



PLEA BARGAIN UNDER NIGERIAN CRIMINAL JUSTICE: A CRITICAL ANALYSIS

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ABSTRACT

It is without doubt that the need to improve the effectiveness and efficiency of the criminal justice system necessitated the enactment of the Administration of Criminal Justice Act of 2015(ACJA), and the various States Administration of Criminal Justice Laws (ACJL). Both the ACJA and the ACJL of the various states, provide for plea bargain among others. Despite the intention of these laws, it is further seen that the prosecuting counsel wields so much power in a plea bargain system. Also, it does seem that the prosecutor has more control over everything that happens in the criminal justice system, including the court. Aside the above, it is argued that the concept of plea bargaining negates the principle of fair hearing and just desert. Furthermore, contrary to what is obtainable in other jurisdictions, it appears that the Nigerian plea bargain system covers almost all aspects of crime. Despite this, in the last decades, the concept has become the prevailing method of case disposal in Nigeria and in a good number of countries around the globe. While the prosecutor's power has been criticized by some scholars, from practical experience, it is also seen that the power have the propensity to compel people with criminal tendency to refrain from committing crime, or use as a bargaining tool in order to promote the goals of the criminal justice system, especially in the quick delivery of justice. This article critically examined the extent to which both the ACJA and ACJL of the various states have enhanced the speedy dispensation of justice through plea bargain. The article adopted the doctrinal method of research in which reliance was placed primarily on the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the ACJA 2015, ACJLs of selected states and other criminal legislations in the country as well as judicial authorities. Reliance was also placed on secondary sources of information such as opinions of eminent scholars expressed in books and journals. It was found that though plea bargain is a veritable catalyst for speedy trial, its effective utilization is hamstrung by the absence of a robust and all-encompassing legal and institutional frameworks sustainable enough to enhance the smooth application of the concept is recommended. In the findings, it is seen that the practice tends to exclude lawyers and also usurp the judicial powers of the courts.

Keywords: Crime, Criminal Justice System, Plea Bargain, Corruption

1. INTRODUCTION

A plea bargain signifies a negotiated agreement between the state and a criminal or the defendant who agrees to a plead guilty to lesser offence or to one or multiple charges in exchange for some concession by the state, usually a more lenient sentence or a dismissal of the other charges. No matter the level of criticisms labelled against the concept, plea bargain has found its way directly or indirectly into Nigeria's gamut of law. A typical example is the



Administration of Criminal Justice Law of Lagos.¹ For instance, section 75² of this law provides that 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 the abuse of legal process.

In a plea bargaining arrangement, the ACJA permits the prosecution to unilaterally conclude a plea agreement with a defendant without specifically indicating a charge and sentence bargain while it expressly allows the prosecution and the defence to agree on an appropriate sentence to be imposed by the court.³ It comes in the form of a charge and sentence bargain. A charge bargain is usually accompanied by a sentence bargain. The ultimate result of a charge or sentence bargain is that the accused person ends up getting a lighter punishment.⁴ No matter the form a plea bargain takes, a vital factor worthy of note is that, the plea agreement is not binding on the court and is subject to the approval of the court. Bello opines that where a plea bargain includes a charge bargain and a sentence bargain, the agreed sentence is only a recommendation to the court.⁵ This simply means that, in most cases, a court is not bound to impose the agreed terms or sentence of a plea bargain. The court in whichever case reserves the power and discretion to decide whether the sentence is the appropriate sentence for the offence having regard to the sentence prescribed for the offence by the substantive criminal law and the provisions of any applicable Sentencing Guidelines.⁶

Historically, plea bargaining is a creation of the American Criminal Justice System, although it has undergone certain stages of development. Most plea-bargaining historians agree that plea bargaining became pervasive in the United States in the second half of the nineteenth century.⁷ According to Ortom, in American Criminal Justice, plea bargaining is ubiquitous...the vital statistic is familiar; around 95% of criminal convictions are based on guilty pleas, most of which are the result of plea bargains.⁸ Also, Lawrence and his team found that in California about 40% of criminal convictions resulted from guilty pleas, often to a crime less serious than the one initially charged between 1880 and 1910.⁹ Likewise, in their study of plea bargaining in the 19th century New York City, McConville and Mirsky discovered that, while some plea bargaining occurred prior to 1845, an institutionalised guilty

¹ Administration of Criminal Justice Law of Lagos State, 2007

² *Ibid*, s 7

³ *Ibid*, s 270(4)(b)

⁴ A Bello, Overview of Plea Bargaining in Nigeria (University of Lagos Press and Bookshop Limited 2020)5; C A Mordi, 'The Use of Plea Bargain in Nigerian Criminal Law' (2018)(9) *Beijing Law Review*; 153-161, 157

⁵ *Ibid*

⁶ *Ibid*.

⁷ W Ortman, 'When Plea Bargaining Became Normal'

<<https://www.bu.edu/bulawreview/files/2020/09/ORTMAN.pdf>> Accessed 22nd March, 2023

⁸ *Ibid*, 1437

⁹ M Lawrence and others, 'The Roots Of Justice: Crime And Punishment In Alameda County, California, in W Ortman, 'When Plea Bargaining Became Normal'<<https://www.bu.edu/bulawreview/files/2020/09/ORTMAN.pdf>> Accessed 22nd March, 2023



plea system arose during the period from 1850 to 1865.¹⁰ Other authors also stated that plea bargaining was the result of rising caseloads.¹¹ The caseload pressure view explanation to comes in two ways; naïve and sophisticated versions. The naïve version posits that the rise in criminal cases in the court necessitated the emergence of plea bargain to lessen the pressure on the courts. This explanation has lots of spontaneous requests but not much evidential support.

In the Nigerian legal system, the origin of plea bargaining is traced formally to 2005 when it was first used by the Economic and Financial Crime Commission in the trial of the former Inspector-General of Police, Tafa Balogun¹² and later in the case of Diepreye Alamieyeseigha, the ex-Governor of Bayelsa State.¹³ As stated above, the concept was introduced into Nigeria by relying on section 14 (2) of their Act.¹⁴ It has been argued that Plea Bargain is unknown to Nigerian Law and should not be justified under any law which financial institutions and prosecutors have relied on.¹⁵ For instance, Adegbite noted that section 180(1) of the CPA deals with the withdrawal or stay of some counts against an accused person where he is already convicted of some other counts in the same charge and as such that cannot be likened to plea bargaining.¹⁶ The author further argued that plea bargaining on its own, presupposes an agreement made at the early stage of trial or later but certainly before conviction a plea bargaining proceeding ought to have been concluded.¹⁷

It is fundamental to state at this point that a plea bargain is different, and so should not be equated with a practice whereby a criminal charge against an accused person is withdrawn or completely dropped in order that such an accused will be used as a ‘star witness’ for the purpose of securing the conviction of his coaccused persons to plea bargaining. Plea bargaining at all material times must depict a negotiated agreement which is meant to shorten the course of trial where an accused person makes a guilty plea in order to receive a lesser punishment. Furthermore, as found in most cases, the accused must have agreed to forfeit some portions of his ill-gotten assets to the government. It should be noted that, in plea bargaining, accused persons usually forfeit a good sum of money running to millions, even billions as the case may be, whereas there is no law prescribing fine close to such amounts of

¹⁰ M Mcconville and C L Mirsky, ‘Jury Trials And Plea Bargaining’<https://www.perlego.com/book/809927/jury-trials-and-plea-bargaining-a-true-history-pdf> accessed 22nd March, 2023

¹¹ M Heumann, ‘A Note on Plea Bargaining and Case Pressure’ (1975)(9) LAW & SOC’Y REV. 515-516

¹² T Soniyi, ‘Balogun Withdraws Suit Against EFCC’ (The Punch, November 18, 2005) 8

¹³ K Adegbite, ‘Plea Bargaining in Nigeria: Any Legal Foundation?’
<https://www.academia.edu/9750096/Plea_Bargaining_in_Nigeria_Any_Legal_Foundation> Accessed 22nd March, 2023

¹⁴ Economic and Financial Crimes Commission (Establishment, etc.) Act, Cap E1 LFN 2010.

¹⁵ *Ibid.*

¹⁶ K Adegbite, ‘Plea Bargaining in Nigeria: Any Legal Foundation?’
<https://www.academia.edu/9750096/Plea_Bargaining_in_Nigeria_Any_Legal_Foundation> Accessed 22nd March, 2023

¹⁷ (n16).



money. It is on this score that it is argued that Plea bargain is not known to both the Nigerian Legal System and Criminal Justice system.¹⁸ The foregoing view is validated by the decision of the Court in *F.R.N v Igbinedion*¹⁹ where the court, per Ogunwumiju (JCA) held that, plea bargain is as at now generally unknown to our criminal justice administration and indeed our criminal jurisprudence. It should be pointed out that this court did not come to this position without considering the provisions of the Criminal Procedure Act, which has the same wordings as the EFCC Act.²⁰

Like every other concept, the plea bargain concept has been vehemently condemned by some legal practitioners and scholars. For those who argue against the concept, it is in their view that plea bargaining is unknown to the Nigerian jurisprudence especially the federal laws. It is clear that the concept is being totally criticized for being a novel concept of dubious origin and deserves no place in our law – substantive or procedural.²¹ It is also argued that it is being used to provide a soft-landing for influential and elitist law-breakers, while ordinary persons who commit crimes of less economic implications languish in prisons.²² Furthermore, in a plea bargain system, it is observed that innocent defendants decide to plead guilty to lesser charges to avoid the risk of being found guilty at trial. Plea bargains lead to poor police investigations and attorneys who do not take the time to properly prepare their cases. This is unconstitutional because it takes away the defendants' constitutional right to a trial. It is against the backdrop of the above criticisms that this article critically analyses the concept of plea bargain under the Nigerian criminal justice system.

2. EXAMINING THE LEGAL AND INSTITUTIONAL FRAMEWORKS ON PLEA BARGAIN

Constitution of the Federal Republic of Nigeria, 1999 (as amended)

The Constitution of the Federal Republic of Nigeria 1999 (as amended) is the highest law from which every other law, institution and persons derive the rights, obligations and powers to perform any act. The Constitution is the grundnorm from which other laws such as the Criminal Code Act Cap C38 LFN 2004, Penal Code Law 2004, Administration of Criminal

¹⁸ O Busola, THE CURRENT LEGAL FRAMEWORK ON PLEA BARGAIN IN NIGERIA
<<https://deliverypdf.ssrn.com/delivery.php?>> Accessed 23rd March, 2023

¹⁹ (2014) All FWLR (Pt. 734) 101 at 144

²⁰ (n 12)

²¹ (n 2F)

²² E Nsirim and E Paul, 'Challenges of Plea Bargaining and EFCC'S Performance in Nigeria' (2021)(9)(1) *International Journal of Innovative Social Sciences & Humanities Research*; 107-116,114



Justice Act 2007, Administration of Criminal Justice Law 2015, Laws of Rivers State, Economic and Financial Crimes Commission (Establishment) Act, 2004, Administration of Criminal Justice Law, 2011, Laws of Lagos State, Independent and Corrupt Practices Commission Act 2004, derive their forces for the regulation of crime in Nigeria from. It is important to state here that the Constitution which gives strength or force of law to these other laws also regulate their functions. This is specifically provided in the Constitution when it stated that, if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.²³ This simply means that every law enacted by the National Assembly must be consistent with the provisions of the Constitution, else it will be declared null and void.

The above power extends to executive powers of the government²⁴ legislative powers of the legislative arm of government²⁵ and the judicial powers of the judicial arm of government²⁶ including the institutions which are specifically created to carry out functions aimed at curbing crime and protecting the weak in the society. The CFRN 1999(as amended) also creates and ensured that there is separation of powers among the three arms of government that no arm can usurp the powers and functions of the other. To this end, the executive is vested with the execution and implementation of the law,²⁷ the legislative arm is vested with the power to make laws²⁸ and the judicial arm is vested with judicial powers and interpretation of the law.²⁹ In the case of *Abacha v Fawehinmi*,³⁰ the Supreme court in affirming the supremacy of the Constitution held inter alia, that it is necessary to get our bearings right. The Constitution is the supreme law of the land, it is the grundnorm. its supremacy has never been called to question in ordinary circumstances.

Criminal Code Act Cap C38 LFN 2004

The Nigerian Criminal Code is another extant legislation enacted to curb the perpetration of crime in Nigeria. It is the top codified law as far as crime is concerned in Nigeria and the most relied on in criminal investigation, trial and punishment of criminals. The 2004 Criminal Code Act is derived from the Nigeria Criminal Code Act 1916, Nigeria Penal Code

²³ Constitution of Federal Republic of Nigeria 1999 (as amended) s 1(3)

²⁴ *Ibid* s 5

²⁵ *Ibid* s 4

²⁶ *Ibid* s 6

²⁷ Constitution of Federal Republic of Nigeria 1999 (as amended) s 5(1) (b)

²⁸ *Ibid* s 4 (2)

²⁹ *Ibid* s 6 (1) and (2)

³⁰ (2001)51 WRN 29



Act 1960 and other criminal laws enacted by the Nigerian Parliament from time to time. The purpose of criminal law is to provide the society with a set of rules regarding legal and illegal behavior. In other words, criminal law outlines what actions and behaviors are allowed and the ones that are prohibited. It defines what actions are crimes and how to punish those who commit these crimes. For instance, housebreaking or burglary prohibited by section 411 of the Act,³¹ entering dwelling house with intent to commit felony,³² breaking into building and committing felony,³³ breaking into building with intent to commit felony,³⁴ breaking into a place of worship and committing felony,³⁵ obtaining goods by false pretense³⁶ and others.

Another vital object of the Criminal Code is to protect individual rights and freedom, public order and security, state of justice, public health and environment, and communal peace, as well as to discourage the commitment of offences. This Law defines the basic principles for criminal responsibility³⁷ and types of crimes, punishments and security precautions to be taken in this respect. The purpose of the Criminal Code is to ensure order, peace and the security of the State, its peoples, and inhabitants for the public good. It aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law³⁸ and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others.

Administration of Criminal Justice Act 2015

Pointedly, sections 270, 271, 272, 273, 274, 275, 276, and 277 or Part 28 of the Act³⁹ is tagged 'plea bargain and plea generally.' The Act specifically states that notwithstanding anything in this Act or in any other law, the 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; and (b) offer a plea bargain to a defendant charged with an offence.⁴⁰ It is further provided that the prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence, provided that all

³¹ Criminal Code Act Cap C38 LFN 2004

³² Ibid, section 412

³³ Ibid, section 413

³⁴ Ibid, section 414

³⁵ Ibid, section 415

³⁶ Ibid, section 419

³⁷ (n 16), sections 22 to 36

³⁸ (n 1) section 36(12)

³⁹ Administration of Criminal Justice Act 2015

⁴⁰ Ibid, Section 270(1)



of the following conditions are present; (a) the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt, (b) where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative; or, (c) where the defendant, in a case of conspiracy, has fully co-operated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders.⁴¹

The Act⁴² provides that where a prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, public interest, public policy and the need to prevent the abuse of legal process, such a prosecutor may offer or accept the plea bargain,⁴³ and that in such case, the prosecutor and the defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of the term of the plea bargain, which may include the sentence recommended within the appropriate range of punishment stipulated for the offence or a plea of guilty by the defendant to the offence(s) charged or a lesser offence of which he may be convicted on the charge; and an appropriate sentence to be imposed by the court where the defendant is convicted of the offence to which he intends to plead guilty.⁴⁴ Flowing from the above, section 270(5) of the Act⁴⁵ is to the effect that the prosecutor may only enter into an agreement contemplated in subsection (3) of this section after consultation with the police responsible for the investigation of the case and the victim or his representative, having had due regard to the nature of and circumstances relating to the offence, the defendant and public interest...provided that in determining whether it is in the public interest to enter into a plea bargain, the prosecution shall weigh all relevant factors, including (i) the defendant's willingness to cooperate in the investigation or prosecution of others; (ii) the defendant's history with respect to criminal activity; (iii) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct; (iv) the desirability of prompt and certain disposition of the case; and (v) the likelihood of obtaining a conviction at trial, the probable effect on witnesses and others.

⁴¹ (n 39) section 270(2)

⁴² *Ibid.*

⁴³ *Ibid.*, section 270(3)

⁴⁴ (n 29), section 270(4)

⁴⁵ *Ibid.*



Economic Community of West African States Protocol on the Fight against Corruption, 2001

The Protocol whose major aim and objectives are to promote and strengthen the development in each of the State Parties effective mechanisms to prevent, suppress and eradicate corruption, to intensify and revitalise cooperation between State Parties, with a view to making anti-corruption measures more effective to promote the harmonisation and coordination of national anticorruption laws and policies came into force on 21st December 2001.⁴⁶ By the provision of article 2, the Protocol applies whenever an act of corruption is committed or produces some effects in a State Party or whenever a national institutional system fails to provide the most basic preventive measures enumerated in Article 5 below.⁴⁷ Article 4 of the protocol talks about Jurisdiction, and provides that each State Party shall adopt the necessary measures to exercise its jurisdiction in respect of criminal offences established in accordance with Articles 6, 7 and 12 of this Protocol as long as the criminal offence was committed in its territory, offences committed by one of its nationals or by a permanent resident.⁴⁸ Article 5⁴⁹ makes provision for preventive measures. The said article states that in order to realise the objectives set out in article 2 above, each State Party shall take measures to establish and consolidate a National law, ethical guidelines, regulations and codes of conduct that would eliminate conflicts of interest, emphasise methods of recruitment based on merit and provide thorough measures aimed at guaranteeing reasonable standards of living, transparency and efficiency in the procurement and disposal of goods, works and services and in the recruitment of personnel into the public service.⁵⁰

Rome Statute of the International Criminal Court 1998

The Statute⁵¹ is the treaty that traditionally established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and entered into force on 1st July 2002. It is on record that as of November 2019, 123 states are party to the statute.⁵² The statute amongst other things, sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for States to cooperate with the ICC. The Rome Statute outlines the ICC's structure and areas of jurisdiction. The ICC does not have jurisdiction over States or Organisations, but individuals. By the

⁴⁶ Economic Community of West African States Protocol on the Fight against Corruption, 2001, article 2

⁴⁷ *Ibid*, article 3

⁴⁸ *Ibid*, article 4(1)(a)(b)

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, article 5(a)-(j)

⁵¹ Rome Statute of the International Criminal Court 1998

⁵² S A Williams, The Rome Statute on the International Criminal Court-Universal Jurisdiction or State Consent-To Make or Break the Package Deal”< <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1415&context=ils>> Accessed 20 July 2023



provisions of articles 6, 7, 8, and 8, the ICC has jurisdiction over four kinds of crimes, genocide, crimes against humanity, war crimes, and the crimes of aggression.⁵³

3. A CRITICAL ANALYSIS OF THE CONCEPT OF PLEA BARGAIN UNDER NIGERIAN CRIMINAL JUSTICE SYSTEM

This segment considers the operating principle of the concept and the set of persons that are in most cases the ultimate recipient of justice. On the surface the above look trivial but it underscores a deep sense of moralism that will help match off the arguments in this section. Thinkers like Lacey⁵⁴ have argued that although several inhuman treatment are perpetrated within the criminal processes of most societies, criminal justice aspires towards a moral and political legitimacy. According to Echewija, 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.⁵⁵ It is argued that the cardinal purpose of all criminal justice systems of the world is to curtail crime or criminal activities. To the author, the paramount function of securing these conditions of basic trust must adopt a retributivist approach to punishment.⁵⁶ Flowing from the above, a genuine fight against crime requires the creation of a wide range of distinctiveness and certainty in the institutional law framework devoid of corruption.

Coming from this ambient, it can be boldly argued that plea bargain as currently practised in Nigeria is not one of them. It is argued that the practice succeeds only in giving judicial imprimatur to crime, acts of corruption and demeans the country's image as a cesspool. The article argues that the problem with Nigeria's criminal justice system in relation to crime is not the law, but the fact that laws are not properly applied, weak institutions and personnel that embowel the intuitive ideas about justice. It is also seen that the weaknesses are in the various State mechanisms tackling criminal activities rendered plea bargaining unattractive in Nigeria.

Constitutionality of Plea Bargain in the Nigerian Legal System

Authors have continually argued that plea bargain practice is not recognised under the Constitution of the Federal Republic of Nigeria 1999(as amended), hence the concept has no

⁵³ (n 132)

⁵⁴ N Lacey, 'Getting Proportionality in Perspective: Philosophy, History and Institutions' <http://eprints.lse.ac.uk/110509/1/CJ_50_Niki_final_April_16.pdf> accessed 22 July, 2023

⁵⁵ S P Echewija, 'Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique.(2017)(3)(2) IAFOR Journal of Ethics, Religion & Philosophy, 25-45;28

⁵⁶ (n55), 27.



Constitution flavour or backup. They submit that plea bargain in criminal cases appeared on both legal and institutional regimes of the Nigerian Legal System in 2005 basically in relation to the prosecution of economic crimes by the Economic and Financial Crimes Commission, and the only legal provision which empowered the EFCC to settle criminal cases with defendants is section 14(2) of the EFCC Act.⁵⁷ The said section, pointedly, empowered the EFCC to compound any offence punishable under the Act by accepting such sums of money as it thinks fit not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.⁵⁸ This period, the EFCC was seen engaging in plea bargaining with persons accused of economic and financial crimes.⁵⁹ A typical example was the Punch Newspaper report of 2019, where late Tafa Balogun withdrew a suit instituted against the EFCC challenging the powers of commission to prosecute him and speculating that the withdrawal might not be unconnected with alleged plans for a plea bargain.⁶⁰

Notwithstanding the above, other authors have argued that the power to plea bargain is conceivable within the general discretionary powers of the Attorney General conferred by the Constitution.⁶¹ Bello opines that the Attorney General of the Federation (AGF) and the Attorney General of a State (AGS) are conferred with prosecutorial discretionary powers under sections 174 and 211 of the Constitution⁶² to institute, take over, and discontinue criminal prosecution. The Supreme Court in *State v Ilori*⁶³ held that the prosecutorial powers of the AGF and AGS is not subject to judicial review. Hence, it is argued that the prosecutorial power to plea bargain is within the wide powers granted to the AGF and AGS by the Constitution even though not expressly stated in the CFRN 1999(as amended).⁶⁴ Therefore, Bello argued that the laws merely provide a framework for the exercise of the powers of the AGF and the AGS for plea bargaining in our courts.⁶⁵

It is noteworthy to state that a defendant does not have a constitutional right to demand or insist on a plea bargain with the prosecution, but only a constitutional right to fair trial and legal assistance. Hence, whether a defendant will be offered a plea bargain depends entirely on the exercise of

⁵⁷ Economic and Financial Crimes Commission (Establishment, etc.) Act, 2004

⁵⁸ *Ibid.*

⁵⁹ T Soniyi, 'Balogun Withdraws Suit Against EFCC' (The Punch , November 18, 2005)

⁸ <<https://punchng.com/efcc-withdraws-from-gojes-n5bn-fraud-case/>> Accessed 21 May 2023

⁶⁰ ACJL 2007

⁶¹ A O Bello, 'The Emergence of Plea Bargain in Nigeria' <<https://api-ir.unilag.edu.ng/server/api/core/bitstreams/9ea4dd5b-69f9-4dae-b9a1-7880b540f4e8/content>> Accessed 21 July 2023; A O Bello, 'Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects' (2006)(1) Current Law Series, 42-67;49.

⁶² Constitution of the Federal Republic of Nigeria, 1999(as amended)

⁶³ [1983]1 S.C.N.L.R. 94.

⁶⁴ (n 17), 6

⁶⁵ *Ibid.*



prosecutorial discretion. In *Lafler v Cooper*⁶⁶, Justice Scalia dissenting stated that there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.⁶⁷ Same position applies in Nigeria and criminal cases in Nigeria. Having stated that the concept however has no constitutional origin. It is imperative to state that the first enactment in Nigeria, providing a legal framework for plea bargaining, is the Administration of Criminal Justice Law of Lagos State 2007. The law was later repealed and replaced with the Administration of Criminal Justice Repeal and Re-enactment Law of Lagos State 2011. Thereafter, the Federal Administration of Criminal Justice Act⁶⁸ and a host of other State legislations, including the Rivers State Administration of Criminal Justice Law⁶⁹ have subsequently emerged.

It is noted that other recent developments impacting the practice of plea bargain in Nigeria include the adoption of Sentencing Guidelines across the States, Practice Directions and the emergence of Plea Bargain Manual issued by the Attorney General of Lagos State for Lagos state.

Plea Bargain and the Notion of Justice

Justice has been held to be a three way traffic; justice for the accused or defendant accused of a heinous crime, justice for the victim, which if it is in a murder case, the blood is crying out to heaven for vengeance and justice for the society whose social norms and values had been desecrated and broken by the criminal act complained of.⁷⁰ As a general rule, justice and fairness are complementary concepts that cannot be separated from one another. The doctrine of equity, which is now a part of Nigerian law⁷¹ has its roots in fairness and holds that justice must be administered in accordance with what is just, right, and fair. The aphorism justice must not only be done, but must also be seen to be done is justified in light of this. It is seen that a plea bargain system which a competent court will only confirm the contents of an agreement reached between a prosecutor and a defendant negates the principle of justice. In *State v Gwonto & 4 Others*⁷² Kayode Eso JSC(as he then was) stated inter alia that, the court has for some time now laid down as a guiding principle that it is more interested in substance than in mere form...that justice can only be done if the substance of the matter is examined.

⁶⁶ 132 S. Ct. 1376, 1395 (2012)

⁶⁷ Justice Scalia quoted *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)

⁶⁸ ACJA 2015

⁶⁹ ACJL, No. 7 2015

⁷⁰ *Josiah v The State* [1985]1 NWLR (Pt 1) 125

⁷¹ Interpretation Act, section 45(1)

⁷² (1983) 1 S.C.N.L.R 142 at 160



Again, in the landmark case of *Akeredolu v Abraham & Ors*⁷³ the Supreme Court's decision was to the effect that technicality or other cruel practices in the administration of justice shuts out Justice. The court further stated that a man denied justice on any ground, much less a technical ground, grudges the administration of justice.⁷⁴ It therefore warned that it is better to have a case heard and determined on merit than to leave the Court with a shield of victory obtained on mere technicalities or other arrangement such as plea bargain arrangement. What is justice for the offender and the state, may not be justice for the victim. For justice therefore to be justice, it must meet the needs of the offender, victim and society. The essence of criminal punishment is to correct the anti-social predisposing causes in the offender, to ensure that he does not return to his old ways and not to bargain. The all-embracing rationale of criminal justice all over the world has remained just deserts, anchored on deterrence, which has, inter alia, spun custodial congestions, dehumanizing and degrading treatment of those in custody. As Karibi-Whyte JSC (as he then was) rightly stated, the repression of anti-social conducts by means of punishment is the paramount objective of the criminal law.⁷⁵ It is on the strength of the above that it is submitted that the plea bargain arrangement is variant with justice as far as the victim and society is concerned.

On the part of the accused, the issues to be considered is whether an agreement to plea bargain by a defendant could violate his Constitutional rights, and if it does, is such defendant entitled to it? To evaluate the above hypothetical construct, the decision of the Nigerian Supreme Court in the case of *Ariori v Elemo*⁷⁶ will be instructive. The Supreme Court held in this case that a waiver presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefits but he either neglects to exercise his right to the benefits or where he has two choices decides to take one but not both. When heaved to buttress further, on the extent to which a person could waive his fundamental rights, the court drew a distinction between fundamental rights that are for the sole benefit of the private individual and those that are for the benefit of the litigant and the public. The Court held that rights for the sole benefit of the private individual can be waived while waiver of the second category of rights is not permissible no matter the situation. If the law permitting plea bargaining stipulates substantive and procedural safeguards to prevent abuse of prosecutorial powers and prevents unfair treatment of defendants, the waiver of

⁷³ (2018) LPELR- 44067 (SC)

⁷⁴ *Ibid.*

⁷⁵ Karibi-Whyte, 'Groundwork on Nigerian Criminal Law' <

⁷⁶ (2001) 36 WRN 94



defendants' rights should be upheld as constitutional. Applying the decision in *Ariori v Elemo*, a challenge to the constitutionality of plea bargaining in Nigeria is not likely to succeed.⁷⁷ The laws regulating plea bargaining contain procedural and substantive safeguards to protect defendants and to ensure that they knowingly and voluntarily waive their rights, and if a defendant chooses to waive his or her right in this regard because of the speedy trial or for him to be set free, he must lose if he subsequently, turns back to challenge such waiver.

4. PLEA BARGAIN, FAIR HEARING AND HUMAN RIGHTS

The Universal Declaration of Human Rights was the first official declaration and document to guarantee human rights.⁷⁸ One of the rights set out in the declaration is the right to a fair hearing.⁷⁹ This right, along with several others, have subsequently been ingrained in the framework of other regional and international instruments such as the International Covenant on Civil and Political Rights,⁸⁰ the African Charter on Human Rights and Peoples' Rights⁸¹ Organization of American States⁸² and League of Arab States.⁸³ According to Nakibuule, the right to a fair hearing prescribes other in-built fair trial rights, such as the right to a speedy trial, to balance the protection of the accused until proven guilty with the state's retributive responsibility and society's reconciliatory needs.⁸⁴ To the authors, a fair hearing must reflect the equality of arms by way of participation by all parties in parity to a trial, which includes the accused, who is key in the trial.⁸⁵ The author submitted that plea bargaining has evolved in contemporary criminal justice as a procedure whereby an accused pleads guilty to end a trial subject to the consent of the state prosecutor.⁸⁶ The victims of the offence in cases where they take part in the process, and, primarily, with the judge's oversight on the appropriate sentence before the agreement is sealed.

In this article, it will be argued that a plea bargaining arrangement depicts a system where the right of an accused to a speedy trial is guaranteed, there is a constitutional concern as to whether the accused enters into a plea bargain and pleads guilty to the charged offence

⁷⁷ (n 32)

⁷⁸ UDHR 1948

⁷⁹ Ibid, Preamble; articles.10–11(1)(2) respectively

⁸⁰ ICESCR 1966, article 14(c)

⁸¹ ACHPR 1982, article. 7(1) and (2)

⁸² OAS 1969, Preamble; article 8(1)(2)

⁸³ LAS 2004, articles. 16 and 45

⁸⁴ S K Nakibuule, 'Plea Bargaining as a Human Rights Question'

<<https://www.tandfonline.com/doi/full/10.1080/23311886.2020.1818935>> Accessed 22 July 2023

⁸⁵ Ibid, 2

⁸⁶ Ibid.



voluntarily or out of fear or other consideration, particularly, the accused person's level of education is a serious factor to be considered in this situation. From all extant laws perused so far, the prosecutor in the government agencies tends to be given so much power, that the voluntariness of the plea arrangement between an accused and the prosecutor appears to be defined more from state and institutional perspectives than from the perspective of the accused. Nakibuule observed that in some states, plea bargaining is instituted to decongest the courts and improve court efficiency, and has resulted in the reduction of cases aged over three years old from 24% in 2017 to 17% in 2019.⁸⁷

It is argued that human rights law does not regulate the voluntary nature of plea bargaining.⁸⁸ Other instruments such as the ICESCR which proposes the right to a fair hearing does not address guilty pleas, and as a result, plea bargaining. The Human Rights Commission, explained that the UN General Assembly imposes a duty on the Court to give the accused the benefit of doubt and noted that the prosecution bears the burden to prove the guilt of the accused beyond all reasonable doubt.⁸⁹ The dilemma highlights the gap in the measure of voluntariness. In *Kambanda v Prosecutor*⁹⁰ the ICTR found *Kambanda's* claim that the detention contributed to an oppressive atmosphere which compelled him to sign the plea agreement under conditions he found oppressive did not render his plea agreement involuntary. It can be inferred from the decision-making choices of the Courts on the voluntariness of a plea bargain that there is no guidance from these International Courts on how voluntary an accused's plea bargain ought to be. Similarly, in *Håkansson and Stureson v Sweden*⁹¹ the ECHR accepted the waiver of a public trial as compliant with the Council of Europe because it was voluntary, unequivocal, and the accused was informed and had understood the consequences of the right they had waived. However, in 2014, the ECHR switched its lens on plea bargaining's voluntariness from considering it as against the backdrop of any form of implicit or explicit coercion of the accused to adopting an institutional perception of a voluntary plea bargain. It has been argued however, that there seems to be no intrinsic justification for this new paradigm.

⁸⁷ (n 43), 6

⁸⁸ *Ibid*, 22

⁸⁹ UN Human Rights Committee, 2007 para. 30

⁹⁰ ICTR 97-23-A

⁹¹ *Application no. 11855/85* <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_11855-85_001-416> Accessed 23 July, 2023



The ICTY Appeal Chambers in *Prosecutor v Milan Babic*⁹², cautioned that it is not enough for courts to simply recount the plea agreement's voluntary clause addressing the accused, which asks the accused whether a series of statements are read as true or not. The accused should be presented with his statement and interrogated to ascertain its truth. This Court disregarded the appellant's contention that the defence counsel had failed to properly inform the appellant of the nature of the charges and the consequences of pleading guilty, and found that the appellant's plea was voluntary as they had indicated at the trial that they were fully aware of both the charges against them and the consequences of pleading guilty.

CONCLUSION/RECOMMENDATION

No doubt, to ensure a speedy trial is one cardinal issue faced by many jurisdictions. Intolerable trial delays, indeterminate pre-trial detentions and indecent attitudes of the investigating officer or prosecuting counsel are compelling factors why an accused hanker for a plea bargain and most times, bargains involuntarily. It is for this reason that this article has seriously advocated that a plea bargain processes should be timed and delineated statutorily to conform to the parameters of a fair hearing. If this is done, an accused will see the plea bargaining process as predictable and certain. Procedural certainty and purposeful monitoring of the institutions and officers saddled with such responsibility will enhance the practice and build an accused's confidence, including balancing the rights of all parties.

RECOMMENDATION

In light of the above, the following recommendations are:

Firstly, robust and all-encompassing legal and institutional frameworks and sustainable enough to enhance the smooth application of plea bargain in Nigeria.

Secondly, Corruption must be tackled to enhance the practicability of the concept of plea bargain in the institutions saddled with the responsibilities of investigation and prosecution of criminal offenders.

Finally, the Provision of Section 270 of the Administration of Criminal Justice Act of 2015 and other relevant laws should be amended to allow for appeals on a negotiated judgment as it is with normal court's judgment.

⁹² International Criminal Tribunal for the former Yugoslavia (ICTY); Appeals Chamber
<<https://www.refworld.org/cases,ICTY,48ac2a962.html>> Accessed 23 July, 2023