

Review

## Democracy, plea bargaining and the politics of anti-corruption campaign in Nigeria (1999-2008)

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**This article examines the genuineness of the campaign against corruption in Nigeria by the democratic regime inaugurated in 1999. It underscores the rationale behind the introduction of plea bargaining as a condition for mitigation of criminal offense in Nigeria. The paper argues that the way and manner by which this element entered the country's legal document was itself criminal in nature and lack any known framework when compared to the operation of the concept in other countries. The paper concludes that the country cannot wage any serious war against corruption with plea bargaining in force. It explains that Nigeria does not need the notion of plea bargaining at this particular stage of the campaign against corruption as there is the need to attain some level of acceptable cleansing before plea bargaining can be a subject in the criminal or legal book of the country.**

**Key words:** Democracy, corruption, plea bargaining and criminal justice system.

### INTRODUCTION

Plea bargain is an agreement in a criminal case between the prosecutor and the defendant that usually involves the defendant pleading guilty in order to receive a lesser offense or sentence. Plea bargain is often referred to as really just establishing a "mutual acknowledgement" of the case's strengths and weaknesses, and does not necessarily reflect a traditional sense of "justice". In most cases, it is employed to accelerate the pace of justice and more often than not, to reduce or decongest the prison. On the other hand, plea bargains are employed to reduce the caseloads of prosecutors in order to pave way for effective prosecution of more serious cases. This is

apart from the fact that defendants save time and money by not having to defend themselves at trials. However, the adoption of plea bargains usually comes with an acceptable framework for its operation in order to provide justification for its use. It is important to note that the aforementioned primary justifications of plea bargains all provide benefits to the respective players – the court, the prosecutor and the defendant. It must be pointed out that plea bargains do not inherently offer any benefit to the society at large or take any steps towards a truly just outcome. Consequently, many in the legal field have openly challenged the plea bargaining system that it is

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immoral, unethical and unconstitutional.

Over the years, one major problem that Nigeria, albeit other countries, has had to confront in their drive towards socio-economic and political development is the problem of corruption. While it is acceptable that corruption is not peculiar to a particular country or continent, it has come to represent a feature of governance and politics in a good number of African countries. In other words, just as the history of corruption is as old as the history of man and the world he lives in (Lipset and Lenz, 2000), the point being made is that some countries are more corrupt than others, and Africa, unfortunately, seems to have produced some of the most corrupt polities.

In spite of the established negative impact of corruption on state and society (Huang, 2008; Mauro, 1997), corruption remains a pandemic in Nigeria. Successive administrations in Nigeria have consequently initiated various strategies aimed at its drastic reduction if not elimination, including the establishment of structures and institutions to combat the crime of corruption. However, despite the activities of these institutions and promulgation of laws against the crime of corruption, the disease has continued to rear its ugly head at every level of governance in Nigeria. The lapses in the procedure for prosecuting criminal cases in Nigeria, such as the long period and complexity of investigations, paved way for the application or adoption of plea bargains. It is within this narrative that the concept or, more directly, the 'policy' of plea bargain in the Fourth Republic must be understood and engaged.

Bearing in mind the history of politicization and trivialization of anti-corruption policies in post-colonial Nigeria, this paper therefore argues that the adoption of plea bargaining into the criminal justice system in Nigeria (as evidenced at the dawn of the Fourth Republic) is itself a corrupt practice by the ruling party. It specifically makes the point that the unequal and imbalance nature of the agreement is a ploy to ensure that public office holders accused of corruption are set free without losing their stolen fortune.

## METHODOLOGY

This paper adopts the qualitative method in its analysis. By qualitative method, the paper adopts the key informant interview to elicit information from stakeholders in the campaign against corruption and prosecution of corruption cases in the country. In this wise, the paper considers very important the opinions of Head of the Legal Departments of both the EFCC and ICPC. Also, the paper considers as important the interview of Head of

Law Departments in the Universities in order to add academic flavours to the output of the paper. In order to achieve this, the author interviewed the Head of the Legal Department of ICPC in Lagos and his counterpart in the EFCC in Lagos. Apart from this, some identified lawyers working with the two anti-corruption institutions were also interviewed in order to confirm or contradict the opinion of the Heads.

Also, the Head of Research at the Nigerian Institute of Advance Legal Studies was also interviewed. In the same manner, the Dean of the Faculty of Law of Lagos State University was also interviewed. The information gathered through these key informant interviews has helped in enriching the paper. However, it is important to state that the paper limited its horizon to the activities of the anti-corruption agencies in Lagos for convenience sake.

## DEMOCRACY, CORRUPTION AND PLEA BARGAIN: CONCEPTUAL AND THEORETICAL CLARIFICATIONS

The fact that democracy allows for freedom does not presuppose that such freedom can be exercised without certain limitations. It is widely accepted that democracy operates based on constitutionalism which should not be compromised, particularly in explaining the power relationship between the governor and the governed. The basic consideration for categorizing a democracy as being 'true' or 'strong' is the extent to which it respects constitutionalism. With this, it is obvious that the power of the rulers can be checkmated as well as the activities of the followers. The practice of democracy in different forms in different parts of the world has made complex the meaning of democracy. While the conduct of periodic elections has been considered an important indicator of democratic practice, the process for this conduct has been neglected which in fact constitute a big minus for democracy itself, particularly with reference to third world countries. Democracy in any society has different facets which must be holistically considered to measure democracy. We will not delay the discussion on democracy with the various definitions of the concept as this has been variously considered by the author and others. Nevertheless, there have been several attempts by scholars to classify democracy under different headings and theories. This taxonomy of democratic theories has helped in understanding better the dynamics of the concept of democracy and its different shades as can be found in different countries. For instance, Cunningham (2001) divides contemporary democratic theory into seven categories including liberal democracy,

classic pluralism, catallaxy, participatory democracy, democratic pragmatism, deliberative democracy and radical pluralism. In his analysis, liberal democracy receives the most extensive discussion due to its dominance in modern Western political thought and the affinities attributed to it such as level of participation allowed by the theory, its degree of egalitarianism, its notion of autonomy and selfhood, the role of positive and negative conceptions of freedom and a host of others. Classic pluralism, on the other hand, stresses the clash of interest groups and the need for processes to establish social order and stability. Cunningham investigates its views of power, leadership, and political culture in this conception of democracy, and some of the criticisms of its conservative implications. In view of its abstract view of group power and its rejection of economic classes and ethnic and racial groups as relevant interest groups, this perspective is criticized by more radical democrats as an ideology legitimating the corporate capitalist system and having little compatibility with meaningful democracy.

“Catallaxy,” is a species of “social choice” theory that takes self-interested individuals as the units of social analysis. Cunningham takes the term “catallactic” from the classical liberal theorist Hayek, and accordingly takes what is now called a neo-liberal or “free-market” view of democracy. He presents a clear picture of this theoretical framework and discusses its analytical strengths and weaknesses, including both empirical and normative problems with applying its economic account to political activity, including governing, voting, and citizenship in general. Not surprisingly, critics find the connection between this theory and any meaningful conception of democracy to be rather tenuous. Cunningham’s analysis of participatory democracy was brief and focused on the scale on which direct democracy can exist in a viable manner, the role (or non-role) of a state in a participatory system, and the tension between the libertarian and authoritarian dimensions of self-determination by small-scale, often relatively homogeneous groups. The strengths of the participationist critique of representation, of depoliticized consumer society, and of unresponsive political and economic systems in general are brought out, as are possible problems with a participatory approach, such as the dangers of majority tyranny and social pressure. The pragmatist emphasizes the relevance of democratic values and practices to diverse spheres of human activity, the importance of the social context in which democratic phenomena develop, the fact that the achievement of democracy in any realm is a matter of degree, and the need for a creative democratic response to particular circumstances, rather than a democratic ideological absolutism. From a

pragmatic point of view, democracy requires experimentalism, and some questions – even basic ones about structures and procedures --cannot be answered through ready-made theories.

Another theory discussed by Cunningham is the deliberative democracy theory, which stresses the centrality of questions concerning public discourse, justification procedures, norms of reciprocity, and the conditions for free, rational and democratic formation of policy. This perspective shares with varieties of civic republicanism and participatory democracy an emphasis on the transformative effects of participation in democratic processes. The final theory discussed by Cunningham is the “radical pluralism,” which is associated most closely with various post-modernist and post-structuralist theories. Another classification of democratic theory can be found in the works of Kelly Meier<sup>1</sup>. Meier classified theories of democracy into four basic theories which are protective democracy, pluralist democracy, developmental democracy and participatory democracy. Protective democracy has its root in liberalism and believes government exists to protect the rights of individual citizens. Governmental involvement in the lives of citizens should be focused on protecting material wealth and maintaining a free market. Protective democracy acknowledges that there will be an imbalance in wealth and assumes the elite will be in power. It discourages broad-based civic engagement unless it is related to protecting civil liberties. The pluralist theory connects democracy to power held by special interests. Pluralists believe that citizens are disinterested in becoming involved. Those who are engaged do so through smaller political groups. Governmental leadership rests in the hands of those who are elected, and they are generally considered elite. Special interest groups play an important role and jockey for power in areas related to specific issues and values.

In a similar vein, developmental democracy assumes the best about society. This theory considers citizens to be engaged in civic issues and focused on what is best for society as a whole. Democracy is connected to morality. As citizens become involved in government, they acquire an understanding and appreciation of what is needed to improve services and communities. The developmental theory acknowledges the need for elected officials but believes the people are responsible for selection and oversight of their work. Participatory democracy is the last of the classification scheme of

<sup>1</sup>Meier, K.S. “Four Basic Theories of Democracy” [www.classroom.synonym.com/four-basic-theories-of-democracy-11726.html](http://www.classroom.synonym.com/four-basic-theories-of-democracy-11726.html)

Meier. Participatory democracy focuses on retooling government to encourage more citizen involvement. According to Meier, this theory emerged in the 1960s when student activism was common and issues such as the Vietnam War and civil rights provided an avenue for engagement. Advocates of this theory believe that non-governmental agencies such as corporations have too much control over the welfare of their employees. The main idea of this theory is to provide more involvement and control over all governmental laws and non-governmental rules pertaining to American citizens.

In what looks similar to the classification of Aristotle, Althaus (2012) classified the theory of democracy into three which are: republicanism, pluralism and elitism. Republican democracy connotes a healthy and respectful marketplace of ideas where citizens deliberate to make the best decision possible based on a set of known options that come to light through reasoned debate. This is similar to Cunningham's deliberative democracy and Meier's participatory democracy. The pluralistic approach to democracy centers on the benefits derived from competition among distinct interest groups. A key concept in this approach to democracy is advocacy (see Baker, 2002). Different interest groups advocate their position within specific rules that allow for at least a modicum of fairness, and the group able to generate the most power through a force of will wins. Of utmost importance under this model is that citizens recognize which positions serve them best and which macro-political entities (e.g., political parties) represent those political stances.

The elitist theory of democracy is considered the most interesting of the three classifications. According to Althaus (2012), infortainment is all that is needed for this democracy to function properly. That this approach to democracy reflects leadership by the few is self-explanatory: Experts are in charge. As a normative ideal, the experts with the most knowledge and the greatest virtue (i.e., lack of corruption) hold the most powerful positions in the social system.

However, we shall consider sacrosanct the variables to evaluate or judge democracy as outlined by Crowell. The first variable in judging democracy is the presence and employment of state institutions based on the rule of law. The second is the commitment of the elites to democracy which determines the direction and stability of the country. The third is the national wealth which shapes the national interests. Fourth is the existence and success of private enterprise because this represents another method for civilian involvement in the growth of the state. Fifth is the existence and size of a middle class which creates more security and catalyzes the development of a stronger

democracy. There will exist in most state, a poor and disadvantaged class of people; therefore, sixth, some degree of state sponsored welfare system is a necessary component for a viable democracy. Seventh is the spirit of a civil society and a political culture where citizens are allowed to be active in both local and federal governments. Eighth, following civil society, citizens must also have the opportunity for education and along the same lines – information must be allowed free distribution. Ninth, ethnic tension and regionalization within a state make democracy difficult, which is why a homogeneous society is beneficial to a democracy. Finally, the tenth and most visible element in a democracy is maintaining a favourable international environment where assistance and monitoring can be offered (Crowell, 2003). While one may agree with the ten variables outlined by Crowell, the point should be made that his ninth variable is restrictive and faulty. This is because heterogeneous society such as India has been able to sustain its democracy for over five decades and India is believed to be the largest democracy in the world today. Nevertheless, it is important to note that the nature of government does not prevent systemic decay and corruption. Attitude of the elites and the followers is sacrosanct in ensuring that the basic tenets of democracy are imbibed for socio-economic and political development of the society.

The scope of corruption is contextual and its incidence varies greatly, reflecting a country's policies and legislation, bureaucratic culture, political development and social tradition. However, it affects all facets of society, although it is inclined to be pervasive in some society more than others (Anti-Corruption Commission, Zambia, 2012). In the same manner, like the concept of democracy, corruption has received an extensive attention in communities, and perhaps, due to the fact that it has been over flogged in the academic and non academic circles, corruption continues to receive varied definitions. It has broadly been defined as a perversion or a change from good to bad. Specifically, corruption or "corrupt" behavior "involves the violation of established rules for personal gain and profit" (Sen, 1999: 275). According to the Longman Contemporary English Dictionary, corruption is defined as "the dishonest, illegal, or immoral behavior, especially from someone with power". Power in this sense is not restricted to public space, it also encompass official position in the private or social sector. It is considered as an effort to secure wealth or power through illegal means – private gain at public expense; or a misuse of public power for private benefit (Lipset and Lenz, 2000).

In addition, corruption is a behavior which deviates from the formal duties of a public role, because of private

gains. It is a behavior which violates rules against the exercise of certain types of duties for private gains – regarding influence (Nye, 1967). This definition includes such behavior as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private uses) (Banfield, 1961). Again, Osoba (1996) adds that corruption is an “anti-social behavior conferring improper benefits contrary to legal and moral norms, and which undermines the authorities” to improve the living conditions of the people.

Corruption poses a serious development challenge to the socio-political and economic fabric of a society. In the political realm, it undermines democracy and good governance by flouting or even subverting formal processes. Corruption in elections and in legislative bodies reduces accountability and distorts representation in policymaking; corruption in the judiciary compromises the rule of law; and corruption in public administration results in the unfair provision of services. More generally, corruption erodes the institutional capacity of government as procedures are disregarded, resources are siphoned off, and public offices are bought and sold. At the same time, corruption undermines the legitimacy of government and such democratic values as trust and tolerance. Corruption also undermines economic development by generating considerable distortions and inefficiency. In the private sector, corruption increases the cost of business through the price illicit payment themselves, the management cost of negotiating with officials, and the risk of breached agreements or detection. Although some claim corruption reduces costs by cutting red tape, the availability of bribes can also induce officials to contrive new rules and delays. Openly removing costly and lengthy regulations are better than covertly allowing them to be bypassed by using bribes. Where corruption inflates the cost of business, it also distorts the playing field, shielding firms with connections from competition and thereby sustaining inefficient firms.

Corruption also generates economic distortions in the public sector by diverting public investment into capital projects where bribes and kickbacks are more plentiful. Officials may increase the technical complexity of public sector projects to conceal or pave way for such dealings, thus further distorting investment. Corruption also lowers compliance with construction, environmental, or other regulations, reduces the quality of government services and infrastructure, and increases budgetary pressures on government.

While discussing the factors that facilitate corruption,

scholars seem to have combined the various elements of corruption under two main approaches: the principal-agent approach and the collective action approach. The principal-agent approach presupposes the imbalance nature of information with regards to an activity between a principal (the owner of job) and the agent (the client). A principal-agent problem exists when one party to a relationship (the principal) requires a service of another party (the agent) but the principal lacks the necessary information to monitor the agent’s performance in an effective manner. The “information asymmetry” that arises because the agent has more or better information than the principal creates a power imbalance between the two and makes it difficult for the principal to ensure the agent’s compliance (Booth, 2012). This approach has been widely used to understand corruption across geographies and sectors (e.g. the police, customs, procurement, service delivery etc) (Klitgaard, 1988; Rose-Ackerman, 1978).

According to this theory, conflict exists between principal on the one hand (who are typically assumed to embody the public interest) and agents on the other (who are assumed to have a preference for corrupt transactions insofar as the benefits of such transactions outweigh the costs). Corruption thus occurs when a principal is unable to monitor an agent effectively and the agent betrays the principal’s interest in the pursuit of his or her own self-interest (Persson et al., 2013). Thus, principal-agent theory sees corruption exclusively as an agent problem, with the principal unable to play an effective monitoring or oversight role, mostly as a result of a lack of information.

The collective-action approaches to corruption are still an emerging body of work, in both conceptual and empirical terms (DFID, 2015). From a collective-action perspective, all stakeholders – including rulers, bureaucrats and citizens alike – are self-maximizers, and the way they behave to maximize their interests is highly dependent on shared expectations about the behavior of others (Ostrom, 1998). The rewards and costs of corruption depend on how many other individuals in the same society are expected to be corrupt. If corruption is the expected behavior, individuals will opt to behave in corrupt ways because the costs of acting in a more principled manner far outweigh the benefits, at least at individual’s level (DFID, 2015). From a collective-action perspective, the key calculation about the costs and benefits of corruption derives from the cost of being the first to opt out of corruption in a given setting or context. The problem of corruption is thus rooted in the fact that, where corruption is pervasive, principals are also corrupt and they do not necessarily act in the interest of society as a whole but rather pursue particularistic interests

(Mungiu-Pippidi, 2011). In most Sub-Saharan African countries, the two scenarios painted are usually the case with corruption. In the first instance, civil servants that are meant to be at the heart of service delivery are the most corrupt and show the way for politicians. The public office holders that are meant to appraise their performance do not have information about how well they have performed the job. In most cases, they are usually “partners in crime” when it comes to corruption issues.

Essentially, some few individuals and groups will be available to campaign against the corruption and corrupt tendencies. This usually becomes a policy issue where government of the day is in agreement with the campaign against corruption hence establishing structures and institutions to fight the scourge. Most anti-corruption initiatives fail. This is because anti-corruption initiatives discussion and research centers too much on the “top and tail” of corruption – the causes and effects – and too little is said on the “heart” – the practical mechanisms for fighting it (Zuleta, 2008). Anti-corruption initiatives fail because of over-large ‘design-reality gaps’, that is, too great a mismatch between the expectation built into their design as compared to on-the-ground realities in the context of their deployment (Hecks, 2011). Successfully implemented initiatives find ways to minimize or close these gaps. However, corrupt tendencies seem to have become overwhelming in some countries thereby creating prosecution problem for the judiciary in those countries. In order to get out of the problem, some countries have adopted plea negotiation or plea bargain to relieve the system of the problem of investigation and prosecution.

Plea bargaining is a negotiated settlement of criminal matter. It is a form of short-circuiting the process of prosecution which can be used for small and big crimes (Fagbohun, 2015). It is also considered an agreement between an accused and a prosecutor (Atanda, 2015). Plea bargaining is a process of criminal justice system which has been in place since the 19<sup>th</sup> and 20<sup>th</sup> Centuries (Dervan, 2010). While its usage and application in some countries has been old, it is new in some other countries. The case for its greenness in these countries could be attributed to its rejection because it does not offer fair deal and retrogressive in nature. There has been series of cases for and against plea bargaining as an aspect of criminal justice system. Dervan (2010) distinguished between administrative theory of plea bargaining and shadow-of-trial theory of plea bargaining. According to Dervan, administrative theory of plea bargaining refers to the role of the prosecution in dictating the terms and conditions of the bargain and relegates the defendant to the position of an unwilling, passive participant whose

only power rests in the ability to accept or reject the government’s offer. This theory portrays prosecutors as administrative figures handing down punishment in the place of the courts. The shadow-of-trial theory on the other hand, argues that both prosecutors and defendants participate in the plea bargaining process and engage in a mutually beneficial contractual negotiation. In this model, each party forecasts the expected sentence after trial and the probability of acquittal. The parties then come to a resolution that contains some related proportional discount.

In another related development, Latona (2015) distinguished between Plea change and plea negotiation/bargain. According to Latona, plea change is an aspect of plea bargaining which refers to negotiated agreement from pleading guilty to pleading not guilty. In this case, an accused person that had already pleaded guilty may suddenly plead not guilty as a result of certain development in the evidence of the case. Whereas, plea negotiation/bargain is said to be the substitution for the prosecution removing certain offences where the accused agrees to divulge information or testifying on behalf of the prosecution in respect of other *participice criminales* (other parties involved in the crime) who are basically the fundamental members of the criminal organisation or enterprise. This is different from the types of plea bargaining alluded to by an association of lawyers known as Findlaw<sup>2</sup>. This group of lawyers differentiate three types of plea bargaining: charge bargaining, sentence bargaining and fact bargaining. In this case, charge bargaining is considered the most common form of plea bargaining where the defendant agrees to plead guilty to a lesser charge provided that greater charges will be dismissed. For example, an accused person may decide to plead to manslaughter rather than murder. The sentence bargaining is not the common type and it is more tightly controlled than charge bargaining. This is when a defendant agrees to plead guilty to the stated charge in return for a lighter sentence. Typically this must be reviewed by a judge, and many jurisdictions simply do not allow it. Fact bargaining is the least common form of plea bargaining and it occurs when a defendant agrees to stipulate to certain facts in order to prevent other facts from being introduced into evidence. Many courts do not allow it, and in general, most attorneys do not favour using fact bargains.

From the above, it is obvious that the applicability of plea bargaining should be in conformity with the objective reality of the environment that is applying it. There is no universal framework for its applicability. Therefore, it is

<sup>2</sup> Findlaw is an association of Lawyers in the United States of America.

meant to be reviewed and adopted based on the situation in different countries.

## **DEMOCRACY, CORRUPTION AND PLEA BARGAINING IN NIGERIA: AN OVERVIEW**

After a decade and a half years of authoritarianism in Nigeria, the inauguration of democracy in May 1999 became a watershed in the history of Nigeria because it somewhat elevated Nigeria a step higher on the ladder of democratic nations, particularly with the transition from one civilian rule to another in 2007. Prior to the administration of Obasanjo in 1999, the military misrule was marked by much suffering, infrastructural decay, and institutionalized corruption. Nepotism, bribery and patrimonialism became the order of the day. However, the hope of the common man for a just and an egalitarian society became rekindled with the institution of a democratic government in 1999. Nigeria's quest for democratization after years of military rule erased its pariah status earned under series of military regimes chief of which was the Sani Abacha junta. The administration of Olusegun Obasanjo, after its inauguration in 1999, made as its cardinal point the eradication of corruption from the social fabric of Nigeria. In its efforts to unravel the evils of corruption, the Olusegun Obasanjo's administration established structures and institutions that had the mandate to check corruption. Nevertheless, the legacy of corruption and lack of accountability bequeathed by many years of military rule continues to be an impediment to the goals of socio-economic development (Akanbi, 2004).

The fight against corruption in Nigeria has never been popularized as we have in the Fourth Republic with the inauguration of Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and other related offences Commission (ICPC) to complement the efforts of the existing institutions of anti-corruption in the country. The aim was to fight the deadly practice to a standstill for the country to progress and join other countries in the developed world. While the new institutions tried in no small measures to eradicate corruption in Nigeria through prosecution of defaulters, regardless of their status, the capability of these institutions, particularly the EFCC, to sustain this effort became doubtful with the new administration of Umar Musa Yar'Adua. This is because the criticism leveled against the institution and the subsequent harassment, intimidation and embarrassment of the former Chairman of the Commission became a pointer to the fact that the administration of Yar'Adua was not ready to pursue the

campaign against corruption with the vigour and rigour it required. More so the sudden introduction of plea bargaining to the criminal justice system in the country has also been criticized as an opportunity to create room for alleged corrupt officers to escape judgment.

However, it is important to understand critically the use of plea bargaining in any criminal justice system, either as a measure to decongest the prison or as a means of alleviating the risks and uncertainties of trials. The sudden introduction of the agreement into Nigeria's criminal justice system is an attempt by the power that is to provide soft landing for their cohorts and more importantly making nonsense of the anti-corruption crusade. This is because the technicalities involved in plea bargaining have been jeopardized in this process and this call for debate. The issue of what is stolen or embezzled and how this is resolved with the instrument of plea bargaining should be laid to bear for public discussion and knowledge.

It is obvious that application of plea bargaining in several other countries such as Canada, Malaysia, United States of America, Spain, South Africa, Zambia, India, Central African Republic and a host of others come with legal frameworks which originated from the constitutions of these countries and in most cases, it is being done away with. For instance, in India, plea bargaining has been rejected in several cases at the level of the country's Supreme Courts. The traditional view of the India Supreme Court was that the concept of plea bargaining or negotiations in criminal cases is strictly not permissible as it amounted to an informal inducement (Srimurugan, 2010). This is despite the introduction of provisions of plea bargaining in the Criminal Law in India. Also in Malaysia, it is reported that the legal system in Malaysia does not recognize the concept of plea bargaining. Nevertheless, there are indications of negotiations in the criminal procedures of the country. This has since been jettisoned as new legal provisions in the country did not allow the use of the concept in its criminal justice system. Even in the USA, where the practice had been in use since 18<sup>th</sup> Century, it is no longer fashionable to apply the concept of plea bargaining in the criminal proceedings in the country. In South Africa, several Committees were raised to investigate the issue of plea bargaining before it was entrenched in the Constitution of the country. This is not without modifications and procedure on the sentencing. Despite the fact that plea bargaining is recognized by the laws of South Africa, the negotiations between the prosecutor and the accused has no effect whatsoever on the decision of the trial judge in terms of sentencing (South African Law Commission, 2001).

The essence of the above instances is to showcase the

countenances of countries to the concept of plea bargaining as an instrument of criminal justice system in those countries. While it is being rejected in most of these countries out rightly, it is being modified in some other countries to ensure justice is carried and injustice is not permitted. The lesson in this for Nigeria is to highlight the need for Nigeria to ensure that the country is washed off its corruption garment before considering the use of plea bargaining as part of the criminal justice system.

In virtually all the institutions of the Nigerian state, corruption rears its ugly head as the hallmark of official business. From Abacha loot to Abdusalam profligacy, virtually all government agencies ranging from federal to the State and even at the local government levels, were involved in one corrupt practice or another (Akanbi, 2004). While we may not be able to venture into the causes of corruption in Nigeria, it may be discernible to do an overview of how these corrupt practices became entrenched into our socio-economic and political spheres. As observed by Munlinge and Hesetedi (2002: 122), "to explain the entrenchment of corruption in modern societies, an excursion into history is necessary". In the case of Nigeria and some other countries, colonial rule policies of divide and rule, coupled with concentration of power discouraged accountability and accentuated the propensity for corrupt practices in Nigeria. These were the structures inherited at independence without any attempt made at fundamental restructuring. In the post-colonial era, power remained centralized and institution of the state continues to serve as tool for personal aggrandizement. This was complicated by the expanded role of the state on the economy, which characterized the period of indigenization and nationalization. All these provided opportunity for bureaucratic and executive corruption (Basil, 2007).

Apparently, the lack of political will to combat the scourge led to the elevation of the menace to inglorious heights. The tendency for post-colonial African leaders to directly engage in looting of public fund, often stashed away in foreign banks did not help matters. High level official corruption thus prevented a credible and effective crusade against the menace. While these manifestations may be incontestable, corruption affects the over-all democratization process in the society. It became a leakage to the resources of the state that could have been channeled to infrastructural development and well being of the citizenry. This explains the endless array of decaying infrastructure and dilapidated social services being offered by the Nigerian state. Corruption in Nigeria is the failure of the state to perform or live up to its moral and political status. This is why some have argued that the state has become the sole agent of corruption in all

its political business and economic ramifications (Basil, 2007).

In the Fourth Republic, corruption has become a norm and practice of politics among the political class from the presidency to the councilors in the local governments. The furniture mentality, which the political class brought to governance, represents the highest form of corruption and the enslavement of the popular masses of this country (Dukor, 2003). The amount spent by successive administration as furniture allowance for new political office holders holds much to be desired.

The housing scam (branded Ikoyi Gate) in 2005 committed by the state and its actors is another dimension to the collective mentality of corruption. In a similar collective unconsciousness, "the financial institutions in Nigeria are pinnacles of corruption. Corruption of course cannot work in a country like Nigeria without them. The introduction and operation of community banks is the most sophisticated form of the exploitation of the underprivileged people of this country" (Ibid.: 24). Similarly, deregulation in the communication sector is the highest stage in the development of the communication industry whereby it becomes part and parcel of the invited mentality of corruption. The public was only aware of the huge amount paid by the network providers to obtain the license for their operation from the government. However, the poor operation of the networks have been blamed on the government as no infrastructure was provided for the take off of the communication operation despite the huge amount of money collected from the operators *ab initio*. Lack of ethical standards in government and business organizations in Nigeria is a big problem. The issue of ethics in public sector and in private life encompasses a broad range, including a stress on obedience to authority and on the necessity of putting moral judgment into practice. Thus, many officeholders in the society do not have clear conception of the ethical demands of their position. They think that official position is a license to steal public money with impunity. This might have been made possible by the poor reward system in the country. Nigeria's reward system is among the poorest in the world; it is one society where hard work is not properly rewarded but rogues are often glorified (Dike, 2006).

The problem of corruption in Nigeria is a political one, which torches on every facet of the democratic governance of the state. The issue of corruption in Nigeria is a manifestation of the lack of political will on the part of the sovereign and the failure of the state to maintain law and order. Hence, business corruption is a symptom of the failure to grapple with political corruption, which raises questions on the moral uprightness of the



state to exist or on the political will of the leadership to pilot the affairs of the state. It can be argued therefore, that where there is no political corruption, is where the state operates under a high moral law and upholds, protects and enforces the rule of law on itself and on its citizenry. However, the reverse is the case in Nigeria where there is high level of contract inflation, embezzlement and diversion of monies in banks, industries and other parastatals.

Again, it has also been argued that accountability of elected representatives to the people is the hallmark of any democratic administration (Mabogunje, 1999). However, democracy in Nigeria has been plunged into crisis by its failure to ensure accountability of the ruler to ruled as well as the inability of the state to make officials accountable for their actions and bring corrupt Public officials to justice. This is not to suggest that there are no institutions established to ensure accountability and checkmate corruption, but the best of these institutions has only earned the country the status of being rated the second and later third most corrupt country in the world and, among African states, slowing down the pace of the battle against corruption (The Guardian, February 12, 2005:12). The point being made here is that the phenomenon of corruption ravaging all levels and all arms of government poses serious threat toward the realization of the ideals of democracy.

Furthermore, the Independent National Electoral Commission (INEC) appears to be a compromised set up serving the interest of the ruling party (Mwalimu, 2001). The gross ineptitude of INEC manifests in the series of upturned election results by the election tribunals, open admittance of election rigging (not without the connivance of INEC). Worse still, some of these actions were allowed to continue in the face of open admittance by the parties involved. The above merely endangers democracy in Nigeria. Worthy of note is the point that there seem to be a declining faith by citizens in the capacity of democratic institutions, which have been manipulated by profiteering political elite thereby weakening the foundation and consolidation of democracy in the country. This is evidenced in the apathy displayed by Nigerians in the elections of 2007 and 2011.

### **PLEA BARGAINING AND THE POLITICS OF ANTI-CORRUPTION: AN INSIGHT INTO THE CRIMINAL JUSTICE SYSTEM IN NIGERIA**

Indeed corruption is one of the greatest challenges of the contemporary world. It undermines good governance, fundamentally distorts public policy, leads to the

misallocation of resources, harms the private sector and particularly hurts the poor (Basil, 2007). Many aspects of bribery and corruption, as observed by Basil, include accepting gratification, giving or accepting gratification through agent, fraudulent acquisition of property, offences committed through postal system, deliberate frustration of investigation, making false statement or returns of gratification by and through agents, bribery of public officers, using office or position for gratification, bribery transaction, false or misleading stamen and attempt (conspiracy) punishable as offences.

In the light of the above demented acts of corruption on polity and administration in Nigeria, government, if democracy must be sustained and maintained, should demonstrate the leadership and political will to combat and eradicate it in all sectors of government and society by improving governance and economic management, striving to create a climate that promotes transparency, accountability and integrity in public as well as private endeavours. Also, there is the need for a virile civil society and general empowerment of the citizenry. Such empowerment must include access to information about activities of government agencies.

Of utmost importance in the fight against corruption in Nigeria is the reform of the criminal justice system in the country. There are various institutions involved in the administration of justice in Nigeria, some of them directly and some indirectly. These institutions include the Judiciary, the police (including other law enforcement agencies), the ministry of justice, the prisons service and legal practitioners. These institutions perform key functions in the justice system. The judiciary performs its traditional role of trying cases brought before it and imposing punishment; the police and other enforcement agencies perform the role of investigation, prevention, arrest and pre-arraignment detention. The police, in addition, also perform the role of prosecutors in the lower courts. The ministry of justice performs the role of prosecutors and is also generally responsible for the administration of justice. The prison service is responsible for carrying out orders of the court in relation to sentences and detention of persons. The legal practitioners play the role of either prosecuting or defence counsel in criminal proceedings.

In Nigeria, criminal jurisdiction is vested in several courts. Almost all courts exercise both civil and criminal jurisdiction. Nigeria operates a federal system therefore there are both federal and state courts systems and both converge at the appellate courts level. In terms of hierarchy, at the lowest is the Magistrate court followed by the High Court, the Court of Appeal and the apex court, the Supreme Court.

It is important to note that there is no uniformity of laws governing criminal law and procedure in the country, although the criminal justice system in all the states of the federation are similar with some differences in the law applicable in the Northern and the Southern states. With respect to substantive law, the Criminal Code Act applies in the Southern states and the Penal Code Act applies in the Northern states. In procedural matters, the law applicable in the Southern states is the Criminal Procedure Act while the Criminal Procedure Code applies in the Northern states.

The present criminal justice system in Nigeria is derived from our historical connections with Britain. The criminal justice system is accusatory and based on the general principle that an accused is presumed innocent until proven guilty (Ojukwu and Briggs, 2005). Under the 1999 Constitution of the Federal Republic of Nigeria, "the power to institute criminal proceedings lies with the various States' Attorneys General and the Attorney General of the Federation". The police also have powers subject to the powers of the Attorneys General to institute and prosecute criminal cases. Indeed, the police prosecute the bulk, if not all, the criminal offences brought before courts of summary jurisdiction such as the Magistrate court.

At this juncture, it is pertinent to re-echo the point that in a bid to curb the menace of corruption, the government has at various times enacted various laws and established series of agencies to tackle corruption. Prior to the establishment of Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices and other Related Offences Commission (ICPC), the Nigerian Police Force has the responsibility of combating crimes in the country. They arrest and prosecute offenders (Akolokwu, 2006). There are copious provisions of the Criminal Code which deals with the issue of bribery and corruption. The Act makes it a felony for anybody in public office to ask for, receives or obtains any property or benefit for any service done in the course of his duty. Any public officer guilty of this is liable to seven years imprisonment (quoted from Olakulehin, nd). It is generally agreed that the criminal code has not been effective at curbing corruption due to a number of factors.

However, since the inauguration of the structures and institutions of anti-corruption in Nigeria in 2000 and 2003 respectively (that is, the ICPC and the EFCC), the power to prosecute criminal cases were granted to these bodies. This is particularly to empower the agencies to effectively carry out their functions and in relation to the need of the Nigerian state as at the time of inauguration. The ICPC was established in 2000 owing to the failure of the Police and the code of Conduct Bureau in curbing the menace

of corruption. The law at its inception was faced with a legal tussle; however, a Supreme Court ruling eventually allowed the ICPC Act to come into operation. The mandate of the commission include the receiving and investigation of reports of offences as provided by the law, to look into the work of government bodies such as ministries and parastatals and guide the implementation of actions that will help prevent and eliminate corruption. The EFCC on the other hand was established in 2003 as part of a national reform programme to address corruption and money laundering and in answer to the Financial Action Task Force (FATF), concern about Nigeria's Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) laws. While this power has become a subject of controversy at different levels in the country, it is obvious that the agencies perform their function in collaboration with other government agencies with similar power of prosecution like the police and ministry of justice. The efforts of the EFCC in combating the financial crimes (particularly the internet scam and advance fee fraud) in the country are commendable. Also, the agency tried in no small measure to prosecute public officials alleged for corrupt practices, though not without criticisms. As a matter of fact, the doggedness with which the former Chairman of the anti-graft agency, Mallam Nuhu Ribadu, carried out this function was appreciated internationally that Nigeria was considered a promising democratic nation. However, the inauguration of the Umar Musa Yar'Adua in May 2007 seems to have made nonsense of the achievement of the EFCC so far. This is because, the administration melted down the enthusiasm which EFCC was known for and this is believed to be a ploy to shield high profile personality alleged for corrupt practices. This is despite the proclamation of the administration's zero tolerance for corruption.

It is no exaggeration that the subtle incursion of plea bargaining into the criminal justice system of Nigeria during the trial of some influential personalities in the law courts has provoked flurry of debates (Famoroti, 2009). Ordinarily, plea bargaining occurs mainly in criminal proceedings. It simply means the practice whereby an accused person standing a criminal trial pleads guilty to a charge(s) in return for a lesser sentence or dropping of some charges or both. Plea bargaining is said to be the most critical process in any criminal justice system. It is usually carried out with certain guidelines and conditions. It is just one part of the very lengthy criminal justice process. The criminal process begins with a crime-taking place and then continues with the formal investigation. After the investigation is concluded and there is cause to issue a warrant, the suspect is placed under arrest and

brought to the police station for processing (booking). Depending on the crime and the defendant, the suspect is either released from custody or held until the next phase of the process.

The next phase is the arraignment in which the defendant enters their plea of guilty or not guilty to the charge. During the arraignment, the defendant also is advised of the nature of the charge(s). The defendant is also advised that they have the right to have an attorney to represent them in the matter. Following the arraignment, the trial begins. Depending on the crime committed, the trial either occurs in front of a judge who makes the ruling on the case, or in front of the a jury who decides the fate of the case.

It is important to stress that plea bargaining is a relatively new concept in Nigeria's criminal justice system. No law has provided for it in Nigeria's criminal Law procedure (Fagbohun, 2015; Atanda and Oluborode, 2015). According to Ayoola ISC, "No law set out any modality for plea bargaining, it is not until recent times that it became a matter of public discussion" (quoted from Danlomi, [www.amanaonline.com/Articles/art\\_4522.html](http://www.amanaonline.com/Articles/art_4522.html), 2009). However, some commentators have made reference to a provision in the EFCC Act as authority for plea bargaining in the Nigerian laws. The section reads thus:

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 or discontinue criminal proceedings against any provision in any court of law, the commission may compound any offence punishable under the Act by accepting such sums of money as it thinks fit, not exceeding the amount of the maximum fine to which that person would be liable if he had been convicted of that offence (Balogun, 2007:17).

It is however contended that this section is not an authority for plea bargaining. In fact, the section has nothing to do with plea bargaining (Olakulehin, nd). Plea bargaining has to do with negotiation of sentence during a trial. It has its own actors. The prosecutors offering the consideration; the defense attorney (on behalf of the accused) accepting the consideration in exchange for pleading guilty and the judge who has the discretion of accepting the plea or not. In other words, the plea bargaining does not rest with the EFCC alone or both the EFCC and the accused. Where the judge refuses, then there is no case of plea bargaining. The section perhaps only allows the EFCC to weigh the option of recovering any amount which might have been squandered in lieu of prosecution or otherwise. This is not 'stricto sensus' a plea bargaining (Ibid.). Nevertheless, Latona (2015)

explained that Sections 75 and 76 of the Administration of Criminal Justice Law of 2011 in Lagos State provided for plea bargaining instrument in the administration of criminal cases. Apart from the laws of Lagos State, there is no other law that made provision for plea bargaining in Nigeria.

Having established that the law has not in any statute provided for this practice, we however admit the fact that it is an idea that was developed from judicial practice. The practice in reality is gaining grounds in the Nigeria criminal justice system because of its frequent adoption in notable cases in recent times. It has been employed in a number of cases including Tafa Balogun's case (Kawonise, 2008), Wunmi's case, Alamesiagha's case, Igbinedion's case and many more. While it is not our contention here that the adoption of plea bargaining is bad, it is important to stress that the adoption in the case of trial of corruption in Nigeria is itself corruption. This is because the agreement is required in other areas of trial of criminal cases where awaiting trial cases have filled the prisons system in the country. It should be pointed out that one of the problems confronting the prison system in Nigeria is the problem of prison congestion and plea bargaining would have been a good option to be introduced in order to decongest the said prison. However, this was not the approach of the state which had adopted plea bargain to set free corrupt public office holders. The fact remains that Nigeria's judicial system is imbalance as it favours the rich against the poor. In all the cases where the plea bargaining has been adopted, it is apparent that the agreement was entered into as a ploy to free the personality involved. Rather than making it the discretion of the courts (judge), it is usually seen as a political solution to safe the face of corrupt officials.

The first attempt of plea bargaining in the Nigerian criminal justice system was noticed during the trial of Salisu Buhari who was elected the Speaker of the House of representative during the 1999 general elections. Salisu Buhari won a seat to the House of Representatives and became a Speaker of the House using a forged certificate and with false age. Having being charged for perjury and forgery, Buhari pleaded guilty to the two count charges and was made to pay a fine of one thousand five hundred naira only and was set free. As if this was not enough, he was granted presidential pardon by the Olusegun Obasanjo's administration.

The other case of misapplication of plea bargaining in Nigeria was the Tafa Balogun's case, a former Inspector General of Police who was accused of embezzling over N17billion meant for the Police Force. Balogun's case was worse as the allegation became substantiated after investigation and it came at a time the Nigerian Police

force was under serious criticism for its inefficiency and ineffectiveness. Various reports conducted within the country, and outside Nigeria revealed that the Nigerian Police Force was the most corrupt institution of the state within Nigeria (See Global Corruption Reports, 2007; The Afikpo Report, 2005; World Bank Report on Nigerian Governance and Corruption, 2001). Part of the reason adduced for the corruption of this institution was that the Police was the least paid and that Officers and men of the force only get papers for their promotion and deployment. The emolument and entitlement to support the mobilization is not usually paid and at times, they are paid after one year of transfer or deployment. This exposed an average Nigerian Police to go to the road to mount road blocks in order to collect bribe from motorists along the highways. This has become the *trade mark* of the Nigerian Police force. Tafa Balogun was released after pleading guilty and was made to return part of the embezzled fund.

Again, the Alamiesiegha's case was an embarrassment to the country. After he had been charged for money laundering outside the country, and eighteen other charges, he was made to enter into plea bargaining which only made him to serve the term jail of two years instead of about fourteen years under the guise of concurrent running of jail term and to forfeit cash worth over one million US dollars found in his residence. The point being made here is that for such offences as those committed by Alamiesiegha, the law could have taken its full course in order to prevent or deter other potential public money looters.

Another beneficiary of the prosecutorial device imported from the leading common law societies into our criminal justice system was the ex-governor of Edo state, Lucky Igbinedion. A federal high Court in Enugu had on December 18, 2008 imposed a fine of N3.5m on Igbinedion, the son of a High Chief of Benin Kingdom, after he was found guilty of committing fraud while he was governor.

All these are not part of other fraudulent cases that the EFCC has prosecuted applying the plea bargaining formula. A particular case in point is the one involving Nigerian fraudsters Mr. Anajemba, Mrs. Amaka Anajemba, Mr. Emmanuel Nwude and Mr. Nzeribe Okoli who duped a Brazilian banker Mr. Nelson Sakaguchi about \$242 million in 2004. This was reported as one of the World's biggest fraud cases. The individuals pleaded guilty and were made to repay \$25.5million and got various jail sentences except Mr. Anajemba who had been deceased at this time.

Despite all these, issues of corruption has continued to trail the democratic experiment of Nigeria as no serious

efforts has been made after the Olusegun Obasanjo's administration in 2007 to absolutely fight corruption to standstill. It is imperative to point out that despite the existence of institutions of anti-corruption in Nigeria, the disease has not stopped to rear its ugly head in the country.

## CONCLUSION AND THE WAY FORWARD

This paper has attempted to examine the application of the concept of plea bargaining into the criminal justice system of Nigeria under a democratic regime as an anti-corruption crusade. In doing this, the paper has analyzed the various democratic theories as applicable to the various systems in the world. It has also explained the concept of corruption vis-à-vis the theories of corruption in the literature. This has been done by establishing a synergy between the concept of democracy, corruption and plea bargaining. The emphasis of the paper has been on the anti-corruption campaign of successive governments in the country since the inauguration of the Fourth Republic in 1999.

The Fourth Republic, just like the previous republic, had made some efforts to fight corruption but the introduction of plea bargain into Nigeria's Criminal Justice system merely confirms the position that even where governments publicizes various anti-corruption policies, most have at best trivialized the serious endeavour of fighting corruption. Plea bargain would do nothing but embolden corrupt public officials and guarantee the continuance of corrupt practices. Bearing in mind that corruption has been said to be a deviation from the standards that have been laid down. Where the laws says that anybody who is liable for an offence shall be sentenced to say seven years imprisonment, except in rare cases, such a culprit must be made to face the consequences of his action. This is the whole essence of the criminal justice system.

Therefore, with reference to plea bargaining, the mere fact that a person admits or confesses that he committed a crime should not affect his being punished for the crime in the absence of any defense as the case may be. After all, admission and confession are not new under our law. Plea bargaining is not more than admission and confession under the law of evidence except that the accused is offered lesser sentence.

Considering the damage that corruption has done to the socio fabric of Nigeria, this is not the time for plea bargaining. Once a looter is aware that he could be made to forfeit part of what he had embezzled, all he needs to do is to loot more than necessary in order to create space

for the percentage he would use for plea bargaining. Yet even when plea bargaining is to be considered, it is important that the *modus operandi* be designed and incorporated into the general criminal justice system rather than an open blanket as it is. The available cases of corruption where plea bargaining has been applied is infinitesimal compared to cases of corruption in the country. This suggests that several cases of corruption were not brought to limelight not to talk of prosecuting such cases. It is indeed a misnomer for a country like Nigeria and its corruption stand to apply plea bargaining. This only indicates the level of unseriousness that country exhibit among the comity of nations in its crusade against corruption.

Therefore, it is pertinent to stress that drastic action should be taken to nip the matter in the bud if corruption is to be forgotten in Nigeria. One of the ways forward, as suggested by Fagbohun is to allow civil society organisations (CSOs) in the prosecution procedures of corruption in the country. In this case, formidable registered CSOs should be empowered to collaborate with government agencies in charge of prosecution of criminal cases to establish and prosecute individuals found wanting in terms of corruption.

Secondly, there is the need for protection of individuals who have information about a public office holder found to be corrupt. Over the years, it has become covertly unreasonable for any law abiding citizen to make report of criminal tendencies to law enforcement agents and get adequate cover without being molested. Citizens are usually opened to harassment when they make available information about a criminal to law enforcement agent(s) in the country. Some have lost their lives in this regard without any form of consideration by the government of the day.

It is important for government to establish data base of citizens in the country. This should be done in the form of social security as we know it in the United States of America and other developed countries of the world.

Fourthly, anti-corruption institutions in the country should be strengthened and empowered to be independent. The situation where EFCC's power of prosecution was withdrawn and placed under the watch of the Ministry of Justice did not allow the agency to perform its duties as it used to be. It became an instrument of laughter for criminals who were hands in glove with the honorable Minister of Justice. This prevented the Commission to perform its duties without being manipulated by the Minister.

Lastly, there is the need to carry out reform of the laws of the land. The criminal justice procedure of Nigeria should be overhauled and strengthened to accommodate

provisions of the law that would deter potential thieves from occupying public office. And where they find themselves in public offices, they should be deterred by institutions and structures which are not subject to manipulations by any individual.

## Conflict of Interests

The author has not declared any conflict of interests.

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