The Concept of Plea Bargaining Under Nigerian Law and Islamic Law

By

Ibrahim Yahaya Abikan*

Abstract

This paper examines the concept of plea bargaining under Islamic Law with a view to finding out whether its application is legally permissible under Nigerian law. The paper further discusses the practice of plea bargaining and its impact on the Nigerian Criminal Justice System. The practice of plea bargaining has become prominent across the globe in that it has become part and parcel of the criminal justice system of many countries. The practice is that an agreement is reached between the prosecutor and the defendant whereby the defendant pleads guilty to a lesser charge in exchange for reduced or a dismissed charges subject to approval of the cour.. With the enactment of the Administration of Criminal Justice Act, 2015, Nigeria has fully adopted the practice of plea bargaining. The paper adopts doctrinal method where relevant materials on the topic of the research were utilized. The writer's major finding is that the application of the plea bargaining is not legally possible and permissible under Islamic Criminal Law with respect to hudud offences which are the right of Allah while the practice is legally permissible in qisas (the law of retaliation) and ta'azir (discretionary punishments) offences which border on the individual or public right. The paper recommends that the practice of plea bargaining in the Islamic countries should be limited to only qisas and ta'azir offences and not hudud offences.

Keywords: Plea Bargaining, Islamic Criminal Law, Crime Justices System, Hudud, Qisas, Ta'azir.

Introduction

The pursuit for justice throughout the world has led to the new innovation and introduction of the concept of plea bargaining to the administration of criminal justice system of many developed countries like the United States, Canada, Germany, France, Malaysia, and many others. Plea bargaining has gained good ground and it also occupies an ambivalent position in the criminal justice system.[1] In the passing decades, plea bargaining has become the prevailing method of case disposal in the United States and in an increasing number of countries across the globe.[2] Some countries like U.S.A., Germany, Malaysia and other countries apply the concept to all types of offences, while countries like India, Pakistan, Italy, France and others limited the scope of the application to certain types of offences.[3]

* Lecturer and Acting Head, Department of Islamic and Customary Law, Bola Ajibola College of Law, Crescent University, Abeokuta, Ogun State, Nigeria.

[1] Mike A. A. Ozekhome, 'Coercion to Compromise: The Imperatives of Plea' *The Jurist:* Law Review on Contemporary Legal Issues in Nigeria, University of Abuja, (2013) (14) 166.

[2] Ibid.

[3] Bala Babajide and Ibrahim Danjuma, 'The Concept of Plea Bargaining in the Muslims' Countries: The Islamic Position towards its application *Journal of Islamic and Comparative Law*¸ the Journal of the Centre of Islamic Legal Studies, Institute of Administration, Ahmadu Bello University, Zaria (2015) (3), 63.

Plea bargaining as a prosecutorial strategy or tool is an emerging phenomenon which was alien to criminal justice administration in Nigeria' It was imported into Nigeria's justice system by the implication of section 14(2) of the Economic and Financial Crimes Commission (EFCC) Act, 2004.[4] Recently, plea bargaining has been implemented in Nigeria since its enforcement in notable cases such as are Igbinedion case,[5] Cecilia Ibru's case,[6] John Yakubu's case[7] and many more.

It is noteworthy that Administration of Criminal Justice Law of Lagos State 2011 was the first legislation to localize and import plea bargaining into Nigeria's criminal jurisprudence.[8] In 2015, the law was repealed, and the new Administration of Criminal Justice Law of Lagos State 2015 was enacted by the Lagos State Government. It is observed that the new law retains the concept of plea bargaining, the scope and procedure of its application.[9] Equally, in the year 2015, the Federal Government of Nigeria passed into law Administration of Criminal Justice Act 2015. Section 270 to 277 of the Act deal generally and extensively with plea bargaining, its scope, and the procedure of its application.[10]
The practice of plea bargaining has generated a lot of controversy in Nigeria. Many view it as an escape method for criminals especially in the context of its use in handling high profile corruption cases by the Economic and Financial Crimes Commission (EFCC).[11] Indeed, plea bargaining has many critics. Islamic Criminal Law is quite different from the conventional criminal law in the sense that while the former derives its sources from Qu'ran, Hadith, Sunnah and other secondary sources of Islamic Law, the later derives its source from the Constitution and statutes enacted by the legislatures.[12]

The paper seeks to discuss the concept of the plea bargaining, tracing historical nature of the concept, its meaning, types, and the use of the concept in Nigeria. The paper takes a critical look at and examines the position of plea bargaining under Islamic Criminal Law with a view to determining whether or not Islamic Criminal Law can accommodate the concept of plea bargaining. The study will conclude with necessary recommendations.

Brief History of the Concept of Plea Bargaining
The origin of plea bargaining is so unclear that is why there is no agreement among the writers and scholars as to when precisely the concept emerged.[13] However, it is believed that it originated from the United States of America as this is evident in their criminal

[4] Economic and Financial Crimes Commission (EFCC) Act, 2004.
[5] *Federal Republic of Nigeria v Michael Igbinedion* (2014) All FWLR (Pt. 734), 101 at 144.
[6] *Federal Republic of Nigeria v Mrs. Cecilia Ibru* (unreported) Charge No. FHC/L/297/C/2009.
[7] *Federal Republic of Nigeria v John Yusuf Yakubu* (unreported) Charge No. FHC/Abuja/CR/54/12
[8] See generally sections 75 and 76 of Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State, 2011.
[9] See generally sections 75 and 76 of Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State, 2015.
[10] Sections 270 to 277 of Administration of Criminal Justice Act, 2015.
[11] Mike A. A. Ozekhome, (n.1) 167.
[12] Bala Babaji and Ibrahim Danjuma, (n.3) 70.
[13] Mike A. A. Ozekhome (n 1) 169.

jurisprudence and it was only used then episodically before the 19th century.[14] According to Simeon, in criminal court, the practice of plea bargaining can be traced from Middlesex County in Massachusetts between the years 1780 – 1900 and was mostly used in the proceedings of liquor selling violations under mandatory sentencing laws. The prosecutors encountered a system whereby different charges for the sale of liquor without a license would be dropped to one charge and the accused would be sentenced to a prearranged fine and courts.[15] Feeley stated that in England and USA legal system, the prosecutor in public criminal trials has an inherent power to exercise discretion to either bring or drop charges against the accused person. To him, the power of prosecutor to enter *nolle-prosequi* under common law gave birth to plea bargaining.[16] Ted Eze and Amaka Eze hold the view that in most of the history of the common law, plea bargaining was not known until the nineteenth century when there was significant evidence of the practice in America.[17] John Langbein is of the view that plea bargaining was unknown during most of the history of common law, and only in the 19th century was the practice found in either England or the United States.[18]

Lawrence Friedman and Albert Alschuler maintain that plea bargaining did not emerge before 1800, but became prominent in the last third of the nineteenth century as a pertinent aspect of American urban courts. The concept re-emerged in the twentieth century especially in the 1920s when the Federal Courts were faced with large numbers of prohibitions cases, and in the 1960s due to the rise in blue collar crimes.[19] According to Alschuler, the concept did not exist with any frequency until in the 19th century and he based his argument on the fact that the legal practice and reports of cases show that for many years, the English courts opposed and discouraged guilty pleas and that this practice of discouraging the pleas of guilty extended to the second half of 19th century where plea bargaining was introduced and backed with the laws.[20] K. V. Santhy holds a similar view that the concept of plea bargaining originated from the United States of America and became established in the case of *Robert M. Brady v. United States*.[21] where the Supreme Court of United States held that 'guilty pleas are not constitutionally forbidden'.[22]

It is submitted that from the above different views it is understood that the concept of plea bargaining has been in existence prior to 19th century, but, it only gained

[14] Ibid.
[15] Simeon Sungi, 'Is it Pragmatism or an Injustice to Victims? The Use of Plea Bargaining in International Criminal Court' *Journal of Theoretical and Philosophical Criminology* (2015) (7) (2) 23, http//www.jtpscrim.org/AUGUST2015/plea-Sungi pdf. Accessed March, 2018.
[16] Bala Babaji and Ibrahim Danjuma, (n 3) 64.
[17] Adekunbi Imosemi and Bisola Ogundare, 'Plea Bargaining in Nigeria: an Aftermath of the Administration of Criminal Justice Act 2015' *International Journal of Business and Law Research* 5(4):93 – 105 (2017) www.seahipai.org. 95.
[18] Ibid.
[19] Ibid, 96.
[20] Bala Babaji and Ibrahim Danjuma, (n 3) 64.
[21] 397 US 742 (90 s. Ct. 1463, 25 L. Ed 2d 747).
[22] Bala Babaji and Ibrahim Danjuman, (n 3) 64.

prominence, judicial blessing and recognition in the 19th century. Equally, the concept originated from the American jurisprudence, and it was practiced in the United States of America before England or any other countries in the globe.

Meaning and Types of Plea Bargaining

Different wordings have been used by different scholars, jurists, commentators, lawyers and authors to explain the true meaning of the concept plea bargaining. All the meanings and definitions given revolve around the fact that the concept is an agreement in a criminal case between the prosecutor and the defendant whereby the defendant will be allowed to plead guilty so that he can get a lesser or dismissed charges. According to Encyclopedic dictionary, plea bargaining is defined as 'the negotiation of an agreement between a prosecutor and a defendant whereby the defendant is permitted to plead guilty to a reduced charge.'[23] Black's Law Dictionary defines the concept of plea bargaining as, '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 the other charges.[24]

According to Agaba, plea bargaining is generally an agreement in a criminal trial in which a prosecutor and an accused person arrange to settle the case against the accused usually in exchange for concession.[25] Candace McCoy simply defines plea bargaining as 'the process by which the defendant is a criminal case relinquishes the right to go to trial in exchange for a reduction in charge and/or sentence'.[26]

From the above different definitions, it is understood that plea bargaining is a concept of give and take, that is, an agreement will be reached between the prosecutor and the defendant wherein the defendant pleads guilty to a lesser charge in exchange for a reduced sentence which is subject to court's approval or acceptance, while the prosecutor on the other hand will secure conviction of the defendant. Thereafter, it is a concept of giving and taking as observed by Babaji in his words that 'is just like Trade by Barter between the prosecutor and the accused person.'[27] It is observed from different definitions above, that plea bargaining must be a conscious and a deliberate act between the prosecutor and an accused person with a plea of guilty being an overt act on the part of the accused in evidence of the plea bargain. The offence or offences to which the accused must enter a plea of guilty is/are for them to decide or agree upon. It has been observed that the concept of plea bargaining operates in *persona* and not by privy or proxy.[28] In other words, no one can plead on behalf of another.

[23] See Webster's New Explorer Encyclopedic Dictionary, 2006 edition, 1402. Also Webster's Ninth New Collegiate Dictionary, 1989, Merriam – Webster Inc, Publishers, Springfield, Massachusetts, U.S.A., 902.
[24] Bryan A. Garner, (ed) Black's Law Dictionary, (8th ed; Thomson West, 2004) 1190.
[25] James Atta, Agaba, *Practical Approach to Criminal Litigation in Nigeria*,(3rd Ed. Bloom Legal Temple, Abuja, 2015), 624.
[26] Mike A. A. Ozekhome, (n 1) 167 – 168.
[27] Bala Babaji and Ibrahim Danjuman, (n 3) 66.
[28] Agbai Iro Ogbuabia, *Quick Reference Criminal Trials And Procedure in Nigeria*, Logicgate Media Limited, Lagos (2016) 13.

There are two kinds of plea bargaining as endorsed in international jurisprudence, that is, express or explicit and implicit plea bargaining.[29] Express bargaining occurs where an accused or his lawyer negotiates directly with the prosecutor or a trial judge concerning the benefits that may follow the entry of a plea guilty.[30] Under this type of bargaining, the terms of the agreement between the accused and the prosecutor are clear and unambiguous.[31] Implicit bargaining on the other hand occurs without face to face negotiation between the accused and the prosecutor or a trial judge. Under this type, the accused unilaterally pleads guilty with expectation that he will get a reward for his entry of guilty plea. He may get a lesser charge or sentence because trial judges establish a pattern of treating accused who plead guilty more leniently than those who exercise the right to trial.[32]

From the above classification, it is understood that the express bargaining occurs where there is a clear consensual agreement reached between the accused and the prosecutor regarding the benefits the latter will derive from his plea of guilty whereas under the implicit bargaining, there is no consensual agreement reached between the accused and the prosecutor and there is no specific benefits the accused may derive from his plea of guilty.

Heumann[33] added policy bargaining which appears to be peculiar to the USA as the third type of plea bargaining. This has to do with policy the prosecutor may adopt from time to time. He may decide to inform the accused that he will not negotiate with him with respect to some particular cases but will withdraw some of the lower charges against the accused person who pleaded guilty to a policy case.[34] It may be understood that in this type of bargaining, the prosecutor has unfettered discretion to form a policy or decision whether to negotiate with the accused or withdraw some charges against the latter if he pleads guilty to a policy case. Explicit bargaining can be further sub-divided into a charge, sentence and facts bargaining.

Charge bargain occurs when the prosecutor allows a defendant to plead guilty to a lesser charge or to only some of the charges that have been filed against him.[35] It involves a negotiation of the specific charges (counts) that the defendant will face at the trial. Usually, in return for a plea of guilty to a lesser charge, a prosecutor will dismiss the higher or other charge(s) or counts. For example, in return for dismissing charges for murder, a prosecutor may accept a guilty plea for manslaughter (subject to the court approval). A defendant charged with burglary may be offered the opportunity to plead guilty to attempted burglary.[36]

[29] Adewale Afolabi, 'A Critical Analysis of Plea Bargaining Under the Criminal Code and Administration of Criminal Justice Law'. *The Jurist: Law Review on Contemporary Legal Issues in Nigeria*, University of Abuja, (2013) (14) 124.
[30] Ibid.
[31] Baba Babaji and Ibrahim Danjuma, (n 3) 67.
[32] Adewale Afolabi, (n 29) 124.
[33] Bala Babaji and Ibrahim Danjuma, (n 3) 67.
[34] Ibid.
[35] Adewale Afolabi, (n 29) 124.
[36] Mike A. A. Ozekhome, (n 1) 168.

Sentence bargain occurs when a defendant is told in advance what his sentence will be if he pleads guilty. Sentence bargaining involves the agreement to a plea of guilty (for the stated charge rather than a reduced charge) in return for a lighter sentence. This can help a prosecutor obtain a conviction if for example, a defendant is facing serious charges and is afraid of being hit with the maximum sentence.[37] In that case, he will be advised to plead guilty in exchange for a promise of leniency. In this type of bargain, the prosecutor needs not press for a lesser charge, but rather, even though the charge remains as it is, the prosecutor would, based on the agreement, recommend a lighter sentence.[38] This type of bargaining relieves the prosecution the burden of going through trial to prove its case. It equally provides the defendant with an opportunity for a lighter sentence. Sentence bargains can only be granted if they are approved by the trial judge.[39]

Fact bargaining involves an admission to certain facts (stipulating to the truth and existence of provable facts, thereby eliminating the need for the prosecutor to have to prove them) in return for an agreement not to introduce certain other facts into evidence.[40] This type of bargaining occurs when prosecutor and defendant bargain over what version of events to be presented to court as facts of the case.[41] In this type of bargaining, the prosecutor may agree with the defendant to present certain facts before the court as what actually happened and decide to suppress or abandon some other facts in exchange for a guilty plea. Some statutes or sentencing guidelines specify that certain increases or decreases in the sentencing range must occur if certain facts are proved. For instance, a drug offence may carry a mandatory minimum sentence if the offender had a prior drug felony, possessed a certain amount of drugs or played a supervisory role in a drug conspiracy.[42] But, in event that fact bargaining agreement is reached between the prosecutor and the defendant, the former may present facts before the court that there was no such prior during felony involving the latter even if there was

Attractions of Plea Bargaining

The major reason for the application of plea bargaining is that it helps the court and state to manage the case loads. It reduces the work load and pressure on the prosecutor and the judge, thereby saving time to prepare for gravest case by leaving the effortless and petty offences to settle through plea bargaining.[43] It is also a factor in reforming the offender by accepting the responsibility for their actions and by submitting them voluntarily before the law, without having an expensive and time consuming trial.[44] Plea bargaining allows persons who admit responsibility for their crimes to receive reward for their remorse in the form of lighter sentences.[45] It also saves time and energy since the defense counsel does less work than what is required while he receives the same legal fees or even a higher fee

[37] Ibid.
[38] James Atta Agaba, (n 25) 625.
[39] Adewale Afolabi, (n 29) 124.
[40] Mike A. A. Ozekhome, (n 1) 169.
[41] Ibid.
[42] Ibid.
[43] Adewale Afolabi, (n 29) 126.
[44] Ibid.
[45] James Atta Agaba, (n 25) 626.

for securing a reduced sentencing.[46] It is observed that the difficulty in proving certain complex cases such as economic crimes committed across many jurisdictions in one operation make plea bargaining quite attractive.[47]

The plea bargaining is also desirable to afford the accused person and the state the option of compromising factual and legal disputes. It has been argued that if plea bargaining did not improve the positions of both parties, that is, the accused and the State, either party would have insisted on trial[48] which means that both parties benefit from the adoption of the plea bargaining instead of criminal trial. Some jurists argue that society cannot afford to provide trials to all the accused persons if guilty pleas were unrewarded.[49] Plea bargaining also avoids the necessity of a public trial and may protect the innocent victim of crime against the trauma of giving evidence in open court such as in rape cases where the victim may not want to testify because of stigmatization and the social implications of the evidence on her future life.[50]

Under the adversarial justice system, it is important that the accused's case be proven beyond reasonable doubt, a situation which more often than not gives the offender who may have actually committed a crime the chance of escaping justice and punishment. But with the practice of plea bargaining in place, there are higher chances of securing the convictions of the accused persons.[51] It also reduces public expenditure and saves taxpayers money spent on prolonged trials and enrich the public purse especially where the bargain includes forfeiture of properties and recovery of looted funds.[52] Plea bargaining enhances rapid and prompt trial, and it reduces or eliminates the legal loopholes that tend to truncate the criminal trial. Prisons or correctional centers are overcrowded and congested in many of developing countries, but, with practice of plea bargaining, such overcrowded prisons can be decongested. There can be not a better summary of the merits of the plea bargaining than the one presented by Chief Mike Ozekhome, SAN when he said:

> "Plea bargaining is allowed in many criminal jurisdictions across the world. There is nothing wrong in it as a concept. It is meant to save the cost of litigation, to reduce the time and pressure of litigation, to lead to quick dispensation of justice and to allow criminals who have become repentant and remorseful of their crimes to say, state, I am sorry. I have committed an offence, forgive me, let me give back to you what I have illegally enriched myself with. That is the meaning of plea bargaining."[53]

However, the critics of the concept of the plea bargaining argue that the concept undercuts the requirement of proof beyond reasonable doubt and the plea negotiation is substantially more likely than trial to result in the conviction of innocent. In developing countries that have started using it, plea bargaining results in unjust sentencing.[54]

---

[46] Adekunbi Imosemi and Bisola Ogundare (n 17) 96.
[47] James Atta Agaba, (n 25) 626.
[48] Adewale Afolabi (n 29) 127.
[49] Ibid.
[50] James Atta Agaba, (n 25) 627.
[51] Adekunbi Imosemi and Bisola Ogundare (n 17) 96.
[52] Ibid.
[53] Mike A. A. Ozekhome, (n 1) 185.
[54] Adewale Afolabi (n 29) 127.

Notwithstanding this argument, it has been observed that the advantages of plea bargaining in countries that practice it far outweigh the disadvantages.[55]

Plea Bargaining in Nigeria

It is important to state that before the enactment of the Administration of Criminal Justice Law of Lagos State in 2007,[56] plea bargaining as a concept had been unknown and alien to criminal justice administration in Nigeria. This is because none of our penal laws recognize the concept.[57] The Constitution[58] insists on proof of every allegation constituting a crime before conviction. Section 36 (5) of the Constitution provides that 'Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.' The import of this provision is that prosecution has a duty to prove the guilt of every person charged with criminal offence by proving the ingredient of such offence. By virtue of this provision, the issue of plea, or charge or sentence bargaining between the prosecutor and the accused person does not arise. By the provision of section 135(1) of the Evidence Act,[59] the standard of proof required to upstage the presumption of innocence is proof beyond reasonable doubt. In fact, and indeed there is no frame work for plea bargaining in Nigeria except under Administration of Criminal Justice Law of Lagos State and Administration of Criminal Justice Law of Anambra State.[60] The first traces of plea bargaining can be found in the Economic and Financial Crimes Commission Act. The basis for the application of plea bargaining by the Economic and Financial Crimes Commission can be found in section 14(2) of the EFCC Act which provides:

Subject to the provision of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue, take over or discontinue 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 maximum amount to which that person would have been liable if he had been convicted of that offence.[61]

It was on the basis of the above provision that the concept was first applied in high-profile cases where the defendants were allowed to enter guilty pleas to lesser charges after they have agreed to forfeit most or all the assets acquired with the funds accused of being misappropriated to the State.[62] Equally, it was an attempt to act under the above provisions that the case of *Federal Republic of Nigeria v Nwude and Others*[63] was settled. It is important to state that plea bargaining gained notoriety in Nigeria when it was first used by the EFCC in 2005 to settle the case of corruption against former Inspector General of

[55] Mike A. A. Ozekhome, (n 1) 186.
[56] This law was published as Lagos State of Nigeria Official Gazette No. 21, Vol. 41 and it came into force on 28th day of May, 2007.
[57] James Atta Agaba, (n 25) 629.
[58] Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[59] Evidence Act, 2011.
[60] Administration of Criminal Justice Law of Anambra State, 2010.
[61] Economic and Financial Crimes Commission Establishment Act Cap. Laws of the Federation of Nigeria, 2004.
[62] *Federal Republic of Nigeria v Dieprieye Alamiesiegha* (2006) 16 NWLR Pt. 1004 at 93 – 9.
[63](2015) LCN/7850(CA)

Police, Tafa Balogun.[64] It was later used that same year in the case of ex-Governor D.S.P. Alamieyesagha of Bayelsa State for embezzlement and Emmanuel Nwude and Nzeribe Okoli for defrauding a Brazilian Bank. It was subsequently used in 2008 in the cases of former Governor of Lucky Igbinedion of Edo State for embezzlement and also in 2010 in the case of Mrs. Cecilia Ibru, erstwhile Managing Director of the then Oceanic Bank for abuse of office and mismanagement of funds.[65]

The Administration of Criminal Justice Act which came into force in May 2015 makes far elaborated reaching provisions on plea bargaining in section 270 of the Act. The notion of plea bargaining was embedded in the section as a means available to ensure justice during trial as well as a way of securing the proceeds of criminal activity for the State. There is a general provision that empowers the prosecutor to receive and consider a plea bargaining from a defendant or offer a plea bargaining to a defendant.[66] The conditions under which such plea bargaining may be entered into are also highlighted in subsection (2) and the plea of such a trial is taken during or after the presentation of the evidence of the prosecution, but, before the presentation of the evidence of the defense provided that (a) the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt.[67] J. A. Agaba considered this paragraph (a) of section 270(2) of the Act selfish on the part of the prosecutor in the sense that the only main attraction of plea bargaining to the prosecutor is his difficulty in proof of certain offences charged beyond reasonable doubt and no more.[68]

Subsection 3 extended the conditions for consideration in offering or accepting plea bargaining which must be based on the interest of justice, the public interest, public policy, and the need to prevent abuse of legal process.[69] Section 270(5) provides for the relevant factors the prosecutor should take into account when considering accepting or make an offer of plea bargaining. Such factors include: the criminal antecedents of the defendant his willingness to cooperate with the prosecutor in the investigation and eventual prosecution of others involved in the criminal enterprise in question, the expense and time of trial and much more fundamentally the willingness of the defendant to make restitution or pay compensation to the victim of the offence.[70] Both the Administration of Criminal Justice Law of Lagos State, 2015 and Administration Criminal Justice Act, 2015 are explicit on the nature/procedure of the plea bargaining whether it is a charge bargain or a sentence bargain or both.[71] Section 76(1) of ACJL, Lagos State provides:
The prosecutor and a defendant or his legal practitioner may before the plea to the charge enter into an agreement in respect of –

[64] See the Punch of Friday, 9th December, 2005 under the caption: 'EFCC breached plea with Balogun-Abayomi' – where it was alleged that the counsel to Balogun was accusing the Commission of reneging on a plea bargaining arrangement between the parties.
[65] Mike A. A. Ozekhome, (n 1) 186.
[66] Section 270(1) of Administration of Criminal Justice Act, 2015.
[67] Section 270(2)(a) of ACJ A, 2015.
[68] James Atta Agaba, (n 25) 639.
[69] Section 270(3) of ACJA, 2015.
[70] Section 270(5) ACJA, 2015.
[71] See section 76(a) and (b) of Administration of Criminal Justice Law of Lagos State 2015.

a) a plea of guilty by the defendant to the offence charged or a lesser offence of which he may be convicted on the charge; and
b) an appropriate sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty.[72]

It is submitted that the subsection makes it clear that the parties have to agree beforehand, the nature of the bargain (negotiation), whether it is a charge or a sentence bargain or both.

In order to show transparency in the negotiation, the law makes it mandatory for the prosecutor to enter into a plea bargain only after consultation with the police responsible for the investigation of the case and the victim or his representative.[73] The prosecutor, in entering into the bargain, is further enjoined to take into account the nature or circumstances relating to the offence, the defendant and the interest of the community.[74] It has been observed that in one breath, the law incorporates the concept of restorative justice into plea bargaining. That is, justice to the State, justice to the accused, justice to the victim of the crime and Justice to the community.[75] The victim or his representative has the opportunity to make representation as regards the content of the agreement[76] and the inclusion in the agreement of a compensation or restitution order.[77] Terms of the agreement has to be signed by both parties and it must contain cautionary words that the defendant has the right to remain silent, he was not forced to make any admission or confession that should be used against him[78] before forwarding to the Attorney-General.[79]

Although, the judge or magistrate shall not participate in the plea-bargaining discussion,[80] the prosecutor is enjoined to inform the court that the parties have reached agreement and the court shall in turn inquire from the defendant to confirm the terms of the agreement.[81] The duties of the presiding judge or magistrate is to scrutinize the sentence recommended via the plea agreement and decide whether or not to uphold same. Where a court convicts, it shall consider the agreed sentence, and may impose that sentence if it deems the sentence appropriate, or impose either a lesser or heavier sentence.[82] Where the defendant is informed of the heavier sentence, he is at the liberty to either abide by his plea of guilty as agreed upon or withdraw from his plea agreement in which event the trial shall proceed *de novo* before another judge or magistrate as the case may be.[83] Where the trial commences *de novo* before another judge or magistrate, no reference shall be made to the earlier agreement, no admission contained therein or statement relating thereto shall be admissible against the defendant and both the prosecutor and the defendant may not enter into a similar

[72] See section 270(4) of ACJA.
[73] Section 270(5)(a) of ACJA and section 76(2)(a) of ACJL, Lagos State.
[74] Section 76(2)(5) ACJL, Lagos, and section 270(5)(5) ACJA.
[75] James Atta Agaba, (n 25) 640.
[76] Section 270(6)(a) ACJA; and section n76(3)(a) ACJL.
[77] Section 270(6)(b) ACJA; and section n76(3)(b) ACJL
[78] Section 270(7)(a)(b)(c) ACJA
[79] Section 270(7)(d) ACJA
[80] Section 270(8)
[81] Section 270(9) of ACJA, and section 76(6) of ACJL, Lagos.
[82] Section 270(11) of ACJA.
[83] Section 270(15) of ACJA.

plea and sentence agreement.[84] Subsection (17) recognizes the conviction or sentence arising from a plea bargaining amounting to trial shall avail the defendant the plea of double jeopardy, he shall not be charged or tried again on the same facts for the greater offence earlier charged to which he had pleaded to a lesser offence.[85] Subsection 18 states that once the judge has confirmed from the defendant the correctness of the contents of the agreement and having made same voluntarily, he will make it a final judgment with no right of appeal except where fraud alleged.[86] It is worthy to note that the striking feature of the law on plea bargaining is that the right of choice/discretion of the defendant remains unfettered from the beginning of the plea process to the point of sentence. More importantly, the aim of plea bargaining under the ACJA is that natural justice should be observed before and during the trials in the interest of the victim and the State.

Islamic Criminal Law

For proper understanding of the phrase Islamic Criminal Law, there is need to define the word crime according to Islamic Law. The Arabic word for crime is *Jarima* which is derived from the word *Jaram*. The word *Jaram* literally means to cut and to earn what is not good.[87] In the technical sense, *Jarima* or crime refers to prohibition imposed by Allah, the violation of which gives rise to punishments known in Arabic as *Uqubat*.[88] Therefore, crime may be defined as the legal prohibition imposed by Allah violation of which is punishable by *hadd*, *qisas* and *ta'azir*.[89] Legally speaking, crime could be defined as any act or omission by a person against the divine injunctions of Islamic Law which is punishable by *hadad*, *qisas* or *ta'azir*.[90]

Islamic Law is based on primary and secondary sources of *Shari'ah*. The primary sources are the Glorious Qur'an which is the final arbitrator, it provides punishments for certain offences and the Sunnah of the Noble Prophet Muhammad (S.A.W.) which provides punishments for certain offences that are not explicitly found in the Qur'an, which also contains explanation and the practical application of the concept stated in the Qur'an.[91] The secondary sources includes *Ijma* which is the consensus of the Muslim jurists within the framework of the Qur'an and Sunnah of the Prophet (S.A.W.) on any issue where no clear injunction could be found in the Qur'an or Sunnah.[92] Another secondary source is *qisas*, which refer to analogical deduction. That is the process of deduction by which the text of the Qur'an, Sunnah and *Ijma* are applied to cases which though not covered by its language are yet governed by its underlying reason or cause (I'lla).[93]

---

[84] Section 270(16) of ACJA
[85] Section 270(17) of ACJA
[86] Section 270(18) of ACJA
[87] Yahaya Yunusa Bambale, *Crimes and Punishments Under Islamic Law*, (2nd edn., Malthouse Press Limited, 2003) 1.
[88] Ibid.
[89] Ibid.
[90] Muhammad Anwarullah, *The Criminal Law of Islam*, (Kitab bhavan 1784, Kalam Mahal, New Delhi, India, 2006) 1.
[91] Bala Babaji and Ibrahim Danjuma, (n 3) 70.
[92] Mansur Ibrahim Sa'id, *Islamic Criminal Law and Practice in Nigeria*, (First Pub. Usmanu Danfodiyo University Printing Press, Sokoto, 2011) 11.
[93] Ibid, 13.

Unlike other systems obtainable in other jurisdictions, *Shari'ah* is outstanding in the area of crime in the sense that, it takes into consideration the nature of crime prior to fixing the punishment for it. For instance, if the effect of a crime is such that will have a more negative effect on the society than on the individual, the *Shari'ah* makes the punishment more severe and stricter[94] because such crime is regarded as the violation of the right or a boundary of Allah. Whereas, if the negative effect is more on the individual than on the society, it gives discretion to such individual to choose between the infliction of the punishment or compensation or even grant of pardon.[95] While the punishment which is prescribed for crimes whose effects are more on the society is called *hudud,* the one which is prescribed for crimes whose effects are more on the individual is referred to as *qisas*.[96] There are other crimes that have lesser effect whether on the society or on the individual, these are known as t*a'azir*. The *Shari'ah* has left the type of the punishment to inflict at the discretion of the Muslim political leader or the judge.[97]

For the purpose of this study, crimes under Islamic Law are broadly divided into three: *hudud*, *qisas* and *ta'azir*.

Hudud are punishments that are textually designated and they apply to crimes whose penalties are mandatory, that is, as defined in the Glorious Qur'an or prophetic tradition.[98] It has also been defined as specified punishment associated with rights of Allah under the *Shari'ah* or punishment that are fixed by the *Shari'ah* and they are obligatory because they are also associated with the rights of Allah.[99] It is understood from the above definitions that *hudud* offences carry specific and fixed punishments by the Qur'an and Sunnah of the Noble Prophet which must be enforced. *Hudud* offences or punishments are the highly rated offences against the rights of Allah with the extreme punishments to be enforced in accordance with the well laid down rules of procedure and evidence in Islamic Law.[100]

The punishment in *hudud* are not subject to any amendment, alteration or commutation, substitution, change or waiver (whatsoever the case may be) by the judge, ruler or any person in authority. In simple term, they are not compoundable by way of pardon, mediation, or amicable settlement by the fact of change in time, place and situation; nor has any one the prerogative to waive the punishment.[101] Babaji gave an insight to this thus:

> There is very little or no room for compounding such offences once the formal charge has been framed and lay before a court. This is because; the rights contained therein belong to Allah

[94] Ibid, 19.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] A. O. Naseef, *Encyclopedia of Seerah,* (Vol. 11: Law Publishing Co. Lahore, Pakistan, 1982) 486.
[99] Mansur Ibrahim Sa'id, (n 88) 20.
[100] Bala Babaji, 'An Assessment of the Application of *Hudud* Punishments in Islam with Particular Reference to the *Shari'ah* Penal Code Laws of some Northern States of Nigeria; *Journal of Islamic and Comparative Law,* The Journal of the Centre of Islamic Legal Studies, Institute of Administration, Ahmadu Bello University, Zaria, (2015) (30) 106.
[101] Yahaya Yunusa Bambale, (n 83) 26 – 27.

> and the community and are therefore, of public in nature... The court or any legislator is not empowered to make any changes or amendments in them. Hence, whoever is found guilty of anyone of the *Hudud* offences, shall be punished with the corresponding *Hadd* regardless of the victim's (aggrieved party's) opinion or personality of the offender.[102]

Finally, it has been reported that the Holy Prophet (S.A.W.) prohibits any mediation in respect of *hadd* punishment. The *hudud* offences are *zina* (fornication or adultery) *qadhf,* (false accusation of unlawful sexual intercourse) *Sariqah,* (theft), *hirabah* (robbery, armed robbery), *Shurbul-Khamr,* (wine drinking), *riddah* (apostasy) and *baghye* (rebellion or treason).

The second classification is *qisas* and *diyya*. *Qisas* refers to retaliation. In Islamic Law, the punishment prescribed for murder and the infliction of injury is *qisas*, that is, inflicting on the culprit an injury exactly equal to the injury he inflicted upon the victim.[103] *Qisas,* according to Islamic Law, is specified punishment imposed by Allah as an obligation to be carried out in order to enforce the right of mankind.[104] It has been observed that unlike in the cases of *hudud* where the right of Allah is emphasized more, in *qisas* cases, the right of individual human being is stressed more, although, in both the two cases *hudud* and *qisas*, the punishments are prescribed by Allah and as obligation to be implemented by Muslim rulers.[105]

Where *qisas* offence is committed, death penalty is imposed on the murderer. It cannot be altered or cancelled after the offender has been proved guilty, unless, the guardians of the victim have agreed to collect compensation in place of retaliation.[106] It is important to state here that unintentional murder i.e. manslaughter is not punishable with death but, it only entails the payment of blood money i.e. *Diyya*h *Muhakkaka* (normal blood money).[107] However, where the murder is intentional, the punishment is retaliation and no *Kaffarah* (expiration or penance) will be performed. When retaliation does not take place, *diyyah* (blood money) and *kaffarah* are due from the culprit. The blood money here is in the form of compensation which is made so high as to discourage people from committing such a crime. This type of blood money is known as *Diyyah Mughallaza*, i.e. heavier or exemplary blood money. *Diyya* is payable if the victim or his heirs remit the accused.[108] In short, by virtue of the relevant Qur'anic verses,[109] three options are possible in *qisas* cases thus: (1) insist on retaliation, (b) forgive on amicable settlement for *diyyah* and (c) pardon or forgive *in toto.* This is in line with prophetic Hadith which says:

---

[102] Bala Babaji, (96)107-108.
[103] M. S. El-Awa, *Punishment in Islamic Law:* (Trust Publications, Indianapolis, 1982) 69.
[104] Mansur Ibrahim Sa'id, (n 88) 54.
[105] Ibid.
[106] See Qur'an 2:178, Qur'an 5:45, Qur'an 17:33 and Qur'an 4:92.
[107] Qur'an 4:92. so also Babale 90. Yahaya Yunusa Bambale, (n. 83) 90.
[108] Yahaya Yunusa Bambale, (n 83) 89.
[109] Qur'an 2:178, Qur'an 5:45, Qur'an 17:33 and 4:92.

> Whoever kills intentionally shall be handed over to relatives of the victim who should have the option to choose between whether to take blood money or kill and they are entitled to take what they reach compromise upon.[110]

It is important to explain that where the relatives of the victim choose retaliation, they have no legal right to carry out the execution themselves, rather it is the Muslim ruler or government that has a duty to carry out such retaliation.

The third classification is *ta'azir* which is defined as discretionary punishment to be delivered for transgression against Allah or against an individual for which there is neither fixed punishment nor penance *(kaffara)*. These are punishments not determined specially by the textual authorities but rather left open for the rule or judge to determine their quantum, severity or mildness, for example, lashes, fine and imprisonment.[111] In essence, *ta'azir* crimes are acts which are punished because the offender disobeys the law of God and because they are injurious to the interest of the society.[112] *Ta'azir* are less serious than *hadd* crimes and they are the most flexible type of punishment because they take into consideration the needs of the society and the changing social needs. Examples of *ta'azir* offences are bribery, selling defective goods, taking usury, abuse of trust, gambling and contempt of courts.[113]

The Concept of Plea Bargaining Under Islamic Law

The aim here is to examine the fact whether the plea bargaining is possible and legally permissible under Islamic Criminal Law. Plea bargaining is generally an agreement in criminal trial in which a prosecutor and an accused person arrange to settle the case against the accused usually in exchange for concession.[114] It is also seen as 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 concessions by the prosecutor, usually a more lenient sentence or a dismissal of the other charges.[115] The concern here is to examine whether the prosecutor and the accused person under Islamic Law can arrange for the settlement of the case/crime committed by the accused person in exchange for some concessions which may result to the reduction of the charge or a more lenient sentence or an outright dismissal of the charge.

Before embarking on this examination, it is important to point out that by virtue of section 75 of Administration of Criminal Justice Law of Lagos State, 2015, plea bargain may be considered and accepted from a person charged 'with any offence'.[116] The phrase 'with any offence' may be interpreted to mean that plea bargain is possible and legally permissible in Lagos State with respect to any kind or type of offence whether capital, felony and misdemeanor offences. However, the Administration of Criminal Justice Act 2015 did not specifically state or create the differences between offences that could be plea

[110] Mansur Ibrahim Sa'id, (n 88) 59.
[111] M. S. El-Awa (n 99) 96.
[112] Bala Babaji and Ibrahim Danjuma, (n 3) 71.
[113] Mansur Ibrahim Sa'id, (n 88) 72.
[114] James Atta Agaba, (n 25) 624.
[115]Bryan A. Garner, (n 24) 1190.
[116] Section 75 of Administration of Criminal Justice Law of Lagos State, 2015.

bargained and offences that could not. Section 270(1)(a) of the Act simply permits the prosecutor to 'receive and consider a plea bargain from a defendant charged with an offence'. It is submitted that since the Act deliberately avoids specifying the type of the offence that could be plea bargained, one can safely conclude that the Act permits the use of plea bargain for all types of offences whether capital, felony or misdemeanor offence.

Unlike the position under the Administration of Criminal Justice Law of Lagos State 2015 and Administration of Criminal Justice Act, 2015, the application of plea bargaining is possible and legally permissible in Islamic Law with respect to only *qisas* and *ta'azir* offences and not in *hudud* offences. It has been pointed out earlier in this work that the punishments in *hudud* are not subject to any derogation, modification, alteration, negotiation, reconciliation, commutation, substitution, change or waiver by the judge or ruler. That is, the punishments are not compoundable by way of pardon or amicable settlement in exchange for some concession which may result to the reduction of the charge or a more lenient sentence or a dismissal of the charge.

In Islamic Law, it is not allowed for the prosecutor, ruler, judge, or any person whosoever to agree or negotiate or arrange for amicable settlement of the *hudud* offences in exchange for any concession. This is because, the *hudud* punishments are perfect right of Allah, *haq* Allah. In such offences, the right of Allah must be completely extracted from the offender by way of the prescribed punishment in the interest of general public no matter who is involved.[117] For example, where a married person committed *zina* (adultery), the prescribed punishment under *Shari'ah* is stoning to death, but, where the offender is unmarried, the punishment is one hundred lashes.[118] Qur'an 24:2 provides that: 'The woman and the man guilty of fornication, flog each of them with a hundred stripes…'[119]

Equally, where a person commits *qadhf*-defamation or false accusation of adultery, the Qur'an requires him to produce four witnesses failing which he should be given eighty lashes. Qur'an 24:4 provides: 'And those who accuse chaste women and then do not produce four witnesses, lash them with eighty lashes'.[120] Also, where a person commits *sariqa* – theft and the conditions for infliction of *hadd* including *nisab* – minimum value is met, the punishment is the cutting off of his hand. Qu'ran 5:38 states that: 'As to the thief male or female cut off his or her hands, a retribution for their deed and exemplary punishment from Allah.[121]

It is not permissible for a judge to substitute or reduce 100 lashes which is fixed punishment prescribed by Allah for fornication to 90 lashes or 80 lashes for false accusation to 70 lashes or to substitute amputation of the hand of a thief with fine, community service or imprisonment, because they are perfect right of Allah which are not subject of negotiation or agreement or plea bargaining. It has been argued that there is no bargaining, reducing or changing the punishment in *hadd* crime because it has no minimum or maximum

[117] Monsur Ibrahim Sa'id, (n 88) 59.
[118] See Qur'an 24:2.
[119] Ibid.
[120] Qur'an 24:4.
[121] Qur'an 5:38.

punishment to be inflicted on the accused person.[122] It has been observed that 'it is prohibited to make any reconciliation or mediate or negotiate an offence in order to mitigate the punishment for the offences that their punishments are provided in the Holy Qur'an'.[123] Almighty Allah said that 'Let no pity withhold you in their case in a punishment prescribed by Allah, if you believe in Allah and the Last Day. '[124]

However, in the category of offences where the right of the victim-*haq* Adam is more pronounced over that of Allah, as in *qisas* (retribution), the negotiation and bargaining between the victim and the culprit or their respective relations is permissible under Islamic Law.[125] It has been rightly pointed out in this work that relatives of the victim (the killed person) have the option to choose between whether to take blood money or to kill and they are entitled to take what they reach compromise upon. By virtue of Qur'an 2:178, where *qisas* offence is committed, death penalty is imposed on the murderer unless the guardians of the victim have agreed to collect compensation in place of retaliation.[126]

Equally, in the case of *ta'azir* which is discretionary punishment for crimes that either infringe on the rights of Allah or the right of an individual. *Ta'azir* offences deal with offences that do not have prescribed punishment either in the Qur'an or *Hadith*, they are considered as a crime against the public and not against Allah, for instance, bribery, selling defective goods, among others.[127]

It is submitted that plea bargaining is possible under Islamic Law in both *qisas* and *ta'azir* offences in that in the *qisas* offences, Islamic Law permits a negotiated agreement and bargaining between the victim or his relations and the killer or his relations with a view to reaching an agreement and amicable settlement as to whether to collect blood money or to outrightly forgive or pardon the killer. It depends on the agreement reached. In the case of *ta'azir* offences which are injurious to the interest of the society, such as bribery or contempt of court or giving short measure and adulterating food sale, the affected individual or the government may have a negotiated agreement with the culprit with a view to reaching amicable settlement with such offender in exchange for some concession, to be granted by the judge. Since, these types of offences are based on the judge's discretion, such agreement reached between the prosecutor and accused person may be permitted and endorsed by the judge which means that plea bargaining is equally possible and permissible in *ta'azir* offences. On this note, Bala Babaji wrote as follows:

> However, if it is in respect of a right of a man, a person or victim may reconcile and forgive the offender and upon such he may be rewarded for the forgiveness. Thus, plea bargaining might be supported under Islamic Law of crime in cases of *Qisas* or *Ta'azir* offences but, not in case of *Hudud* Offences.[128]

[122] Bala Babaji and Ibrahim Danjuman, (n 3) 71.
[123] Ibid.
[124] Qur'an 24:2.
[125] Monsur Ibrahim Sa'id, (n 88) 20 and 59.
[126] Qur'an 2:178 Also Monsur Ibrahim Sa'id, (n 88) 58.
[127] Bala Babaji and Ibrahim Danjuma, (n 3) 71.
[128] Bala Babaji and Ibrahim Danjuma, (n 3) 72.

Conclusion and Recommendations

The paper has carefully examined the concept of plea bargaining under Islamic Criminal Law. In discussing this concept, the paper has made attempt to explain the meaning of the concept of plea bargaining, types, its reasons or attractions, history, the position under the Administration of Criminal Justice Law of Lagos State 2015 and Administration of Criminal Justice Act 2015 and observed that both statutes permit the use of or application of plea bargaining in all offences. The paper takes a critical look at and extensively discussed Islamic Criminal Law, and its classification and it was observed that the application of plea bargaining is not legally possible or permissible under Islamic Law with respect to those offences which border on the right of Allah which offences have prescribed fixed punishments in the Qur'an and/or *Hadith*. Whereas the use of and application of plea bargaining is possible and legally permissible in those offences that border on the individual or public right that is *qisas* and *ta'azir* offences. Finally, the application of the concept of plea bargaining to all types of offences is not permissible and will contravene the purpose, principle, and objective of Islamic Law (Maqasidus *Shari'ah*).

The paper recommends that the Nigerian Administration of Criminal Justice Act 2015 should be amended to specifically state explicitly those offences that can be plea bargained and those ones that cannot. It is further recommended that any country that is applying or intend to apply or include the concept of plea bargaining in its legal system should ensure that the offences to be plea bargained should be limited to only *qisas* and *ta'azir* offences and not *hudud offence*.