REGULATING PLEA BARGAINING TO ACHIEVE ACCEPTABLE CRIMINAL JUSTICE OUTCOME IN NIGERIA*

Abstract

The article reviews economic and financial crimes cases settled through plea bargaining in Nigeria. The sentences imposed by the courts after plea agreements were generally perceived as grossly inadequate and a mockery of justice. The article reviews the sentences, practice of plea bargaining and issues generated by the cases. It explores options to regulate plea bargaining and ensure that it produces fair and acceptable results drawing insights from other jurisdictions. The paper finds that contrary to the claim that plea bargain is vaccination against punishment, a legal framework that sets out the ground rules and define the role of the parties can ensure that it is conducted fairly and in the public interest. The article further finds that Sentencing and Prosecutorial Guidelines also have the potentials to prevent abuse of plea bargaining by judges, prosecutor and defence counsel and recommends their adoption.

1.1 Introduction

The resort by the Economic and Financial Crimes Commission[1] (EFCC) to plea bargaining in the prosecution of economic and financial crimes has attracted public criticism and scathing remarks.[2] Some of the cases concluded by plea bargain (plea bargained cases) involved former public officer holders who were convicted of converting several billions of naira. The sentences imposed by the courts after the conclusion of plea bargain agreements were generally perceived as grossly inadequate and as mockery of justice. This paper examines

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[1]The Commission was established pursuant to the Economic and Financial Crimes Commission (Establishment) Act, Laws of the Federation of Nigeria, 2010, Cap. E1.

[2] Plea bargaining has been described as a "defeat of justice"- see A Olatunbosun & Z Alayinde "Plea Bargaining: A Mockery of Nigerian Criminal Justice System" in *Essays in Honour of Babatunde Raji Fashola, SAN,* (Ikeja, Nigerian Bar Association, Ikeja Branch, 2010) 109 at 117 and as a 'vaccination against punishment – see L Obijofor "Plea Bargain-Vaccination Against Punishment" http://www.nigeriavillage square.com /articles/levi-obijiofor/plea-bargain-vaccination-against-punishment.html accessed on 20/1/2016.

various issues[3] that have been thrown up by the cases and the options that can be employed to address the concerns generated by the cases.

Part I is the introduction. Part II of the paper clarifies important concepts used in the paper. Part III undertakes an analysis of the plea bargained cases. Part IV analyses the various legal issues thrown up by the cases. Part V explores the options that are available to address some of the concerns generated by the plea bargained cases. Part VI presents the summary of the paper's findings and concludes with recommendations.

1.2 Clarification of Concepts

This part clarifies the following important terms used in the paper "plea bargaining," "charge bargaining," and "sentence bargaining." Plea bargaining generally is a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of other charges.[4]

There are generally two basic types of plea bargains.[5] These are charge bargain and sentence bargain. In a charge bargain, the defendant agrees to plead guilty to a specific charge and the prosecutor agrees to dismiss any other charges or to prosecute for a lesser offence.[6] In sentence bargaining, the defendant wants the prosecutor to recommend a more lenient

[3] The issues that have been generated by the cases include the perception that wealthy political exposed persons receive minor punishments for looting the public territory without substantial jail terms or in some cases as in the recent convictions relating to theft of pension funds option of monetary fines as alternative to jail term. The issues generated by the cases are examined in Parts I and IV of the paper.

[4] B Garner (ed) *Black's Law Dictionary* (9th Edition, 2009) at p. 1270. See also A O Bello "Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects" (2006) 1 *Current Law Series* 42.

[5]There are other practices in the United States which are strictly not plea bargains but which may have similar effects as a plea bargain. These are the plea of *nolo contendere* and indicated sentence. Criminal defendants often enter a plea of *nolo contendere* which means that although the defendant do not admit guilt he is not contesting the charge. See generally on *nolo contendere* N Lenvin "Nolo Contendere: Its Nature and Implications" (1942) 51 *The Yale Law Journal* 1255, N Cogant "Entering Judgment on a Plea of Nolo Contendere: A Re-Examination of North Carolina V. Alford and Some Thoughts on the Relationship Between Proof and Punishment" (1975) 17 *Ariz. L. Rev.* 992 and C Shipley "The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant" (1986-1987) 72 *Iowa L. Rev.* 1063. Indicated sentence occurs in situations in which the judge indicates that if the defendant pleads guilty with no plea bargain he will impose a particular sentence where the prosecutor and the defence are not able to agree as to the sentence to be imposed. The result sometimes takes the place of a plea bargain. see "Plea Bargains: A Concept Paper", Central European and Eurasian Law Initiative Legislative Assistance Research Program, at 11 available at http://www.abanet.org/ceeli/publications/conceptpapers/pleabargains/plea_bargainsconcept_paper.pdf accessed 20/1/2016.

[6] S. Reid, *Criminal Justice* (Brown & Benchmark, USA, 1996) at 237.

sentence than the normal sentence for the crime or to agree not to oppose the recommendation made by the defence.[7] The end result in both types of plea bargains is that the defendant is likely to get a lighter punishment in consideration for pleading guilty.

1.3 Analysis of Plea Bargained Cases

This part examines six cases concluded through plea bargaining by EFCC. Many of the cases are yet to be reported in any law report. The facts, the circumstances of the plea bargain and the sentences are examined against the background of public concern for the sentences.

1.3.1 *Federal Republic of Nigeria v. Emmanuel Nwude and 6 Ors*[8]

The defendants were initially charged with 95 Counts of offences including several counts of conspiracies, obtaining property by false pretences and money laundering involving over $200,000,000. The charges of obtaining by false pretences and money laundering were brought under the provisions of Advanced Feed Fraud and Other Related Offences Act No. 13 of 1995.

The case involved three individuals and four corporate entities used to launder the proceeds of the crime. The 2nd and 4th defendants were the first to enter a guilty plea pursuant to an "alleged" plea agreement. The parties did not file a formal plea agreement in court. The following circumstances of the case indicated an informal plea agreement. First, defendants who had earlier challenged the charges against them suddenly entered a guilty plea. Second, is the filing of an Amended Information which substituted initial charges with offences under section 419 of the Criminal Code attracting lesser punishment. Third, prosecution agreed to defendants pleading to reduced charges.

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[7] *Ibid*, at 238 and J. Parker *Plea Bargaining* [1972] 1 *Am. J. Crim. L.* 187, 188.

[8] Two judgments were delivered in this case. The first judgment was delivered on 15th July 2005 – see Certified True Copy of the Judgement of Honourable Justice J O K Oyewole of the High Court of Lagos State in the Ikeja Judicial Division Unreported in Charge No. ID/92C/04 after the conviction of the 2nd and 4th defendants (hereafter Judgment No. 1). The second judgment was delivered on 18th November, 2005 after the conviction of 1st, 3rd, 4th, 5th, and 6th defendants, see Certified True Copy of the Judgement of Honourable Justice J O K Oyewole of the High Court of Lagos State in the Ikeja Judicial Division Unreported in Charge No. ID/92C/04 (hereinafter Judgment No.2).

The 2nd defendant pleaded guilty to the lesser offence of failure to make a full disclosure of assets and liabilities contrary to section 27(3)(a) of the EFCC Act, an offence punishable by up "to imprisonment for a term of five years." The trial judge accepted her guilty plea and sentenced her to prison for two and half years. The 4th defendant (a corporate entity) was convicted of money laundering and obtaining property by false pretences and was ordered to forfeit some properties to the victims of the fraud.[9]

The 1st, 3rd, 5th, 6th and 7th defendants also pleaded guilty to a Further Amended Information containing 16 counts and were convicted.[10] The court gave credence to the existence of an informal plea agreement between the parties by noting as follows:

"In imposing a sentence on the accused persons, the court has noted the fact that in changing their pleas, valuable time and resources are being saved and is evidence of remorse and common sense, a point appreciated by the prosecution as reflected in the present amended charges".[11]

The 1st defendant who can be described as the mastermind was convicted of conspiracy in count 1 and other offences in counts 2-5 and sentenced to 5 years without option of fine for each counts, all sentences to run concurrently. The 1st, 5th, and 7th defendants were ordered to forfeit the sum of $110, 000, 000 (One Hundred and Ten Million Dollars) to the victims of the fraud. The court also ordered the 1st defendant to forfeit all properties listed in the Schedule to the further amended information. The 3rd defendant was convicted and sentenced to 4 years imprisonment each for counts 1, 4 and 7, all sentences to run concurrently. The 5th, 6th and 7th defendants (corporate entities) were also convicted and the court made an order winding them up. The assets of the companies were confiscated and forfeited to the Federal Government of Nigeria (FGN).

[9] See Judgment No. 1 *ibid* at 1-2.
[10] See Judgment No. 2, (n8).
[11] *Ibid,* at 1.

1.3.2 *Federal Republic of Nigeria v. Tafa Adebayo Balogun & Ors*[12]

The 1st defendant (a former Inspector General of Police) was charged with eight other defendants on 70 counts involving allegations of money laundering under section 14 of the Money Laundering Act 2004, and theft of monies belonging to the Nigerian Police under section 289 of the Penal Code. The total monetary value of all the charges against the 1st defendant was in excess of 12 billion naira. The offence under the Money Laundering Act attracted a mandatory minimum term of imprisonment of "not less than 2 years or more than 3 years." The offence of theft under section 289 of the Penal Code attracts a punishment "which may extend to seven years or with fine or with both.

The circumstances surrounding the guilty plea by the defendants are similar to the circumstances of the informal plea bargain in *Nwude's* case. There was no formal plea agreement filed in court. The defendants however pleaded guilty after the prosecution had amended the charges and substituted an amended eight-count charge alleging failure to make full disclosure of assets and liabilities contrary to section 27(3)(a) of the EFCC Act an offence punishable by up "to imprisonment for a term of five years." The offence to which the offender pleaded guilty allowed the court the discretion to sentence an offender to any term of imprisonment within the five years range. This may be compared with section 14(1) of Money Laundering Act 2004 which imposes a mandatory term of not less than two years and the seven years maximum range under section 289 of the Penal Code. The Court convicted the 1st defendant and sentenced him to six months for each of the 8 counts and ordered that the sentences should run concurrently.[13] In addition, the court also ordered the 1st defendant to pay a fine of N500,000.00 (Five Hundred Thousand Naira) on each of the eight counts. The corporate entities (2nd – 9th defendants) used to launder proceeds of the crime were convicted under section 18(2) of the Money Laundering Act 2004 and all their assets and properties were forfeited to the FGN.

[12]Certified True Copy of the Judgement of Honourable Justice B F M Nyako of the Federal High Court Abuja Judicial Division Unreported in Charge No. FHC/ABJ/CR/14/2005 *Federal Republic of Nigeria v. Tafa Adebayo Balogun & 8 Ors.* delivered on 22 November 2005 (Judgment No. 3).
[13] *Ibid,* at 3.

1.3.3 *Federal Republic of Nigeria v. Chief DSP Alamieyeseigha &Ors*[14]

The defendant a former Governor of Bayelsa State and others defendants were initially charged under the Money Laundering Act 2004 which attracts a mandatory minimum term of imprisonment of "not less than 2 years or more than 3 years." The charges involved the 1st defendant and corporate entities laundering funds belonging to Bayelsa State Government to purchase several properties and transferring funds to bank accounts in the United Kingdom.

The plea and conviction of the 1s defendant followed the pattern of the cases earlier discussed. There was no formal plea agreement. The 1st defendant pleaded guilty after the prosecution had amended the charges. Counts 1-6 charged the 1st defendant with failure to make full disclosure of assets and liabilities contrary to section 27(3)(a) of the EFCC Act an offence punishable by up "to imprisonment for a term of five years." The 1st defendant pleaded guilty and was sentenced by the trial Judge Hon Justice M.L. Shuaibu to two years imprisonment on each of the 6 counts with the sentences to run concurrently. The court also ordered the forfeiture of properties listed in the judgment to the Bayelsa State Government. The 2nd to 7th defendants pleaded guilty to counts 7 – 33 involving allegations of money laundering. The court convicted the defendants and ordered that the companies be wound up and all their assets be forfeited to the FGN. Various properties listed in the judgment were also ordered by the court to be forfeited to the FGN.

1.3.4 *Federal Republic of Nigeria v. Lucky Nosakhare Igbinedion & Anor*[15]

The 1st defendant (former Governor of Edo State) was charged with the 2nd defendant (a corporate entity) with 191 counts of offences bordering on corruption, money laundering and stealing of Edo State Government funds. Some of the charges include counts of stealing under section 390(5) of the Criminal Code which attracts imprisonment of up to seven years. Charges were also brought under sections 14(1) and 16 of the Money Laundering Act 2004 attracting imprisonment for a term "of not less than 2 years or more than 3 years," and a term

[14] See Certified True Copy of the Judgement of Honourable Justice M L Shuaibu of the Federal High Court holden at Lagos Unreported in Charge No. FHC/L/328C/2005 *Federal Republic of Nigeria v. Chief Diepreye Solomon Peter Alamieyeseigh* delivered on 26 July 2007 (Judgment No. 4).

[15] See Certified True Copy of the Judgement of Honourable Justice A Abudu-Kafarati of the Federal High Court holden at Enugu Unreported in Charge No. FHC/EN/6C/2008 *Federal Republic of Nigeria v. Lucky Igbinedion & Anor*. delivered on 18 December 2008 (hereinafter "Judgment. No. 5").

of "not less than 5 years or to a fine equivalent to 5 times the value of the proceeds of the criminal conduct" respectively.

Following the pattern of the earlier cases there was no formal plea agreement between the parties. The prosecution filed an amended charge containing 24 counts. The 1st defendant who can be described as the mastermind of all the offences was only charged with a solitary count of neglecting to make a declaration of his interest in an account with Guaranty Trust Bank contrary to section 27(3) of EFCC Act. All that transpired in court from the transcript of the judgment and the proceedings is the entering of a guilty plea by the defendants, conviction, *allocutus* and the passing of sentence by the court.[16]

The 1st defendant was convicted and sentenced to a fine equal to the amount contained in the account that he failed to declare; the sum of N3, 357, 524. 16 for an offence which attracts imprisonment for up to five years. The trial Judge Hon Justice A. Abdu-Kafarati did not make any attempt to articulate the reasons why the penalty of fine was imposed without any custodial sentence. The 2nd defendant a corporate entity was wound up and its assets forfeited to the FGN. A total sum of N500, 000, 000 (Five Hundred Million Naira) fine was imposed on the 2nd defendant.

1.3.5 *Federal Republic of Nigeria v. Dr (Mrs) Cecilia Ibru*[17]

The defendant was until 14 August 2009, the Chief Executive Officer and Group Managing Director of Oceanic International Bank Plc (Oceanic). An examination of the books of Oceanic by the Central Bank of Nigeria revealed that it was in a grave financial situation. Criminal investigation was commenced into the management of the affairs of Oceanic and its subsidiaries by EFCC and the Securities and Exchange Commission (SEC). Criminal charges were subsequently preferred against the defendant in Charge No. FHC/L/297C/09.

A formal Plea and Settlement Agreement between the Attorney General of the Federation and the defendant was concluded and filed in court. The monetary value of the financial impropriety in the amended Charges is over N170, 000, 000, 000 (One hundred and

[16] *Ibid.*
[17] See Certified True Copy of the Judgement of Honourable Justice Dan D Abutu Chief Judge of the Federal High Court holden at Lagos Unreported in Charge No. FHC/L/297C/2009 *Federal Republic of Nigeria v. Dr (Mrs.) Cecilia Ibru* delivered on 8 October 2010 (Judgment No. 6).

seventy billion Naira). The amended charges consisted of various counts involving financial malpractices and insider dealings in securities in contravention of different laws.

The plea agreement recommended the imposition of a term of imprisonment of six months and the forfeiture of assets.[18] The defendant pleaded guilty and was convicted of offences charged under Counts 14, 17 and 23 out of the 25 counts indicated on the Amended Charge. On Count 14 the defendant was sentenced to 6 months imprisonment for an offence which under sections 15(1)(b) and 16(1)(a) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act [19] (Failed Bank Act) attracts a punishment of "imprisonment not exceeding five years without an option of fine." On count 17 the defendant was sentenced to six months imprisonment for an offence under section 28(1) & (3) of the Banks & Other Financial Institution Act,[20] (hereafter BOFIA) which attracts a punishment of N1000.00 fine or imprisonment for five years or both. On count 23 the defendant was sentenced to six months imprisonment for an offence which under sections 15(1)(a)(i) and 16(1)(a) of the Failed Banks Act attracts a punishment of "imprisonment not exceeding five years without an option of fine." In addition to the sentences which the court ordered should run concurrently, the court also ordered the forfeiture of assets listed in Schedule VI of the Plea Agreement. The forfeited assets included ninety four real properties located in Nigeria and overseas and shares in several companies. The court also made an order directed at the Nigerian Prison Service as follows:

> "That the Prison authority shall, not later than two hours after receiving the convict into their custody take the convict to Reddigton Hospital, Victoria Island, Lagos from where she was brought to court, to continue her treatment in that hospital until she is certified fit by the hospital authority to continue her sentence".[21]

The members of the public were understandably enraged at the punishments imposed by the court on the defendant. One commentator opined that the punishment imposed as a result of the plea bargain with the defendant "did not fit the crime because those who are much less privileged serve much longer jail sentences for petty theft."[22] Another commentator expressed

[18] *Ibid,* at 15, para. 4.1.
[19] Cap. F2, Laws of the Federation of Nigeria, 2010.
[20] Cap.B3 Laws of the Federation of Nigeria, 2010.
[21] See Judgment No.6, above at (n 17) 2.
[22] T Edwards "Nigeria: Farida Waziri's EFCC- A Bungled Plea Bargain" http://allafrica.com/stories /201101 031195.html accessed 20/1/2016.

the view that plea bargain is vaccination against punishment.[23] Strong views have also been expressed about the legality of plea bargaining. The former Chief Justice of Nigeria (CJN) Hon Justice Dahiru Musdapher has argued that plea bargain is "a novel concept of dubious origin," that "has no place in our law- substantive or procedural."[24] The former CJN recently reaffirmed his view about the illegality of plea bargaining by opining that "…plea bargain is indeed a threat to our criminal justice system in Africa."[25]

1.3.6 *Federal Republic of Nigeria v. John Yusuf*[26]

The last of the plea bargained cases that attracted public opprobrium is the one involving Mr. John Yusuf a former director of the Police Pension Office. He was charged with several counts of offences for defrauding the office and pensioners of N27.2 billion Naira. He was convicted after pleading guilty to counts 18, 19 and 20 in which he was alleged to have connived with others to convert N24.2 billion Naira, N1.3 billion Naira and N1.7 billion Naira, belonging to the Pension Office to personal use.

He was convicted of the three counts and sentenced to imprisonment for two years each on each of the counts (sentences to run concurrently) with an option of N250,000 (two fifty thousand naira). In addition, the defendant was ordered to forfeit landed properties located in Abuja.

Against the background of the various views expressed about the legality of plea bargaining and the punishments imposed in some of the aforementioned cases, the paper addresses the following issues raised by the decisions and the public outcry against the use of plea bargaining.

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[23] L Obijofor "Plea Bargain-Vaccination Against Punishment" http://www.nigeriavillagesquare.com /articles/levi-obijiofor/plea-bargain-vaccination-against-punishment.html accessed 20/1/2016.
[24] I Nnochiri "CJN Abolishes Plea Bargain" (16 November 2011) *Vanguard* http://www.vang uardngr.com/2011/11/cjn-abolishes-plea-bargain/ accessed 20/1/2016.
[25]The former Chief Justice of Nigeria reaffirmed his opposition to plea bargaining at a forum held on Alternative Dispute Resolution Summit organised by the Negotiation and Conflict Management Group and the National Judicial Institute, Abuja on November 16, 2012- see I. Chiedozie, "EFCC, ex-CJN Disagree on Plea Bargain" (16 November 2012) *The Punch* http://www.punchng.com/news/efcc-ex-cjn-disagree-on-plea-bargain/ accessed 20/1/2016).
[26]I Chiedozie "Nigerian Wonder: N27bn Pension Thief Gets N750,000 fine" (29 January 2013) *The Punch*, http://www.punchng.com/news/nigerian-wonder-n27bn-pension-thief-gets-n750000-fine/ 20/1/2016.

1.4. Legal Issues Relating to Use of Plea Bargaining in Nigeria

A number of legal issues have been raised arising from the use of plea bargaining in Nigeria. Is plea bargaining constitutional? Is plea bargaining conceivable under existing procedural laws governing administration of criminal justice in Nigeria. Are there any justifications for plea bargaining in Nigeria? Are the punishments imposed in plea bargained cases adequate or is plea bargaining a vaccination against punishment? This part examines the aforementioned issues.

1.4.1 Constitutionality of plea bargains

The issue of the legality or constitutionality of plea bargain is perhaps the most serious objection against it. There is no express or implied constitutional prohibition of plea bargaining. The Constitution however vests the Attorney General of the Federation and of the States[27] with prosecutorial discretionary powers. Prosecutorial discretion is the power of the prosecutor to enforce the laws selectively.[28] It begins with the decision to initiate or decline prosecution and extends through sentencing.[29] This includes the power to institute, take over, and discontinue criminal prosecution.[30]

It has been argued that some form of plea bargaining is legally conceivable under the general discretionary powers of the Attorney General and his officers.[31] The Attorney General may exercise his discretion to enter into negotiations with an accomplice to a crime if the

[27]See sections 174 and 211 of the 1999 Constitution. See generally on the office and duties of the Attorney General T. Elias "The Office and Duties of the Federal Attorney- General in Nigeria" (1972) 6 *Nigerian Law Journal*, 149.
[28]S. Lezak & M. Leonard "The Prosecutor's Discretion: Out of the Closet- Not out of Control" (1984) 63 *Oregon Law Review*, 247.
[29] *Ibid.*
[30] See sections 174 and 211 of the 1999 Constitution. The power to discontinue prosecution has generated some controversies in Nigeria. See generally G. Sanyaolu "The Attorney General's Unfettered Discretion" (1986) 1 *The Legal Practitioners' Review* 1986, 3 and O. Oyewo "Power of the Attorney General in the Administration of Justice: Establishing Constitutional Control" (1997) 1 *The Journal of Public Law* at 111; Hon. Justice A. A. M. Ekundayo "Constitutional Provision of the *Nolle Prosequi* – A Blessing or a Curse" (1988, Nigerian Institute of Advanced Legal Studies) 18. see R Osamor "The Unbridled Powers of Attorney Generals: Threat to Democracy?" (2008) 1 *UNAD J.P.C.L.* 100 and Y. Hambali "The Attorney-General and his Constitutional Powers of Public Prosecutions in Nigeria" (2008) 1 *UNAD J.P.C.L.* 161-184.
[31] A. O. Bello, (n 4) 49. The argument that the discretionary powers vested in the AG under the Constitution encompasses the power to enter into a plea bargain agreement has been supported by A. Kalu, See A. Kalu "The Role of Plea Bargaining in Modern Criminal Law" in E Azinge & L Ani (ed) *Plea Bargaining in Nigeria:* and *Law and Practice* (2012, Nigerian Institute of Advanced Legal Studies) 134, at 140, 141 and 146.

interest of justice and public interest so requires. Such negotiations are usually accompanied with an understanding that lesser charges would be brought against the cooperating defendant without whose assistance the State may not be able to successfully prosecute other suspects who may be the masterminds. This practice which is accepted by English Courts at the period of early common law[32] is also sanctioned and recognised in the United States of America.[33] This is evidently a form of plea bargain.

The support given to the practice of plea bargain in the U.S by the Supreme Court in a series of cases[34] has however not succeeded in stifling the clamour of those who have argued that plea bargaining is unconstitutional.[35] Plea bargaining implicates some constitutional rights of defendants. The rights implicated by plea bargaining in the U.S. Constitution and similar rights under Nigerian Constitution are: (i) presumption of innocence until proven guilty;[36] (ii) the right to a fair hearing in public; [37] (iii) the privilege against self-incrimination;[38] and (iv) the right to examination of witnesses called by the prosecution.[39] When a defendant enters into a plea agreement, the presumption of innocence in his favour is displaced. The prosecution no longer has to discharge the burden to prove beyond reasonable doubt that the defendant has committed the offence alleged. A plea agreement is an act of self-conviction by a defendant which negates his right against self-incrimination.

The crucial issue here is whether an agreement to plea bargain by a defendant can be said to be a violation of these rights or whether these rights are rights which a defendant is permitted to waive. In *Ariori v. Elemo.*[40] the Supreme Court drew a distinction between fundamental rights that are for the sole benefit of the private individual and those that are for the benefit of the litigant and the public. The Court held that rights for the sole benefit of the

[32]See 2 M. Hale *The History of the Pleas of The Crown* at 235. quoted in Y. Beeman, "Accomplice Testimony Under Contingent Plea Agreements" in (1987) 72 *Cornell Law Review*, 1

[33] Courts in the USA sanction accomplice plea agreements and recognise them as proper exercise of prosecutorial authority, see *United States v. Boley* 730 F.2d 1326, 1333-1334 and *United States v. Librarch* 536 F.2d 1228 (8th Cir.).

[34] *Santobello v. New York* 404 U.S. 257, (1971), *Corbitt v. New Jersey* 439 U.S. 212 (1978) and *Bordenkircher v. Hayes* 434 U.S. 357 (1978).

[35] T. Lynch "The Case Against Plea Bargaining" (2003) 26 *Regulation* 24 (arguing that government officials use their powers to pressure people who have been accused of crime and who are presumed innocent to confess their guilt and waive their constitutional rights to a formal trial); see also "The Unconstitutionality of Plea Bargain" A Report by The President's Commission on Law Enforcement And Administrationof Justice , Task Force Report: The Courts (1970) 83 *Harv. L. Rev.*1387.

[36] S. 36(5).

[37] S. 36(4).

[38] S. 36(11).

[39] S. 36(6) (d).

[40] (2001) 36 WRN 94.

private individual can be waived while waiver of the second category of rights is not permissible. The court gave as example the right to speedy trial which a litigant can waive by asking for adjournments of the case. The Court however ruled that waiver of a right to a speedy trial is not permissible where the adjournments requested is of such a nature that the court will lose the advantage it has of accurate assessment of the witnesses it had observed in the course of trial. The court noted that such an adjournment would lead to injustice and that it is against public policy to compromise illegality.

It is submitted that the aforementioned constitutional rights of defendants implicated in plea bargaining falls within the first category of rights as classified by the Supreme Court. Consequently, plea bargaining is constitutional in Nigeria

1.4.2 Plea bargaining and procedural laws

This section interrogates the claim by the former Chief Justice of Nigeria Hon. Justice Dahiru Musdapher that plea bargaining "has no place in our law- substantive or procedural."[41]

Section 14(2) EFCC Act empowers the Commission (subject to the prosecutorial powers of the Federal Attorney General) to compound any offence punishable under the EFCC Act by accepting such sum of money as it thinks fit not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence. This provision enables the Commission to compound cases arising under the Act.[42] Section 14(2) is silent on what the EFCC should do before or after compounding a case. The EFCC as a prosecuting authority necessarily has discretionary power to institute criminal proceedings subject to the AGF's constitutional powers. A combination of the discretionary powers of the EFCC together with the power to compound offences in the author's views encompass the power to plea bargain criminal charges with defendants.

With the exception of Lagos State Administration of Criminal Justice Repeal and Re-enactment Law 2011 (hereafter ACJ 2011), the Criminal Procedure Act,[43] the Criminal Procedure Codes and other Laws regulating criminal procedure in the various states have no

[41] I. Nnochiri "CJN abolishes plea bargain" (16 November 2011) *Vanguard* http://www.vang uardngr.com /2011 /11/cjn-abolishes-plea-bargain/ 20/1/2016.
[42] This may be contrasted with the provision of sections 127 and 128 of the Criminal Code Schedule to the Federal Criminal Code Act Cap. C38 Laws of the Federation of Nigeria 2010.
[43] Cap. C 41 Laws of the Federation of Nigeria 2010.

direct provision for plea bargaining. There are however provisions which may produce the same result as plea bargain. The Criminal Procedure Laws permits a person standing criminal trial to enter a guilty plea. In such a case, the trial judge is required to verify the facts admitted by the defendant and ensure that it amounts to an admission of all the essentials elements of the offence before proceeding to conviction and sentence.[44] There is no statutory authority in Nigeria[45] that a person convicted pursuant to a guilty plea should receive lenient punishment from the court. It is however generally accepted that a guilty plea is a well-established reason for reducing sentence.[46] A defendant may choose to plead guilty without any negotiation between the prosecutor and the defence.[47] A guilty plea may be the result of informal or formal plea bargain between the prosecution and the defence. The distinction between an ordinary guilty plea and a guilty plea occasioned by a plea bargain is that the latter involves a promise of concession by the prosecution either in the form of dropping more serious charges or an agreement to a reduced sentence. The practical result of either of the two is that the defendant is likely to get a reduced sentence.

Furthermore, in a charge bargain the prosecutor may withdraw some of the charges against the defendant if he agrees to plead guilty to lesser charges. This usually takes place where the plea agreement is concluded after the defendant has been formally arraigned and charged. If the plea agreement is concluded before the filing of charges the prosecution simply files the charges reflecting the agreement. The Criminal Procedure Act[48] permits the variation of charges on the grounds that the charge is "imperfect or erroneous." The provision does not contemplate varying charges for the purpose of enabling the prosecution and the defence to conclude or effect a plea agreement. On the hand if it is agreed as earlier argued that the Attorney General and the prosecution have the discretion to determine which charges to bring against defendants, that discretion may be exercised with or without a clear provision in the Criminal Procedure Law.

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[44] See section 213 of Administration of the Criminal Justice Repeal and Re-enactment Law of Lagos 2011; see also section 318 of the Criminal Procedure Act, Cap C41 Laws of the Federation of Nigeria 2010.

[45] In England there is statutory authority for the practice of reducing sentence upon a guilty plea, see Section 48 of the Criminal Justice and Public Order Act 1994.

[46] See S. Seabroke & J. Sprack, *Criminal Evidence Procedure: The Essential Framework* (1996, Black Stone Press Ltd) 385-386; see also J. Israel, Y. Kasmisar & W. LaFave *Criminal Procedure and the Constitution* (USA, West Publishing Company, 1991) at 541(noting that sometimes there is no actual bargaining between the defendant and the prosecutor and the defendant enters a plea of guilt merely because it is generally known that this is the route to a lesser sentence).

[47] S Reid *Criminal Justice,* (n 6) 234.

[48] See the provision of section 162 of the Criminal Procedure Act, Cap C41 Laws of the Federation of Nigeria 2010.

There are no provisions in any existing procedural rules authorising a Court to take cognisance of a formal plea agreement (except ACJ 2011). The first case to the knowledge of the writer where a plea agreement was formally executed between the prosecution and the defence, filed in court and acted upon was in the case of *FRN v Dr. (Mrs) Cecilia Ibru.* In cases where a formal plea agreement is not filed and the court allows the prosecution to withdraw some charges and substitute new charges pursuant to a charge bargain, the court has given effect to a plea agreement.

1.4.3 Any justification for plea bargains in Nigeria

The need to promote the efficiency of the criminal justice system has been identified as the overriding cause for entering plea bargaining negotiations.[49] Plea bargaining enables prosecutors to process thousands of criminal cases. Available data indicates that in the U.S. in the Federal District Courts in 1998 alone, 69,769 cases were filed and 60,958 entered plea agreements.[50] It is generally accepted that without the plea bargaining option the legal system would simply "crumble under the weight of cases requiring juries and judges."[51]

The administration of criminal justice in Nigeria has been plagued with a number of problems. These include delays in the administration of justice, inadequate judicial infrastructure (both human and material) to enhance speedy determination of cases, high crime rate,[52] overburdened prosecutors with heavy caseload, and unavailability of funds to provide the support services required to ensure smooth administration of criminal justice. Plea bargaining provides an option to address some of the problems plaguing the administration of criminal justice particularly the problem of heavy criminal caseload and cost to tax payers of protracted criminal trials.

While it is important to carry out in depth and detailed statistical surveys to verify some of the problems confronting the administration of criminal justice particularly the relationship between the volume of criminal cases and the time it takes to conclude criminal cases, there are some indications of delays in criminal trials in Nigeria. A survey of the length of time it

[49] See F. Herssick III and R. Saujani "Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defence Counsel, and the Judge," (2001-2002) 16 *B.Y.U Journal of Public Law* 189.
[50] See C. Pastore and K. Macguire, (ed) *Sourcebook on Criminal Justice Statistics,* (United States Dept. of Justice, 1999) 419, Table 5.21, quoted in F Herssick III and R Saujani *ibid*, 192.
[51] F Herssick III and R Saujani, (n 49).
[52]See Summary of Crime Statistics in Nigeria, http://www.cleen.org/crime.html accessed 20/1/2016.

took to process one hundred and thirty criminal cases from the trial court to the Supreme Court revealed that it took an average of eight years.[53] It took an average of two years and eight months to complete a trial at the High Court.[54] A number of reservations may be made on the result of the survey. First, the survey only covered reported criminal cases that went all the way to the Supreme Court. Unreported cases obviously have been omitted. Second, the survey did not cover cases in respect of which there is no appeal. Third, there is no indication of the geographical spread of the cases. While there may be heavy caseload in heavily populated cities, the same cannot be said of other less populated cities. The survey therefore cannot be relied on as presenting a good representation of the length of trials for criminal cases in Nigeria. The reservations notwithstanding, the survey demonstrates the problem of delay in criminal trials.

1.4.4 Adequacy of punishments imposed in plea bargained cases

With the exception of *Nwude's* case, members of the public were enraged at the punishments meted out to the convicts in the cases earlier reviewed. The AGF echoed public concerns relating to the plea bargained cases..[55] While a comprehensive discussion of the objectives of criminal law is beyond the scope of this paper, it is important for the purpose of the appraisal of the punishments imposed in the plea bargained cases to highlight the general principles.

The objectives of criminal law are protection of the offender, punishment of the offender and the protection of the community[56] amongst others. With respect to punishment of the offender, punishment is the infliction of consequences designed to be unpleasant on the ground that the offender deserves such treatment.[57] The goals of punishments have been explained in terms of retribution and the utilitarian objects of disablement, deterrence, rehabilitation or reform, denunciation and education.[58] The problem however is that the courts

[53] See J. Ogunye, *Criminal Justice System in Nigeria –The Imperative of Plea Bargaining* (Lagos: Lawyers League for Human Rights and Open Society Initiative for West Africa: 2005) 150-159.
[54] The computation was arrived at by adding up the length of time it took to conclude the cases and dividing the total with the number of cases.
[55] T. Agbaegby "The Reforms That Will Checkmate EFCC" (21 August 2011) *Newswatch*, http://www. news watchngr.com/index.php?option=com_content&task=view&id=3434&Itemid=1 accessed 20/1/2016.
[56] D. Lanham et al *Criminal Laws in Australia,* (The Federation Press, NSW, Australia, 2006) 1-7.
[57] *Ibid*. See a detailed definition of punishment in HLA Hart, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility: Essays in the Philosophy of Law,* (Oxford University Press, 1968,) 1.
[58] C. O. Okonkwo (ed), *Okonkwo & Naish on Criminal Law in Nigeria,* (Spectrum Books Limited, Nigeria, 1980) 28- 37.

when sentencing do not always have these principles or goals in mind.[59] Sentencing is the way in which principles of punishment are applied to individual cases.[60] Adeyemi, defines punishment as "…an order which is definite in its nature, type and quantum, whether it is made mandatory by law or it is fixed by the court or tribunal at its discretion (made at the conclusion of trial consequent upon a finding of guilt)".[61] This definition covers cases where the sentence is made mandatory by law precluding any judicial discretion.[62] Sentencing also cover cases in which the nature and quantum of sentence is within judicial discretion. Courts in exercising judicial discretion must aim to achieve the objectives of the criminal justice system.[63] The process of reaching a verdict on sentencing is twofold. First, the court must decide from amongst the conflicting principles of punishment which one should be applied. Second, the court must determine the type and quantum of sentence that will accord with it.[64]

In the absence of statutory based Sentencing Guidelines in Nigeria, judicial authorities have developed sentencing guidelines. First, is the principle of proportionality stipulating that a sentence must fit the crime. The more serious the crime is, the more severe the sentence.[65] Despite the fact that the proportionality principle is one of the main goals of sentencing, sentences vary markedly not only across, but within jurisdictions.[66] Second, the Sentencing Guidelines developed by judicial authorities include: character and record of the offender, position of the offender amongst his confederates and rampancy of the offence.[67]

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[59] *Ibid*, 28.
[60] *Ibid*, 37.
[61] A. Adeyemi "Administration of Justice in Nigeria: Sentencing" (hereafter "sentencing") in Osinbajo & Kalu (ed) *Law Development and Administration in Nigeria* (Lagos: Federal Ministry of Justice, 1990) 109.
[62] An example of mandatory sentence is the sentence of death upon conviction for the offence of murder- see section 319 of the Criminal Code, Schedule to the Criminal Code Act, Cap. C 38 Laws of the Federation of Nigeria 2010. Apart from mandatory sentences, other statutory limits on sentencing discretion are: (i) cases where there is a jurisdictional limitation on the court's discretionary powers; (ii) limitations imposed by the offence –creating statute which include: (a) statutory maximum; (b) Statutory minimum; (c) range between statutory minimum and statutory maximum; and (d) sentence of imprisonment without option of fine. For a discussion of these other statutory limits See A Adeyemi "The Nigerian Law Reform Commission: Sentencing Guidelines Project" (hereafter A Adeyemi, Abuja) being a Commissioned Research Paper presented at the Stakeholders Meeting on Sentencing Guidelines in Nigeria organised by the Nigerian Law Reform Commission held on 14 November 2012 at Conference Room 3rd Floor Phase 3, Podium J, Federal Secretariat, Abuja, Nigeria, 6-8.
[63] See A Adeyemi, Abuja *ibid*, 2.
[64] C O Okonkwo (ed) (n 58) 39.
[65] See A. Adeyemi, Abuja, (n 62) 9. See for judicial authorities espousing the principle in Nigeria – *Mohammadu v. COP* [1969] 1 All NLR 465, *Udoye v State* [1967] NMLR 197 and *Adeyeye & Anor. v. State* [1968] NMLR 267.
[66] M. Bagaric "Proportionality in Sentencing: its Justification, Meaning and Role" (2000) 12 *Current Issues Cri. Just.*143.
[67] A. Adeyemi, (n 63) 11-15.

A court in sentencing an offender has a duty to write a judgment which must statutorily "contain the point or points for determination, the decision thereon and the reason for the decision."[68] The practice however as noted by Adeyemi[69] and Okonkwo[70] is that the courts do not pay enough attention to articulate the reason(s) for the sentences which they impose. This often gives the impression that the decisions are arbitrary.

In the plea bargained cases, the courts failed to articulate the reason for the sentences. In *Nwude's* case the court did not clearly articulate the reasons for the sentences imposed on the 2nd and 4th defendants. It merely alluded to the:

> "…demeanour and general comportment of the 2nd accused person since the inception of this case which shows sobriety and penitence. However, the message must still be sounded that no one must be permitted to profit from criminality".[71]

The court failed to address the sentencing principles that should apply where the defendant voluntarily pleads guilty to a criminal charge.

In its second judgment delivered against the 1st, 3rd, 5th, 6th and 7th defendants in *Nwude's* case, the trial Court made some comments about the reasons for the imposition of sentence. The court noted the valuable time and resources saved by defendants pleading guilty. The court noted the need to strike a balance between the element which motivated the offences committed by the defendants and the need to impose sanctions that would "sing post to society that crime does not pay and that certain conduct are simply not acceptable."[72] The court sentenced the 1st defendant to 5 years without option of fine in addition to forfeiture orders. The judgment in *Nwude's* case is perhaps a testimony to the fact that substantial sentence can be imposed pursuant to a plea agreement. The decision in the author view refutes the allegation that plea bargain is a vaccination against punishment. A sentence of five years imprisonment out of a maximum of seven years under section 419 of the Criminal Code, Schedule to the Criminal Code Law of Lagos State, 2004 cannot by any stretch of imagination be described as "a vaccination against punishment." In the spate of criticism that followed the plea bargained cases no mention was made of the substantial sentence imposed in *Nwude's* case. The sentences

[68] Criminal Procedure Act, Cap, C41 Laws of the Federation of Nigeria 2004, s. 245.
[69] See A. Adeyemi, Abuja, (n 62) 16-17.
[70] C. O. Okonkwo (ed) (n 58) p. 40.
[71] See Judgment No.1, (n 8) 1.
[72] See Judgment No. 2 (n 8) 1.

imposed in *Nwude's* case is a testimony to the fact that plea bargaining can produce a fair and acceptable result.

In *Tafa Balogun's* case the court made some comments about what it considered factors that influenced its decision. The Court noted as follows:

"Bearing in mind that he is a first offender, and has shown remorse all during the trial, and did not waste the time of the court, I find it necessary to send a signal to the whole country that no matter how highly placed, nobody is above the law and that this country is serious in the war against corruption".[73]

The court then sentenced him to six months imprisonment in addition to an order for forfeiture of assets estimated to be in excess of $150 million.[74] In addition, the court imposed a fine of N500,000 (Five Hundred Thousand Naira) for an offence punishable by up to five years imprisonment under section 27(3) of the EFCC Act. The attempt by the court to state the factors that influenced its decision to impose sentence while commendable is not sufficient. The court should have articulated the basis for the decision to impose a punishment of six months instead of the maximum punishment of five years prescribed for the offence by Law. Lucky Igbinedion for the same offence was convicted and sentenced to a fine equal to the amount he failed to declare. There was no articulation of the rational for the sentence in the judgement. For a similar offence, Diepreye Alamieyeseigha was also convicted and sentenced to two years imprisonment and in addition forfeited assets estimated at around $55 million.[75] The court did not articulate sentencing principles that formed the basis of its decision to impose a term of imprisonment of two years. The only comment in the judgment that bear any semblance of relationship with sentencing principles is that "The respective pleas in mitigation on behalf of the convicts would be taken into account in passing the sentence particularly the fact that the convicts are first offenders".[76]

The decision in *Yusuf's* case coming after all the earlier cases understandably attracted considerable public opprobrium.[77] While conceding that the interest of justice is served by the

[73] Se Judgment No. 3, (n 12) 3.
[74] See D. Iriekpen and F. Muraina, "Nigeria former Governors in 'Plea Bargain' With EFCC" (27 July 2007) *Thisday*.
[75] T. Ahemba "Nigeria accuses ex-governor of stealing $55 million" (20 December 2005) *Reuters* http://www. redorbit.com/news/international/335827/nigeria_accuses_exgovernor_of_stealing_55_mln/ accessed 20/1/2016.
[76] See Judgment No. 4 (n 14) 6.
[77] The sentence was described as " a slap on the wrist", see O. Ezigbo, "Pension Scam: CNPP Slams Judge Over Lenient Sentence" available at http://www.thisdaylive.com/articles/pension-scam-cnpp-slams-judge-over-lenient-sentence/137786 accessed 20/1/2016. Following public outcry John Yusuf was arrested for some other

conviction of the defendant and the forfeiture of stolen assets, the lack of prison sentence is the focus of public condemnation. Perhaps a more serious underlying problem is the failure of judicial sentencing principles to provide guidance on what the court should do when a defendant pleads guilty and the appropriate amount of discount in punishment.

With the lack of articulation of principles underlying sentencing in the above cases, it is difficult to defend the courts from any allegation or perception that the judgments were arbitrary and did not meet the justice of the case. The same trend of perception of arbitrariness came to the fore when the court sentenced Cecilia Ibru to six months imprisonment. The court accepted the recommendation of six months imprisonment contained in the Plea and Settlement Agreement without articulating the reasons or principles that informed the decision to impose a sentence of six months. The author agrees with the view that the first indispensable step is for the courts to state reason or reasons for the sentences which they impose and make the process of sentencing more transparent.[78]

In the absence of specific binding Sentencing Guidelines providing objective criteria to measure the quantum of sentence that should be imposed for offences where the defendant pleads guilty, there would always be divergent views as to the appropriateness of a sentence. Newspaper reports of sentencing which to a large extent shapes public perception about sentencing is not always a good yardstick to measure the appropriateness of a sentence. Research has shown that the media often do not pay enough attention to the sentencing process resulting in very incomplete picture of sentencing.[79] Newspaper reports have been found to generally omit many points which weigh with the judge in determining what sentence to pass.[80]

The general impression from public comments and perception about the punishments imposed by the courts in the plea bargained cases is that the sentences of imprisonment were too lenient. Underlying this perception is the assumption of the efficacy of imprisonment. This assumption is however not supported in the literature. Adeyemi, has argued that imprisonment which has become the most frequently used disposition measure by Nigerian courts since

offences he allegedly committed, see J. Alechenu, F. Olokor & I. Chiedozie, "27bn Pension Thief Re-arrested After Outcry" http://www.punchng.com/news/n27bn-pension-thief-rearrested-after-outcry/ accessed 20/1/2016.

[78] A Adeyemi, Abuja, (n 62) 17.

[79] J. Roberts "Sentencing, Public Opinion and the News Media" (hereinafter J Roberts "Sentencing") (1995) 26 *Revue General De Droit,* 116. See generally also J Roberts & Anthony Doob "Sentencing and Public Opinion: Taking False Shadows for the True Substances" (1989) 27 *Osgoode Hall L. J.* 491.

[80] J. Roberts "Sentencing" *Ibid.*

1962[81] lacks both deterrent and reformative value.[82] A positive development from all the plea bargained cases is that in addition to the sentence of imprisonment, the courts also ordered restitution and forfeiture of properties to the victims of the crime.

1.5 Options for Regulating Plea Bargains

Plea bargaining has continued to be controversial despite its prevalence in the American justice system. This has led some critique to call for its abolition.[83] The introduction of plea bargaining in Republic of Georgia and its initial use solely in corruption cases attracted similar reactions to the introduction of plea bargaining in Nigeria. Its introduction in Georgia in 2003 vide the Criminal Procedure Code was perceived as just another form of corruption in an already corrupt legal systems.[84] Government undertook some reforms to address the concerns principal among which is the adoption of Criminal Law Guidelines modelled on the US Sentencing Guidelines.[85]

The challenge however is that where factors that make resort to plea bargaining imperative exists, whether the legal system permits it or not, informal plea bargaining will evolve. The case of Japan is good illustration of this phenomenon. Despite the resistance to institutionalised plea bargaining, key players in the Japanese legal system have sanctioned alternative kinds of bargaining in response to the demands for efficiency.[86] The main response has been a system of "tacit" bargaining, in which there is an implicit, often unspoken, exchange of the defendant's confession for lesser charges or recommendation of a more lenient sentence by the prosecutor.[87] Prakash highlighted the disadvantages of tacit bargaining, arguing that it exploits existing vulnerabilities of the Japanese justice system and its nonbinding nature limits its effectiveness.[88] Consequently, he argues that a system of institutionalised plea bargaining

[81] See A. Adeyemi, "Sentencing" (n 62) 118. See also A. Adeyemi "Scientific Approach to Sentencing" in T O Elias (ed) *Nigerian Magistrate and the Offender* (1970, Ethiope Publishing Corporation) 5, 52-53.
[82] A. Adeyemi, "The Problem of Imprisonment in the Nigerian Penal System" in A Popoola & E Adodo (ed) *Current Legal Developments in Nigeria- Essays in Memory of Professor J D Ojo* (Obafemi Awolowo University Press Limited, 2007) 23.
[83]See S.Schulhofer "Plea Bargaining as Disaster" (1992) 101 *Yale L.J.* 1979. See also T. Lynch, (n 35) 46 and 27.
[84] C. Alkon "Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems" (2010) 19 *Transnat'l L. & Contemp. Probs.* 355, 365-366.
[85] *Ibid*, 367.
[86] P. Prakash, "To Plea or Not to Plea: The Benefits of Establishing an Institutionalised Plea Bargaining System" (2011) 20 *Pacific Rim Law & Policy Journal*, 607, 609.
[87] *Ibid.*
[88] *Ibid*, 611.

would provide protection for defendants' rights and level the playing field between defence and prosecution by yielding enforceable plea agreements through a negotiated exchange of benefits. There is growing consensus among academics in Nigeria that plea bargaining if properly regulated can promote efficiency and enhance the dispensation of criminal justice.[89] What follows is an exposition of the measures that can assist to ensure that plea bargaining is properly regulated in Nigeria.

1.5.1 Establishing a statutory framework for the regulation of plea bargains

There was no direct legislative provision sanctioning plea bargain at the time the plea bargained cases were concluded. While the paper contended earlier that there are existing provisions which arguably can support some form of plea bargaining, the need for an express statutory provision to regulate such a novel concept in the administration of criminal justice in Nigeria cannot be over-emphasised. A statutory provision will set out clearly the procedure, nature and the form of a plea bargain agreement. A statutory framework will protect the rights of defendants to an informed and voluntary plea agreement. In addition, it will define the role of the parties in the plea bargain process. An examination of the provisions of the Lagos State Administration of Criminal Justice (Repeal and Re-enactment) Law 2011[90] (ACJ Law 2011) reveals how the Lagos law has made provisions clarifying the above issues. Section 270 of the Administration of Criminal Justice Act 2015 provide a detailed procedure for plea bargaining modelled after the ACJ Law 2011.

(A) Procedure, nature and form of plea bargain

[89] A. Bello,(n 4) 78 and 79; A. Adeyemi "The Place of Plea Bargaining in the Criminal Process: The Nigerian Experience" Being a paper presented at the One-Day Conference on *International Law and Good Governance*, organised by the Nigeria Society of International Law, held at the Nigerian Institute for International Affairs, Victoria Island, Lagos, Nigeria on 28 November 2012, 18; A. Alubo, J. Barde & M. Zechariah "Plea-Bargain Mechanism in the Judicial Determination of Corruption Cases: A Critical Inter-Jurisdictional Assessment" in I Abdulquadir *et al* (ed) *Corruption and National Development* Proceedings of 46th Annual Conference of the Nigerian Association of Law Teachers Held 22 – 26 April 2013 at the University of Ilorin, Ilorin, Nigeria, 235 at 270-271; A. Chineyere, "Plea Bargain: Immunity From Punishment" in E. Azinge & L. Ani, (ed) *Plea Bargaining in Nigeria: Law and Practice* (Nigerian Institute of Advanced Legal Studies, Lagos, 2012) 266, 300 -301.

[90] The statutory framework for plea bargain was first introduced into Nigerian law vide ss. 75 and 76 of the Lagos State Administration of Criminal Justice Law 2007.

The ACJ Law 2011 vests the power to consider and accept a plea bargain with respect to any offence in the Attorney General of the State (AG).[91] It contemplate a charge and sentence bargain by the conjunction "and" joining the provision covering charge bargain with sentence bargain.[92] It is only a Law officer that can enter into a plea agreement[93] after consultation with the investigating police officer and if reasonably feasible the victim.[94] The complainant if reasonably feasible is also afforded the opportunity to make representation to the prosecutor regarding the content of the plea agreement and the inclusion in the agreement of a compensation or restitution order.[95] The plea agreement must be in writing and signed by the prosecutor, the defendant, the legal practitioner and an interpreter when required.[96] The plea agreement shall state that before its conclusion, the defendant has been informed –

(i) that he has a right to remain silent;

(ii) of the consequences of remaining silent; and

(iii) that he is not obliged to make any confession or admission that could be used in evidence against him.[97]

The plea agreement is also required to state fully the terms of the agreement and any admission made.[98] The above provisions are designed to ensure the protection of constitutional rights of defendants. It is counsel's duty to explain to defendants the implication of plea bargain on their constitutional rights.

(B) Role of the court in plea bargain

The court is not allowed to participate in plea discussions. The court may be approached in open court or in chambers regarding the contents of discussions and may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.[99] The court's general input in plea negotiation enables it to provide guidance of possible sentencing options and the possibility of the court accepting

[91] ACJ Law 2011, s. 75.
[92] ACJ Law 2011, s. 76(1)(a)&(b).
[93] ACJ Law 2011, s. 76(11).
[94]ACJ Law 2011, s. 76(2)(a) & (b).
[95] ACJ Law 2011, s. 76(3).
[96] ACJ Law 2011, s. 76(4)(c).
[97] ACJ Law 2011, s. 76(4)(a).
[98] ACJ Law 2011, s. 76(4)(b).
[99] ACJ Law 2011, s. 76(5).

the terms of the proposed agreement. Participation of judges in plea negotiations has been frowned at because defendants may feel that if they refuse an offer that has involved the participation of a judge they will face harsher punishment if convicted after a trial.[100] The ACJ Law 2011 anticipated this objection by providing that a new trial following a botched plea bargain must start *de novo* before court.[101]

The court inquire from defendants the correctness of the agreement,[102] verifies whether the defendant admits the allegations in the charge and the voluntariness of the plea.[103] If satisfied of the defendant's guilt, the court may convict the defendant on his guilty plea.[104] The court must find a factual basis for a guilty plea before entering judgment.[105] Where the court is of the opinion that the defendant cannot be convicted of the offence in respect of which the agreement was reached or that the agreement is in conflict with the defendant's rights, the court shall record a plea of not guilty in respect of such charge and order that the trial proceed.[106]

The court exercises the final discretion to impose a sentence pursuant to a plea agreement. Where the defendant is convicted, the court shall consider the sentence agreed upon in the agreement and if the court is—

(a) satisfied that such sentence is an appropriate sentence impose the sentence; or

(b) of the view that it would have imposed a lesser sentence than the sentence agreed upon in the agreement, impose the lesser sentence; or

(*c)* of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, it shall inform the accused of such heavier sentence considered to be appropriate.[107]

The above provision empowering the court to impose a lesser sentence than the sentence agreed upon in the plea agreement enables the court to intervene and protect defendants who for a variety of reasons might have agreed to terms, which on a fair consideration the court finds to be unfair. The Law also enables the court to intervene and protect the interest of the

[100] See S. Reid, *Criminal Justice*, (n 6) 237.
[101] ACJ Law 2011, s. 76(9)(b).
[102] ACJ Law 2011, s. 76(6).
[103] ACJ Law 2011, s. 76(7)(b).
[104] ACJ Law 2011, s. 76(7)(a).
[105] ACJ Law 2011, s. 213(2).
[106] ACJ Law 2011, s. 76(7)(b).
[107] ACJ Law 2011, s. 76(8)(a)(b) & (c).

society by ensuring that the sentence recommended in the plea agreement meets the justice of the case. [108] The Law gives a defendant who has been informed by the court of its decision of a heavier sentence two options. First, abide by the guilty plea as agreed upon in the agreement and subject to the defendant's right to lead evidence and to present argument relevant to sentencing, the court may proceed with sentencing. Second, the defendant may withdraw from the plea agreement and the trial shall proceed *de novo* before another court.[109]

Where a trial proceeds *de novo* after a defendant withdraws from the plea before another court

(a) no reference shall be made to the agreement;

(b) no admissions contained therein or statements relating to it shall be admissible against the defendant; and

(c) the prosecutor and the defendant may not enter into a similar plea and sentence agreement.[110]

1.5.2 Regulating plea bargains through sentencing guidelines

There are disparities in sentences imposed in the plea bargained cases. The most common justification for sentencing guidelines is the need to promote consistency. [111] Sentencing guidelines can promote more principled approach to sentencing, constrain prison population and ensure fairness. Before sentencing reform in USA at the federal level, federal sentences were described as "indeterminate and heavily dependent on the discretion of district court judges"[112] and this amongst other ills produced unjust disparities between similarly situated offenders.[113] Consistency is one of the main reasons cited for promulgating Judicial

[108] In USA judicial authority affirms the court's power to reject a plea bargain where sentence is too lenient. See decisions of Federal Courts *United States v. Bean* 564 F.2d 700 (5th Cir. 1977); *United States v. Adams* 634 F.2d 830 (5th Cir. 1981). See the following State Courts' decisions, *City of Akron v. Ragsdale* 399 N.E 2d 119 (Ohio Ct. App. 1978) and *People v. Ferguson* 361 N.E.2d 333 (III. Ct. App. 1977).
[109] ACJ Law 2011, s.76(9).
[110] ACJ Law 2011, s. 76(10).
[111] J. Roberts "Structuring Sentencing in Canada, England and Wales: A Tale of two Jurisdictions" (hereafter Julian Roberts, "Sentencing") (2012) 23 *Criminal Law Forum*, 318 at 323.
[112] F. Bowman "The Failure of the Federal Sentencing Guidelines: A Structural Analysis" (2005) 105 *Colum. L. Rev.* 1315, at 1321
[113] *Ibid*, 1322.

Sentencing Guidelines in New South Wales, Australia.[114] Sentencing Guidelines reduces judicial disparity in sentencing and promote more uniformity and consistency.[115]

Two critical elements required for Guidelines to be effective have been identified by Roberts. First, is the need for Guidelines to be sufficiently detailed and prescriptive to actually provide guidance for courts at sentencing.[116] Second, is the requirement for judicial compliance with the guidelines. A guidelines scheme should be accompanied by a statutory requirement for sentencers to follow the guidelines or provide reasons why this is not desirable.[117] The English guidelines provide sentence ranges, starting point sentences, list of aggravating and mitigating factors, reminders of statutory requirements. The guidelines also requires the courts to follow a step by step methodology.[118] Ashworth, added two important issues that need to be addressed in addition to creating guidelines for specific offences if the system is to offer appropriate assistance to courts. First, the Guidelines should cover general principles of sentencing, dealing with the purpose of sentencing, and the significance and application of aggravating and mitigating factors. Other issues that should be dealt with include how the courts should deal with offenders who have previous conviction, offenders charged with several offences and how to deal with an offender who has paid compensation to the victims.[119] Second, is the need for the courts to be provided with guidance on how to apply new forms of sentences introduced by statute.[120]

There is a recent move towards developing Sentencing Guidelines in Nigeria by the Nigerian Law Reform Commission and the Lagos State Law Reform Commission.[121] The Nigerian Law Reform Commission's Draft Sentencing Guidelines Bill 2012 and Lagos State Law Reform Commission's Draft Sentencing Guidelines Bill 2012 adopts the approach of making detailed provisions on general sentencing principles to guide sentencing courts. Section

[114] G Mackenzie Achieving Consistency in Sentencing: Moving to Best Practice?" (2002-2003) 22 *U. Queensland L.J.* 74, 75.
[115] A, Adeyemi, Abuja, (n 62) 15.
[116] J. Roberts, "Sentencing" (n 111) 339.
[117] *Ibid*.
[118] *Ibid*, 340.
[119] A. Ashworth "The Sentencing Guideline System in England and Wales" (2006) 1 *S. Afr. J. Crim. Just.* 1 at 8.
[120] A good example to illustrate the point in Nigeria is the introduction of the Community Service Sentence as a non-custodial sentence under the Lagos State Administration of Criminal Justice Law 2007. The implementation of the sentence did not start until the introduction of the Rules of Court for Community Service Order 2011 made under the Administration of Criminal Justice Repeal and Re-Enactment Law 2011. The Rules provide detailed guidance for the courts on a variety of issues surrounding the implementation of community service sentence.
[121] A Stakeholders' Meeting on Sentencing Guidelines Bill was organised by the Lagos State Law Reform Commission in Lagos on 17 October 2012 while the Nigerian Law Reform Commission held a Stakeholders Meeting on Sentencing Guidelines for Nigeria on in Abuja, Nigeria.

59(1) of the Lagos Draft Bill further provides a process for developing specific offence guidelines by way of Regulations made pursuant to the Sentencing Bill. Section 59(2) requires that the development of the specific offence guidelines should involve consultation with stakeholders in the administration of criminal justice. Another important aspect of the Lagos Sentencing Guidelines Bill is that section 4 of the Bill makes it mandatory for the courts to apply any applicable Sentencing Guidelines unless it is satisfied that it would be contrary to the interest of justice to do so. This provision makes Sentencing Guidelines mandatory yet flexible by allowing the courts to depart where the interest of justice dictates departure.

While the adoption of sentencing guidelines will assist in ensuring consistency, issues of inconsistency may still remain. Available evidence suggests that the introduction of Sentencing Reform Act and Sentencing Guidelines in the United States under the Federal system has succeeded in reducing judge-to-judge disparity within judicial districts.[122] There has however been evidence of significant disparities between sentences imposed on similarly situated defendants in different districts and different regions in the country and inter-district disparity appear to have grown larger in the guidelines era.[123] Empirical research in ten selected jurisdictions in United States of America suggest that the Guidelines have brought a degree of order and consistency to the prosecutorial charging and bargaining decisions that affect sentencing.[124] The research however found clear evidence that the Guidelines are circumvented in minority of cases (approximately 20-35 %) through charge bargaining amongst other devices.[125] Charging bargaining can easily be used to defeat the objective of consistency in sentencing for similar offences by the prosecutor not charging the offender for the more serious offence disclosed by the fact of the case.[126] One of the ways of ensuring that prosecutors do not abuse their charge bargaining powers is through prosecutorial guidelines which set outs the principles and standards that prosecutors must observe in exercising discretion.

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[122] See U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment: of How Well the Federal the Federal Criminal Justice is Achieving the Goals of Sentencing Reform* 94 (2004) http://www.ussc.gov/Research/Research _Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf accessed 20/1/2016, at 13.

[123] F. Bowman, (n 112) 1326-1327.

[124] S. Schulhofer & I. Nagel "Plea Negotiations Under the Federal Sentencing Guidelines: Guidelines Circumvention and its Dynamics in the Post-Mistretta Period" (1997) 91 *Nw. U. L. Rev.* 1284.

[125] *Ibid*, 1285.

[126] See for a discussion of how charge bargaining practices can undermine the sentencing structure under the Guidelines, I. Nagel & S. Schulhofer "A Tale of two Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines" (1992) 66 *S. Cal. L. Rev.* 501, 502.

1.5.3 Regulating Plea Bargains through Prosecutorial Guidelines

The attraction of plea bargaining to prosecutors as a case management tool and the discretionary power exercised by prosecutors raises the possibility of abuse to enormous proportion. In the words of a commentator, "no government official in America has as much unreviewable power and discretion as the prosecutor."[127] The challenge is how to put structures and processes in places to regulate prosecutorial discretion.

Prosecutorial Guidelines embodying procedures, standards and policies governing entering into plea bargaining can provide a basis for improving and checking the exercise of prosecutorial discretion. Bibas, has undertaken extensive analysis of how prosecutor's internal office policies can improve the exercise of discretion. Head prosecutors he counselled should write down and enforce procedural and substantive office policies. Prosecutors also should be ready to explain why they are not seeking enhanced sentences.[128] He cited the research by Miller and Wright undertaken to analyse cases in New Orleans District Attorney's Office to show that internal prosecutorial norms can develop and consistently shape prosecutors behaviour without any judicial involvement.[129] Guidelines he argued offer an element of consistency to the decision making process.[130] Internal offices practices should encourage prosecutors to develop patterns and habits and then justify deviations from those habits.[131] Line prosecutors should be required to explain briefly in writing why they decided not to offer usual plea bargain to particular defendant. The written explanations can then be scrutinized by supervisors. The fear of review he argued further would discipline outliers without preventing justifiable deviation.[132]

There have been recent developments in Nigeria designed to improve the exercise of prosecutorial discretion in concluding plea bargain agreement. The first is the issuance by the Attorney General of the Federation (AGF) of the Economic and Financial Crimes Commission (Enforcement) Regulations 2010 (the Regulations). The Regulations were issued pursuant to

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[127] S. Bibas "Prosecutorial Regulation Versus Prosecutorial Accountability" (hereafter Bibas "Prosecutorial Regulation") (2009) 157 *U. Pa. L. Rev.* 959, 960.
[128] *Ibid*, 1003.
[129] M. Miller & R. Wright "The Black Box" (2008) 94 *Iowa L. Rev.* 125, 133-135.
[130] See E. Podgor, "Department of Justice Guidelines: Balancing ' Discretionary Justice'' (2003) http://law.bepress.com/expr esso/eps/67 accessed 20/1/2016.
[131] S. Bibas "The Need for Prosecutorial Discretion" (hereafter "Need for Discretion") (2010) 19 *Temple Political & Civil Rights Law Review*, 369, 374.
[132] *Ibid*, 375.

section 43 of the EFCC Act. The AGF under section 43 is empowered to make regulations with respect to "any of the duties, functions or powers" of EFCC. The Regulations *prima facie* is within the AGF's rule making powers under the EFCC Act. The Regulations deals with a variety of issues affecting the prosecutorial powers of the EFCC including procedure for receiving complaints, investigation, report of results of investigation, valuation and disposal of forfeited assets.

Regulation 22 governs entering into plea bargain agreement by EFCC. It precludes any officer of EFCC from entering into plea bargain discussions with a defendant without the prior knowledge and approval of the AGF. Furthermore, an agreement made pursuant to such discussions is made subject to AGF's approval.[133] Regulations 22(2) requires EFCC before entering discussion leading to plea agreement to consider the followings:

(a) be satisfied that the plea bargain will enable the court to pass a sentence that matches the seriousness of the offence taking into account other aggravating features; and
(b) the public interest and in particular the interest of the victim of the offence if any.

Where a discussion leads to a plea bargain agreement, the agreement must be reduced into writing, signed by both parties and including a:

(a) list of the charges;
(b) statement of the facts; and
(c) declaration signed by the defendant personally, accepting the stated facts and admitting guilt of the agreed charges.[134]

EFCC when requesting the approval of the AGF for a plea agreement must attach the followings:

(a) The signed plea agreement;
(b) A joint submission as to sentence and sentencing considerations;
(c) Any relevant sentencing guidelines or authorities;
(d) All of the material provided by EFCC to the accused in the course of the plea discussions;
(e) Any material provided by the accused to EFCC; and

[133] R. 22(1).
[134] R. 22(3).

(f) The minutes of any meetings between the parties and any correspondence generated in the plea discussions.[135]

The AGF missed the opportunity of using the Regulations to provide detailed guidance to the EFCC in the process of entering into plea bargain. The Regulation should in the author's view have provided further guidance on factors that EFCC should take into consideration before entering into plea bargain agreement and the relative weight to be attached to each factor. The provisions of the *Practice Guide for Prosecutor* (the Guide) issued by the Office of the Attorney General of Lagos State in 2010 articulated some of the factors that prosecutors should take into consideration in recommending a plea agreement for the approval of the Attorney General.[136] The Guide provides that in recommending a plea agreement for the approval of the Attorney General, prosecutors shall take into account the following: (i) lack of evidence which may result from any of the following: (a) non-availability of witnesses; (b) lack of sufficient incriminating evidence; (c) non-availability of exhibits; and (d) inadequate investigation; (ii) need to use an accomplice as prosecution witnesses; (iii) need to secure conviction for a lesser offence where there is likelihood of non-conviction for the actual offence having regard to circumstances established in paragraph (i) above; (iv) public interest, the interest of justice and the need to protect the victims of crime; (v) cost of prosecution and the likelihood of a protracted trial; and (vi) case load management concerns.[137] The Guide also established a procedure for supervision of a recommendation to enter into a plea agreement. It requires that a prosecutor's Court Group, the Director of Public Prosecutions and the Solicitor General and Permanent Secretary make inputs before a request is made to obtain the written approval of the Attorney General. The requirement of written recommendations and supervision has the potential to promote transparency and discourage arbitrary use of plea bargain.

[135] R. 22(4).
[136] See O. Shasore & A. Bello, *Practice Guide for Prosecutors*, (*The Guide*) Lagos State Ministry of Justice, November 2010. The Guide also contain policy statements and principles governing the issuance of Legal Advice by the Directorate of Public Prosecutions and guidelines for prosecutors in defendants make applications to court for bail.
[137] *Ibid*, 15-16.

.6 CONCLUSION

This part concludes the paper by summarising its findings and making recommendations to improve the practice of plea bargaining in Nigeria.

1.6.1 Summary of Findings

An attempt has been made in this paper to examine issues raised by plea bargained cases. The analysis reveal legitimate concerns with severity of punishment, disparity in punishment for similar offences and failure by the courts to articulate sentencing principles or reasons that informed their decisions.

The paper found that plea bargaining although not expressly provided in the statute books is indeed part of the general prosecutorial powers vested by the Constitution in the Attorney General of the Federation and of the States and by implication in all prosecuting authorities. Analysis of procedural laws also reveal that the laws cover some aspects of plea bargaining.

The paper found that plea bargaining despite fears of abuse has the potential to assist in solving problems of protracted criminal trials and the associated cost to taxpayers. *Nwude's* case proved that plea bargaining can produce satisfactory results. The paper finds that the solution to the fears of abuse is to explore options that can be used to ensure that plea bargaining is conducted fairly and in the public interest. The exploration of the options revealed the potentials of a legal framework, sentencing guidelines and prosecutorial guidelines as useful devices in that regard.

1.6.2 Recommendations

The following recommendations will improve the practice of plea bargaining in Nigeria:

1. The Lagos approach of establishing a legal framework for plea bargaining which removes any controversy concerning its legality and clearly sets out the ground rules for the conduct of plea bargains is recommended. This amongst others will protect the rights of defendants, define the role of the parties and promote transparency, accountability and acceptability.

2. Attorney Generals and heads of prosecuting authorities should develop prosecutorial standards and guidelines and ensure that line prosecutors use and apply them. Guidelines can be used to monitor and supervise line prosecutors and prevent abuse of prosecutorial discretion.

3. Binding and comprehensive Sentencing Guidelines Legislation able to provide effective guidance for sentencing courts, but flexible to allow departure where the interest of justice dictates should be adopted across the country.