Plea Bargaining in Economic Crimes involving Companies in Nigeria: A Palliative to the Festering Wounds of Corporate Stakeholders without Cure

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Abstract

The Corporate form is characterized by legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. The shareholders invest in the company as owners while the board of directors manage the company on behalf of the shareholders and in the interest of other stakeholders. Delegation of management of the business of the company is a source of corporate opportunism as directors or officers employ various ways of expropriating the shareholders. They embark on asset stripping and sometimes, brazenly steal the profits. These criminal acts have serious social and economic repercussions on the corporate stakeholders, warranting sanctions. In recent times, however, prosecution of corporate criminals has been a matter of negotiated agreements between the prosecutors and accused persons under the concept of plea bargaining. These are matters of concern which have motivated this discourse. Using the doctrinal method, this article has examined the concept of plea bargaining and its practice in Nigeria, and found that the application of the concept to economic crimes involving companies is inappropriate because of the operation of corporate personality which casts a distinction between the company and its shareholders which extends to property ownership. It is difficult to determine the real victim of an economic crime perpetrated by directors or officers of the company who are custodians of its property for purposes of restitution. Considering the effects of economic crime on all corporate stakeholders and susceptibility of plea bargaining to abuse, this article recommends its non-application to economic crimes involving companies, and longer jail sentences for such criminals.

***Key words**: Plea bargaining, economic crimes, restitution, corporate stakeholders*

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Introduction

In modern times a large amount of wealth of individuals has shifted from ownership of actual physical property to ownership of shares or stock representing a set of rights and expectations in an enterprise.[1] The corporate form is characterized by legal personality, limited liability, transferable shares, delegated management under a board structure and investor ownership.[2] The shareholders invest capital (share capital) in the company as "owners" while the board of directors manage the company on behalf of the shareholders. The company, as a going concern, also utilizes loan capital supplied by creditors as a source of working capital. The employees supply labour to the company for which they expect remuneration. The society has interest in the operation and governance of companies and efficient use of assets because of the costs failure would generate. These groups are corporate stakeholders.

The delegation of management to directors is a source of corporate opportunism and directors, as insiders, have various ways of expropriating the shareholders as owners. They embark on assets stripping for their private purposes and they often set about this fraudulently.[3] Sometimes, directors simply steal the profits.[4]This fraudulent behaviour of directors is related to the agency problem that is associated with the large quoted companies where there is consumption of perquisites by managers and other types of empire building,[5] and one of the causes of corporate failure is fraud on the part of directors.[6]

When an economic crime like fraud is committed by directors or management against a company, the repercussions are legion. The interests of the shareholders are adversely affected

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1 JD Cox and T Hazen, *Corporations* (2nd edn, Aspen Publishers 2003), 39

2 John Armour and Henry Hansmann and Reinier Kraakman, 'Essential Elements of Corporate Law: What is Corporate Law?' Discussion Paper No. 6437/2009 <https://www.harvard.edu/programs/olin/center> accessed 6 January 2018

3 Tom Hadden, *Company Law and Capitalism* (2nd edn, Weidenfeld and Nicolson 1977), 240

4 R La Porta and Others, 'Investor Protection and Corporate Governance' [2007] (58) Journal of Financial Economics, 3-27

5 Ibid

6 Nash Riggins, 'Corporate Failure' <https://www.financialdirector.com.uk> accessed 22 January 2020; Paul Hopkin, 'Understanding Corporate Failures' <https://www.fmmagazine.com> accessed 22 January 2020

because it is their fund that is dissipated, the creditors and employees who expect to be paid are negatively affected, and the society suffers social costs. In recent times, however, prosecution of perpetrators of economic crimes, committed against companies, has become a matter of negotiated agreements between the prosecutors and accused persons under the concept of plea bargaining. Under this procedure, the accused negotiates for a lenient or lesser penalty by pleading guilty to a lesser offence than that charged without full trial. He is then given a lenient or lesser penalty, either in terms of a term of imprisonment or payment of fine in a sum of money after conviction, than that for a higher charge.

Although restitution to the victim of the crime or his representative may be available, under the plea bargaining procedure, this is problematic in economic crimes committed by corporate criminals – directors or officers of widely held public companies due to the theory of corporate personality which presents a company as a distinct legal person from its shareholders and other stakeholders; the difficulty of defining and identifying the victims of crime in a company, and the doctrinal rigidities associated with allocation of rights (including the right to sue) within the company.

This article interrogates the utility of plea bargaining in economic crimes committed against companies and finds that the procedure is a legal conspiracy against stakeholders and inappropriate in the context of companies more so that there is difficulty in identifying the ultimate victim of crime for purposes of restitution. It is a palliative to the corporate stakeholders' festering wounds which does not cure them. The article then advocates the non-application of plea bargain to economic crimes involving companies and longer jail sentences for corporate criminals.

Conceptual Framework

Plea Bargaining

A plea is an accused person's formal response of 'guilty', 'not guilty', or 'no contest' to a criminal charge.[7] Plea bargaining in criminal proceedings, is an agreement between the prosecution and the defence by which the accused agrees to plead guilty to a lesser charge in return for an offer by the prosecution, for example, to offer no evidence on a more serious charge against the accused.[8]

Black's Law Dictionary[9] defines plea bargain as 'a negotiated agreement between a prosecutor and criminal defendant whereby the defendant pleads guilty to a lesser offence or to some multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges'. The Administration of Criminal Justice Act (ACJA),[10] which adopted the concept of plea bargaining in Nigeria in a broader perspective, defines the concept thus:

> Plea bargain means the process in criminal proceedings whereby the defendant and the prosecution work out a mutually acceptable disposition of the case, including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformity with other conditions imposed by the prosecution, in return for a lighter sentence than that for the higher charge subject to the Court's approval.

According to Alubo,[11] plea bargain is an agreement that is negotiated, haggled or bargained between the prosecutorial authority and the accused or suspect, which leads, if successful, to withdrawal of charges or some charges or the imposition of lenient sentences. He furthered that plea bargain invariably leads to conviction, and there is

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7 Bryan A Garner, *Black's Law Dictionary* (9th edn, Thomson Reuters 2009), 1268; Elizabeth A Martins and Jonathan Law, *Oxford Dictionary of Law* (6th edn, Oxford University Press 2006), 396

8 Elizabeth A Martins and Jonathan Law (n, 7)

9 Bryan A Garner (n, 7), 1270

10 Administration of Criminal Justice Act (ACJA) 2015, Section 494(1)

11 Alphonsus Okoh Alubo, 'Plea Bargaining, Sentencing Guidelines and Options Under the Benue State Administration of Criminal Justice Law, 2019, being a Paper presented at a two-day Seminar organized by the Benue State Judiciary in collaboration with Ministry of Justice, Makurdi, on Understanding the Administration of Criminal Justice Law of Benue State, 2019 held at Benue Hotels, Makurdi from Thursday 19th – Friday 20th March, 2020

a charge and sentence bargaining, and in other cases, even counts may be bargained.

Lawrence and Others,[12] define plea bargaining as an agreed trade-off between the prosecutor and the defence that involves an admission of guilt to a specific infringement and/or specific facts, in exchange for some reduction in penalty and/or findings on specific facts. More specifically, a plea bargain can take the following forms: (i) simple plea bargaining, where there is a specific discount for pleading guilty; (ii) charge bargaining, which can apply to multiple charges (drop some in exchange for a plea to one of them) or a unique charge (drop a serious charge in exchange for a guilty plea to a less serious charge); or (iii) fact bargaining, where agreement is reached for a selective presentation of facts in exchange for a guilty plea. The authors further state that a further variation is where the defendant accepts a sanction without pleading guilty, or accepts a sanction while maintaining innocence.

Basically, therefore, there are three kinds of plea bargain – the 'Charge Bargain' which entails the prosecutor allowing the accused to plead guilty to a lesser charge or to some of the charges preferred against him or her, which typically occur at the pre-trial phase; a 'Sentence Bargain' which is offered when the defendant is informed in advance what the sentence will be if he or she pleads guilty; and 'Fact Bargain' which is rare and involves the defendant admitting to certain facts in return for agreement for the prosecutor not to introduce certain facts before the trial court.[13]

Economic Crime

Black's Law Dictionary[14] defines economic crime as 'a non-physical crime committed to obtain a financial gain or a professional advantage'. According to Kitch,[15] there are two major styles of economic crimes. The first consists of crimes committed by

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12 Jon Lawrence and Others, 'Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases?' [2008] Journal of Comp Law, 17-42

13 Ikechukwu Nnochiri, 'Criminal Justice System: Is Plea Bargain Desirable?' <https://www.vanguardngr.com> accessed 18 April 2020.

14 Bryan A Garner (n, 7), 427

15 Edmund W Kitch, 'Economic Crime' in Sanford H Kadish (ed), *Encyclopedia of Crime and Justice* (Free Press 1983), 670-671

businessmen as an adjunct to their regular business activities. Businessmen's responsibilities give them the opportunity, for example, to commit embezzlement, to violate regulations directed at their areas of business activity, or to evade payment of taxes. This type of economic crime is also called white-collar crime. The second style of economic crime is the provision of illegal goods and services or the provision of goods and services in an illegal manner. Indubitably, the first style of economic crime alluded to by Kitch is apt for this discourse because judicially, directors of a company have been described as merely commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it,[16] and their responsibility to run the business of the company afford them the opportunity to fraudulently make off the assets of the company for their private purposes.

To Europol,[17] economic crime also known as financial crime, refers to illegal acts committed by an individual or group of individuals to obtain a financial or professional advantage. The principal motive in such crimes is economic gain.According to CIPCE,[18] economic crime covers a wide range of offences, from financial crimes, committed by banks, tax evasion, illicit capital heavens, money laundering, crimes committed by public officials (like bribery, embezzlement, traffic of influences) among others.

Dinitz,[19] posits that economic crime, often referred to as white collar crime, is one of the most insidious and predatory offences. Unlike street crime, for which there may well be some protection, the average citizen is completely at the mercy of the perpetrators of economic crimes. Economic crime is usually confused with another term, corruption. There are different definitions of corruption and each definition illuminates different dimensions of the phenomenon to be studied, influencing the

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16 Re Forest of Dean Coal Mining Co. (1897) 10 Ch 450 at 452; see also Honowo v Adebayo (1969) ALL NLR 176 at 186

17 Europol, 'Economic Crime' <https://www.europol.europa.eu> accessed 16 April 2020

18 CIPCE (Centro de Investigacion y Prevencion de Ia Criminalidad Economica), Buenos Aires – Argentina, 'Database on Economic Crimes in Argentina' <https://www.cipce.org.ar> accessed 16 April 2020

19 S Dinitz, 'Economic Crime' <https"//www.ncbi.nim.nih.gov> accessed 16 April 2020

analysis and prosecution tasks to be implemented.[20] A first definition focuses on public ethics. Here, corruption is defined as an ethical confusion between public and private space.[21] A second vision relates the problem of corruption to lack of transparency of the state, may that be in the form of barriers to access public information or the pinpoint hiring opportunities to certain companies in the area of goods and services.[22] The third definition of corruption is that it is one of the many parts of a more complex and more comprehensive criminal phenomenon, which is economic crime.[23] The focus of this article is on economic crimes perpetrated in the private sector by corporate criminals.

Restitution

Restitution is the return of property or money to the owner or person entitled to possession by a person who has unjustifiably received the property or money.[24] The basis for restitution is that the person should not be unjustly enriched or retain an unjustified advantage. Black's Law Dictionary[25] gives a quadruple meaning of restitution. It is-

(i) a body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment;

(ii) the set of remedies associated with that body of law, in which the measure of recovery is usually based not on the plaintiff's loss but on the defendant's gain;

(iii) return or restoration of some specific thing to its rightful owner or status; and

(iv) compensation for loss, especially full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition for probation.

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20 CIPCE (n, 18)

21 Ibid

22 Ibid

23 Ibid

24 Elizabeth A Martin and Jonathan Law, *A Dictionary of Law* (6th edn, Oxford University Press 2006), 464

25 Bryan Garner (n, 7), 1428

Contextually, the fourth meaning of restitution by Black's Law Dictionary is most apt for criminal proceedings in which plea bargaining is adopted and restitution ordered, which is the focus of this article.

Restitution involves the Court, as part of a sentence in a criminal case, ordering a defendant to compensate the victim for losses suffered as a result of the crime.[26] Although restitution and fines are both financial costs that can be imposed on a defendant as part of criminal sentence, fines are specific, predetermined penalties that are paid to court. Restitution, on the other hand, is intended to repay victims for their losses. Restitution is almost always part of the sentence in theft or fraud cases; the court directs the defendant to pay back the amount stolen.[27]

Stakeholder

A stakeholder is 'a person who has an interest or concern in a business or enterprise, though not necessarily as an owner'.[28] Apart from shareholders, all those who have stake or interest in a company, including employees, customers, creditors and members of the host community are stakeholders. They are affected by the operations of the company.

Legal Framework for Plea Bargain in Nigeria

The legal framework for plea bargain in Nigeria now is the Administration of Criminal Justice Act (ACJA) 2015. Section 270 of the Act provides for plea bargain. Prior to the enactment of the ACJA, the law supporting the application of plea bargain in Nigeria was the Economic and Financial Crimes Commission (EFCC) Act.[29] Section 14(2) of the EFCC Act provides that:

> 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 to institute, continue, take over or discontinue any

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26 Sherilyn Streicker, 'Restitution Law for Victims of Crime' <https://www.nolo.com> accessed 16 April 2020

27 Ibid

28 Bryan A Garner (n, 7), 1534

29 EFCC (Establishment) Act, Cap E1 Laws of the Federation of Nigeria 2004

> criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the amount which that person would have been liable if he had been convicted of that offence.

Although compounding a crime under criminal law is different from plea bargain as it is itself the offence of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper prosecution,[30] the EFCC found authority in the provisions to administer plea bargain. Other statutes that permitted plea bargain before the passing of the ACJA were section 72 of the Administration of Criminal Justice Law of Lagos State 2007 (repealed in 2011), section 167 of Anambra State Administration of Criminal Justice Law 2010 and Section 339 of the Criminal Procedure Code (CPC) Cap 491 Laws of the Federation of Nigeria 1990 (Abuja) which provided for compounding offences.[31]

Evolution of Plea Bargaining

According to Alschuler,[32] although plea bargaining pre-dates the American criminal justice system, its evolution into force that consumes 95% of defendants in America is a phenomenon confined predominantly to the nineteenth and twentieth century. Alubo,[33] traces the genesis of plea bargain to the medieval Common Law Court of Guilty Pardons to accomplices in felony cases. Plea bargain, according to Fisher,[34] was first used in the case of victimless crimes and it is also traceable to Middlesex County in Massachusetts between the years 1980 – 1900, used mostly in proceedings of liquor-setting violations under mandatory sentencing laws. The

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30 Bryan A Garner (n, 7), 325

31 Alphonsus Okoh Alubo (n11); Samuel Idhiarhi, 'Practice and Procedure of Plea Bargain Under ACJ Act' published February 9, 2017 <https://www.punchnig.com> accessed 17 April 2020.

32 Albert W Alschuler, 'Plea Bargaining and Its History' [1979] (1) Columbia Law Review, 79

33 Alphonsus Okoh Alubo, 'Plea Bargain and the Anti-Corruption Crusade in Nigeria' [2009] (8) (2) University of Jos Law Journal (UJLJ), 32

34 George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford University Press 2003), 72

practice became prevalent in the United States of America (USA), in the nineteenth century as the work load of judges became inflated as a result of the explosion of personal injury cases,[35] and is deeply entrenched in the criminal justice system of the United States of America.[36]

The phenomenal rise of plea bargain can be attributed to various forces but Fisher posits that the increasing power of prosecutors is the pinnacle reason for the success of plea bargaining. He stated that:

> There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce… But though its victory merits no fanfare, plea bargaining has triumphed… The battle has been lost for some time…. Victory goes to the powerful. [37]

Fisher further developed the idea that as the criminal system became more complex, prosecutors gained increased powers to offer significant incentives to defendants.[38] He argued further that as the criminal system became more sophisticated, prosecutors gained the power to use selective charge bargaining to offer reduced sentences for those who will negotiate.[39]

In Nigeria, the history of the application of plea bargaining started with the trials of a former Inspector-General of Police, Tafa Balogun in 2005 and Emmanuel Nwude in 2006 by the Federal Republic of Nigeria (FRN) at the instance of the EFCC.[40] Since then, plea bargain has been applied in other cases, including *FRN v Mrs Cecilia Ibru*,[41] *FRN v Lucky Igbinedion*,[42] *FRN v John Yusuf Yakubu*.[43]

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35 Alphonsus Okoh Alubo (n, 11)

36 Bayo Adetomiwa, 'Nigeria: The Concept of Plea Bargaining in Nigeria' – Matrix Solicitors, 9 November 2018 <https://www.mondaq.com> accessed 18 April 2020

37 George Fisher, 'Plea Bargaining's Triumph' [2000] (109) Yale Law Journal, 857,859; See also Jacqueline E Ross, 'Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in the United States Legal Practice' [2006] (54) American Journal of Comparative Law (Supplement), 717

38 Ibid

39 Ibid

40 Samuel Idhiarhi (n, 31)

41 (Unreported) Charge No. FHC/L/296^{C}/2009

42 (2014) ALL FWLR (Pt.734) 101 at 144; (2014) LPELR 22760 (CA)

These trials were under legal provisions (mentioned elsewhere in the article) supporting the application of plea bargaining before the enactment of the Administration of Criminal Justice Act (ACJA) 2015. The new Act[44] has provided for plea bargaining. States of the Federation that had not previously legislated on plea bargaining have also now enacted their own Administration of Criminal Justice Laws and provided for it, for example, the Benue State Administration of Criminal Justice Law,[45] Kaduna State Administration of Criminal Justice Law,[46] to mention a few.

The Practice of Plea Bargaining in Nigeria

Prior to the passing of the ACJA in 2015, plea bargaining in economic crimes was fraught with abuses and attracted criticism, for example, there was selective and inefficient prosecution of the types of crimes and those responsible. This was indicia of the structural impunity in Nigeria's judicial system towards criminal activity. Obviously, this is linked to the fact that economic crimes are often perpetrated by powerful political and economic power.[47] Economic crimes are generated from a hidden power that defines the relationship between economics and politics.[48]

The provision of the EFCC Act,[49] upon which plea bargaining was based, has some pitfalls. As rightly stated by Eze,[50] it does not provide any definite guidelines as to the basis for adopting the procedure of plea bargain. It is left at the discretion of the EFCC. The discretion is too wide and could be open to abuse. The second problem is the aspect of the same provision which empowers the Commission to accept any sum of money as it thinks fit, exceeding the amount to which that person would have been liable if he had

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43 (Unreported) Charge No. FHC/L/297^{C}/2009

44 Administration of Criminal Justice Act 2015, Section 270

45 Benue State Administration of Criminal Justice Law 2019, Section 272

46 Kaduna State Administration of Criminal Justice Law 2017, Section 282

47 CIPCE (n18)

48 Ibid

49 EFCC Act 2004, Section 14(2)

50 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, 32-43 available at <https:///www.eajournals.org> accessed 18 April 2020

been convicted of that offence. This is a blank cheque and window of opportunity to the officers of EFCC for so much stolen wealth in exchange for secret gratifications.[51]The sum of money which the EFCC is to accept, at its discretion, is not referenced to the amount stolen or embezzled but to the amount of the fine to be imposed. It is submitted that the entire provision made plea bargain an almost primordial instinct of the prosecutorial soul and gave the EFCC the prosecutorial power to manipulate cases and justice. This confirms Dervan's statement that: 'The history of plea bargaining is the history of prosecutors gaining increased leverage to bargain'.[52]

The EFCC has been applying the concept of plea bargaining to release many corrupt criminals, including corporate criminals, who steal corporations' funds and should have been in jail as a deterrence to others. Although most of the cases in which plea bargaining has been adopted in Nigeria are cases that involved high profile public officers, they all give useful insight on the practice of plea bargaining in Nigeria and help to illuminate on the implications of the practice in economic crimes involving companies. The EFCC has applied this procedure in very high profile cases, beginning with a former Inspector-General of Police, Mr. Tafa Balogun. The defendant was arraigned on a 70-count charge of corruption on a massive scale, which were reduced to an 8-count charge of money laundering through plea bargaining. He was convicted and jailed for only 6 months.[53]With regard to economic crimes involving companies, the procedure was adopted by the EFCC in the trial of Emmanuel Nwude and Nzeribe Okoli who were charged for defrauding a Brazilian Bank.[54]Further, in the case of *Federal Republic of Nigeria (FRN) v Mrs Cecilia Ibru*,[55] the defendant, a former Managing Director of Oceanic Bank defrauded the bank of large sums of money and was arraigned for an offence contrary to section 15(1) of the Failed Banks (Recovery of Debts) and Financial

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51 Ibid

52 Lucian E Dervan, 'Plea Bargaining's Survival: Financial Plea Bargaining, a Continued Triumph in a Post-Enron World' [2007] (60) (3) Oklahoma Law Review, 451-488

53 Alphonsus Okoh Alubo (n, 11); Ted C Eze and Eze Amaka G (n, 50)

54 Samuel Idhiarhi (n, 31); Ted C Eze and Eze Amaka G (n, 50)

55 Ibid (n, 41)

Malpractices in Banks and Punishable under section 16(1)(a) of the same Act. The punishment stipulated by the law is imprisonment for a term not exceeding five years without the option of fine. The defendant accepted to forfeit the assets worth over ₦150 billion which she fraudulently acquired. Consequently, she was sentenced to six months imprisonment without an option of fine.

The EFCC also applied the concept to the cases of DSP Alamieyeseigha who was arraigned on corruption charges and the Governor of Edo State, Lucky Igbinedion who was charged with stealing billions of Naira from the public treasury on 28th December 2018. The latter was convicted and sentenced to pay an infinitesimal fine of N3.5 million. He was also to serve twelve years imprisonment on a six count charge of corruptly enriching himself while he was Governor. However, the sentence was to run concurrently and because he had remained in custody for two years, he was released a few days after, under a plea bargain agreement.[56]

The much criticized case of *FRN v John Yusuf Yakubu*[57] is also a product of plea bargain. Mr. John Yakubu Yusuf who was involved in over ₦27 billion Naira scam, was left off the hook with payment of a paltry sum of seven hundred and fifty thousand Naira (₦750,000.00) only as option of fine for two years jail term. Thus, the concept has been criticized since it seems to be practiced to favour the rich and elite criminals who loot, launder and embezzle public funds for their selfish gains.[58] What is perplexing and most worrisome in all these sentences is the fact that the general public is not informed of what was stolen and what was recovered from the thief so as to justify such sentences.[59]

The Administration of Criminal Justice Act (ACJA)[60] and the Administration of Criminal Justice Laws of States of the Federation have provided for plea bargaining. This means that the concept is part of the criminal justice system in Nigeria and will continue to be practiced. The pertinent question is whether plea

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56 Ted C Eze and Eze Amaka G (n, 50)
57 Ibid (n, 43)
58 Alphonsus Okoh Alubo (n, 11)
59 Ted C Eze and Eze Amaka G (n, 50)
60 ACJA 2015, Section 270

bargaining is desirable in all cases in Nigeria? Before proffering an answer to this question, it is necessary to highlight the pros and cons of the concept.

Pros and Cons of Plea Bargaining from all Perspectives

Plea bargain practice is said to be the most useful means of quick disposal of criminal trials the world over.[61] Lawrence and Others[62] argue that from the perspective of the prosecution, the potential benefits are simple proof and the cost effective disposition of cases. The risk of taking a case to a full trial can be significant and acquittals costly. Proof 'beyond reasonable doubt' is a demanding standard: a guilty plea and agreed facts could bring speedy resolution. With regard to the defendant, depending on the extent to which there is discretion and flexibility, and the facts in any given situation, the procedure may result in a significant reduction of punishment, certainty and speed of resolution, specified and more limited co-operation in matters of evidence and agreement over conditions of confinement. This can be as important to some defendants as the length of sentence.[63]

In *FRN v Lucky Igbinedion*,[64] the Court of Appeal stated the advantages of plea bargain as follows:

> The advantages of plea bargain include:
> (i) Accused can avoid the time and cost of defending himself at trial, the risk of harsher punishment, and the publicity the trial will involve.
> (ii) The prosecution saves time and expense of lengthy trial.
> (iii) Both sides are spared the uncertainty of going to trial.
> (iv) The court system is saved the burden of conducting a trial on every crime charged.[65]

However, plea bargaining has its demerits. In the first place, it is self-incrimination and condemnation without adjudication.

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61 Ibid (n, 50)
62 Jon Lawrence and Others (n, 12)
63 Ibid
64 Ibid (n, 42)
65 Ibid, 75-76

According to Langbien,[66] it occurs when the prosecution induces a criminal accused to confess guilt and waive his right of trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudicated guilty following trial. The prosecutor offers leniency either directly, in the form of charge reduction, or indirectly, through the connivance of the judge, in the form of a recommendation for reduced sentence that the judge will follow. In exchange for procuring this leniency for the accused, the prosecutor is relieved of the need to prove the accused's guilt, and the court is spared having to adjudicate it. The Court condemns the accused on the basis of his confession, without independent adjudication. It is, therefore, a non-trial procedure for convicting and condemning people accused of serious crimes.

In Nigeria, there is no authority under the Constitution of the Federal Republic of Nigeria (CFRN) for plea bargaining. Under the Constitution,[67] an accused person is presumed innocent until proven guilty. This presumption of innocence can only be rebutted by the prosecution when it is able to satisfactorily discharge the legal burden cast on it by the Evidence Act[68] to prove its case against the accused person beyond reasonable doubt. The Constitution, as the ground-norm is supreme over all authorities and persons throughout the Federal Republic of Nigeria,[69] and if any other law is inconsistent with the provisions of the Constitution, the latter should prevail, and that other law shall to the extent of the inconsistency be void.[70]

The erosion of presumption of innocence under plea bargain is an infraction of the Constitution of the Federal Republic of Nigeria. Adetomiwa[71] rightly submits that plea bargain is a fundamental concept, which any nation which desires to make it part of its criminal justice system should incorporate it into its constitution to accord it the necessary force. In the absence of any

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66 John H Langbien, 'Torture and Plea Bargaining' [1978] University of Chicago Law Review, 1-22, available at <https://www.chicagounbound.uchicago.edu> accessed on 19 April 2020

67 CFRN 1999 (as amended), Section 36(5)

68 Evidence Act 2011, Section 135(1), (2) and (3)

69 CFRN 1999 (as amended) Section 1(1)

70 Ibid, Section 1(3)

71 Bayo Adetomiwa (n, 36)

clear provision under the CRFN, the applicability of plea bargain is certainly contrary to provisions of the Constitution.

Another problem is that plea bargain might not serve public interest due to potential pitfalls in the area which may be due not so much to plea bargaining itself but from other abuses in the judicial system.[72] Under section 270(3) of the ACJA 2015, the Prosecutor has the discretion to offer or accept plea bargain. Given the level of corruption in Nigeria, there is tendency for abuse of the process by the prosecuting authorities. Further, plea bargain might dilute deterrence except an increased number of prosecutions are being brought and resolved more quickly to enhance deterrence.[73] In addition, there may be public perception that the defendant has been put under pressure, to plead guilty and of 'deals' being struck behind closed doors. How significant these wider political issues are in practice will depend largely on the transparency and predictability of the process.[74]

How Desirable is the Application of Plea Bargaining to Economic Crimes Committed against Corporations by Corporate Criminals?

Upon creation, through registration, a company becomes a distinct and separate person from the owners. This is the concept of corporate personality which was enunciated in *Salomon v Salomon & Co Ltd.*[75] By corporate personality, a company is an artificial person with power to own property like a natural person, to sue and be sued in its own name independent of the members who are not liable for its debts. In *Kano State Oil and Allied Products Limited v Kofa Trading Company Ltd*[76] and a succession of several other cases, the Supreme Court of Nigeria held that upon incorporation of a company, it becomes a body corporate and, in the eyes of the law, a person which is distinct from its members or shareholders.

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72 Jon Lawrence and Others (n, 12)
73 Ibid
74 Ibid
75 (1897) AC 22 (HL)
76 (1996) 3 NWLR (Pt.436) 224

The general view among corporate law scholars and economists is that ownership of a company's shares, which qualifies the holder as a member of the company, translates to ownership of the company by the shareholders.[77] However, the opposite and more acceptable views by corporate law commentators is that companies are persons and as such, they cannot be owned like dogs and wombats.[78] Both the common law[79] and statutory[80] definitions of 'a share' underscore the point that 'a share' is the expression of a proprietary relationship, which does not extend to ownership of assets of the company. It only signifies the interest of a shareholder in a company measured by a sum of money and made up of various rights which includes, amongst others, the right to share in the profits of the company by way of declared dividends, and to participate in the distribution of assets of the company during winding up.

The shareholders invest capital in the company but they are not owners of the assets of the company including that capital, the company owns its assets independent of them. This is, indeed, corporate realism theory. The pertinent question then is, if the interests of the shareholders are not the same with those of the company, who is actually a victim of an economic crime committed against the company for purpose of restitution under a plea bargain sentence? This question is more pertinent given the fact that the company, as an artificial person, must act through its human organs and the power of management is generally vested in the board of

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77 Samuel E Ojogbo, 'Minority Members in Public Companies in Nigeria: What a Manner of Membership?' [2017] (8) (1) The Gravitas Review of Business and Property Law, 39-51

78 Bruce Welling, Corporate Law in Canada: The Governing Principles (3rd edn, Scribblers Publishing 2006), 593

79 Borland's Trustees v Steel Brothers& Co Ltd, wherein Farwell J stated: "A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place and o interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se … The contract contained in the articles of association is one of the original incidents of a share. A share is not a sum of money… but is an interest measured by a sum of money and made up of various rights contained in te contract including the right to a sum of money of more or less amount."

80 Companies and Allied Matters Act 2004, Section 79: "The interest in a company's capital of a member who is entitled to share in the capital or income of such company; and where a distinction between stock and shares is expressed or implied, includes stock."

directors.[81] The directors are said to represent the directing mind and will as well as hands and limbs of the company.[82] They have the power to make decisions, sue on behalf of the company, and they are trustees of the company's monies and property.[83] The question that crops up for consideration is: what will happen if the directors are perpetrators of the economic crime against the company? For example, what is the position if they mismanaged the company and have brazenly and fraudulently engaged in 'assets stripping' and theft of the company's funds? The custodians will not indict themselves and will not act to remedy the wrong. Can the directors or officers, as corporate criminals, still receive restitution on behalf of the artificial entity which they manage and have defrauded?

The concept of corporate personality creates a distinction between the company and its shareholders which extends to ownership of property. As such, shareholders have no claim to the assets of the company including monies embezzled or stolen by corporate criminals – directors and officers. There is, therefore, difficulty in defining and identifying who is the real victim of an economic crime committed against the company by its directors or officers who are custodians of its property for purposes of restitution. The shareholders whose fund is dissipated have no right to restitution, their right is restricted to a return on their investment in form of dividends. The creditors who have supplied loan capital have no right to restitution; their right comes to the fore only during winding up. The employees who are suppliers of labour, have no right to restitution even if they have not been paid their wages.

Resources that could support a corporation and ultimately, a country's development are lost through the criminal acts of corporate criminals. The rights of corporate stakeholders are infringed through brazen 'asset stripping' and theft. In the end, the culprit is given a milder punishment under plea bargaining as in the cases of Mrs Cecilia Ibru and John Yusuf Yakubu and the issue of restitution to victims in trials of corporate criminals presents complex problems.

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81 Companies and Allied Matters Act 2004, Section 63(3)

82 Bolton Engineering Co Ltd v Graham & Sons Ltd (1957) 1 QB 159 at 172 per Lord Denning

83 Great Eastern Railways Co v Turner (1872) LR 8 Ch 149 at 152

Economic crimes unleash significant social and economic impact on corporate stakeholders and their importance should not be trivialized. They can cause corporate collapse, for example, the fraudulent acts of Mrs Cecilia Ibru, who was the Managing Director of Oceanic Bank, had the potential of putting the banking company into financial distress and insolvent liquidation just as the fraudulent acts of Emmanuel Nwude and Nzeribe Okoli could have caused financial distress for the Brazilian Bank which they defrauded.Even in the United States of America (USA) where plea bargaining originated, the collapse of Enron in 2001, and a quick succession of corporate scandals that followed – WorldCom, Adelphia, Symbol Technologies, Dynegy, Health South, and others triggered action by the President, Congress, Department of Justice (DOJ), and United States Sentencing Commission (Sentencing Commission) who all acted swiftly to 'get tough' on corporate criminals. As the media exposed more corporate corruption and shady dealing, law makers competed to prove their toughness on crime by raising sentences.[84]

Predominantly, these government institutions focused on two reforms aimed at restoring confidence in the American financial system: increasing the number of criminal offences available to prosecutors and increasing the prison sentences for those convicted.[85] The result of this frantic effort was the passing of the Sarbanes-Oxley (SOX) Act[86] which sought to restore investor confidence through sweeping changes to corporate structure and criminal statutes. By creating new laws and amending old fraud provisions, SOX took aim at all financial crimes in an effort to increase prosecutions and prison sentences for an enormous class of defendants, not just the limited number of officers and directors involved in the major scandals of the time.[87] Indeed, shortly before SOX became law, the Attorney-General, John Ashcroft, stated that the proposed reforms would 'make it clear that executives and

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84 Stephanos Bibas, 'White-Collar Plea Bargaining and Sentencing After Booker' [2005] (47) WM & Maryl Review, 721

85 Lucian E Dervan, 'Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World' [2007] (60) (3) Oklahoma Law Review, 451-485

86 Sarbanes-Oxley Act 2002

87 Stephanos Bibas (n, 84)

companies will face tough penalties including longer jail sentences for individuals'.[88]

As a strict measure on sentencing corporate criminals for corporate frauds, the Feeney Amendment Act passed in 2003 prevented Federal Judges in the USA from making downward departures during sentencing for any reason other than those specifically stated in the Sentencing Guidelines issued by the DOJ. Accordingly, Federal Prosecutors were not allowed to request or accede to a downward departure in sentencing except in limited circumstances specified in the Memorandum and with authorization from the Assistant Attorney-General.[89] The goal of the DOJ's Memorandum, was in essence, to further restrict a defendant's ability to receive downward departures and, thus, increase prison sentence.[90] The Memorandum dictated that prosecutors stop offering reduced sentences in return for plea agreements if such deals excluded a readily provable offence for which the sentence was greater.[91]

It is submitted that the practice of encouraging or inducing corporate criminals in Nigeria to enter into plea agreements is not the appropriate antidote to corporate fraud or crime carried out by corporate criminals against companies. This is more so that there are copious provisions in the statutes regulating the operation of companies and their securities on this matter, for example, the Corporate Affairs Commission has power under the Companies and Allied Matters Act[92] to conduct investigation into affairs of a company when it appears to the Commission that there are circumstances suggesting that –

(a) the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some parts of its members; or

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88 Press Release: Department of Justice, USA. Attorney-General Statement on Corporate Responsibility and the Creation of the Corporate Fraud Task Force (July 9, 2002) available at <https://www.usdoj.gov/opa/p-1/2002/Jul/02.ag-388.htm>

89 Ibid (n, 84)

90 Stephanos Bibas 'The Feeney Amendment and Continuing Rise of Prosecutorial Power in Plea Bargain' [2004] (94) Journal of Criminal Law and Criminology, 295, 308

91 Marc L Miller, 'Domination and Satisfaction: Prosecutors as Sentencers' [2004] (56) Stanford Law Review, 1211, 1248

92 Companies and Allied Matters Act, 2004, Section 314

(b) any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial or that the company was formed for any fraudulent or unlawful purpose; or
(c) persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or
(d) the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

The Commission's power of investigation under this provision was confirmed by the Court of Appeal in the case of *Corporate Affairs Commission v United Bank for Africa Plc & 5 Ors*,[93] wherein the issue was whether the Commission has powers to inspect affairs of banks without a Court Order. The Court of Appeal held that section 314(1) of CAMA empowers the Commission to investigate affairs of banks without the need for a court order.

Investigation under the provision may lead to a number of consequences. It may prompt a shareholders' action for unfair prejudicial conduct,[94] or trigger proceedings by the Commission,[95]or prosecution by the Attorney-General of the Federation if criminal conduct is revealed or suspected,[96] a winding up petition by the Commission.[97] This power of the Commission to take inquisitorial actions against companies is a more practical way of avoiding the rigour and cost of litigation as a means of remedying abuses of corporate power.[98]

Further, where a company is being used as a cover for the commission of crime, the veil of incorporation can be lifted to hold the person using the company personally liable because corporate personality theory is not one that permits anybody to use a limited

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93 Judgment in Suit No. CA/L/443A/2014 delivered on 30th March 2016, (2016) NGCA, 76
94 CAMA 2004, Sections 310-312
95 Ibid, Section 321
96 Ibid, Section 322
97 Ibid, Section 323
98 TAT Yagba and BB Kanyip and SA Ekwo, *Elements of Commercial Law* (Tamaza Publishing Company Limited 1994), 274

liability company to perpetrate fraud.[99] Directors who commit fraud cannot take shield under corporate personality that they were acting for the company. Similarly, where directors divert money or other property received as loan for a specific purpose and with intent to defraud, fail to apply the money or other property for the purpose it was received, they are personally liable under the Companies and Allied Matters Act,[100] and the Court has interpreted the provision as such.[101]

It is submitted that these provisions are adequate for purposes of civil and criminal sanctions against corporate criminals without resort to plea bargaining.

Conclusion and Recommendations

Not until recently, plea bargaining was not part of Nigerian legal system. The practice is novel and has now been incorporated in Nigeria's criminal justice administration legislation. However, the concept has no authority in the constitution of the Federal Republic of Nigeria and is inconsistent with the constitutional provision on presumption of innocence in favour of all accused. The concept has merits and demerits but in relation to economic crimes committed against corporations by corporate criminals – directors and officers – it is inappropriate due to the nature of a corporation and the operation of corporate personality theory which makes it difficult to determine the victim of economic crime involving a company. This problem is exacerbated by the abuses the practice of plea bargain is prone to, for example, the present practice whereby the prosecuting authority engages in secret deals with fraudsters and looters who are discharged and acquitted after they offer to return only a little of what they have embezzled or stolen is more of a palliative, without cure, to the festering wounds inflicted on the corporate stakeholders. It is a legal conspiracy against corporate interests. It is, therefore, recommended that plea bargaining should not be applied in high profile economic crimes committed by corporate criminals against

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99 Federal Republic of Nigeria v Mustapha Olowe & 2 Ors (2006) 7 QCCR 185 at 215

100 CAMA 2004, Section 290

101 Frank and Frank Construction Co Ltd & 1 Or v Nigerian Deposit Insurance Corporation (NDIC) (1999) 1 FBTLR 5

companies. Rather, the law should focus on prosecuting and punishing corporate criminals with longer jail sentences and imposing additional long jail terms if they fail to surrender fully the amount of money which they have embezzled or stolen.