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Plea Bargaining and the Administration of Criminal Justice in Nigeria

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Abstract
Plea bargaining is one of the recent developments introduced into the Nigerian Criminal Justice System by the Administration of Criminal Justice Act 2015. This Act may not be the first to introduce Plea bargaining in Nigeria, but its provisions are unique and more elaborate. Plea bargaining has been applied in a number of economic and financial crimes in Nigeria. Its application has been quite controversial, to the extent that it is thought in some quarters that plea bargain can only be applied to economic and financial crimes. This paper highlights the provisions of law in relation to Plea Bargain in Nigeria as a foundation for generating further discussion of this issue. It also identifies the benefits and challenges of Plea bargain as a part of the Nigerian Criminal Justice System.

Keywords: Plea Bargain, Criminal Justice, Prosecution, Defence, Safeguards.

INTRODUCTION

The Nigerian Criminal Justice System

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'.[1] The Criminal Justice System has 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] *Black's Law Dictionary 9th edn.*

What is Plea Bargaining?

Plea Bargaining has been confused with a lot of similar concepts. It has been confused with the powers of the Attorney General to discontinue criminal proceedings before judgment is given, it has also been confused with the exercise of a prosecutor's discretion to decline to prosecute and in some cases, it has also been confused with condonation. Condonation has been defined as ***'****a victim's express or implied forgiveness of an offence by treating the offender as if there has been no offence'*.[2]

What then is Plea Bargaining? Albert Alschuler gave an elaborate explanation of what it means. He stated that:

> 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.[3]

The definition of Plea Bargaining as stated by Albert Alschuler is very comprehensive. However, the definition must be taken with some caution, as he states that the plea bargain agreement could be 'implicit'. The Administration of Criminal Justice Act 2015 requires that the Plea Bargain Agreement must be in writing[4].This means that the agreement must therefore be explicit.

The Administration of Criminal Justice Act[5] defined Plea Bargaining 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.[6]

Plea Bargain could take any of the following two forms; it could either be 'Sentence Bargain' or 'Charge Bargain'. The court in *Romrig Nigeria Limited v. FRN*[7], explained the terms 'Sentence Bargain' and 'Charge Bargain' thus:

> A sentence bargain is where the prosecution agrees to a lesser punishment for the accused if he can plead guilty to the charge. A charge bargain involves the agreement to drop some charge(s) against the accused if he pleads guilty." Sentence bargain seeks to reduce the punishment of the defendant while Charge bargain seeks to reduce the charges against the defendant.
> This interpretation was based on the provision of the Act.[8]

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2 See Asake v. The Nigerian Army Council & Anor. (2006) LPELR-5427(CA), where the (Court adopted the definition of Condonation in Black's Law Dictionary, 7th edn). Condonation can sometimes bar prosecution, see section 171 of the Armed Forces Act.

3 A. Alschuler, Plea Bargaining and Its History (1979) 79 Columbia Law Review at 3.

4 Section 270(7).

5 Hereinafter ACJA or the Act.

6 Section 494.

7 (2014) LPELR-22759(CA).

Entry of Plea Bargaining into the Nigerian Justice System

There would be no attempt to trace the history of Plea Bargain either in the Nigerian Criminal Justice System or elsewhere, however, it is pertinent to state a few basic facts about its entry into our justice system.

Plea Bargain is one of the recent developments in our justice system. In *Romrig Nigeria Limited v.FRN,*[9] the court stated that: 'It is also essential to note that plea bargain was alien to criminal justice administration in Nigeria but was imported into our justice system by the implication of section 14(2) of the EFCC Act.'

Also, in *FRN v. Lucky Igbinedion & Ors,*[10]the court stated that the Administration of Criminal Justice Law of Lagos State was the first legislation to localise and import plea bargain into Nigeria's criminal jurisprudence. It further stated that 'The EFCC have in principle used and found the concept of plea bargain expedient but the EFCC Act and the CPA have not set out any protocol for its application'.[11]

No attempt would be made to resolve the slight inconsistencies that exist in the dicta of the court in the two cases cited. However, the Criminal Procedure Act, and the Economic and Financial Crimes Commission Acts had some provisions which set the tone for the further and more detailed introduction of plea bargain in Nigeria. The Administration of Criminal Justice Law of Lagos State 2007 however appears to be the first law which made an elaborate and clear provision on plea bargaining in Nigeria. That law was repealed and re-enacted in 2011. The Administration of Criminal Justice Act 2015 was subsequently enacted with more elaborate and detailed provisions for plea bargain.

When does Plea Bargain Come Up?

In order to determine at what stage Plea Bargain comes up in the criminal justice administration, it is pertinent to reconsider the definition of Plea Bargain as stated above.

The first thing to note is that it can only come up after criminal proceedings had been commenced. This is because the Act states that it is 'a process in criminal proceedings'. It is submitted, that cannot qualify as Plea Bargain if the concession granted to a person is given before the commencement of criminal proceedings.

Furthermore, the Act states that it takes place 'between the defendant and the prosecution. This presupposes that criminal proceedings have already begun.

The fact that the definition stated that one of the forms which Plea Bargaining could take is by the 'defendant pleading to a lesser offence than that charged in exchange for a lighter sentence' with the ultimate aim of disposing the case in a manner that is mutually agreeable to both the

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8 Section 270(4).
9 Supra.
10 (2014) LPELR-22760(CA).
11 Supra.

prosecution and the defendant, further lends credence to the fact that Plea Bargain can only come up after criminal proceedings had commenced.

This position was further fortified in *Romrig Nigeria Limited V. FRN*[12] where it was stated:

> I am of the humble view that a plea bargain agreement is a post-arraignment agreement of some sort since it may result in a situation where the accused may plead guilty to some charges against him, so that others may be dropped.

It is noteworthy that a plea bargain agreement can be entered into by the prosecution and the defendant at any time before the presentation of the evidence of the defence.[13] The implication of this is that the moment the defence begins to present its evidence, the opportunity to plea bargain is forever lost.

Who Initiates Plea Bargain?

Plea Bargain can be initiated by either the prosecution or the defence. The defendant may offer a Plea bargain deal to the prosecutor, either directly or through his representative,[14] or the prosecutor may on his own offer a plea bargain deal to the defendant.[15] The Act also provides that during or after the presentation of the case of the prosecution, the prosecution may enter into plea bargaining with the defendant but this can only be done with the consent of the victim or his representative provided the following factors are present:

a. The evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt;
b. Where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative; or
c. Where the defendant has in a case of conspiracy fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of the other offenders.[16]

Offences where Plea Bargain Apply And Conditions for Entering into Plea Bargain Agreement

In Nigeria, plea bargain has been used mostly in cases of financial crimes and corruption matters. Kana and Zakari also re-echoed this in their work when they stated that: 'So far, it has been applied mostly in cases involving allegations of corruption, such as embezzlement of public funds, money laundering and other economic and financial crimes.'[17] Its application or use in financial and economic offences does not mean that those are the only cases plea bargain can be applied.

It is to be noted that there is a paucity of case law in Nigeria on plea bargain. Therefore much reliance cannot be placed on case law for guidance. This may be attributed to its fairly new

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12 Supra.
13 Section 270(2) ACJA.
14 270(1)(a) ACJA.
15 270(1)(b) ACJA.
16 Section 270(2) ACJA.
17 A. Kana and M. Y. Zakari 'The State of Plea Bargain in Corruption Trials in Nigeria'. Journal of International Law and Strategic Studies (JILSS) 30, 31.

application in the Nigerian criminal Justice administration. This means that reliance will be more on the provisions of the Act.

From the wordings of section 270(1) of the ACJA, it can be reasonably inferred that any offence can be plea bargained. It states thus:
270(1) notwithstanding anything in this Act or in any other law, the prosecutor may:
a) receive and consider a plea bargain from a defendant charged with **an offence** either directly from that defendant or on his behalf;

b) Offer a plea bargain to a defendant charged with **an offence**.[18]

The Act merely states that the prosecutor may receive and consider a plea bargain from a defendant charged with an offence, or that he may offer a plea bargain to a defendant. There is no stipulation in the law on the nature of offences that plea bargain can apply.

The Act makes further provision for some factors which the prosecutor ought to take into consideration in accepting, offering and entering into a plea bargain agreement. But it did not state that the nature of the offence alone should determine whether or not plea bargain should be entered. [19]

It is important to state that before a plea bargain offer is made to a defendant or a defendant's plea bargain offer is accepted by the prosecutor, he is required to satisfy himself that it is in the interest of justice, public interest, public policy and the need to avoid abuse of legal process.[20]

The Act requires that the prosecution consults with the Investigating Officer responsible for the investigation of the case and the victim or his representative before entering into a plea bargain agreement.[21] The prosecutor before concluding the plea bargain agreement is mandated by the law to afford the victim or his representative an opportunity to make representation to him on the content of the agreement and the inclusion of compensation or a restitution order in the plea bargain agreement.[22]The prosecutor is also required to consider the nature of the offence and the circumstances relating to the offence, the defendant and public interest, before entering into any plea bargain agreement with the defendant.[23]

The Act laid down factors for determining whether entering into a plea bargain agreement is in the interest of public interest or not. The requirements include:
a. the defendant's willingness to cooperate in the investigation or prosecution of others;
b. the defendant's history with criminal activity;
c. the defendant's remorse or contrition and his willingness to assume responsibility for his conduct;
d. the desirability of prompt and certain disposition of the case;
e. the likelihood of obtaining a conviction at trial, the probable effect on witnesses;

[18] Emphasis mine.
[19] See section 270(3) &(5)ACJA.
[20] Section 270(3) ACJA.
[21] Section 270(5)(a) ACJA.
[22] Section 270(6) .
[23] Section 270(5)(b) ACJA.

f. the probable sentence or other consequences if the defendant is convicted;
g. the need to avoid delay in the disposition of other pending cases;
h. the expense of trial and appeal;
i. the defendant's willingness to make restitution or pay compensation to the victim where appropriate.[24]

Form and Content of the Plea Bargain Agreement

The Administration of Criminal Justice Act stipulates that a plea bargain agreement should be in writing. It is important that the plea bargain agreement is reduced into writing because the terms need to be clearly set out. The existence of an agreement reduced into writing clears any doubt as to the existence of a plea bargain agreement and makes for certainty of the terms.

In *Romrig Nigeria Limited v. FRN*[25], the court had to determine if there was a plea bargain agreement in existence. It stated:

> I am of the humble opinion that the procedure employed by parties was too casual. Even in ordinary Out of Court Settlement issues, parties reduce their settlement terms into writing and present it to the Court. The documentation of a plea bargain agreement is not only desirable, it is most logical as it would prevent the inconsistencies that trail oral evidence such as distortion of agreement terms by parties at will.[26]

The Plea Bargain Agreement should contain the following information:

a) It should state that before the conclusion of the agreement, the defendant was informed:
 i. that he has a right to remain silent;
 ii. of the consequences of not remaining silent;
 iii. that he is not obliged to make any confession or admission that could be used in evidence against him.
b) Fully state the terms of the agreement made and admissions made, and
c) It must be signed by the prosecutor, the defendant, the legal practitioner and the interpreter, (if one was used).[27]

The reason the law requires that the above are inserted in the Agreement is not far-fetched; it is to safeguard the defendant's right to fair hearing and a fair trial. A copy of the agreement is to be forwarded to the Attorney-General of the Federation.[28] This would help the Attorney-General monitor the application of Plea Bargain and serve as a check to its abuse.

Safeguards in the use of Plea Bargain

One of the safeguards which has earlier been discussed, is the requirement that the agreement once reached, should be reduced in writing, setting out certain facts which would give assurance to the courts that the rights of the defendant were not abused in the process.

[24] Section 270(5).
[25] Supra.
[26] Supra.
[27] Section 270(7) ACJA.
[28] Section 270(7)(e) ACJA.

The Act stipulates that the presiding Judge before whom proceedings are pending should not participate in the discussions towards negotiating a plea bargain agreement.[29] This is to secure the independence of the court and further the defendant's right to a fair trial.

When the court is informed that the prosecution and the defendant had reached an agreement by the prosecution, the court has an obligation to inquire from the defendant if he admits the allegation in the charge to which he had pleaded guilty, and if the agreement was entered voluntarily, without undue influence.[30] This can be likened to the trial-within-trial which a judge holds when it is represented to him that the confession made by a defendant was not voluntarily obtained.

This safeguard, like all others, is aimed at protecting the rights of the defendants. The defendant has a right to remain silence and a right against self-incrimination. These rights are ancillary to the right to a fair trial. When it is represented to the court that a defendant has waived these rights, by entering a plea bargain agreement with the prosecutor, the court has an obligation to inquire if the waiver of those rights was voluntarily done.

When the court is satisfied that the defendant is guilty of the offence to which he has pleaded guilty; that is the offence in respect of which he entered a plea bargain agreement with the prosecution, the court can convict the defendant on his own guilty plea.[31]

The court has an obligation to determine if the defendant can be convicted of the offence in respect of which he entered a plea bargain agreement with the prosecution. If the court is of the opinion that the defendant cannot be convicted in respect of that offence, for any reason, or that the plea bargain agreement reached is in conflict with the defendant's right to fair hearing guaranteed under the constitution and reiterated under section 270(7) of the Act, the court would record a finding of not-guilty and the trial would proceed normally as if no agreement has been reached between the prosecution and the defendant.[32]

The court also has an obligation to ensure that the plea bargain agreement reached with the prosecution is just. This is by ascertaining if the punishment imposed under the plea bargain agreement is commensurate with the offence admitted. After the defendant is convicted, the court would consider the sentence agreed upon by the prosecutor and the defendant. Where the court is satisfied that the sentence agreed upon is appropriate, the court will impose the sentence. Where however, the court is of the opinion that it would have imposed a lesser sentence than that agreed upon, it would impose the lesser sentence on the defendant.[33]

Where the court is of the opinion that the offence requires a heavier sentence than that agreed upon by the prosecutor and the defendant, the court would inform the defendant of that fact.[34] In this case, the defendant would have two options open to him:

[29] Section 270(8) ACJA.
[30] Section 270(9) ACJA.
[31] Section 270(10)(a) ACJA.
[32] Section 270(10)(b) ACJA.
[33] Section 270(11)(a)&(b) ACJA.
[34] Section 270(11)(c).

a) He could still abide by his guilty plea as agreed upon, but that would be subject to his right to lead evidence and present argument which is relevant to sentencing; he would abide by his guilty plea provided that he would still be permitted to make an argument and lead evidence which can mitigate his punishment; or

(b) He can decide to withdraw from his guilty plea agreement, in which case the trial would be commenced *de novo* before another judge.[35]The existence of a Plea Agreement does not preclude the defendant from resiling from that Plea Agreement (since the court has refused to enforce the agreement reached by the defendant and the prosecution) and changing his plea. Indeed the Act protects that right, and ensures that a change of plea does not prejudice the defendant unfairly. Thus, he is entitled to a new trial before another judge. The law also provides that no references whatsoever shall be made to the plea bargain agreement and that admissions made under that plea bargain agreement shall not be admissible against the defendant in the new trial.[36] The prosecution and the defendant are also precluded from entering into a similar plea and sentence agreement again. [37]

Another safeguard placed in the use of plea bargain is the protection against double jeopardy. This is a constitutional right entrenched in section 36(9) of the 1999 constitution of the Federal Republic of Nigeria (as amended) and re-echoed in the Act. Section 270(17) of the Administration of the Criminal Justice Act 2015 provides that where a person has been convicted and sentenced through the implementation of a plea bargain agreement, he shall not be charged or tried again on the same fact for the greater offence he was earlier charged with, to which he pleaded to a lesser offence.
The Act also provides that where a person has pleaded guilty to a charge under a plea bargain agreement, and he is convicted and sentenced, based on his plea, the decision of the court shall be final and there shall be no right of appeal, unless in a situation where fraud is alleged.[38]

Benefits of Plea Bargain
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*[39] 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

[35] Section 15(a) & (b) ACJA.
[36] Section 270(16) ACJA.
[37] Section 270(16)(c) ACJA.
[38] Section 270(18) ACJA.
[39] Supra.

High Court up to the Supreme Court.[40] 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.

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.

2. It also reduces the length of trial since the need for a full trial is dispensed with.

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.

Drawbacks /Challenges of Plea Bargain

There are some problems associated with the use of plea bargain in our criminal justice system, a few would be highlighted.

[40] 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.

1. Plea bargain has been viewed in some quarters as an obstacle to our fight against corruption.[41] The former CJN; Honourable Justice Dahiru Musdapher described it as a 'soft landing to high-profile criminals who loot the treasury entrusted to them.'[42] Truly this is what plea bargaining is. It lets criminals off the hook easily; they get to negotiate the terms of their punishment, when it should be the courts and the law dictating what the punishment should be. It fosters corruption and encourages a flagrant disregard of the law since one can always negotiate the terms of his punishment.

2. Plea bargain also encourages lethargy in law enforcement agencies. Rather than strive to uncover evidence which would establish the guilt of a defendant, the law enforcement agencies would rather just rely on admissions made by accused persons and on plea bargain to secure convictions.

Honourable Justice Dahiru Musdapher aptly summarises the challenges associated with plea bargain and this forms one of the strongest criticisms against its application. He stated:

> I was referring to the sneaky motive-if not behind its introduction into our legal system, then evidently in its 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 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.[43]

Conclusion

The plea bargain regime in Nigeria is desirable. Does it have challenges? Of course it does. Does it have benefits? Of course it does. Are those challenges surmountable? They definitely are.

The Administration of Justice Act 2015 made some attempts to put some safe guards in the system which seeks to regulate its application and avoid a flagrant abuse of plea bargain. It does not leave the prosecutor as a god unto himself as the constitution did with the powers of *nolle prosequi* vested in the Attorney General, rather, it put in place a system which ensures that the victim, the court, the investigating officer, the defendant and the Attorney General of the Federation are all made a part of the process. This is laudable. It therefore behoves every stakeholder in the Nigerian Criminal Justice System to act as a watchdog to ensure that plea bargain is not abused but properly utilised in Nigeria.

[41] This is attributed to the Former Chief Justice of Nigeria; Honourable Justice Dahiru Musdapher.
[42] The Nigerian Tribune of 16 November 2011.
[43] Vanguard Newspaper of March 8, 2012.