

PROSPECTS AND PROBLEMS OF PLEA BARGAIN IN THE NIGERIAN CRIMINAL JUSTICE SYSTEM

By

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Abstract

The spate of crime all over the world has made it pertinent for the judiciary to embrace a mechanism to achieve expeditious administration and dispensation of criminal matters; bereft of injustice. Plea bargain is a legal technique which aids speedy dispensation of criminal trials through a negotiated agreement between the prosecutor and the defendant. It involves the exchange of mutual concessions, plea of guilty by the defendant, restitution and disclosure of sensitive information in consideration for the withdrawal or reduction of charges and sentencing. Nigeria, like America and England has legalized and incorporated the practice of plea bargain into its Corpus juris by the enactment of the Administration of Criminal Justice Act of 2015. This age-long principle; though novel and still evolving in Nigeria, has its share of prospects and problems spanning from being a legally useful prosecutorial technique for decongesting the correctional centers and saving the State enormous resources and time involved in putting an accused through a full trial; to being a possible avenue to encourage looting, corruption and unethical negotiations with defendants to bargain the reduction of their sentences or charges over crimes admittedly committed. This article analyzes the various perspectives of authors, case laws and theories on plea bargain in a bid to unveil the prospects and problems of plea bargain in the administration of criminal justice while proffering solutions to its problems.

Introduction

Etymologically, 'Plea Bargain' is obtained from two words- 'plea' and 'bargain'. Plea means the formal statement made in a court by a defendant in response to the charges made out by the prosecutor¹. Bargain on the other hand, means to negotiate something, either by way of mutual concession or undertaking, with the aim of arriving at an agreement.²

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¹ Black's Law Dictionary (9th Edn St. Paul MN: West. 2009).

² Ibid

Plea bargain is a negotiated agreement between a prosecutor and a defendant whereby the defendant pleads guilty to a lesser offence or to one of the multiple charges in exchange for some concession by the prosecutor; usually a more lenient sentence or dismissal of the some charges³. It is considered as a deal given by the prosecutor in consideration for the accused to plead guilty.⁴

Plea bargain can be in the form of charge bargain⁵, sentence bargain⁶, fact bargain⁷ and count bargain⁸. The quests for Justice against crimes, accelerated disposition of criminal trials and the pursuit for retribution have necessitated the paradigm shift for the adoption of plea bargain as an innovate strategic mechanism for managing criminal trials.

Essentially, contemporary judicial system focuses on the possibility of restitution of offences and the rehabilitation of offenders contrary to the tenets of penal philosophy. To this end, plea bargain is an offshoot of the justice mechanism designed to achieve restitution of offences, restoration of victims, conservation of state resources, and preservation of fair justice; while the offender is fairly compensated with concession to a lesser charge or sentence.

Although, plea bargain is only applicable in criminal trials, it bears semblance with some features of Alternative Dispute Resolution (ADR) as applicable only to civil trials. In civil suits, disputing parties have the right and are sometimes compelled by rules of court to explore alternative means of resolving their disputes. In successful situations, parties either by themselves or through their legal representative negotiate a settlement and present same to the court to adopt as consent judgment. Similarly, plea bargain basically involves parties-driven resolution of the allegation levied against the defendant.

³ *Olugbenga V. FRN* (2018) LPELR-47572(CA)

⁴ C.C. Wigwe, 'The law and morality of plea bargain' [2013] (5)(1) *port Harcourt law journal, Faculty of Law, Rivers State university of Science and Technology, port Harcourt Nigeria*, 1

⁵ J.Agaba, 'Practical Approach to Criminal Litigation in Nigeria' (3rdEdn, Bloom Legal Temple 2017) 587.

⁶ *Ibid.*

⁷ A. Chinyere, 'Plea Bargain: Immunity from Punishment?' (2018)

<<https://legalpediaonline.com/plea-bargain/>> accessed 29 July 2021.

⁸ Asalawpractice, 'Plea Bargain Under The Nigerian Criminal Justice System' (2021)

<<https://asalawpractice.org/pleas-bargain-under-the-nigerian-criminal-justice-system/#:~:text=The%20above%20statutory%20provisions%20institutionalized,guarantees%20speedy%20dispensation%20of%20justice>> accessed 2 January

The incursion and subsequent adoption of the concept of plea bargaining into the Nigerian criminal justice system was enhanced by the Economic and Financial Crimes Commission (Establishment) Act 2004⁹ and the Administration of Criminal Justice Law of Lagos State 2007.¹⁰ These enactments have given rise to several others like the enactment of the Administration of Criminal Justice Act 2015¹¹ and the Administration of Criminal Justice Laws of different states in Nigeria¹². Thus making plea bargain one of the most adopted criminal resolution tool used in combating crimes.¹³

Admittedly, what appeared to be the first attempt by the Nigerian legislature to recognize the principle of Plea Bargaining was the enactment of Economic and Financial Crimes Commission Act; which in Section 14(2) of the Act empowered the anti-graft agency to 'compound' offences penalized under the Act. It is necessary to state at this juncture that the EFCC's power to compound offences is clearly distinguishable from the principle of plea bargain. However, the commission has resorted to applying plea bargain in resolving its financial crimes due to the spike in corruption and the failure of previously established offices of the government to tackle corruption in Nigeria. As a parlance within criminal proceedings, compounding means an agreement not to prosecute a crime in consideration for the receipt of some properties from the person accused of an offence.¹⁴ The court of Appeal in *Chidilue v E.F.C.*¹⁵ held that for a crime to be compounded, there shall exist an understanding not to charge the crime, the defendant must have knowledge of the real offence carried out and receipt of something valuable as compensation for not prosecuting the crime.

The foremost application of the principle of plea bargain by the EFCC was in the case of *F.R.N v. Nwude*¹⁶ and thereafter, the commission has

⁹ EFCC Act Cap.E1 LFN, 2004

¹⁰ ACJL 2007

¹¹ ACJA 2015

¹² A. A. Adewumi, 'Plea Bargain: A Panacea For Economic And Financial Crimes In Nigeria' [2017] (37) *Ahmadu Bello University Law Journal (A.B.U.L.J)* 106-118

¹³ A. Chinwe, 'The Use of Plea Bargain in Nigerian Criminal Law' [2018] (9) *Beijing Law Review*; 153-161.

¹⁴ J. Agaba (n 6) 594.

¹⁵ (2012) 5 NWLR (pt.1292)160.

¹⁶ *Federal Republic Of Nigeria V Chief Emmanuel Nwude & 6 Ors, Id/92c/2004*

successfully achieved convictions in plethora of cases; thereby purging Nigeria of financial and economic crimes as well as efficiently managing the internal effort to combat money laundering¹⁷.

There is no doubt that the benefits of plea bargain have led to the effective administration of the Nigerian criminal justice system as espoused in the case of *FRN V. Lucky Igbinedion*¹⁸ where the court of Appeal per Ogunwumiju, J.C.A. elucidated that:

The benefits of plea bargain include: The defendant can prevent the time and expense of protecting himself at the trial, as well as the danger of a harsher penalty and the publicity that the trial brings. The state saves time and money by avoiding a full trial, both sides avoid the uncertainty of going to trial, and the judicial process avoids the hardship of performing a trial upon each crime charged.

These benefits elucidated above are prospective indicators that plea bargain when properly applied, will ensure justice for all.¹⁹

Irrespective of the fascinating prospects of plea bargain, there are vast looming problems herald by the implementation of plea bargain. Every plea bargain is subjected to judicial approval which is an essential condition precedent to the effectiveness of the plea agreement.²⁰ Failure of the judge to ensure that the plea bargain is not tainted with undue influence, bribery and corruption will undermine the whole essence of the plea agreement. Justice Dahiru Musdapher, recapped his disapproval of the use of plea bargaining by explaining that the nefarious motivation for its inclusion in our legal system is not to promote the public's interest but encourage a negative outlook of the legal system as a whole.²¹

Another looming problem is the inequity in the consideration for a reduced sentence or charge. Most often, the marginal forfeitures out of an enormous looted funds are not satisfactory considerations for a reduced sentence or charge; neither will any consideration be sufficient where

¹⁷ E. Nsirim and C. Onyige, 'The Use of Plea Bargaining in Reduction of Economic and Financial Crimes in Nigeria' [2020] (11)(4) *International Journal of Recent Scientific Research*, 38055-38065.

¹⁸ (2015) 2 NWLR (Pt 1444) 475; (2014) LPELR – 22760 (CA) 75-76

¹⁹ C. Amordi, *The Use of Plea Bargain in Nigerian Criminal Law* (Beijing Law Review 2018) 153-161

²⁰ Wigwe (n4)

²¹ I. Nnochiri, 'Plea Bargain: CJN Slams EfCC' *Vanguard Newspaper* (Nigeria, 6th March, 2012)

<<https://www.vanguardngr.com/2012/03/plea-bargain-cjn-slams-efcc/>> accessed on 2 January, 2022.

death or loss of limb occurs. Regrettably so, these problems fuel the public's disregard for the application of plea bargain in the Nigerian criminal justice system.

Evolution of Plea Bargain in Nigeria

The search for justice is as old as mankind. Human societies have witnessed the evolution of justice from self-help as seen in the state of nature, the private bargain regime in ancient tribal communities to the more sophisticated courts of justice in the contemporary human societies. The rigid state of the primitive methods of criminal justice, necessitated the development of plea bargain as a pragmatic way of dispensing criminal trials.²²

Historically, the practice of plea bargain, is traceable to the United States of America which accounts for 80% of its criminal convictions.²³ The historical development from this primordial system to the modern practice of plea bargain was succinctly captured by Jay Wishingrad who stated that, "*the contemporary prosecution will warn the accused with a lengthy prison sentence in return for a guilty plea that would significantly reduce his sentence*".²⁴

In Nigeria, EFCC was the first prosecuting body to introduce plea bargain.²⁵ Section 14(2) of the EFCC's Act which empowers the Commission to compound offences, created heightened public awareness. Subsequently, the practice of plea bargain evolved with the enactments of the Lagos State Administration of Criminal Justice Law 2007 and the Administration of Criminal Justice Act 2015. The practice of plea bargain had ever since gathered several judicial approvals.

As the first state in Nigeria to enact a statute that expressly introduced plea bargain, Lagos state broadened the awareness of plea bargain and its Administration of Criminal Justice Law pivoted further enactments like the Administration of Criminal Justice Act 2015 and the Administration of Criminal justice laws of different states.

The formal legal recognition of plea bargain in Nigeria is not without controversies. While some authors applaud the laudable achievements

²² J. Wishingrad, 'The plea bargain in historical perspective' [1974] (23) (2) *Buffalo Law Review*.

²³ O. Alubo, 'Plea Bargain: History and Origin' in E. Azinge & L. Ani (ed) *Plea Bargain in Nigeria: Law and Practice* (Lagos: Nigerian Institute of Advanced Legal Studies 2012) 1.

²⁴ O. Alubo, 'Plea Bargain: History and Origin' in E. Azinge & L. Ani (ed) *Plea Bargain in Nigeria: Law and Practice* (Lagos: Nigerian Institute of Advanced Legal Studies 2012) 1..

²⁵ Wigwe (n4)

and prospects of plea bargain application in the Nigerian Criminal Justice System, most writers and indeed the general public have, over the years, criticized the emergence of plea bargain. These never-ending criticisms are predicated on the conception that plea bargain will be used as an escape route for corrupt politicians to evade justice.

Analysis of the Diverse Perspectives on Plea Bargain

The pervasive conception of plea bargain by the public has necessitated the the need to analyze the diverse perspectives of plea bargain across case laws, statutes and writings of learned authors to ascertaining the prospects and problems of this revered principle of criminal justice.

Agaba²⁶ described Plea Bargain as an agreement of concession in criminal trial whereby the prosecutor and defendant mutually negotiate and agree to a quick disposition of the criminal proceeding by the defendant admitting guilt over a lesser number of offences or light sentence in concession for the prosecutor to reduce the charges or sentence.

Idhiah²⁷ employed an equation approach in his analysis of the workings of plea bargain. He postulated that a defendant is inclined to accept a plea offer made to him by the prosecutor if pleading guilty outweighs the risk of asserting his choice to full criminal trial. In other words, the defendant would accept to plead guilty to an offence charged against him if serving the reduced sentencing offered to him, is better than what he is likely to obtain if he goes to full trial in addition to the cost and time associated with the full criminal proceeding.

Edward²⁸ a proponent of restorative theory of plea bargain is of the view that all resolution of conflict with criminal flavor should only be resolved by those directly concerned, and to the exclusion or interference of the state through punishment. Restorative Justice (sometimes known as "reparative justice") is a type of justice that prioritizes the interests of victims, offenders, and the surrounding community over abstract legal ideas.

²⁶ J. Agaba, 'Practical Approach to Criminal Litigation in Nigeria' (3rd Edn, Bloom Legal Temple 2017) 587.

²⁷ I. Samuel, 'Plea Bargain and Guidelines for Plea bargaining' (Abuja Ministry of Justice, 2017) <<https://www.researchgate.net/publication/315216323>> accessed 17 September 2021.

²⁸ R. E. McSheffrey, *A Restorative Theory of Criminal Justice* (United Kingdom: Queen's University 2016).

Hill²⁹ and Zehr³⁰ see plea bargain as a convergence of all parties with stakes to collectively proffer solutions to the consequences of an offence while equally dealing with the aftermath of the offence.

The central theme of the above definitions of plea bargain is that it provides reparation of injury caused to the victim and redemption of the offender.³¹ They are of the view that in resolving a crime, offenders and the victims must participate in a procedure on how to make recompense and offer compensation to the victims, with the objective of both victims and offenders reintegrating into the society³²

One of the shortcomings of the perspective of these views is that not all victims of crimes can be restored. In a case of rape or murder, while the victim of rape can be taken care of medically, emotionally and psychologically, the physical harm sustained by the victim cannot be adequately restituted. Also, while restorative justice seeks to rehabilitate and re-integrate the offender, into the society, restorative justice does not really forestall reoccurrence of crime.

Although the objectives of plea bargain is to reduce the hassles of criminal prosecution and make restitution where possible while also reducing the punishments to be meted out on the defendant as compensation for agreeing to waive his right to full criminal trial, the involvement of the actual victims of the crime in the plea negotiation is usually limited. Criminal offences are often regarded as offences against the state but in the actual sense, there are actual or direct victims of the crimes who are usually shut out of the entire process of the plea bargain.

²⁹F..D Hill, '*Restorative Justice: Sketching a New Legal Discourse*' (Addleton Academic Publishers, 2014) 12.

³⁰ H. Zehr '*Restorative Justice; the concept*' in D. Herman, '*Restorative justice And Retributive Justice; An opportunity For Cooperation & Occasion For Conflict in Search of Justice*' (Oxford University Press, 2017).

³¹Criminal Justice, *The three theories of criminal justice*

<<https://www.criminaljustice.com/resources/three-theories-of-criminal-justices/>> accessed 12 September 2021.

³²Criminal Justice, *The three theories of criminal justice*

<<https://www.criminaljustice.com/resources/three-theories-of-criminal-justices/>> accessed 12 September 2021.

More succinctly, the Administration of Criminal Justice Act (ACJA) defined plea bargain as:³³

the process in criminal proceedings whereby the defendant and the prosecution work out a mutually acceptable disposition of the case; including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformity with other conditions imposed by the prosecution, in return for a lighter sentence than that for the higher charge subject to the Court's approval.

Notwithstanding the shortfalls of these revered views, to Udosen,³⁴ and Price³⁵, the concept of plea bargain finds justification in restorative justice. It is noteworthy that most of the above perspectives show divergent views of the principle of plea bargain which encapsulates the prospects and problems of plea bargain in Nigeria. However, the pertinent question begging for an answer is whether or not the prospects of plea bargain outweighs its problems.

Judicial Attitude and The Prospects of Plea Bargain

The role played by the court in a plea bargain agreement is crucial to the acceptability or rejection of the plea agreement entered into by the prosecution and the defendant³⁶. The trial judge may reject the plea agreement and order a full trial if the plea agreement is tainted with undue influence, coercion in inappropriate negotiations.³⁷ Hence, the court scrutinizes the propriety of such agreement before a conviction.

In the case of *Gava Corporation Limited v FRN*,³⁸ the significance of the court in ascertaining the component of a valid plea bargain was reinstated when the court opined that surely, the goal of a plea deal isn't only to end a trial,

³³ ACJA 2015, S 494.

³⁴U. Jacob, 'The Application of Plea Bargaining and Restorative Justice in Criminal Justice in Nigeria' [2020](5) *Global Journal of Human-Social Science*, 10 <https://www.researchgate.net/publication/347450255_The_Application_of_Plea_Bargaining_and_Restorative_Justice_in_Criminal_Trials_in_Nigeria_The_Application_of_Plea_Bargaining_and_Restorative_Justice_in_Criminal_Trials_in_Nigeria> accessed 17 July 2021.

³⁵ J.D.M. Price, 'Personalizing Crime, Dispute Resolution Magazine', Fall (America November 2001)<<https://thenigerialawyer.com/restorative-justice-a-panacea-to-crime-prevention-in-nigeria-by-james-hope-esq/>> accessed 25 August 2021.

³⁶ Wigwe (n4)

³⁷ACJL Lagos, 2011, Section 76(7) ACJA 2015, s 270(1).

³⁸ (2019) 10 NWLR (pt. 1679) 139.

there must be a deal between the prosecution and the appellant in which the appellant consented to admit guilt to a lower crime or to one of several crimes in return for some concession. The court further held that the idea of plea bargaining plainly acts *in personam*, rather than via *privity* or *proxy*, and must be a conscious and intentional conduct between prosecution and accused.

As provided for in the Administration of Criminal Justice Act 2015, the plea agreement must be in writing with the signature of both parties before it can be accepted by the court³⁹. Hence, it is only the written negotiation that can serve as evidence of plea bargain between the prosecution and the defendant before the court. It is also worth noting as stated by the court that the concept of plea bargain operates *in personam* and as such, a party who is not a party to a plea negotiation cannot seek to benefit nor be subjected to the terms of such arrangement.

The Supreme Court's decision above is on all fours with the Supreme Court case of *Romrig Nig. Ltd v Federal Republic of Nigeria*⁴⁰ wherein the apex court reiterated the need for plea bargain to be in written form and the terms be clearly stated, being the evidence for establishing the existence of a plea bargain between the prosecution and the defendant. The resultant effect of a plea bargain duly entered is in a defence of *autrefois convict* for the defendant⁴¹. Thus, the mere negotiation between the prosecution and the defendant leading to the withdrawal of charges against the defendant does not *ipso facto* mean that plea bargain had been reached⁴². Also, where more than one defendant is charged for certain offences, one of the defendants cannot enter a plea bargain on behalf of other defendants⁴³.

These principles have weighed heavily on the minds of the courts when handling cases on plea bargain. Thus, the courts have been circumspect in criminal matters to ensure that parties are not coerced into unconscionable plea bargain that would be inimical to the benefit of a victim, illegal or against public policy.⁴⁴ The Presiding Judge or Magistrate is empowered to examine, consider, and evaluate the sentence stated in the plea agreement and if the Presiding Judge believes the reduced sentence is not

³⁹ ACJA 2015, s270(7).

⁴⁰ (2018) 15 NWLR (pt. 1642) 284.

⁴¹ *PML (NIG) LTD v FRN* (2017) LPELR-43480 (SC); (2018) 7 NWLR (pt.1619) 448.

⁴² *Ibid.*

⁴³ *Federal Republic of Nigeria v Lukcy Igbinedion* (2015) 2 NWLR (pt. 1444) 475.

⁴⁴ *Iboyi Kelly v Federal Republic of Nigeria* (2020) 14 NWLR (pt. 1745) 479 P. 538 to 539.

proportionate to the seriousness of the crime perpetrated, the presiding Judge may impose a harsher penalty, subject to the conditions established or laid out in section 270(11)(C) of the ACJA.

It is important to state that though plea bargain is a negotiation which takes place between a defendant and the prosecution, where the former pleads guilty to the lesser offences, while the latter agrees in turn to drop one or more of the charges against the defendant⁴⁵, the Court is bound to diligently ensure that the defendant's plea of guilt represents the facts supplied by the prosecution.⁴⁶ However, where the court chooses to accept some terms of the plea bargain but vary the sentence contained in the plea bargain, the court must first inform the defendant or his counsel of the heavier sentence he intends to impose.⁴⁷ This gives the defendant the opportunity to withdraw his plea of guilt or accept the heavier sentence by the court. Failure of a court to adhere to this constitutional requirement vitiates the conviction and sentence of a defendant whose plea bargain was varied by the court.⁴⁸

The Nigerian courts have recorded successful convictions by applying the principle of plea bargain in the cases of *EFCC v Tafa Balogun and Federal Republic of Nigeria v Cecilia Ibru*⁴⁹ wherein the court in accepting the plea bargain of Tafa Balogun reduced his seventy (70) count charges to eight count charges of which he pleaded guilty, forfeited his properties and paid N500,000.00 on each of the eight count charges and was sentenced to six months imprisonment while the former Chief Executive Officer and Managing Director of Oceanic International Bank Plc.; Mrs. Cecilia Ibru⁵⁰ was convicted and sentenced to 18 months imprisonment on a three-count charge with forfeiture of her properties after a plea bargain respectively.

From the cases above, it is notable that the prospects of judicial implementation of plea bargain in the administration of criminal justice is undoubted. The courts have expressed a receptive attitude towards the recognition and enforcement of plea bargain in Nigeria. The courts have

⁴⁵N. Elizabeth & P. Eke, 'Challenges of Plea Bargaining and EFCC'S Performance In Nigeria' [2021](9)(1):107- *International Journal of Innovative Social Sciences & Humanities Research* <116https://seahipaj.org/journals-ci/mar-2021/IJISSHR/full/IJISSHR-M-11-2021> accessed 20 February 2022.

⁴⁶ ACJA 2015, 274(1)(c).

⁴⁷ ACJA 2015, s270(11)(c).

⁴⁸*Olumide Agbi v Federal Republic of Nigeria* (2020) 15 NWLR (pt.1748) 416.

⁴⁹ Unreported Suit No: FHC/L/297C/2009.

⁵⁰ *F.R.N v Mrs Cecilia Ibru Charge FHC/L.297C/2009*.

unanimously opined that plea bargain provides some prospects to the administration of criminal justice in Nigeria, particularly in the decongestion of judges' dockets, accelerated disposition of trials, restitution of crimes and compensation of victims.

Problems and Limitations of Plea Bargain in the Nigerian Criminal Justice System

Certain judicial personalities have questioned the practice of plea bargain in the Nigerian Justice System. Hon. Justice Dahiru Musdapher; past Chief Justice of Nigeria opined that "the idea of plea bargain is not only problematic, but was never part of the Nigerian legal system – at least until the EFCC snuck it into our statutory law"⁵¹ According to the learned jurist, the practice threatens the Nigerian criminal justice procedure.

Similarly, a former Justice of the International Court at The Hague, Prince Bola Ajibola (SAN) expressed that plea Bargain undermines the credibility of the entire anti-corruption procedure and those found culpable of any crime perpetrated in Nigeria ought to be duly and severely punished.⁵²

Most scholars argue that plea bargain principle is inconsistent with the Nigerian Constitution and unknown to the Nigerian criminal justice system.⁵³ They express that under section 36 of the 1999 Constitution as amended, an accused person is presumed innocent until proven guilty⁵⁴ but the adoption of plea bargain shuts the door of fair hearing against the defendant. It is trite that fair hearing is the right to present evidence, to cross-examine, among other things"⁵⁵.

Some scholars further state that the constitution having failed to expressly provide for the adoption of plea bargain implies that the practice of plea bargain is contrary to the provisions of the Constitution and should not be practiced.⁵⁶

⁵¹ T. Eze and A. Eze, 'A critical appraisal of the concept of plea bargaining in criminal justice delivery in Nigeria [2015](3)(4) *Global Journal of Politics and Law Research*, 31–43.

⁵² T. Eze and A. Eze, 'A critical appraisal of the concept of plea bargaining in criminal justice delivery in Nigeria [2015](3)(4) *Global Journal of Politics and Law Research*, 31–43..

⁵³ N. Okwori, *Plea Bargaining: A Trial Procedure that Negates Fundamental Rights of the Accused* (SAGE Publication 2010).

⁵⁴ *ibid.*

⁵⁵ H C Black, *Black's Law Dictionary*, (St. Paul, M N: West Publishing Co., 1999) 597.

⁵⁶ L. Azubuike, 'Plea Bargaining in Nigeria under the Administration of Criminal Justice Act' [2020] (1) *African Journal of Legal Studies* <<https://doi.org/10.1163/17087384-12340065>> accessed 27 August 2021.

Beyond these constitutional lacunae is a streak of problems in the implementation of plea bargain in Nigeria. Authors argue that there is the tendency for abuse of the use of plea bargain especially by the Attorney-General who already wields enormous powers in criminal administration to accept a plea bargain⁵⁷ and since the laws on plea bargaining do not necessarily provide guidelines as to the application of the process, the use of the process is to the discretion of the Attorney General and the prosecution⁵⁸ which may open the gates of bribery and corruption.

In a country like Nigeria, it is common knowledge that the sentences given to those who commit acts of corruption are ridiculously little in comparison to the crime committed.⁵⁹ It is usually treated as an escape route from retribution. According to some writers, a guilty plea based on plea bargaining may guarantee conviction which is different from serving the full penalty provided in the enabling Act.⁶⁰

A very fundamental defect in plea bargaining is the fact that victims may not feel that justice has been done where the court accepts the plea bargain of a defendant when the victims may have suffered emotional, physical and psychological damages⁶¹ or even demoralizing and traumatic injuries,⁶² which would be incomparable to the leniency in a plea bargain principle.

Also, the remote application of plea bargaining in mostly financial matters has displayed great limitations. In Nigeria, the application of plea bargain is mostly limited to high profile financial cases dealing with corruption which is contrary to its usage in the United States that has applied it to try over 90% of all criminal cases.⁶³

⁵⁷ K.G. Muhammed 'An Appraisal of the Power of Nolle Prosequi under the Constitution of the Federal Republic of Nigeria' [2014] (17) *Nigerian Law Journal*, 128.

⁵⁸ A. Chukwunweike, A. Ogbuabor, O. Nwosu and Edwin O. Ezike, 'Mainstreaming ADR in Nigeria's Criminal Justice System' (2014) (45)(1) *European Journal of Social Sciences*, 1450-2267.

⁵⁹ R. A. Aborisade and O. A. Adeleke, 'One rule for the goose, one for the gander? The use of plea bargaining for high profile corruption cases in Nigeria' [2018] (12)(2) *Africa Research Review* 12.

⁶⁰ V. Egwemi and I. B. Babangida, 'Corruption and Corrupt Practices in Nigeria: An Agenda for Taming the Monster' [2012] (14) (3) *Journal of Sustainable Development in Africa*, 48.

⁶¹ K. hKipnis, 'Criminal Justice and the Negotiated Plea' [1976] (86)(2) *Ethics*, 93.

⁶² Jacqueline Ross, 'The Entrenched Position of Plea Bargaining in United States Legal Practice' [2006] (54) *Am. J. Comp. L.* 717.

⁶³ A. Adebayo, 'A Review of Plea Bargain Concept in the Anti-Corruption War in Nigeria' [2018] (5)(1) *Brawijaya Law Journal*, 1.

The ACJA has provided that the judgment reached by a court through a plea bargain cannot be appealed against.⁶⁴ This provision is seen as a breach of the ones constitutional right especially when a prosecutor may have intimidated the defendant or swayed the defendant unduly into pleading guilty and accepting a plea bargain.⁶⁵ Also, preventing the defendant from appealing a conviction obtained through a plea bargain will shut him of the opportunities of utilizing fresh pieces of evidence that may not have been available at the time of the trial but have become possible at a later time on appeal.⁶⁶ These daunting problems militate the smooth implementation of plea bargain in Nigeria.

The Constitutionality of Plea Bargain in Nigeria

I. The Constitution of the Federal Republic of Nigeria 1999 as amended.

The Constitution of the Federal Republic of Nigeria 1999 as amended, has no express provisions on the application of plea bargain but provides enabling provisions that establishes certain legal principles applicable to plea bargain in the Nigerian criminal justice system. The doctrine of presumption of innocence stands as the cornerstone of the Nigerian criminal justice system where every person accused or alleged to have committed a criminal offence is presumed to be innocent until proven guilty.⁶⁷ Hence, the defendant is treated as innocent and the evidential burden of proving his guilt lies on the prosecution.⁶⁸ This legal principle as applicable in the criminal justice system in Nigeria is laid down in section 36(5) of the 1999 Constitution, which provides that a person accused of committing a crime is deemed innocent until proven guilty; Provided, that nothing in this section will be construed to invalidate any legislation only because it places the burden of proof on such individual.

Two very important points are inferable from the provision above. Firstly, a defendant is innocent of a crime until the commission of such crime has been proven by the prosecution and a successful proof of criminal liability

⁶⁴ ACJA 2015, s270 (18).

⁶⁵ D. S. McConkie, 'Judges as Framers of Plea Bargaining' [2015] (26) *Stanford Law & Policy Review*, 61.

⁶⁶ R. Nobles, and D. Schiff, D. 'The Supervision of Guilty Pleas by the Court of Appeal of England and Wales Workable Relationships and Tragic Choices' [2020] (31) *Crim Law Forum*, 513–552 .

⁶⁷ *State v Ajayi* (2016) LPELR-40663 (SC); *Uche Williams v State* (1992) 10 SCNJ 74.

⁶⁸ Evidence Act 2011, s138; *Ani v State* (2000) 6 SCNJ 98.

is established at the point of conviction by the court. Secondly, the Constitution expressly recognizes and validates the evidentiary rules on the burden of proving criminal offences and the shift in criminal proof. Fundamentally, the prosecution has the onerous evidential duty of proving the guilt of a defendant and the proof must be beyond reasonable doubt.⁶⁹

However, the effect of a guilty plea made by the defendant at the commencement stage of a criminal trial, is that it lessens the burden of proof on the prosecution.⁷⁰ This does not however mean that the evidential burden of proof on the prosecution has been discharged; the prosecution is required to narrate the fact alleged and establish that all the ingredients of the offence have been admitted by the defendant before the guilty plea can be sustained.⁷¹

Hence, does the practice of plea bargain negate the constitutional presumption of innocence of an accused person? The answer is in the negative. Section 36(5) of the Constitution clothes the defendant with innocence until proven guilty. The act of negotiating a defendant's plea bargain does not strip the defendant of the status of being an innocent person neither does adducing evidence by the prosecution against the defendant in a full criminal trial *ipso facto* mean that the guilt of the defendant has been proven.

The task of ascertaining the guilt of the defendant is the duty of the Court at the stage of conviction. Thus, plea bargain does not operate to negate the constitutional presumption of innocence accorded to an accused because the plea bargain is still subject to acceptance by the trial judge who is required by law to re-arraign the defendant before accepting the plea, verify the voluntariness and authenticity of the defendant's guilty plea, evaluate the ingredients of the offence and afford the defendant the full option of changing his guilty plea.⁷²Hence, the defendant may at the stage of the arraignment, plead not guilty, thus invalidating the plea agreement.

In any case, the defendant is in the eyes of the law free and innocent until the Court is satisfied of the defendant's guilt regardless of a plea bargain. The Court of Appeal in *Kayode and 2 ors. V. State*⁷³ further provided that if

⁶⁹Evidence Act 2011, s135.

⁷⁰Agaba (n24) 649.

⁷¹*Ibid*, 647.

⁷²J. Agaba (n24) 603.

⁷³ (2008) All FWLR (pt. 402) 1014.

the defendants admit their guilt, the court was to still reevaluate the evidence and the charge and guarantee that the defendants understood the basic purpose and significance of the charge and plea through question and answer sessions that had to be recorded, before entering a guilty plea and sending the accused persons to prison.

The duties of the court where the defendant willingly pleads guilty or upon a plea bargain are substantially the same. Thus, a defendant who executes a plea bargain is presumed innocent until the court evaluates the ingredients of the offence vis-à-vis the guilty plea and convicts accordingly. This is so because where the court is of the opinion that the plea bargain has been procured by undue influence, coercion or inappropriate means, the judge may dismiss the plea agreement, reverse the plea of guilty to one of not guilty and order a full trial.⁷⁴

II. Administration of Criminal Justice Act, 2015

Notwithstanding the above constitutional x-ray of the doctrine of plea bargain, the legislative enactment of the Administration of Criminal Justice Act is a more comprehensive improvement on some of the shortcomings in the provisions of the Constitution.

The ACJA expressly defines plea bargain as the criminal procedure wherein the defendant and the prosecutor are allowed to work out a mutual agreement within the confines of the law, subject to the Court's approval.⁷⁵

On who can initiate the option of plea bargain, section 270(1) of the ACJA provides that the Prosecutor, the defendant or the counsel acting on behalf of the defendant may initiate the plea bargain.

Hence, contrary to the often misconceived perspective that only the prosecution can initiate a plea bargain, the Act has expressly made it clear that either the prosecution, on behalf of the state, or the defendant, either by himself or through his legal representative, can initiate the option of plea bargain. By the provision of S.270 (2), a plea bargain can only be executed with the victim's or his representative's approval, after or during prosecution's evidence, but before the presentation of evidence of the defence. To this end, the prosecution shall afford the victim or his representative the opportunity of making contributions towards the content of the plea agreement and the inclusion of compensation or

⁷⁴ ACJL Lagos 2011, s76 (7)(b).

⁷⁵ ACJA 2015, s 494.

restitution order in the said plea agreement.⁷⁶ All assets, money or property agreed to be returned to the victim under the agreement shall be ordered by the trial judge or magistrate to be transferred to the victim or the representative,⁷⁷ to uphold the tenets of justice.⁷⁸

Another commendable provision of the Administration of Criminal Justice Act on plea bargain is that plea bargain in Nigeria must be unequivocally clear in writing. Unlike in United States of America or some civil law jurisdictions where plea agreement can be oral, all plea agreement negotiated and executed by parties in Nigeria must be in a written form, with terms expressly stated, defendant's admission of guilt unequivocally stated and a caveat that the defendant had been reminded of his right to be silent.⁷⁹

Although, the Act in section 270(8) excludes the participation of the trial judge or magistrate in the conversations and agreements that leads to the plea bargain execution; however, the judge has the duty to allow the defendant verify the accuracy of all terms in the plea agreement⁸⁰ and where the sentencing agreed to is heavier than what would have been imposed, the judge or magistrate is obliged to impose the lesser sentencing and vice versa.⁸¹ These provisions of the Act are mandatory and non-compliance will render the plea agreement voidable.

The doctrine of *autrefois acquit* operates as a defence in favour of the defendant with respect to offences he pleaded guilty to and those withdrawn during the negotiation of the plea bargain.⁸² Also, where a conviction is made sequel to the plea bargain, judgement of the court in that regards is made final and cannot be appealed by either party, except on the grounds of fraud.⁸³

It is worthy to note that the provisions of the ACJL Lagos State as well as other states are substantially the same with the provisions of the ACJA, save for a few differences.

⁷⁶ ACJA 2015, s 270(6).

⁷⁷ ACJA 2015, s 270(12).

⁷⁸ *Ibid*, s 270(3).

⁷⁹ ACJA 2015 s 270(7) .

⁸⁰ ACJA 2015 s 270(9) .

⁸¹ ACJA 2015, S 270(10) & (11).

⁸² *Ibid*, S 270 (17).

⁸³ *Ibid*, S 270(18).

Conclusion

The increase in the spate of crime in Nigeria has overburdened and overwhelmed the judiciary and has led to prolonged trials, depletion of resources and congestion of the courts and prisons despite the statutory provisions of plea bargain in the ACJL of different states, ACJA and EFCC Act.

Unlike in other foreign jurisdictions, the Nigerian courts are sometimes weary in applying plea bargain in the administration of its Criminal justice because plea bargain is largely perceived as an immoral concept of criminal law that secures the reduction of a convict's sentence. The courts in applying the legal provisions governing plea bargain should strive to ensure that every defendant's constitutional right is protected and upheld as well as the rights of the victims.

The apt application of this criminal law principle has been useful and effective in the successful prosecution of high profile corruption cases in Nigeria like the trial of former Inspector General of Nigerian Police Tafa Balogun, former Governor of Bayelsa and Edo States, D.S.P. Alamiyeseigha and Lucky Igbinedion, former Managing Director of defunct Oceanic Bank Plc. Mrs Cecilia Ibru and chief Bode George.

Despite the need for a constitutional amendment to incorporate the concept of plea bargain, the statutory provisions for plea bargain in Section 13 of EFCC Act 2010, Administration of Criminal Justice law of Lagos State 2021 and the Administration of Criminal Justice Act 2015 are consistent with the provisions of the constitution. Also, the ACJA and EFCC Act should be amended to provide for a fixed percentage of not less than 90% of proceed of corruption to be refunded by the defendant to the State or victim, to deter intending criminals from abuse of plea bargain.

The prospects of plea bargain will also be boosted when the application of plea bargain is broadened to incorporate other crimes like stealing, affray, murder, burglary, breaking and entering which will in turn facilitate the criminal process. From the above, it is obvious that the prospects of plea bargain outweighs its problems and abolishing any practice that has immense prospects because of few problems could be an act of dispensing a baby with the bath water. Hence, the problems associated with plea bargain in Nigeria will be history if tackled with tenacity. Femi Babafemi, an EFCC Spokesperson expressed his view that Plea bargaining eliminates expenses because most Nigerian criminal laws do not require criminals to face the death penalty. So, in order not to lose everything, both the government and the people should apply plea bargain.⁸⁴

⁸⁴ G.O. Adeleke, 'Prosecuting Corruption and the Application of Plea Bargaining in Nigeria: A Critique' [2012] (3)(1) *International Journal of Advanced Legal Studies and Governance*, 53.