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PLEA BARGAINING IN THE UNITED STATES OF AMERICA: A MODEL FOR NIGERIA'S CRIMINAL JUSTICE SYSTEM?

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ABSTRACT
Because of the arithmetical increase in crimes over the last several decades and public outcry to address this issue, the courts have in the United States of America with the implementation of the crime control model in almost every state, placed a heavy emphasis on a high rate of apprehension and conviction with a premium on speed and finality. In doing this, prosecutors have determine that the plea bargain is an effective means of eliciting a conviction regardless of the guilt or innocence of the suspect. In Nigeria, arising from the ills besetting the criminal justice administration, calls have been made for the adoption of the plea bargaining system as operated in the United States of America as a fast track programme in the criminal justice sector environment. The paper extrays the question as to whether the concept of plea bargaining in the United States is an appropriate model for Nigeria and notes that owing to the controversy surrounding same, some states such as Alaska, New Orleans, Ventura County, California and Oakland County and Michigan have terminated the application of all plea bargaining and thence the paper concludes that it is not an appropriate model to the peculiar situation of Nigeria.
Keywords: Plea bargaining, criminal justice system, The Constitution, Nigeria, United States

INTRODUCTION

One source to which Nigeria lawyers and judges frequently look for guidance is the constitution of the United States of America and the decisions of the United States Supreme Court interpreting and applying it.[3] There are several reasons for this. Nigeria and the United States, both ex-colonies of Britain, are both common law jurisdictions, so the laws, the legal system and the principles of judicial making are similar. Both are Federations rather than unitary states. In both, the Federal Constitution, as interpreted ultimately by the Supreme Court remains law of the land. Both constitutions contain Bill of Rights of which the judges, high and low, are considered to be the particular guardians and enforcers. Since 1979, both Nigeria and the United States have operated presidential systems of government, with full systems of checks and balances of one branch of government upon the other, rather than the less segmented cabinet/parliamentary system of the mother country (Britain). Along with these very extensive similarities between the politics of the two countries go some more practical considerations. The Constitution of the United States and the decisions of the United States Supreme Court interpreting it are surprisingly accessible to Nigerian lawyers and judges. One finds them in Universities, Ministry of Justice and court libraries all over the country along with text books and case books on the United States constitutional law

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[3] Ostein P. (et al), "The law of separation of Religion and State in the United States; A Model for Nigeria? In S. O. O. Amali et al Eds, Religion in the United States (Ibadan: American Studies Association of Nigeria) 2002 Pp 14 – 32. See equally No. 37, TCNN Research Bulletin, March (2002) Pp 24-35.

and in other areas like the criminal justice system. The United States materials are all English, the official language also of Nigeria.

One must not fail to mention the immense prestige that the constitution of the United States and the United States Supreme Court as its ultimate interpreter, have built up during the more than two hundred years they have been in operation. As the Chief Justice of the United States Supreme Court said not too long ago:

> ***"For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our court alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States amongst other sources, for developing their own law"***[4]

Because of the arithmetical increase in crimes over the last several decades, and public outcry to address this issue, the courts have in the United States of America with the implementation of the crime control model in almost every state, placed a heavy emphasis on a high rate of apprehension and conviction with a premium on speed and finality. In doing this, prosecutors have determine that the plea bargain is an effective means of eliciting a conviction regardless of the guilt or innocence of the suspect.

Plea bargaining is an essential part of the Criminal Justice System in the United States of America which though is not included under the fair trial principle in the Bill of Rights enshrined in the Sixth Amendment of the United States Constitution has been repeatedly held by the American Courts to be constitutional. The vast majority of Felony Criminal cases in urban areas of the United States of America are determined on the basis of Plea bargaining rather than by a jury trial.

The above explains why in recent times in Nigeria, arising from the ills besetting the criminal justice administration in Nigeria,[5] calls have been made for the adoption in Nigeria of the plea bargaining system as operated in the United States of America as a fast track programme in the criminal justice sector environment.[6] Arising from these calls, prominent Nigerians[7] have been convicted and sentenced under the plea bargaining system by the Judex arising from prosecution conducted by the Economic and Financial Crimes Commission (EFCC).

THEORETICAL ISSUES

The burning question is however, whether the plea bargaining system as operated in the United States is a model for Nigeria?

This may not be an easy question to answer for two main reasons:

(i) **The question is many not one**. The measures being taken in the plea bargaining scheme differs significantly from state to state – in legislative approach, in many substantive details, and above all in the scope of implementation.

(ii) **The interpretive difficulty**. We are similarly faced with a more fundamental difficulty, which is that no Nigerian court – certainly not the Court of Appeal nor Supreme Court of Nigeria has yet authoritatively interpreted on the constitutionality of plea bargaining or even upheld a decision relating to one. We therefore do not know what the courts will apply in

[4] Rehnquist W, "Constitutional Courts: Comparative Remarks", In Germany and its Basic Law: Past, Present and Future. A German – American Symposium (Paul Kirchhoff & Donald P. Kommers, (eds) (1993) P. 412.

[5] Such ills includes, delays in the administration of criminal justice, overcrowding of prisons by awaiting trial inmates, the cost of criminal prosecution and enforcement of custodial punishments and detention, as well as corruption.

[6] Ogunye J, Criminal Justice System in Nigeria: The imperative of Plea Bargaining: Lawyers league for Human Rights (2005) P. 2.

[7] An epitome was conviction and sentence of Mrs. Cecilia Ibru (former Managing Director and Chief Executive Officer of Oceanic Bank Plc) and the erstwhile Governor of Bayelsa State, Alemisegha and those involved in the Halliburton bribe scandal. This approach is been carried out to ape what is obtainable in the United States of America where plea bargain has come to dominate the administration of justice where every two seconds during a typical work day, a criminal case is disposed of in an American court room by way of a guilty plea or "*Nolo Contendere Plea*".

determining whether a conviction and sentence arising from plea bargain is constitutional or not and whether it is sanctioned under the Nigerian criminal justice system. In fact we do not know what plea bargain will eventually come to mean as the courts interpret and apply it in the future if need be.

Persuasive authorities from the United States of America are however bound that may assist the courts in Nigeria in arriving at the interpretive difficulty. The Supreme Court of Nigeria in **OGUGU VS STATE**[8] Per Bello JSC has endorsed this approach in the following wordings:

> ***"It has long been a cardinal principle of our constitutional law that on account of the unique character and diversity of our constitution, the courts should always endeavour to find solution to constitutional questions within the constitution through its interpretation, but the courts may seek guidance as persuasive authorities from the decisions of the courts of other common law jurisdiction on the interpretation and construction of the provision of their constitutions which are in pari material with the relevant provisions of our constitution."***[9]

Naturally, the Nigerian courts do not apply the jurisprudence of other countries uncritically. In the words of Belgore JSC;

> ***"It is always of great help to know that line of thinking jurisprudentially in other countries courts with constitutional provisions resembling our own, nonetheless our constitution must always remains creature of its own circumstances and must always be interpreted in its own location and meanings".***[10]

In the case of **ADEGBENRO VS AKINTOLA & 1 ORD**[11] the court has this to say;

> ***"It is at the end the wordings of the Nigerian constitution itself that is to be interpreted and applied, and this wordings can never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this constitution".***[12]

METHODOLOGY

The research methodology employed in the writing of this article is a combination of the doctrinal and empirical research methods for the purposes of identification and analysis of primary data. The primary data are obtained through the adoption of doctrinal methodology. Doctrinal research method is to a large extent library oriented with reliance fully placed on relevant literatures such as reputable academic books, articles published in reputable academic journals, conference and workshops papers, newsletters as well as internet materials. Reliance was equally placed on primary sources of data which involved a consideration of various types of domestic legislation in the area of plea bargain.

As for empirical nature, information was gathered from experts, journalist and other public officials for the purposes of eliciting research data's and obtaining clarifications and making in-depth probing of some theoretical issues as well as from documents, newspapers and magazines. Finally, originality is exhibited in making analysis and recommendations.

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[8] (1998) 1 HRLRA 167.
[9] *Ibid* at P. 189.
[10] ***Ibid*** at P. 211.
[11] (1962) 1 ALL NLR 454.
[12] Per Viscount Redcliff at P. 479 in his judgment for the Privy Council, quoted in Attorney – General Bendel State Vs Attorney General of the Federation (1981) 10 S.C. 1, (1981) NSCC 314 at P. 331 per Fatai Williams CJN.

Against this background, the basic objective of this paper is to attempt to consider the question as to whether the plea bargaining scheme as operated in the United States is an appropriate model for Nigeria's criminal justice system and to conclude with recommendations.

Meaning of Plea Bargaining

Kurtis R. Jeter[13] defines Plea Bargaining as;

> ***"A negotiated settlement between a state usually known as the "people" and an individual, usually called the "defendant", who has received from that particular state what is called a "charging instrument" for allegedly committing some type of crime…"[14]***

Kenneth R. Tapsc[15] on the other hand sees Plea Bargaining as;

> ***"…When the defendant agrees to settle a case with certain guidelines and conditions in which the prosecution will ask the defendant for a guilty plea in exchange for a reduced or even suspended sentence"[16]***

A summation of the above definitions would reveal that plea bargain is an agreement between the state (prosecution) and an accused person (defendant) in a criminal case. Under the agreement, the accused person accepts to plead guilty to a less severe offence than the one originally charged or to a smaller number of offences than the one originally charged. In this agreement, the burden on the prosecution to prove the guilt of the accused person in a fully-blown trial is lifted; and the accused receives a lighter sentence or punishment than that which he is likely to receive if trial in respect of the offence originally charged were to be conducted and considered judgment delivered.[17] It may simply be regarded as a contract with the state or an agreement to plead guilty to the same offence charged but the prosecution and the court agrees to a lesser penalty.

Historical Evolution of Plea Bargaining

Prior to the 19th century writes Dirk Olin,[18] Plea bargain was a prosecutorial tool used only episodically i.e. occasionally. It emanated almost with public prosecution which, although is not exclusive to the United States of America, developed earlier and more pervasively in the United States than in most other common law jurisdictions. But according to him, because judges, not prosecutors, controlled most sentencing, plea bargaining was limited to those rare cases in which prosecution could unilaterally dictate a defendant (accused person's) sentence.[19] Not until the crush of civil litigation brought in by the explosion of personal injury cases in the industrial era did judges began to appreciate the workload relief plea bargaining provided.[20]

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[13] Kurtis R. J, "The injustice of the plea bargain" at http://www.realcostofprisons.org/writing/jetter-injustice pdf visited on 10/12/2013.

[14] *Ibid* at P. 1.

[15] See Kenneth R. T. "Plea Bargaining Pros and Cons"; at http://www.streetdirectory.com/travelguide/14026/ legal matters/pleabargainingprossandcos.n.s.html visited on 10/12/2013.

[16] *Ibid* at P. 1.

[17] An example in Nigeria is the plea deal which was consummated in September 13, 2010 where the former First Lady of the Nigerian Banking Sector Mrs. Cecelia Ibru dropped on the floor of a law chamber office where she had gone with her lawyers to sign a plea bargain deal she sought from the Economic and Financial Crimes Commission, EFCC, which is prosecuting her on 1 25 count charges of Money Laundering and Mismanagement of depositors funds to a six months imprisonment with a forfeiture of a whopping sums of N150 billion. The charges were reduced to 3 count charges and sentence mitigated arising from the plea bargain deal.

[18] National Editor of the American Lawyer, "Plea Bargain" The New York Times Magazine at http://www. truthinjustice.org/bargaining.html visited on 7/12/2013.

[19] *Ibid* at Pp 1 – 2.

[20] Fisher, Plea – Bargaining's Triumphs: A History of Plea – bargaining in America Stanford University Press, referred to by Dirk Olin in the Article Supra note 22.

Plea bargaining is a creature of the criminal justice system of the common law countries where there is a concept of plea. It is inapplicable in civil law systems where there is no concept of plea.[21] United States of America, Britain and Canada are some of the leading common law countries that have plea bargain systems, though with varying degrees of development.

The following would illustrate the growth of plea bargain viz:

(i) **In 1633,** Galileo gets house arrest from the inquisition in exchange for his reciting penitential psalms weekly and recounting Copernican heresies.

(ii) **In 1931,** Al Capone brags about his light sentence for pleading guilty to tax evasion and prohibition violations.

(iii) **In 1969,** to avoid execution, James Earl Ray pleads guilty to assassinating Martin Luther King Jr. and gets 99 years imprisonment.

(iv) **In 1973,** Sipco Agnew resigns the Vice Presidency and pleads no contest to the charges of failing to report income; and he got three years' probation and a $10,000:00 fine (roughly one-third of the amount in issue).

(v) **In 1990,** facing serious federal charges of insider trading, Michael Milken pleads to lesser charges of securities fraud, soon after, his 10 years sentence is reduced to 2 years sentence.[22]

Some Reasons Advanced For The Introduction of The Plea Bargain System In The United States of America

The under mentioned are some of the reasons advanced for the introduction of the plea bargain system in the United States of America to wit:

(i) That it helps an accused person who is being represented by a private counsel (attorney) to cut down the cost of his defence and save money that would otherwise have been paid out as attorney fees to cover professional services that would have been rendered in respect of a prolonged trial. Thence time and money is saved.

(ii) That it enables an accused person who is being detained on an order of remand by a magistrate or judge because he is entitled to bail or cannot fulfill the terms or conditions of bail, to get out of custody early, immediately following the adoption of the plea bargain agreement by the court as its judgment.[23]

(iii) That it makes the accused to "maintain a decent" criminal record as pleading guilty or no contest in exchange for a reduction on the number of charges or revision of serious offences is smarter than risking going to trial in respect of serious offences or charges and facing possible conviction.

(iv) That plea bargaining charge from a felony to misdemeanor can assist an accused to secure critical advantage in the future.[24]

(v) That it is a means of preserving social status by having a less socially stigmatizing conviction of an offence on one's record.[25]

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[21] Albert France, a civil law jurisdiction, recently passed a law allowing the operation of plea bargaining, a clear indication that civil law countries are warming up to the adoption of the system.

[22] *Ibid*.

[23] Depending on the nature of the offence committed by the accused person, he may be released conditionally or on probation, with or without some community service obligation; or released after serving the prison term that may be imposed as sentence over the plea agreement, but certainly earlier than it would have been in case if there were no plea bargaining.

[24] For instance, a conviction of a felony results in the forfeiture of some professional licenses. Someone previously convicted of a felony may have difficulty in securing employment, conviction of a felony may be latched unto as evidence of bad character in certain criminal and civil proceedings to discredit people who testify as witnesses or to impeach the evidence given by the person convicted; and in many jurisdictions, felons cannot exercise the right to vote or own or posses firearms.

[25] For instance, an offender who exchanged a guilty plea for the reduction of charges that are considered to be morally repugnant and socially reprehensible to less repugnant and repressible charges may not suffer much ostracism by friends, family and society. Thence, the ridicule and social censure a conviction of the offence of rape or molestation may attract are likely to be more than the rejection a person may suffer in the society for conviction of the offence of assault.

Essentially speaking therefore, the benefits that informed the introduction of the plea bargain system is dual. The short term benefit is in terms of getting a lighter sentence and the long term benefit is avoiding a mandatory jail term.

Legal Framework of Plea Bargaining In The United States of America

Principally, at the Federal level, the Federal Rules of Criminal Procedure of the United State[26] makes provision for plea agreement procedure. This is essentially provided for under Rule 11(c) (1) & (b). These rules provides as follows:

11(c) - Plea agreement procedure

> ***(1) In general, an Attorney for the government and the defendant's attorney, or the defendant when proceedings per se, may discuss and reach plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offence or a lesser or related offences, the plea agreement may specify that an attorney for the government will;***
>
> ***(a) Not bring or will move to dismiss, other charges.***
>
> ***(b) Recommend or agree not to oppose the defendant's request that a particular sentence or sentencing range is appropriate or that a particular provision of the sentencing guidelines or policy statement or sentencing factor does or does not apply (such a recommendation or request does not bind the court). Or***
>
> ***(c) Agree that a specific sentence or sentencing range is the appropriate disposition of the one, or that a particular provision of the sentencing guidelines or policy, statement or sentencing factors, does not apply. (Such a recommendation or request binds the court once the court accepts the plea agreement)…"***

Thence, under Rule 11(c) (1) above, there are three types of plea agreement. These are **the charges bargain, sentence recommendation and specific sentence agreements**.

Under Rule 11(c) (1) (b), the plea agreement does not bind the court. The prosecution recommendation is merely advisory, and the Defendant (accused) cannot withdraw his plea if the court decides to impose a sentence other than what was stipulated in the agreement. Rule 11(c) (1) (c) agreement on the other hand does not bind the court once the court accepts the agreement when such an agreement is proposed, the court can reject it if it disagrees with this proposed sentence in which the defendant has an opportunity to withdraw his plea.[27]

The Federal Rules of Criminal Procedure is not the only statute governing plea agreement or bargain process at the Federal level. The Sentencing Reform Act[28] established the United States Sentencing Commission[29] and the United States Sentencing guidelines promulgated there under, and the prosecutorial remedies and other tools to end the exploitation of Children Today Act (Protect Act) are two other legislations that regulate the operation of plea bargaining.[30]

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[26] Amended up to December, 2002.

[27] Rule 11 Federal Rules of criminal procedure http://:www.land.cornell.edu/rules.frcmi/rule11.html visited on 7/12/2013.

[28] See the sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984.

[29] The commission is an independent agency in the judicial branch of government, charged with the main duty of establishing sentencing policies and practices and practices for the federal courts, including for offenders convicted of federal offences. The commission monitors and evaluates the effects of the sentencing guidelines on the criminal justice system and revises the sentencing guidelines as may be necessary, it equally recommends to congress appropriate modifications of substantive criminal law and sentencing procedure.

[30] Plea bargaining are so common in the superior courts of California that the judicial council of California has published an optional seven page containing all mandatory advisement required by Federal and state law to help prosecutors and defence attorney's reduce such bargains into written plea agreements.

Constitutionality and Application of Plea Bargaining In The United States of America

The Constitutionality of plea bargaining was established in Brady Vs United States in 1970.[31] As a follow up, it has been argued that when plea bargaining are broken, the remedy that exists as a result of the prevalence of plea agreements as it affects the accused (defendant) is to be found in the law of contract rather than the law of trial procedure.[32]

Application of Plea Bargaining

Plea bargaining is just one part of the very lengthy criminal justice process. The criminal process begins with a crime taking place and then continues as with the formal investigation. After investigation is concluded and there is cause to issue a warrant, the suspect will be placed under arrest and brought to the police station for processing (booking) depending on the crime and the accused, they will be either released from custody or held until the next phase of the process.

The next phase is arraignment in which the accused enters a plea of guilty or not guilty to the charge. During the arraignment, the accused is also advised of the nature of the charge(s). The accused is also advised that he has the right to have an attorney to represent him in the matter. In this process, plea agreement can be made and or reached. An epitome is the swiftness in the determination of the case of John Walker Lindh, the American who, in 2001, fought with the Taliban in Afghanistan against the United States of America and was subsequently captured.[33]

In recent times, plea bargain system has been adopted by the United Nation's War Crimes Tribunal of The Hague[34] to solve the problem of delay in the handling of backlog of cases arising from the war crimes in the 1990's. Sentences are being reduced for "co-operation" and guilty pleas.[35]

Brief Analysis of The Nigerian Criminal Justice System

The criminal justice system is the aggregate of the consequences of procedural rules and policies that are applicable from the time of arrest, which is the first contact of the offender with the criminal process to the very last stage of the process which is the conviction and sentence.[36] It may be helpful in analyzing and debating our criminal justice system, to view control as its general justifying aim and to see the protection of rights, control of the abuse of power and consideration of the system as "qualifiers"[37] which

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[31] 397 U. S. 742. Other cases were the United States Supreme Court affirmed that plea bargaining is an intrinsic part of the country's criminal justice system includes: Santobello vs. New York 404 U.S. 257, 260 (1971), Giglio vs. United States (1972) 405 U.S. 150 – 154; United States vs. Agure (1976) 427 U.S. 97; United States vs. Bagley (1985) 473 US 667; Kyles vs. Whitley (1995) 514 U.S. 419; United States vs. Ruiz (2002) 536 U.S; United States vs. Broce (1989) 488 U.S. 563; Bousley vs. United States (1998) 523 U.S. 614 – 619; Mcmann vs. Richardson (1970) 397 U.S. 759; Tollet vs. Henderson (1973) 411 U.S. 258; 267; United States vs. Broce (1989) 488 U.S. 563 AT 573; Boykin vs. Alabama (1969) 395 US 234 – 243 and United States vs. Mezenatto (1995) 513 U.S. 196 – 201.

[32] Western Peter (et al), "Constitutional law of remedies for broken plea bargains", California Law Review (1978) P. 471.

[33] John Walker Lindh, 20 years old Taliban Soldier pleaded guilty on Monday 15th, 2002 to charges that could keep him in prison for twenty years in fulfillment of terms of an agreement with United States Attorney's. In exchange of his guilty plea, the prosecutors dropped serious charges that were brought against him including conspiracy to murder citizens of United States of America, charges that on conviction could have confined John Walker to prison for life, prolonged trial it was argued could have been a national dilemma in the event of a prolonged trial and appeal thereon.

[34] Plea bargain system was introduced at the War Crimes Tribunal in May 2003.

[35] Between 1996 and May 2003, only eight (8) accused persons pleaded guilty at the Tribunal. Between May 2003, when the plea bargain system was introduced, and November 2003, eight (8) accused persons have pleaded guilty. Though the introduction of this system has sharply been criticized.

[36] Owoade M. A. "Dispensation of Criminal Justice in Nigeria, Problems and Prospects". In; S.M.G. Kanam (et al) eds of Contemporary Issues in Nigerian Law; Legal Essays in honour of Hon. Justice Umaru Faruk Abdullahi, CON, Ahmadu Bello University Zaria, 2006, P. 215.

[37] The term "qualifiers" was used by A. J. Ashworth in his "Concepts of Criminal Justice" in (1979) Criminal Law Report Pp. 412-313, Ashworth himself conceded that the term "general justifying the aim" and the suggested framework of his article was adopted from H.L.A. Hart, "prolegomenon of the principles of punishment", in punishment and Responsibility (Oxford 1968)

interact with crime control and among themselves in the balancing of the conflicting policies and principles which are at play in the administration of criminal justice. Criminal procedure is problematic because the nature of what is just and unjust is often in dispute.

Nigeria has an Anglo – Australian and perhaps and Indo – Sudanese orientation to criminal law and the criminal process.[38] Although, it is almost impossible to completely and satisfactorily define a crime owing to multiplicity of perspective, a crime can broadly be defined as an act or omission prescribed by the state, which has a punishment for its occurrence.[39]

In Nigeria, there are two principal penal statutes. There are the Criminal Code operating in the Southern part of the country and the Penal Code operating in the Northern part of the country. There are also two principal procedure enactments operating in conjunction with the two codes in the Southern and Northern part of the country namely: the Criminal Procedure Act and the Criminal Procedure Code. Apart from these enactments, there are lots of statutes, both Federal and State, permeating all walks of life which define various crimes, the commission of which attracts penalties.

The Nigerian criminal justice system recognizes the model of criminal process identified by Herbert C. Pacher.[40] He identified the due process model and the crime control model conceding that there are common grounds between the two.[41]

These common grounds are usually, but not always, the products of constitutional protection and/or long dating concepts of natural law and not merely matters of procedure in Nigeria, the Constitution of the Federal Republic of Nigeria 1999[42] represents in varying terms the common grounds as well as the due process model. In one breath, it accommodates the common law doctrine of natural justice as contained in the maxims **Nemo judex in Casasua and Audi** Alteram Partem**.**[43] In others, it ruled against retroactive criminal legislation[44] and double jeopardy.[45] At the same time, it emphasized the concept of offences,[46] presumption of innocence[47] and non compellability of accused person.[48]

There are other criminal procedure principles which extend the right to fair hearing enshrined in the Constitution. For instance, proof of beyond reasonable doubt. The burden of proof in a criminal trial is one of such principles.[49] For a person accused of a crime to be convicted, it must be proved beyond reasonable doubt that he did commit the offence. Underscoring the importance of proof beyond reasonable doubt in the criminal justice system, Honorable Justice Oputa JSC (as he then was) stated in the memorable case of **UKWUNNENYI VS STATE**[50] as follows:

> ***"Proof beyond reasonable doubt is the policy of our law. This policy derives from the fact that human justice has its human limitations. It is not given to human justice to see and know, as the great eternal knows, the thoughts and action of all men.***

Chapter 1, at page 10 op cit, Hart says: "In relation to any social institution, after stating what general aim or value its maintenance fosters, we should inquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier, our main social institutions always posses a plurality of which can be understood as a compromise between partly discrepant principles.

[38] See Adeyemi A. A. (Eds), Nigerian Criminal Process (Lagos University Press) 1977 P. xix.

[39] See section 2 of the criminal code which defines an offence thus; "An act or omission which renders the person during the act or making the omission liable to punishment under the code or under any order in council, ordinance or law, or statutes, is called an offence". Summarily, section 28 of the penal code provides that: "Except where otherwise appears from the context, the word "offence" includes an offence under any law for the time being enforce".

[40] Herbert L. P, The Limits of the Criminal Sanctions, (Stanford University Press, California) 1968.

[41] *Ibid.* Particularly chapter 8, Pp. 149 – 173.

[42] See section 36 thereof.

[43] Section 36(1) of the 1999 Constitution.

[44] Section 36(8) *Ibid.*

[45] Section 36(9) *Ibid.*

[46] Section 36(3) *Ibid.*

[47] Section 36(5) *Ibid.*

[48] Section 36(11) *Ibid.*

[49] See Section 135-141 of the Evidence Act 2011.

[50] (1989) 4 NWLR (PT 114) 131

> ***Human justice has to depend on evidence and inference. Dealing with the irrevocable issue of life and death, she has to tread cautiously lest she send an innocent man to an early and ignoble death. In our system, it is therefore better that nine guilty person's escape than one innocent man is condemned. That is why the court gives the benefit of any doubt to an accused person".***[51]

Therefore, the true test to fair hearing is the impression of the reasonable man who was present at the trial whether from his observation; justice has been done in that case.[52]

The Nigerian criminal justice system is strictly adversarial in nature as opposed to the inquisitorial system of criminal justice system.[53]

The beginning of a criminal trial is an arrest and eventually ends with a conviction which may or may not lead to imprisonment.

Plea Bargaining In Nigeria: A Strange Metaphor?

Negotiated contracts between an accused person and the state in criminal trials in the United States of America have been crystallized into what I call, a metaphor plea bargaining.

In Nigeria the broad sweep application of this metaphor have been adopted in the sentence and conviction of former Managing Director and Chief Executive Officer of Oceanic Bank Plc, Mrs. Cecilia Ibru by a Federal High Court in Ikoyi Lagos State, South West Nigeria.[54] She was sentenced to a Six Months imprisonment with a forfeiture of a Whopping sum of N150 Billion. The prosecution team[55] had in terms with a plea bargain amended Ibru's charges to three counts (instead of the hitherto 25 count charges) which she pleaded guilty to and was subsequently convicted.[56]

Only recently the sums of $26.5 million (about N3.8 Billion) plea bargain payment was made to the Federal Government of Nigeria by a construction giant named in the $180 million Halliburton bribery scandal to escape prosecution.[57]

The construction giant had been discovered during investigation by the panel set up as being one of the suspected conduits through which Mr. Jeffery Tesler, the international lawyer who allegedly distributed the bribe money, sent million of dollars to notable Nigerians. However, several attempts made by the panel to locate the money have yielded no fruitful and concrete results. The United States had warned President Jonathan that unless he pursues the prosecution of suspects in the $180 million Halliburton scandal to a logical conclusion, it (US) would not back his then 2011 presidential bid.[58]

The US further disclosed that it was ready to assist Nigeria collect and return some of the millions of dollars of the bribe money stashed in Swiss and other European Banks provided the president ensures the

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[51] *Ibid* at P. 156.

[52] See Gaji Vs State (1975) 5 S.C. 61; Josiah vs. State (1985) 1 NWLR 125.

[53] Glanville Williams has argued that the terms refers only to the model in which evidence is elicited, and the single characteristics of an inquisitorial system is the activity of the judge in questioning the defendant (accused) and witnesses. On this definition, the French system is inquisitorial. But the French trial, whether English, involves an oral hearing with prosecution and accused separately represented and with no compulsion upon the accused to answer questions. See The proof of guilt 3rd eds. (London, Stevens and Sons) 1963. Pp. 29-30.

[54] Cecelia Ibru was among the 20 sacked bank executives being prosecuted in court for money laundering and mismanagement of depositor's funds.

[55] Consisting of Kola Awodein SAN, D. D. Dodo, SAN, Koiyin Ajayi Esq, Godwin Obla Esq and Rotimi Jacobs Esq.

[56] See "Cecelia Ibru convicted, forfeits N15bn …To spend 6 months in prison" culled from reports N.G.com – Breaking News, Nigeria, Africa, World Sports, Politics, Business, Educational at http://:reports ng.com visited on 14/12/2013. The Economic and Financial Crimes Commissions were apparently acting under section 14(2) of the Economic and Financial Crimes Commission (establishment) Act 2004 which provides for the compounding of offences punishable under the Act by accepting such sums of monies as it think fit not however exceeding an amount that a person would have been liable if he had been convicted of that offence.

[57] Vanguard (Nigeria): "Halliburton: N.38bn plea bargain money missing" at http://www.vanguardngr.com /2010/11/Halliburtonn.3-bn-pleabargain visited on 17/12/2013. P.1

[58] *Ibid*.

suspects are arrested and prosecuted.[59] Bodunde, Ibrahim Aliyu, Batagarawa, Bello Obaseki, were said at a point during investigation granted bail on "plea bargaining".[60]

Is Plea Bargaining as Practiced In The United States of America an Appropriate Model For Nigeria?

In the opinion of the writer, the answer is clearly in the negative. One main reason for this has already been stated and that is that there is the interpretative difficulty in the sense that there has not been any authoritative decision on the constitutionality of Plea bargaining in Nigeria as opposed to its counterpart in the United States of America. Moreover the Plea bargain system as practiced in the United States of America must be read in the light of the Constitution of the Federal Republic of Nigeria 1999. It must always remains a creature of its own circumstances and must always be interpreted in its own location. The Constitution of the Federal Republic of Nigeria 1999 and other criminal statutes in existence do not accommodate plea bargaining system as operated in the United States. Even the Economic and Financial Crimes Commission[61] does so in violation of the provisions of the Constitution.

Most judicial system in the United States of America operates their system based on the crime control model instead of the due process model. Thence, the Plea bargaining system is utilized more as a matter of expeditious convenience than for any other reason. In Nigeria, the due process model is given prominence.

Under the Anglo – Nigerian Adversary system trial, whatever its undoubted merits, the court itself cannot undertake a search for the relevant evidence but it must reach its decision solely on the basis of such evidence as is presented by the two parties. While the paramount consideration is the truth, the judge is not permitted to search for the truth by any means. In **OGBUDU VS ODOGHA**,[62] and **EVOYOMA VS DAREGBE,**[63] the Supreme Court of Nigeria reiterated the principle that a judge must discover the truth from the evidence presented by the parties, and that he cannot call a witness which he thinks might throw some light in the facts.[64]

Unlike the plea bargaining system, the judge under the Nigerian criminal system is protected by the rules which are apparently aimed at ensuring certainty of truth but which may in particular cases shut out the truth if the plea bargain system is adopted as practiced in the United States. He is hemmed in by rules of procedure which reflect our constitutional and social values in relation to which "justice" in a particular case may be of secondary importance.[65]

In Nigeria, the accused person has an absolute unqualified right to compel the state to investigate its own case, find its own witnesses, prove its own facts and convince the judge through its own resources as it is not the responsibility of the courts to bridge the yawning gaps in the prosecution's case.[66] Throughout the process, the accused has a fundamental right to remain silent, in effect challenging the state at every point to prove its case. The Plea bargain system even in the United States of America has led to a situation where government officers have deliberately engineered the system to ensure that the jury trial system in the United States established by the constitution is seldom used. Thence, Plea bargaining is the primary technique used by the government either in the United States of America or in Nigeria to by- pass institutional safeguards in trial.

The constitutional rationale in the United States of America for Plea bargaining to the effect that there is no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution

[59] In line with this, the government ordered the arraignment of five suspects including Bodunde, Aliyu Ibrahim, AVM Dominic, A. Bello and Mr. George Mark, for their alleged roles in the scandal while Mr. Gaius Obaseki, former GMD of NNPC, initially forged in the scandal, are to secure prosecution witnesses.

[60] Vanguard (Nigeria) Halliburton: op cit at P. 2.

[61] Established by Section 1(1) of the Economic and Financial Crimes Commission (Establishment) Act 2004.

[62] (1967) NWLR 22.

[63] (1968) NWLR 389.

[64] See equally DURUMINIYA VS COP (1962) NWLR 70; R VS WILCOX (1961) ALL NLR 631.

[65] Olawoye C. O, "Aspect of evidence and procedure" in Elias, T. O. Eds. Law and Social Change in Nigeria (Evans) 1972 P. 47.

[66] See generally sections 36(1) 36(12) of the 1999 Constitution.

offer holds no sway under the Nigerian criminal justice system. It is only a constitutional fiction that government does not retaliate individuals who wish to exercise their right to trials.

Under the Nigerian criminal justice system, prosecutions are not a hide and seek game. Plea bargaining is rife with unfair prosecutorial tactics which might even culminate to unprofessional conduct on the part of both the prosecuting lawyers and the defence lawyers. In this case, the defence lawyer in a plea bargain system operates in a negotiating rather than a trial setting. The client's interest herein in entering a contractual relationship with the government is to exchange truthful cooperation and testimony for a reduction of sentence which in many cases may be perjurers in nature.[67] Thence, instead of seeking protection from the state, an accused is made to seek the governments favour. Rather than offsetting an asymmetry in resources between the government and an individual accused person, the defence lawyer and his client seek to augment the informational and evidential resources of the prosecution.

A client's interest in obtaining a sentence reduction in return for corporation does not and should not carry the same weight as the interest of a client on a trial in a criminal case. This lesser weight is reflected on the fact that in Nigeria, there is no Constitutional or statutory right to such a contractual exchange.

Whereas the due process model enshrined under the Nigerian 1999 Constitution ensures that an accused person is given equal protection under the law, including the chance to adequately defend himself, thus placing justice first, the crime control model which the plea bargain postulates, sees the repression of criminal behaviour as far more important than justice and places due process on the back burner, all at the expense of the liberty of the United States citizens as well as those of Nigerians in the few cases in which it has been applied.

Granted, the purpose of most things including the Plea bargain is not to facilitate crime, but the existence of a Plea bargain like the existence of a bank, creates immoral, unethical and even criminal opportunities for those within the criminal justice system who posses substandard values. Plea bargain is a dysfunction that enables opportunist to capitalize on it in order to achieve economic gain and regrettably in a criminal matter.

Plea bargain does not give room for better investigation. Prosecutors who would ordinarily have a bad case cash in the opportunity to get a conviction. Judges are made to be lazy and spent less time in court while criminals are given the opportunity to continue with their arrogant manipulation of a paper tiger court system. Even though Plea bargain may curtail the ills of delay and saves cost, it does so in an unconstitutional manner.

CONCLUSION

The argument in this paper has been that the United States of America system of Plea bargaining is not an appropriate model for adoption in the Nigerian criminal justice system. This is an area of the law in which it is not a correct approach to the proper interpretation of our (Nigerian) Constitution as it relates to the due process provisions.

To say that Plea bargaining often leads to injustice is an understatement. In fact, the concept of the term Plea bargain, to those who have been exposed to it, is dramatically opposed to the concept of justice, although not in the grammatical sense of the words, but rather in terms of the actualization of the ideology. Plea bargain is not even cohesive with the United States of America Judicial System's concept of due process, in that its function is to usurp the constitutionally constructed and theoretically constitutionally protected due process amendments and the rights afforded to the citizens therein.

This was not what the authors of the Constitution of the United States of America intended when they spoke of due process. The need to take a closer look at the vehicle of Plea bargaining to ensure that a

[67] For an example of an opinion that views a guilty plea agreement through the lens of contract law, see United States vs. Ayden (1977) 5 20 US 670. If the Court accepts the agreement and thus the government pronounced performance, then the contemplated agreement is complete and the defendant gets the benefits of his bargain. But if the court rejects the governments punished performance, thus the agreement is terminated and the defendant (accused) has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the non occurrence of a condition subsequent.

citizen receives due process have led states such as Alaska, New Orleans, Ventura County, California, Oakland County and Michigan to terminate the application of all plea bargaining. The question then is why should Nigeria import a system when the country of its origin are saddled with controversy over its application and have even gone to some extent of jettisoning same?

Do we as a country only 'ape' other countries without a consideration of our peculiar circumstances? Plea bargaining and justice have nothing in common. Like Kurtis R. Jeter[68] would argue;

> ***"…therefore for the sake of accuracy, should we not, from this point on, refer to the "criminal justice system" as the "criminal plea bargain system"?[69]***

I entirely endorse this view to be a better description until the United States of America and indeed Nigeria by and through the power of the citizens thereof, take the initiative to correct this injustice. Similarly, unless we as a nation collectively address this effrontery as we should with every assault that takes place against the liberties provided for under the Nigerian Constitution, Plea bargaining, like a cancer, will only grow worse.

RECOMMENDATIONS

It is recommended that rather than embraces whole heartedly this cancerous principle called Plea bargaining, there is an urgent need for an agenda towards criminal justice reforms in Nigeria involving the Police, Prosecutors, the Judiciary, Prisons and review of criminal laws. How this is to be done and the analytical principles that should be adopted, are questions I leave for another day.

[68] Kurtis R. Jeter. "The injustice the plea bargain" op cit at P. 9.
[69] *Ibid.*