

# Negotiating Criminal Responsibility with Plea Bargain in Nigeria: A Comparative Approach

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## Abstract

The concept of plea bargaining is a commendable tool in the administration of criminal justice in Nigeria. It is simply a negotiated agreement between a prosecutor and a defendant where the defendant pleads guilty to a lesser offence in exchange for concession. This study examines the historical development of the concept, its comparative development in selected countries such as, the United States of America, India, Canada and some Common Law jurisdictions where plea bargaining has gained prominent recognitions in its criminal justice systems particularly, where there is absence of compulsory prosecution against the criminal defendants. In the same vein, the study also examines the issues arising from the emergence and practice of plea bargain in Nigeria. It therefore, proffers appropriate recommendations against the background of the examination of the Administration of Criminal Justice Act (ACJA), 2015 which has also been domesticated in some States in Nigeria.

**Key words:** Plea Bargain, Criminal Justice, Prosecutor, Defendant, Guilty, Offence

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## 1. Introduction

Pursuant to the Constitution of the Federal Republic of Nigeria, 1999,<sup>1</sup> the rights of an accused person standing trial for a criminal offence are fully guaranteed.<sup>2</sup> It is trite that an effective criminal justice system, contemplates the protection of a person's rights. However, contemporary criminal prosecutions are concluded without full conventional trial. Instead, they are settled through plea bargains in which an accused person agrees to plead guilty in exchange for a reduced sentence.

The concept of plea bargain remains controversial in legal parlance. It has been argued that plea bargain is an illegal attempt at politicising the prosecution of those involved in corrupt activities in Nigeria.<sup>3</sup> *Ipso facto*, plea bargaining does not enhance sufficient punishment in the fight against corruption.<sup>4</sup> Plea bargain is a common law concept, though, not applicable to all countries where the source of legal systems can be traced to common law. The concept is available in criminal matters where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or the victim's representative and not just in relation to cases within the realm of corrupt practices. It is submitted that irrespective of the controversies surrounding the principle of plea bargaining, especially, in Nigeria, the concept is entrenched in the Nigerian legal system as one of the tools required for the efficient, effective and speedy dispensation of criminal justice. This study examines the argument for and against the application, as well as the legality of plea bargain in Nigeria.

The problem of definition looms large in legal parlance. However, definitions are fundamental guides in any worthy intellectual voyage. Against this background, different scholars have defined the concept of plea bargaining, yet, there is no universally acceptable definition of plea bargaining as the concept has been perceived differently.

According to the *Black's Law Dictionary*,<sup>5</sup> a plea bargain (also plea agreement), is any agreement in a criminal case between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. This may mean that the defendant will plead guilty

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<sup>1</sup> Constitution of the Federal Republic of Nigeria, 1999.

<sup>2</sup> *Ibid*, Sections 35 and 36.

<sup>3</sup> Adebayo Adedeji, 'Plea Bargain and Administration of Criminal Justice' available at <<http://www.punchng.com/feature/the-law-you-plea-bargain-and-the-administration-of-criminal-justice>> accessed on 10th December 2015.

<sup>4</sup> Victor Ngwuoke, opinion in *Vanguard Newspaper* of 10<sup>th</sup> October, 2015.

<sup>5</sup> B. Garner, *Black's Law Dictionary*, 7<sup>th</sup> Ed; 1173.

to a less serious charge, or to one of several charges, in return for the dismissal of other charges, or it may mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence.

Plea bargaining also means that the accused person's plea of guilt has been bargained for and consideration has been received.<sup>6</sup> Langbein in his inimitable work on plea bargain, referred to plea bargaining as 'condemnation without adjudication'.<sup>7</sup>

According to Deter, Plea bargain is:

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...<sup>8</sup>

A plea bargain has also been defined as an informal agreement whereby the accused person agrees to plead guilty to one or some charges in return for the prosecution agreeing to drop other charges or a summary trial.<sup>9</sup>

According to Olatunbosun,<sup>10</sup> a plea bargaining is an agreement in a criminal case between the prosecution and the defendant, where the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. The learned scholar further stressed that, the inclusion of plea bargaining in the nation's criminal justice system is apposite. The idea is that, in corruption cases, a defendant agrees to plead guilty to a lesser charge with minimal punishment in exchange for the return of most of their stolen wealth.<sup>11</sup> Hitherto, there were many inherent legal complexities and technicalities that adversely affected the pace of court's proceedings and prompt determination of cases, which plea bargaining could have addressed, and therefore, plea bargaining would fast track trial and reduce cost of prosecution.

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<sup>6</sup> Ferguson and Roberts, 'Plea Bargaining: Directions for Canadian Reform' (1974) 52 *Can. Bar Review* 497 at 501.

<sup>7</sup> J. H. Langbein, 'Land Without Plea Bargaining: How the Germans Do It' 78 *Michigan Law Review*, (1997), 204.

<sup>8</sup> R.J. Lantis, 'The Injustice of the Plea Bargain' available at <<http://www.reallyorprison.org/writing/jetter-injusticepdf>> accessed on 14th December 2018.

<sup>9</sup> S. I. Nchi, *The Nigerian Law Dictionary*, 2nd Ed. (Jos: Greenworld Publishing Company Ltd., 2000), 403.

<sup>10</sup> Adeniyi Olatunbosun, 'Plea Bargaining is Good for our Criminal Justice System' available at <<http://www.vanguardngr.com/2015/12/plea-bargaining-is-good-for-our-criminal-justice-system-says-don-2/>> accessed on 21st December 2018.

<sup>11</sup> *Ibid.*

In plea bargaining, before or upon an arraignment, there is usually an agreement between the prosecutor and the accused person. It means that, the accused person agrees to have corruptly enriched himself with the sum which he is ready to return to government coffers without being made to undergo full trial. It is noteworthy to state that, the court will confiscate the property, the money stolen in addition to paying a fixed amount of fine by the accused person. The prosecutor usually weighs the options before accepting to an offer of plea bargaining.

It is *ipso facto* distillable from the various scholarly definitions that plea bargaining is a negotiation between the prosecutor and the defendant or accused person, culminating in legally admissible concession from both parties, acceptable to the trial court.

## 2. History of Plea Bargaining

Plea bargaining has existed for centuries. It is worthy of note that in older legal systems, convictions were procured by confession and laws existed covering such criminal confessions. However, by the 18<sup>th</sup> century, inducements had been forbidden in English Law to prevent miscarriage of justice.<sup>12</sup> Accordingly, early United States plea bargain history led to courts permitting withdrawal of plea and rejection of plea bargains, although such arrangements continued to happen behind the scenes.<sup>13</sup> Thereafter, a rise in the scale and scope of criminal law led to plea bargaining gaining new acceptance in the early 20<sup>th</sup> century, as courts and prosecutors sought to address an overwhelming influx of cases.<sup>14</sup> In a number of urban districts, the enforcement agencies maintained that the only practicable way of meeting this situation with the existing machinery of the Federal Courts, was for the United States Attorneys to make bargains with defendants or their counsel, whereby defendants plead guilty to minor offences and escape with light penalties.<sup>15</sup>

However, the constitutionality of plea bargaining and its legal footing were established by *Brady v United States*.<sup>16</sup> In 1970, the Supreme Court of the United

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<sup>12</sup> Lucian E. Dervan and Vanessa A. Edkins, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' available at <<http://scholarlycommons.law.northwestern.edu/jclc/vol.103/iss/1>> accessed on 12th October 2017.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, (Stanford: Stanford University Press, 2003), 1.

<sup>16</sup> (1970) 397 U.S. 742.

States of America warned in the same decision, that this was conditional and required appropriate safeguards and usage, namely, that plea incentives so large or coercive as to over-rule defendants' abilities to act freely, or used in a manner giving rise to a significant number of innocent people pleading guilty, might be prohibited or lead to concerns over constitutionality.<sup>17</sup> Prior to this, the court had held in *United States v Jackson*<sup>18</sup> that a law was unconstitutional that had the effect of imposing undue fear in a defendant (in that case, the fear of death) to the point it discouraged exercise of a constitutional right,<sup>19</sup> and also forced the defendant to act as an unwilling witness (self-incrimination) against himself in violation of the Fifth Amendment to the United States Constitution.<sup>20</sup>

In that case, the court further stated:

The plea bargain is more than an admission of past conduct; it is the defendant's consent that judgement of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.<sup>21</sup>

The ruling distinguished the case of *Brady*<sup>22</sup> from other previous cases emphasising improper confessions. It further laid down the following conditions for plea to be valid:

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<sup>17</sup> L. E. Dervan, 'Bargained justice: Plea Bargaining's Innocence Problem and the Brady Safety – Value' *Utah Law Review*, 1, (2012) 51-97.

<sup>18</sup> (1968), 390 U.S. 570.

<sup>19</sup> The Sixth Amendment (Amendment VI) to the United States Constitution is the part of the United States Bill of Rights that sets forth rights related to criminal prosecutions. The U.S. Supreme Court has applied the protections of this amendment to the states through due process clause of the fourteenth amendment, which addresses citizens' rights and equal protection of the laws, and was proposed in response to issue related to former slaves following the American civil war.

<sup>20</sup> The Fifth Amendment (Amendment V) to the United States Constitution is part of the Bill of Rights and protects a person against being compelled to be a witness against himself or herself in a criminal case. "Pleading the Fifth" is a colloquial term for invoking the privilege that allows a witness to decline to answer questions where the answers might incriminate him or her, and generally without having to suffer a penalty for asserting the privilege. A defendant cannot be compelled to become a witness at his or her own trial. If, however, he or she should choose to testify, he or she is not entitled to the privilege, and inferences can be drawn from a refusal to answer a question during cross-examination. The Amendment requires that felonies be tried only upon indictment by a grand jury (who is a legal body that is empowered to conduct official proceedings to investigate potential criminal conduct and to determine whether criminal charges should be brought). Federal grand juries can force people to take the witness stand, but defendants in those proceedings have Fifth Amendment privilege until they choose to answer any question. To claim the privilege for failure to answer when being interviewed by police, the interviewee must have explicitly invoke their constitutional right when declining to answer questions.

<sup>21</sup> See note 15, p.748.

<sup>22</sup> *Ibid*, 757 - 758.

- i) Defendant must be fully aware of the direct consequences, including the actual value of any commitments made to him
- ii) Plea must not be induced by threats (or promises to discontinue improper harassment), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)
- iii) Pleas entered would not become invalid later merely due to a wish to reconsider the judgment which led to them, or better information about the defendant's or the state's case, or the legal position.

Against this background, the case of *Santobello v New York*<sup>23</sup> further added that when plea bargains are broken, remedies exist and it has been argued that given the prevalence of plea agreements, the most important rights of the accused person may be found in the law of contracts rather than the law of trial procedure.<sup>24</sup>

However, plea bargain is said to dominate the administration of justice in America, though it is still very nascent under the Nigerian criminal justice system. It is, therefore, pertinent to state that, more than ninety percent of the criminal cases in America are never tried, much less proven to juries. It is worthy of note that, empirical research has shown that the overwhelming majority of individual who were accused of crime, forgo their constitutional rights and plead guilty in order to receive a reduced prison sentence.<sup>25</sup>

## 2.1 Plea Bargain in Nigeria

Generally, the practice of plea bargain was not part of Nigerian criminal justice system but however, there was the need for Nigeria to join the clarion call or else, would be left behind, as the entire world had advanced in all facets of life's endeavour. The need to introduce a Nigerian legislation was predicated on the urgent necessity to usher in a regime of utter justice in criminal administration system. This was even more so, as Nigerian courts were already applying plea bargaining without legislation in that behalf.<sup>26</sup> One of the earliest cases in Nigeria,

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<sup>23</sup> (1971), 404 U.S. 257 – It is a United States Supreme Court case in which the court ruled that the sentence of the defendant should be vacated because the plea agreement specified that the prosecutor would not recommend a sentence, but the prosecutor breached the agreement by recommending the maximum sentence.

<sup>24</sup> J. Standen, 'Plea Bargaining in the Shadow of the Guidelines' Cal. L. Rev., Vol. 81(6), (1993), 1471.

<sup>25</sup> T. Lynch, 'The case against Plea bargain' *Cato Institute project on Criminal Justice, U.S.A., (2003)*, 24.

<sup>26</sup> *Federal Republic of Nigeria v Tafa Balogun* (2005) NWLR, Pt. 843,428; where the court relied on Section 14 of the Economic and Financial Crime Commission (EFCC) Act, to apply plea bargain.

where plea bargain was applied was the case of *Federal Republic of Nigeria v DSP Alamieyesiegha*.<sup>27</sup> After arraignment and subsequent trial, the accused was sentenced to 12 years imprisonment on a six – count charge that bothered on corruption and other economic offences. Rather than serve a prolonged prison term upon conviction, Alamieyesiegha accepted the Economic and Financial Crime Commission's (EFCC) offer of guilty plea. The former governor entered into a plea bargain with the EFCC in order to receive a lighter sentence and pleaded guilty to the charges. However, because he had almost completed two years in jail before accepting the bargain, he was released few days after his conviction by the court.

In a similar vein, in the case of *Federal Republic of Nigeria v Cecilia Ibru*,<sup>28</sup> the former managing director and chief executive officer of Oceanic Bank International, Nigeria Plc. became another beneficiary of plea bargain when she was sentenced to 18 months imprisonment by the Federal High Court, Lagos, for abuse of office and mismanagement of depositors' funds. She was sentenced to 6 months imprisonment on each count.

It is trite that since the emergence of the plea bargain history, its acceptance as a part of criminal justice systems over the world has continued to rise. For instance, the concept is now applicable in England, Wales, India, and some other countries of the world.<sup>29</sup> Perhaps, the Economic and Financial Crimes Commission (EFCC) Act, 2004 made an audacious attempt at introducing the concept of plea bargain into the Nigerian system. The Act provides as follows:

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.<sup>30</sup>

The offences referred to under this provision are those punishable under the EFCC Act and the section does not, therefore, apply to general criminal trials in Nigeria. The offences listed under the Act include: offences relating to financial malpractices, offences in relation to terrorism, offences relating to false

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<sup>27</sup> (2006) 16 NWLR (pt. 1004), 1.

<sup>28</sup> (2009) unreported FHC/L/297/.

<sup>29</sup> Bayo Adetomiwa, 'The Concept of Plea Bargaining in Nigeria' available at <[www.matrixslicitors.com/articles.php?id=13](http://www.matrixslicitors.com/articles.php?id=13)> accessed on 5<sup>th</sup> January 2016.

<sup>30</sup> Section 14(2) of the Economic and Financial Crimes Commission (Establishment) Act, 2004.

information, retention to proceeds of a criminal conduct, as well as offences in relation to general economic and financial crimes.<sup>31</sup>

It is pertinent to state clearly that the provision of the Economic and Financial Crime Commission Act<sup>32</sup> indicates that when an accused agrees to forfeit some portions of his ill-gotten assets to the government, the commission may compound any offence for which such a person is charged under the Act.

It is submitted that the effect of the said provision of the Economic and Financial Crime Commission Act, is that, a person found guilty of committing an offence is liable to be prosecuted under the relevant provisions of law, but compounding of an offence in the context of the aforementioned provision of the Economic and Financial Crime Commission Act,<sup>33</sup> implies an amicable settlement for the purpose of averting prosecution for an offence. In other words, the concept of compounding of offences as incorporated under section 14(2) of the Economic and Financial Crime Commission Act,<sup>34</sup> by implication, serves as a measure to avoid the long drawn process of prosecution, which would save both cost and time in exchange for payment of a penalty to the aggrieved (the state or government). Therefore, under the Economic and Financial Crime Commission Act, the power to compound an offence is at the discretion of the commission.

The *Black's Law Dictionary*,<sup>35</sup> perceives the word “compound” to mean, ‘settlement of matter by a money payment, in lieu of other liabilities’. This definition, thoughtfully, presents the concept of compounding, as a settlement mechanism that affords the offender an opportunity to avoid prosecution, in exchange of him undertaking a liability that is pecuniary in character or otherwise.

In a similar vein, apart from what is obtainable under the EFCC Act<sup>36</sup> which serves as a measure to avoid the long drawn process of prosecution, which would also save both cost and time in exchange for payment of a penalty to the aggrieved (the state or government), it is apt to state that the closest attempt at introducing the concept of plea bargaining into the Nigerian criminal justice system was the introduction of the Administration of Criminal Justice Law 2007 (ACJA) of Lagos State. Thus, Section 76<sup>37</sup> makes copious provisions wherein the defendant could

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<sup>31</sup> Ibid, sections 14 – 18.

<sup>32</sup> Section 14(2).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Black's Law Dictionary, 9<sup>th</sup> ed; 325.

<sup>36</sup> Section 14(2) of the EFCC Act

<sup>37</sup> Section 76(1)-(10) of the Administration of Criminal Justice Law (ACJL) 2007 of Lagos State.



plead guilty to the offence charged or a lesser offence, and deals extensively with the *modus operandi* of the necessary agreement of the parties, the role of the presiding judge or magistrate and sentencing.

It is very obvious that the provision for plea bargaining in the Administration of Criminal Justice Law of Lagos State, 2007,<sup>38</sup> as clearly appraised above is quite explicit. It is worthy of note that while the provision of the Economic and Financial Crime Commission Act<sup>39</sup> subjects the plea bargaining to the provisions of section 174 of the Constitution, the Administration of Criminal Justice Law Lagos State does not subject the applicability of the plea bargain to any law, not even the Constitution.

The statutory flavours given to the concept of plea bargaining are, however, not limited to the Economic and Financial Crime Commission Act<sup>40</sup> and the Administration of Criminal Justice Law<sup>41</sup> of Lagos State. The most recent and commendable step in actualising the statutory backup to the concept of plea bargain in Nigeria is the enactment of the Administration of Criminal Justice Act, (ACJA), 2015<sup>42</sup>, which authorised plea bargain in Nigeria. Thus, Section 270 of the ACJA 2015 provides that the prosecutor may:

Receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf, or offer a plea bargain to a defendant charged with an offence. The prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution.

In the light of the above, we are, therefore, in agreement with the submission of Shittu, that the Administration of Criminal Justice Act 2015<sup>43</sup> which has also been domesticated by some States in Nigeria, is a revolutionary intervention in our justice sector delivery system that ostensibly would impact on the quality of justice and avoid delays in the adjudicatory process in Nigeria.<sup>44</sup>

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<sup>38</sup> A law on Criminal Justice Administration in the High Courts and Magistrates' Courts of Lagos State and for other connected purposes.

<sup>39</sup> See note 28.

<sup>40</sup> Ibid.

<sup>41</sup> See note 33.

<sup>42</sup> Cap A2 Laws of the Federation of Nigeria, 2015.

<sup>43</sup> Ibid.

<sup>44</sup> Wahab Shittu, "What's Wrong with Administration of Criminal Justice Act?" available at <the nationalineng.net/whats-wrong-with-administration-of-criminal-justice-act-2/> accessed on 14th December 2017.

It suffices to note at this juncture that the Administration of Criminal Justice Act, 2015,<sup>45</sup> is an inimitable enactment. It is a 495 – section law that repealed the Criminal procedure Act and the Criminal Procedure Code as applicable in all the Federal courts and courts in the Federal Capital Territory, Abuja.<sup>46</sup> But the Act regulates more than just criminal procedure: it covers, in most part, the entire criminal justice process from arrest, investigation, trial, custodial matters and sentencing guidelines and options. One essential feature of the ACJA is that it provides that court proceedings should be recorded electronically. It states that in certain exceptional circumstances, where the evidence of a technical, professional or expert witness would not ordinarily be contentious as to require cross-examination, the court may grant leave for the evidence to be taken in writing or by an electronic recording device.<sup>47</sup> Another salient feature of the Act is the provision for the compensation of victims of crime. Victims of crimes are often neglected and left without any form of compensation even when the offender has been found guilty and sentenced. The ACJA has addressed this by broadening the powers of the court to award costs, compensation and damages in deserving cases, especially to victims of crime.<sup>48</sup> Furthermore, the ACJA in sections 453, 460 and 468 addressed the problem of excessive use of imprisonment as a disposal method by introducing some alternatives to imprisonment. These include the introduction of suspended sentence, community service, parole and probation.

The merits of plea bargaining under the criminal justice system in Nigeria, has been ventilated by the application of the concept by the Economic and Financial Crime Commission Act in high profile economic and financial crimes. Notably, it was invoked in the case of *Federal Republic of Nigeria v Igbinedion*.<sup>49</sup> In that case, the former governor of Edo State (between 1999 and 2007), Chief Lucky Nosakhare Igbinedion, was arraigned by the Economic and Financial Crime Commission before the Federal High Court, Enugu Division on a 191 – count charge of corruption, money laundering and embezzlement. In a plea bargain arrangement, the Economic and Financial Crimes Commission reduced the one hundred and ninety one count charge to one-count charge.<sup>50</sup> In line with the concept of plea bargain, the court convicted Lucky Igbinedion on the one-count

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<sup>45</sup> Ibid.

<sup>46</sup> Section 493 of the ACJA, 2015.

<sup>47</sup> Section 364 of the ACJA, 2015.

<sup>48</sup> Sections 319 – 328 of the ACJA, 2015.

<sup>49</sup> (2011) Suit No. CA/B/329 CG, see also (2014) All FWLR pt. 734, p. 101.

<sup>50</sup> O.Peter, 'The Abuses of Plea Bargain in Nigeria' available at <<http://www.mondayandnitevision.blogspot.com/200/07>> accessed on 15th December 2017.

charge and ordered him to refund the sum of five hundred million Naira, forfeit three houses and sentenced him to six months imprisonment or in default, for him to pay a sum of three million, six hundred thousand Naira as a fine.

It is distillable from the foregoing that plea bargaining is of immense benefit to the criminal justice system in Nigeria. Plea bargain is a commendable intervention for the speedy resolution of criminal trails worldwide. It may appear that the problem with its application thus far in Nigeria is that it gravitates more in favour of the defendant's vis-à-vis the victim. However, it is worthy of note that the cases of *Igbinedion*<sup>51</sup>, *Ibru*<sup>52</sup> & *Alamuesiegha*<sup>53</sup> were decided before the enactment of the Administration of Criminal Justice Act, 2015. It is, therefore, expected that with the enactment of ACJA, a better application of plea bargaining in tandem with the Act will usher in appreciable criminal justice in Nigeria, especially against the background that plea bargain in Nigeria is applicable to cases where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative.

### **3. Comparative Approach to Plea Bargain**

#### **3.1 *Plea Bargain in the United States of America***

The United States model of plea bargaining is by far the most developed. The advent of plea bargaining as a legal concept, subject to legal regulations was first introduced in the case of *Brady v United States*.<sup>54</sup> The practice of plea bargaining had been previously frowned upon. In the above case, the United States' Supreme Court acknowledged the existence of the plea bargain and its necessity in an overloaded criminal justice system. It considered plea bargaining as being a tool which could serve to protect the court system from complete collapse. The United States' Supreme Court's decision in *Brady v United States*<sup>55</sup> 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. Plea bargaining in the United States 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

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<sup>51</sup> See note 44.

<sup>52</sup> See note 46.

<sup>53</sup> See note 47.

<sup>54</sup> See note 15.

<sup>55</sup> *Ibid.*

convincing evidence. The increased practice of plea bargaining in the United States resulted in the need to establish checks and balances to ensure that individuals would not be coerced into making bargain. The court would have to investigate the case to ensure the guilty plea had not come from coercion, misrepresentation of promises or bribes.<sup>56</sup>

Within the United States criminal justice system, plea bargaining has become an integrated part of the process with more than ninety-seven percent of convictions in the federal system resulting from pleas of guilty rather than convictions by jury trial.<sup>57</sup>

The Supreme Court of the United States has affirmed that plea bargaining is an intrinsic part of the countries criminal justice system. Thus, in the case of *Santobello v New York*,<sup>58</sup> the United States' Supreme Court stated that plea bargaining:

is an essential component of the administration of justice, adding that if every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

There are some features of the American judicial system that have promoted the growth and development of the concept of plea bargain. The first is the well-established and functional practice of adversarial jurisprudence in the American legal system. Another factor that has helped the system to grow is the absence of compulsory prosecution. Furthermore, private prosecution is not known to the American judicial system. In other words, prosecution for offences cannot be maintained by the victims of such offences.<sup>59</sup>

It is that, under the American plea bargain system, an accused person does not have to know the strength of the government or prosecutor's case in order to make a voluntary and intelligent plea. It is, therefore, submitted that, in the United States' plea bargain system, criminal defendants who plead guilty to the charges for which they stand trial in consequent of a plea bargain, may receive leniency in terms of sentence than those who insist on trial. The favour received by such

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<sup>56</sup> L.E. Dervan and V A. Edkins, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' 1.

<sup>57</sup> Ibid.

<sup>58</sup> (1971) 404 U.S. 257, 260.

<sup>59</sup> T. C. Eze and A. G. Eze, 'A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria' *Global Journal of Politics and Law Research*, vol. 3, No. 4 (2015).

criminal defendants is as a result of the fact that by pleading guilty, the defendant saves the time of the court.

In some jurisdictions other than the United States of America, prosecutors and defendants can work with judges to predetermine what sentence the defendants will get if they accept a plea bargain. In most jurisdictions, however, judges' role in plea bargaining is limited. These are attempts that have been made to curtail plea bargaining in other jurisdictions.<sup>60</sup>

### ***3.2 Indian System of Plea Bargaining***

The concept of plea bargaining in India is a bit different from that of the United States of America. The concept of plea bargain is new to the Indian criminal justice law and can be traced to the Criminal Law Amendment Act.<sup>61</sup> Unlike the American system of plea bargaining which is initiated by the prosecutor, the accused person initiates it under the Indian system. A unique feature under the Indian system is that, the accused person has to file the application for plea bargaining before commencement of trial. Here, an affidavit in support of the application is important. Another unique feature under the Indian criminal justice system is that, the court cannot dispose of the criminal cases without having decided on the case which is predicated on the agreed terms between the prosecutor and the defendant. For instance, when the accused person confesses purposively to the commission of the crime, the parties (the prosecutor and the defendant or his representative) negotiate the terms of the punishment which will be pronounced upon ultimately by the trial court. However, property offences in the nature of socio-economic crimes such as the looting of the public treasury and offences committed against a woman or a child less than 14 years of age are excluded from the application of the procedure.

### ***3.3 Plea Bargaining in Canada***

In Canada, the courts always have the final say with regard to sentencing. However, plea bargaining has become an accepted part of the criminal justice system although judges and crown attorneys are often reluctant to refer to it as such. In most Canadian criminal proceedings, the crown has the ability to recommend

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<sup>60</sup> These attempts take the form of plea cut-off dates, ban on plea bargaining after felony indictment and total ban on plea. In plea cut-offs, a few jurisdictions provide that courts 'shall not accept negotiated pleas once a pretrial conference has been held or after the effluxion of a given period of time'.

<sup>61</sup> Criminal Law (Amendment) Act, 2005,

a lighter sentence that it would seek following a guilty verdict in exchange for a guilty plea.<sup>62</sup>

Like other common law jurisdictions, the crown can also agree to withdraw some charges against the defendant in exchange for a guilty plea. This has become the standard procedure for certain offences such as impaired driving. It is instructive to note that in the case of hybrid offences, the crown must make a binding decision as to whether to proceed summarily or by indictment prior to the defendant making his or her plea. If the crown elects to proceed summarily and the defendant then pleads not guilty, the crown cannot change its election. Therefore, the crown is not in a position to offer to proceed summarily in exchange for a guilty plea.<sup>63</sup> Canadian judges are not bound by the crown's sentencing recommendations and could impose harsher penalties. Therefore, the crown and the defence will often make a joint submission where they will both recommend the same sentence so as to maintain the visibility of the judge's ability to exercise discretion.

Moreso, judges are not bound to impose a sentence within the range of a joint submission and a judge's disregard for a joint submission is not in itself a ground for the sentence to be altered on appeal. However, if a judge routinely disregards joint submissions, that judge will compromise the ability of the crown to offer meaningful incentives for defendants to plead guilty. At this stage, defence attorneys would become reluctant to enter into joint admissions if they were thought to be of little value with a particular judge, which would thus result in otherwise avoidable trial. For this reason, Canadian judges will normally impose a sentence within the range of any joint admission.<sup>64</sup>

### **3.4 Plea Bargaining in other Common Law Jurisdictions**

In some common law jurisdictions, such as England, Wales and the Australian State of Victoria, plea bargaining is permitted only to the extent that the prosecutors and the defence can 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.<sup>65</sup> No plea bargain takes place over the penalty.<sup>66</sup>

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<sup>62</sup> A. Pringle, 'Plea Bargaining' - *The Canadian Encyclopedia*, available at <[www.encyclopediansdienne.ca](http://www.encyclopediansdienne.ca)> accessed on 14th December 2017.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *R v Houlton (2000) NSWCCA, 209.*

<sup>66</sup> *Ibid.*

In the case of hybrid offences in England and Wales, the decision whether to deal with a case in a magistrate court or crown court is not made by magistrates until after a plea has been entered. A defendant is, thus, unable to plead guilty in exchange for having a case with magistrates' court (which has lesser sentencing powers).

#### 4. Recommendations for Reforms

Few features of our criminal process have been so durable and yet so disfavoured as plea bargaining. Despite misgivings about its wisdom and its statutory flavour, and calls for its abolition, the practice in Nigeria shows no sign of vanishing. Nevertheless, the present plea bargaining process may be neither the only nor the most equitable way to induce a large number of guilty pleas. It may be possible to attain the administrative goals of plea bargaining at less cost to the interests of both the defendant and the public. This study contends that the application of the concept of plea bargain in Nigeria before the enactment of the Administration of Criminal Justice Act appeared to have gravitated in favour of the defendants. This was understandably so, in the absence of a standard legal framework. However, with the enactment and application of ACJA, as well as its domestication in other states' laws, a better application of the concept is desirable.

This study canvasses the need for a pre-plea conference. This model for the bargaining process promises to improve plea bargaining in several ways. For instance, it would curb the prosecutor's opportunity to abuse his charging power. The exercise of such power would be confined to the pre-plea conference, the judge would be given the opportunity to evaluate the proposed charge reductions and the cumulative plea concessions it may merit. In the same vein, the judge would have an independent power to compel charge reductions and dismissals despite the objection of the prosecution. This position has been given judicial flavour in the case of *People v Tenerio*.<sup>67</sup>

This study further canvasses that the bargain deal should be open. The secretive manner with which the plea bargain is negotiated and secured is injurious to the criminal justice system. It is our submission, therefore, that plea bargaining being a court process, its negotiation should be openly canvassed in the court. This will enable enlightened and informed Nigerians, perhaps to make contributions

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<sup>67</sup> (1970) 89 Cal. Rapt. 249, 473, p. 2d 993.

towards frustrating it, if considered not to be in public interest. The rationale for this is that, when an accused consents to a plea agreement, the presumption of innocence in his or her favour is superseded. Thus, the prosecution need no longer discharge the burden of proof beyond reasonable doubt that the accused committed the offence.

Further, since the concept of plea bargain has been codified in Nigeria by virtue of the Administration of Criminal Justice Act, 2015, as domesticated by some states in Nigeria, the concept of plea bargain as it were, as well as the procedure in reaching the bargain deal should be properly followed. In other words, it should not be used as a means of witch-hunting perceived opponents in whatever guise or in the name of fighting corruption. Any alleged criminal offender who chooses to plead guilty before trial should be given the opportunity to do so. It is, therefore, submitted that the usage of plea bargaining in Nigeria should not be selective and inconsistent penalties from similar crimes should not be awarded, especially to favour persons perceived to be members of the upper class.