AN APPRAISAL OF SAFEGUARD AGAINST THE ABUSE OF PLEA BARGAIN AGREEMENTS UNDER THE NIGERIAN CRIMINAL JUSTICE SYSTEM[1]

Abstract

The Nigerian Criminal Justice System (NCJS) is an interrelated structure for equity, fairness and justice against illegalities. On the other hand, plea bargain is an agreement between parties to a criminal trial, whereby the defendant pleads guilty to a lesser offence or few of multiple charges in exchange for some concession by the prosecutor and which agreement is enforced by the courts. There are explicit conditions that must be met in order for a plea agreement to have the force of law. Safeguard of these conditions is sacrosanct. Thus, the aim of this article was to appraise the safeguard against abuse of plea bargain agreements under NCJS. The methodology adopted was doctrinal, dealing with analysis of both primary and secondary resources from physical and e-library. This article found that there are some inadequacies in the law and practice of plea bargain agreement. Also, that apart from the parties, prosecutors and judiciary, the National Assembly also has impact in the plea bargain agreement. Therefore, this article recommended among others that the National Assembly should amend the Constitution to provide for plea bargain agreement as a viable tool in NCJS, also Attorney Generals and heads of prosecuting authorities should develop prosecutorial standards and guidelines for plea bargain agreement and ensure to monitor and supervise all prosecutors against abuse of prosecutorial discretion in plea bargain practice.

Key Words: Agreement, Bargain, Criminal, Justice, Plea.

1. Introduction

Plea bargaining is a recent development in Nigerian Criminal Law.[2] Section 494 defines plea bargain as "the process in criminal proceedings whereby the defendant and the prosecution work out a mutually acceptable disposition of the case; including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformity with other conditions imposed by the prosecution, in return for a lighter sentence than that for the higher charge subject to the Court's approval. Also, the prosecutor and a defendant or his legal practitioner may before the plea to the charge enter into an agreement with regard to the defendant pleading guilty to the offence charged or a lesser offence of which he may be convicted in the charge and an appropriate sentence impose by the court.[3]

In fact, many criminal cases are resolved out of court by having both sides come to an agreement. This process is known as negotiating a plea or plea bargaining. In most jurisdictions it resolves most of the criminal cases filed. Thus, plea bargaining is prevalent for practical reasons. Defendants can avoid the time and cost of defending themselves at trial, the risk of harsher punishment, and the publicity a trial could involve. The prosecution saves the time and expense of a lengthy trial. Both sides are spared the

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[2] Administration of Criminal Justice Act (ACJA), 2015.
[3] *Ibid.*.

uncertainty of going to trial. The court system is saved the burden of conducting a trial on every crime charged.[4] However, all these gains are not bereft of abuse of the process.

Furthermore, it is to be noted that either side may begin negotiations over a proposed plea bargain, though the process for both sides to agree for the plea bargain to be effective could be abused, especially by the party on the gainful side. Plea bargaining is said to be more gainful to the prosecutor and the state. This is because it involves the defendant's pleading guilty to a lesser charge, or to only one of several charges. It also may involve a guilty plea as charged, with the prosecution recommending leniency in sentencing. The judge, however, is not bound to follow the prosecution's recommendation. As such, many plea bargains are subject to the approval of the court. This is to check any possible abuse of the process by the parties. Conversely, some plea bargain may not be subjected to the court reassessment and approval or rejection, for example, the prosecutors may be able to drop charges without court approval in exchange for a "guilty" plea to a lesser offense.[5] This as well is a bane to the process.

To further probe the challenges associated with plea bargaining, other alternatives are also made possible in the criminal justice system. For instance, many states opt for digression programs that expunge less serious criminal matters from the full, formal procedures of the justice system. Typically, the defendant will be allowed to consent to probation without having to go through a trial. If he or she successfully completes the probation, by undergoing rehabilitation or making restitution, the matter will be expunged from the records.[6] This equally is not an ultimate defrayment of the prevalent problem of abuse of criminal justice system.

Additionally, a defendant cannot bargain on the issue of penalty which is exclusively determined by the presiding judge, even though, it is the prosecutors that make sentence recommendation to the judge. The judge, however, is not bound to follow the prosecution's recommendation. The judge must agree to the result of the plea bargain before accepting the plea. This implies that the judge reserves the prerogative to reject a bargain if he feels uncomfortable with it or if he is of the opinion that it was not intelligibly and voluntarily entered into by the accused. This discretion strictly for the judge may mar or be a plus to the rationale behind plea bargain in the criminal justice system.

Basically, a guilty plea must be an informed choice entered into voluntarily by the defendant. Due process of law prohibits arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, dignity of human person, personal liberty, property acquisition, and the rest. One of the major advantages of plea bargaining is that it helps prosecutors and the Courts in the effective administration of justice where the due process of fair hearing and natural justice are held sacrosanct. In all criminal prosecutions, the accused is entitled to enjoy the right to a speedy trial as justice delayed is justice denied.[7] That is to say, the right to speedy trial cannot be compromised or negotiated away, even where plea bargain fails. Otherwise, it makes it a compelling factor to uphold plea bargain notwithstanding the bedeviling abuses. Therefore, these backdrops make it adroit imperative for this study to critically appraise the safeguards against the abuse of plea bargain agreements under the Nigerian criminal justice system.

[4] K Atseni, *Concise Nigerian Legal System* (Sam Bookman Publishers, 1999) 37.
[5] N Tobi, *Sources of Nigerian law* (Lagos: M.J. Professional Publishers Ltd, 1996) 16-7.
[6] *Ibid*, p19.
[7] M Johnson, 'Effects of Judicial Precedent on the Nigerian Legal System', *University of Benin Law Journal, Faculty of Law* (8) (1) (2015) 56 – 71.

2.Nature of the Nigerian Criminal Justice System

Tappan defines crime as "an intentional act or omission in violation of criminal law…committed without defense or justification, and sanctioned by the state as a felony or misdemeanor."[8] The Criminal Justice System is relatively new. It became popular in 1967 where in a study it showed that the process of dealing with law breaking and breakers forms a system. Criminal justice system means the functioning of the crime regulatory system and its constituent parts and the work of the functionaries within the system. While criminology has its roots in European scholarship, criminal justice system is an American phenomenon.[9] Nigerian Criminal Justice System is regulated by the Constitution and Statutes of the National Assembly and those of the states. For instance, we have provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) providing in sections 35 and 36 (4) to (12) for elements and ingredients of criminal trial. The constitution further delegates powers to other established institutions and bodies to make input in the Nigerian criminal justice system. For instance, section 4 of the Constitution[10] also empowers the National Assembly and State Houses of Assembly to make laws which include matters pertaining to criminal justice system, thus we have the Administration of Criminal Justice Act[11] and Administration of Criminal Justice Laws of the different states. There is also the Penal Code, Criminal Laws, and the statutes regulating different professional bodies. In the case of *Bamaiyi v State*, Uwaifo, JSC observed that "Nigerian criminal justice system has its stipulations and safeguards for the prosecutor, the accused and the victim."[12] That is to say, it is not a straightjacket system, added to the adoption of plea bargain agreement.

Supervision and direction required in the enforcement of criminal justice is saddled on different bodies, agencies, or offices with respective roles. Other than the direct provisions in the Constitution of the Federal Republic of Nigeria, 1999, the National Assembly and the State Houses of Assembly are also empowered for the administration of the Nigerian criminal justice. Apart from the laws enacted by the legislature[13], the legislature can as well perform oversight functions[14] regarding criminal cases resulting from insecurity and other threat to national existence.

Law enforcement agencies and prosecuting officers from the Nigerian Police, EFCC, ICPC, and the rest also function in the administration of criminal justice system in Nigeria. Other bodies in the administration of criminal justice system include the courts,[15] judicial authorities, Attorney-General of the Federation as prosecutor and power to enter nolle prosecue,[16] Attorney-General of the states as prosecutors and power to enter *nolle prosecue* in their respective states of jurisdictions,[17] the President of Nigeria who can grant amnesty and prerogative of mercy,[18] Governors of the respective states with power for prerogative of mercy,[19] and influence from the International Criminal Court of Justice (ICCJ) and ICJ based on UN Charter and other international legal instruments.

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[8] P Tappan, 'Definitions of Crime' *Online Database* <https://www.cliffsnotes.com/study-guides/criminal-justice/crime/definitions-of-crime> accessed on 10th August, 2024.
[9] *Ibid*, 815.
[10] *Constitution of the Federal Republic of Nigeria*, 1999 (as altered).
[11] *ACJA*, 2015.
[12] *Bamaiyi v State* (2001) FWLR (pt. 16) 956 at 965 and 967.
[13] *Constitution of the Federal Republic of Nigeria*, 1999 (as altered), section 4.
[14] *Ibid*, sections 4 (1) 58, 59, and 100.
[15] Constitution of the Federal Republic of Nigeria, 1999, s 6.
[16] *Ibid*, Section 174.
[17] *Ibid*, Section 211.
[18] *Ibid*, Section 175.
[19] *Ibid*, Section 212.

3. Legal Framework for Plea Bargain in Nigeria

The closest attempt at introducing plea bargain into the Nigerian criminal justice system was the introduction of the Administration of Criminal Justice Law (ACJL 2007) of Lagos State. This, of course, was possible since under the Nigerian legislative framework it is not the exclusive preserve of the central government to enact laws to regulate the criminal justice system. Similarly, the Economic and Financial Crimes Commission Act 2004 (EFCC Act) also made an audacious attempt at introducing the concept of plea bargain into Nigerian system albeit naming it "compounding". Section 14(2) of the Act categorically 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.*[20]

However, while this provision of the EFCC Act subjects the plea bargaining to the provisions of section 174 of the Constitution.[21] The ACJL does not subject the applicability of the plea bargain to any law, not even the Constitution. Section 75 of the ACJL provides that:

> *Notwithstanding anything in this Law or any other law, the Attorney-General of the State shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney-General is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice and the need to prevent abuse of legal process.*[22]

However, before getting to this level, there was no direct legislative provision sanctioning plea bargain at the time the plea bargained cases were concluded. A statutory provision now sets out clearly the procedure, nature and the form of a plea bargain agreement. There is a statutory framework which now protects the rights of defendants to an informed and voluntary plea agreement. In addition, it defines 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 reveals how the Lagos law has made provisions clarifying the above issues. Section 270 of the Administration of Criminal Justice Act, 2015 provides a detailed procedure for plea bargaining modelled after the ACJ Law 2011.

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). It contemplates a charge and sentence bargain by the conjunction "and" joining the provision covering charge bargain with sentence bargain. It is only a Law officer that can enter into a plea agreement after consultation with the investigating police officer and if reasonably feasible by the victim. 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. The plea agreement must be in writing and signed by the prosecutor, the defendant, the legal practitioner and an interpreter when required.

[20] *Economic and Financial Crimes Commission Act,* 2004 (EFCC Act), section 14 (2).
[21] *Constitution of the Federal Republic of Nigeria*, 1999 (as altered), section 174.
[22] *Lagos State Administration of Criminal Justice (Repeal and Re-enactment) Law*, 2011, section 75.

The plea agreement shall state that before its conclusion, the defendant has been informed:

(a) that he has a right to remain silent;
(b) of the consequences of remaining silent; and
(c) *that he is not obliged to make any confession or admission that could be used in evidence against him.*[23]

The plea agreement is also required to state fully the terms of the agreement and any admission made. 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.

4. Appraisal of Safeguard against the Abuse of Plea Bargain Agreements under NCJS

4.1 Protecting the Rights of a Victim in a Plea Bargain Agreement under ACJA, 2015

The first systematic use of plea negotiation, being the Boston bargains, was basically for victimless offenses, so the prosecutor did not have to consider victims' concerns.[24] But, now there is a different approach. Apart from the advantages of plea bargain agreement under ACJA which includes it being served as one of the tools used in the expedient disposition of criminal trials, a case management strategy, giving exponentially less severe penalties than a conviction at trial and cost efficient, it also impacts much on the victim. Thus, one of the usefulness of plea bargain is that it not only creates an avenue for punitive justice, in some instances it also incorporates the concept of restorative justice by placing the victim back to the position they would have been.

Sometimes even victims prefer plea bargains to trials. Plea bargains allow victims to avoid testifying in court, which may be frightening or upsetting, especially for victims of violent crimes. Some victims also appreciate the certainty provided by plea bargains.[25] They need not worry about the emotional trauma of dealing with the acquittal of someone they feel is guilty. Also, it brings the victim to a focal point by providing for actual compensation for the victim.

Despite these obvious merits of the plea bargain, it is not devoid of its shortcomings. A very fundamental defect of the process is that though the state has the powers to prosecute, where there is a crime against a person (the victim), such a victim may not feel that justice has been done in his case where the court accepts the plea bargain of the defendant. Also, it is increasingly the norm in Nigeria that only the rich can assess justice. This is because they can buy their way through and afford any penalty levied against them unlike the poor who are left to their fate to languish in prison.[26]

Therefore, in consideration of the procedure before entering the agreement, the prosecutor may only enter into plea bargaining agreement after consultation with the police officer responsible for the investigation of the case and the victim if reasonably feasible. The law provides that "the Prosecution must consult IPO (investigating police officer) and where feasible the victim as to the inclusion of compensation and restitution before an agreement is reached."[27]

[23] *Ibid.*
[24] 'Victim Participation in the Plea Negotiation Process in Canada'. *Department of Justice* (US International Publications, 2015).
[25] Attorney General's Office, 'Criminal Justice Measures to Enhance Fraud Prosecutions' *Press Release* (2009).
[26] J Baldwin and M McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, 1977) 199.
[27] Lagos State Administration of Criminal Justice Law (2011) section 76(2).

4.2 The Role of Law Enforcement in Plea Bargain Agreement under ACJA, 2015

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."[28] The challenge is how to put structures and processes in places to regulate prosecutorial discretion.

Prosecutorial guidelines embodying procedures, standards and policies governing the entering into plea bargaining, can provide a basis for improving and checking the exercise of prosecutorial discretion. Bibas[29] has undertaken extensive analysis of how prosecutor's internal office policies can improve the exercise of discretion. Head prosecutors he counseled, should write down and enforce procedural and substantive office policies. Prosecutors also should be ready to explain why they are not seeking enhanced sentences.[30] He cited the research by Miller and Wright[31] undertaken to analyze 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. He argued that Guidelines offer an element of consistency to the decision making process.[32] Internal offices practices should encourage prosecutors to develop patterns and habits and then justify deviations from those habits.[33] 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.[34]

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 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*

[28] 'Attorney General's Office Guidelines on Plea Discussions in Cases of Serious or Complex Fraud' *An Executive Legislation* (London Attorney General's Office, 2009).
[29] S Bibas 'Prosecutorial Regulation versus Prosecutorial Accountability' (2009) (157) *U. Pa. Law Review*, 959-60.
[30] *Ibid*, 1003.
[31] M Miller and R Wright, 'The Black Box' (2008) (94) *Iowa Law Review* 125, 133-5.
[32] E Podgor, "Department of Justice Guidelines: Balancing Discretionary Justice" *Online Database* <http://law.bepress.com/expr esso/eps/67> accessed on 25th July, 2024.
[33] S Bibas, 'The Need for Prosecutorial Discretion' (2010) (19) *Temple Political & Civil Rights Law Review*, 369-74.
[34] *Ibid*, 375.

(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.[35]

EFCC when requesting the approval of the AGF for a plea agreement must attach the following[36]:

(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
(f) The minutes of any meetings between the parties and any correspondence generated in the plea discussions.[37]

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.[38] The Guide also contains policy statements and principles governing the issuance of legal advice by the Directorate of Public Prosecutions and guidelines for prosecutors if defendants make applications to court for bail. 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 (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.[39]

[35] Attorney General of the Federation (AGF), *Economic and Financial Crimes Commission (Enforcement) Regulations* (2010), regulation 22.
[36] *Ibid*, regulation 22(3).
[37] *Ibid*, regulation 22(4).
[38] O Shasore and A Bello, Practice Guide for Prosecutors, (The Guide) Lagos State Ministry of Justice, November 2010.
[39] *Ibid*, 15-16.

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 to 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.

4.3 The Role of Courts in Plea Bargain Agreement

Plea bargaining agreement is subject to the supervision of the Court with respect to its subject matter and the conclusion. The role of the judge is to ascertain whether the agreement has been concluded in accordance with the law and whether there are sufficient evidences confirming the conviction. Reporting to this, the Court may, whether or not to accept the agreement. The Court shall verify the formal conditions of plea bargaining agreement, and if formal requirements are fulfilled, the Court shall pronounce upon the plea bargain by sentence, by a non-contradictory procedure, in open court, after hearing the accused and lawyer as well as a civil party, if present.

The sentence shall compulsoriry provide:

a) the particulars which it must contain and the decisions of the meeting, and the exposure of a sentence which is pronounced at first instance;

b) the deed for which ended in a plea bargain agreement and its legal classification.[40]

However, punishment and its execution procedure laid down in the agreement does not bind the Court, which may proceed to a re-individualization of the penalty or the manner of its execution, without creating to the defendant a heavier situation. If the conditions are not met, the Court rejects the plea bargaining agreement and sends the defendant with his dossier to the Prosecutor for further prosecution, pronouncing at the same time *ex oficio* about the custody state of the defendant. Through implementation law it is introduced a new case for the rejection of the agreement, namely the situation where the Court considers that the solution that was reached an agreement between Prosecutor and defendant is unreasonably mild in relation to the seriousness of the offence or the offender dangerousness. This provision softens the conventional character of the agreement, by setting up a greater role of judges in the process of individualization of punishment, as an important part of the Court's function that he meets. In this way, the regulation departs from the adversarial form and is coming to the specific features of criminal process of continental style, in which the judge does not have just a referee role, but active role in finding out the truth in all aspects. 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. The court's general input in plea negotiation enables it to provide guidance of possible sentencing options and the possibility of the court accepting 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.[41]

[40] S Bibas, 'The Need for Prosecutorial Discretion' (2010) (19) *Temple Political & Civil Rights Law Review*, 369-74.

[41] A Adeyemi, 'The Nigerian Law Reform Commission: Sentencing Guidelines Project' *A Commissioned Research Paper Stakeholders Meeting on Sentencing Guidelines in Nigeria* (Nigerian Law Reform Commission, 14 November 2012).

The ACJ Law 2011 anticipated this objection by providing that a new trial following a botched plea bargain must start de novo before court. The court inquires from defendants the correctness of the agreement, verifies whether the defendant admits the allegations in the charge and the voluntariness of the plea. If satisfied of the defendant's guilt, the court may convict the defendant on his guilty plea. The court must find a factual basis for a guilty plea before entering judgment. 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.[42]

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.*[43]

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 society by ensuring that the sentence recommended in the plea agreement meets the justice of the case. 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. 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.*[44]

Regulating plea bargains through sentencing guidelines entails disparities in sentences imposed in the plea bargained cases. The most common justification for sentencing guidelines is the need to promote consistency. 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"[45] and this amongst other ills produced unjust disparities between similarly situated offenders. Consistency is

[42] *Ibid.*
[43] A Adeyemi, 'Administration of Justice in Nigeria: Sentencing' In Osinbajo and Kalu (ed), *Law Development and Administration in Nigeria* (Federal Ministry of Justice, 1990) 109.
[44] *Ibid.*
[45] *Ibid.*

one of the main reasons cited for promulgating Judicial Sentencing Guidelines in New South Wales, Australia. Sentencing Guidelines reduces judicial disparity in sentencing and promote more uniformity and consistency.

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. 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. The English guidelines provide sentence ranges, starting point sentences, list of aggravating and mitigating factors, reminders of statutory requirements. The guidelines also require the courts to follow a step by step methodology. 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.[46] 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. Second, is the need for the courts to be provided with guidance on how to apply new forms of sentences introduced by statute. There is a recent move towards developing Sentencing Guidelines in Nigeria by the Nigerian Law Reform Commission and the Lagos State Law Reform Commission. The Nigerian Law Reform Commission's Draft Sentencing Guidelines Bill 2012 and Lagos State Law Reform Commission's Draft Sentencing Guidelines Bill 2012 both adopt the approach of making detailed provisions on general sentencing principles to guide sentencing courts. Section 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.[47] 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. 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.[48]

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. 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. This will as well guide the Court in sound judgment and not jungle justice or questionable justice which defeats the essence of the plea bargain.

[46] A Ashworth and M Redmayne, *The Criminal Process in Oxford* (OUP, 2005).
[47] J Ogunye, *Criminal Justice System in Nigeria: The Imperative of Plea Bargaining* (Lawyers League for Human Rights and Open Society Initiative for West Africa, 2005) 150-9.
[48] *Ibid.*

5. Conclusion

Plea bargaining despite fears of abuse has the potential to assist in solving problems of protracted criminal trials and the associated cost to taxpayers. Plethora of decided cases prove that plea bargaining can produce satisfactory results. Succinctly put therefore, while the plea bargain practice will do more good to the Nigerian criminal justice system through this study, it is imperative to incorporate it with the necessaryrules that would prevent abuse of the process. It also needs to be incorporated into the Nigerian Constitution to have more force.

6.Recommendations

Sequel to the foregoing, the following recommendations are made which would improve the practice of plea bargaining in Nigeria:

(1) The National Assembly should amend the Constitution to specifically provide for plea bargain agreement as a viable tool in the Nigerian criminal justice system.

(2) Attorney Generals and heads of prosecuting authorities should develop prosecutorial standards and guidelines with respect to plea bargain agreement, and ensure that all prosecutors use and apply them. Such guidelines should be used to monitor and supervise all prosecutors and prevent abuse of prosecutorial discretion in plea bargain practice.

(3) 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 should be commended and imbibed by other states. This amongst others will protect the rights of defendants, define the role of the parties and promote transparency, accountability and acceptability.

(4) Solutions to the fears of abuse should be a commitment for every stakeholder 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, as already recommended.