Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique

Sule Peter Echewija
Department of Philosophy, Federal University Lafia, Nigeria

Abstract

The idea of "justice" normatively reflects "justitia" in the Roman worldview: "*fiat justitia, ruat caelum*" (may there be justice though the heavens fall). That is, justice must prevail no matter whose ox is gored. In its corrective schema, justice is connected to the ideas of just desert. Justice in this sense is possible through a just law couched within the principle of retributivism (where punishment is proportionate to the severity of crime). This idea must remain intact if criminal justice, as a form of social control, is to attain the moral and political legitimacy to which it aspires. Unfortunately, these ideals are constantly at risk in Nigeria's criminal justice system, especially in the prosecution of corrupt crimes where convictions have largely been plea bargained. Plea bargaining exploits the insubstantiality of Nigeria's criminal codes and its proponents argue from a cost-benefit analysis stance that pits cost against justice. This prima facie approach inexorably leads to the following questions: what are the requirements of justice? Is criminal justice concerned with justice to the offender or victims of crime? Is a court ruling necessarily just? The paper attempts to answer these questions in showing that justice transcends mere court rulings and is underpinned by certain moral ideals: a moral operating principle of the judicial process and the degree to which a people or victims of crime perceive their penal system as just. The current application of plea bargaining in Nigeria fails to satisfy these moral requirements of justice.

Key Words: justice, plea bargain, weak laws, crime severity, proportionate punishment

Introduction

The President Buhari administration has taken up the gauntlet to fight corruption, which is a paradigm shift of some sort from the past administration of President Goodluck Jonathan. According to Vice President Yemi Osinbanjo, the administration is currently investigating $15 billion lost in security-related contracts alone; a sum that is over half of the country's entire reserve at $27 billion (see Abimboye, 2016). In one such case, the former Chief of Air Staff, Adesola Amosu (retd.) and 10 others were arraigned on June 26, 2016 on a 26-count charge of multiple fraud amounting to N22.8 billion. They pleaded not guilty, but by July 8, the defence counsel informed the court of their clients' intention to enter into a plea bargain with the Economic and Financial Crime Commission – EFCC (Sahara Reporter, 2016). At a resumed hearing before the Federal High Court in Lagos on October 4, 2016, the defence counsel, contrary to the prayers of the prosecutor, argued that trial cannot commence because the accused were still in plea-bargain talks with the EFCC. Consequently, Justice Idris granted the prayer of the defence counsel and adjourned till October 20, 2016, for commencement of trial.

Besides, the Presidential Advisory Committee Against Corruption (PACAC) has adopted "plea bargaining" in the prosecution of on-going corruption cases. Why has this judicial instrument become so important in Nigeria? What is justice and what sort of justice derives from a negotiated judgment? Is a court ruling necessarily just? What is the concern of criminal justice – is it justice to the offender, victims of crime, or both? The paper attempts to answer these questions in its argument that the current circumstances under which plea bargaining is applied in Nigeria's criminal justice does not translate to justice, particularly for victims of corruption crimes. In doing this, the paper maintains that justice transcends mere court rulings and is underpinned by certain moral ideals: the degree to which a people or victims of crime perceive their penal system as just and sound moral operating principles of law.

The paper is structured in four parts. In the first, an attempt is made at conceptualising justice while adopting a working definition of justice as "someone's due". The second examines the cost of justice and how it is increasingly shifting the principle of punishment from retributivism to *cost-benefit* considerations. In the third part, the paper analyses the current application of plea bargaining in the prosecution of corruption as a semblance of cost considerations and argues that such practice yields legality and not justice. The fourth part attempts an analysis of the morality of justice, arguing that justice entails an inherent moral ideal found in the absence of a *displacement gap.*

What is Justice?

The question of justice has been a perennial one for philosophers from time immemorial. Justice is speculatively fluid; an inconclusive ethical, legal and ontological term with transcendental properties. Consequently, the enterprise of its explication is not amenable to easy comprehension given a cluster of disparaging opinions. This, however, does not vitiate the fact of our intuitive insight or a priori knowledge about what justice is and ought to be. These complexities notwithstanding, the talk about justice mirrors integrity, rightness, equality, fairness, and in its corrective schema is retribution.

Justice is a moral ideal and a principal virtue of individuals (in their interactions with others) and social institutions. For most scholars, justice is closely associated to the ideas of just

desert or the Latin *Suum cuique tribuere* (to allocate to each his own). "Rewards and punishment are justly distributed if they go to those who deserve them" (Barry & Matravers, 1998, p. 4229) and in the right proportion. Thus, justice means giving people their due. Aquinas, Kant and Spinoza among other great philosophers so conceived justice. For Aquinas, it is the "perpetual and constant will of giving everyone his due". Kant conceives it as living honourably, injuring no one and "to give every person his due". For Spinoza, "Justice is the habitual rendering of everyman his lawful due" (cited in Obioha, 2011, p.186). Justice as *one's due* has been criticised by many thinkers, but as I shall argue shortly, it is this idea of justice that comes closest to offering a comprehensive idea of justice in both its distributive and corrective senses.

The foremost critic of justice as *one's due* is Plato. In Book I of his *The Republic,* Cephalus upheld that justice involves giving a man his due. For him, justice is truth telling and paying of one's debts (2000, p. 5). Socrates dismissed this on the ground that one cannot return arms (debt) to a mentally deranged friend notwithstanding if that friend had deposited them when in his right senses. Thrasymachus, Socrates most avowed interlocutor, defined justice as "the interest of the stronger", "the interest of the government or the ruling class" (p. 13). The ruling class makes laws and justice requires subjects to obey such laws (p. 14). Therefore, this conception holds that justice is obedience to the laws. For Thrasymachus, to be just is to be disadvantaged and weak since obedience to the interest of the stronger automatically coerces one to serving their interests; only the unjust is happy and strong:

> Observe also what happens when they hold an office; there is the just man neglecting his affairs and perhaps suffering other loses, and getting nothing out of the public because he is just; moreover, he is hated by his friends and acquaintances for refusing to serve them in unlawful ways. But all this is reversed in the case of the unjust man. I am speaking . . . of injustice on a large scale in which the advantage of the unjust is most apparent; . . . in which the criminal is the happiest of men, and sufferers or those who refuse to do injustice are the most miserable (Plato, 2000, p.18).

Thrasymachus was speaking about justice in practice and he is not far wrong. Justice in Nigeria (in relation to high profile corruption cases) is Thrasymachean in this sense, particularly as it pertains to the treatment of looters of the common wealth. However, justice as practiced does not directly translate to justice in the true sense. To this end, Socrates' opposition is quite understandable because he was poised to construe justice in its *oughtness*. Consequently, he defined justice as keeping what is properly one's own and doing one's own job. That is, there are two senses of justice. First it requires that "a man may neither take what is another's, nor be deprived of what is his own" (justice in this sense clearly mirrors 'justice as one's due'). In the second, justice entails minding your own business, "and not being a busy body" (2000, pp. 102–3).

For Aristotle, "just means lawful and fair, and unjust means both unlawful and unfair" (cited in Dukor, 1997, p. 501). The defect in this argument is easy to fathom. A court ruling may be lawful and fair, yet unjust as with cases arising from unjust laws. Legalities arising from unjust laws cannot bring about justice in the true and moral sense of the term. Aristotle also distinguished between distributive and rectificatory justice. Whereas the latter occurs in the distribution of resources based on a geometric principle of treating equals equally and unequals unequally, the former corrects anomalies in inequitable transactions. Thus, justice in the rectificatory sense is the mean between loss and gain; whether a party to a transaction has committed and the other suffered an injustice (Dukor, 1997).

For Rawls, justice regulates the interactions of free and equal persons, and fairness arises when the favoured in society acquiesces to a distributive rule they would prefer had they been unfavoured (see Obioha, 2011). He argues that all socio-primary goods like political liberty, choice of occupation, opportunity, wealth, etc. are to be distributed equally unless an unequal distribution would help the least favoured. Therefore, justice as fairness focuses on equitable distribution of social goods and permits unequal distribution only if the weakest members of society benefit from such inequality.

If it is just for the weak to profit from an inequitable distribution of social goods, it therefore means, in a sense, that distributive fairness eschews equality. It also means that justice entails "to each according to his needs" not "due". Critics of Rawls' theory argue that nature itself is unfair in distributing her gifts – some people are more talented, favoured, smarter or better looking. So why should those "favoured by nature" be made to pay for what is not a moral problem or an injustice? (Obioha, 2011). According to Nozick, individuals have rights (e.g., to justly acquired holdings) and any action that interferes with such rights (as in redistribution) is unjust. A just distribution is that resulting from voluntary transfers or by an appropriation that makes no one else worse off (see Barry and Matravers, 1998, p. 4232).

Despite this problem in Rawls' theory, analysts like Obioha (2011) claim that justice as fairness is better than every other conception of justice without good argument save its *prima facie* appeal. How does justice as fairness handle situations where someone contravenes the law? Broadly speaking, there are two senses of justice: distributive and corrective. Justice as fairness or social justice, be it of equal or unequal distribution, clearly involves the distribution of resources. On the other hand, justice involves punishing justly. Now justice as fairness satisfies only one sense of justice in terms of a comprehensive theory. However, a conception of justice as "one's due" captures both senses (distribution and punishment): "corrective justice covers that which is due to a person as punishment, distributive that which is due by way of benefits and burdens other than punishment" (Barry and Matravers, 1998, p. 4229). While there is no widespread agreement regarding the content of just distribution, which is the difference between, for instance, Rawls and Nozick's theories, there is quite a bit of agreement as to the criteria for just punishment. That criteria basically tends towards retributivism.

Feinberg (1965) buttresses this point in his argument that punishment is functionalist in nature and expresses a society's disapproval of a given act with the more serious crime (e.g., robbery, corruption, terrorism, etc.) receiving the most disapproval:

> What justice requires is that the condemnatory aspect of the punishment suit the crime. . . . Further, the degree of disapproval expressed by the punishment should "fit" the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degree to which people are disposed to commit it (p. 423).

A society expresses the degree of her disapproval by punishing retributively. That is, such punishment must be seen as appropriate for the crime, especially by victims of the crime. Our treatment of plea bargaining in the administration of criminal justice in Nigeria follows this understanding of justice.

The Cost of Justice

Justice is arguably the most salient measure of the socio-contractual existence of the state. With the judiciary occupying a distinct arm of government in almost (if not) all systems of governance in the world, it is an invaluable system of staggering behemoth both in size and cost. Such cost, spanning the entire spectrum of the criminal justice process (the police, the prosecutors, the trial courts, and correctional facilities, etc.) has been described as a *Prima facie* evil (Lacey, 2007) which many governments are desperate to prune. Of particular concern has been the cost of incarceration. The cost of feeding inmates in Nigerian prisons is estimated at over N5.5 billion annually (Osasona, 2016). Similarly, the running of prison facilities in the United States of America costs about $80 billion yearly (*The Economist,* 2016). This shows that punishment by incarceration (a fragment of criminal justice) can be expensive, hence the introduction of theories and judicial tools such as "cost-benefit analysis" and "plea bargaining" to, among other things, cut the cost of justice.

Consequently, an economic perspective is now being read into the cost of justice, particularly the cost-effectiveness of sentences in relation to alternative, less expensive approaches to punishment. This is approached from two sides: (1) Cost-Effectiveness Analysis (CEA), and (2) Cost-Benefit Analysis (CBA). According to Johnsøn (2014), whereas CEA compares the costs of alternative ways of producing the same or similar outputs, CBA quantifies in monetary terms as many of the costs and benefits of any proposal or policy program. They both examine the value for money of projects and policies. Johnsøn (2014) argues that these approaches are currently underutilised in evaluating governance and anti-corruption reforms in developing countries. As I shall argue in the following section, Nigeria's application of plea bargaining profoundly mirrors CBA.

An example of the application of CEA and CBA in the United States of America is the 2010 recommendation of the Missouri Sentencing Commission, which required the inclusion of the costs of various possible sentences and the price tag on each sentence in the "pre-sentencing reports" prepared for judges (Flanders, 2012a, p. 392). The Commission's goal is to encourage judges to select cheaper forms of punishment in lieu of imprisonment. Consequently, cost now determines the appropriateness of punishment, not the degree of the harm caused or seriousness of an offence.

This policy has attracted both support and criticism. While advocates believe the approach is laudable in its capacity to free up money in funding other social programs, philosophical critics believe, and justifiably too, that making cost a determining feature of sentencing detracts from the relation which punishment ought to have with the severity of crime. According to Flanders (2012b), judges who sentence based on cost might face greater popular opposition for being too lenient on criminals, particularly in cases eliciting profound public interest like corruption. For him, therefore, cost should be a highly disfavoured factor in sentencing because it is counter-intuitive to justificatory theories of punishment:

> If we believe in retribution, it will be hard to see how cost should figure in determining what punishment the offender deserves (at least at the time of sentencing)… But even if we are not strict retributivists about sentencing, it is hard to fit cost assessment into any of the traditional justifications for punishment, including deterrence and rehabilitation (p. 164).

For core retributivists like Kant, an offender must necessarily get his/her due punishment even if other important social programs would suffer inadequate funding. Criminal desert, for

Kant, is a moral and categorical imperative. Thus, states must be weary of this obligation in order not to give the impression of abetting crime. This idea is clearest in Kant's famous example of a disbanding Island. If such a society were to break up, the execution of the last murderer is a moral necessity "so that everyone will receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment" (as cited in Norrie, 1991, p. 40).

Scholars like Scott (2012) have argued that it would be probably impossible to completely ignore the price tags associated with different forms of punishment given global economic downturn and pressure on limited resources. Even if we could consent to cost consideration in sentencing, argues Flanders (2012a), such consideration must be essentially marginal; not something judges are urged to consider as a primary sentencing factor. In other words, cost consideration must not result in minimal sentences that vitiate the principle of desert. Five years imprisonment for a parking offence is unjust in the same way as one-year imprisonment for aggravated murder or offences of considerable social harm (like corruption). That is, sentences should neither be too much nor less notwithstanding the "cost-consideration" of punishment.

Plea Bargained Justice and the Fight Against Corruption in Nigeria

Public interests have been continually frustrated when it comes to prosecuting high-profile cases of corruption in Nigeria as most (if not all) have been plea bargained.[1] This frustration derives from disparate punishment between classes of citizens. As Garba (2016, p. 1) put it, "Nigeria is a country of paradoxes, one in which the VIP steals an elephant and runs away with it but the poor man stealing a goat goes to jail for up to 30 years." VIPs run away with stolen elephants through plea bargaining; a judicial tool which eviscerates proportionality in punishment. This has led victims of such crimes to run a gauntlet of the criminal justice system, which for them has become a will-o-the-wisp in punishing looters of public funds.

Plea bargaining is a legal practice in common law judicial systems whereby an accused pleads guilty in return for reduced charges or a lighter sentence (Gorr, 2000, p.129). By this practice, both the accused and prosecutor concede certain incentives by making compromises for a mutually agreeable bargain. Adherents of plea bargaining often argue that it saves costs and leads to a general expediency in dispatching criminal cases. Howe (2005) argues the practice is wholly beneficial because it has punishment maximizing value:

> Bargaining maximizes deserved punishment at a reasonable cost by allowing prosecutors and judges to pursue many discounted sentences with the same resources that they would otherwise use to pursue a single sentence after trial. . . . We prefer to trade some punishment to avoid the high costs associated with a bargainless system . . . (pp. 635–6).

Although plea bargaining may save states the time, effort, and risk involved in the trial of all accusations, however, Uviller (1977) found that there is something less gratifying about it because ". . . when the high principles and great social purposes of criminal justice are set in the balance, the process sometimes seems downright unsavory" (p. 102). The practice has existed in the United States for at least a century and, given the enormity of caseloads in

[1] Tafa Balogun, November 2005; Lucky Igbinedion, December 2008; Bode George, October 2009; Cecilia Ibru, October 2010; John Yusuf, January 2013, to mention a few.

relation to available legal personnel, has been used to resolve approximately 90 percent of all criminal cases in America (Howe, 2005). On this score, its application is a matter of expeditious convenience. But recent experiment on the partial or complete abolition of plea bargaining in states like Alaska, New Orleans, California (particularly "proposition 8"), Michigan, etc. has shown that the "caseload" argument is a hard sell as "court processes did not bug down; [rather] they accelerated" (Rubistein and White as cited in Gorr, 2000, p. 129).

Caseload and *Cost* appears to be the strongest attractions of plea bargaining in the United States. Is the same true of its application in Nigeria? To answer this question, let us briefly look at how this principle entered Nigeria's administration of criminal justice. According to Dahiru Musdapher, former Chief Justice of Nigeria, plea bargaining "is not only dubious but was never part of our judicial system – at least until it was sumptuously smuggled into our statutory laws by the Economic and Financial Crimes commission" (as cited in Eze & Amaka p. 42). This smuggling refers to section 14(2) of the EFCC Act, which states that:

> Subject to the provision of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (relating to the power of the Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any persons in any court of law), the Commission may compound any offence punishable under this Act *by accepting such sums of money as it thinks fit, not exceeding the amount of the maximum fine to which that person would have been liable if he had been convicted of that offence* (emphasis mine).

Most analysts, Dahiru Musdapher inclusive, take this to be the entrance of plea bargaining into Nigerian jurisprudence, but the literal interpretation of this section does not reflect plea bargaining. This is because the section focuses on accepting "the equivalence of the fine a defendant would have paid if convicted" to truncate trial, which is different from what plea bargaining advocates. Moreover, accused persons usually forfeit huge sums of money, sometimes in billions; fines are never that high (Adegbite). Notwithstanding, these concerns of proper legal provisions have now been laid to rest with the passage of the Administration of Criminal Justice Act, 2015. Section 270, subsection 1 of which provides that a Prosecutor may:

> (a) receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf; or
> (b) offer a plea bargain to a defendant charged with an offence.

The problem with plea bargaining in Nigeria is not merely about legal provisions, rather it is about *too lenient* punishment. Nothing in the above provision restricts plea bargaining to financial crimes only. But its application so far has displayed such restriction. To this end, one may argue that the *caseload* argument is untenable in Nigeria's application of plea bargaining. This is because, unlike the United States' application which cuts across all ranges of criminal breaches, Nigeria has restricted its application to only cases of corruption. The total holding-capacity of Nigerian prisons is 47,284. However, prisons currently hold around 56,718 inmates, with 68% (about 39,032) of which are awaiting trial (Osasona 2016, pp. 1–2). If its application is as a result of "caseload", then it would have been used to dispose of these cases of awaiting trial, which is more than half of the total prison population in Nigeria. That plea bargaining in Nigeria has been used to prosecute only a few cases bordering on corruption, contra to the United States which has used it to try over 90% of all criminal cases, is morally questionable. I agree with Onyeka's (2013, p. 191) argument that its application in

Nigeria is a recreation of George Orwell's *Animal Farm* where "[all] animals are equal but some animals are more equal than the others"[2].

Contra *caseload* and *cost* arguments, the attraction of plea bargaining to the Nigerian judicial system is the insubstantiality in Nigeria's penal laws: "three out of the five major legislative pieces that collectively regulate criminal justice in Nigeria – the penal code (enacted in 1960), the criminal code (enacted in 1902), and the Prison Act – are all substantially relics of colonial culture" (Osasona, 2016, p.1). In the words of Femi Babafemi, an EFCC Spokesperson:

> . . . Plea bargaining saves a lot of cost as most of Nigerian criminal Acts don't stipulate capital punishment for their offenders…for instance, [the Money Laundary Act] provides for a fine of not more than N250,000 and two to three years jail term for anybody convicted of violating the law . . . if an individual is convicted of embezzling N10 billion, he is allowed to pay N250, 000 and serve a jail term of not more than three years. That is after a long trial where the government may have spent #10 million to get justice . . . [Therefore], we sometimes agree to plea bargaining which is a global and universal approach to getting justice. So in order for Nigerian government and the Nigerian people not to lose out completely, we allow these people to forfeit a substantial part of the loot (as cited in Adeleke, 2012, pp. 61–2).

Several issues can be garnered from this submission. The first is that the most fundamental start point in the fight against corruption is a review of Nigeria's obsolete penal laws.[3] These laws are naturally weak and cannot guarantee justice in the retributive sense much less to deter. And when plea bargaining is applied, the punishment becomes counter-intuitively disproportionate with the severity of crime. Nigeria is tough on crimes ranging from terrorism, kidnapping, robbery, to offences such as gay marriages, but not on corruption. For instance, robbery and conspiracy for armed robbery attracts life imprisonment or the death penalty in the Robbery and Firearm Special Provision Act, 2004; while same sex marriage attracts 14 years imprisonment and above under the Same Sex Marriage (Prohibition) Act, 2014. Corruption is not punished as severely. The maximum sentence in the Penal Code for misappropriation or embezzlement is two (2) years imprisonment or a fine or both.[4] In the EFCC Act 2004, the maximum is five years, while it is seven years under the Corrupt Practices and Other Related Offences Act 2000 (of course this drops to about two years when plea bargained). When compared to other African countries like South Africa, we find that these punishments are far too lenient. In South Africa, the minimum sentence under the Criminal Law Amendment Act 105 of 1997 is fifteen (15) years imprisonment. Punishment goes as high as life imprisonment in the Prevention and Combating of Corrupt Activities Act of 2004. The argument here is that unless punishments for corruption are reviewed from these abysmally low provisions, the application of plea bargaining will yield nothing close to justice.

Above all, allowing *substantial* forfeiture of loot may be legal, but is it just? The position of this paper is that a court ruling is not necessarily just contra Aristotle's definition of justice as

[2] Also see Kayode (2013) for similar argument.

[3] I have argued this point in "Extractive Versus Weak Institutions in the Development Crisis in Africa" *Developing Country Studies* (http://iiste.org/Journals/index.php/DCS/article/view/31622/32495); and in "Crimes Against Post-Colonial African States: A Feinbergian Critique Of Crime Punishment in Nigeria's Criminal Justice System" (Forthcoming)

[4] See Section 309. Since plea bargaining involves pleading guilty to reduced punishment, prosecutors look for such lenient punishments with which to charge or dispose of cases. This section was used in the case of John Yusuf convicted of diverting a N27.2 billion police pension fund.

"lawful and fair. Substantiality only confers legality but never justice if the philosophical justifications of punishment are anything to go by. Besides, this paper holds that justice must satisfy an inherent moral ideal to be plausibly deemed just. This I shall examine in the next section.

The Morality of Justice

What is the operating principle of law? Who is the ultimate recipient of justice? These are questions whose plausible answers underscore a deep sense of moralism that will help us match off the arguments in this section. Thinkers like Lacey (2007) have argued that despite the inhumanities perpetrated within the criminal processes of most societies, criminal justice aspires towards a moral and political legitimacy. Such legitimacy derives implicitly and explicitly from how a judicial system treats issues of punishment. According to Dimock (1997), the purpose of the law is to secure the conditions of basic trust in the society, which is achievable only where violators of the law are punished retributively: "Any legal system which is understood as performing this function (of securing the conditions of basic trust) must adopt a retributivist approach to punishment" (p. 37). While I agree with Dimock's functionalist theory of law and retributive punishment, I however disagree with her version of retributivism which states that non-violent crimes or crimes without direct, physical harm do not require incarceration. My disagreement is not just about the fact that the alternative punishment she proposes (ban from holding office, community service, etc.) seems too lenient (which this paper is generally against), but because on that score the proportionality between crime and severity of punishment is hard to determine. What length of community service is proportionate as punishment for an offender like John Yusuf who misappropriated N27.2 billion?

During my mandatory National Youth Service year in Abuja, I once visited a community and asked for water to drink. The murky water brought made me inquire about the source. On hearing that it was a nearby stream, I made for it only to find cattle muddying and drinking from the same source, a hardly flowing stream. There were visible cases of river blindness, cholera and other diseases associated with bad water in the community. Now, imagine if a contract had been awarded to sink a borehole for this community but which was not carried out as is, sometimes, the usual practice. When charged to court, the contractor forfeits a part of the contract sum having plea bargained, and is released on payment of a paltry fine; both the forfeiture and fine did not add up to the contract sum. In a situation like this, can it be said that justice was served? What is justice as far as the victim of this crime – the community – is concerned? Justice for them would be a properly sunk borehole; that is their due. And what this implies is that the government would have to re-award the contract at a loss or an extra cost of the crime.

Justice as one's due in the above context carries with it a principle of morality. Dworkin (as cited in Campbell, 2007, p. 234) highlights this moralism in his argument that law contains other norms such as principles which have different functions from laws. For him, the principle that "no one shall be permitted to profit from his own fraud, or take advantage of his own wrong" may be used to set aside an otherwise valid rule like plea bargaining. In this sense, principles are different from rules as they perform a legitimating role. Laws operate within a principle without which they can only be said to be legal. But where they operate on good, moral principles like Dworkin's, they lead to justice. In essence, principles have "justice conferring" *weight* as they represent, according to Campbell (2007), the underlying justificatory values within a legal system. It is this underlying principle of law that confers

morality on justice. What is the principle of plea bargaining? That in making trial expeditiously convenient for prosecutors one can benefit from crime? As Dworkin further argues, the principle of the judiciary is that "the courts will not permit themselves to be used as instrument of inequity and injustice" (as cited in Campbell, 2007, p. 234). A judicial system which allows very abysmal punishment by way of plea bargaining is unjust and immoral in this sense.

Another "justice-conferring" ideal is the degree to which victims of crimes perceive a sentence as just. Discussions in criminal justice have often focused on the behaviour, punishment and rehabilitation of the criminal with very little consideration for the recipients of justice – victims of crimes. According to Marsh (2004), this one-sided obsession, both academic and judicial, has led to situations whereby a good deal of public policies in criminal justice are not informed by the needs, wants and status of the victims of crime. The United Kingdom circumvented this neglect through the 1990 Victim's Charter, which recognised victims as ultimate consumers of justice. That is, justice pertains to them. Victims are either primary (those who suffer directly from a crime) or secondary (those who suffer the effects, but are not directly involved e.g., the public).

How does the public become victim in a crime? For Feinberg (1990), crimes such as tax fraud, inefficient public institutions, contempt of court, and, to some extent, corruption, are non-normative harms in that they do not directly violate the rights of individuals, but setback collective interests. There is a sense in which corruption directly violates an individual's rights, and in which case corruption constitutes both normative and non-normative harms. Individuals share in public harms by virtue of being members of the society. As he put it: "[w]hen public harms are committed, *we* are wronged, and the public grievance is *our* grievance. I have a grievance as an individual because *we* have a grievance as a group . . ." (p. 33). It therefore follows that justice pertains to victims of crime either in the primary/normative sense or in the secondary/non-normative sense. Just as an individual demands justice from a law court for wrongful dismissal or robbery at gunpoint, so too do victims of crimes of collective harms. A good example is the street protests that greeted the plea bargained ruling in the case involving John Yusuf in 2013. The protest represents a dissociation from the ruling by which the non-normative victims of the crime are saying the ruling was unjust. How, in this sense, is justice measured? Sentence satisfaction. According to the 1991 Criminal Justice Act in England, justice involves sentence satisfaction:

> If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge (as cited in Ashworth, 2005, p. 102).

Where such satisfaction is lacking, there is, in its place, a moral vacuum or a displacement gap – a void between what victims of crime expect as sanction and what the state's judicial institution actually provides. All the plea bargained rulings on corruption cases in Nigeria open up such moral vacuum and to that extent remain unjust. A criminal justice system is moral and just only to the extent it successfully bridges the displacement gap.

Conclusion

A genuine fight against corruption requires the creation of a wide range of disincentives and, certainly, plea bargaining as currently practiced in Nigeria is not one of them. If anything, it only succeeds in giving judicial imprimatur to acts of corruption and demeans the country's image as a cesspool. The problem with Nigeria's criminal justice in relation to corruption is not plea bargaining itself, but the fact that it is applied amidst weak and obsolete laws that eviscerate our intuitive ideas about justice. Since weaknesses in the penal laws are the major factors that have rendered plea bargaining attractive in Nigeria, this paper submits that such laws be reviewed to reflect the opprobrium with which most countries view acts of corruption today. As I have argued in the paper, justice requires at least two *justice-conferring* ideals: a moral operating principle of the judicial process and a bridged *displacement gap*. These ideals cannot be realised without such review of the penal laws. It is only when this is done and a looter of the treasury still gets a minimum sentence of at least five years imprisonment, despite plea bargaining, that the moral conditions of justice set out in this paper can be met.

References

Abimboye, M. (2016, May 18). Fuel hike: President Buhari had no choice – VP Osinbanjo. Retrieved from https://www.naij.com/833199-fuel-hike-president-buhari-no-choice-vp-osinbajo.html

Adekunle, K. (2013). Plea bargaining and the Nigerian penal system: Giving judicial imprimatur to corruption. *New Ground Research Journal of Legal Studies Research and Essays, 11*(1), 10–17.

Adegbite, K. (2015). **"**Plea bargaining in Nigeria: Any legal foundation?" *The Lawyers Chronicle: The Magazine for the African Lawyer.* Retrieved from http://www.thelawyerschroni cle.com/plea-bargaining-in-nigeria-any-legal-foundation/

Adeleke, G. (2012). Prosecuting corruption and the application of plea bargaining in Nigeria: A critique. *International Journal of Advanced Legal Studies and Governance, 3*(1), 53–70.

Ashworth, A. (2005). *Sentencing and criminal justice.* (Fourth edition) Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139051965

Barry, B. & Matravers, M. (1998). Justice. *Routledge Encyclopedia of Philosophy,* Version 1.0, London: Routledge.

Campbell, T. (2007). Legal studies. In R. Goodin, P. Pettit *and* T. Pogge (Eds.), *A companion to contemporary political philosophy* (pp. 226–253). London: Blackwell Publishing.

Dimock, S. (1997). Retributivism and trust. *Law and Philosophy,* 16(1), 37–62.

Dukor, M. (1997). Conceptions of justice. *Indian Philosophical Quarterly, XXIV*(4), 497–551.

Eze, C. T. & Amaka E. (2015). A critical appraisal of the concept of plea bargaining in criminal justice delivery in Nigeria. *Global Journal of Politics and Law Research*, *3*(4), 31–43.

Feinberg, J. (1965). The expressive function of punishment. *The Monist*: *Philosophy of Law, 49*(3), 397–423.

Feinberg, J. (1990). *Harmless wrong-doing: The moral limits of the criminal law,* Vol. 4. Oxford: Oxford University Press. https://doi.org/10.1093/0195064704.001.0001

Flanders, C. (2012a). Cost as a sentencing factor: Missouri's experiment. *Missouri Law Review, 77*(2), 390–410.

Flanders, C. (2012b). Cost and sentencing: Some pragmatic and institutional doubts. *Federal Sentencing Reporter, 24*(3), 164–168.

Garba, S. (2016, May 26). Nine key milestones in president Buhari's first year. *Sahara Reporters*. Retrieved from http://saharareporters.com/2016/05/26/nine-key-milestones-president-buharis-first-year-garba-shehu

Gorr, M. (2000). The morality of plea bargaining. *Social theory and practice*, *26*(1), 129–151. https://doi.org/10.5840/soctheorpract20002617

Howe, S. (2005). The value of plea bargaining. *Oklahoma Law Review, 58*(1), 599–636.

Johnsøn, J. (2014). Cost-effectiveness and cost-benefit analysis of governance and anti-corruption activities. *Anti-Corruption Resource Center,* U4 Issue, 4.

Kayode, K. (2013, February 4). Plea-bargaining: One legal system, two classes of citizens. *National Mirror*. Retrieved from http://nationalmirroronline.net/new/plea-bargaining-one-legal-system-two-classes-of-citizens/

Kipnis, K. (1976). Criminal justice and the negotiated plea. *Ethics*, *86*(2), 93–106. https://doi.org/10.1086/291984

Lacey, N. (2007). Criminal justice. In R. Goodin, P. Pettit *and* T. Pogge (Eds.), *A Companion to Contemporary Political Philosophy (*pp. 511–520). London: Blackwell Publishing.

Marsh, I. *Criminal justice: An introduction to philosophies, theories and practice*. London: Routledge.

Nigeria (2004). Economic and financial crimes commission act.

Nigeria (2015). Administration of criminal justice act

Norrie, A. (1991). *Law, ideology and punishment: Retrieval and critique of the liberal ideal of criminal justice.* Boston: Kluwer Academic Publishers.

Obioha, P. (2011). The nature of justice." *Journal of Social Science, 29*(2), 183–192.

Onyeka, I. (2013). Plea bargaining: A recreation of George Orwell's *Animal farm* in Nigeria. *AFRREV LALIGENS: An International Journal of Language, Literature and Gender Studies, (2)*2, 190–202.

Osasona, T. (2016). Policy brief: The Nigerian criminal justice system. *The Centre for Public Policy Alternatives (CPPA)*

Plato. (2000). *The Republic.* Benjamin Jowett (Trans.). New York: Dover Publications, Inc.

Sahara Reporters, (2016, October 4). Court adjourns fraud trial of former naf chief Amosu and 10 others, suspects to continue plea bargain. Retrieved from http://saharareporters.com/2016/10/04/court-adjourns-fraud-trial-former-naf-chief-amosu-and-10-others-suspects-continue-plea

Scott, R. (2012). How (not) to implement cost as a sentencing factor. *Federal Sentencing Reporter*, *24*(3), 172–177.

The Economist. (2016, April 30). When economists turn to crime: How cost-benefit analysis might save America's criminal-justice system. Retrieved from http://www.economist.com/news/united-states/21697826-how-cost-benefit-analysis-might-save-americas-criminal-justice-system-when-economists-turn

Uviller, R. (1977). Pleading guilty: A critique of four models. *Law and Contemporary Problems, 41*(1), 102–131. https://doi.org/10.2307/1191232

Corresponding author: Sule Peter Echewija
Contact email: supet3@yahoo.co.uk