

## RECONCEPTUALISING PLEA BARGAIN AS A PROSECUTORY TOOL IN NIGERIA

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### Abstract

*Plea bargaining is relatively a new concept in Nigeria's criminal justice system. This legal strategy is designed for use by prosecutors to negotiate deals with defendants, where the defendant or accused agrees to plead guilty to a lesser charge or one among multiple charges in return for substantial concessions from the prosecution—usually a lighter sentence or even a case dismissal. However, the trend has since changed and its been put to much more pervasive use. The present use, notwithstanding, one may argue that the Economic and Financial Crimes Commission (EFCC) and other Nigerian law enforcement agencies tend to be overzealous in their conduct of plea bargains concerning suspects arrested and items seized, recovered or placed under custody. The doctrinal research method is adopted analysing the pertinent laws. The paper posits that there are some disadvantages that can be deduced from the practice of plea bargain in Nigeria. The paper further lends a voice for the establishment of guidelines and procedures detailed steps, proper procedures or legal framework should be created to guide the sale of properties recovered or seized during plea bargain. This paper advocates for the extension of plea bargaining to all types of criminal charges to enhance the efficiency and fairness of Nigeria's criminal justice system.*

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### **1.0 Introduction**

Plea Bargaining is a procedural arrangement, whereby the prosecution approaches a defendant with the possibility of dropping some charges or receiving a reduced sentence in exchange for the defendant confessing to guilt. According to Alubo,<sup>1</sup> Plea Bargain is an internal system where the accused admits guilt to one or several offenses in exchange for the prosecution's consent to drop additional charges, resulting in a more lenient sentence. Langbein,<sup>2</sup> referred to "Plea Bargaining" as a procedural method that does not involve a trial.

Blacks Law Dictionary<sup>3</sup> describes Plea Bargaining as a process in which the prosecutor and the accused negotiate a resolution to the case, which must then receive the court's approval.

Plea bargain in criminal cases emerged on the legal scene in Nigeria in the year 2005 in relation to the prosecution of economic crimes by the Economic and Financial Crimes Commission (EFCC) established under the Economic and Financial Crimes Commission (Establishment, etc.)

### **2.0 Reconceptualizing Plea Bargain as a Tool for Enhancing the Role of the Prosecution in Nigeria**

The introduction of plea bargaining into Nigeria's criminal justice system marked a transformative shift, offering a range of benefits for the legal

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<sup>1</sup>Alubo, A.O. "The American Plea Bargaining System: Prescriptions for Nigeria Criminal Justice System" in Dakes C.J. (ed) New Vistas in Law vol. 2 (Jos: Faculty of Law University of Jos, 2002) p. 26.

<sup>2</sup>Langbein, J.H. Understanding the Short History of Plea Bargaining: Yale Law School (1979) Faculty Scholarship series paper 544 p. 2 available at <http://www.digital.comments.law.yale.edu/fss-papers> retrieved on 14 February 2023

<sup>3</sup> 6<sup>th</sup> edition p. 1152.

framework and its stakeholders. Originally more common in jurisdictions like the USA, plea bargaining allows for more efficiency and expediency by resolving cases without full trials, thus conserving judicial resources.<sup>4</sup>

The benefits of plea bargain were discussed in the case of *Federal Republic of Nigeria v Igbinedion*.<sup>5</sup> The court emphasized several advantages of plea bargaining, highlighting that the accused can bypass the time and expenses associated with defending a trial, as well as mitigate the risk of receiving harsher penalties and attracting public attention. It also benefits the prosecution by reducing the time and costs that would otherwise be spent on an extended trial. Furthermore, both parties avoid the unpredictability associated with trial proceedings, and the court system is relieved from the logistical demands of conducting trials for every charge brought forth.

In most jurisdictions like the U.S.A., where plea bargain is practiced, prosecutors consider ‘case strength’ as the single most important ingredient in Plea Bargain.<sup>6</sup> Section 270 (2) (a) of the ACJA acknowledges this context by stipulating that the prosecution may engage in plea bargaining with the defendant. This can occur with the consent of the victim or their representative either during or after the evidence from prosecution witnesses has been presented, but before the defence begins. This provision is contingent upon the condition that the prosecution's evidence is insufficient to prove the offense charged beyond a reasonable doubt.<sup>7</sup> Frankel<sup>8</sup> is of the view that factors that weaken the State's case against offenders are universal and include the following:

- (a) only shaky evidence connects the defendant to the crime;

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<sup>4</sup> Garner B. Blacks Law Dictionary (8<sup>th</sup> Edition) (U.S.A.: West Publishing Company, 2004) p. 1190

<sup>5</sup> (2014) LPELR – 22760 (CA) p. 6

<sup>6</sup> Samaha, J. Criminal Justice (New York: West Publishing Company, 1991) p.357

<sup>7</sup> S. 2(a)

<sup>8</sup> Frankel, M.E. Criminal Sentences Law without Order (New York: Hill and Wang, 1973) p. 307

- (b) the evidence available at charge has disappeared or weakened, witnesses die, leave town, victims lose resolve, forget or decide after all they do not want the defendant to suffer;
- (c) the defendants have committed criminal acts but lacked requisite intent with the absence of *mens rea*, a material element in most serious crime, defendants cannot be convicted;
- (d) the defendant has committed acts with requisite intent, but other legal flaws mar the case.

If any or a combination of the above factors weakens the case, many prosecutors may resort to plea bargaining. Those who justify the concept bargain claim that it is more beneficial to obtain convictions on lesser charges without trial than to move to trial on the right charges and risk losing totally by acquittal.<sup>9</sup>

In the U.K., the Criminal Law encourages plea bargain. The Criminal Justice Act<sup>10</sup> Section 144 (1) provides as follows:

In determining what sentence to pass on an offender who has pleaded guilty to an offence before that court or another court, a court must take into account.

- (a) The stage in the proceedings for the offence at which the offender indicated his intention to plead guilty and
- (b) Circumstances in which this indication was given.

Andrew and Richard<sup>11</sup> have argued that the precept behind the Act lies in the time and expense that is presented when an accused person agrees to plead guilty. Despite its elaborate uses in the Criminal System, there are still some hardliners who do not go in with the concept of Plea Bargain.

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<sup>9</sup> *ibid*

<sup>10</sup> Section 144(1) of the U.K. Criminal Justice Act 2003

<sup>11</sup> Andrew, S.L. & Richard, Y. Criminal Justice (3<sup>rd</sup>ed) (Oxford University Press, 2007) p. 387

Wilson<sup>12</sup>, argues that the law should protect only innocent accused persons, and where offenders commit crimes prosecution should follow, and legal technicalities should not be in the way. It has also been argued by some authors that the prompting of offenders.

The act of defendants pleading guilty challenges the rule that the prosecution should bear the burden of proof.<sup>13</sup> In Nigeria, where plea bargaining is still a relatively new practice and the laws surrounding it are also recent, there is a widespread belief that plea bargaining is being used by corrupt government officials as a means to evade appropriate punishment for their crimes.<sup>14</sup>

*Hon. Justice Kayode Eso (JSC)*<sup>15</sup> made a stinging observation on plea bargain thus:<sup>16</sup>

They bargain with the judge, bargain with the accused person, he returns half of the money, and then they give him some hairy-fairy punishment go serve 3 (three) months in prison and the three months will, of course, be in the hospital. This is an encouragement for other governors to steal when they come into office...

The author respectfully suggests that there is a need to educate Nigerians on the concept of “plea bargain” to dispel the myth that it is solely a tool for high-profile corrupt officials to avoid proper punishment. Referencing the *Santobello v New York case*,<sup>17</sup> the Court upheld the constitutionality and utility of plea bargaining, deeming it a vital component of justice, and stated that when administered correctly, it should be promoted.

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<sup>12</sup> Wilson, J.Q. *Thinking about Crime* (2<sup>nd</sup>ed) (New York: Basic Books, 1983) p. 10

<sup>13</sup> Ibid

<sup>14</sup> <[http://www.defence\\_of\\_plea\\_bargain/premium\\_times/kampala\\_international\\_university/ogunye.html](http://www.defence_of_plea_bargain/premium_times/kampala_international_university/ogunye.html)> accessed 20 April 2014

<sup>15</sup> As he then was (of blessed memory)

<sup>16</sup> Vanguard Newspaper Interview published on 18<sup>th</sup> November 2012

<sup>17</sup> 404 U.S. 260 (1971)

Despite mixed opinions about ‘plea bargain,’ its benefits to the criminal justice system seem to outweigh its drawbacks. It's crucial to acknowledge several advantages of plea bargaining:

- (i) It reduces litigation costs, thus conserving funds that would otherwise be spent on lengthy court cases, saving taxpayer money since negotiations are cheaper than trials.
- (ii) It assists courts and prosecutors in managing caseloads that have increased due to industrialization and rising criminal activity.
- (iii) It promotes the efficiency by ensuring for speedy and swift disposal of criminal lawsuits.
- (iv) It facilitates the decongestion of prisons.
- (v) Plea bargaining allows prosecutors to focus on prosecuting major offenses while handling less serious cases more leniently. This strategic management is essential given the volume of cases that need attention.<sup>18</sup>
- (vi) It can spare victims the trauma of public court appearances, which is particularly important in sensitive cases like assaults where the victim may wish to avoid public scrutiny.<sup>19</sup>
- (vii) In some cases, a defendant, even if guilty, might provide crucial information about another more serious crime. An example is Major Al-Mustapha's trial, where Barnabas Jabilla (Alias Rogers) was used as a key prosecution witness following a plea bargain that resulted in a lighter sentence for him.<sup>20</sup>

For defendants, the benefits of plea bargaining include:

- (i) Swift implementation of corrective measures.
- (ii) The opportunity to show remorse by admitting guilt, which can aid in their rehabilitation.

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<sup>18</sup> Epiphany, A. and Ani, L. *Plea Bargain in Nigeria Law and Practice* (Lagos: NIALS, 2012) . 109

<sup>19</sup>Agaba, J.A. *Practical Approach to Criminal Litigation in Nigeria* (3<sup>rd</sup>ed) (Abuja: Lawlords Publication, 2016) p. 627

<sup>20</sup>ibid

- (iii) Avoidance of the public trial process and the associated distress and humiliation.
- (iv) Receipt of concessions in exchange for guilty pleas;
- (v) Potential for significant sentence reduction, especially for those facing multiple charges.<sup>21</sup>
- (vi) Lower legal costs, which can be substantial, thus making early resolution financially beneficial.<sup>22</sup>

While there are numerous arguments for and against plea bargaining, its advocates argue that it is indispensable due to its broad utility.<sup>23</sup>

However, Nigeria faces similar challenges to those seen in jurisdictions like the USA and the UK, where plea bargaining is more established. Particularly, the EFCC and other law enforcement agencies contend with issues akin to those in other countries but are hampered further by less advanced investigative capabilities. The Evidence Act<sup>24</sup> in Nigeria limits the admissibility of forensic evidence, and even when it's permissible, the criteria are not sufficiently supportive of modern investigative techniques. Underfunding and inadequate training in forensic investigations prevent law enforcement from reaching international standards.

Moreover, the lengthy process from crime commission to trial can result in victims becoming unavailable to testify, posing significant challenges to the prosecution. This can lead to offenders being acquitted due to insufficient evidence and potentially reoffending, confident in their chances of evading conviction.

### 3.0 Brief History of Plea Bargain

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<sup>21</sup>Ocheme, C. Plea Bargain in the Administration of Criminal Justice in Nigeria: *NIALS Journal of International Legal Studies* (Lagos: NIALS, 2013) p. 100

<sup>22</sup> Ibid

<sup>23</sup>Samaha (n 7 ) 373

<sup>24</sup> Act no. 2 2011

Plea Bargain has been in existence for several centuries. Convictions were sometimes obtained by confessions back then. Although inducements had been outlawed by English law by the eighteenth century to stop the judicial system from spontaneously aborting.<sup>25</sup> Consequently, withdrawal of 'plea bargains,' has been historically permitted by courts in the USA but these arrangements persisted behind closed doors.<sup>26</sup>

Plea bargains gained popularity as a result of rising crime rates since courts and prosecutors had to deal with an excessive number of cases.<sup>27</sup> The plea bargain involves an effort to address society's need for justice in an environment of growing urbanization and industry, together with all of its associated problems. Over 90% of convictions by the 1930s were the result of a 'plea bargain.'<sup>28</sup> Courts, however, were hesitant to support these for a while.

*Brady v. United States*<sup>29</sup> established the rationale of plea bargains in the USA. In that case, the petitioner accused of the kidnapping in 1959 faced a death sentence as a maximum punishment. He was represented by an experienced attorney. The accused first decided to enter a "not guilty" plea. However, he later changed his plea to guilty after learning that his co-accused had confessed to the authorities and would enter a guilty plea, making him a potential witness. After being questioned twice over the voluntariness of the plea, his plea was accepted, and he was later given a 50-year prison sentence. He requested relief in 1967, arguing that his guilty plea was not given voluntarily. He maintained that his attorney put undue pressure on him to enter a guilty plea. He was not granted the respite by the District Court of New Mexico. The Appeal Court upheld the Court's

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<sup>25</sup><[http://www.wikipedia/innocent\\_defendants\\_dilema/plea\\_bargain/derven/lucian/edkins/vennesa.html](http://www.wikipedia/innocent_defendants_dilema/plea_bargain/derven/lucian/edkins/vennesa.html)> accessed 13 February 2023.

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup>Dervan (n 7)

<sup>29</sup> 397 U.S. 742 (1970)



decision after prayer. After receiving a second appeal, the Supreme Court maintained the decision made by the lower court, concluding among other things that;

The subject we address is innate to the criminal code and how it is applied because guilty pleas are not unconstitutionally forbidden. This is because the criminal law gives the judge or jury a variety of options when determining the appropriate sentencing in each case. In addition, it is frequently in the state's and the defendant's best interests to avoid the possibility of the maximum punishment allowed by law. The benefits of entering a guilty plea and reducing the likely sentence are clear to a defendant who believes there is little chance of being found not guilty. His exposure is reduced, the proper procedures can start right immediately, and the trial's logistical hassles are eliminated...

The Supreme Court emphasized that the use of plea bargains is conditional and necessitates proper safeguards to prevent abuse. Specifically, they cautioned against overly coercive plea incentives that could compromise the defendant's capacity for free will or those that could result in a sizable number of innocent individuals entering guilty pleas, which might raise constitutional issues. The Court also noted that a "plea bargain" entails beyond simply admitting guilt for prior acts; it includes the defendant's agreement to accept a judgment without a trial, effectively waiving the right to a judge or jury trial. Such waivers of fundamental rights which are constitutional have to be voluntary and made with a full understanding of the implications and potential consequences.<sup>30</sup>

Additionally, the Court clarified;

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<sup>30</sup> Ibid

We cannot assume that it is unconstitutional for the state to provide benefits to a defendant who, in turn, provides a significant benefit to the state and demonstrates through his plea that he is prepared to accept responsibility for his actions and enter the correctional system in a mental state that gives hope for successful rehabilitation over a shorter time frame than might otherwise be required.

The Court also established principles to ensure the validity of a plea bargain, stipulating thus:

- ((a) The defendant must fully comprehend the immediate implications and the true value of any promises made to him;
- (b) The plea should not be coerced through threats, improper harassment, deceit, or offers that are inherently inappropriate or unrelated to the prosecutor's role (such as bribes);
- (c) Once entered, a plea should not be deemed invalid simply because of a change of heart by the defendant or due to new insights into the case's facts or the legal positions of the parties involved.

Finally, the Court remarked that a 'Plea Bargain' is not more infallible than a trial before a court or jury. Therefore, stringent measures are adopted to prevent any unreliable outcomes.

According to Standan,<sup>31</sup> Plea Bargain existed as a contract between the state and the defendant. The Supreme Court of the USA underlined that both parties must abide by the provisions of this agreement in the *Santobello v New York case*. The Court also pointed out that if a plea bargain is violated, there are legal remedies available to address such breaches.

#### **4.0 Plea Bargain in Nigeria Legal System**

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<sup>31</sup>Standan, J. Plea Bargaining in the Shadow of the Guidelines 1993 Cal L. Rev. p. 81

In Nigeria, Prosecution authorities have only offered plea bargains to former public officers and offenders charged with Economic and Financial Crimes. There is little or no record that the Authorities have offered plea bargains in other categories of offenders.<sup>32</sup>

In *PML (Nigeria) Limited v. FRN*, the Court stated inter-alia;

In the criminal jurisprudence in this country, it would appear that plea bargain as a prosecutorial strategy or tool is an emerging phenomenon, thus there would appear to be no codified guidelines about it as it obtains in some other jurisdictions. It would also appear that there is a dearth of authorities of our courts thereon as it is an emerging phenomenon.<sup>33</sup>

Before 2015, the federal legal framework for plea bargaining in Nigeria was limited, with only specific provisions such as section 14(2) of the EFCC Act<sup>34</sup> in place. This section granted the EFCC the authority to settle any offense punishable under the Act by accepting a monetary payment. The maximum fine that would be imposed in the event of a conviction could not be exceeded by the amount accepted. Specifically, section 14(2) provided that under the constraints of Section 174 of the Constitution, the Commission can resolve any offense by accepting a payment it deems appropriate, up to the maximum potential penalty for the offense.

In Nigeria, the only established legal framework for plea bargaining at the state level was found in Lagos State.<sup>35</sup> The law sets out the procedure governing Plea Bargain in Lagos State and clearly defines the roles of the Court, the Defence, and the Prosecution. It also made substantive and

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<sup>32</sup>Daudu, J. A (Adekunle, D. (eds) *Reforming Criminal Law in Nigeria* (Nigeria Bar Association, 2012) p. 209

<sup>33</sup> (2014) LPELR – 22767 (CA) p. 3

<sup>34</sup>Economic and Financial Crimes Commission (establishment) Act Cap E. 1 LFN 2004

<sup>35</sup> Administration of Criminal Justice Law 2007 see Section 75 and 76

procedural precautions to protect not just the involvement of the accused person but also the involvement of the public.

In 2015, the ACJA<sup>36</sup> was promulgated creating a Legal Framework for practicing the concept of ‘Plea Bargain’ in Federal Courts. Section 270 states inter alia;

- “Notwithstanding anything in the 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 the defendant or on his behalf.
  - (b) Offer a plea bargain to a defendant charged with an offence”

By Section 270 (1-18) conditions precedent to enforce plea bargain in a criminal trial are clearly outlined.

In 2015, Rivers State enacted the ACJL,<sup>37</sup> which included Section 277 (1) and (2). These sections specifically facilitate plea bargaining by stipulating that, notwithstanding Section 277 (1) or any other law, the prosecutor is authorized to:

- (a) ‘Receive and consider a plea bargain proposal from a defendant charged with an offense, whether the proposal comes directly from the defendant or through their counsel, as a means to resolve or conclude the case.’
- (b) ‘Initiate or suggest a plea bargain as a method for resolving a case involving a defendant charged with an offence.’

Section 277 (1) (2) (a) of the legislation allows the prosecution to engage in a plea bargain with the defendant when the available evidence is not sufficient to establish guilt beyond a reasonable doubt.

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<sup>36</sup>Administration of Criminal Justice Act

<sup>37</sup>Administration of Criminal Justice Law No 7 of 2015

Additionally, the Delta State ACJL has been expanded to include detailed provisions that support the implementation of plea bargaining within the criminal justice system. Ocheme,<sup>38</sup> argues that the concept of plea bargaining is familiar in any country with a common law heritage because these legal systems assign significant responsibilities to the Attorney-General and prosecutors, including the management of pleas and the amendment of charges.

## 5.0 Conclusion

Where the idea of forensic investigations of crime is introduced into Nigeria as a mandatory practice, the role of the prosecution will be enormously enhanced in the swift disposition of criminal cases. For instance, according to statistics gathered from the High Courts in Warri, Delta State, Nigeria, out of the 263 criminal cases filed by the prosecutions from the year 2010 – 2015, 124 of those criminal cases were struck out of the court due to lack of prosecution witnesses or lack of evidence.<sup>39</sup> Even though evidence abounds that some of these accused persons may have been actual perpetrators of those crimes, due to the standard of proof in criminal cases laid down by law, they escape culpability. It is hereby argued that if plea bargain were to be practiced as it exists globally, the situation would have been different because some of those accused persons who would have been pronounced guilty albeit on lesser charges would not have been able to escape punishment; the time of the court would have been saved and the money expended on trial would have been saved and avoided by both the prosecutions and the accused.

Comparatively, in the UK by the end of March 2005, the Crown Prosecution Service<sup>40</sup> had completed 94,743 cases, with 61.5% ending in

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<sup>38</sup>Ocheme '(n 10) 105

<sup>39</sup> Information gathered from the High Court Registry December 2015

<sup>40</sup> Crown Prosecution Service is the equivalent of the Directorate of Public Prosecutions in Delta-State

guilty pleas.<sup>41</sup>In the US, Department of Justice statistics from 2000 show that 87.1% of defendants resolved their cases through plea bargains, while only 5.2% of cases went to trial.<sup>42</sup> It is submitted respectfully that one constant thing is change, the introduction of the concept of Plea Bargain in its original concept serves as a prospect to the prosecutions in Nigeria in her criminal justice system. This burst can be attained by the constitution of the Sentencing Committee to ensure the success in the first appearance of this concept of a plea deal. Plea Bargain will go a long way to secure an efficient criminal justice system, by ensuring that those who are truly guilty are put behind bars and allowing those innocent accused persons who remain in prison awaiting trial for a long time be set free.

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<sup>41</sup> Andrew S.L. & Richard Y. Criminal Justice (3<sup>rd</sup>ed) (Oxford University Press, 2007) p. 387

<sup>42</sup> n. 36 p. 108