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The Application of Plea Bargaining and Restorative Justice in Criminal Trials in Nigeria

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The Application of Plea Bargaining and Restorative Justice in Criminal Trials in Nigeria

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Abstract- The use of plea bargaining concept in the dispensation of criminal trials in Nigeria is highly debatable. Critics see it as a violation of the accused person's fundamental rights while advocates see it as the most useful instrument for quick disposal of criminal cases. This paper explores the position of the laws relating to plea bargaining in other jurisdictions and makes recommendations for incorporation into our laws. In conducting this study a jurisprudential analysis has been carried out with the help of statutes and judicial authorities. The paper has found that the use of plea bargaining in Nigeria cuts short the delay of criminal cases and save the time and energy of the accused, prosecution and the State. The paper suggests that if Nigeria desires to practise plea bargaining, she needs to enact into her constitution, standard procedure rules regulating the concept, borrowing some lessons from India and Pakistan models.

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I. Introduction

Perhaps the most controversial practice in the Criminal Justice process in Nigeria in recent times is plea-bargaining. A plea bargain is an agreement between the prosecutor and the accused person in a criminal trial. It is a process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the accused person's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in turn for a lighter sentence than that possible for the graver charge. At the resolve of the case both parties, the prosecutor and the accused, tend to achieve two things: saving of time and reduction of costs.

There is the need to begin and conclude trials expeditiously, decongest the prison, reduce the time and financial cost of criminal investigation and trials and still maintain and observe fundamental human rights principle without much ado; laying credence to the above, the concept of plea bargaining apparently seems to be one of the procedure that would assist the Nigerian Criminal Justice System to achieve these laudable objectives.

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However, the concept of plea bargaining has generated a lot of arguments amongst members of the bar, bench, law enforcement agencies, the legal writers and the general public at large in Nigeria and it is this event of argument at various levels that has kindled the interest of the writer to delve into this controversial area of study so as to make an attempt at ascertaining the proper position of the law.

II. The Concept of Plea Bargaining

It is important to observe that plea bargain, like any other legal concept, is incapable of acceptable precise definition. However, different practitioners, legal scholars and eminent jurists define plea bargaining differently. There is no gainsaying that these variations owe their causes to the different jurisdictions and to the context of use.[1]

The author of *Black Law Dictionary*[2] defines plea bargain as:

> A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of the multiple charges in exchange for some concession by the prosecutor, usually, a more lenient sentence or a dismissal of the charges, also termed plea agreement, a negotiated plea, and sentence bargain.

While The *Oxford Advanced Learner's Dictionary*[3] defines plea bargaining as:

> An arrangement in a court of law by which a person admits to being guilty of a smaller crime in the hope of receiving less severe punishment for a more serious crime.

The author of *The New International Webster's Comprehensive Dictionary*[4] of English Language defines plea bargaining as:

> A process in which a defendant in a law case arranges, as with a district authority, to plead guilty

[1] Miller, H. S., "Plea bargaining in the United States", *NCJR* Vol. 1, 1978. pp. 1-5.
[2] Black's Law Dictionary (9th edn., United States: West Publishing Company, 2009) at p. 1270.
[3] Hornby, A., Oxford Advanced Learner's Dictionary (6th edn. Oxford University Press), p. 890.
[4] The New International: Webster's Comprehensive Dictionary of the English Language, (Encyclopedic edition, 2010) published at Typhoon Media Corporation at p. 969.

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to a lesser charge in order to avoid standing trial for a more serious one and the risk of severe punishment.

Also, Alubo [5], in his article:"Plea Bargaining: History and Origin" in *Plea Bargaining in Nigeria*, defines plea bargaining as:

> The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to courts approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the courts of the multi-count indictment in return for a lighter sentence than that possible for the graver charge.[6]

Ekpo, the then Chairman of the Independent Practices and other Related Offences Commission at his paper presentation[7] described plea bargaining as:

> The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of cases subject to the court's approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one some of the counts of a multi-count indictment in return for a lighter sentenced than that possible for a graver charge.

Agaba, [8] in his book, *Practical Approach to Criminal Litigation in Nigeria (Pretrial and Trial Proceeding)*, defines plea bargaining as:

> An agreement in a criminal trial in which a prosecutor and accused persons arrange to settle the case against the accused usually in exchange for concessions.

The Learned author further said [9] that plea bargain involved the prosecutor, the accused, the victim and the court. The writer is of the opinion that the court is non-existent in the negotiation process between parties to a case. This is so because the court is not made to be interfering in any negotiation process holding to the common principle of unbiased and fair adjudication of justice.

A former Justice of the International Court of Justice at The Hague and a one time Attorney General of the Federal Republic of Nigeria, Prince Bola Ajibola[10] (SAN) describes plea bargaining as a tool used by the economic and financial crime commission to secure conviction of corrupt public officers amounting to corruption in Nigeria, as it would encourage other people to steal public money.

From the angle of judicial precedents, the concept of plea bargaining was more elaborately pronounced upon by the American eminent jurists Chief Justice Burger in Santobello v New York[11] where His Lordship stated as follows:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'Plea Bargaining,' is an essential component of the Administration of Justice. Properly administered, it is to be encouraged.[12]

The Economic and Financial Crimes Commission Act which is one of the principal legislations on plea bargaining law and practice in Nigeriain in its Section 14(2) provides for plea bargaining thus:

> *Subject to the provisions of Section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General to institute, continue, takeover or discontinue any criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the amount to which that person would have been liable if he had been convicted of that offence.*

However, it must be noted that this section of the EFCC Act subjects plea bargaining to the provisions of Section 174 of the Constitution.

Also, the Administration of Criminal Justice Law of Lagos State (ACJL) Section 75 provides for plea bargaining concept as follows:

> Notwithstanding anything in this Law or any other law, the Attorney-General of the State shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney-General is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice and the need to prevent abuse of legal process.

It is pertinent to note that the ACJL does not subject the applicability of the plea bargain to any law, not even the Constitution.

[5] Alubo, A. O., "Plea Bargaining: History and Origin" in Plea Bargaining in Nigeria: Law and Practice (Eds) Azinge, E. and Ani, L., NIALS, 2012, Abuja .
[6] Alubo, A. O., "Plea Bargaining: History and Origin" in Plea Bargaining in Nigeria: Law and Practice (Eds) Azinge, E. and Ani, L., NIALS, 2012, Abuja.
[7] Ekpo NTA, "Should Plea Bargaining Apply to all Offences in Nigeria" Being a Discussion Paper: On the Practice Perspectives of Plea Bargaining in Nigeria, 7th May, 2013.
[8] Agaba, J. A., Practical Approach to Criminal Litigation in Nigeria (Pretrial and Trial Proceeding), 1st ed. Pan of Press, Abuja 2012, P. 589.
[9] *Ibid*, at pp. 590-591.
[10] Ajibola O. Christian, 'Plea Bargaining: a Tool for Courts and Prison Decongestion (2012) (3), *Law and Policy Review 89.*
[11] (1971) 404 U.S 257.
[12] A Review of the Literature Plea Bargaining <*https://www.bartleby.com/essay/-F35ZAY2MC*> .Accessed 20 January, 2019.

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The Administration of Criminal Justice Law 2010 provides in Section167 thus:

> Notwithstanding anything in this Law or in any other Law, the Attorney-General of the State shall have power to receive, consider, and accept a plea bargain from any person charged with any offence either directly from that person charged or on his behalf, by way of an offer to accept to plead guilty to a lesser offence than that charged.

Where the Attorney-General is of the view that the acceptance of such plea bargain is in the interest of justice, public interest, public policy and the need to prevent abuse of legal process, he may accept such plea and the court seized of the matter shall be so informed and shall proceed to enter a guilty plea to such lesser offence and impose the due punishment accordingly. When a person is convicted and sentenced under the provisions of subsection (1) of this section, he shall not be charged or tried again on the same facts with the higher offence earlier charged to which he had pleaded to a lesser offence.

The provisions of this section shall not apply to persons:

(a) Charged with capital offences or any offence involving the use of violence;

(b) Persons who had, in the last ten years, been convicted and sentenced for any such similar offence or any offence involving grievous violence or sexual assault.

From the foregoing, one obvious inference from the meanings of the concept of plea bargaining in relation to the Nigerian criminal jurisprudence is that once an accused person accedes to the use of plea bargaining, his right to presumption of innocence and the corresponding duty of the prosecution to prove its case beyond reasonable doubt abate. A guilty plea would be entered and a pre-negotiated penalty follows.

A significant proportion of people in Nigeria are of the view that the country is not yet ripe to practice the plea bargain principle. Proponents of this position are of the view that the Nigerian nation is replete with corruption and that we are still in a phase of a maturing democracy, which should not introduce practices that may likely endanger the growth of our young democratic system. The proponents of this thinking also posit that the use of plea bargain eradicates the punitive aspect of the criminal justice system that plays a vital role in serving as a deterrent to other criminals. Others feel that since the plea bargain practice is not recognized under the1999 Constitution of the Federal Republic of Nigeria and other Acts of the National Assembly,[4] it is an alien practice.[13]

[13] The Concept of Plea Bargaining in Nigeria *http://www.mondaq.com/Nigeria/x/753394/Crime/* accessed 15th January 2019.

III. The Development of Plea Bargaining in the United States of America

The U.S. model of plea bargaining is by far the most developed. There are various elements which can be the subject of a "bargain" and the U.S. model can be divided into three areas, concessions, contractual and consensual.[14] In the U.S., the concept of plea bargaining is now entrenched in the federal and state criminal procedure rules,[15] with the State of California even providing a seven-page form to guide the prosecution and defence in the formulation of their agreements.[16] Thus, in the case of *Santo bellow v. New York,*[17] in the Supreme Court held that:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of Justice. Properly administered, it is to be encouraged.

Also, in the case of *Brady v. the United States,*[18] the U.S. Supreme Court further set out certain safeguards for the defendant so as to protect him against infringements of his fundamental rights. These safeguards include that the hearing must take place in open court and that the defendant must make the waiver of their right to a trial "intelligently". Additionally, the court must be able to satisfy itself that the plea was made by the defendant "voluntarily and knowingly". There have been a series of cases where the defendant has effectively been punished for wanting to exercise their right to a jury trial.

Attorney Timothy Sande fur argues, in defense of plea bargaining, that the defendant has the right to make a contractual agreement with the State as in other free-trade situations. Plea bargaining is more like forced association and as such once a person is charged with a crime he/she cannot simply walk away from the State.[19]

Plea bargaining as something which can be regulated by law was first introduced in the case of *Brady v. the United States*[20]. Plea bargaining had been previously a frowned upon practice. The Supreme Court acknowledged the existence of the plea bargain and its necessity in an overloaded system. It considered plea

[14] Alge, "Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?".

[15] Rule II, Federal Rules of Criminal Procedure (United States of America).

[16] Form CR-101, Plea Form with explanations and Waiver of Rights – Felony, Judicial Council and California.

[17] (1917)404 US 257.

[18] (1970)397 U.S. 742.

[19] Lynch, T. "The Case Against Plea Bargaining". In: Regulation 26 (2003), pp. 24–27.

[20] 397 U.S. 742 (1970).

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bargaining as a tool which could serve to protect the court system from complete collapse. The Supreme Court decision in *Brady v United States* concerning plea bargaining was envisioned as a tool to be used when and where there was evidence which pointed towards the overwhelming guilt of the defendant. It was considered appropriate in cases of overwhelming guilt to offer the defendant the opportunity to bargain which may afford them some kind of a benefit. Plea bargaining was only ever meant to be used as a tool by the prosecution in those cases where the guilt of the defendant could be established with very convincing evidence. It was in these types of cases that the plea bargain was seen as a way for the defendant to benefit from the opportunity to plea where the evidence was overwhelming against him. The increased practice of plea bargaining resulted in the need for establishing checks and balances to ensure that individuals would not be coerced into making bargains. The court would have to investigate the case to ensure that the guilty plea had not come from coercion, misrepresentation of promises or bribes.[21]

Within the United States system plea bargaining has become an integrated part of the process with more than 97% of convictions in the federal system resulting from pleas of guilty rather than convictions by jury trial.[22] The advent of federal sentencing guidelines has further helped to clarify what sentence a defendant could reasonably possibly expect. The guidelines have been created in order to ensure uniformity in all cases decided in the federal courts. Sentencing guidelines enable the prosecutor to play with the sentencing differentials which are, "the differences between the sentence a defendant faces if he or she pleads guilty versus the sentence risked if he or she proceeds to trial and is convicted." The danger with this situation is that all of the cards are in the hands of the prosecution. At the heart of the debate over the appropriateness of the practice of plea bargaining are the associated risks of bargaining away one's justice. Additionally, it is the innocent and not only the guilty who are punished. There is an unhelpful prevalent myth that innocent people will not accept a plea to plead guilty in return for a lesser penalty. Hence the myth presumes that it is not possible to coerce someone who is innocent into pleading guilty of something which he/she is not. Much of the assertions placed forward as evidence are based on assumptions of how innocent people may behave in given circumstances. In a study conducted by the Innocence project into the effects of plea bargaining upon the innocent defendant revealed that more than half of the participants were willing to falsely admit something in order to obtain some perceived benefit.[23]

In Brady, the Supreme Court made the observation that the assumption that the defendant would have been able to make an informed plea of guilty because "pleas of guilty are voluntarily and intelligently made by competent defendants with adequate legal counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.[24]"

The Supreme Court has noted that a key element to the acceptance of a plea bargain as constitutional is the option as well as the possibility of the defendant's accepting or rejecting the offer.

a) Plea Bargaining in South Africa

South Africa is one of the common law countries that have fully adopted the plea bargain practice. In the application of plea bargain in the South African Criminal Justice System, the prosecutor can reach an agreement with the defence on the sentence to be imposed.[25] Certain formalities, such as the whole agreement must be in writing. The time for entering an agreement(s) is before the commencement of the trial that is before the accused has to enter a plea. It is also a one-off situation and a new plea agreement and not to be reached if the court has ruled for a trial to start a fresh. Only a prosecutor and a legally represented accused may negotiate an agreement on plea and sentence. The judicial officer is not to participate in the negotiations.

b) Plea Bargaining in Pakistan

Pakistan is one country that views plea bargain with a lot of suspicion. It, however, introduced the procedure into its legal system in 1999 as an anti-corruption Law[26]. The purpose of the procedure in Pakistan is to allow persons accused of official corruption to return what they have stolen as determined by investigators and prosecutors and regain their liberty with infracted political rights and damaged reputation. In Pakistan, the procedure benefits the society by having what has been taken from it restored while the perpetrator of the evil act is set free after being stigmatized. The procedure is at the instance of the accused person who makes an application making a frank disclosure of all he took from the public till. The application is scrutinized by the National Accountability Bureau who if satisfied, endorses the application and presents same to Court. The Court decodes on whether or not to accept the application. Whether the Court accepts the applications or not, the accused stands

[21] Dervan L. E., and Edkins, V. A., "The Innocent Defendant's Dilemma: An Innovative EmpiricalStudy of Plea Bargaining's Innocence Project". In*: J. Crim. Law Criminol*. 103.1 (2013), pp. 1–48.
[22] Dervan and Edkins, "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Project".
[23] *Ibid.*
[24] *Ibid.*
[25] Unrepresented Accused are Excluded from the Provision.
[26] National Accounting Ordinance I. 1999.

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convicted but is not sentenced. After the conviction, the accused is discharged but barned from taking part in any elections or holding any public office. Furthermore, the accused is dismissed from any public occupied by him and is disqualified from seeking or obtaining a loan from any bank.

Apart from corruption cases, a formal plea bargain is not popular in other cases in Pakistan. The prosecutor is, however, free to drop a charge in return for the defendant's pleading guilty to lesser charges. Parties have no right to bargain about the penalty to be imposed on a defendant since this is solely at the discretion of the Court[27].

c) Plea Bargaining in India[28]

The practice of plea bargain was introduced to the Indian criminal Justice System by the Criminal Procedure (Amendment) Act, 2005. The same Act introduced a new chapter [29] which deals with plea bargaining. In the Indian system, plea bargaining applies to offences punishable with a maximum term of imprisonment of seven years. It does not apply to offences against women or children below the age of fourteen years and to offences affecting the socio-economic condition of the Indian government.

d) Plea Bargaining in England and Wales

In some common law jurisdictions, such as England and Wales and the Australian State of Victoria, plea bargaining is restricted to charge bargaining whereby the prosecutors and the defence can only agree that the defendant will plead guilty to some charges and the prosecutor will drop the remainder. The Courts in these jurisdictions have made it plain that they will always decide what the appropriate penalty is to be. No bargaining takes place over the sentence. In the case of hybrid offences in England and Wales, the decision whether to try a case in a Magistrate Court or Crown Court is not made by the Magistrate until after a plea has been entered. A defendant is thus unable to plead guilty in exchange for having a case dealt with in a Magistrates' Court (which has lesser sentencing powers).

IV. Uses in Civil Law Countries

Unlike the Common Law jurisdictions, in civil law countries, prosecutors have limited or no power to drop or reduce charges after a case has been filed, and in some countries their power to drop or reduce charges before a case has been filed is limited, hence, plea bargaining is impossible. Also, many civil law jurists consider the concept of plea bargaining abhorrent, seeing it as reducing justice to barter.

a) France

In France, plea bargaining in a very limited form was introduced in 2004, by a concept known as *plaider coupable* in respect of only very minor offences. This has been the subject of such controversy that in 2009, plea bargaining produced only about 11.5% of the decision in correctional courts.[30]

b) Central African Republic

In the Central African Republic, witchcraft carries a heavy penalty but those accused of it typically confess in exchange for a moderate sentence.[31]

c) Germany

In Germany, a plea bargain is almost unknown in its criminal jurisprudence and plea agreements make a limited appearance in few cases. However, there is no exact equivalent of a guilty plea in German criminal procedure.[32]

V. The Applicability of Plea Bargaining in Nigeria

Plea bargain as a concept was not known in Nigerian Criminal Justice jurisprudence until 2004 when the Economic and Financial Crimes Commission was established. The Act[33] establishing the Economic and Financial Crimes Commission by virtue of Section 14(2) is the first federal enactment to experiment with a form of plea bargaining. The section provides thus:

> Subject to the provision of Section 174[34] of the constitution of the Federal Republic of Nigeria 1999, the commission may compound any offence punishable under the Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he has been convicted of the offence.

This provision is the stronghold that the Economic and Financial Crimes Commission has held on to prosecute public office holders.

From the foregoing provision it is clear that the commission is charged with the responsibility of enforcing the provision of:

a. The Money Laundering Act 2004;
b. The Advance Fee Fraud and other Related Offences Act, 1995
c. The Failed Banks (Recovering of Debts) and Financial Malpractices in Bank Act 1994

[27] *Ibid.*
[28] *Ibid.*
[29] Chapter xxi(A).Criminal Procedure (Amendment) Act 2005.
[30] Les chiffres-cles de la Justice, French Ministry of Justice, October 2006.
[31] Graeme Wood, Hex Appeal, the Atlantic (June 2010).
[32] Herrmann, J., Bargaining Justice: A Bargain for German Criminal Justice, (1991-1992) 53, U. Pitt. L. Rev., p.755.
[33] Cap E.1, Law of the Federation of Nigerian, 2004.
[34] Relating to the Power of the Attorney-General of the Federation Institute, Continue take or Discontinue Criminal Proceedings against any Person in any Court of Law.

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d. The Banks and other Financial Institution Act 1991
e. Miscellaneous Act;
f. Any other law or regulation relating to economic and financial crimes including the Criminal Code or Penal Code.[35]

For those arguing for the provision, they argue that the provision is effective when the accused agrees to give up money stolen by him; the commission may compound any offence for which such a person is charged under the Act.

Notable in the manifestation of plea bargain practice by the Economic and Financial Crimes Commission in Nigeria is the case against Cecilia Ibru[36] where the former Chief Executive Officer and Managing Director of the Oceanic Bank was arraigned by the Economic and Financial Crimes Commission in court on the 31st day of August, 2009 on a 25- count charge, all bordering on corrupt practices in office; the charge was subsequently reduced to 3 – count charge wherein the accused pleaded guilty to the amended charge bordering on abuse of office and mismanagement of depositors' funds, she was sentenced to six (6) months imprisonment on all counts to run concurrently. She was also ordered to return about N191 billion worth of assets and cash.

Another incident of the practice of plea bargain under the Economic and Financial Crimes Commission Act is the case of *FRN v. Alamieyeseigha*[37] a former governor of Bayelsa state, Alamieyeseigha. He stood trial on a 33 count charge of corruption, money laundering, illegal acquisition of property and false declaration of assets and he pleaded guilty to a 6 count charge of money laundering brought by the commission and forfeited properties worth billions of naira in exchange for a lesser sentence. The former governor entered into a plea bargain with the commission, gave up his rights to trial and pleaded guilty to the charges. Rather than serve a prolonged prison term if convicted, he accepted the commission's offer of a guilty plea. However, because he had spent almost 2 years in prison, he was released a few days after his conviction by the court.

Also, in *FRN v. Lucky Igbinedion,*[38] the former governor of Edo state, Lucky Igbinedion, from 1999-2007, was arraigned by the EFCC before the Federal High Court in Enugu on a 191-count charge of corruption, money laundering and embezzlement of N2.9 billion. In a plea bargain arraignment, the commission through its counsel Mr. Rotimi Jacobs reduced the 191 to a one-count charge.

The term of the plea bargain was that the prosecutor would reduce the 191 counts to one and in return, Mr. Lucky Igbinedion would return N500 million, three properties and plead guilty to one charge. In line with the bargain, on the 18th of December 2008, the court presided over by Justice Abdul Kafarti convicted lucky on the one count charge and ordered him to refund N500 million, forfeit three houses and sentenced him to a six-month imprisonment or N3.6 million as an option of fine. There was a general outcry by Nigerians over the judgment, which made the chairperson of the anti-corruption agency to issue a statement that the plea bargain duly entered fell short of its expectation.

Similarly, in the case of *FRN v Yakubu Yusuf,*[39] Yakubu was accused, arrested and tried for the offences of criminal misappropriation contrary to Penal Code Act, 2004, Section 309. The accused was alleged to have stolen the sum of N32.8 billion of the police pension fund. The accused person subsequently entered into plea bargaining with the commission and he was arraigned before the federal high court presided over by justice Thalba in 2013. The accused person pleaded guilty to a 3-count charge and was convicted and sentenced to 2years imprisonment on each of the three counts. He was however given an option of fine of N250,000 on the 3 counts totaling N750,000 which the accused paid and walked away. The judge also ordered that 32 properties of the accused and a cash sum of N325million in his bank account be forfeited to the Federal Government of Nigeria.

Another case where the plea bargain system held sway was the case of *Emmanuel Nwude v. Nzeribe Okoli*.[40] The accused were charged with defrauding one Nelon Sakaguchi who was at the time material to scam the Managing Director of Noroeste Bank S.A, a Brazilian bank, of the sum $242 million; they were initially charged with offences under the Advance Fee Fraud and Other Related Act, 1995 [41] which provided for a term of imprisonment, upon conviction, of ten(10)years without option of fine. The trial began in February, 2004 after several antics by the suspects or accused and their various counsels to weary the prosecution and frustrate the case; the accused had to opt for a plea bargain. The charges were consequently amended and brought under S. 419 of the Criminal Code which provides for a term of seven (7) years imprisonment thus giving the court discretion in sentencing. They pleaded guilty to the amended charge on the 18th November, 2005. The first convict was sentenced to a total of 25years imprisonment on the various counts which was to run concurrently. In effect the first accused had to serve a term of 5years imprisonment with effect from the date of arrest. In addition, he was to pay the sum of N110

[35] Section 7(2) of the EFCC Act, Cap E.1, L.F.N 2004.
[36] Suit No: FHC/1/CS/514/2012 (Unreported).
[37] (2006) 16 NWLR (Pt. 1004) 1-894.
[38] Suit No: FHC/3/TD/11.
[39] (2012) NWLR (Pt. 6) 78.
[40] Kotefe, K, "242 M Scam Nwude, Okoli Bay 22 Years Respectively "Punch Newspaper, 19 November, 2005 P. 1.
[41] The Acthad Been Repealed by the Advance Fee Fraud and other Fraud Related Offences Act, 2006.

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million to the said Nelson Sakaguchi; the court also ordered the forfeiture of his choice assets in major cities in Nigeria and United Kingdom including his equity holdings in Union Bank Plc and the Nigeria Bottling Company Plc. The other accused also bagged some various terms of imprisonment and forfeited choice properties both in Nigeria and abroad.

Furthermore, in the *Federal Republic of Nigeria v. Olisa Metuh,*[42] the accused was the former National Publicity Secretary of the People's Democratic Party. He was arrested and tried by The Economic and Financial Crimes Commission on a 7-count charge for Money Laundering, Corruption, and Conspiracy involving N400 million being proceeds of his crime from the $2.1 billion allegedly misapplied by the former National Security Adviser to President Goodluck Jonathan. Olisa Metuh was arraigned before Justice Okon Abang of the Federal High Court sitting at Abuja. Following the failure of an attempted no case submission, the accused entered into a plea bargain with the Commission which made him return the alleged N400 million being proceeds of his crime to the federal government.

The Benefits of Plea Bargain

1. Plea Bargaining is gaining popularity because of certain merits that flow from it. Several merits flow from the practice of plea bargaining. One of these is that the principle of plea bargain no doubt is becoming one of the most useful means of quick disposal of criminal trials the world over. Its applicability in Nigeria will certainly have positive impacts amidst the criticisms. For instance, in the case of*Federal Republic of Nigeria v. Lucky Igbinedion,*[43] the Court of Appeal per *Ogunwunmiju, J.C.A.*(as he then was) enumerated the merits of plea bargain thus:
   i. Accused can avoid the time and cost of defending himself at trial, the risk of harsher punishment, and the publicity the trial will involve.
   ii. The prosecution saves time and expense of a lengthy trial.
   iii. Both sides are spared the uncertainty of going to trial.
   iv. The court system is saved the burden of conducting a trial on every crime charged
2. One of the advantages of plea bargain practice is that it saves all parties namely, the prosecutor, the accused, the victim and the court cost of prosecuting and defending the case in court. This is regarded as one of the fundamental advantages of restorative justice in criminal adjudication.
3. Plea bargaining reduces the burden of conducting trials on every crime charged because where the state decides to prosecute every offence as alleged, the courts will be greatly overburdened. This would greatly hamper the efficiency of the judiciary in the discharge of its constitutional role.
4. Both the prosecutor and the defence are spared the uncertainty that is associated with trials in terms of winning or losing the case. The plea bargain practice also has the advantage of avoiding a situation where an innocent man is convicted on a crime he may not have committed since the outcome of a case is uncertain as the judge has the final powers to deliver a verdict on the evidence presented before him. It is not therefore outside the realm of possibilities that an innocent person is convicted of a crime for any reason, maybe due to the ineptitude of his/her counsel or the failure of the judge to have a full and perfect grasp of the case before him/her.

Despite the gains of plea bargaining discussed above, certain arguments can also form formidable objections against it. A very fundamental defect of the process is that the practice subverts many of the basic values of jurisprudence relating to criminal trials. Plea bargaining programmes do not set precedent, define legal norms, or establish board community or national standards, nor do they promote a consistent application of legal rules. Also, it is increasingly the norm in Nigeria that only the rich can assess justice. This is because they can buy their way through and afford any penalty levied against them, unlike the poor who are left to their fate to languish in prison. Plea bargaining undercuts the requirement of proof beyond reasonable doubt and that plea negotiation is substantially more likely than a trial to result in the conviction of the innocent. Innocent accused may be paid by the actual perpetrators of crime in return to their guilty plea with an assured reduction in penalty. [44]

Finally, critics suggest that plea bargaining deprecates human liberty and the purposes of the criminal sanction by "commodifying" these things – that is, treating them as instrumental economic goods. [45] Critics of plea bargaining have argued that it derogates from the constitutional right of accused persons to trial. This right is guaranteed by the Constitutions of most countries. For example, the Constitution of the Federal Republic of Nigeria, 1999 provides that every person accused of a crime shall be entitled to a fair trial within a reasonable time.[46]

[42] (2017) NWLR (pt. 10) 98
[43] Supra

[44] <ahref=http:///law.jrank.org/pages/1289/Guilty-Plea-Plea-Bargaining-Evaluations-plea-bargaining.html> Guilty plea: Plea Bargaining – Evaluations of Plea Bargaining accessed on 21/8/2010.
[45] *Ibid.*
[46] See Section 36 of the Constitution. Fair trials also entail the observance of the two rules of natural justice: *Audi alteram* and *nemo judex* in *causa sua*. The USA by its sixth Amendment guaranteed a right to a jury trial.

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VI. The Concept of Restorative Justice Model in Nigeria

One important point to be made here is that Nigeria's criminal Justice system draws inspiration from the retributive school of thought that emphasizes punishments for any crime or harm done to another, institution or to the society. For instance, both the criminal and penal codes make provisions for the fact that if a man unlawfully kills another, he is prosecuted and if he is found guilty he must also be killed through hanging to death. Now that we have found ourselves in this retributive process of our criminal justice system that has shut its doors to other processes that could be effective in combating crime, helping victims, rehabilitating criminals, and keeping our society safe and sound, the challenge is whether or not our Justice delivery system should continue going this route in the face of an almost deteriorating justice system.[47] It is against this background that the society looked into the possibility of complementing the current Criminal Justice System with plea bargaining which finds some justification in the penal concept of restorative justice. Restorative Justice is relevant in our society today because it is emerging as a formidable alternative to imprisonment, prosecution, as well as a means of holding offenders accountable in a way that responds not only to the needs of offenders but also the victims, as well as the community.[48]

As against the traditional approach of punishing the offenders, restorative justice adopts a victim-offender mediation process which culminates in the latter being made to take responsibility for their actions. They could even proceed to redeem the harm they have done either by an apology, return of stolen items, or by performing community service. Rather than remand an offender as an awaiting trial inmate or sentence him to a long term of imprisonment – either of which results in prison congestion, the restorative justice approach adopts non-custodial options, rehabilitation, fast track trial, and alternative dispute resolution (ADR) mechanisms to resolve the fallout of offences.[49]

Restorative justice is a modern theory in penal jurisprudence, and like plea bargaining, it explores the big picture of reforming the offender, compensating the victim and restoring social equilibrium in the community. The Federal Government has been urged to adopt restorative justice system as an alternative to the contemporary criminal justice system, which is characterised by punishment of offenders through imprisonment. The then Commissioner for Justice and Attorney General of Lagos State, Ade Ipaye, made the call at a two-day National Prison and Restorative Justice Conference held in Abuja in the year 2013.According to him, problems facing the criminal justice system such as prison congestion, funding, long duration of civil litigation, abuse of court process by unmerited interlocutory applications, non-compliance with the court's orders and judgments could be solved through the application of restorative justice.

Similarly, one of the foremost scholars in Nigeria, the Director – General, Institute for Peace and Conflict Resolution (IPCR) Prof. Oshita in his paper titled "Restorative and Community Justice: Challenges, Lessons and Prospect" states that: the component of restorative justice in community healing is unavoidable, especially in a situation today, where perpetrators of violence in many Nigerian communities, are released to face their own victims in the same communities. He argued that Nigeria cannot afford to ignore the utility of restorative justice in contemporary conflict resolution and restoration, particularly in dealing with memories of the past. To him, restorative justice, as an important part of the peace building process, focuses on healing, building an rebuilding of communities for both offenders and victims in the short, medium and long terms, and Nigeria must design a context-relevant model of restorative justice for the state and society to be accountable and to render peace with justice for preparation as well as victims of crime.

From the angle of Judicial Precedents, the issue of the Nigerian criminal justice system being pre-occupied with conviction and sentencing of the accused thus ignoring the plight of the victims was elaborately pronounced upon by the Supreme Court of Nigeria, in the case of *Godwin Josiah v. State*[50]when Mr. Justice Oputa J. S. C. (as he then was) stated that:

> Justice is not one-way traffic. It is not justice for the appellant only. Justice is not even two-way traffic. It is really three-way traffic. Justice for the Appellant/Accused of a heinous crime of murder, justice for the Victim, the murdered man, the deceased, 'whose blood is crying to heaven for vengeance' and finally justice for the society at large – the society whose social norms and values had been desecrated and broken by the criminal act.

Lagos state government has again taken the lead in this with the introduction of Sections 347 and 348 in the Administration of Justice Law, 2011, which have introduced restorative justice in the state.[51]Restorative justice can play an essential role in curbing recidivism,

[47] Lynch T., "The Case Against Plea Bargaining". In: Regulation 26 (2003) *Asian Journal of Humanities*at pp. 24-27.

[48] Bradshaw & Rose borough, 2005 *Asian Journal of Humanities* at p. 135.

[49] <*http://dailytrust.com.ng/daily/index.php/law/10857-can-restorative-justice-reduce-crime-in-nigeria*> on the 28th of September, 2015.

[50] (1985)1 NWLR p. 125.

[51] <*http://www.news24.com.ng/National/News/FG-urged-to-adopt-restorative-justice-reduce-system-20130913*> on the 28th of September, 2015.

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as well as helping victims, and boosting public confidence in justice.

VII. Conclusion

It has been shown in this paper that the practice of plea bargaining is very much here to stay with us in Nigeria and there is no indication that of the countries studied there are any plans to reduce its uses within their legal systems. Almost all the countries studied have stated that the reason for the use of plea bargaining is to ensure an expedient and efficient Criminal Justice System. The paper has further shown that plea bargaining also helps in cutting short the delay in cases and speedy disposal of criminal cases, saving courts time, which can be used for hearing the serious criminal cases, saving money and energy of the accused and the states, reducing the congestion in prisons, raising the number of convictions from its present low to a fair level to create some sort of credibility to the system. It is also evident from the cases analysed that both in Nigeria and other countries examined in this paper that plea bargaining is not exempt from abuse. It can oftenbe manipulated to serve the interests of the criminal. The criminal defendant canbargain for his justice reinforcing the standpoint of this paper that the rich canbuy their justice. Alternatively, the prosecutors can use it as a tool to intimidate,bully and coerce the defendant into giving them the desired result.

Another attack on the scheme of plea bargaining is made on the ground that the practice subverts many of the basic values of jurisprudence relating to criminal trials. Plea bargaining programmes do not set precedent, define legal norms, or establish board community or national standards, nor do they promote a consistent application of legal rules.

The study also has found that in Nigeria, under the Constitution, an accused person is presumed innocent until proven guilty. [52] This presumption of innocence can only be rebutted by the prosecution and this is achieved when the prosecution is able to satisfactorily discharge the legal burden on it to prove its case against the accused person beyond reasonable doubt as required by Sections 135(1), (2) and (3) of the Evidence Act, 2011 and Section 1(1) of the 1999 Constitution (as amended) declares its supremacy over all authorities and persons throughout the Federal Republic of Nigeria.

The plea bargain is a fundamental concept, which any state which desires to make it a part of its criminal justice system should incorporate into its constitution to give it the necessary force. In the absence of any clear provision under the Constitution of Nigeria, the applicability of plea bargain is certainly contrary to the provisions of the constitution as it stands now.

Finally, another very fundamental problem the plea bargain practice is likely to bring to the Nigerian Criminal Justice System is the tendency for abuse of the process by the authorities especially the Attorney-General who wields enormous powers in criminal administration. This is because the form of the plea bargain in Nigeria as modelled by Lagos State vests the power to accept a plea bargain in the Attorney-General. Already, there are several calls for the powers of the Attorney-General to be reduced possibly by the splitting of the office and functions into two, viz- the Attorney-General (being an officer of the state) on the one hand, and the Minister/Commissioner for Justice (being an appointee of the executive) on the other. This is aimed at reducing the influence and interference by the executive with the discharge of the functions of the office of the Attorney-General.

VIII. Recommendations

Based on the foregoing analyses, the following recommendations are proffered:

1. As regards the general concept of plea bargain and other forms of restorative justice and the resultant merits earlier pointed out, we recommend that plea bargaining should not be applied in a way that it will be perceived as mocking Nigeria in criminal justice system considering the peculiar system in Nigeria as it appears that it is only applied in favour of the politically and economically powerful personalities rather than for the benefit of the underprivileged and common offenders. This paper emphasizes that plea bargaining must apply generally to all criminal offenders, and not limited only to financial and white-collar crimes. If it is limited, as it is now, to only high profile cases and offenders, there will be no impact whatsoever, as these cases and offenders constitute less than one percent of the total criminal docket in our courts.

   We add that in accordance with the best practices in other countries examined in this paper there should be Federal and State laws respectively that will accommodate plea bargaining and restorative justice concept. We further recommend that these legislations should include sentencing guidelines for their applicability. The effect of lack of such guidelines played out in the now famous case of pension fraud where one John Yusuf, an Assistant Director with the Police Pension Board allegedly misappropriated about N32.8 billion and upon his making a guilty plea, he was given a sentence of two years imprisonment or an option of paying N750, 000 as fine. He gladly and instantly paid the meager fine and went back home free.

[52] Section 36(5) of the Constitution.

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There is no gainsaying that the Lagos law, even though in the opinion of the writer, may not be as detailed and advanced as laws in other jurisdictions where a plea bargain is fully on ground, remains a force to reckon with. While the experimental practice by the EFCC were the judges and EFCC who are not guided by any detailed, extents, local rules to all sort of means to achieving plea bargaining.

2. This study has found that in Nigeria, under Section 36 (5) of the the 1999 Constitution(as amended) an accused person is presumed innocent until proven guilty and that the presumption of innocence can only be rebutted by the prosecution by proving his case against the accused person beyond a reasonable doubt as required by our laws.

   Plea bargaining as it is now applicable in Nigeria is a fundamental concept derogatory against the concept of accused's innocence because once accused person pleads guilty his right of presumption of innocence under Section 36 (5) of the constitution is taken away. Accordingly, this work recommends that the practice of plea bargaining in Nigeria should allow the constitutional rights accorded every defendant, particularly those of presumption of innocence and fair hearing should be maintained effectively like in the conventional courtroom system where the accused is give ample opportunity of giving his evidence and discrediting the evidence of the prosecution with little or no obstruction. Despite the fact that the adversary procedure and the application of evidence procedures make the trial procedure so expensive and longer, it also guarantees fair hearing to the accused and presumes the accused innocent until he is found guilty of the accusation, unlike plea bargain which is a perfectly designed system to produce conviction of the innocent regardless of whether or not the is guilty, because he is better off accepting the plea.

   This paper shows that restitution as a cardinal principle of punishment is now recognized globally. But in Nigeria, the present practice where the EFCC engages in secret deals with treasury looters who are discharged and acquitted after they surrender only a little of what they have stolen is not only counterproductive but it emboldens treasury looters. We, therefore, recommend that the looters be made to return the entire amount of money and property they have stolen as opposed to returning just a bit.

3. It is further recommended that in Nigeria a participatory model of plea bargaining should be adopted; as is the practice in India and Pakistan, it should be incorporated into our laws. This will enable the accused, the prosecutor, the victim and the general public at large to be involved so that the populace can access the application and efficacy of the concept. However, this model should be used in all criminal cases involving both the rich and the poor and not only in Anti-corruption cases at it is now the practice in Nigeria.
4. It is also recommended that to drive home the evil of treasury looting of public fund in Nigeria, there should be a mandatory provisoin our laws that the defendant who has been convicted should be taken to a town hall meeting in his town or village where his shameful conduct shall be publicly declared to his kith and kin by the EFCC and the public informed about the compassionate grounds upon which the convict was discharged.
5. We recommend that in Nigeria special courts be created specifically to hear and determine all corruption cases. This has been done to investment disputes with the creation of Investment and Securities Tribunal (IST) and it has been yielding a positive result. Investment cases are now disposed within a very short period of time. We submit that if we have such specialized courts to administer corruption cases only, the idea of caseloads will become a forgotten issue.

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