

CONVICTION TO COMPROMISE: THE PLEA BARGAIN OPTION

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INTRODUCTION

Criminal Justice administration is taking new dimensions worldwide. One of the recent developments in the administration of criminal justice is the emergence of plea bargaining. Most criminal prosecutions are concluded even without trial, this happens in the form of compromises between the parties concerned.

There is polarity of contemporary reactions to this practice. Nevertheless, most participants in the plea bargaining process find the practice as a panacea in the administration of criminal justice. In an epoch where the practice of plea bargaining has come under opprobrium, especially in relation to the anti-corruption fight, it is only apt to engage in an exercise of self-flagellation and make a few recommendations that will impact on criminal justice administration.

In furtherance of its resolve to bring contemporary problem to public discourse and arrive at practical recommendations that will move the nation forward, the Nigerian Institute of Advanced Legal Studies, held a one day Roundtable on Conviction to Compromise: The Plea bargain option to articulate the problems and challenges facing our criminal administration with a view to providing solutions.

Perspectives for the Roundtable include:

- i. Plea Bargaining: History and Origin
- ii. The paradox of plea bargaining
- iii. Guilty Pleas and Concessions of Bargaining
- iv. Criminal Justice and Sentencing Policy
- v. Coercion to Compromise: The Imperatives of Plea Bargaining

- vi. The Negotiated Guilty Plea: A paradigm shift in Sentencing
- vii. Plea Bargain in Nigeria: Constitutional Question
- viii. The Role of Plea Bargaining in Modern Criminal Law#
- ix. Economic Crime and Plea Bargain
- x. Plea Bargaining: The Law and Economics of Criminal Prosecution in Nigeria
- xi. The Prosecutors Role in Plea Bargaining
- xii. Plea Bargain: Immunity from Punishment

OBSERVATIONS

1 By its nature, plea bargaining is an activity undertaken within the context of prosecutorial discretion whereby the prosecutor in order to save time or cost, or avoid the difficulty in certain cases, of having to strive to prove certain facts required to establish certain offences, decides to offer certain concessions to the defendant in exchange for specific offence(s) charged or proposed to be charged.

2 Plea bargaining allows criminals who have accepted responsibility for their actions to receive consideration for their remorse in the form of a lighter sentence.

3 Plea bargaining is part of the prosecutorial decision making process where the criminal defendant and the prosecutor reaches a mutually satisfactory disposition of a criminal case, subject to court approval which often concludes a criminal case.

4 The United States of America operates plea bargain fully, Rule 11(e) of the Federal Rules of Criminal Procedure of the United States of America states that plea bargain must take place before trial.

5 In the United States of America, National Prosecution Standards have been laid down which the prosecutor must adhere to before making a decision to enter a plea bargain.

6 Apart from the National Prosecution Standards, in making a decision, the prosecutor must be guided by public interest before entering into a plea bargain.

7 Under the US system, the judge does not participate in plea bargain discussions, and will only authorise a plea bargain where the defendant makes a knowing and voluntary waiver of his/her right to a trial, understands the charges, maximum sentence if he/ she pleads guilty, makes a voluntary confession in court to the alleged crime, and there is factual basis to support the charge.

8 Plea bargaining is time saving and expedites the conclusion of the criminal process without the need for formal trial.

9 The use of plea bargaining system in the United States of America has reduced the cost of criminal justice from \$76 billion to \$3.8 billion annually.

10 Plea bargaining usually gives the defendants less punishment than they would receive if they were found guilty of all charges after a full trial.

11 Some of the criticisms of plea bargaining include:

a. Plea bargaining has been criticized as being unfair to criminal defendants for it gives prosecutors too much discretion in choosing the charges that a criminal defendant may face.

b. Prosecutors use overcharging to coerce guilty pleas from defendants thereby depriving them of the procedural safeguards and the full investigation of the trial process.

c. Defendants could face prosecutorial coercion due to the lack of level playing fields between the criminal defendant and prosecutor during plea bargaining.

d. Refusal to plead guilty and accept plea bargain could lead to the criminal defendant being charged with a more serious offence.

e. The Prosecutor is not bound to honour the terms of the plea bargaining agreement.

12 The suggestion that plea bargaining “usually involves the defendant's pleading guilty to a lesser offence in return for a lighter sentence” also distorts the reality of plea bargaining by ignoring the vast array of concessions that may be offered to a defendant in exchange for his guilty plea.

13 A troublesome derivative of plea bargaining in the United States is over charging which is used to coerce guilty pleas.

14 Guilty plea or plea bargaining is not restricted to misdemeanours alone, it extends to felonies as well.

15 Some of the factors that necessitate the practice of plea bargaining in courts in America and other places are present in Nigeria today.

16 The presence of counsel during the negotiating stage of plea bargaining constitutes satisfactory safeguards.

17 The Supreme Court has enormous powers to interfere in issues relating to sentences passed by lower courts, but it has however set criteria for interference for itself.

18 First offender status could be combined with other mitigating factors to reduce a prison sentence

19 Our courts in recognition of the delay which is at times inevitable if justice is to prevail reflects this recognition while sentencing so that an offender is not worse off for being detained in the course of his trial, especially when a prison sentence is to be imposed.

20 Courts are sometimes moved by the conduct of the offender when sentencing

21 Where an accused person pleads guilty, he saves the time of the court, witnesses and
the prosecution.

22 Aggravating factors could either lead to the enhancement of the punishment or
playing down the mitigating factors in which case the offender will be deprived of the
possibility of having a lighter sentence.

23 Mitigating factors in sentencing are not mutually exclusive and could not be
combined together to produce desired results by the Court.

24 Plea bargain is one of Nigeria's attempt at institutionalizing the concept of restorative
justice.

25 Conceivably, the most dominant source of the criticism against plea bargaining can be
traced to retribution as a penal philosophy.

26 There is a view that plea bargaining process is being abused via paying back a
fraction of the money that had been stolen.

27 The guiding principle of the new Criminal Law of Lagos State 2011 includes
rehabilitation, restoration, deterrence, prevention and retribution.

28 The practice of plea bargaining cannot be divorced from restorative justice.

29 There had always been provisions in Nigerian laws for the accused person to plead
guilty to a charge or charges leveled against him in a court of law.

30 The statutory basis for plea bargain in Nigeria is Section 127 of the Criminal
Procedure Act (CPA).

31 Provisions have always existed in our procedural laws on amendment and substitution
of charges (Sections 162 and 163 CPA).

32 Specific plea bargaining provisions in our laws include Section 14(2) EFCC Act,
2004, Section 76 of the repealed Criminal Justice Law of Lagos State, 2007, Section 76 of the
Administration of Criminal Justice Repeal and Renactment Law (CJRRL) 2011, and Section
248(2) of the 2005 Administration of Criminal Justice Bill.

33 Plea bargaining was never part of the history of the Nigerian legal system.

34 Plea bargaining was introduced to our statutory laws with the creation of the
Economic and Financial Crimes Commission (EFCC).

35 Plea bargaining under the Lagos State dispensation encapsulates both plea and
sentence bargain; preserves and/or reckons with rights/ interests of accused, victims, the
community and the investigator; reckons with the nature and circumstances of the offences;

subjects the process to review and validation by the presiding judge; and reduces the risk of abuse.

36 The economic underpinning s of plea bargaining indicates that it could save tax payers money and enrich the public treasury, especially where the bargain includes recovery, forfeiture and refund of substantial sums of money, and includes gorging provisions.

37 The challenges facing our justice delivery system includes delays in adjudicatory process, undue reliance on technicalities in adjudicatory process, inadequate funding of the judiciary, encroachment on the independence of the judiciary, deliberate subversion of constitutionalism, lack of due process, absence of rule of law, breaches of fundamental human rights and ethics of professionalism, lack of transparency and travesty of good governance.

38 Congestion of cases in courts, long adjournment of cases, indiscipline on the bench and the bar, corruption among officials of the judiciary, missing files, shameless demand for gratification before administrative duties in the judiciary are carried out, prohibitive cost of filing fees in the litigation process, incompetence and unqualified judicial delivery system, lack of confidence by the rank and file on the judicial process, wide spread adoption of sharp practices outside the framework of the legal system and absence of political will to apply and enforce the law are more challenges.

39 In many common law jurisdictions, plea bargaining is applied only to the extent that the prosecutors and the defence can agree that the defendant will plead guilty to some charges and the prosecutor will drop the remainder.

40 A survey of its application in some common law jurisdictions shows that a legal framework or some form of legislation regulating the expected roles and limitations of all stakeholders involved in the process is put in place.

41 Upon its introduction into Nigeria via the EFCC Act, plea bargain had been applied in a number of cases, particularly those bordering on economic crimes.

42 Plea bargaining as introduced by the Act gives the commission limited plea bargain options.

43 Plea bargaining assist prosecutors and the courts in the effective administration of justice by doing away in delay in the dispensation of justice. Use of plea bargaining can save the prosecutor from the burden of proving his case beyond reasonable doubt.

44 The present criminal process arrangement in Nigeria is grossly inadequate, and may have accounted for the arbitrariness and uncoordinated approach in the implementation option.

45 Plea bargain has some similar feature to a contract, in terms of legality the fact that a contract becomes void due to illegality in this case, legality of plea bargaining equally gives an accused person the right to decide what his plea should be.

46 Guilty plea in itself is not sufficient mitigating factor to justify leniency.

47 A guilty plea is usually a part of a plea bargain.

48 Banning the application of plea bargain does not eliminate all guilty pleas.

49 In the United States, plea bargaining operates in the form negotiation between the state and an accused person.

50 A criminal defendant has a right to accept or refuse plea bargains, he can also derogate from plea bargaining

51 The process of plea bargaining could be initiated by all stakeholders including victims, offender and prosecutor.

52 A challenge facing the application of the discretionary principle of plea bargaining is its alleged selective and discriminatory application.

53 Plea bargaining may work for lesser offences not economic crimes and corruption cases.

54 The law reform commission is harmonizing the Criminal Procedure Act, Criminal Procedure Code, Criminal Code and Penal Code hopefully the issue of plea bargain may be addressed.

55 Plea bargaining is used as a last resort when the system cannot prosecute a case fully.

56 In Nigeria what we have is compounding an offence and compounding extinguishes criminal liability.

57 Lagos State through their administration of Criminal Justice Law made a clear provision for Plea Bargain.

58 The Prosecutor should understand that his role is to prosecute and not persecute and must understand clearly what public interest is.

59 Our criminal justice system recognizes that it is only the Attorney General that can discontinue a proceeding against a criminal.

60 In Nigeria the accused person who used the option of plea bargain remains an ex-convict and cannot hold public office

61 The practice of plea bargain cannot be separated from the practice of restorative justice, both seeks to restore criminals and the victims.'

62 It is better to restore victims to the place where they were before the crime was committed.

63 There are several opportunities under our laws for the Attorney General to use plea bargain.

64 There is no need for an amendment of section 174 and 211 of the constitution.

65 The cost of imprisonment in Nigeria makes plea bargain imperative to the entire system.

66 Plea Bargain ensures full restitution; it addresses the issue of fast criminal justice administration.

67 The problem is that the institutions in Nigeria are weak, human capital should be enhanced.

RECOMMENDATIONS

1. Plea bargaining though useful in cost, time and human resources savings, requires some edge trimming even in the US.

2. Nigeria has reached a stage in its developmental process when it has to face the challenges facing its justice delivery system and explore viable options to move its legal system forward.

3. Government must not leave plea bargaining as a practice of courts, and go further to make legislation.

4. There is need to look at some other forms of punishments including non- custodial punishments using guidelines on sentencing to obliterate or eclipse the likelihood of gross abuse by the courts and provide scope of operation.

5. More effort should be made by counsel to furnish the Courts with relevant facts which could enable the judge to pass an appropriate sentence.

6. Judges should devote more time in reviewing and where necessary inquire from relevant materials necessary before passing their sentence.

7. The number of years of imprisonment awarded should always appear so that anybody carrying out research on sentencing practice could appreciate the trend and the degree of the variation in sentencing.

8. Those responsible for reporting cases should endeavour to remember to always include aspects relating to “Allocutus”, bearing in mind that some still include it at the moment, It should be a regular feature.

9. It should be mandatory that judges should give reasons for the sentences imposed to be able to advert to its guiding principles.
10. Practice direction on sentencing should be laid down by the superior courts, more appropriately the Court of Appeal as the need arises especially with respect to prevalent offences.
11. Prosecuting counsel should, whenever necessary, emphasize the aggravating factors, by showing for example the prevalence of the offence and urge a deterrent policy.
12. Judges should familiarise themselves with the conditions in our prisons and should visit them from time to time to get firsthand knowledge of the sentence involved.
13. Seminars should be organized from time to time for judges to deliberate on sentencing practices.
14. Statistics of reports of after effects of particular sentences should be kept. These may form the basis of useful discussion at seminars.
15. More sentencing options such as suspended sentence, partly suspended sentence, community service order and weekend imprisonment should be created to reduce reliance on imprisonment as a form of penal sanction.
16. Sentencing and treatment of offenders should be taught both at the undergraduate and professional levels.
17. Plea bargaining should be viewed from a holistic angle of both restoration and retributive models of justice to avoid giving the impression of immunity from punishment, freedom from guilt and escape from punishment. This will also reduce the chances of making a mockery of the criminal justice system.
18. Practice direction should be given by Chief Judges on procedure to be followed as regards the quantum of restitution, restoration, compensation and sentence of imprisonment to be made in cases bothering on fraud, breach of public trust and corruption.
19. It is imperative for law enforcement efforts to be focused on detection and prevention of crimes rather than concentrating on dealing with the end result of crime.
20. Law enforcement agencies and their personnel should be equipped with forensic science capabilities and high tech equipment that have capacity to, for instance, track down and incapacitate terrorism financing, economic and financial transactions that border on criminality, cyber crimes and more.
21. The capacity of law enforcement agents and their support staff should be built for more effective discharge of their duties.

22. Substantial justice uninhabited by servitude to technicalities is imperative for the success of this option.
23. There is the imperative need to build the capacity of prosecutors and end the rampant practice of outsourcing criminal prosecutions to private legal practitioners, unless cogent and verifiable reasons compel otherwise.
24. There is an imperative need to take a cue from the Lagos State model.
25. There is the imperative need to engender integrity in the criminal justice system. There is a need to institutionalize a regulatory framework for the operation of plea bargain in Nigeria in line with our peculiar circumstance.
27. Need for prosecutors to be highly knowledgeable particularly in prosecution of criminal matters, and must be conscious of his duty to prosecute and not to persecute in every case.
28. Preservation of public interest, sense of justice, integrity, fairplay, sense of balance, practicability and feasibility should be behind the minds of prosecutors at all times.
29. Prosecutors should have the ability to recognise and predict/ approximate the outcome of true adjudication at a lower cost when opting for plea bargain.
30. Cost and benefit analysis should be considered in order to save time and avoid unnecessary public trials and protect innocent victims of crime from going through trial process ordeals which could engender their privacy and expose them to unnecessary risks.
31. Prosecutors should guarantee transparency of the plea bargaining process via avoiding inducement, threats or coercion.
32. Effective confidence building measures should be devised for parties to the plea bargain option.
33. Critical to the success of plea bargain in Nigeria is the need to institutionalise a standardised legislation that would guide the practice and define clearly the role of the prosecutor, the accused person, the defence counsel, the victim, the judge and the society in order to forestall abuse.
34. The National Assembly should place a viable mechanism for setting in motion a legal framework for the adoption of plea bargaining as part of our criminal jurisprudence in Nigeria.
35. Plea bargaining should not be an exclusive preserve of the rich; it should be applicable to all criminal cases with great caution in criminal cases, and.
36. Legislations should be put in place in both Federal and state level to accommodate plea bargaining.

37. Some sentencing guidelines must be made available for judges so as to ensure impartiality in the practice of plea bargaining, especially when it comes to the issue of concession.
38. Nigerian should consider the option of penal orders as practiced in West Germany when it comes to simple offences.
39. The Georgian Model of plea bargaining is worth considering when designing a legal framework for plea bargaining in Nigeria.
40. The process of initiating the plea should be made broader so that any of the party involved can initiate the plea.
41. The need to use other terms like plea agreement, plea negotiation and plea arrangement is suggested
42. Before a Plea bargain the prosecution should consider several issues before using plea bargain i.e. the age of the case, whether or not to call witnesses, availability of witnesses and the victims; and the emotional trauma caused.
43. The accused person must be fully aware of what a plea bargain is all about; there must be factual bases on what the accused is being charged with
44. A clear sentencing guideline should be worked out to guide our judges in the execution of their duties to form the guidelines for the execution of plea bargain.
45. Government should not just leave Plea Bargain as a practice of the courts but it should be looked into with clear guidelines so that it can be enforced by our courts.
46. Nigerians should appreciate human loss and human indignities suffered in our prisons and opt for plea bargain
47. There must be a mechanism for monitoring the actions of prosecutors, judges and investigators.
48. We must ensure that only people who have a sound knowledge of criminal law processes are given the task of prosecuting plea bargain.
49. The Attorney General does not need guidelines it is the prosecutors that need guidelines for plea bargaining so there is no need for the amendment of section 174 and 211 of the constitution of Federal Republic of Nigeria , 1999
50. In Nigeria an accused person should be allowed to intervene in his case, if he feels his lawyer is being too legalistic he should be allowed an opinion through plea bargain.
51. To decongest our courts we need plea bargaining in Nigeria
52. There should be proper investigation before Plea bargain can be brought in
53. Capacity of lawyers working in the ministry of justice should be built and improved

54. Our Prosecutors go into plea bargain from a position of weakness, we need to reposition our laws to enable the prosecutors enter the plea bargain from a position of strength.
55. The law of plea bargain should ensure that corruption is minimized, the law should include double jeopardy, compounding, prison decongestion, and it should break down the applicability and the framework of plea bargain.
56. The major problem in Nigerian laws is sentencing; we should have more sentencing options in our laws example suspended sentence.
57. There is need to look at plea bargaining from human right perspective not only economic perspective.
58. A compensation package should be designed to include all parties.
59. Plea bargain should be initiated at the instance of the accused, prosecutor and the victim.
60. Nigeria has reached a stage in its developmental process when it has to face the challenges facing its justice delivery system and explore viable options to move its legal system forward.

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