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LIMITATIONS OF PLEA BARGAINING IN PROSECUTING CYBERCRIME IN NIGERIA

Abstract

The main purpose of the Administration of Criminal Justice Act is to ensure the efficient management of criminal justice institutions, speedy dispensation of justice, protection of society from crime and protection of the rights and interests of the suspect, the defendant and victim. Plea bargaining is one of the new innovations introduced in the Act. It is a negotiated agreement between a prosecutor and a criminal defendant who pleads guilty to a lesser offence for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the charges. Even though plea bargaining has been praised as a panacea in the administration of criminal justice, it has also been condemned as a drawback as regards the anti-corruption fight. This work focuses on the limitations of plea bargaining in prosecuting cybercrime in Nigeria. The central hypothesis outlined here is that applicability of plea bargaining in cybercrime trials weakens the deterrent effect prison sentences are intended to have. Under the Cybercrime Act, 2015, prison sentences range from two (2) years to ten (10) years with or without a fine. The prevalence of cybercrime heightened even after the Cybercrime Act came into force. This shows that the prison sentences are not deterrent enough and applying plea bargain in cybercrime trials will further frustrate effective/sufficient punishment of cyber criminals. This paper takes a comparative approach, it analyses the Nigerian law on plea bargaining and its application to cybercrime while juxtaposing it with the law and practice in the United States. It argues that plea bargaining should not be applied to cybercrime trials in Nigeria and if it must be applied, it should be subject to the condition that the defendant would work with the law enforcement agencies in policing the cyberspace.

1.0. Introduction

According to Marc Rogers, a former cybercrime investigator in the United States and Canada:

> We are never going to solve the cybercrime problem. We are just trying to keep a lid on it; we don't even know how many of these activities are going on. We are only aware of a fraction of what's happening. That makes it a very hard problem to deal with.[1]

According to Peter Grabosky, the term cybercrime is a label of convenience, and it refers to a wide range of crimes committed with the aid of digital technology.[2] Cybercrime has been described as the latest and perhaps the most complicated problem in the cyber world.[3]

Nigeria has been described as a key player in underground cyber activity and has become a destination for international cybercrime syndicates.[4] The 2014 Annual Report of the Nigeria Deposit Insurance Corporation, NDIC, shows that between 2013 and 2014, fraud on e-payment platform of Nigeria's banking sector increased by 183 percent.[5] Also in 2014, a report published by the Center for Strategic and International Studies, United Kingdom, estimated the annual cost of cybercrime to Nigeria at about 0.08 percent of Nigeria's gross deposit product representing about N127 billion.[6] Nigerian's Senate President, Bukola

[1] Meridith Levinson, 'Why Law Enforcement Can't Stop Hackers' [2011] <*http://www.cio.com*> accessed 10 July 2017.
[2] Peter Grabosky, *Cybercrime: Keynotes in Criminology and Criminal Justice Series* (New York: Oxford University Press 2016) 2.
[3] Parthasarathi Pati, 'Cyber Crime' <*http://www.naavi.org*> accessed 1 July 2017.
[4] Noah Rayman, 'The World's Top 5 Cybercrime Hotspot' [2014] <*http://www.time.com*> accessed 1 July 2017.
[5] Babagana Monguno, stated this during the inauguration of a 31- man Cybercrime Advisory Council in Abuja, cited in Gabriel Ewepu, 'Nigeria Loses N127bn Annually to Cybercrime- Nsa, *Vanguard News* [Nigeria, 19 April 2016] <*http://www.vanguardngr.com*> accessed 1 July 2017.
[6] Ibid.

Saraki,[7] reiterated the fact that Nigeria lost about N127 billion to cybercrime.[8] He stated that in recent times, we have seen the virulent use to which criminals and other shadowy agents have put the cyber space. The cyber ecosystem has been weaponised and manipulated to devastating effect to undermine democratic processes. He described cybercrime as an ever-mutating monster, constantly growing new tentacles and taking on new formations.[9] According to Microsoft's Digital Crimes Unit, 'there are nearly 400 million victims of cybercrime each year and cybercrime cost consumers 113 billion dollars a year'.[10]

'Nigeria currently ranks third globally in cybercrimes behind the United Kingdom and the United States'.[11] Also, Nigeria emails, the Advanced Fee Fraud or 419 frauds is classified as one of the most common forms of fraud.[12] This is a red flag to the nation and deeply threatening to the economy and image of the country. The high level of cybercrime in Nigeria and by Nigerians is a recognized phenomenon worldwide and has become a matter of urgency that needs to be addressed. The need to curb cybercrime is of paramount importance to Nigeria's economy and image, applying plea bargain to prosecution of cybercrime will only cripple that effort. The global community already has a stereotype conception of Nigeria; it is high time the country makes a huge effort by prosecuting cybercriminal with strict prison sentences.

[7] He made this known at Nigeria's first Legislative Stakeholders Conference on ICT and Cyber security in Abuja. He was represented by Senate Minoriy Whip, Phillip Aduda.
[8] Bukola Saraki, 'Nigeria Loses N127bn to Cybercrime' *Vanguard News* (Nigeria, 6 November 2017) <*http://www.vanguardngr.com*> accessed 7 November 2017.
[9] Ibid.
[10] Jean Shiloh and Amzath Fassassi, 'Cybercrime in Africa: Facts and Figures' [7 July 2016] <*http://www.scidev.net.com*> accessed 30 June 2017.
[11] Umar Danbatta, the Nigerian Communication Commission, NCC Chief Executive Officer stated this at the 2017 Annual General Conference of the Nigeria Bar Association, NBA in Lagos on August 29, 2017.
[12] Grabosky, (n 2) 19.

A review of the academic literature on the subject of plea bargaining shows that most authors concentrate on the advantages or disadvantages of plea bargaining.[13] There is scarce literature canvassing for the exemption of plea bargain in prosecution of cybercrime.

This paper is divided into four parts, the first part introduces the concept of plea bargaining and cybercrime. The second part consists of the concept of plea bargaining, the history and practice of plea bargaining in United States, Germany and Nigeria. The third part discusses the application of plea bargain under the Administration of Criminal Justice Act, 2015 and its applicability to cybercrime trials. The fourth part analyses arguments for and against plea bargaining and offers insights on the limitations of plea bargaining in prosecuting cybercrimes in Nigeria.

2.0. The Concept of Plea Bargaining

Plea bargain has been defined as 'the process of negotiation and explicit agreement between the defendant, on one hand and the Prosecution, the court, or both, on the other, whereby the defendant confesses, pleads guilty, or provides other assistance to the government in exchange for a more lenient treatment'.[14] Plea bargain has also been defined as an agreement between

[13] Samuel Oguche, 'Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination against Punishment or Mere Expediency?' [2011] (1) (1) *NIALS Journal of law and Development* 49. The author analysed the arguments for and against plea bargaining. He opined that plea bargain is necessary in Nigeria going by the fact that the prisons are overcrowded. He recommended that legislation should be put in place both at the federal and state levels to adequately accommodate plea bargaining. Jenia I. Turner, *Plea Bargaining Across Borders,* (New York: Aspen Publishers, 2009). The author gave a thorough history of plea bargaining in various jurisdictions and discussed the controversies associated with the process. She opined that the lack of transparency in plea negotiations reduces the public legitimacy of the criminal justice system. The work offered insight of the practice of plea bargaining across borders, but it did not consider the history or the practice of plea bargaining in any African country. Francis Ohiwere Oleghe, 'Plea Bargain under the Administration of Criminal Justice Act, 2015, and its Alternative Dispute Resolution Elements' [2016] (11) (1) *Journal of Arbitration* 197. The author treats the subject of plea bargaining as a form of alternative dispute resolution. Ngozi Umeh, 'Criminal Arbitration: The Uses and Abuses of Plea Bargaining in Nigeria' [2014] (9) (11) *Journal of Arbitration;* 1-23. The author concentrated on the pros and cons of plea bargaining. She recommended that the courts should clearly define, the parameters of plea bargain, so that we can have

[14] Turner, (n 14) 1.

the prosecutor and the defendant to resolve a criminal case without going to trial.[15] In what he calls a working definition, Tope Adebayo defines plea bargain as:

> A device allowing accused persons- in person or by their legal counsel- to reach an accommodation with the prosecutor to enable them plead guilty in court to an offence of lesser gravity than the one(s) prosecutors wish to charge them with or with which they have already been charged or to one or more of a multiple of charges; an accused person may also agree to plead guilty to the offence with which they are charged, all in a bid for a lighter sentence than would/might have been given if the case has been prosecuted fully and conclusively.[16]

AW Alschuler defined plea bargaining as 'the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state'.[17]

From the foregoing definitions, it is clear that there are some features that should be present in a plea bargain agreement. These are:

i. The negotiation and agreement between the defendant and the prosecutor;
ii. The defendant's guilty plea; and
iii. The concession from the prosecutor.

There are basically two types of plea bargain. It can emanate from likely concessions that may accrue to a criminal defendant in exchange for his guilty plea. The concessions can either be in form of reduction in the charge against the defendant or the reduction in the sentence. The two types of plea bargaining are, charge bargain and sentence bargain. In a charge bargain, the accused person pleads guilty to a lesser charge or to some of the charges filed against him in exchange for a guilty plea. In a sentence bargain, the prosecutor agrees to recommend a lighter sentence for the accused person in exchange for his guilty plea.

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[15] Kushtrim Tolaj, 'The Instititionalization of Plea Bargaining in Kosovo' [2012] <*http://www.jurist.com*> accessed 19 June *2017*.

[16] Tope Adebayo, 'The Legality of the Use of Plea Bargain in the Nigeria Criminal Justice System' <*http://www.topeadebayo//p.wordpress.com*> accessed 27 June 2017.

[17] AW Alschuler, *Plea Bargaining and its History,* [1979] *Columbia Law Review* (79) (1) 13.

2.1. History of Plea Bargaining in the United States

In the eighteenth century, ordinary jury trial at common law was a judge–dominated, lawyer-free procedure conducted so rapidly that plea bargaining was unnecessary.[18] A number of scholars, most notably Albert Alschuler, have argued that, until the nineteenth century, guilty pleas were relatively rare and treated with suspicion by courts in both England and the United States.[19]

Between the mid-nineteenth and early twentieth centuries, the United States went from being a nation where plea bargaining did not exist to one in which plea bargaining was the method by which a majority of criminal prosecutions were resolved.[20] This transformation occurred largely without legislative action or formal judicial sanction.

The legality and constitutionality of plea bargaining were established in *Brady v. United States*.[21] The US Supreme Court held that plea bargaining did not in itself undermine the voluntariness of guilty pleas. This decision paved the way to a new era of regulation by courts and legislatures. Another court judgment that played a key role in the history of plea bargaining in the United States is *Santobello v New York*.[22] The court affirmed its support for plea bargaining calling it 'not only an essential part of the process but a highly desirable part for many reasons'. The court also held that when plea bargains are broken, remedies exist, and that judgment will be vacated if the prosecutor fails to keep its promise made under a plea agreement.

[18] John H. Langbein, 'Understanding the Short History of Plea Bargaining' [1979] Faculty Scholarship Series. Paper 544 <*http://www.digitalcommons.law.yale.edu/fss_papers/544*> accessed 11 June 2017.
[19] Alschuler, (n 19).
[20] Mike Mcconville and Chester L Mirsky, Jury Trials and Plea Bargaining, (2005) cited in Turner, (n 11).
[21] 397 US. 742 [1970].
[22] 404 U.S 260 [1971].

These court decisions are pointers to the fact that plea bargaining is a recognised procedure for resolution of cases in the United States.

2.1.1. Practice of Plea Bargaining in the United States

The growth of plea bargaining in the US acquired more impetus as the years went by. In other to reduce the disparities in sentencing, Determinate Sentencing Guidelines at the federal and state levels where introduced.[23] The prosecutor now did not have to go 'Judge shopping' any more to find a judge ready to impose a sentence in an exemplary case.[24] He or she already knew what the penalty limits were, and the judge had no choice but to impose them.[25] This made the prosecutor somewhat more powerful in the courtroom.

The Determinate Sentencing Guidelines were eventually declared unconstitutional by the US Supreme Court in *US v Booker*,[26] because they violate the Sixth Amendment right to trial by jury. The court decided that the determinate aspect of the Guidelines had to be eliminated to pass constitutional muster. Presently, the Guidelines are deemed to be advisory only, both at the federal and state levels. However, judges are still expected to take the Guidelines into consideration and calculate the sentence according to them.

In most cases in the United States, the only participants in plea bargaining are the prosecutor and defence attorney, who in turn consults with his or her client.[27] Judges are generally not involved in plea negotiations. However, judges are expected to review the validity of the guilty plea. The judge examines the defendant and evidence related to the case to ensure

[23] The Guidelines are issued by the United States Sentencing Commission established by the Sentencing Reform Act of 1984.
[24] Emilo C Viano, 'Plea Bargaining in the United States: A Perversion of Justice [2012] <*http://www.cairn-int.info*> accessed 11 June 2017.
[25] Ibid.
[26] 542 U.S. 296.
[27] Ethical rules instruct defence attorneys to inform their clients of a proposed plea agreement. See Model Rules of Prof'l Conduct R. 41.

that the guilty plea is intelligent, knowing, voluntary and based on the facts of the case.[28] Judges also decide whether to accept or reject the plea agreement, unless the prosecution and the defence have agreed to a specific sentence.[29] Although the prosecution will typically make a sentencing recommendation pursuant to the plea agreement, judges are not bound by it.[30] In the United States, the advisory sentencing guidelines limit judicial sentencing discretion. Based on the guidelines and the charges filed, parties can accurately predict the range in which a defendant might be sentenced.

Federal Rules of Criminal Procedure 11 recognizes and codifies the concept of plea agreements. Section 11 (c) Provides thus:

> (1) An attorney for the Government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participant in these discussions. If the defendant pleads guilty or *nolo contendere* to either a charged offence or a lesser or related offence, the plea agreement may specify that an attorney for the government will:
> (a) not bring, or will move to dismiss, other charges;
> (b) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court);[31] or
> (c) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the pleas agreement).[32]

[28] Turner, (n 14) 23. The judge's ability to perform a thorough review is limited because the parties have already agreed on a deal, they are unlikely to present any evidence that might disturb it.
[29] See Fed. R. Crim. Proc. 11 (c) (1)(c).
[30] See Fed.R. Crim. Proc. 11 (c) (1) (b).
[31] The Sentencing Guidelines are regarded to be advisory only.
[32] Federal Rules of Criminal Procedure > TITLE IV ARRAIGNMENT AND PREPARATION FOR TRIAL. Rule 11. Pleas <*http://www.law.cornell.edu>frcmp*> accessed 12 June 2017.

From the foregoing provision, it is clear that it is the state prosecutor and the defence attorney (or the defendant when he appears on his own behalf) that negotiate and may or may not reach an agreement. The judge is not part of the negotiation. The court has the discretion to accept the agreement, reject it, or defer a decision until the court has reviewed the report. In the United states, despite some restrictions[33] and strong criticism, the practice of plea bargaining is predominantly common in criminal cases.

2.3. Plea Bargaining in Nigeria

Up until 2004, Nigeria like Germany could be described as a land without plea bargaining.[34] There was no law in Nigeria that provided for the legality or constitutionality of the use of plea bargain in the administration of the criminal justice system.

The Economic and Financial Crimes Commission Act was the first Nigerian law that provided for something somewhat similar to plea bargaining. Section 14(2) of the Act provided as follows:

> subject to the provisions of section 174 of the Constitution of the FRN, 1999, the Commission may compound any 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.[35]

Compounding in the provision means that the Commission may not prosecute the defendant or may drop some charges in exchange for some consideration which in this case, the defendant gives up sums of money which the commission deems fit. Oguche Samuel, is of the opinion that what is obtainable under the EFCC Act is a form of charge bargain.[36] This paper argues that even though the legislation did not specifically mention plea bargaining, the provision

[33] California and Mississippi do not permit plea bargaining in serious violent and sexual assault cases. See Cal. Pen. Code s. 1192.7(2)-(3).
[34] John Langbein, an American comparative law scholar called Germany a 'land without plea bargaining'.
[35] S. 14(2) Economic and Financial Crimes (Establishment) Act, 2004 (EFCC Act). S. 174 of the CFRN (as amended) provides ''
[36] Oguche (n 14) 49.

could pass as some form of plea bargaining because from the definition of plea bargaining there must be some form of concession gained or exchanged by both parties. In this case, punishment is compounded by the commission in exchange for sums of money from the defendant. This process is akin to the concept of plea bargaining but does not justify the application of plea bargaining because the law did not specifically provide for it.

The first plea bargaining-specific law in Nigeria is the enactment of the Administration of Criminal Justice Law 2007, Laws of Lagos State. Section 75 of this law provides:

> 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.[37]

Section 76 of the Act sets out the process which covers both charge and sentence bargain. The provision is similar to the provisions of the Federal Rule of Criminal Procedure 11 of the United States. The negotiation is between the prosecutor and the defendant or his lawyer, the presiding judge or magistrate shall not participate in the discussion but will be informed by the prosecutor of the agreement reached. The presiding judge or Magistrate shall ascertain whether the defendant admits the allegations in the charge to which he pleaded guilty and whether he entered into the agreement voluntarily.[38] This is also the practice in the United States. The provision for plea bargain under the Lagos State Law is similar to what is contained in the Criminal Procedure Code of the Republic of Georgia.[39] In Lagos State, plea bargain is available to defendants accused of all kinds of offences, unlike the usual trend which

[37] See s. 76 ACJL 2007, Laws of Lagos State.
[38] S 76(7).
[39] Ted C Eze and Eze Amaka G, 'A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria' [2015] 3(4) *Global Journal of Politics and Law Research* <*htt://www.eajournals.org*> accessed 15 July 2017. The Administration of Criminal Justice Law of Anambra State is not as detailed as that of Lagos State.

exclude plea bargaining in capital offences, defilement, rape and offences involving the use of violence.

2.3.1. The Use of Plea Bargain in Nigeria

Plea bargaining was first used by the EFCC in 2005 in a case of corruption against former Inspector-General of Police, Tafa Balogun. A settlement was reached, and he was sentenced to a prison term of six (6) months. In *Federal Republic of Nigeria v. Emmanuel Nwude and Amaka Anajemba*,[40] the defendants were given reduced sentences after they pleaded to defrauding a Brazilian bank of N224 million. The defendants made restitution of substantial lumps of the stolen kitty in exchange for a lesser sentence. In *EFCC v Lucky Igbenedion,*[41] the former governor of Edo State, Chief Lucky Igbinedion was charged with embezzling N2.9 billion on 191 counts. Under a plea bargain arrangement, the 191 counts were narrowed down to one, to which he pleaded guilty. The court convicted him on the one charge and fined him N3.5M in lieu of a prison term. He also refunded N500M and forfeited three landed properties.

On October 8, 2010, the former chief executive officer (CEO) of Oceanic Bank International Nigeria Plc, Mrs. Cecilia Ibru was sentenced to eighteen months imprisonment by the Federal High Court Lagos, Nigeria for committing various economic and financial crimes. The Economic and Financial Crimes Commission, EFCC had charged her with 25 count criminal information bothering on financial crimes before the court. However, she entered into a plea bargain with the prosecution and pleaded guilty to a lesser three-count charge. The court thereafter convicted her on the three-count charge and ordered for forfeiture of her assets amounting to about N191 billion. She was sentenced to six (6) months on each of the three counts which are to run concurrently.

[40] (2006) 2 EFCSLR 145.
[41] (2008).

On January 28, 2013, the sentencing of the Assistant Director in the Police Pension Office, Mr John Yakubu Yusuf, to two years imprisonment or N750,000 (Seven hundred and fifty thousand naira) fine, brought to the fore the propriety or otherwise of the mechanism of plea bargain in Nigeria's criminal justice system.[42] Many commentators were alarmed at the inconsequential punishment meted out to the culprit. There have also been other legal opinions on how plea bargain mechanism is alien to our jurisprudence. Many argued that it is not in our Constitution or any other statute. At the Alternative Dispute Resolution Summit organized by the Negotiation and Conflict Management Group and the National Judicial Institute on November 15, 2012, a former Chief Justice of Nigeria, Hon. Justice Dahiru Musdapher stated:

> The concept is not only dubious but was never part of the history of our legal system at least until it was surreptitiously smuggled into our statutory laws with the creation of the Economic and Financial Crimes Commission.[43]

From the foregoing, it is obvious that plea bargaining has not been fully accepted in Nigeria unlike in the United States where it has constitutional backing.

3.0. The Application of Plea Bargaining under the Administration of Criminal Justice Act 2015

The Administration of Criminal Justice merged and preserved existing criminal procedures[44] into one principal Act that would apply uniformly in all federal courts in Nigeria. The concept of plea bargain is one of the new innovative provisions introduced in the Act with the intention to enhance the efficiency of justice. Section 270 of the Act,[45] is on plea bargain and plea generally. Section 270(1) provides thus:

(1) Notwithstanding anything in this Act or in any other law, the Prosecutor may:
(a) Receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf; or
(b) Offer a plea bargain to a defendant charged with an offence.

[42] Umeh, (n 14) 11.
[43] Ibid.
[44] Criminal Procedure Act Cap C41 *LFN* 2004 and the Criminal Procedure Code Cap C31 *LFN*, 2004.
[45] ACJA 2015.

(2) The prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence, provided that all of the following conditions are present:
(a) The evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt;
(b) Where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative; or
(c) Where the defendant, in a case of conspiracy, has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders.

In summary, section 270 covers the plea bargain guidelines, plea to information or charge, proof of previous conviction, effect of plea of not guilty, effect of plea of guilty, amending charge where defendant pleads guilty, amending charge where defendant pleads guilty to offence not charged, failure to plead due to malice or otherwise, plea: *autrefois* acquit or convict, pardon. The provision is similar to the provision of Rule (11) of the Federal Rules of Criminal Procedure of the United States. It seems that plea bargaining in the United States was the model for Nigeria's criminal justice on plea bargain.

It should be noted that the Act provided clear statutory conditions for commencing a plea bargain. It also stipulated the relevant factors the prosecutor must weigh in determining where it is in the public interest to enter into a plea bargain. The Act also made provisions for the compensation of the victim of the crime under plea bargain and the protection of the defendant. Also, the finality of judgment based on plea bargain was clearly stated in the provision of Section 270 of the Act.

3.1. Applicability of Plea Bargaining in the Prosecution of Cybercrime

The Administration of Criminal Justice Act (ACJA) 2015 deals with criminal procedure and effectively repealed the Criminal procedure Act Cap. C41 Laws of the Federation of Nigeria, 2004, and the Criminal Procedure (Northern States) Act Cap C42 LFN, 2004 applicable in all federal courts and courts in the Federal Capital Territory (FCT). One essential feature of the

ACJA is the paradigm shift from punishment as the main goal of the criminal justice to restorative justice which pays serious attention to the needs of the society, the victims, vulnerable persons and human dignity generally.[46]

The Act applies to all criminal trials including cybercrime. Even though it is a federal enactment, some of the provisions are of general application throughout the country.[47] In particular, arrests and detention of all criminal suspects shall be regulated by the provisions of ACJA. Section 2 (1) ACJA provides that:

> without prejudice to section 86 of this Act, the provisions of this Act shall apply to criminal trials for offences established by an Act of the National Assembly and other offences punishable in the Federal Capital Territory, Abuja.[48]

The Cybercrime (Prohibition, Prevention etc Act, 2015) is an enactment of the National Assembly of the Federal Republic of Nigeria. The criminal offence of cybercrime is one established by an Act of the National Assembly so the ACJA applies to cybercrime. It is important to discuss what cybercrime is all about. Cybercrime is any activity that uses a computer either as an instrumentality, target or as a means for perpetuating further crimes. There are different kinds of offences that come under the umbrella term cybercrime. This includes; hacking, illegal interception of computer- mediated communications, illicit markets, theft of services, theft of data, theft of credit card details, espionage, piracy, fraud, sales and investment fraud, unauthorised online fund transfer, ATM fraud, destroying and damaging data, website defacement, interfering with the lawful use of a computer, malicious code, denial of

[46] 'The Administration of Criminal Justice Act 2015 (ACJA)', [2016] <*http://www.lawpavillion.com*> accessed 12 July 2017.

[47] Femi Falana, 'The Administration of Criminal Justice Act, 2015', [1 September 2015] <*http://www.t.guardian.ng*> 11 July 2017.

[48] Section 86 ACJA provides that: the provisions of this Part and Parts 9 to 30 of this Act shall apply to all criminal trials and proceedings unless express provision is made in respect of any particular court or form of trial or proceeding.

service, spam, phishing, cyber stalking or bullying, cyber war and cyber terrorism. This list is not exhaustive

In the United States, plea bargain is applied to cybercrime trials. Robert Moore was sentenced to two years of prison for hacking into the networks of internet phone companies. He was up against a maximum of five years imprisonment.[49] David Kernell, who hacked into the vice presidential candidate Sarah Palin's yahoo email account at age 20, was sentenced to 366 days at a rehabilitation center, where he was allowed to continue his college studies. Kernel also faced a maximum of five years imprisonment.[50] Plea bargain was also applied in the case of Joshua Holly, who hacked Miley Cyrus[51] account. He got just three years' probation for spamming and computer fraud instead of ten years imprisonment.[52]

'Because the evidence against them is usually incriminating, cybercriminals often enter plea agreements with prosecutors, where they plead guilty to all charges in return for a more lenient sentence'.[53] While plea bargaining has its benefits, it weakens the deterrent effect that prison sentences are intended to have.[54] At this point, it is important to briefly analyse the benefits or otherwise of plea bargaining.

4.0. Arguments in Support of Plea Bargaining

Legal scholars and commentators have argued that plea bargain principle is a useful means of speedy disposal of criminal trials. Ogunwumiju, JCA in *FRN v Lucky Igbinedion,*[55] stated the advantages of plea bargaining to include:

[49] Levison, (n 1).
[50] Ibid.
[51] A famous American singer, songwriter and actress.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] (2014) LPELR- 22760 (CA).

1. Accused can avoid the time and cost of defending himself at trial, the risk of harsher punishment, and the publicity the trial will involve.
2. The prosecutor saves time and expense of a lengthy trial.
3. Both sides are spared the uncertainty of going to trial.
4. The court system is saved the burden of conducting a trial on every crime.

4.1. The advantages of plea bargaining includes:

(i) Plea Bargaining as a Sort of Restorative Justice

It has been argued that plea bargaining is a form of restorative justice. The point of unity between plea bargain and restorative justice is the cardinal role the victim plays in both.[56] The primary determinants of restorative justice are the interests of the victim, the community and the offender.[57] Leniency towards the offender tends to lead to the achievements of these aims.[58] By giving the defendant the opportunity of a lesser sentence or charge in a plea bargain, the society is sending a message of mercy and readiness to forgive the defendant.[59] It is expected that the defendant will in turn feel less traumatised and ready to re-enter the society that he has scorned with his crime. The road to reconciliation of the offender with the community is thus opened.[60] This paper is of the view that deterrence is in no way synonymous with restorative justice. The object of this paper is to uphold the deterrent nature of prison sentence to see how it would deter prospective cybercriminals from committing cybercrime. Plea bargaining as a form of restorative justice may go down well with certain crimes but definitely not cybercrime because most cybercriminals go back to the drawing board once they regain their freedom.

[56] Akin Ibidapo-Obe & F Abayomi Williams, *Arbitration in Lagos State, A Synoptic Guide* (Lagos: Concept Publications Limited, 2010) 117.
[57] Umeh, (n 14) 3.
[58] Ibid.
[59] Obe & Williams, (n 74) 116.
[60] Ibid.

(ii) Uncertainty of Trial

Both the prosecutor and the defence are spared the uncertainty that is associated with trials. The plea bargain practice also has the advantage of avoiding a situation where an innocent man is convicted on a crime he may not have committed since the outcome of a case is uncertain as the judge has the final powers to deliver a verdict on the evidence presented before it.[61] It is not therefore outside the realm of possibilities that an innocent person is convicted of a crime for any reason, from the ineptitude of its counsel to the failure of the judge to have a full and perfect grasp of the case before it.[62]

(iii) Prison Decongestion

It has also been argued that the adoption of plea bargaining helps in prison decongestion. Some cases are never investigated and/or prosecuted for upwards 4-5 years and some suspects languish in prison awaiting trials. One measure that would greatly assist in decongestion of prisons in Nigeria is the use of plea bargaining to alleviate human suffering, shorten trial periods or avoid it entirely.[63]

(iv) Length of Trial

It has been argued that plea bargain practice saves time by avoiding unnecessary delay which is the norm of criminal trials in Nigeria. The right to a speedy trial is a constitutional right that the accused person is entitled to. The constitutional guarantee of speedy trial is intended to ensure that the accused is not subjected to unreasonably lengthy confinement before trial.[64]

(v) Saves Costs to Government

[61] Bayo Adetomiwa, 'The Concept of Plea Bargaining in Nigeria' <*http://www.matrixsolicitors.com*> accessed 16 July 2017.
[62] Ibid.
[63] Umeh, (n 14) 17.
[64] Oguche, (n 14) 73.

Some school of thoughts argue that plea bargaining saves costs for the government. One of the advantages of plea bargain practice is that it saves both parties the cost of prosecuting and defending the case. It has been argued that the economic underpinnings of plea bargaining is that it saves tax payers money and enrich public treasury, especially where the bargain involves recovery, forfeiture and refund of huge amount of money. Some observers defend plea bargaining on grounds of economy or necessity. Viewing plea negotiation less as a sentencing device or a form of dispute resolution than as an administrative practice, they argue that society cannot afford to provide trials to all accused who would demand them if guilty pleas were unrewarded- or, at least, that there are more appropriate uses for the additional resource that an effective plea bargaining prohibition would require.[65]

4.2. Criticisms against Plea Bargain

Even though the concept of plea bargain is widely used in the criminal justice systems of many countries it has been a subject of criticism by scholars and even crime victims.

Some critics of plea bargaining argue that the process is unfair to criminal defendants. The critics claim that prosecutors possess too much discretion in choosing the charges that the criminal defendant may face.[66] It has been argued that plea bargaining undercuts the requirements of proof beyond reasonable doubt.[67] When a defendant is arrested, prosecutors have the authority to level any charge if they possess enough facts to support a reasonable belief that the defendant committed the offence. This standard is called 'probable cause', and it is a lower standard than ability to prove a charge 'beyond reasonable doubt', the standard that the prosecution must meet at trial.[68] Thus, for

[65] Ibid, 74.
[66] 'Plea Bargaining: A Shortcut to Justice' <*http://law.jrank.org/pages/9227/Plea-Bargaining-Shortcut-Justice.html*> accessed 16 July 2017.
[67] 'Guilty Plea: Plea Bargaining- Evaluations of Plea Bargaining' <*http: //law.jrank.org/pages/1289/Guilty-plea-Plea-Bargaining-Evaluations-plea-bargaining.html'*> accessed 16 July 2017.
[68] Ibid.

leverage, a prosecutor may tackle on similar, more serious charges without believing that the charges can be proved beyond reasonable doubt.

It has also been argued that prosecutors use overcharging to coerce guilty pleas from defendants thereby depriving them of the procedural safeguards and the full investigation of trial process.[69] The most serious concern with the plea bargaining process relates to the possibility that an accused that is in fact innocent will be induced to plead guilty. While it is a requirement of law that an accused admits guilt before a court accepts plea, other pressure may frustrate this principle. [70]

Every person charged with a criminal offence has the constitutional right to trial.[71] It has been argued that the plea bargaining process is a derogation of this constitutional right. Under the Charter of Rights and Freedom, section 10(b) provides that 'everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right'.[72] The duty of the defence counsel in a criminal proceeding is to protect the client as much as possible from being convicted except by a court of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence which the client is charged. In some cases, this obligation is not observed, most defence counsel would rather work in favour of the police or the prosecutor.

It has been argued that the applicability of plea bargaining in criminal trials connotes disparity in class. Plea bargaining is argued by some scholars to be an innovation to protect members of the political class responsible for looting.

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[69] Epiphany Azinge, 'Conviction to Compromise: The Plea Bargain Option [2012] <*http://www.nials-nigeria.org*> *accessed* 16 July 2017.
[70] 'Plea Bargaining: Criticism of the Practice' [2016] <*http://www.justice.gc.ca.com*> accessed 16 July 2017.
[71] See section 36 CFRN (as amended).
[72] Charter Right

Some critics of plea bargaining suggest that it deprecates human liberty and the purposes of the criminal sanction.[73] They argue further saying that plea bargaining merchandises the whole process by treating defendants as instrumental economic goods.

Finally, and most importantly, it has been argued that plea bargaining result in unjust sentencing. The practice of plea bargaining results in unwarranted leniency for offenders and that it promotes a cynical view of the legal process.[74] They argue that the practice of plea bargaining waters down the importance of deterrence in a criminal trial and this is a far cry of the objective of criminal proceedings.

4.3. Limitations of Plea Bargaining in Prosecuting Cybercrime

Investigation and prosecuting cybercrime is a formidable task because of the nature and scope of cybercrime. One of the most significant differences between cybercrime and terrestrial crime is the nature of evidence. There are differences in the form it takes, how it is stored, where it is located, how it is found, and the physical limitations of what it will tell you.[75] Digital evidence is intangible. It is often volatile, in that it may no longer be accessible after a brief period and it maybe massive in quantity, thereby posing substantial logistical challenges.[76] Another challenge to the investigation and prosecution of cybercrime in Nigeria is jurisdiction. The borderless nature of cybercrime compounds the problem of prosecution. When the cybercrime originates from Nigeria but extends or targets another country after having routed through servers in one or more intermediate countries. This raises the question of where the crime occurred, and which country has the jurisdiction for investigating and prosecuting the case.

[73] Ibid, (n 81).
[74] Ibid.
[75] Grabosky, (n 2) 110.
[76] Ibid,11.

Assembling and preserving electronically generated evidence, and presenting it in court requires familiarity with digital forensics. Most prosecutors in Nigeria are not even computer literate.

With the challenges in prosecuting cybercrime and the prevalence of the crime applying plea bargain to cybercrime trial would make a joke of the criminal justice system in Nigeria. There is no guarantee that a criminal defendant who enter a plea agreement with the prosecutor will not go back to the cyberspace to commit more crimes. This was the case of Kevin Mitnick, one of the prominent computer hackers in the United States. In 1970, he obtained unauthorized access to telephone systems in Los Angeles. In 1981, he was arrested for destroying data over a computer network.[77] In 1989, he was convicted under the Computer Fraud and Abuse Act for theft of software from the Digital Equipment Corporation. Following his release, he continued offending, his notoriety earning him a place on the FBI's most wanted list.[78] After a nationwide search, he was rearrested in 1995 and held without bail. In 1999, at the age of thirty-six (36), he was sentenced to a total of thirty-eight (38) months in federal prison (including time served), followed by supervised release.[79] On January 21, 2000, he was released from prison after serving fifty-nine months and seven days. The condition of his release was extremely stringent.[80] For this reason and more this work argues that applying plea bargaining to cybercrime trials would be counter-productive in the fight against cybercrime as it would encourage cybercriminals to go on with the crime since if they are caught the would negotiate with the prosecutor for a lighter sentence. Cybercriminals should serve the full prison sentence stipulated in the Cybercrime Act, 2015 so as to act as a deterrent to prospective cybercriminals. The major limitation of plea

[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.

bargaining in prosecuting cybercrime is the deterrent effect it has on prospective cybercriminals.

The main aim of punishment is deterrence. Deterrence is one of the primary objects of the criminal law. Its primary goal is to discourage members of society from committing criminal acts out of fear of punishment.[81]

The most powerful deterrent would be a criminal justice system that guaranteed with certainty that all persons who broke the law would be apprehended, convicted, and punished, and would receive no personal benefit from their wrongdoing.[82] This work argues that plea bargaining should be exempted from prosecution of cybercrime in Nigeria and all cybercriminals found guilty of a cybercrime should be apprehended, convicted and punished. He should not receive any benefit in the name of plea bargaining. Plea bargaining sends the wrong kind of message for a serious crime like cybercrime and it would make a mockery of the fight against cybercrime. It weakens the deterrence effects of prison sentences and it should be exempted from prosecuting cybercrime unless the cybercriminals works with the law enforcement agencies in policing the cyberspace. This option should be the last resort, there should be proof that the defendant is remorseful and has repented from his sins of cybercrime. Even when it seems so, such defendant should be closely monitored when working in conjunction with the law enforcement agencies in tackling cybercrime because committing cybercrime seems addictive and most cybercriminals go back to the crime once they are off the hook.

[81] 'Deterrence' <*http://www.legal-dictionary.thefree-dictionary.com*> accessed 12 July 2017.
[82] Ibid.

The sentence for the largest cybercrime case ever prosecuted is the lengthiest ever imposed in the United States for hacking or identity-theft.[83] TJX[84] hacker, Albert Gonzalez was sentenced to 20 years in prison for leading a gang of cybercriminals who stole more than 90 million credit and debit card numbers from TJX and other retailers.[85] The hacker had faced a sentence of between fifteen (15) and twenty-five (25) years for the TJX string of intrusions. The United States government sought the maximum sentence, while Gonzalez sought the minimum, on the grounds that he suffered from asperger's disorder and computer addiction, and he cooperated with the government extensively against his U.S co-conspirators and two Eastern European hackers (known only as 'Grigg' and 'Annex'). Gonzalez even provided the government with information about breaches that had not yet been detected.[86] A psychiatrist who examined Gonzalez for prosecutors, however found no evidence of Asperger's disorder or computer addiction. The assistant U.S attorney, Stephen Heymann urged the court to hand down a twenty-five (25) year sentence that would strongly deter future Albert Gonzalezes from a life of cybercrime.[87] U.S District Judge, Patti Saris credited Gonzalez for his apparent remorse but said she was disturbed by the fact that he committed the crimes while working for the government. Gonzalez was finally sentenced to twenty (20) years in prison. Humza Zaman, a former network manager at Barclays Bank, was sentenced to forty-six (46) months in prison and fine $75,000 for serving as a money courier for Gonzalez. He was charged with laundering between $600,000 and $800,000 for Gonzalez.

[83] Kim Zetter, 'TJX Hacker Gets 20 Years in Prison' (2010) <*http://www.wired.com*> accessed 10 July 2017. TJX is an American apparel and home goods company based in Massachusetts. It claims to be the largest international apparel and home fashions off-price department store chain in the United States.
[84] TJX Companies Inc. (TJ Maxx), is an American apparel and home goods company based in Framingham, Massachussetts.
[85] Ibid.
[86] Ibid.
[87] Ibid.

The Nigerian criminal justice system should take a cue from this case. Applying plea bargaining to prosecution of cybercrime and giving cybercriminals a lighter sentence would defeat the purpose of the fight against cybercriminal and Nigeria would also be seen as a country high in cybercrime activities. Exempting the option of plea bargaining in prosecuting cybercrime would help the image of the country. Foreign investors would believe that the country has a criminal justice system that abhors cybercrime and would extensively punish perpetrators of cybercrime if found guilty by a court of competent jurisdiction.

5.0. Conclusion

The concept of plea bargaining may have a few benefits like decongesting the prisons, avoiding delay in criminal trials and saving costs for the government but its limitation to justice outweighs its benefits especially in the realm of cybercrime. Applicability of plea bargaining in prosecution of cybercrime would only cripple the fight against cybercrime in Nigeria. It would make a mockery of the deterrent effect of the punishment for cybercrime. The rule of law is crystal clear. Those who are found guilty of any crime committed within Nigeria should be adequately punished through the process of law. This work argues that applicability of plea bargaining should be exempted in the prosecution of cybercrime in Nigeria. Cybercrime is a national and global issue that needs to be tackled urgently. Nigerian legislation on cybercrime should be perceived as one which totally abhors cybercrime by punishing cybercriminals severely. Nigeria should not be seen as a safe haven for individuals that engage in cyber-related offences. To achieve all these, plea bargaining should not be an option in the prosecution of cybercrime in Nigeria.