

Plea Bargaining in Nigeria: A Clog on Fundamental Human Rights

Emuaye, Grace Adija

*Department of Arts and Social Sciences
School of General Studies, Federal College of Education
(Technical) Omoku, Rivers State*

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Abstract

Injustice anywhere is a threat to justice everywhere.' There is manifest injustice with regards to vulnerable, innocent, and unrepresented defendants in plea bargain cases under the Nigerian adversarial system of adjudication in which the judge does not descend into the arena of conflict but rather plays a passive role as an impartial umpire. Thus, because of the passive role of the judge, vulnerable and unrepresented defendants are induced, and most times coerced into plea bargaining by prosecutors who do not want to go through the rigors of trials because the burden of proof lies on the prosecution at trial thereby, compelling such defendants to admitting to offences they never committed which therefore is tantamount to an infringement of their fundamental human rights. Thus, the aim of this paper is to critically analyze plea bargaining as practiced under the Nigerian adversarial system of adjudication as a clog on fundamental human rights of defendants. Thus, there is urgent need to wedge the sliding slope. This piece therefore makes necessary recommendations that would bring about positive change in the criminal justice system in Nigeria and in other jurisdictions in general if implemented.

Keywords: *Plea bargaining, Human Rights, Clog*

Corresponding Author: Emuaye, Grace Adija

Background to the Study

According to *Ashworth and Redmayne*,¹ the criminal process is part of the state response to crime, part of the mechanism by which the state applies substantive criminal law to its citizens, and it forms part of the wider criminal justice system which include all the agencies and institutions such as the police, prosecutors, judges, public defenders, prison officers amongst others. Thus, suffice it to state that the essence of the criminal justice system is not only to convict criminals but as well to protect the innocent and thereby maintaining a fair justice process. In Nigeria however, so much injustice is evident in the criminal justice system specifically in plea bargain cases where most unrepresented and vulnerable defendants are coerced by prosecutors into pleading guilty to offences they never committed under the guise of incentives, this is humbly submitted to be an infringement on the fundamental right to fair hearing,² the principle of equality of arms,³ the presumption of innocence,⁴ Right against self-incrimination⁵ and right to confront prosecution witnesses.⁶ Thus, *Khalilov*⁷ opined that any person in a democratic society is guaranteed to be provided with the right to fair trial regardless of his or her being accused of a serious crime even of one leading to serious consequences. However, contemporary criminal justice system in most countries of the world recognize plea bargaining in which the defendant is deemed to have waived his right to fair trial. However, for a guilty plea in plea bargain to be legitimate, it must be voluntary, informed, unequivocal and fact based⁸. However, in Nigeria, most plea bargain cases arise most often from threat by prosecutors to charge the defendant for higher offences. Hence, the idea of voluntary, informed, unequivocal, and fact-based requirement then becomes questionable. Also, because Nigeria operates the adversarial system of adjudication in which the judge plays a silent role as an impartial umpire who does not descent into the arena of conflict in order not to get blinded by the dust of conflict⁹, there is practically lack of scrutiny by judges as to whether the guilty plea by the defendant is fact based and voluntary.

The Legal Framework of Plea Bargaining in Nigeria

Plea bargain made its debut in Nigeria in the year 2004 in the case of *Federal Republic of Nigeria v Nwude and others*¹⁰. In this case, the defendants were arraigned before an Abuja High Court in 2004 for swindling a Brazilian bank of the sum of \$242 million, one of the defendants changed

¹ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed Oxford University Press 2010) 2

² Article 10 and 11 of the Universal Declaration of Human Rights 1948 (UDHR); Article 7 of the African Charter on Human and People's Rights 1981 (ACHPR); Section 36 (4) of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) and Section 135 of the Nigerian Evidence Act 2011

³ Article 14 (3)(d) ICCPR; Article 10 UDHR

⁴ Article 11 UDHR; Article 7 ACHPR; Article 14 (2) ICCPR; Section 36(5) CFRN

⁵ Article 14(3)(g) ICCPR; Section 3(11) CFRN

⁶ Article 14(3)(e) ICCPR; Section 3(6)(d) CFRN

⁷ Fardin Khalilov, 'Equality of Arms in Criminal Procedure in the Context of the Right to a Fair Trial' (2021) RUDN Journal of Law 602-621

⁸ Kakibuule Gladys Kisekka 'Plea Bargaining as a Human Right Question' (2020) 6 Cogent Social Sciences, Issue 1

⁹ Abraham Goldstein, 'The Passive judiciary: Prosecutorial Discretion and the Guilty Plea' (1981) 46 Hofstra Law Review 63

¹⁰ Suit No ID/92/2004

her plea to a guilty plea in the mid of the trial, others as well did same. Hence, they got lesser sentence and were directed to refund the swindled money and as well forfeit their acquired properties. Section 494 (1) of the Nigerian *Administration of Criminal Justice Act*¹¹ defines 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.” Also, the Economic and Financial Crimes Commission which is an anti-graft agency in Nigeria that has the authority to prosecute financial crime offenders¹² made provision for the legal basis of plea bargaining as applied by the commission in *section 14 (2) of the Economic and Financial Crimes Commission Act, 2004 (EFCC ACT)*¹³ as follows;

“Subject to the provisions of section 174 of the constitution of the Federal Republic of Nigeria, 1999 which relates to the power 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 sum 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”.

Thus, suffice it to mention that apart from federal laws regulating plea bargaining in Nigeria, several states also made provision for plea bargaining in criminal justice.¹⁴ A perfect example is Section 75 of the *Administration of Criminal Justice Law of Lagos State*¹⁵ 2011 which provides as follows;

“Notwithstanding anything in this law or any other law, the Attorney-General of the state shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney-General is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice and the need to prevent abuse of legal process”.

Section 76 of same law further provides as follows;

“The prosecutor and a defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of;

- a. A plea of guilty by the defendant to the offence charged or lesser offence of which he may be convicted on the charge*
- b. An appropriate sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty”¹⁶*

¹¹ Laws of the Federation of Nigeria 2015

¹² Tafa Balogun v Federal Republic of Nigeria (2005) 4 NWLR (Pt 324) 190; Lemmy Ughogbe 'Tafa Balogun Pleads Guilty' the Guardian Newspaper of 23 November 2005 pg 1-2 (report that Tafa Balogun, a former Inspector General of Police in a plea bargain arrangement pleaded guilty to a lesser charge of financial crime being prosecuted by EFCC and then given a lesser sentence; Alamieyeseigha v FRN others v Federal Republic of Nigeria (2006) 16 NWLR (Pt 1004) 1

¹³ CAP E1 Laws of the Federation of Nigeria 2010

¹⁴ Section 167 of the Administration of Criminal Justice Law OF Anambra State (ACJL) 2010

¹⁵ Repeal and Re-enactment Law CAP A3 Laws of Lagos State 2011

¹⁶ ACJL, LFN 2010

Thus, for the purpose of improving the criminal justice system in Nigeria, the Administration of Criminal Justice Act was enacted in 2015. Section 270-277 of the Act laid down the parameters for the application of plea bargain in Nigeria, section 270 provides as follows: “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”

Hence, suffice it to mention that the *Constitution of the Federal Republic of Nigeria 1999*, which is the supreme law of the country¹⁷ as well provides a constitutional basis for plea bargaining in Nigeria. Section 174 of the said constitution provides to the effect that the Attorney General of the Federation or officers of his department as prosecutors, shall have the power to discontinue criminal proceedings at any stage before judgment is delivered.

Procedural Issues Concerning Plea Bargaining in Nigeria

Ideally, in the criminal justice process, at trial, it is trite that the prosecution always has a duty to prove the guilt of the accused beyond reasonable doubt before a conviction can be secured.¹⁸ However, in plea bargaining, the criminal defendant pleads guilty to the conviction of lesser offence than the offence initially charged and therefore convicted without any possible trial. However, this plea of guilt ought to be voluntary. Thus, the issue of voluntariness of the defendant's acceptance of a guilty plea is a serious issue in plea bargaining process. *Albert Alschuter*¹⁹ therefore opined in this regard that plea bargaining is sometimes infected with duress from the prosecutors. An accused who is in fact innocent could be induced to plead guilty and bear witness against himself because of threat from lazy prosecutors who do not want to go through the stress and rigors of trials. Thus, this situation seems to as well operate in some other jurisdiction as *Leverick*²⁰ emphatically stated that pressure is plead on accused persons to plead guilty, hence innocent persons plead guilty to avoid the risk of a harsher punishment. Thus, suffice it to state that even though plea bargain ought to be a useful tool in retribution and rehabilitation, but the way plea bargaining is being leveraged by prosecutors especially in Nigeria has put the rights of suspects in a precarious position.

Infringement of Fundamental Rights of Criminal Defendants by Plea Bargaining: International Human Rights Law Provisions

Right to Fair Hearing

According to *Black's Law Dictionary*, “fair hearing is a judicial or administrative hearing

¹⁷ Section 1(1) of the Constitution of the Federal Republic of Nigeria 1999 provides for the supremacy of the constitution above all other laws of Nigeria.

¹⁸ Section 135 of the Evidence Act, CAP E11 FFN 2011. This legal burden of proof is as well recognized under international law. Article 66 of the Rome Statute of the International Criminal Court mandate the international Criminal Court (ICC) to impose conviction only when the guilt of the accused is proved. Also, the case of *Victor v Nebraska* (1994) 511 U.S. 1 is instructive. Justice Ginsberge stated in this case that the requirement of 'beyond reasonable doubt' means that conviction should be imposed when the jury is firmly convinced of the guilt based upon the perusal of evidence. However, if there is a real possibility that the accused is innocent, then he must be acquitted.

¹⁹ Albert Alschulter 'The Changing Plea Bargaining Debate' (1981) 69 CAL LREV 652

²⁰ F. Leverick, 'Sentence Discounting for Guilty Plea: An Argument for Certainty over Discretion' (2014) Crim. L.R Issues 5 338 at 340

conducted in accordance with due process”²¹. Thus, the right to fair hearing prescribes other in-built fair trial rights such as presumption of innocence. A fair trial according to *Meriam Webster Dictionary*²² is “a trial which is conducted fairly, justly and with procedural regularity by an impartial judge.” *Curtis*²³ therefore opines that because of the sensitive and essential nature of the right to fair trial, most international human rights instruments enshrine it in more than one Article. Hence, suffice it to mention that the aim of the right to fair trial is to ensure proper administration of justice. It provides for a right for parties to be heard and to respond to allegations made against them. Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*²⁴ buttresses this position.

Article 7 of the *African Charter on Human and People's Rights* 1981,²⁵ makes provision in same regards. Hence, it is humbly submitted that the right to fair trial is one of the most vital human rights. Thus, because of the important nature of the right to fair trial, it has been enshrined in the above mentioned international human rights instruments and state parties are obligated to enforce the provisions of the treaties prescribed by their laws. Nigeria as a member state and signatory to the above-mentioned treaties is therefore under legal obligation to comply. However, with the evolution of plea bargaining into the criminal justice system, several legal scholars have argued that it negates this fundamental right to fair trial.²⁶ Hence, *Dervan and Edkins*²⁷ are strongly of the opinion that the courts should carry out thorough investigation of each plea bargain cases and guilty plea to ensure that the guilty plea had not come from coercion, misrepresentation of promises or bribe. Hence, the need for checks and balances.

Presumption of Innocence

In every criminal proceeding, the defendant has the right to be presumed innocent and the burden of proof ordinarily rests on the prosecution.²⁸ Hence, the criminal trial provides a forum to put the prosecution to proof.²⁹ Article 7 of the *African Charter on Human and Peoples Rights* provides for right to be presumed innocent until proved guilty by a competent court or tribunal. Also, Article 11 of the *Universal Declaration of Human Rights* makes provisions for the presumption of innocence as follows “*Everyone "charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*” The *International Covenant on Civil and Political Rights* 1966 is another international legal instrument which further elaborates the provision of the UDHR

²¹ Text to n 9

²² Merriam-Webster's Collegiate Dictionary (10th edn, 1999)

²³ Doebller Curtis, *Introduction to International Human Rights Law* (CD Publishing 2006) 107-108

²⁴ Although Nigeria is a signatory to the ICCPR, it is however yet to be domesticated in Nigeria in accordance with section 12 of the Nigerian Constitution (as amended). However, the provision of the ICCPR forms a substantial part of Nigerian domestic law.

²⁵ Nigeria ratified the African Charter on Human and People's Rights on 22 June 1983, hence a state party. The ACHPR establishes the African Commission on Human and People's Rights. The purpose of establishment of this commission is to promote and protect human and people's rights in Africa.

²⁶ Okwori Nicholson Alechenu, Plea Bargaining; A Trial Procedure that Negates Fundamental Rights of the Accused Person (2013) SSRN

²⁷ Dervan L.E and Edkins V.A., 'The Innocent Defendants Dilemma: An innovative Empirical Study of Plea-Bargaining (2013) J. Crim. Law 103

²⁸ *Woolmington v DPP* (1935) AC 462 (HL)

²⁹ John Langbein, *The Origin of the Adversary Criminal Trial* (Oxford University Press 2003)

with regards to the presumption of innocence. Article 14 provides that “everyone charged with a criminal offence shall have the right; (2) to be presumed innocent until proved guilty according to law”. Thus, a defendant's right to be presumed innocent is one of the cornerstones of the right to a fair trial. The right to be presumed innocent until the contrary is proved by a court of competent jurisdiction or tribunal is a very important human right that is recognized as a norm of customary international law and enshrined in legal instruments of international human rights law. It is however submitted that by the evolution of plea bargaining as practiced in Nigeria, the fundamental principle of presumption of innocence is truncated. This is because the criminal defendant sometimes because of the uncertainty of what the outcome of full trial would be, gets lured by incentives for a reduced charge and reduced sentence and therefore agrees to plead guilty to a lesser offence without any trial and without judicial scrutiny of the facts that led to the admission of the guilty plea.

Infringement of Fundamental rights of Defendants by plea Bargaining: Nigerian Constitutional Provisions

By virtue of being a human being including persons accused of crime and are standing trial, man is conferred with inalienable rights³⁰ which have been recognized by human rights instruments globally and domesticated into the national laws of most nations including Nigeria. *Kayode Eso JSC* emphasized and re-iterated the vital nature of fundamental rights when he stated thus; “A human right is a right which stands above the ordinary laws 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 is to have these rights enshrined in the constitution so that the rights could be immutable”³¹. Thus, suffice it to state that this sacrosanct nature of fundamental human rights is being truncated by the practice of plea bargaining in Nigeria. Thus, it is submitted that by virtue of the coercive way plea bargain is practiced in Nigeria, some fundamental human rights of accused persons as provided in the Nigerian Constitution are infringed. The following are some of the constitutional guarantees infringed upon by the practice of plea bargaining in Nigeria:

Section 36 (5) of the Constitution of the Federal Republic of Nigeria; it provides thus:

*“Every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty.”*³²

This section provides for the Presumption of innocence. The supreme court of Nigeria in the case of *State v Ajayi* held that “it is trite that in criminal proceedings, the onus is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and the prosecution can only achieve this by ensuring that all the vital ingredients of the charge are proved by evidence.”³³ However, Plea bargain as a non-trial procedure convicts and condemns the

³⁰ Chapter iv of the Constitution of the Federal Republic of Nigeria 1999 made provision for the inalienability of human rights. Matters arising from this chapter of the constitution is often given priority and accelerated hearing as a human right matter. Also, it is pertinent to mention that Nigeria domesticated the human rights provisions of several international human rights treaties into her domestic law.

³¹ *Ransome Kuti v Attorney General of the Federation* (1985) 2 NWLR (PT6)

³² CFRN 1999; The provision of this section of the Nigerian constitution is similar with that of Article 6 of the Rome Statute of international Criminal Court.

³³ (2016) LPELR 40663 (SC) Okoro JSC pg. 50; Okputuobiode v State (1990) All NLR 36; Uche William v State (1992) 10 SCNJ 74

accused without trial and tendering of evidence to justify the conviction, hence this negates the right to presumption of innocence as enshrined in section 36(3) of the 1999 constitution of the federal Republic of Nigeria. When an accused person agrees to plea bargaining the presumption of innocence in his favour is displaced.

This section makes provision for the right to fair trial. *Section 138 (2) of the Nigerian Evidence Act*³⁴ buttresses fair trial. The section provides to the effect that the burden of proving the guilt of the accused under the Evidence Act rests upon the prosecution. Thus, in the case of *Kareem v Federal Republic of Nigeria*,³⁵ *Adekeye JCA* of the court of Appeal emphasized the right to fair trial when he stated that in all criminal cases, the prosecution has the burden of proving the essential ingredient the offence against the accused and the standard of prove has to be beyond reasonable doubt before a conviction can be secured and as such there would be deemed to be a fair trial which is one of the fundamental rights of the criminal defendant. Fair hearing is the bedrock of any adjudication. However, it is pertinent to state that in plea bargaining in Nigeria with regards to innocent criminal defendants, the fundamental right to fair trial of the defendant is scarified on the altar of plea bargain.

Section 36(11) of the constitution of the Federal Republic of Nigeria 1999. It provides thus:

“No person who is tried for a criminal offence shall be compelled to give evidence at the trial”.

This section makes provisions for the right against self-incrimination. Self-incrimination refers to the act of making a statement that suggests one's involvement in a crime. Thus, some learned legal scholars are of the opinion that plea bargain agreement is an act of self-incrimination.³⁶ This is in the sense that under the Nigerian Law of Evidence, the trial of any form of inducement or coercion violates any confessional statement made³⁷. Irrespective of this legal position however, the prosecutors in Nigeria still use their powers to pressurize criminal defendants into admitting crimes they never committed to relief them of the stress of proving the accused guilt beyond reasonable doubt.

Conclusion

The critical analysis of this work explicitly demonstrates that the atmosphere that prevails during plea bargaining in Nigeria rubs the defendant of the real element of choice.³⁸ Most criminal defendants enter plea bargaining involuntarily by virtue of concession that arise out of incentives.³⁹ Thus, a criminal defendant that is in fact innocent from all indications could be coerced or induced to plead guilty during plea bargaining because of threat of a higher charge

⁴⁰ Study of Plea Bargaining Innocence Project J.Crim. Law Criminal 103 1(2013)pg 1-48

⁴¹ Section 270 (8) of the Nigerian Administration of Criminal justice Act exclude judges from the negotiation process between the prosecutor and the defendant.

⁴² Section 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999. Prosecutors wield their powers by virtue of this provision and by virtue of the fact that the provision of the Constitution is supreme and above other laws in Nigeria, and by the provision of section 1 (3) of the Nigerian constitution, if any other law is inconsistent with the provisions of the constitution, that other law shall be rendered null and void to the extent of its inconsistency. Hence, prosecutors in Nigeria enjoy the full support of the constitution which is supreme for prosecutorial discretion

and sentence from lazy prosecutors who do not want to go through the rigors of trial because the burden of proof lies on the prosecutor at trial.

Hence, suffice it to state that the situation is indeed aggravating because of lack of judicial involvement and scrutiny of plea agreement by virtue of the strict adherence to the adversarial system tenets of which the judge plays a passive and non-interference role in plea bargaining. Thus, *Dervan and Edkins*⁴⁰ posited that courts should carry out thorough investigation of each plea bargain cases and guilty plea to ensure that the guilty plea had not arisen from coercion, or misrepresentation, hence the need for checks and balances. Thus, it is submitted that in the Nigerian adversarial system in which the judge only plays a passive role in plea bargaining⁴¹ and in which there is no judicial scrutiny of guilty plea, the prosecution has enormous discretionary powers,⁴² and most times uses this power to coerce unrepresented and vulnerable defendants into pleading guilty to a lesser charge. Therefore, because of this situation, several fundamental rights of criminal defendants are infringed upon, both under international human rights law and under Nigerian constitution. Some of such rights infringed upon include the right to fair trial, the principle of equality of arms, presumption of innocence, right against self-incrimination and the right to confront prosecution witnesses. Thus, the practice of plea bargaining in Nigeria undermines several principles of criminal justice system as well as some fundamental human rights. Hence, there is need for urgent reform to wedge the sliding slope and bring about sanity to the criminal justice system in Nigeria.

Recommendations

In the light of the above, the following recommendations are hereby humbly made:

1. To secure consistency with the rule of law and to curtail the arbitrariness of persecutors in the process of plea bargaining, it is humbly recommended that there should be judicial scrutiny of guilty plea in plea bargaining. The law should be reformed to enable judges to scrutinize the fact of the case that amounts to the guilty plea, thereby innocent accused persons would not end up being coerced into admitting to an offence they never committed.
2. Plea bargaining should not be left to persecutorial discretion.
3. There should be a hybrid of both the inquisitorial and adversarial imputation. The judge should be allowed to scrutinize the plea of the defendant vis-a-vis the fact of the case.

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