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THE LEGALITY OF THE USE OF PLEA BARGAIN IN THE NIGERIA CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

The concept and use of plea bargain in Nigeria has caused much furore in recent years. This has been because of its use by the Economic and Financial Crimes Commission (EFCC) in dealing with cases of corruption by public officials and others holding offices of public trust.

To many, the practice conflicts with their sense of justice for the betraying thieves of the public's finances or savings; It is incomprehensible to them how highly-placed thieves of many millions and billions of naira are allowed to get away with miserably small sentences in the name of plea bargain, while thieves of smaller sums or thieves of the same millions and billions of naira but without the high-level placement or connections bag the weighty sentences generally more commensurate to their offences. Consequently, many question the justifiability and legality of the practice, saying that it is alien to Nigerian statutes on criminal matters and downright unfair.

In this article, an examination of the arguments for and against the legality of the use of plea bargain in Nigeria shall be conducted with a view to taking a position on the matter at the end.

ORIGIN OF THE CONCEPT

Plea bargaining is an invention of the American legal process, it started by convention but having been accepted by the courts; it is now entrenched in their federal and state criminal procedure rules , with the State of California even providing a seven-page form to guide the prosecution and defence in the formulation of their agreements.

The Black's Law Dictionary, gives the definition of plea bargain as: a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor usually, a more lenient sentence or a dismissal of the charges.

In what I call my working definition, plea bargain is: a device allowing accused persons- in person or by their legal counsel- to reach an accommodation with the prosecutor to enable them plead guilty in court to an offense of lesser gravity than the one (s) prosecutors wish to charge them with or with which they have already been charged or to one or more of a multiple of charges; an accused person may also agree to plead guilty to the offence with which they are charged, all in a bid for a lighter sentence than would/might have been given if the case had been prosecuted fully and conclusively (this is not the same as entering a plea of guilty at the beginning of a trial in court in hope of getting a light sentence from the C or making an allocutus at the end of a trial for mitigation of punishment).
Whatever the agreement is, the essence of a plea bargain agreement to the defendant is to get reduced punishment.

OPINIONS ON PLEA BARGAINING

As stated earlier, many people (both within and without Nigeria) are opposed to the practice of plea bargain because it conflicts with what they believe to be fair and just. They argue that it makes a mockery of the seriousness of justice; they further argue that a refusal to 'save the time of the State and Court' on the part of accused persons -who protest their innocence and insist on a full trial- could lead to retaliation against an accused person through the imposition of the most stringent punishments available -this could happen in jurisdictions like the United States where prosecutors are entitled to canvass or request for any sentence they want within the scope of the provided sentencing limits for a particular offence- or the filing of more serious (but true) charges than the prosecutor had initially proposed. There is also the risk of sentencing innocent people or people against whom the evidence of the State would not stand, who are constrained to plead guilty just because of the spectre of heavy sentences.
Those in favour of the practice, point to the fact that agreements to plead guilty without having to go through a trial are effective in saving time, costs of prosecution and reducing the burden of the courts. In Nigeria, it has been argued that without the use of plea bargain in cases of corruption and embezzlement, only small amounts of money would have been recovered through the fines that would have been imposed by way of punishment.
It is imperative to point out in the Nigerian context, the opposition to plea bargain from the street is primarily due to the fact that it seems to be used for only rich and powerful thieves and not even an option
extended to every criminal.

The fact that people steal money meant for the use of the general society is the chief reason behind the decay and collapse of Nigeria as a country; as the absence of funds means social amenities and welfare programs cannot be provided. Consequently, the wrath of the people demands the rolling of the embezzlers' heads and not merely the slapping of their wrists. Similarly, those who make away with peoples' bank savings are not expected to get away lightly; the Nigerian people demand that the breach created in the public trust, be filled up by the most appropriate and deserved punishment of their betrayers.

THE USE OF PLEA BARGAIN IN NIGERIA

Plea bargain gained notoriety in Nigeria when it was first used by the EFCC in 2005 to settle the case of corruption against former Inspector-General of Police Tafa Balogun. It was later used that same year for ex-Governor D.S.P Alamieyesagha of Bayelsa State for embezzlement and Emmanuel Nwude and Nzeribe Okoli who had defrauded a Brazilian bank.

It has subsequently been used in the cases of former Governor Lucky Igbinedion of Edo State for embezzlement (2008), and most recently the case of Mrs. Cecilia Ibru, erstwhile Managing Director of the then Oceanic Bank for abuse of office and mismanagement of funds (2010). The EFCC has generally defended itself on the basis of the provision of S. 14(2) of the EFCC Act 2004 which reads inter alia: "the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence".

It is also worth noting that some have declared that plea bargain has existed in certain statutes on criminal justice even before the enactment of the EFCC Act 2004 in particular Section 180(1) of the Criminal Procedure Act and that therefore its use by the EFCC was not something done in abstraction or without statutory precedents. Section 180 (1) CPA provides:

"When more charges are made against a person and a conviction has been had on one or more of them, the prosecutor may, with the consent of the court, withdraw the remaining charge or charges or the court, of its own motion, may stay trial of such charge or charges."

Others point to Article 37 of the United Nations Convention against Corruption (2003) which says that state parties should allow for the mitigation of punishment for accused persons who agree to give evidence of their corrupt acts in co-operation with prosecuting authorities.

The legality of the use of plea bargain in the Nigerian Criminal Justice System.

According to the Black's law dictionary, Legality means "adherence to the law, prescription, or doctrine; the quality of being legal".

Legal means "to be established, required or being permitted by law".

Not a few have claimed that the practice of plea bargain is illegal and alien to the statutes of criminal justice in Nigeria. Last November, the Chief Justice of Nigeria, the Honourable Justice Dahiru Musdapher, lent his voice to the criticism of the plea bargain practice at the fifth annual general conference of the Section on Legal Practice of the Nigerian Bar Association (NBA), held in Abuja in November 2011, and said of it: "plea bargaining is a novel concept of dubious origin.

It has no place in our law – substantive or procedural." His speech, led to the writing of many newspaper articles with headings which gave the impression that the CJN had banned the use of plea bargain- perhaps that might have been his implied meaning or intention. At any rate his words as reported were: "it should never again be mentioned in our jurisprudence."

A study of Justice Musdapher's speech however, lets the reader/listener know or understand just what caused his indignation; His Lordship apart from stating in broad and sweeping terms that plea bargaining was unknown to our law and by implication illegal, was in fact complaining about the same thing as many other Nigerians to wit: the use of plea bargain for only the rich and powerful in society. As reported by the Tribune he said;

"It was invented to provide (a) soft landing to high-profile criminals who loot the treasury entrusted to them. It is an obstacle to our fight against corruption."
On Monday February 5th 2012, Justice Musdapher reiterated and defended his position on plea bargain at a workshop for judicial correspondents, referring to what he described as:

"The sneaky motive behind its introduction into our legal system, or its evident fraudulent application." He went on to say:

"You will see also that plea bargain is not only a flagrant subordination of the public's interest to the interest of 'criminal justice administration', but worst of all, the concept generally promotes a cynical view of the entire legal system."

His Lordship's position was lamented at the workshop by the Chairman of the Governing Council of the National Human Rights Commission (NHRC), Dr Chidi Anslem Odinkalu and the Chairman of the Nigerian Bar Association (NBA) Abuja chapter, Mazi Osigwe as well as the Chairman of the Economic and Financial Crimes Commission, Mr. Ibrahim Lamorde. The gentlemen posited that the CJN was not being fair in his criticism of the practice or his declaration that it was alien to the statutes, they referred to the previously mentioned S.180 (1) CPA and S.14(2) EFCC Act and decried what they called the failed criminal justice system of the country. They further pointed out that the cases against Tafa Balogun, Cecilia Ibru, Diepreye Alamieyesagha, and others might have dragged on in court for years or might have been quashed if they hadn't been settled by plea bargain. They however proposed a reformation/ regulation of the use of the practice in the country, and suggested a set of policy guidelines governing the operation of the practice be issued by the Chief Justice and the Body of Attorney-Generals.

In discussing the legality of plea bargain in the Nigerian criminal justice system, it is important to examine the following lines of thought:

- The essential conception and the imperative of the discharge of the burden of proof.

- The argument that extant statutes provide for plea bargaining.
- The use of the phrase 'plea bargain' in our statutes and the concept of legality.

The essential conception of plea bargain and the imperative of the discharge of the burden of proof
By its definition and essence, plea bargain entails a trial scenario (or a modified trial scenario) and the entry of a guilty plea having negotiated with the prosecution for concessions. The prosecution informs the judge of the terms of the agreement and the judge acts accordingly. It is important to note that the law does not say an accused person shall be punished simply because his guilt is 'apparent/obvious' to every man on the street; but rather that a person charged with a crime shall be tried before a competent court and shall be convicted; if shown beyond reasonable doubt to be guilty. This means that a person whose guilt is 'obvious' to the man on the street, may be discharged and acquitted by a court, if the prosecution lacks evidence and skills to successfully prosecute a case against them. While this may seem absurd and twisted to laymen, lawyers know that this is the law and the practice. It is also enshrined in the Constitution; that no person shall be compelled to incriminate themselves or say things they do not want to-whether true or not. This is a fundamental right , ; therefore where people are threatened or unduly persuaded or unfairly induced to admit to an offence under a plea bargain agreement, this is wrong. The State either has (strong) evidence against the accused or it hasn't, it can either prove its case as required by law or it can't.

Consequently, the statements of the Messrs. Odinkalu, Osigwe and Lamorde especially with reference to the fact that those cases settled by plea bargain might have been quashed if allowed to continue in court and what the EFCC Chairman described as the use of plea bargain to overcome the challenges of unnecessary delays and the uncertainties of trials and appeals, are self-destructive positions; because the only legal reason for quashing cases is their legal weakness, thus the 'guilty' may walk free if the cases against them cannot stand the legal test for criminal matters and this shall be the fault of the State.

Therefore in view of the fact that plea bargain agreements do not meet the legal test required by S.135 of the Evidence Act and in fact, can sometimes be employed in a manner that could breach a fundamental right, a case can be made against the legality of the practice.

The argument that extant statutes provide for plea bargaining

The statutory provisions which have been used as justification for plea bargain include S.180 (1) CPA, S.14 (2), EFCC Act and S.174 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
However it is self-evident that the contents of these provisions are really conceived by those who invoke them, in an implied sense and by virtue of inherent powers and meanings. The only piece of legislation in the country at present that contains the phrase 'plea bargain', with circumstances and rules on how to implement the practice is the Administration of Criminal Justice Law (2007) of Lagos State.
It is arguable that the implied meanings drawn from the other statutes border on disingenuousness. Going by the concept of legality, it may be posited that seeing as the phrase 'plea bargain' is not used, anywhere, and that the concept of 'compounding an offence' does not include any of the trappings of a trial to wit: the preparation and filing of a charge sheet, an arraignment and the entering of a plea; but rather is an agreement to give money in exchange for non-prosecution of an offence, there are no statutory bases on which to stand this claim. Let it be noted that 'compounding' itself was originally an offence under common law (and still is in some common law countries, while in others it has been replaced by statutory offences). Some countries allow the compounding of certain offences (see Section 320 of the Code of Criminal Procedure, 1973 of India). Nigeria by virtue of the EFCC Act has legalised the compounding of offences by the EFCC within the purview of the Act -the EFCC represents the Nigerian people as the victims and is also the prosecuting authority which decides not to prosecute- but this cannot be said to be plea bargaining, not by any stretch of the imagination, at least not as we understand the definition of the same. Ironically, the EFCC has been doing something else altogether that they do not have authority to do.

The invocation of S180 (1) CPA is even more confusing, the phrasing in that subsection could not be clearer or plainer: a prosecutor gets a conviction on one or more of several charges, he decides he is satisfied with that conviction and then he decides to withdraw the other charges on the charge sheet or the court could decide that the conviction given is sufficient or weighty enough and consequently order a stay of the trial of the other charges but this is not a plea bargain arrangement as has been erroneously claimed.

S.180 (1) should not be read separately from subsection 2 of the same section which provides:

"Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction which has been had is set aside, in which case, subject to any order of the court setting aside such conviction, the court before which the withdrawal was made may, on the request of the prosecutor, proceed upon the charge or charges so withdrawn."

It is self-evident that subsection 1 contains two scenarios; a withdrawal by the prosecutor and a stay by the court. A withdrawal is not a stay and vice versa, furthermore the provisions in subsection 2 cover only the withdrawal and grants what could be called a temporary or subjective acquittal (my coinage, owing to the fact that the withdrawn charges could be revived and proceeded upon).

Now here is a possible scenario of how subsection 1 could play out: a man is charged with many offences including one or more carrying the death penalty, life imprisonment or lengthy prison terms; he gets convicted on one or more and receives any of the penalties above, the prosecutor confident that the convict would lose all of his appeals and be hanged or be locked away, could decide to withdraw the other charges; or the court could decide that having handed down a sentence of death, life or thirty-five years (for example) in prison, there is no need to proceed on the other charges and subsequently grant a stay. How could that possibly be a plea bargain arrangement?

The invocation of S. 174 of the Constitution is another funny one as the law does not give any reason that remotely smacks of plea bargain for why or how the Attorney-General may exercise his power of nolle prosequi and the power has been exercised many times in different cases including EFCC cases without any references or semblance to plea bargain.

This line of thought here could be summed up thus:

1. The invocation of the statutes is on the basis of implication and inherence,

2. The use of the phrase 'plea bargain' is done as a result of the application of the most extreme of liberal interpretations/meanings by those who use the phrase,

3. In view of the fact that the circumstances in the Nigerian statutes above do not remotely reflect or resemble the circumstances contained in the concept of plea bargain as used/indicated in its country of origin the United States, or in other countries that apply it either by conventional practice or by statute, the practice shouldn't be used nor should arguments be made for the use of the practice on the bases of any existing federal laws, the liberal conception of the phrase cannot be supported,

In view of the fact that plea bargain as is currently used in Nigeria involves criminal matters of crucial public interest and importance; the liberal use of the phrase 'plea bargain' or the importation of the practice without a written law shouldn't be done or encouraged.

5. The supporters of the use of plea bargain in our criminal justice system especially in dealing with cases of corruption, should argue their case on the grounds that it is a desirable practice and on convention but should not over stretch the meaning of statutory provisions or expand and conflate the intentions of the law makers.

The use of the phrase 'plea bargain' in our statutes and the concept of legality

The concept of legality requires that a thing be provided for expressly in the law, this is desirable especially when it relates to criminal matters, rather than be the product of implication, inherence and/or abstraction.

Consequently, in consonance with Chief Justice Musdapher, and at the risk of being accused of legalism, it is important to point out that no federal statute provides expressly for plea bargain and even those statutes whose meanings are held to imply provisions for plea bargain are really not phrased in a manner so as to lend themselves to liberal interpretations and stretched meanings. Therefore the legality of the use of plea bargain in Nigeria is very much in question.

As stated much earlier it appears that only the Lagos State Administration of Criminal Justice Law 2007 provides for plea bargain:

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

In view of the fact that under our federal system, the various States/jurisdictions have power to enact laws relevant to their needs and purposes, the Lagos State government has within the limits of its right enacted a law and any other state which wishes to do same is welcome to, the Federal Government as well.

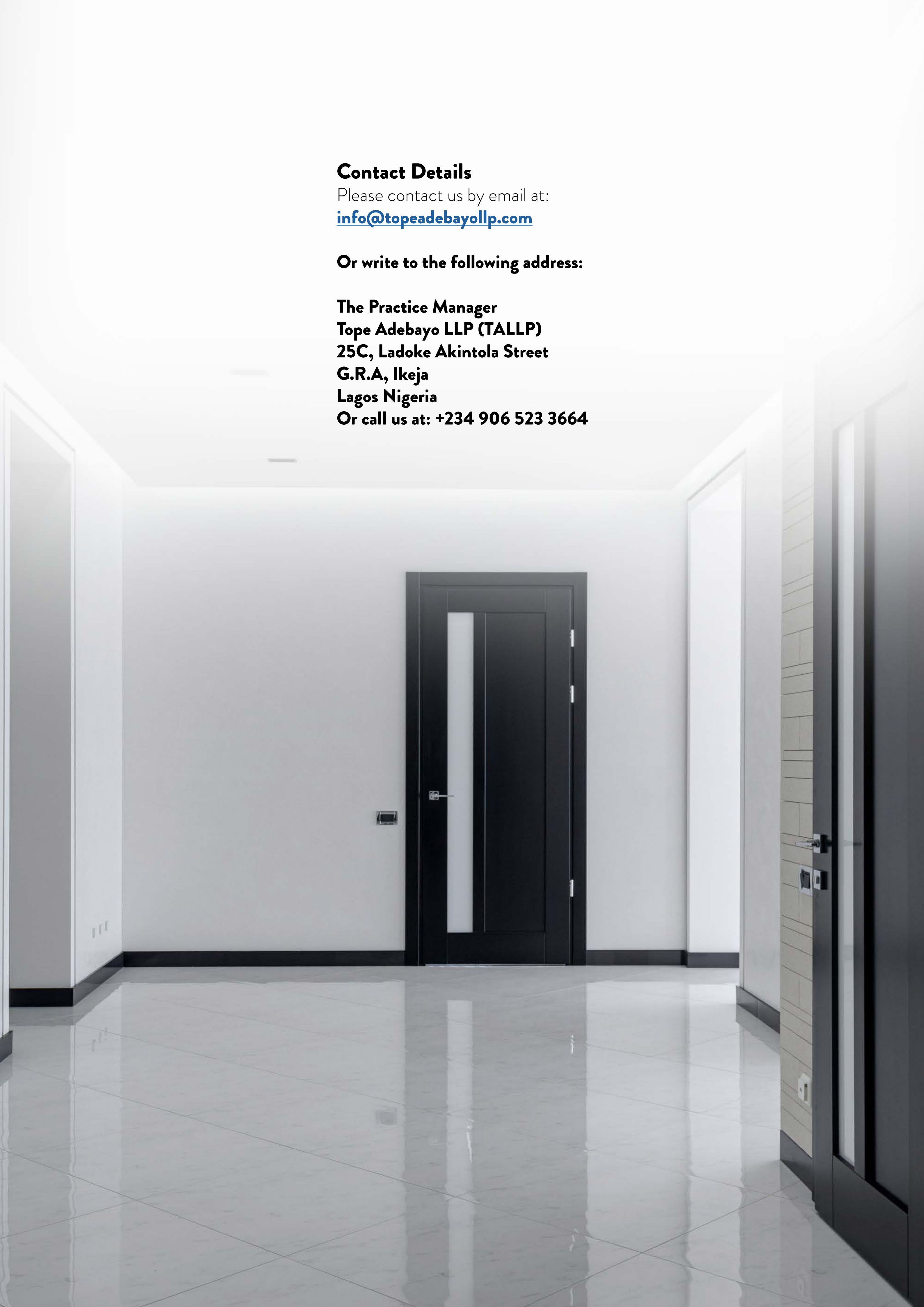
Until there are laws which expressly enable/provide for the use of plea bargain in all criminal cases, in the entire Nigeria or at least in the states that are interested, the practice should not be adopted or used in federal cases as it has no basis in Nigerian federal law.

CONCLUSION

Bearing in mind that the power of the courts to punish is clearly spelt out in law, mindful that the conduct of court proceedings and actions are provided for by the law, considering that prosecutorial powers are granted by law, remembering that even the powers of the President and Governors to grant pardons are contained in law, it is unthinkable how the importation and use of such a vexing procedure as plea bargain in criminal matters on corruption can be done without statutory provisions. If punishments are to be based on clear, well-founded laws, then it stands to reason that the mitigation of punishments should also have its basis in the same manner. As stated earlier, the legality of a thing in Nigeria especially as it relates to sensitive subjects of our criminal justice is not to be based on or determined by the practices of other countries or on the importation of alien conventions but on our own well-founded laws no more, no less.

Therefore, it cannot be said that the use of plea bargain (whether desirable or not) in the Nigerian criminal justice system (barring Lagos State) at present is legal.

-By U. Keith Inyang



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