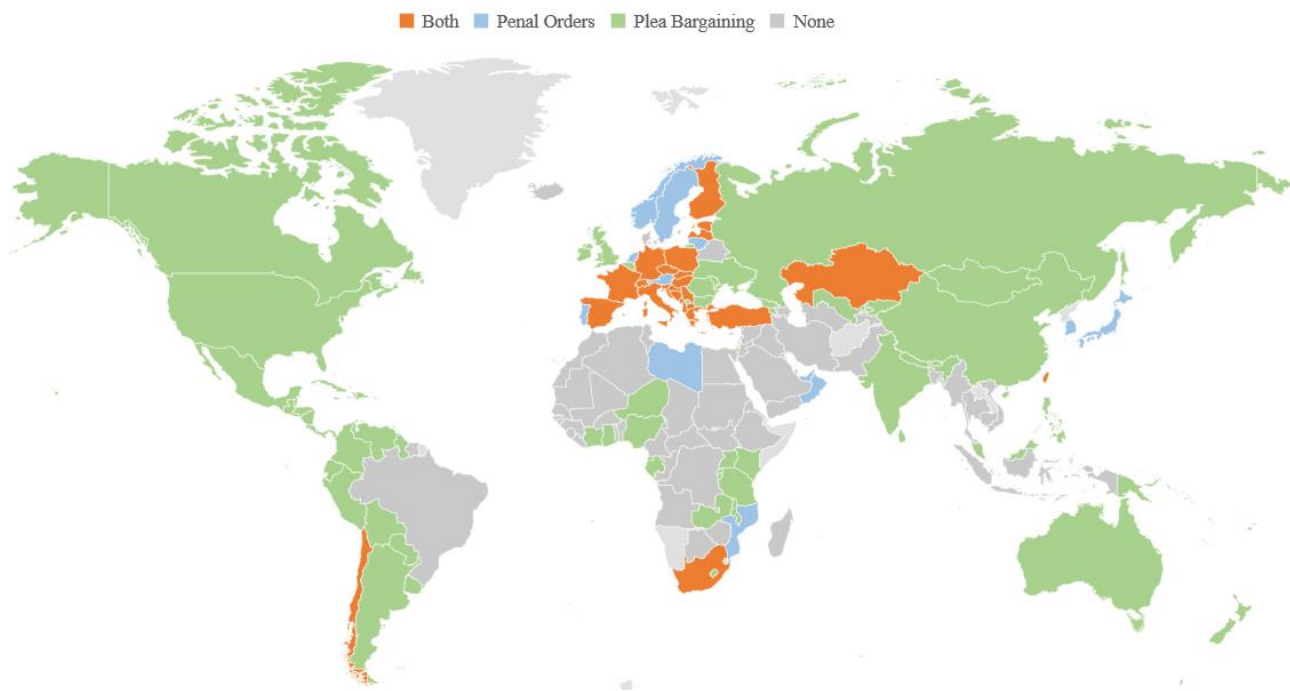
#### 3.1. Legal variability in the design of plea bargaining and penal orders

Figure 3 shows the result of a survey which has been distributed among legal experts in 77 jurisdictions,<sup>20</sup> in order to collect data about the legal design and use in practice of plea bargaining. Although being mainly focused on plea bargaining, the survey also included questions related to the existence and possibility of use of penal orders. The results of the survey have been integrated by personal research, based on the extant legal comparative literature and on the direct consultation of the relevant law in additional 30 jurisdictions. In 2022, out of the 173 jurisdictions surveyed, 115 provided for at least one method of administratization of criminal convictions. In particular, plea bargaining was allowed in 74 jurisdictions and penal order in 14, while both systems were simultaneously allowed in 28 jurisdictions.

<sup>19</sup> The date is referred to the first regulation of the institute, either by statutory law or by judicial decision. In the case of Ireland, I was not able to identify a precise date for the regulation of the practice, even though it is established that a guilty plea should be rewarded with some sentencing benefit, based on the stage of the process in which it is entered.

<sup>20</sup> The term jurisdictions is more appropriate than countries, since the legal status of plea bargaining and penal orders change in different jurisdictions within the same country. This is for example the case for England and Wales, Scotland, and Northern Ireland in the United Kingdom, or for Hong Kong in China.





*Figure 3 Plea bargaining and penal order in the world in 2022.*

The provision of at least one mechanism between plea bargaining and penal orders is the prerequisite for some degree of administratization of criminal convictions. However, the legal regulation of such procedures can have a significant impact on their actual possibility of use, and hence on the extent of administratization itself.

Regarding plea bargaining, the first major difference is the limitation to its applicability across countries. While some jurisdictions do not impose any limit on the possibility of plea bargaining, other jurisdictions do not allow it for crimes punished above a certain sentence threshold, while other exclude it for certain types of crimes<sup>21</sup> or criminals,<sup>22</sup> and others yet differently combine those limitations. Figure 4 shows the cross-country variation in the limitations to plea bargaining, with regard to three possible aspects of limitation: sentence size; type of crime; type of defendant. As can be noted, common law jurisdictions typically do not restrict the use of plea bargaining, while European civil law jurisdictions strongly limit its applicability.

<sup>21</sup> Typically, those are crimes perceived as especially dangerous or harmful, such as terrorism, organized crimes, sexual crimes, corruption.

<sup>22</sup> This is typically the case for juvenile offenders, for which the rehabilitation goal prevails over the need of efficiently imposing a conviction, and for recidivists, who are deemed not worthy of the sentence benefits usually associated with plea bargaining.

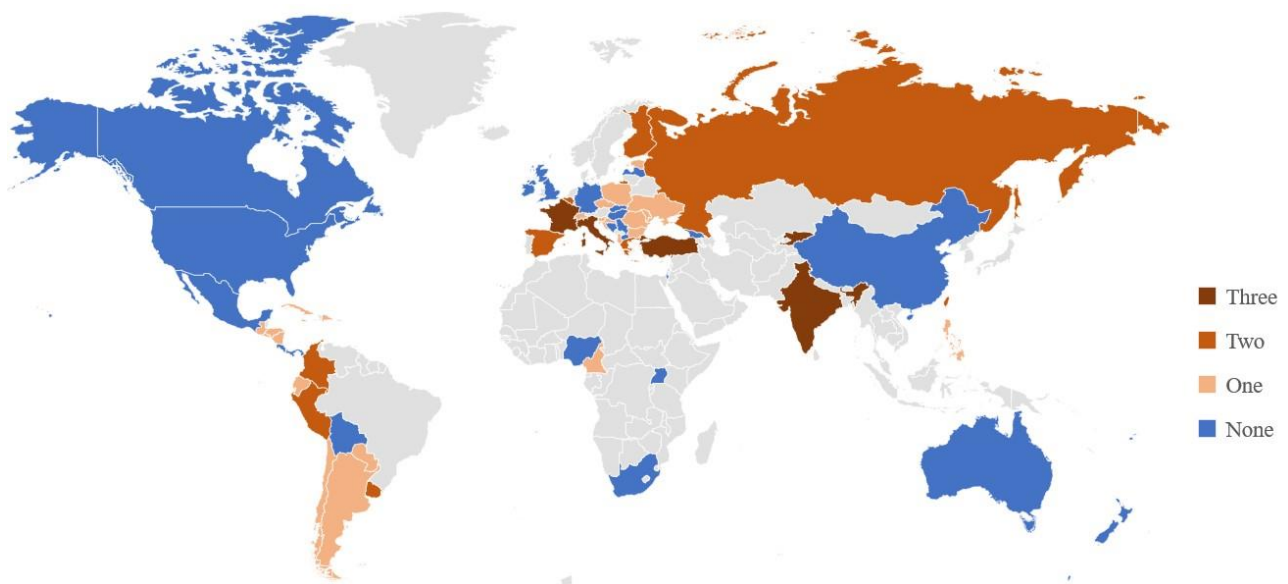


Figure 4 Limitations to the applicability of plea bargaining.

The role of the judge during the plea-bargaining process is another factor that can influence the administratization rates across countries. On one hand, a greater involvement of the judge in the process can dilute the “administrative” character of plea bargaining. On the other hand, different kinds of judicial intervention can either enhance or limit the use of plea bargaining in practice. In this regard, the first great distinction is between systems that allow for the judicial intervention before or during the negotiation phase itself,<sup>23</sup> and those that instead provide only for an *ex post* judicial control over the procedure. In the former systems, the judicial intervention should facilitate the reaching of a plea agreement, thus contributing to a greater administratization of convictions.<sup>24</sup> Concerning the regulation of judicial scrutiny over the agreement, plea-bargaining systems can be further differentiated based on the extent of such scrutiny, and on the range of decisions that can be taken thereafter. Regarding the extent, in some systems judicial scrutiny is limited to checking the respect of procedural rules, while in other systems it can be extended to the content of the agreement, especially with the regard to the proposed sentence, and still in other it can encompass aspects of criminal policy which are alien to the agreement itself.<sup>25</sup> Coming to the range of possible decisions, in certain jurisdictions the judges can either reject *in toto* the agreement<sup>26</sup> or validate it and convict the defendant, imposing the requested sentence or the one provided by law; in other systems, they can also ask the parties to negotiate a different agreement, e.g. if they deem the current terms

<sup>23</sup> This is the case in England and Wales, where a judge can be asked to give an indication about the entity of the sentence that would be imposed at trial, and the one that would impose if the defendant pleads guilty at a certain stage in the procedure. See *R v Goodyear* [2005] EWCA Crim 888. In Germany, probably as a legacy of the inquisitorial traditional, the judge can even initiate the plea-bargaining procedure upon its own motion, and, in any case, she will be involved in the negotiations and be part to the agreement. See § 257c, (1) StPO.

<sup>24</sup> For a comparison about the participation of the judge during plea negotiations in Germany and the USA, see Turner (2006).

<sup>25</sup> This is the case in France, where the judge can refuse to “homologate” the agreement if, among other things, “the interests of society justify the celebration of an ordinary trial hearing” (own translation, see Article 495-11-1, *Code de procédure pénale*).

<sup>26</sup> However, it has been documented in several jurisdiction that the judge reject the agreement only in exceptional cases. See Brook et al. (2016) for an overview of Australia, Canada, England and Wales, New Zealand, and the USA; Leturmy & Bossan (2019) for France; Malone (2020) for the USA.

inadequate in regard to the legal qualification of the facts, or the sentence required; in still other cases, they can even acquit the defendant after a positive review of the plea agreement.<sup>27</sup>

Coming to penal orders, the extent of administratization should be inherently lower, since the applicability of this kind of procedure has always been limited to less serious offenses. However, differently from plea bargaining, the limits to applicability of penal orders are not grounded in the sentence level provided *in abstracto* by the law, but in the type and measure of the sentence that shall be imposed *in concreto*. Figure 5 shows the most serious sentence that can be imposed through penal orders in Europe.<sup>28</sup>

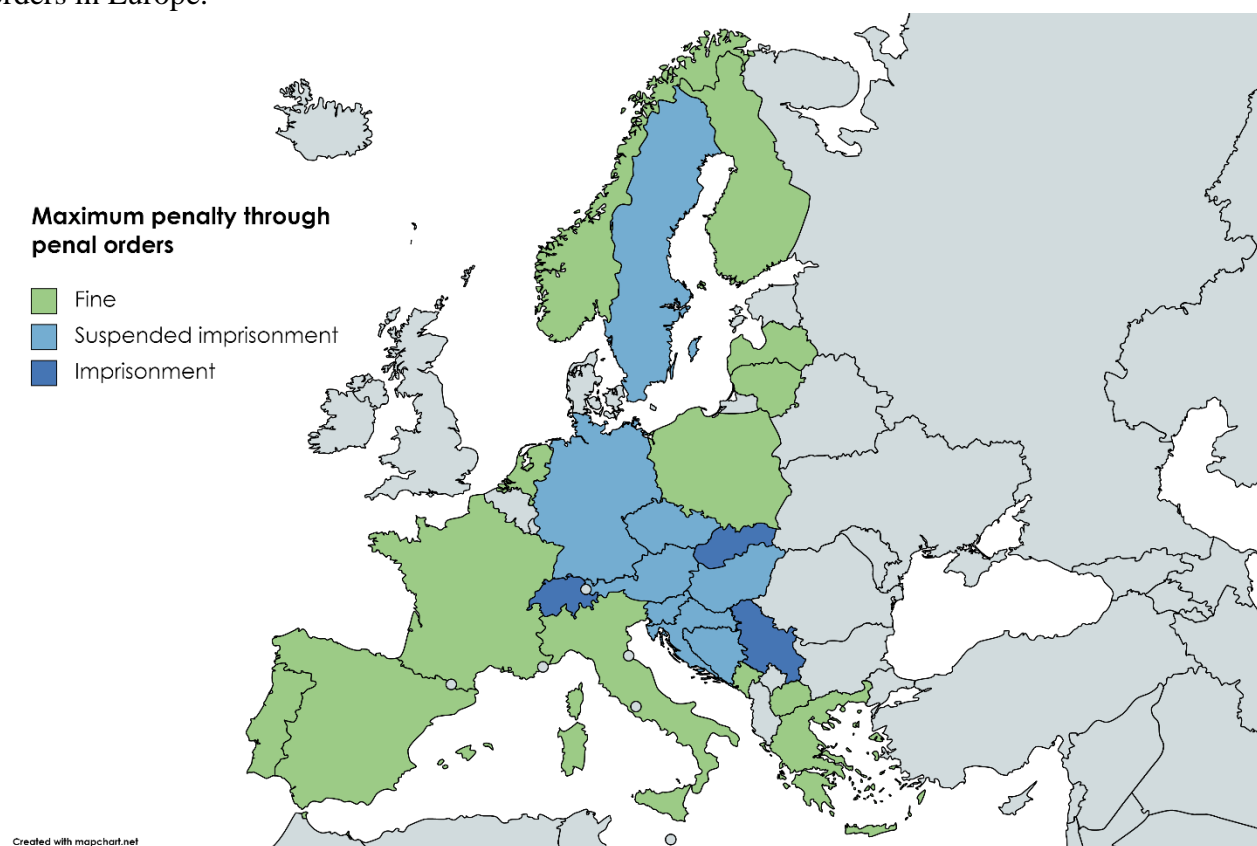


Figure 5 Most severe applicable sanction through penal order in Europe.

As can be noted, the most serious sentence that can be imposed through a penal order is usually a suspended imprisonment or a fine. However, Switzerland allows for a custodial sentence up to 6 months, while Slovakia and Serbia allow for the imposition of a prison sentence up to respectively 3 and 2 years. In some jurisdictions the course of the procedure is slightly modified if the authority is willing to impose a fine over a certain threshold, or certain types of sanctions, such as community service.<sup>29</sup>

Similarly to plea bargaining, the “administrative” character of penal orders can be influenced by the role of the judge. In all cases, in the penal order procedure the judge intervenes if the defendant does not accept the conviction and asks for trial. With regard to the issuance phase, the role of the judge is instead more differentiated across jurisdictions. Most commonly, the penal order is issued by a judge upon request of the prosecutor during the pre-trial phase. However, in some jurisdictions the

<sup>27</sup> This is especially the case in Latin American jurisdictions, even though the statistical frequency of this kind of decisions is extremely low.

<sup>28</sup> In the non-European jurisdictions that provide for penal order, the most severe sentence that can be imposed is a fine.

<sup>29</sup> For example, in the Netherlands a penal order imposing a criminal fine or compensation measures that exceeds 2.000 euros can be only issued after the prosecutor has heard the suspect, assisted by legal counsel. See Article 257c, (2), Code of Criminal Procedure.

prosecutor truly becomes “judge by another name” (Weigend, 2012, p.389), since he can directly convict and impose a criminal sanction through penal order, without any prior judicial intervention.<sup>30</sup> In some jurisdictions even other enforcement authorities, besides the prosecutor, can ask for the issuance of a penal order, or even directly impose it.<sup>31</sup> In other jurisdictions instead, after a fixed time from the issuance of the penal order, the defendant is summoned to a special hearing where a judge ascertain whether the defendant accepts the conviction or not.<sup>32</sup> In yet other cases, a penal order can be issued upon direct initiative of the judge.<sup>33</sup> However, even in the case of greater judicial involvement, the criminal conviction is imposed without trial.

### 3.1. Administratization rate of criminal convictions

Figure 6 shows the administratization rate of criminal convictions in 2019 in 59 jurisdictions worldwide. Darker colors correspond to higher administratization rates.<sup>34</sup> The year 2019 was chosen because it is the most recent year not affected by Covid-19 for which data are available. More recent year could be hardly considered representative, given the likely impact of Covid-19 on both crime rates and law enforcement activities.

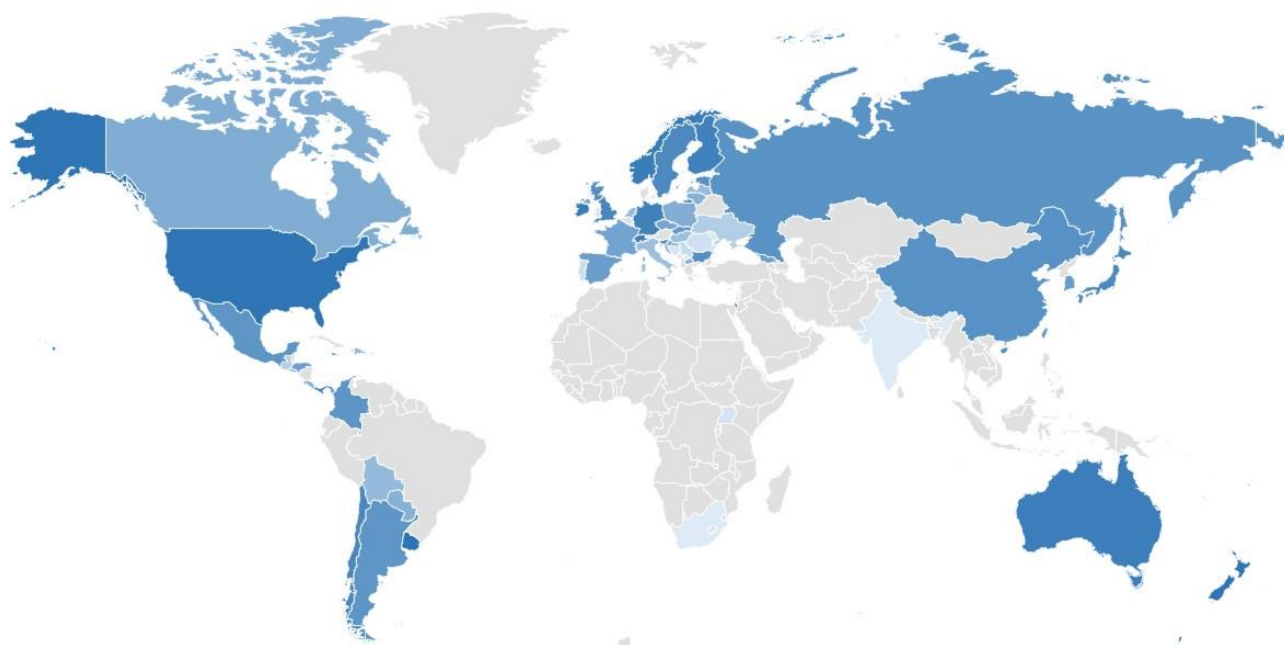


Figure 6 Administratization rate of criminal convictions in 2019.

Some words of caution are necessary when interpreting the map. First, for some countries that have both plea bargaining and penal orders, it was only possible to know the number of criminal convictions imposed through the first<sup>35</sup> or the second method.<sup>36</sup> Hence, for those countries the true

<sup>30</sup> This is the case in Finland, Latvia, the Netherlands, Norway, Sweden, Switzerland, and the United Arab Emirates.

<sup>31</sup> In Germany the penal order can be issued by the judge upon request of the tax authority; in Finland and Norway the penal order can be directly issued, among the others, by police officers or the coast guard.

<sup>32</sup> This is the case for the penal order procedure of Serbia and Bosnia and Herzegovina.

<sup>33</sup> The competence is shared by the prosecutor and the judge in Hungary and Taiwan, while it is exclusive competence of the judge in Poland, Czech Republic, and Slovakia.

<sup>34</sup> The administratization rate is computed as the percentage ratio between the number of convictions imposed through either plea bargaining and penal orders and the total number of convictions imposed.

<sup>35</sup> These countries are Bosnia and Herzegovina, Serbia, South Africa.

<sup>36</sup> This is the case of Switzerland, where data on convictions through plea bargaining are not collected at the national level. However, the rate of convictions imposed through plea bargaining in Canton Geneve in 2019 was 1,78% (own elaboration, based on *Compte rendu de l'activité du Pouvoir judiciaire en 2019*, p.22, available at [www.ge.ch/justice](http://www.ge.ch/justice)). Given that the administratization rate attributable to penal orders is 92,05% for 2019 at the national level, and assuming that the plea-

administratization rate is most probably higher.<sup>37</sup> Second, for certain jurisdictions it was only possible to know the plea bargaining rate before certain types of courts,<sup>38</sup> in some parts of the territory,<sup>39</sup> or with reference to periods of time shorter than one year.<sup>40</sup> Third, in the case of some Common Law jurisdictions, following the extant literature (Fair Trial, 2017; Langer, 2021) and in absence of more explicit data, the number of plea bargaining is proxied by the number of guilty pleas. Fourth, for some jurisdictions, in the absence of more detailed data, the number of criminal convictions imposed through penal orders is proxied by the number of penal orders issued.<sup>41</sup> Fifth, in some cases the reference unit for computing the administratization rate is the number of people convicted, while in other case it is the number of criminal cases concluded with a conviction.

Figure 7 shows the administratization rate in the same 59 jurisdictions in 2019, distinguishing between the convictions obtained through plea bargaining and penal orders. As can be noted, in 37 of the 59 jurisdictions, i.e. 63% of the sample, the majority of criminal convictions are imposed through plea bargaining or penal orders. In 16 of them the administratization rate is even above 80% and in 9 of them it is above 90%, thus relegating the ordinary trial to a quantitatively marginal role in the enforcement of criminal law.

It is also interesting to notice that, notwithstanding its structural limitation to less serious offences, penal order is responsible for more than 80% of criminal convictions in 6 jurisdictions.<sup>42</sup> Furthermore, where the two procedures coexist, plea bargaining is relegated to a marginal role in 9 jurisdictions<sup>43</sup>, while only in 3 jurisdictions it is the other way around;<sup>44</sup> in the remaining 5 jurisdictions the administratization rate is split rather evenly between penal orders and plea bargaining.<sup>45</sup> The reason for the comparatively greater success of penal order *vis a vis* plea bargaining might be the minor effort required for the issuance of the former, given that it is not even necessary a prior contact between the

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bargaining rate of Canton Geneve is representative of those of the other Cantons, knowing the plea-bargaining rate at the national level should not substantially influence the reported figure.

<sup>37</sup> I suspect it is especially higher in the case of South Africa, which, together with India and Uganda, is currently an outlier among Common Law jurisdictions. In the case of South Africa, I was only able to compute the conviction rates related to the formalized plea-bargaining procedure, regulated by Section 105A of the Criminal Procedure Act. However, besides the penal order procedure regulated by Section 57 and 57A CPA, in South Africa still exist the possibility of informal plea-bargaining ex Section 112 CPA. According to the Law and Economics literature, such informal plea-bargaining procedure should be the most used in practice (Adelstein, 2019).

<sup>38</sup> This is the case for: England and Wales, whose data are referred to Crown Courts, which deal with more serious cases, while the number of guilty pleas is not available for the Magistrates Court, which deal with summary offenses (punished with maximum 6 months imprisonment) and which constitute the majority of criminal cases; Ireland, whose rate is referred to the Circuit Courts, which deal with more serious offenses, while the number of guilty pleas is not available for District Courts, which deal with the great majority of offenses; Israel, whose data only refer to cases prosecuted by the prosecutor and not also by police prosecution; Scotland, whose data only refer to summary cases, disposed by either the Justice of the Peace Court or the Sheriff Court Summary, and which constitute the great majority of cases; Bolivia, whose data only refers to *Tribunales de Sentencia Penal, Anticorrupción y de Violencia Contra la Mujer*. In the case of federal states such as Argentina, Australia, Mexico, and the USA, the administratization rate is only referred to the federal jurisdiction.

<sup>39</sup> In the case of Canada it was possible to compute the plea-bargaining rate only for the Province of Quebec. In the case of Paraguay, several districts did not provide relevant data to the national court statistical office for 2019.

<sup>40</sup> For Argentina, the administratization rate is only referred to the federal jurisdiction in the first semester of 2019. For Honduras, it is only referred to the period January-October 2019.

<sup>41</sup> This is the case for: Croatia, Japan, Latvia, North Macedonia, Sweden. The number of issued penal orders is a good proxy for the number of convictions imposed through penal orders as long as the opposition rate is not too high. From the data available for other countries, it seems that the average opposition rate is slightly below 10%.

<sup>42</sup> These jurisdictions are Norway (92,55%); Switzerland (92,05%); Finland (88,48%), Germany (88,25%); Japan (82,26%); Sweden (81,44%).

<sup>43</sup> These jurisdictions are Croatia, Czech Republic, France, Finland, Germany, Hungary, Luxembourg, Slovakia, Taiwan. In all these jurisdictions the plea-bargaining rate is below 3%, with the exception of France and Slovakia.

<sup>44</sup> This is the case in Chile, Estonia, and Spain.

<sup>45</sup> This is the situation in Italy, Latvia, North Macedonia, Poland, and Slovenia.

enforcement agent and the defendant, let alone any form of negotiation. Looking at the countries that rely more on penal orders despite the availability of plea bargaining, it can be noted that the former procedure is much older than the latter. Hence, another explanation might be that the enforcement agents are not willing to invest time and effort in learning how to use plea bargaining, since similar results can be achieved by relying on a procedure that they already know.<sup>46</sup>

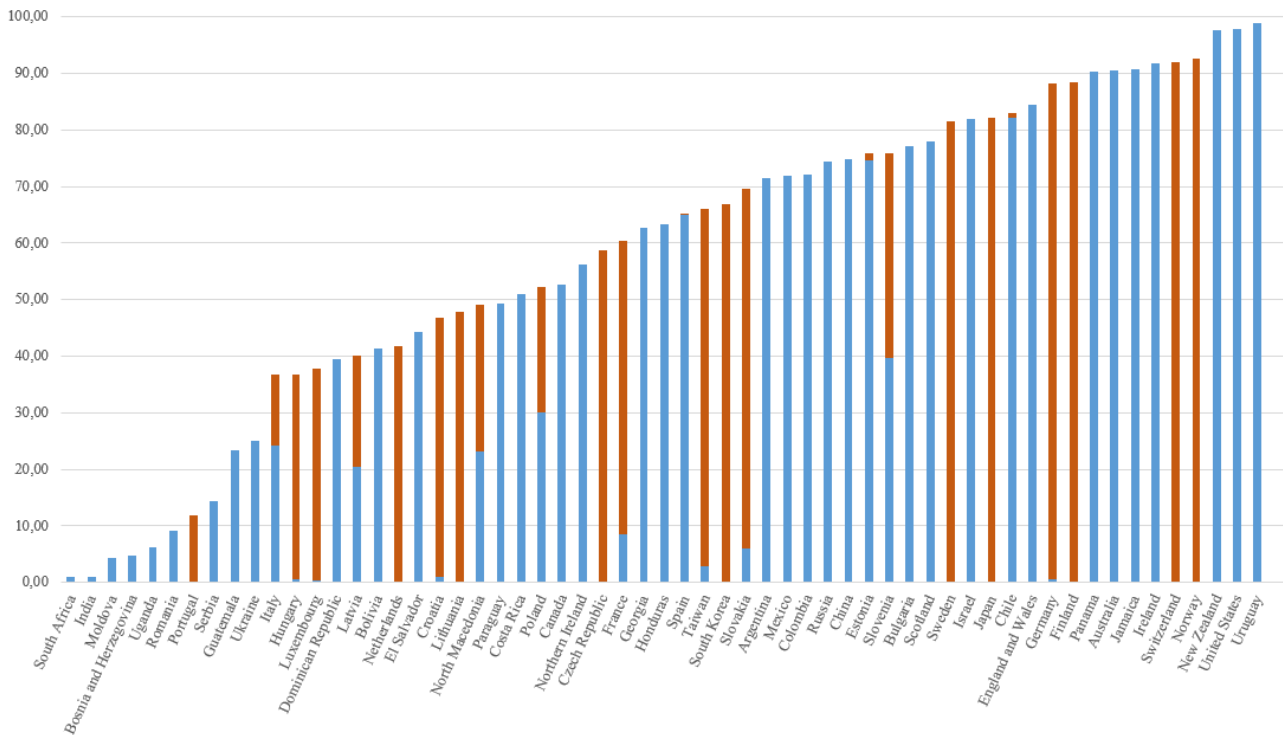


Figure 7 Administratization rate in 59 jurisdictions in 2019: Composition of plea bargaining (blue) and penal orders (orange).

## 4. Expected effects of administratization

In the present subsection the mainstream Law and Economics approach will be applied, in order to discuss the possible effects of larger administratization rates upon structural features and critical outcomes of criminal justice systems.<sup>47</sup> The discussion will also consider possible ways for empirically testing the predictions, and the related challenges. The expected beneficial effect will be discussed first, while the potentially adverse effects will be discussed later.

### 4.1. Possible beneficial effects

The growing adoption of both plea bargaining and penal order has been described as one of the main trends in contemporary criminal procedure worldwide (Garoupa and Stephen, 2008; Langer, 2004, 2021; Thaman, 2012; Fair Trials, 2017). The main reason for the success of such legal transplants has been typically identified in “the desire to minimize the number of fully contested trials” (Hodgson, 2015, p.226), thus diminishing the costs of adjudication of criminal cases, since “the «full-blown» trial with «all the guarantees» is no longer affordable” (Thaman, 2007, p.1). However, also other beneficial effects can result from a greater administratization of criminal convictions. The following

<sup>46</sup> For an empirical confirmation of this result with reference to Italy see Boari and Fiorentini (2001), which finds a lower use of plea bargaining in districts where the head of the prosecutor’s office was older. For anecdotal evidence of a similar phenomenon see Dušek (2015), which documents how the different rates of use of speedy trials across Czech districts can be mainly attributed to bureaucratic inertia, given the costs of learning how to use the new procedure.

<sup>47</sup> The so-called “mainstream approach” relies upon the assumptions of rational choice theory (Pacces and Visscher, 2011).



four beneficial effects will be considered below: greater efficiency; greater effectiveness; greater deterrence; lower costs of wrongful convictions.

#### 4.1.1. Efficiency

The introduction of some form of administratization of convictions is often justified by lawmakers with the aim of enhancing the efficiency of the criminal justice system.<sup>48</sup> Indeed, a greater use of simplified procedures allow to prosecute and adjudicate a greater number of cases with the same budget, compared to exclusive reliance on trials, or to adjudicate the same number of cases by using fewer resources.

Hence, a possible effect in the medium and long term could be a reduction in the number of judges and prosecutors per capita in jurisdictions that display greater administratization rates. As recalled above, this effect was highlighted by Chief Justice Warren Burger in the speech following the decision *Santobello v. New York*, by stating that at that point in time the entire court system in the United States was based on the premise that about only 10% of criminal cases would be adjudicated at trial. In the text of the decision it was also stated that, in the case of a ban on plea bargaining, “the States and the Federal Government would need to multiply by many times the number of judges and court facilities”.<sup>49</sup> The reason is that the activity of the judge is minimal in both plea bargaining and penal orders, at the point that a single judge can dispose of tens of cases in a matter of hours.<sup>50</sup>

Furthermore, a greater administratization minimizes the trial activity, and hence the importance of judges, shifting the focus of the procedure on the pre-trial phase. For this reason, it can also be expected that different administratization rates could affect the ratio of judges to prosecutors. In particular, in the case of lower administratization, prosecutor and judges are both essential for the adjudication of the majority of cases. A higher administratization instead places a greater importance on prosecutors, given their role both in negotiating plea agreements and in preparing the file for the issuance of a penal order. Hence, jurisdictions with higher rates of administratization should present a higher ratio of prosecutors to judges.

However, it is possible that greater administratization does not cause a reduction in the public expenditure for criminal law enforcement, but simply a different reallocation of resources between courts, prosecutors, and police. This might be the case especially if plea bargaining and penal orders are primarily used to deal with simple cases, characterized by indisputable evidence.<sup>51</sup> Hence, it would be incentivized a greater investment in collecting hardly disputable evidence, e.g. through better alcohol testing or more street cameras (Dušek & Montag, 2016, p.19). Another possible investment could be hiring more police officers<sup>52</sup> or improving their equipment. If this is the case, in jurisdictions with higher administratization rate the public expenditures for law enforcement will not be proportionally lower than in other jurisdictions, but simply allocated differently among courts, prosecutors, and police.

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<sup>48</sup> The preparatory works for the new Italian Code of Criminal Procedure of 1988 even stated that “the new procedure will work if we manage to make arrive to debate only a small portion of cases” (“*il nuovo processo funzionerà se riusciremo a far pervenire al dibattimento soltanto una parte piccola di processi*”). See Relazioni al progetto preliminare e al testo definitivo del codice di procedura penale, in G.U. n.250 del 24 ottobre 1988, Suppl. Ordinario n.93, p.104. Indeed, the book regulating the special procedures precedes the one regulating ordinary trial in the Code.

<sup>49</sup> *Santobello v. New York*, 404 U.S. 257 (1971)

<sup>50</sup> For example, in France the president of a court reportedly signed up to 50 penal orders in the turn of 1 hour, Perrocheau (2016), p.615.

<sup>51</sup> This seems to be the case in many jurisdictions. E.g. Wu (2020) shows that in China the recently introduced plea bargaining procedure is mainly used for DUI cases, in which the evidence provided by the alcohol test is mostly clear and undisputed.

<sup>52</sup> This can be especially the case in countries like Norway or Finland, where penal orders can be directly issued by police officers without any prior judicial intervention.

Another possible effect of greater administratization is the reduction in sentence enforcement costs, and not only in law enforcement costs. Indeed, penal orders procedures typically do not allow for the imposition of prison sentences, and even plea-bargaining procedures are characterized by the imposition of milder sentences compared to trials.<sup>53</sup> This should then result in less expenditures in the prison system. In the case of a greater reliance on penal orders, the State can even compensate part of the law enforcement expenditures, given that the most imposed sanctions are usually fines and day fines.

A reduction of the average time to disposal of criminal cases is a final possible efficiency gain from greater administratization. Quicker methods for disposing of criminal cases should result in a reduction of court backlogs. So, it is reasonable to expect both minor court backlogs and higher case clearance rates in the case of greater reliance on plea bargaining and penal orders.

#### *4.1.2. Effectiveness*

A greater administratization of criminal convictions should also increase the effectiveness of the criminal justice system, by allowing the detection and punishment of a larger number of crimes.

One of the first Law and Economics argument in favor of plea bargaining from a social welfare point of view was that it allows to settle out of court the simplest cases, thus freeing-up resources for prosecuting the evidentiary most complex ones (Easterbrook, 1983). As shown by Dušek & Montag (2016), in the presence of a budget constraint and in the absence of alternatives to ordinary trials, many petty crimes are not prosecuted, because the scarce resources are primarily allocated to the prosecution of the most serious offenses; however, the presence of trial-avoiding mechanisms decreases the costs of prosecuting and adjudicating even petty crimes, thus increasing the crime clearance rates for this category of offenses.

Thus, in the medium and long run, a larger fraction of reported crimes should be prosecuted in the case of higher administratization rates. However, as shown by Dušek (2015), the empirical test of this prediction can become tricky if the police can influence the quantity of reported crimes, based on the very possibility of prosecuting those crimes.<sup>54</sup> If this is the case, it is indeed possible that the overall crime clearance does not change, but the number of prosecuted crimes increases because of a more effective law enforcement.

#### *4.1.3. Deterrence*

Closely related to effectiveness is the deterrent effect of law enforcement. In the classic economic model of crime (Becker, 1968) the expected gains, and thus the decision to commit a crime, depend on both the severity of punishment and the probability of apprehension and conviction. As discussed above, a greater use of trial-avoiding conviction mechanisms should increase the probability of apprehension and conviction, thus resulting in increased deterrence. Hence, in the long run we expect lower crime rates in countries with higher administratization of criminal convictions.

The increased probability of apprehension and conviction should affect the most serious crimes, which can be prosecuted more thoroughly with the resources diverted from the prosecution of less serious offenses (Easterbrook, 1983), but they should also affect petty crimes, since they are now prosecuted in greater proportions (Dušek, 2015).<sup>55</sup>

However, as in the case of effectiveness, the empirical test of the deterrence effect can be challenging. The number of reported crimes is a straightforward variable that can be used for measuring the deterrence effect on crime rates (Langer, 2021). However, such measure can be affected by a problem

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<sup>53</sup> However, this is not always the case, as documented in France (Perrocheau, 2010) and China (Wu, 2020).

<sup>54</sup> Dušek (2015) considers the case of the Czech fast-track procedure, which does not constitute a trial-avoiding conviction mechanism but share the economic rationale of plea bargaining and penal orders. He finds that in the case of police-reported offenses the resources reallocation effect dominates the deterrent effect of better law enforcement.

<sup>55</sup> The deterrence effect of prosecuting petty offences is emphasized by the so-called “broken windows theory”, Wilson and Kelling (1982).

of reverse causality. First, as showed by Dušek (2015), if police has a certain control over the number of reported crimes, increased possibility of prosecuting petty offences could result in a higher number of crimes reported, thus hindering the possibility of identifying the true deterrence effect. Second, also for victim reported offences, the costs of reporting the offense are lower if the victim anticipates a higher probability of prosecution, thus resulting in an increased number of reports. Thus, in both cases the diminution of crimes due to increased deterrence can be compensated and even dominated by an increase in the number of crimes reported.

#### 4.1.4. *Costs of wrongful convictions*

Givati (2014) in a cross-country setting finds that a wider possibility of use of plea bargaining is associated with lower social emphasis on the avoidance of wrongful convictions and greater social emphasis on ensuring that the guilty are punished.<sup>56</sup> However, it can be argued that one of the reasons for the introduction of simplified procedures, including penal orders and plea bargaining, is precisely the reduction of social costs from wrongful convictions (Dušek & Montag, 2016). Such effect can be driven by two factors.

On one hand, convictions imposed as the result of penal orders and plea bargaining are typically less severe than those imposed at trial.<sup>57</sup> The diminished accuracy in ascertaining guilt, and hence the likely greater number of wrongful convictions, is then compensated by the imposition of lower penalties. Furthermore, in a Law and Economics defense of plea bargaining based on social welfare considerations, plea bargaining is considered a screening mechanism for separating innocent and guilty defendants (Grossman and Katz, 1983). Indeed, the prosecutor can set the plea agreement offer at such a level that only the truly guilty defendants accept it, while the factually innocent ones opt for trial.<sup>58</sup> However, a too large differential between the trial and the trial-avoiding conviction, usually defined “trial penalty” (Clarke, 1979), can induce a greater number of factually innocent defendant into pleading guilty (Bibas, 2004) or discourage them from challenging the penal order in court.<sup>59</sup> Thus, trial-avoiding conviction mechanisms ascertain the true guilt of the defendant with less accuracy compared to trial, resulting in more wrongful convictions; however, such convictions result

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<sup>56</sup> The paper develops a model in which plea bargaining allows that all guilty are punished, but also some risk-averse innocent defendants are punished, while in the case of no plea bargaining no innocents are punished at trial but some factually guilt defendants are not convicted. The empirical testing of the theory is based on data from 2006 for 20 countries.

<sup>57</sup> In some countries the law even mandates a certain sentence discount in the case of conviction without trial. For example, regarding plea bargaining, in Colombia the sentence is diminished by half in the case of agreement concluded at the indictment hearing, and by one third if it is concluded during the main hearing; in Romania the sentence is reduced by one third in case of imprisonment and by one fourth in case of monetary sanction; similar mandatory sentence reductions are provided in India, Spain, and Russia. Regarding penal orders, in Chile the fine is diminished by 25% if it is paid within 15 days from its reception; in France the imposed fine cannot exceed 50% of the one that would have been imposed at trial, and it is additionally discounted by 20% if it is paid within one month since its reception; in Italy the fine cannot exceed half of the minimum sentence provided by law, the defendant is exempted from paying the expenses of the procedure, and no ancillary sanctions can be imposed together with the fine. Furthermore, as shown above, even in the absence of mandatory sentence discounts, the use of penal orders is generally limited to the imposition of milder sentences, like fines or suspended imprisonment.

<sup>58</sup> The same logic can be applied to penal orders, where defendants can acquiesce to the imposed conviction or challenge it at trial. However, the model by Grossman and Katz (1983) assumes that the prosecutor can properly calibrate the offer, but this is not the case if the law mandates minimum sentence discounts. Furthermore, the screening mechanisms does not work so well if innocent defendants are strongly risk averse. For a discussion about plea bargaining and the problem of risk aversion among innocent defendants see Scott and Stuntz (1992).

<sup>59</sup> A notorious example of trial penalty was decided in the case *Bordenkircher v. Hayes*. A defendant refused the prosecutor’s offer to 5 years imprisonment in exchange for a guilty plea for forging an 88\$ check, despite the threat of possible life sentence at trial, in application of a three strikes law. The defendant was then convicted and sentenced to life imprisonment, but appealed the decision, since the enhanced sentence was required by the prosecutor only to discourage him from exercising his right to trial. The Supreme Court upheld the conviction. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

in milder sentences compared to trial. At the same time, too large differentials between the trial and trial-avoiding sentence can induce risk averse innocent defendants into accepting the criminal conviction imposed through plea bargaining and penal orders. The net effect on the total costs of wrongful convictions will then depend upon the accuracy in ascertaining guilt without trial, the severity of sentences imposed without trial, the differential between these and the trial sentence, and risk aversion of innocent defendants.

On the other hand, following Easterbrook (1983), penal orders and plea bargaining allow for the disposition of the simple cases at a minor cost, thus freeing up resources for prosecuting more thoroughly the more complex cases, which are instead adjudicated at trial. This should then enhance the accuracy of trials in assessing factual guilt, resulting in less wrongful convictions at trial. Furthermore, cases adjudicated at trial are not only the more complex ones, but especially the more serious one (Dušek & Montag, 2016), since the costs of both wrongful acquittals and wrongful convictions are higher than in the case of petty crimes,<sup>60</sup> and trials have a higher capacity of ascertaining true guilt. Thus, a greater administratization of convictions for simple cases and petty crimes allows prosecutors and judges to invest more resources in the adjudication at trial of the more complex and serious offences, further reducing the aggregated cost of wrongful convictions.

## **4.2. Detrimental effects**

Possible detrimental effects of higher administratization rates are discussed with reference to three aspects of criminal justice systems: the level of public trust in law enforcers; equality before the law; the possible dilution effect on deterrence.

An adverse effect typically associated with simplified procedure, is the so-called “innocence problem”, i.e. greater probability of wrongful convictions, and the presence of coercive elements in trial-avoiding procedures, especially in the case of plea bargaining.<sup>61</sup> However, this aspect has already been considered while discussing the effect of administratization on the social costs from wrongful convictions.

### *4.2.1. Trust in law enforcers*

Many people, either in academia, the law practice, or the general public, are uneasy with the idea of a criminal conviction imposed without trial, especially if this is the result of negotiations.<sup>62</sup> In certain cases the law itself refutes the term plea bargaining, even where sentence discounts for early guilty pleas are a regulated reality.<sup>63</sup> Indeed, terms that recall some form of negotiation are not used everywhere to define plea bargaining, in favor of the more neutral “sentence discount” or the more judicial “abbreviated procedure”.<sup>64</sup> Another problematic aspect for public trust is the secrecy of the procedure, concerning both the merits of the case and the terms of the agreement. Thus, the fairness and appropriateness of the law enforcement activity are shielded from public scrutiny.<sup>65</sup> Furthermore,

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<sup>60</sup> The cost of wrongful acquittals is higher because these crimes are likely more dangerous for the society, since wrongful acquittals will diminish the deterrence effect and also void the possible incapacitation effect of criminal sanctions. The cost of wrongful convictions is also higher because these crimes, being more serious, are punished more severely.

<sup>61</sup> For some empirical evidence of the innocence problem in Israel see Beenstock et al. (2021).

<sup>62</sup> For a comprehensive critic of the practice of plea bargaining see Schulhofer (1984, 1992).

<sup>63</sup> In England and Wales in the decision *R v Goodyear* [2005] EWCA Crim 888, which recognizes and regulates the practice of sentence indication, the courts deemed to specify that “A judge should never be invited to give an indication on the basis of what would appear to be a ‘plea bargain’”, see point 67. Similarly, in Northern Ireland the “Standards of Advocacy” of the Public Prosecution Service specify that “‘Plea bargaining’ has no place in the practice or procedures of the PPS” (Section F, Point 19). This is stated while regulating the possibility of accepting an offer from the defense to plead guilty to only some of the charges, or to a lesser charge, with the remaining charges not being proceeded with. See “Standard of advocacy” available at

<https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Advocacy%20Standards.pdf>

<sup>64</sup> This is the case especially in Latin America, but also in Switzerland.

<sup>65</sup> Precisely in response to that, French judges can refuse to validate a plea agreement and decide to adjudicate instead the case at trial if “the interests of society” require so; see Article 495-11-1, *Code de procédure pénale*.

even if most convictions are imposed after guilty pleas, in Common Law jurisdictions it is usually not possible to know whether a guilty plea was the result of some plea agreement. At the same time, many jurisdictions do not collect data about the number of plea bargaining concluded, or do not disclose them to the public.<sup>66</sup> The secrecy of the procedure can even constitute a benefit for the defendant, but at the expenses of public scrutiny upon criminal law enforcement. Such secrecy is even stronger in the case of penal orders, which are a truly inquisitorial procedure under this regard. Indeed, in many jurisdictions the procedure is entirely written, and the defendant never meet with the prosecutor, the judge, or any other issuing authority, thus subtracting the procedure from any form of public knowledge.

A lower public trust in the law enforcement agents can even negatively affect the administratization rates. For example, in North Macedonia the plea-bargaining procedure was used to a much lesser extent compared to the expectations of the legislator. It has been claimed that prosecutors and courts try to avoid this shady method of conviction and prefer trials, precisely because the public trust in the judiciary is already low, and a greater use of plea bargaining might be perceived as some form of corruption (Misoski, 2020, p.39).

Indeed, a greater administratization of criminal convictions might even increase public trust in the law enforcement activity, given the enhanced efficiency and effectiveness of the criminal justice system.<sup>67</sup> However, to achieve this result, it is necessary that the use of plea bargaining and penal orders is perceived as coherent with the law, and that the imposed sentences reflect the true strength of the case, and not only the outcome of negotiations mainly directed at imposing a quick conviction.

#### *4.2.2. Equality before the law*

A first detrimental effect for equality is the differentiated treatment of defendants based on the method of conviction. Indeed, the sentence benefits in case of penal orders and plea bargaining are justified on economic grounds, in order to incentivize the acceptance of convictions by the defendant. However, they do not directly reflect the objective and subjective circumstances of the cases.

An even more threatening aspect is the systematic variation in plea bargaining offers across ethnic groups, documented especially in the adjudication of less serious offences (Berdejó, 2018).<sup>68</sup> A similar situation is mirrored by the different position of defendants during the negotiations based on their wealth. Sometimes, indigent defendants who cannot afford a private lawyer become compelled into pleading guilty, being victims of the nexus of interests that ties prosecutors, public lawyers, and judges (Garoupa and Stephens, 2008).<sup>69</sup> The same might happen in the case of penal orders, where innocent indigent defendants have less possibility to challenge the conviction in court compared to the wealthier ones.

Hence, the outcome of criminal procedures risk of mirroring the economic capacity of the defendant, or his ethnic background, more than the merits of the case, thus resulting in inequality of treatment of comparable criminal acts.

#### *4.2.3. Dilution effect on deterrence*

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<sup>66</sup> Even in Europe, Belgium and Switzerland do not collect such data at the national level, while Singapore did not provide the data despite my request of access.

<sup>67</sup> Besides higher scores of trust in the law enforcement agents, another observable consequence of such effect might be an increase in the number of formal contacts with police to report a crime, as discussed in connection with the deterrence effect.

<sup>68</sup> Such offenses constitute the great majority of criminal cases, thus worsening the problem. However, it has been argued that the distortions in plea bargaining might simply reproduce distortions of the criminal justice system as a whole, thus not being specific to the method of disposition of the case.

<sup>69</sup> Agency problems between defendants and lawyers are described as one of the main departures from the economic model of plea bargaining, defined the shadow-of-trial model (Bibas, 2004). An increase in plea bargaining has been documented as the result of a change in the remuneration scheme of public lawyers in Scotland, that provided incentives towards a quicker disposition of cases (Stephen and Tata, 2007; Stephen et al., 2008).

Sentences imposed through penal orders and plea bargaining are typically lower than those imposed at trial for comparable acts. This can negatively affect deterrence in two ways. First, it reduces the incapacitation effect of a criminal sentence, both because of its shorter extension, and because in some cases a custodial penalty cannot be imposed without trial.<sup>70</sup> Second, it reduces the expected cost of crimes, thus making criminal behavior more attractive (Becker, 1968). However, such effect might be more than compensated by the increased probability of conviction associated with higher administratization, especially considering that probability dominates severity in determining deterrence (Nagin, 2013).

Another possible dilution effect is discussed by Franzoni (1999) with reference to plea bargaining, when the negotiations take place before the completion of the investigation. If the defendant refuses the plea offer, this is interpreted as a signal of innocence by the prosecutor, like in Grossman and Katz (1983). Consequently, the prosecutor will exert less effort in the subsequent investigation phase, thus reducing the probability of conviction and hence deterrence. The results of the model might hold also for penal orders, which are usually issued after very summary investigations. Then, an opposition to the penal order might be interpreted as signal of innocence, and the prosecutor will exert less effort in the preparation of the trial. However, also in this case the increased probability of conviction might dominate the dilution effect on deterrence caused by less thorough investigations.

## 5. Conclusion

The administratization of criminal convictions is a global trend in criminal procedure, and the adoption of plea bargaining and penal orders is still an ongoing phenomenon. Out of the 173 jurisdictions surveyed by the present paper, 115 allowed for some form of administratization of convictions in 2022, constituting roughly 65% of the sample. The administratization rate in 2019 was computed for 59 jurisdictions, providing an original dataset. In 37 jurisdictions the majority of convictions were imposed through plea bargaining or penal orders, while in 16 of them the administratization rate was even above 80%.

The paper has discussed the possible beneficial effects of higher administratization on the following four aspects of criminal law enforcement: efficiency; effectiveness; deterrence; costs of wrongful convictions. It has also discussed possible adverse effects on other three outcomes: public trust in the law enforcement activity; equality before the law; dilution of deterrence.

Identifying the drivers of different levels administratization constitutes the possible direction of future research on the topic, as well as the identification and explanation of time trends and of within-country variations in the administratization rates.

The majority of criminal convictions worldwide are currently imposed through plea bargaining and penal orders, and not at the end of trials. Hence, it is crucial to understand the possible benefits and adverse effects of higher administratization rates. This paper discussed some of such effects, providing the basis for their future empirical testing.

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<sup>70</sup> This is especially the case for penal orders, but also in the case of plea-bargaining the sentence reduction might render the defendant eligible for a substitution of the custodial sanction with a non-custodial measure, or for the conditional suspension of detention.



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