THREE

EVALUATING THE APPLICATION OF PLEA BARGAIN IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA

Yiibe Richard One-In-Number Nenalebari,*
&
DR. M. A. Nwanyanwu**

Abstract

The call for the introduction of plea bargain into our criminal procedure law may not be the solution for our impaired criminal justice system, but certainly it is part of the criminal justice reform package to serve as part of the solution to address the challenges facing our criminal justice administration. The quest to find more efficient means and method of resolving criminal matters in our criminal justice system is a journey that will continue even in more advanced jurisdictions. The option of plea bargain as a concept of resolving criminal matters has been identified as a potent alternative to punishment in the sense of imprisonment. The use of negotiated concessions has been adjudged to benefit all parties more than the conventional method of imprisonment. The concept has been in existence around early 19th century in the United States. The system enjoys state wide acceptability in the United States to the point that 90 percent of cases are resolved using plea bargain in the United States. As has been seen in the research, the idea behind plea behind is that an accused person agrees to plead guilty for a lesser charge with minimal punishment accompanying same in exchange for a plea of guilty. The fundamental rationale for the introduction of the concept as opposed to the conventional punishment is to reduce the cost of prosecution and also to save the time that is usually known for litigations in Nigeria. Again, the criminal justice system in Nigeria is overburdened with a lot of cases; the quick disposal of the matter using plea will help decongest the prisons and also the courts. The paper considered the issue of appeal of plea bargain judgement, the constitutionality of plea bargain, the issue of the level of involvement of the court to the negotiation of a plea arrangement. The research in considering these research problems adopted a doctrinal analysis of primary and secondary materials. The research concluded by recommending that Section 270(18) ACJA 2015 be amended to allow for appeals of plea bargain judgements, The ACJA should be amended to give the court more role, amend the laws to allow the judges more influence in the preparation of the agreement Proper definition of the offences that can be plea bargained, Proper ascertainment of the compensation for the victim in matters of fraud, Expansion of the offences exempted from plea bargain and Amend the ACJA to define the scope and application of Plea Bargain as a non-custodial sentence.

Keywords: Plea Bargain, Criminal, and Justice

1. Introduction

The concept of plea bargain under the Nigerian Criminal Justice system is one of the statutorily recognized tools or means used in disposing of criminal trials. The criminal law tool of plea bargain is deeply rooted in the criminal jurisprudence of the United States of America.[2] There is a very strong dependence on the principle of plea bargain in the United States as more than 90 percent of the

*LLB, BL

** LLM, PhD (India) Postgraduate Coordinator Faculty of Law, R S U.

[2] B. Adetomiwa, 'the concept of Plea Bargain in Nigeria (2018) available at www.Modaq.com/Nigeria/Crime/753394/The Concept-of-Plea-Bargain-in-Nigeria

accused persons convicted in States and Federal courts plead guilty rather than exercise their right to stand trial before the courts.[3]

The principle of Plea bargain basically consists of the exchange of official concessions for a person standing trial for a criminal act signalling some sort of self-conviction. These concessions may relate to the sentence imposed by the court or the Punishment that the Prosecutor may prefer against the accused, the offense charged or a variety of other conditions.[4]According to Alschuler[5] a plea bargain may be explicit or implicit and that it could emanate from a number of officials. However, the Provisions of Section 270 (7) of the Administration of Criminal Justice Act (ACJA) Provides that a plea bargain must be in writing. This removes the option in Nigeria for a plea bargain to be assumed by Parties and not clearly written and expressed by parties.

The closet attempt at introducing the principle of plea bargaining into the *corpus juris* of Nigerian legal framework and criminal jurisprudence was the introduction of the Administration of Criminal Justice Law (ACJL 2007) of Lagos. Similarly, the economic and Financial Crimes Commission Act 2004 (EFCC Act) also made some attempt at introducing the principle of plea bargaining into the Nigeria criminal jurisprudence. Section 14 (2) of the EFCC Act 2004 Provides as follows:
Subject to the provisions of S.174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General to institute, continue, takeover or discontinue any criminal proceedings against any person 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, exceeding the amount to which that person would have been liable if he had been convicted of that offence.

Since the adoption of the principle into the jurisprudence of Nigeria's Criminal Law, it has been a veritable tool in dispensing and ensuring a just resolution of corruption matters involving public officers[6]. Ordinarily, the original intendment of the principle is to ensure speedy conclusion of some criminal matters especially where concessions can be made to allow for a just resolution of the matters where the economic advantage of government will be covered and protected, especially if the funds embezzled are public funds. Traditionally, crimes are usually regarded as fundamentally immoral acts against the state, which inevitably includes the victim and those the actions may affect, which deserves some measure of punishment.[7] The most relevance of the sanctions under criminal laws has been argued to regulate public order and decorum[8], to cause deterrence[9]. However, interestingly there has been an alarming controversy over the use of Plea Bargaining in Nigeria. There are strong indications that the prosecuting agencies are using the openings in the law to resolve high profile criminal financial cases.

There are basically two popularly known types of plea bargain. These two agreements will result to exchange of concessions between the accused person and the prosecutor. When the accused person voluntary agrees to plead guilty to the offence charged, he has the opportunity to decide whether to plead guilty to the charges or not guilty. The concessions made and agreed by the parties can either be in the form of a reduction in the charge against the accused or reduction in the form of sentence on the accused.

The dimension of the research will consider Plea bargaining as a form of restorative justice that is ultimately meant to create a balance between punishment and the economic implications involved, especially considering the fact that the subject of a crime may not be forfeited and the said proceeds lost to the accused person. The paper will consider the reception and application of the doctrine into

[3] A. Alschuler, 'Plea Bargain and its History' [1979] Vol. 79 Journal of Chicago Law school, 30
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] P.A Aidonojie and P. Egielewa, 'Criminality and the Media: Perception of the Amotekun Security Agency in Nigeria' [2020] (vol. 47), International Journal of Comparative Law, Legality and Philosophy, 57
[8] Ibid
[9] L.C Opara, 'The Law and Policy in Criminal Justice System and Sentencing in Nigeria' [2014] (7) International Journal Of Asian Social Sciences, 887-88

the criminal justice of Nigeria and also the relevance it has continued to build. The paper will consider these with the context of its importance to the quick and economical disposition of criminal matters that usually takes a whole lot of time to exhaust. The impact it has on the correctional facilities in the country is another area where the concept is intended to apply.

1.2 Meaning of Plea Bargain

The term Plea Bargain was defined by Langbehim as a non-trial mode of procedure, wherein the accused need not go through the rigors of prosecution and the state need not waste scarce resources to prosecute the accused[10]. He further opined that though the non-trial procedure downplays the constitutional provision that every citizen charged in a criminal matter is entitled to a free and fair trial within the confines of the law. According to him, a plea bargain takes place the moment the defendant in the matter concedes to waive his guaranteed right to fair criminal trial by pleading guilty to the offence he has been charged with in exchange for a reduced sentence or other concessions[11]. According to George beall[12], Plea Bargain is usually seen within the prism of negotiated concessions and compromises between the defendant and the prosecuting authorities. The concessions afford both parties the allowance of negotiating terms which will inevitably bring about the concessions that will resolve the matter without resorting to full blown trial which may take years to resolve[13].
According to Albert Alschuler:

> Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction. These concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offense charged, or a variety of other circumstances. They may be explicit or implicit; and they may proceed from any of a number of officials. The benefit offered by the defendant, however, is always the same entry of a plea of guilty[14].

Plea Bargain typically takes a form of compromise between the parties concerned that is prosecution and defence, whereby the defendant relinquishes the right to go to trial, while the prosecutor surrenders the right to seek the suppose sentence against the criminal defendant.[15] For instance, where the criminal accused commits an offence of homicide which has the punishment for death, the prosecutor will plea bargain with the criminal accused person to plead guilty on the offence of manslaughter which has punishment of life imprisonment, so as to avoid the hurdle of going into full trial and at the same time achieving the conviction of the accused.

1.3 Concept of Criminal Justice System

The criminal Justice system of a country represents a system or structure through which the laws guiding the existence and order of such a society are applied which aids the protection and application of the rights of its citizens.[16]

According to Ukwayi and Okpa[17] sees criminal justice system as: *'An embodiment of crime control techniques which usually represents an entire government agency that function as entities of the state to enforce set out rules which are for the maintenance of law and order'*. The need to develop and also evolve a system that would help government to regulate and also minimize deviant conduct in society has continued to influence the institutionalization of a criminal justice system. According to Ogunode[18], the criminal justice system is a collection of several institutions of government which a

[10] J.H Langbehim, "Understanding the Short History of Plea Bargaining" [1979] 13 Law and Society, 261
[11] Ibid
[12] G beall, "Principles of Plea Bargain" [1977] 9(1) Loyola University Chicago Law Journal, 175-176.
[13] Ibid
[14] A. Alschuler, 'Plea Bargain and its History' [1979] Vol. 79 Journal of Chicago Law school, 30
[15] S Oguche, "Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: a Revolution, Vaccination against Punishment or Mere Expediency?" [2011] 1 no. 1 NIALS Journal of Law and Development, 49
[16] E.E.O Alemika, 'Crime and Public Safety in Nigeria: Challenges and Prospects' [2014] (2) Cleen Foundation, 205
[17] J.K Ukwayi & J.T Oka, 'Critical Assessment of the Nigerian Criminal Justice System and the Perennial Problem of Awaiting Trial in Port Harcourt Maximum Prison, Rivers State'[2017] 16(1), Global Journal of Social Sciences,7-25
[18] S.A Ogunode, 'Criminal Justice System in Nigeria; for the Rich or the Poor' [2015] 4(1) Humanity and Social Sciences Review, 27-39

person accused of a crime has to go through to the point of conviction, sentencing and imprisonment, which is the point of punishment. For some, the criminal justice system is a socio-legal institution of the state that has the responsibility of ensuring and maintaining law and order in society. This invariably makes the criminal justice system a state controlled or social justice tunnel where those accused of violating criminal codes must pass through to until the cases against them is dispensed with to a logical conclusion.

For Iwarimie-Jaja[19], the process of the criminal justice of a state can only become entrenched when the various components ensure the co-ordination of their own duties without any sort of infraction from the other and other machineries of the state. It is important to note that in ensuring that law and order is maintained through the instrumentality of the criminal justice system, there are wide ranges of factors that tend to define the trajectory of justice[20]. For example, it has become common knowledge in Nigeria that the criminal justice system does not significantly represent the interest of the masses and the common man and as such provides a skewed sense of justice for the ordinary man[21]. This invariably the reason why Nigeria and most African countries are still struggling with the challenges of the criminal justice delivery as a result of seeming inefficiency of the criminal justice system in dealing with deviant conduct that tend to undermine the sanctity of life and order in society[22].

According to Dambazau[23] criminal justice can be defined as a legal process or as an academic discipline. That as a legal process, it involves the procedure of processing the person accused of committing crime from arrest to the final disposal of the case. On the other hand, as an academic discipline, criminal justice provides a thorough understanding of the criminal justice system in relation to the society. Bohm and Haley[24] describe criminal justice system as both an institution and a system. The criminal justice system is essentially an instrument of social control; society considers some behaviour so dangerous and destructive that it either strictly controls their occurrence or outlawed them out rightly[25]. Like the family, schools, organized religion, media, and the law, criminal justice is an instrument of social control.

The criminal Justice System in the simplest of terms has been defined as *'the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded'.*[26] The Criminal Justice System as been has said three basic components; Law Enforcement, the Judicial Process and Correctional Institutions. These three components do not work independently, but rather are interconnected and interdependent. The system is triggered when an arrest is made by any of the Law Enforcement Agencies. A person arrested may not go through the whole gamut of the criminal Justice procedure. A person arrested on suspicions of having committed a crime may subsequently be released if there is no sufficient evidence to charge him, or he may be charged to court. He may be convicted or acquitted as the case may be. It is when the judicial process is activated that plea bargaining effectively comes into play.

1.4 Plea Bargain under the Constitution of Nigeria 1999 (as amended 2011)

Before the advent of proper statutory codification on the right of the parties of parties to plea bargain in Nigeria, the power to plea bargain was conceived from the provisions of Section 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended 2011).
Section 174(1) provides as follows:

1. The Attorney General of the federation shall have the power;

[19]D Iwarimie-Jaja, Law and its Administration in Nigeria (Port Harcourt CelWil Publishers, 2007) 45
[20] (n 16) 27-39
[21] Ibid
[22] Ibid
[23] A. B. Dambazau, Criminology and Criminal Justice Kaduna (Nigerian Defence Academy Press, 1999)14
[24] R. B. Bohm, & K. N. Haley Introduction to Criminal Justice (3rd Edition. New York: McGraw Hill, 2002)34
[25] Ibid
[26] Black's Law Dictionary 9th edn.

a. To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any act of the national assembly;
b. To take over and discontinue any such criminal proceedings that may have been instituted by any other authority or person; and
c. To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or other authority or person.

The constitutional powers vested on the Honourable Attorney-General under the said section is in respect of only criminal matters in any court of law in the entire country, though the section expressly exempted the Court-Martial. The section allows the Attorney-General of the Federation to undertake or institute criminal proceedings against anybody in any court within Nigeria with respect of any offence created under any act of the National Assembly. This impliedly prohibits the Attorney-General of the Federation from institution an action against someone with respect to an offence created under an act of a State Assembly and not covered under an act of the National Assembly. It is worthy of note that aside from the Attorney-General himself, the power to institute, undertake and also discontinue a matter can be exercise by someone in the office of the Attorney General's office. The court in the case of *F.R.N v. Adewunmi*[27] the court *per Ogbuagu* that the powers exercised by the Attorney General of the federation under section 174(1) and (2) can be exercised by him and any other person with the authority to so exercise. The court even went further to state that the said powers can be exercised by someone not in the office of the Attorney General of the Federation.[28] The court in the case of *F.R.N v Osahon & 7 Ors*[29] is also instructive when the court held that the powers of the Attorney-General of the Federation as provided for under section 174 can be exercised by a private legal practitioner and any other legal practitioner that is so qualified to practice as a Barrister and Solicitor of the Federal Republic of Nigeria.

This is to say that the Attorney-General of the Federation is not handicapped or limited in the exercise of the powers afforded under section 174 of the constitution except for public interest and also subject to the control of the president of Nigeria who is his appointer. The Supreme Court in the case of *State v. Ilori*[30] the court described the powers of the Attorney General under Section 174 of the Constitution as subject to any control or review by any court or body but a master unto himself.

1. On the other hand, the provisions of section 211 of the constitution makes provides that:

The Attorney General of the State shall have power;

d. To institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any act of the House of Assembly;
e. To take over and discontinue any such criminal proceedings that may have been instituted by any other authority or person; and
f. To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or other authority or person.

The provisions of Section 174 and 211 confer on the Attorney General of the State and the Attorney General of the State Federation the right to enter a *nolle prosequi* wherein they can initiate, take over or discontinue a criminal trial in the overriding interest of the public. Before proper codification of the concept of Plea Bargain under the Administration of criminal Justice Law of Lagos, the Administration of criminal Justice Act, 2015 and the EFCC Establishment Act, some scholars are of the stern opinion that the concept had been in operation in Nigeria under the said provisions. Justice Uwais[31] in one of his contributions to the issue of Plea Bargain said: *'that the concept of plea bargain is not new in Nigeria.'*

[27] (2007) 4. SC (Pt III) 30.
[28] State v Collins Aibangbee & Anor. (1988) 3 NWLR (Pt. 84) 548 at 578
[29] (2006) Legalpedia (SC) 17181
[30] (1983) 14 NSCC 69
[31] Former Chief Justice of Nigeria in Punch Newspaper of Thursday, January 31, 2

1.5 Plea Bargain under the EFCC Act

The EFFC as a commission has mandate to combat all sort of financial crimes in Nigeria. The commission is empowered by the enabling law to prevent, investigate, prosecute and penalize economic and financial crimes in Nigeria.The power of the Attorney General of the Federation and that of the state are empowered to plea bargain with accused and on the basis of such bargain can decide to enter a *nulle proseque* in favour of the accused for concessions that may have been agreed upon.

The Provision of Section 14(2) of the EFCC Act provides as follows:

> Subject to the provisions of section 174 of the Constitution of the federal republic of Nigeria, 1999(which relates to the powers of the Attorney General of the Federation to institute, continue, takeover or discontinue any criminal proceedings against any person 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, exceeding the amount to which that person would have been liable if he had been convicted of the offence.

The application of the Section 14(2) of the EFCC Act is subject to the powers of the Attorney General of the Federation to enter a *nolle prosequi* either to initiate, undertake or discontinue the matter in any court within Nigeria except a court-martial. While the EFCC Act subjects the application of Section 14(2) to the provision of section 174 of the Constitution of the federal republic of Nigeria, 1999, the Administration of Criminal Justice Law (ACJL) 2007 of Lagos did not make the applicability of plea bargain to be subject to the constitution or any other law.

1.6 Plea Bargain under the Administration of Criminal Justice Act 2015

One of the innovations occasioned by the Administration of Criminal Justice Act, 2015 is the introduction of plea bargain as one of the possible pleas available to a defendant.
The provisions of Section 494(1) ACJA defined 'Plea bargain' as:
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.The relevant provisions of plea bargain under the Act are contained in Section 270-Section277 ACJA. The sections approved the controversial practice of plea bargaining as a possible means of obtaining conviction or securing the proceeds of criminal activity for the state. It sets out guidelines for plea bargain. Section 270 Subsection (1) is a general provision vesting the prosecutor power to receive and consider a plea bargain from a defendant or offer a plea bargain to a defendant. While, subsection (2) specifies the conditions under which such plea bargain may be entered into.

1.7 Constitutionality of Plea Bargain in Nigeria

The researcher believes that the concept of plea bargain and the statutes providing for them are in contradiction of the divine provisions of constitutions. The constitution under Chapter two of the Constitution of the Federal Republic of Nigeria 1999 provides for inalienable rights of citizens including those standing any trial. Kayode Esho, JSC posited on the importance of these rights when said: A human right is a right which stands above the ordinary law of the land which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence, and what has been done by our constitution since independence it to have these rights enshrined in the constitution so that the rights could be immutable[32].

One of such rights guaranteed an accused person which stands as the kernel of all criminal trial is the presumption of innocence, provided for under 36(5) of the Constitution which provides as follows: *'every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty'*. Invariably, when an accused person consents to an offence in order to plea bargain, the

[32] Ransome-Kuti v Attorney General of the Federation (1985) 2 NWLR (Pt. 6)

presumption of innocence in his favour will be displaced. This applies to other rights that are available for an accused person like the right to a fair trial in public[33], the privilege against self-incrimination[34], and the right to the examination of witness called by the prosecutor to testify against the accused[35].

1.8 Plea Bargain under the Administration of Criminal Justice Law of Rivers State

As one of the tools for restorative Justice which is a fundamental kernel of the Administration of Criminal Justice Law of Rivers State, the principle of Plea Bargain is conspicuously provided for in the law under Section 277-284. Section 504 of the Administration of Criminal Justice Law of Rivers State defines the term plea bargain as follows:

Means the process of 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 lighter charge subject to the court's approval.

Section 277(1) of the Law provides that:

Notwithstanding the provisions of this law or in any other law, the prosecutor may;

a. Receive and consider a proposal for plea bargain from a defendant charged with an offence directly from the defendant or a counsel on his behalf to deal with or dispose of the case or
b. Offer or propose a plea bargain as a way of disposing of a case to a defendant charged with an offence.

This provision empowers both the defendant by himself or through legal representation and the prosecution to make formal application for a plea bargain as a way of quickly disposing of the matter. This would have been the underlying intentions of plea bargain, which is hastily dispose of matters thereby saving the state the funds for prosecution and also punishment of the defendant.

1.9 Benefits of Plea Bargain

Professor Adiniyi Olatubosun in his opinion about plea bargain said:

> The inclusion of plea bargain in the nations criminal justice system is a welcome development…the concept would help to fast-track adjudication, decongest cases in court and forestall deliberate subversion of justice…there are many legal complexities and technicalities that show court proceedings and prompt determination of cases which plea bargain could address…The prosecutor usually weighs the options before accepting to an offer of plea bargaining.

There are some benefits that can be derived from the proper use and implementation of Plea Bargain in the Nigerian Criminal Justice System. The court in *FRN v. Lucky Igbinedion & Ors*[36] identified a few of those benefits. These benefits are to the defendant, the Prosecution and the State.

The defendant enjoys the following benefits:

1. It saves the defendant the time and cost involved in defending himself in a trial. A defendant who is denied bail and who is still in custody would benefit greatly from a short trial. Even if a defendant is not in custody, he would still benefit from a trial that is commenced and concluded within a short time, as it affords him an opportunity to move on quickly with his life after the trial is concluded and he has served his punishment/sentence. Professor Yemi Osibanjo Stated that a criminal case approximately takes 7 years to be concluded from the High Court up to the Supreme Court.[37]Plea bargain greatly reduces this time. The fact that the Act also does not vest a right of appeal in the parties unless in a case where fraud is alleged further reduces the risk of a prolonged trial.

[33] Section 36(4)
[34] Section 36(11)
[35] Section 36 (6)(d)
[36](2015) 2 NWLR (pt. 1441) 475
[37] Prof Yemi Osibanjo, 'The State of Criminal Justice in Nigeria: Challenges and Opportunities'' being a paper delivered at the Tenth Justice Idigbo Memorial Lecture at the University of Benin on 11th December 2009

2. Plea bargain affords the defendant an opportunity to negotiate his punishment upon admission of guilt or for rendering assistance to the prosecution. This saves him the risk of harsher and more severe punishment.
3. It also reduces the publicity that is usually involved in trial, especially in high profile cases involving prominent persons. When a defendant agrees to plea bargaining, he can negotiate to keep some information out of the public arena. This is not possible when there is a full trial without negotiation between the prosecution and the defendant.
4. It also saves the defendant the uncertainty associated with going to trial. At the conclusion of trial, the punishment imposed might be greater than that envisaged or expected. It gives the defendant a measure of control over the outcome of the trial.

The following benefits are enjoyed by the state and the prosecution when plea bargain is employed:

1. The prosecution is saved the cost of going to trial. The state expends a lot of resources in bringing an offender to punishment. The cost of trial is greatly reduced, as the admissions made by the defendant dispenses with the need to call upon several witnesses and provide more evidence in order to establish the guilt of the defendant. Shoba[38] in his research, discovered by empirical insight that in order to eliminate all forms of delay and cost in the dispensation of justice, the government must adopt a plea bargain arrangement where the parties can make concessions and dispense with the matters easily without costing government money for prosecution.
2. It also reduces the length of trial since the need for a full trial is dispensed with. Nweze[39] in support of plea Bargain argued that exploiting the option of negotiating with the accused or defendant, the harrowing and lengthy trials usually associated with criminal trials in the Nigerian criminal justice system will be averted.
3. It also saves the prosecution the uncertainty of going to trial. Sometimes an offender could be acquitted on a mere technicality which has no direct bearing on the substance of the case; this can be avoided if plea bargain is used.
4. The adversarial system which is used in Nigeria requires the prosecution to establish the guilt of the accused beyond reasonable doubt; this is a great burden on the prosecution. The defendant has no duty to establish his innocence. When plea bargain is used, it lessens the burden of proving the guilt of the defendant.
5. Plea bargain ensures that some measure of justice is served. The offender is made to bear some level of responsibility for his wrong. This is better than having him bear no responsibility at all for his wrong.

1.10 Criticisms of the Concept of Plea Bargain

Despite the advantages noted above, the Concept of Plea Bargain has been criticized by quite a number of people. The most noticeable among them is the Former Chief Justice of Nigeria (CJN), Justice Dahiru Musdapher, who was reported to have criticized the Commission, for smuggling the plea bargain concept into the Nigerian criminal jurisprudence and also said that the concept had "dubious" origin. The Former CJN explained what he meant by his statement that the concept had a dubious origin in Nigeria: when I described the concept as of 'dubious origin', I was not referring to the original raison-d'être or the juridical motive behind its conception way back either in the United States or England in the early 19th Century, I was referring to the sneaky motive behind its introduction into our legal system, or its evident fraudulent application. You will learn that plea bargain is not only "condemnation without adjudication" as John Langbien decried it, it is as some other critics say) "a triumph of administrative and organizational interests over justice. At its very best it penalizes the innocent who may be tempted to plead guilty to avoid being actuated by judicial default and at its most obnoxious extent it grants 'undue leniency' as reward to criminals simply for

[38] B Shoba, 'Effect of Plea Bargain on the criminal Justice System of Madhya Pradesh' [2013] 1 (2) Galgotias Journal of Legal Studies, 1-38

[39] C.C Nweze, Plea Bargain in the Administration of Criminal Justice, a Paper Presented at the West African Regional Workshop on Constitutional Immunity and Criminal Justice Administration, held in Abuja 3rd and 4th July, 2008, 6-8

pleading their guilt. You will see also that plea bargain is not only a flagrant subordination of the public's interest to the interest of 'criminal justice administration', but worst of all, the concept generally promotes a cynical view of the entire legal system. I have said that our wavering disposition on the ethical standards set by your noble profession guarantees or jeopardizes our peace, security and progress. And it is the reason that I have chosen this occasion to speak with all sense of solemnity-on a matter that has continued to eat away at even the modest gains that we seem to be making in reforming both the infrastructure and the overall judicial template of the Nigerian Judiciary.[40]

There are also those who believe the adoption of the concept violates the right of the accused to a fair trial. The right of an accused person to a fair trial includes fundamentally the presumption of innocence that is provided for under the Constitution of the federal republic of Nigeria. Okwori[41], who in his work believes that the practice violates the fundamental human right of an accused person by the inducement of the accused to confess to the committal of an offence and trial waiver for the promise of a reduced sentence. He believes the practice violates the right of presumption of innocence of the accused person until proven guilty, the right to fair hearing in the public, the privilege against self-incrimination and the right to examination of witnesses that are all provided for under the constitution of the federal republic of Nigeria and the constitution of the United States of America.

The essence of deterrence is defeated when someone who may have committed an offence is not meant to feel the brunt of the punishment that goes with it but is allowed to make some sort of atonement. This will not instill some fear or deter them from committing the crime another time. This will only encourage them to continue in the crime and also encourage others to engage in the criminal act. Bamide Aturu[42] in his opinion on plea Bargain expressed strong reservation about its application when he stated that plea bargain is an embarrassment to Nigeria's criminal justice system. He opined that it leads to corruption and has also further reduced Nigeria's moral values as it gives a strong indication that those who have enriched themselves corruptly can easily afford to serve lenient sentences and return rich.

The prosecutor and defendant may agree to a plea bargain, but a judge can void that agreement. A judge is not usually required to follow a plea bargain. They can impose longer sentences or decide that no sentence should be imposed. A judge can also require a case to go to trial if they feel like a plea bargain is being offered in bad faith.

If a case goes to trial and a defendant loses, there may be several grounds upon which an appeal may be filed. Because a plea bargain requires a defendant to plead guilty to the charges, even though they are reduced, it eliminates the ability to file an appeal in almost any circumstance.

2.0 Plea bargaining and the Right of Appeal in Nigeria

The need for an efficient and effective administration of justice has made the establishment of hierarchy of courts and provision for appeal from one court to the other within the hierarchy not only desirable but also expedient. Judges as humans are not infallible.[43] Oputa J.S.C., in *Oredoyin v Arowolo*[44] described an appeal as an invitation to a higher court to find out whether on proper consideration of the facts placed before it, and the applicable law, the lower court arrived at a correct decision. In Nigeria, the right of a litigant to appeal, the jurisdiction of the appellate court to entertain such appeal and the procedure to be followed are governed by the Constitution and other statutes (including subsidiary legislations such as rules of courts).[45] The superior courts mentioned under the Nigerian constitution can all serve as appellate courts.[46]

---

[40] PM News Live on 15th November, 2011, available on Plea Bargain is Dubious â€" CJN - P.M. News (pmnewsnigeria.com) accessed on 18th June,2022.

[41] N A Okwori, Plea Bargain: A trial Procesure that Negates Fundamental Right of the Accused (SAGE Publications, 2010) 10

[42] B Aturu, Plea Bargain, a mockery of Nigeria's legal process, available at https://thenigerianoracle.wordpress.com/2013/02/15Plea-Bargain-a-mockery-of-Nigeria's-legal process/ accessed 27th May, 2022.

[43] I O Alimi, Appeals, available at <http://www.alimiandco.com/publications/APPEALS.pdf> accessed 6July 2020.

[44] [1989]4 NWLR (pt.114)172 at 211.

[45] Alimi, 69.

[46] For the list of these courts, See CFRN, s6 (5).

Appeal may lie to a court as a matter of right in which case the aggrieved party (the appellant) may appeal directly to the appellate court without the leave of such a court. For instance, Section 232, sub-section (2) of the Nigerian Constitution provides for the instances when an appeal shall lie to the Supreme Court from the Court of Appeal.[47] On the other hand, appeal may lie to a court of law with the leave of the court which decided the case. In such instances, the appellant must first seek the leave of the court that tried the matter before it appeals to the appellate court.

The right to appeal a judgment of a court of law forms part of the right to fair hearing which an accused person is entitled to under the constitution. ACJA provides that the judgment reached by a court in a plea bargaining agreement cannot be appealed.[48] In our opinion, this is a flagrant disregard for the constitutional protections of the rights of an accused person in Nigeria. It is not out of place for the prosecutor to bring baseless and multiple count charges against and accused person with the intention of overwhelming him with the charges hoping that he may plea bargain to any of the charges. The helpless accused may have no option than to plead guilty to counts attracting lesser sentence. To put it in a strict sense, the accused may have pleaded guilty to the plea under duress. There may be no enough evidence for the accused to establish his innocence at the trial whereas there may be such opportunity on appeal. When the accused complains of duress or procedural irregularities, there is only one way to find out if he indeed pleaded under duress or not, and that is by him filing an appeal. In all the jurisdictions examined in this research, it is only the ACJA that contains such provision and we cannot help but to wonder why such a draconian provision is included in the ACJA.

2.1 **Constitutionality of Adopting Plea Bargain**

Mordi in his work argued that the practice of plea bargain violates the fundamental human rights of the accused by the inducement of confession of guilt and a trial waiver for the promise of a reduced sentence.[49] We do not agree with the position of this writer in totality. One of the legal safeguards provided under the plea bargain guidelines under the statutes[50] is that the Judge must ascertain the voluntariness of the plea entered into by the defendant. In doing so, if the defendant complains to the court that the plea was induced, the Judge will have no option than to reject the plea. We shall examine these guidelines in detail in a later part of this paper. Okwori argues that plea bargain violates some rights under the American and the Nigerian constitutions such as the right to be presumed innocent until the contrary is proved, the right to fair hearing in public, the privilege against self-incrimination and the right to examination of witnesses.[51] Other scholars from foreign jurisdictions have also argued in this line.[52] The United States Supreme Court has however discountenanced the arguments that plea bargaining is unconstitutional in a host of cases.[53]

The researcher has also argued that the power to plea bargain is conceivable within the general discretionary powers of the Attorney General conferred by the Constitution.[54] 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 Constitution to institute, take over, and discontinue criminal prosecution. The Supreme Court *in State v. Ilori*[55] has held that the prosecutorial powers of the AGF and AGS are not subject to judicial review. The prosecutorial power to plea bargain is within the wide powers granted to the AGF and AGS by the Constitution. Therefore, the ACJLs and the ACJA are not the sources of the power of the AGF and AGS to plea bargain. The

[47] CFRN, s232 (2) (a-f).
[48] Section 270(18) ACJA 2015
[49] Chinwe A. Mordi, 'The Use of Plea Bargain in Nigerian Criminal Law', [2018] (9) Beijing Law Review, 156.
[50] Section 270 ACJA
[51] Okwori, Nicholson Alechenu, Plea Bargaining: A Trial Procedure that Negates Fundamental Rights of the Accused Person (2013). Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629255&download=yes> accessed on the 17th July 2022.
[52] T R. McCoy and M J. Mirra, 'Plea Bargaining as Due Process in Determining Guilt', [1980] (32) Stan. L. Rev., 887.
[53] See for instances, United States v Mezzanatto,513 U.S. 196 (1995); United States v Goodwin, 457 U.S. 368 (1982); Bordenkircher v Hayes, 434 U.S. 357 (1978); Alabama v Smith, 490 U.S. 794 (1989).
[54] A O Bello, 'Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects' in [2006] 1 Current Law Series, 42, 49.
[55] [1983]1 S.C.N.L.R. 94.

Laws merely provide a framework for the exercise of the powers of the AGF and the AGS for plea bargaining in our courts. It is important to underscore the fact that a defendant does not have a constitutional right to demand or insist on a plea bargain with the prosecution. A defendant is guaranteed a constitutional right to fair trial and legal assistance and not a right to plea bargain. Whether a defendant is offered a plea bargain depends entirely on the exercise of prosecutorial discretion. In *Lafler v. Cooper*[56], 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.'*[57] The author submits that the same position applies in Nigeria. The support given to the practice of plea bargain by the US Supreme Court in a series of cases[58] has not succeeded in stifling the clamor of those who have argued that plea bargaining is unconstitutional.[59] Plea bargaining implicates some constitutional rights of defendants.

The rights implicated by plea bargaining in the US Constitution and similar rights under the 1999 Constitution are:

(i) presumption of innocence until proven guilty;[60]
(ii) the right to a fair hearing in public;[61]
(iii) the privilege against self-incrimination;[62] and
(iv) the right to examination of witnesses called by the prosecution.[63]

When a defendant enters into a plea agreement, the presumption of innocence in his favour is displaced. The prosecution is not required to prove defendant's guilt beyond reasonable doubt. A plea agreement is an act of self-conviction by a defendant, which negates his right against self-incrimination. When a plea agreement is reached the court proceeds to conviction and sentence without the need for any public trial and public examination of the witnesses for the prosecution by the defendant. The crucial issue here is whether an agreement to plea bargain by a defendant violates constitutional rights or whether a defendant is permitted to waive them. The starting point for a consideration of this issue is the decision of the Nigerian Supreme Court in the case of *Ariori v. Elemo*[64] The Supreme Court held 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 a choice of two decides to take one but not both. On the issue of the extent to which a person could waive 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. The Court gave as example the right to speedy trial which a litigant can waive by asking for adjournments of the case. The Court however ruled that waiver of a right to a speedy trial is not permissible where the adjournment requested is of such a nature that the court will lose the advantage it has of accurate assessment of the witnesses it had observed in the course of trial. The court noted that such an adjournment would lead to injustice and that it is against public policy to compromise illegality.

The Court also noted that having regard to the comparative educational backwardness, the socio-economic and cultural background of Nigerians, it would be wary in adopting constitutional interpretations from other countries. The court reasoned that the aforementioned factors impose a duty on the court to scrutinize every case of waiver of fundamental rights to see that the right waived falls

[56] 132 S. Ct. 1376, 1395 (2012)
[57] Weatherford v. Bursey, 429 U.S. 545, 561 (1977).
[58] Santobello v. New York 404 U.S. 257, (1971); Corbitt v. New Jersey 439 U.S. 212 (1978) and Bordenkircher v. Hayes 434 U.S. 357 (1978).
[59] T Lynch 'The Unconstitutionality of Plea Bargain" A Report by The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts' [1967] Vol. 83 Harvard Law Review, 1387.
[60] Section 36(5).
[61] Section 36(4).
[62] Section 36(11)
[63] Section 36(6)(d)
[64] (2001) 36 WRN 94.

within the first category. The author has argued elsewhere that the constitutional rights of defendants implicated in plea bargaining fall within the first category of rights as classified by the Supreme Court. The said rights are for the sole benefit of defendants. 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 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.[65] The laws regulating plea bargaining (examined in subsequent chapters) contain procedural and substantive safeguards to protect defendants and to ensure that they knowingly and voluntarily waive their rights.

2.2 Conclusion

The call for the introduction of plea bargain into our criminal procedure law may not be the solution for our impaired criminal justice system, but certainly it is part of the criminal justice reform package to serve as part of the solution to address the challenges facing our criminal justice administration.

The quest to find more efficient means and method of resolving criminal matters in our criminal justice system is a journey that will continue even in more advanced jurisdictions. The option of plea bargain as a concept of resolving criminal matters has been identified as a potent alternative to punishment in the sense of imprisonment. The use of negotiated concessions has been adjudged to benefit all parties more than the conventional method of imprisonment. The concept has been in existence around early 19th century in the United States where countries like Nigeria and South Africa has borrowed from.

The system enjoys state wide acceptability in the United States to the point that 90 percent of cases are resolved using plea bargain in the United States. As has been seen in the research, the idea behind plea behind is that an accused person agrees to plead guilty for a lesser charge with minimal punishment accompanying same in exchange for a plea of guilty. The fundamental rationale for the introduction of the concept as opposed to the conventional punishment is to reduce the cost of prosecution and also to save the time that is usually known for litigations in Nigeria and South Africa. Again, the criminal justice system in Nigeria is overburdened with a lot of cases; the quick disposal of the matter using plea will help decongest the prisons and also the courts.

In Nigeria, plea bargain was introduced into the Nigerian criminal justice system through the EFCC in 2004, via the provisions of Section 14 (2) of the EFCC Act. Though the Act did not expressly mention the plea bargain but the commission used the said provision as a basis for the adoption of the principles. A formal introduction of the doctrine in Nigeria was recorded under the Administration of Criminal Justice Law 2007 of Lagos before the enactment of the Administration of Criminal Justice Act 2007. The provision for the concept has become of general application in states of the Nigerian federation with their own Administration of criminal justice law.

2.3 Recommendations

The provision of Section 270(18) ACJA 2015 to allow for appeals

The provisions of the ACJA and the relevant laws should be amended to allow for appeals of a negotiated judgement as it is with normal cases. This will ensure that the process leading to the plea agreement is devoid of manipulations on the part of the prosecution and the defendant. The right to appeal afford parties and the court to re-examine the plea agreement where parties allege the existence of fraud or force in the resolution of the plea arrangement. When the accused complains of duress or procedural irregularities, there is only one way to find out if he indeed pleaded under duress or not, and that is by him filing an appeal.

The ACJA should be amended to give the court more roles

The Administration of Criminal Justice Law of Lagos State law which allows the parties to approach the court concerning the contents of a plea agreement should be adopted under ACJA and in the other

[65] (n 23) 234

jurisdictions. The judge has the power of informing the parties who have approached him regarding the contents of any of the agreements and he may inform them as to the possible advantages of discussions, possible sentencing options or the acceptability of the proposed agreement. This provision will further guarantee the right to a fair hearing of the defendant.

Amend the laws to allow the judges more influence in the preparation of the agreement.
In South Africa, the law requires that to ascertain whether the plea of the accused was made voluntarily or not, the court could ask certain questions from the accused. The other jurisdictions provided similarly but the provisions are only to the effect that the judge should ascertain the voluntariness or otherwise of a plea without providing for the mode of the ascertainment. It is recommended that the other jurisdictions should borrow such jurisprudence from South Africa to define the scope and provide a limitation to the power of the court in this regard.

Definition of the offences that can be plea bargained
The definition of offence in Section 494 ACJA, did not sufficiently distinguish between offences for the purpose of a plea agreement, Section 494 defined felonies, indictable offence and a misdemeanour, no reference was made to those distinctions when referring to plea bargain. Though Section 274(3) ACJA, states that a person charged with capital punishment cannot plea bargain, but this provision is still too restrictive. There is need to expand the purview of offences exempted from a plea agreement. On the question of what offences ought to be susceptible to plea bargain, some scholars tie it to the nature of the complaint, the prosecutor and the party principally aggrieved.

Compensation for the victim in matters of fraud
As a follow up to defining the Offences that can be plea bargained, the amendment of the Administration of Criminal Justice Act 2015 which empower the Chief Judge of the Federal Capital Territory, or the Chief Judge of the High Court in states that have domesticated the Administration of Criminal Justice Act of which plea bargain is a component, should set out in clear terms the quantum of restitution, restoration, compensation and sentence guidelines in cases bothering on fraud, breach of public trust and corruption to allow uniformity in sentencing.

Expansion of the offences exempted from plea bargain
The ACJA 2015 should expand the classes of offences exempted from a plea. For example, the model in the Administration of Criminal Justice Law of Anambra State, made a sufficient distinction when it provided that plea bargaining shall not apply to any offence involving grievous violence or sexual assault, or to persons charged with capital offences, or any offence involving the use of violence, or persons who had in the last ten years been convicted and sentenced for any such similar offence. Similarly, in India, the Criminal Law (Amendment) Act, 2005, does not allow plea bargaining for cases which are already pending in court, accused involved in an offence punishable by death, life imprisonment, or of imprisonment for more than 7 years, offence against women, offences affecting the socioeconomic condition of the country and offences against children below the age of 14.