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***Maiden Edition***

# THE NIGERIAN LAW STUDENTS' JOURNAL

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# DE QUINTESSENCE

# Plea Bargaining: A Comparative Analysis between the Provisions of the Administration of Criminal Justice Law of Lagos State and Islamic Law.

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## INTRODUCTION TO THE ADMINISTRATION OF CRIMINAL JUSTICE LAW

Principally two sets of laws govern crimes and criminal proceedings in Nigeria. There is the substantive law which comprises the Criminal Code Laws<sup>1</sup>, the Criminal Code Act<sup>2</sup>, the Penal Code<sup>3</sup>, the Penal Code Act<sup>4</sup> and lately the Shariah Penal Code Laws of some of the Northern States<sup>5</sup>. On the procedural aspect, we have the Criminal Procedure Laws<sup>6</sup>,

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<sup>1</sup> Every State of the federation has its own criminal code law applicable to that state. For instance see the Criminal Code Law CAP C17 Laws of Lagos State (LLS), 2003

<sup>2</sup> Cap C38, Laws of the Federation of Nigeria (LFN), 2004. This is a federal enactment which has a general application all over the country

<sup>3</sup> This is generally applicable in the Northern States. See Penal Code Law, CAP. 30 of the Laws of Northern Nigeria, 1963

<sup>4</sup> This is applicable only in the Federal Capital territory, Abuja by virtue of s.13 of the Federal Capital Territory (FCT) Act, CAP F6, LFN, 2004 which makes all the laws applicable in the Northern Region applicable to the FCT. Being a Federal enactment, it must be designated as an act.

<sup>5</sup> For instance see Shariah Penal Code Law of Zamfara State, Law no. 10 of 2000

<sup>6</sup> The various southern states have their Criminal Procedural Laws. See for instance, the Criminal Procedure laws of Lagos, CAP C18, LLS, 2003 which was in operation before the enactment of the ACJL.

the Criminal Procedure Act<sup>7</sup>, the Criminal Procedure Code Laws<sup>8</sup>, the Criminal Procedure Code Act<sup>9</sup> and lately the Administration of Criminal Justice Law<sup>10</sup> (ACJL).

Prior to 2008, the Criminal Procedure Act is the general procedural law applicable in all the southern part of the country including Lagos State. However, in 2007, the Lagos State House of Assembly enacted the ACJL to be the procedural law for the administration of criminal justice in the High Court and Magistrate Courts of Lagos with effect from May 2008. The ACJL has quite a number of innovations<sup>11</sup>. It contained 375 sections. It is the first law that make express provisions for the concept of plea bargaining and its administration<sup>12</sup>.

## The concept of plea Bargaining

This paper is not aimed at debating the theories of plea bargaining<sup>13</sup>. It suffices to say that a brief comment will not do injustice to the paper for better comprehension and lucidity of thoughts. Plea Bargaining takes two forms. There is what is called sentence bargaining and charge bargaining<sup>14</sup>. It arises in a situation where an accused person pleads guilty to an offence in consideration for reduction in the charges preferred against him or the sentence that will be passed on him.

The following are some of the arguments offered by the defenders of the practice<sup>15</sup>.

1. That it ameliorates some of the problems of the criminal justice system vis-a-vis long period of trials and the consequent congestion of the prisons.

<sup>7</sup> A Federal enactment that is applicable in the southern states and the Federal High Court

<sup>8</sup> Applicable in all the Northern States

<sup>9</sup> Applicable in the Federal Capital Territory, Abuja by reasons given in footnote 4. The provisions are *in pari materia* with the Criminal Procedure Code applicable to other Northern States

<sup>10</sup> Law No. 10 2007

<sup>11</sup> For instance, an accused person is now called 'defendant'; complainant is called 'people of Lagos State'; video coverage is to be used as an additional safeguard where an accused person is making a confessional statements and many more

<sup>12</sup> See ss.75 and 76 of ACJL

<sup>13</sup> For a comprehensive discussion on the concept of plea bargaining, see Yekini, A.O: 'The practice of Plea Bargaining and its Effect on the Anti-Corruption Crusade in Nigeria' Electronic copy available at: ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1279003](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279003))

<sup>14</sup> See: Balogun, A.G: 'Nolle Prosequi and plea bargaining: The Evasive Rule of criminal Prosecution' cited in Yekini, A.O., *supra*

<sup>15</sup> Yekini, A.O., *supra*

2. Justice is rendered as quickly as possible.
3. It is justifiable on penological grounds as most of the culprits are ready to be rehabilitated.

#### ITS ADMINISTRATION IN THE ACJL

With the introduction of the ACJL, it will be erroneous to still maintain that there is no legislative backing for plea bargaining in Nigeria as it has been earlier held<sup>16</sup>. The ACJL did not only recognise and gave approval for the practice, it went on to state the functions of the prosecutor, the defence lawyer and the judge.

The law provides for the approval in the following terms:

*Notwithstanding anything in this Law or any in any other law, the Attorney-General of the State shall have power to consider and accept a plea bargain from a person charged with any offence, where the Attorney-General is of the view that the acceptance of such plea bargain is in the public interest the interest of justice and the need to prevent the abuse of legal process.<sup>17</sup>*

#### THE PROCEDURE:

The two types of plea bargaining earlier mentioned are expressly provided for. It provides for a plea of guilty by the defendant to the offence charged or a lesser offence of which he may be convicted on the charge. Secondly there is a plea as to the sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty<sup>18</sup>.

The first requirement is that the prosecutor and the defendant (the accused) must have entered into an agreement and such an agreement must

be in writtin<sup>19</sup>. The prosecutor has a duty to consult with the police conducting the investigations of the crime and the victim of the offence where that is feasible<sup>20</sup>. The prosecutor cannot do all these according to his whims and caprices. The law requires him to have due regard to the nature and circumstances of the offence, the defendant and the interests of the community at large<sup>21</sup>.

The prosecution is expected to carry the victim or his relatives along in the process. He should afford the defendant an opportunity to make representation with respect to the agreement and to possibly make inclusion as to compensation in the agreement<sup>22</sup>. The agreement must be signed by all the parties to the agreement.

The role of the judge is to be neutral to the proceeding. This is necessary in order not to be prejudiced and his discretion at the end of the day not to be fettered. However, where approached by the parties after their agreement, he may advise them generally on possible advantages, sentencing options and the acceptability of the proposed agreement<sup>23</sup>.

#### WHAT NEXT AFTER THE AGREEMENT

Where an agreement is reached, the prosecutor has the duty of informing the court of the agreement. The court will then inquire from the defendant the correctness of the content of the agreement<sup>24</sup>.

As usual under the criminal procedure laws and codes, where an accused upon arraignment pleads guilty, the judge is expected to ensure that the accused person intends to admit of the offence charged and he understands the consequence<sup>25</sup>. The same requirement is to be followed under the ACJL.

Where the judge or magistrate satisfies himself that the defendant is guilty of the offence, he shall go ahead and convict the defendant. However, the judge shall record a plea of not

guilty where he forms the opinion that the defendant cannot be convicted in respect of the offence based on the agreement or that the agreement is not in writing or nor signed. Hence, he shall order that trial should proceed<sup>26</sup>.

Where the defendant is convicted based on the agreement, then the judge shall consider the sentence agreed. Where the judge feels that the sentence agreed by the parties is inappropriate or that the defendant deserves a higher punishment, the following options are available to the judge<sup>27</sup>:

- a. The judge may still go ahead to impose the agreed sentence agreed by the parties.
- b. He may if he thinks that a lesser sentence be given, then impose that lesser sentence.
- c. If he thinks that a higher sentence be given, he shall inform the accused person of such.

#### OPTIONS OPEN TO THE DEFENDANT

Where the accused is presented with a higher sentence that what was agreed with the prosecutor, he may stand by his plea and the judge goes ahead with the sentence. He may withdraw his plea and a new trial will be conducted de novo before another judge. Where a new trial is commenced, all the correspondences by way of agreement reached at the initial proceedings shall be inadmissible against the accused person. The parties are also barred from entering into any further plea bargaining for a second time<sup>28</sup>.

#### Introduction to Islamic Law

The Islamic law otherwise known as Shariah is a separate and distinct legal system on its own<sup>29</sup>. It is a divine law revealed through the Holy Prophet of Muhammad, Peace and Blessings of Allah Be Unto Him (PBUH) to the whole mankind. It knows no boundary. It is eternal as well as universal<sup>30</sup>. It is part and parcel of the religion of Islam. The Shariah governs all the spheres of man including politics, economics,

banking, business contracts, family, sexuality, hygiene and social issues<sup>31</sup>.

The shariah has as its source, the Qur'an<sup>32</sup>, then the Sunnah (Hadiths)<sup>33</sup>. All other sources derive their validity from these two mentioned. The Qur'an is the foundation and supersedes every thing. The authentic Sunnah cannot contradict the Qur'an because it derives its validity from the Qur'an. All other sources i.e. Ijma'<sup>34</sup>, Qiyas<sup>35</sup>, Ur'<sup>36</sup> etc are subservient to the Qur'an and Hadith. This is not a treatise on Islamic Law. The reader could get a detailed analysis of the interplay between all the sources from numerous scholarly works<sup>37</sup>.

#### Concept of crime in Islamic Law

No legal system known in the world treats the issue of crime with levity. Crimes threaten the existence of good order in the state. Hence, there is always the need to legislate against crime. Islamic law is no exception. In actual fact, it is the shariah that frowns most at criminal activities.

The aim of legislation against crime in Islamic Law is basically for deterrence. This however, does not mean that all other theories of criminal punishment are not in place. Crimes are broadly divided into two categories. We have the *Hadd* and the *Tazir* crimes.

*Hadd* are the serious offences or what could be somewhat likened to felony in the common law jurisdictions<sup>38</sup>. They are offences that their

<sup>31</sup> Malik, S. H. A., 'Shariah: A legal system and way of life', Perspectives in Islamic law and jurisprudence: Essays in honour of Justice (Dr) Muritala Okunola, (Oloyede M., ed.), Ibadan: NAMLAS IBADAN publication, p.25

<sup>32</sup> This is the words of Allah revealed to the prophet Muhammad through Angel Jibril.

<sup>33</sup> This is the interpretation of the Qur'an as exemplified by the sayings of the prophet himself

<sup>34</sup> This is the consensus of the Muslim jurists on a point of issue

<sup>35</sup> This is analogical deduction from the Qur'an and the Sunnah on a new issue

<sup>36</sup> This is a customary practice of the people that is not against the Qur'an and Sunnah.

<sup>37</sup> See: A.O Yekini, 'Women and Intestate Succession in Islamic Law', Islamic Law and Law of the Muslim World Research Paper Series, at New York Law School No. 08-49, (<http://www.nyls.edu/islamiclaw>). Doi A.I. (Supra), Shaltut, M., Al-Islam, Cairo: Al-Azhar Press, 1959; Hamid, W., Islam, The Natural Way, Florida: MELS publishers, 1989; Malik, S. H. A., 'Shariah: A legal system and way of life', Perspectives in Islamic law and jurisprudence: Essays in honour of Justice (Dr) Muritala Okunola, (Oloyede M., ed.) (supra); 'Shariah: The Islamic Law (supra), Qadri, A. A., Islamic jurisprudence in the modern World, Delhi: Taj publishers, 1986;

<sup>38</sup> This is not to say *hadd* is synonymous with felony. It is a more form of comparison

<sup>16</sup> This writer has earlier held this position erroneously in A.O Yekini, supra,

<sup>17</sup> s.75, ACJL. *Quare*: what is public interest, interest of justice and abuse of legal process? This may not mean more than the whims and caprices of the prosecutor because the wording is impari material with what we have in s.174(1) of the 1999 Constitution of the Federal Republic of Nigeria on the power of the Attorney General and as laid down in *State v Ilori (1983) 2 S.C. 155*

<sup>18</sup> s.76(1)(a),(b), ACJL

<sup>19</sup> s.76(2), *ibid*

<sup>20</sup> s.76(3), *ibid*

<sup>21</sup> s.76(2)(b) *ibid*

<sup>22</sup> s.76(3)(b), *ibid*

<sup>23</sup> s.76(5), *ibid*. Emphasis is mine. It goes to confirm that the ball is not only in the court of the prosecutor and the accused alone, the end result may lie in the judge or magistrate.

<sup>24</sup> s.76(6), *ibid*

<sup>25</sup> s.76(7), *ibid*

<sup>26</sup> s.76(7)(b), *ibid*

<sup>27</sup> s.76(8), *ibid*

<sup>28</sup> s.76(10), *ibid*

<sup>29</sup> It used to be thought that Islamic Law is part of customary law that position has since changed by various decisions of the courts of the land. See for instance *Usman v Umoru (1992) 7 NWLR pt. 829*

<sup>30</sup> Doi, A. I. 'Shariah: The Islamic Law. London': Ta-Ha

punishment is fixed by the Qur'an and Sunnah. Some of these offences include Murder<sup>39</sup>, Apostasy<sup>40</sup>, Theft<sup>41</sup>, Fornication<sup>42</sup> and Adultery<sup>43</sup>.

*Tazir* are offences that have no fixed punishment. They may be mentioned as offences in the Qur'an but with no prescribed punishment whether in the Qur'an or Sunnah. The judges in those circumstances are allowed to determine the punishment due to an offender.

#### Does plea Bargaining have a place in Shariah?

Plea bargaining does not have any place in the Shariah. It is not allowed. The shariah is a system of law that is based on absolute justice. No emotion or what ever consideration could allow a judge to vary a punishment where an accused person is found guilty of an offence.

There are copious verses from the Qur'an that stresses the fact that justice must be done at all circumstance. Allah says:

*"O you who believe! Stand out firmly for justice, as witnesses to Allāh, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allāh is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you may avoid justice, and if you distort your witness or refuse to give it, verily, Allāh is ever well Acquainted with what you do"<sup>44</sup>*

This shows that justice in every case is mandatory in Islam irrespective of whoever is involved. Once justice is known, then we should shun our lusts or desires as they will dissuade us from doing justice. This is re-echoed in another verse wherein Allah (SWT) declares as follow:

<sup>39</sup> See Qur'an 2 v 178

<sup>40</sup> This is subjected to some controversies from most especially the orientalist commentators on Islam. However, there are series of authentic hadiths from Sahih Bukhari to support the punishment for apostasy. see Volume 9, Book 84, Numbers 57 and 58

<sup>41</sup> See Sahih Bukhari, Volume 8, Book 81, Number 778

<sup>42</sup> Qur'an 24 v 2

<sup>43</sup> *Ibid.*

<sup>44</sup> Q4 v 135

*"O Dāwūd (David)! Verily! We have placed you as a successor on earth, so judge you between men in truth (and justice) and follow not your desire for it will mislead you from the Path of Allāh..."<sup>45</sup>*

The Qur'an also has this to say:

*"And O my people! Give full measure and weight in justice and reduce not the things that are due to the people, and do not commit mischief in the land, causing corruption"<sup>46</sup>*

Although this verse primarily deals with business transactions, however, it could be used to buttress the need of giving what is due in every circumstance to a person. In other words you give a person what he deserves in full. If someone has committed an offence, he knows the consequence beforehand, then in return he should be given the full consequence of his action.

An incident occurred during the life of the prophet. A woman from the upper class of the society committed theft. They then approached *Usama*, the beloved houseboy of the prophet to help them intercede with the prophet. They prophet was infuriated when the house boy met with him. There and then the prophet declared that thus:

*"The people before you were destroyed because they used to inflict the legal punishments on the poor and forgive the rich. By Him in whose Hand my soul is! If Fatima (the daughter of the Prophet) did that (i.e. stole), I would cut off her hand."<sup>47</sup>*

To further buttress the point that punishment is not to be tampered with in Islam, the following report was credited to 'Ali bin Abu Talib:<sup>48</sup>

*I would not feel sorry for one who dies because of receiving a legal punishment, except*

<sup>45</sup> Q38 v 26

<sup>46</sup> Q11 v 85

<sup>47</sup> Sahih Bukhari, (*supra*), Number 778

<sup>48</sup> He is the forth caliph (ruler after the demise of the prophet ) in Islam

*the drunk, for if he should die (when being punished), I would give blood money to his family because no fixed punishment has been ordered by Allah's Apostle for the drunk"<sup>49</sup>*

All these narrations strengthen the fact that punishment could not be varied under any circumstance once the guilt of the accused person is established. There were copious instances in the *seerah* where people came to the prophet to confess that they committed an offence and the prophet would order punishment to be metted on them.

To crown it all, Allah says:

*It is not for a believer, man or woman, when Allāh and His Messenger have decreed a matter that they should have any option in their decisions. And whoever disobeys Allāh and His Messenger, he has indeed strayed and in a plain error."<sup>50</sup>*

Plea bargaining is no more than a mere confession and there should be no reason why it should attract a variation of the law. The only instance where an offender may be pardoned is where after committing such offence, he immediately repents and returned what he might have stolen where it is a case of stealing, but this must be before he was caught for the offence. Allah (SWT) says:

*"And the two persons (man and woman) among you, who commit illegal sexual intercourse, punish them both. And if they repent (promise Allāh that they will never repeat, i.e. commit illegal sexual intercourse and other similar sins) and do righteous good deeds, leave them alone. Surely, Allāh is Ever the One Who accepts repentance, (and He is) Most Merciful."<sup>51</sup>*

<sup>49</sup> Sahih Bukhari, (*supra*), Number 769.

<sup>50</sup> Q33 v 36.

<sup>51</sup> Q4 v 16

Allah (SWT) quickly qualifies the repentance in the next verse thus:

*"Allāh accepts only the repentance of those who do evil in ignorance and foolishness and repent soon afterwards; it is they to whom Allāh will forgive and Allāh is Ever AllKnowing, AllWise"<sup>52</sup>*

#### CONCLUSION

Our conclusion is that while plea bargaining is allowed under the Nigerian law at least with its recent codification in the ACJL which is applicable only in Lagos State\* (it is applicable in other states though no law governs it), it is not allowed under the Islamic law.

It is disheartening to know that the way the concept is practiced in Nigeria has no effect in reducing the rate of crime in the country. Rather it gives some form of hope to the criminals that once they are caught, they can be released on a portion of the loot and just spend some months in prison while they enjoy the rest of the loot after their jail term.

It is recommended that the principle of justice in Islamic law should be adopted. Serious penalties should be imposed on the serious offences. The state should not mind what it takes to prosecute an offender. Once a person is caught and punished severely, it will actually deter others as they will not want to fall into such severe hardship.

The punishment for every offence should be strictly adhered to. The great philosophy of those who had legislated against those crimes should not be ridiculed by the practice of plea bargaining.