NIALS Policy Bulletin
Vol. 10, July, 2020

Nigerian Institute of
Advanced Legal Studies
(NIALS)





PLEA BARGAIN AND ITS IMPLICATION: AN APPRAISAL OF THE ADMINISTRATION OF CRIMINAL JUSTICE ACT (ACJA), 2015

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This Policy Brief is one of the outputs under a Project that aims to facilitate the implementation of the administration of criminal justice in Nigeria by increasing understanding and awareness about the Administration of Criminal Justice Act 2015 and the various state replicas.

The project is supported by John D and Catherine T. MacArthur Foundation

MacArthur Foundation

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BBFPrints - 07065179545



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Advanced Legal Studies

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Published by the

Nigerian Institute of Advanced Legal Studies (NIALS)

With support from

The John D and Catherine T. MacArthur Foundation

About the Project Implementation of ACJA 2015

The Project on the Implementation of the Administration of Criminal Justice Act (2015) aims to deepen understanding of the Federal Act and the respective state counterparts and improve the management of criminal proceedings, including the prosecution of anti-corruption cases in Nigeria. Through workshops, review of bulletins and digests, the Project offers a common framework for providing practical tools for relevant stakeholders and enhances nationwide familiarity with the legal instrument that ensures expediency in, and the modernisation of the criminal justice system.

The John D and Catherin T. MacArthur Foundation is supporting the Project as part of the Foundation's *On Nigeria Grant Program*

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Plea Bargain and its Implication: An Appraisal of the Administration of Criminal Justice Act (ACJA), 2015

1. Introduction

The Administration of Criminal Justice Act 2015 (referred to as 'ACJA 2015) is one of the procedural laws regulating criminal proceedings in Nigeria. With the repeal of Criminal Procedure Act[1] and Criminal Procedure Code (of Northern Nigeria)[2], ACJA 2015 becomes the main legislation for the national criminal justice system applicable in federal courts[3].

Prior to the enactment of the Administration of Criminal Justice Act, there were no clear guidelines on the existence and application of the plea bargain concept in the Nigerian criminal justice system. The Court of Appeal per Ogunwumiju clearly held in the pre- ACJA 2015 case of *Federal Republic of Nigeria v. Igbinedion*[4] that: "plea bargain is as at now generally unknown to our criminal justice administration and indeed our criminal jurisprudence". Although the Economic and Financial Crimes Commission (EFCC), established under the provisions of the Economic and Financial Crimes Commission (Establishment) Act, 2004 had prosecuted political office holders including Diepreye Alamieyeseigha, ex-Governor of Bayelsa State, the former Inspector General of Police, Mustapha Adebayo Balogun [popularly known as Tafa Balogun] and former Managing Director of Oceanic Bank Plc, Mrs Cecilia Ibru under its powers under section 14(2 of the EFCC Act[5], it was in the Administration of Criminal Justice Act of Lagos State, 2007[6] that the words "plea bargaining" were expressly used in any enactment in Nigeria for the first time. As can be seen from the EFCC Act, section 14(2) and the Criminal Procedure Code, section 339, references are to "compounding" and not "plea bargaining".

With the passage of the ACJA 2015, the concept of plea bargain is now part of our criminal justice system and jurisprudence at the federal level. Thus, the Supreme Court in *PML (Securities) Co. Ltd v. FRN*[7] stated:

> 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 in relation to it as it obtains in some other jurisdictions. It would also appear that there is a dearth of authorities of our Courts therein as it is an emerging phenomenon…The first legislation to bring in plea bargain into our criminal jurisprudence is the Administration of Criminal Justice Law of Lagos State (ACJL), 2011. The second is the Administration of Criminal Justice Act, 2015.

Generally, the purpose of criminal justice is to ensure justice for all - the defence, the prosecution and to protect the public. The usual problems encountered in criminal justice administration include lengthy trials, difficulty in effecting conviction, the difficulty in gathering evidence and poor perception of the system by the general public.



The challenge of the system therefore, is to come out with strategies and mechanisms that will further the objectives of the criminal justice system. This is the challenge that the ACJA attempts to solve. In view of the overarching objectives of the ACJA which include the protection of the society from crime and protection of the rights and interests of the suspect, defendant and the victim, the concept of plea bargain provides a roadmap towards achieving this stated purpose. This policy bulletin examines the provisions of plea bargain under this legislation and considers its significance in criminal justice reform and administration in Nigeria.

2. The Concept of Plea Bargain

According to Adekunle,

> Plea bargain is one of the tools employed in the criminal justice system. It helps the court and State to manage caseloads. Although in the ACJA 2015, the discretion to accept a plea bargain lies with the prosecutor, there are certain guidelines to prevent abuse especially as to what the prosecutor must consider before entering a plea bargain with the accused[8].

Section 494(1) of the ACJA 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.

Section 270 (1) of the ACJA provides that 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; or b) offer a plea bargain to a defendant charged with an offence. From the above, plea bargain is made by a specific defendant to a prosecutor or offered to a specific defendant by a prosecutor setting out the terms of the bargain.

Shedding light on this, the Supreme Court in the *PML Securities* case quoting the Court of Appeal per Lokulo-Sodipo JCA, stated as follows –

> 'The concept of plea bargain clearly operates *in personam*, so to say, and not by privy or proxy. By this, I mean that a plea bargain must be a deliberate and conscious act taken by the prosecutor and a particular accused person or specific accused persons in a charge…..'

Plea bargain however does not dispense with the basic rudiments of criminal adjudication. The Supreme Court in the same case stated further that:

> the main purpose of criminal trial is to ensure that a person, who has chosen to break any aspect of the criminal law, is not left to go scot free and for this reason, the prosecution has to establish the guilt of an accused person beyond reasonable doubt to pave the way for his punishment by law. The concept of plea bargain has in no way, derogated from the purpose or objective of criminal prosecution, given the fact that before an accused can benefit from the arrangement, the accused in question must plead guilty to some form of offence and, of course, be convicted for what he has pleaded guilty to.

Where there are multiple defendants, plea bargain made by one cannot be applied to others. To benefit, each defendant has to clearly make a plea bargain to that effect. In the *PML Securities* case, a plea bargain was made by Lucky Igbinedion and Kiva Corporation and those were the only two to whom the plea bargain was applied. Plea bargain was not applied to the appellant who, though a party in the case at first instance, failed to enter into a plea bargain.

According to *Black's Law Dictionary*[9], a plea bargain is

> A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty or no contest to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges – Also termed plea agreement, negotiated plea; sentence bargain.

Thus a plea bargain may be made in respect of the sentence or with respect of the offence charged.[10] This is provided for under Section 270 (4):

> The prosecutor and the defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of:
>
> (a) the term of the plea bargain which may include the sentence recommended within the appropriate range of punishment stipulated for the offence or a plea of guilty by the defendant to the offence(s) charged or a lesser offence of which he may be convicted on the charge; and
>
> (b) an appropriate sentence to be imposed by the court where the defendant is convicted of the offence to which he intends to plead guilty.

In *Nwude V. FRN & ORS*,[11] the accused had bargained with the prosecutor for a lighter sentence in return for forfeiture of some of his properties. The court made it clear that having entered a plea bargain, he could not later seek to retract from it. The court held:

> In this instant case, the Appellant had willingly approached the Respondent and had agreed to forfeit his properties in exchange for pleading guilty to lesser charges. The contention that the punishment of the accused must be confined to the Statement of the offence as contained in the count is not applicable here since he had willingly entered into an agreement with the

> Respondent to forfeit his properties. He cannot now go back on what he has willingly agreed to. He cannot benefit from his crimes. Again the list of properties forfeited were drawn up by the appellant personally, no dates of acquisition stated, he cannot therefore challenge that list. If the list were a product of the 1st Respondent, then he can question or challenge them on dates of acquisition. He is a man of rational thinking who willingly gave the list of properties he is forfeiting. He cannot turn round to allege that some of those properties were obtained before the commission of the offence.[12]

By this, the court has shown the voluntary and binding nature of plea bargain.

On the other hand, in *Ogboka v. State*[13] the court held that there was no plea bargain because the court could not see any form of bargain either for sentence reduction or lesser charge. There was no agreement showing that parties have voluntarily come to some exchange.

3. Factors to Consider Before Offering or Accepting Plea Bargain

Justice is at the heart of plea bargain, hence the acceptance or offer of plea bargain by the prosecutor must be motivated by the desire for justice. Section 270 (3) provides: Where the prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process, he may offer or accept the plea bargain.

Thus, plea bargain is not offered or accepted with a view of giving defendants a slap on the wrist or to mock the administration of criminal justice. Specifically, the provision states that abuse of legal process is to be prevented. This is reinforced by the provision of s. 270 (5) which enumerates factors that the prosecutor is to take into account before concluding that requirement of subsection (3) has been met. Such factors include consultation with the victim, his representative and the police

in charge of investigating the case; and the nature and circumstances relating to the offence, the defendant and public interest.

The ACJA further provides that the prosecutor can only enter into a plea or sentence agreement after consultation with the investigating police officer, and the victim or his representative, with due regard to the nature of and circumstances relating to the offence, the defendant and public interest. The prosecutor, where it is reasonably feasible, is to afford the complainant or his representative the opportunity to make representations to the prosecutor regarding the contents of the agreement and the inclusion in the agreement of a compensation or restitution order. Such agreements between the parties must be in writing and signed.[14]

The requirement that plea bargain agreements be in writing is a welcome development. Even before the enactment of the ACJA 2015, the Court of Appeal in *ROMRIG Nigeria Ltd. V. FRN*[15] stated that it is essential for such agreements to be in writing. The court stated: 'Parties cannot expect the Court to act on an imaginary agreement. … 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.'[16]

4. Procedure for Plea Bargain under the ACJA 2015

Under section 270 (2) ACJA, the prosecution may enter into plea bargain with the defendant, after obtaining the consent of the victim during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence. The following conditions must be present before taking this approach:

> (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, in a case of conspiracy, has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders.

Plea Bargain may be entered before the plea to the charge under section 270 (4). The prosecutor and the defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of:

(a) the term of the plea bargain which may include the sentence recommended within the appropriate range of punishment stipulated for the offence or a plea of guilty by the defendant to the offence(s) charged or a lesser offence of which he may be convicted on the charge; and (b) an appropriate sentence to be imposed by the court where the defendant is convicted of the offence to which he intends to plead guilty.

By virtue of subsection (7) and in consideration of the ROMRIG case above, the ACJA makes it imperative that an agreement between the parties contemplated in subsection (3) shall be reduced to writing and shall state the following fully:

(a) before conclusion of the agreement, the defendant has been 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) state fully, the terms of the agreement and any admission made, and(c) be signed by the prosecutor, the defendant, the legal practitioner and the interpreter, as the case may be.(d) A copy of the agreement signed by the parties in paragraph (c) of subsection (6) of this section shall be forwarded to the Attorney-General of the Federation.

The presiding Judge or Magistrate is not permitted to be part of the discussions. Where there is an agreement between the parties, the prosecutor shall inform the court of the agreement reached by the parties. It is the duty of the presiding Judge

or Magistrate to inquire from the defendant to confirm the correctness and the voluntariness of the agreement. After considering the agreed sentence, the presiding Judge or Magistrate may impose the sentence agreed upon, or impose a lesser sentence. Where presiding judge or magistrate is of the view that the offence requires a heavier sentence than the one agreed, he is to inform the defendant of his view. The defendant may decide to abide by his plea of guilty and accept the sentence by the Judge or Magistrate, or he may decide to withdraw from his plea agreement. If he does so, the trial proceeds *de novo* before another presiding Judge or Magistrate.

5. Safeguard Provisions

There is need to state the fact that under ACJA 2015, there are safeguard provisions for plea bargain and in any case, they are always subjected to judicial approval.

Plea bargain under the ACJA is basically a voluntary agreement. Section 270 of ACJA has made it mandatory that plea bargain can be received and considered if initiated by the defence counsel or the defendant. Also, the prosecutor under the above section can offer plea bargaining to the defendant. All he needs to do is to relate the proposal to the defendant or his counsel. To enforce plea bargaining, defense counsel are ethically required to relay their client's offer to the prosecutor and relay the prosecutor's offer to accept a particular plea to their client as was decided in *Ogboka v. State*.[17] In either case, the prosecutor and the accused are expected to enter into an agreement, where the accused first and foremost pleads guilty to something, in exchange for either the reduction of the sentence or withdrawal of some charges.

The provision which allows the Judge or Magistrate to decline to be bound by sentence agreed to by the prosecutor and defendant is a safeguard for situations where public sensibility may be offended by the sentence agreed on. The provision no doubt is to prevent abuse of the process of plea bargaining under ACJA.

Where a plea agreement is reached by the prosecution and the defence, the prosecutor shall inform the court that the parties have reached an agreement and the presiding judge or magistrate shall then inquire from the defendant to confirm the correctness of the agreement. The Court must ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether he entered into the agreement voluntarily and without undue influence and may where-
(a) he is satisfied that the defendant is guilty of the offence to which he has pleaded guilty, convict the defendant on his plea of guilty to that offence, or

(b) he is for any reason of the opinion that the defendant cannot be convicted of the offence in respect of which the agreement was reached and to which the defendant has pleaded guilty or that the agreement is in conflict with the defendant‘s right referred to in subsection (6) of this section, he shall record a plea of not guilty in respect of such charge and order that the trial proceeds[18]

The discretion offered to judicial officers[19] which permits them to look at the sentence recommended under the plea agreement and decide whether or not to impose same is equally a safeguard measure. Indeed, they can impose stiffer sentences where it is felt that the agreed sentence is insufficient.

Similarly, where the defendant has been informed of the heavier sentence as contemplated above, the defendant may –

(a) abide by his plea of guilty as agreed upon and agree that, subject to the defendant‘s right to lead evidence and to present argument relevant to sentencing, the presiding judge or magistrate proceed with the sentencing, or withdraw from his plea agreement, in which event the trial shall proceed de novo before another presiding judge or magistrate, as the case may be[20].

6. Plea Bargain and Restorative Justice under the ACJA

Under the plea bargain provisions of the ACJA, there is provision for restitution which is a form of restorative justice. Justice is not only for the general public in

line with traditional notions of criminal justice which emphasizes punishment of the defendant for the good of society; but pays little attention to victims of crime.

The ACJA provides that forfeited property due to plea bargain can be vested in the victim; and goes on to prescribe punishment for anyone who without just cause seeks to frustrate such. Section 270 (12-14) provides:

> (12) The presiding Judge or Magistrate shall make an order that any money, asset or property agreed to be forfeited under the plea bargain shall be transferred to and vest in the victim or his representative or any other person as may be appropriate or reasonably feasible.
> (13) Notwithstanding the provisions of the Sheriffs and Civil Process Act, the prosecutor shall take reasonable steps to ensure that any money, asset or property agreed to be forfeited or returned by the offender under a plea bargain are transferred to or vested in the victim, his representative or other person lawfully entitled to it.
> (14) Any person who wilfully and without just cause obstructs or impedes the vesting or transfer of any money, asset or property under this Act shall be guilty of an offence and liable to imprisonment for 7 years without an option of fine.

Commenting on restitution as a principle of law, the Court of Appeal in *Ojukwu V. FRN*[21] stated that 'an intimate reading of the prescription of Section 11 of the Act (Advanced Fee Fraud Act) clearly shows that it had donated extra plenitude of power to the lower Court to make an order of restitution, an act of giving back to a person something that was lost or stolen, or paying him money for the loss, apart

from any other punishment or penalty it may have imposed on a convict.' Also, in the case of *Friday David V. FRN*[22] the CA stated:

> it seems the essence of the order of restitution is not a punishment, it is rather to ensure social justice and to act as a deterrent by ensuring that a criminal is not allowed to enjoy the proceed of his crime in total disregard to the fate of the victim.

Though the above cases are not in relation to plea bargain but the principles enunciated therein accord with the spirit of restitution under the plea bargain provisions of the ACJA. Restitution in plea bargain cases will equally allow the proper agencies of state who are the victims of corruption to receive the stolen funds, as opposed to routinely sending same into a general account, as provided under the Sheriff and Civil Process Act.

Where judgment is entered based on a plea bargain as contemplated under section 270 (1) (a) such judgment is final and no appeal shall lie on it except where fraud is alleged[23]. Similarly, where a defendant is convicted and sentenced under a plea bargain, such person shall not be charged or tried again for the greater offence earlier charged.

Plea bargaining concept permits quick resolution of criminal (corruption cases) proceedings. It has helped the anti-graft agencies to overcome the challenges of unnecessary delays and the uncertainties of trials and appeals. The concept has aided the successful prosecution of high-profile corruption cases [24]. The cases show that the absence of clear guidelines on the application of plea bargaining may have led to abuse and discrepancies in its application. It is hoped that with the enactment of the ACJA 2015, the concept will be effectively utilized in the Nigerian criminal justice system.

7. Significance of Plea Bargain in Nigeria's Criminal Justice System

No criminal justice system can possibly dispose of all crimes committed within its purview. However, the concept of plea bargain can assist in ensuring the disposal of criminal cases and management of criminal case dockets. It can minimize delay in administration of justice and can ensure conviction or accountability in cases that could easily be lost for want of adequate evidence or mired in delay. Conceding that facts in most corruption cases are difficult to prove, plea bargaining becomes the best alternative in corruption cases.

One of the major advantages of plea bargaining is that it helps prosecutors and the Courts in the effective administration of justice. In criminal prosecution of corruption, plea bargain affords the accused a chance to enjoy the right to a speedy trial because justice delayed is justice denied.

It must be stated that plea bargaining has tremendously impacted in sentencing guidelines by the court under the ACJA 2015. In *Federal Republic of Nigeria v. Babatunde Abisuga & 1Or*[25] , the court made the sentencing of the accused defendant in accordance with the provisions of section 270 of ACJA 2015. The presiding judge had to consider the plea for leniency of the defendant's counsel, the guilty plea of the defendant, albeit made well into trial, and even the Plea-Bargaining Agreement executed between defendant and the complainant pursuant to section 270 of the ACJA 2015.

8. Recommendations

The following recommendations are proffered towards improving the provision of plea bargaining in corruption cases in Nigeria.

- The Federal Government in its fight against corruption should regard the concept of plea bargain as the best alternative to full prosecution, especially in economic and financial crimes. This is because,

economic crimes are usually complex and so much is involved in terms of time and cost, so it is easy for a prosecutor to agree to a plea offer to save time, especially as the ACJA 2015 has made salient provisions to guard against its abuse.

- All the States of the federation should amend both procedural and substantive laws to accommodate plea bargain in an extensive and comprehensive manner as provided under the Administration of Criminal Justice Act 2015.
- There should be greater involvement of judges in plea bargaining – that is, judges should take a more active role in plea bargaining to ensure that defendants' rights are respected.

9. Conclusion

Plea bargain, in its provisions and application under the Act, reinforces the main purposes of the ACJA 2015 as set out in section 1 -promoting efficient management of criminal justice institutions and speedy dispensation of justice, protecting the society from crime, and protecting the rights and the interests of both the defendant and victim. The Act also pivots the criminal justice system from punishment as its main object to restorative justice which pays attention to the needs of the victim, defendant, other vulnerable persons and society. Thus, plea bargaining as provided under the ACJA2015 has the potential to speed up the administration of justice and if utilized efficiently, could reduce the time spent on trying offenders who opt for its use.

[1] Cap C42, Laws of the Federation of Nigeria (LFN), 2004
[2] Cap C80, LFN, 2004
[3] Its application is however restricted to the Federal High Court, High Court of Federal Capital Territory Abuja, Magistrate Court in Abuja and High Court of State exercising Criminal Jurisdiction over offences created by an Act of National Assembly. But it does not apply to criminal proceedings before Court Martial. See Section 2 ACJA 2015
[4] (2014) All FWLR (Pt 734) 101 at 144
[5] Section 14(2) of the EFCC Act provides thus: 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 criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence
[6] See sections 75-76 of the Lagos State Administration of Criminal Justice Law, 2007.
[7] (2018) LPELR-47993(SC)
[8] Adedeji Adekunle, *Overview of the Administration of Criminal Justice Act, 2015* (NIALS Press, 2015) 5
[9] Bryan A Garner, *Black's Law Dictionary* (10th Edn, Thomson Reuters: 2014) 1338.
[10] Garner, ibid defines "charge bargain" - A plea bargain in which a prosecutor agrees to drop some of the counts or reduce the charge to a less serious offense in exchange for a plea of guilty or no contest from the defendant"; "sentence bargain" - A plea bargain in which a prosecutor agrees to recommend a lighter sentence in exchange for a plea of guilty or no contest from the defendant;" and no contest" - A criminal defendant's plea that while not admitting guilt, the defendant will not dispute the charge."
[11] (2015) LPELR – 25858 (CA)
[12] ibid Per YARGATA BYENCHIT NIMPAR, J.C.A (Pp. 62-65, paras. A-B)
[13] (2016) LPELR – 41177 (CA)
[14] S. 270 (6).
[15] (2014) LPELR – 22759 (CA).
[16] Per Helen Moronkeji Ogunwumiju, J.C.A (Pp. 40-41, paras. E-A).
[17] [2016] LPELR-41177 (CA).
[18] Section 270 (8) and (9)
[19] section 270 (10) (11)
[20] Section 270 (15)
[21] (2019) LPELR- 46494 (CA)
[22] (2018) LPELR 43677 (CA)
[23] section 270 (18)
[24] Conviction of former governor of Bayelsa and Edo states, Dieprieye Alamiesieigha and Lucky Igbinedion, former IGP, Tafa Balogun and former C.E.O of Oceanic Bank Plc, Mrs. Cecilia Ibru.
[25] CHARGE NO: CR/58/2012