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Victim Participation in Plea Bargaining: A Challenge to Nigeria's New Criminal Procedure Laws

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Abstract:
One of the most phenomenal developments in Nigeria's criminal justice system was the recent enactment of the Administration of Criminal Justice Act (ACJA), 2015.[1] This law, which came into effect in 2015contains far reaching innovations. These new innovative provisions include the concept of negotiating with an offender, which in criminal justice is referred to as plea bargaining. Although plea bargaining is new to the Nigerian criminal justice system, it is a concept concept well entrenched in other jurisdictions around the world. As a controversial component of charges and sentencing procedure, plea bargaining, has for ages continued to generate plethora of debate among scholars. Most often, the argument is on whether it adds utility to criminal justice administration or is simply the commodification of justice. What is undoubtedly true of plea bargaining is its enormous consequence on the rights and roles of parties as well as the effect it has on the general procedure in criminal justice.
This paper intends to look at the concept of plea bargaining from a wider perspective as it affects the legitimate interests of the victim of crime. The argument reviews situations in which this idea of negotiating with a criminal offender leaves the victim unattended and isolated despite his or her trauma as the one at the receiving end of a criminal act. His or her interest is subsumed even more that in conventional trials as disposal of cases move from the conventional courtroom adversariality to some form of bureaucratic arrangement.

Keywords: *Victim, plea-bargaining, criminal, defendant, justice, law, transparency*

1. Introduction

The preamble to the Administration of Criminal Justice Act 2015 (henceforth ACJA) explains concisely the purpose of the Act, which is to ensure that criminal justice in Nigeria becomes more efficient in the speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and also the victim.[1] The Act is to apply to criminal trials for offences established by an Act of the National Assembly and other offences punishable in the Federal Capital Territory, Abuja.[2] This suggest that, other offences established by state laws are not subject to the provisions of the new Act. What the preamble did not say is how far reaching it is in propping new dimensions in the way criminal cases are settled. Far from the exclusivity of adversarial trial, the ACJA has come up with a new contour that allows prosecutors to negotiate with the offender through what is known in global criminal justice parlance as Plea bargaining or Plea negotiation.

The provisions that allow for the application of plea bargaining is contained in part 28 to the Act which states "Notwithstanding anything in this Act or in any other law, the Prosecutor may:

- Receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf;
- Offer a plea bargain to a defendant charged with an offence.

The prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence.[3]

This is concisely what is contained in the new legislation that has come to replace previous ones. Yet, many scholars and commentators have failed to clearly recognise the effect of this idea on victims of crime in Nigeria. Even as the new Act mentions the consent of the victim, research has shown that this kind of approach does not alleviate the peril that plea bargaining has on victims.

[1] Section 1 (1) ACJA
[2] Section 2(1) ACJA
[3] Part 28 ACJA (1) - (5)

Looking at this challenge from a wider context, it will be argued that the criminal justice process has continued to unfairly excludes the victims even where he or she has a legitimate interest(Ashworth, 2015). Often, this is borne out of the entrenched universal principle that sees the prosecution of crime as an exclusive prerogative of the State. Hence, the victim, for the most part, serves the role of a source of information about the crime and the criminal and features mostly as the individual whose injury triggers State action. For most part, his or her interest is subsumed by public interest and overwhelmed by the prerogative of the State (Garland, 2001).Beside this familiar approach in which the state takes over the prosecution of criminal matters, scholars also argue that the adversarial structure of trials has also contributed to the diminution of the victims' role (Yaroshef sky, 1989).This is because the one of the most pronounced principles of the adversarial system (sometimes referred to as accusatorial) is to the extent that any attempt to restrict the defendant is seen to undermine the very essence of fairness and justice (ibid). Other scholar argues that despite the legitimacy of the victims' right, there have to be certain limits to his or her role, that it should not be allowed to assume an "independent position in the conflict of forces within criminal justice" (Vogler, 2005). On where the victim stands:

> "His or her interests may be represented by the state in some cases or by independent lawyers in others, but to create a separate category of interest would be to give unjustified double privilege to their role and to unbalance the crucial relationship between state, civil society and the defendant (ibid)."

2. The Near Absence of the Victim's Interest in Plea Bargaining

In Anglo American adversarial system of criminal justice, which is also the foundation of plea bargaining, the victim is assumed to be so thoroughly represented by the State that for the most part, he or she is left out of the arena, reduced only to the trigger of the whole process (Christie, 1977).Studies have demonstrated how victims often felt excluded and ignored in their own case (Maguire, Mike and Bennett, 1982). But with the advent of plea bargaining, some scholars saw a shift towards a system that will bring the victim back to relevance and grant them certain benefits previously denied by conventional court trials. These benefits as assumed by some scholars include privacy and confidentiality in cases that may lead to stigma upon the victim e.g., sexual violations, or in cases where the victim does not want the kind of publicity that trials will provoke, or even where the victim wants an expeditious trial, compensation or reparation. Plea bargaining is therefore seen as a system that offers all these incentives to the victim. It also saves the distress of cross-examination. Others have different opinions, stressing that plea negotiation, like trials, has significantly excluded the victim from any meaningful role (McDonald, 1976),referring to numerous studies that show how more victims are becoming dissatisfied with the outcome of a plea bargain (ibid). It was also argued that, far from notion of confidentiality and expediency, having the victim to publicly disclose their part of the story and injury is not only a matter of principle, and it also helps in the process of healing and restoration (Rauxloh, 2012). Hence, most victims will prefer to give evidence at trial than allow for a process that benefits the offender (Fenwick, 1977).Yet, what is common with conventional processes and even plea bargaining is how the victim has continued to remain largely insignificant and has a little or no role or influence in the manner charges are formulated, negotiations entered and sentence awarded (Goldstein, 1982).Essentially, in trial and in plea bargaining, the victim is unlikely to contest when a charge is dropped or challenge the leniency of any sentence recommended by the prosecution or imposed by the court:

> "His injury becomes the occasion for a public cause of action, but he has no 'standing' to compel prosecution of the crime against him or to contest decision to dismiss or reduce the charge or to accept plea bargains, or to challenge the sentence imposed on the offender who injured him, or to participate in hearings on restitution…If his interest in pressing charge comes in conflict with the prosecutors' conception of public interest, the latter prevails. And what is seen to be in public interest may consist of elements that have little or nothing to do with the victims' case-its strength or weakness-or the nature of the victims' injuries or his outrage against the defendant or even his fear that the crime may be repeated (ibid)."

It is a principle in most civil law regimes of continental Europe for the victim to give his or her consent for plea bargaining. This idea had been borrowed in Nigeria despite the fact that the Nigerian criminal justice system is wholly adversarial in nature. In other prominent adversarial regimes, especially those of common law, the victim has no stake in plea bargaining. One of the major reasons for this according to scholarsis the longstanding principle of criminal trials that was transplanted ensuring that the structural formation plea bargaining also gives the prosecution the powers to negotiate with the defendant on behalf of the State (Gittler, 1983). The effect of this neglect is well documented in scholarship. For instance, research shows that where the interest of the victim is in retribution, he or she is likely to be outraged by a large sentence concession, especially where the victim's interest is not about retribution, "there is little other satisfaction to be gained. Victims seldom get an apology, seldom are reconciled with the offender, and seldom receive restitution (ibid)." This neglect is among the aspects of criminal justice that has been contentious, and often rejected by proponents of restorative justice whose insistence is about the victims having some significant role in their case (Cavadino and Dignan, 1997). should the injured be encouraged to participate in the process of reparation, but that their reparationshould, in fact, be the major element of the process, which is the most appropriate approach if justice is to be served (Morris, Allison and Maxwell, 2000). Similarly, any relationship between the offender and the victim to be restored, as part of the what criminal justice aims to achieve, the victim should be involved in the process of the negotiation, because denying him a stake in his case, makes forgiveness difficult (Stark weather, 1991). Another benefit of such involvement is the way in which it motivates the public to be more willing to obey the law, report crime and to provide decision makers will relevant and valuable information for the efficient administration of justice (Welling, 1987). A contrary position refers to the wisdom of assigning the role of prosecution into the hands of State officials as a logical idea because the prosecutor is more likely to be neutral, impartial and less vindictive than the victim who in most cases is already outraged by the harm inflicted upon him (Erez, Edna and Tontodonato, 1990). The challenge here is that the prosecutor, being an advocate as well as an

administrator is often likely to place greater emphasis on expending his limited time and resources selectively more than the concern he will have in the pursuit of justice for the victim (ibid).And where the prosecution dictates most of the processes, which is often the case, the victim is denied both the right to state his case and get retribution (Gittler, 1983). The victims end up beaten twice, first by the sentencing to the crime committed and then by the system (ibid).

A familiar proposition with the proponents of restitution is the insistence on the importance of involving all those with a stake in a criminal case in both trial and disposition (Scott, 2005). It should however be noted that, as with punitive policies, the idea of restitution only maintains the victim's position as a tool in the pursuit of objectives that have more to do with restoring the offender than with any of the legitimate demands of the victim (Zedner, 2005). Yet, other opined that whether in the context of restorative or conventional sentence, the substantive rights of the victim should be limited to receiving support and proper service (Ashworth, 2015). Similarly, other scholars suggest that the role of the victim should not extend to a degree where he will have grave influence, especially in the outcome of a sentencing decision (Sanders, 2001). The argument here is that, where victim's involvement, particularly in the sentencing becomes a priority, the question of proportionality will be highly endangered. In the sense that such participation may come in direct conflict with the penological idea of 'just desserts', which in its nature insists on proportionality of punishment (ibid). This opinion was asserted by the English Court of Appeal:

> "The opinion of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise, cases with identical features would be dealt with in widely differing ways, leading to improper and unfair disparity" (ibid).

While the victims interest is mostly in restitution than in the degree of punishment the courts award (Ashworth, 2015),what is most common is that he often serves the interest of the State as a tool to establish the culpability of the offender (Zedner, 2004).Incidentally, any decision made at the conclusion of a trial or a negotiation has a direct bearing on the restorative as well as retributive interests of the victim (Gittler, 1983).Studies have shown that, part of the reasons prosecutors deny the victim any role in the negotiation is because, negotiation is mainly prioritised for its utility in quick disposal of cases. Hence, any attempt to introduce the victim into the process is considered a hindering factor capable of either decelerating the process, or even making it confrontational, thereby creating an atmosphere that will make a plea offer less attractive to the defendant (Welling, 1987). Others refute these claims, arguing that victim participation neither slows the process of negotiation nor decreases the number of plea bargains (Heinz and Kerstetter, 1980). Engaging the victim according is seen as a mark of procedural justice that "enhances the acceptance of bargained outcomes, potentially diminishing the tendency of some victims to seek vengeance outside the criminal justice system (O'Hear, 2007)."Referring to the 'social psychology model' of Tyler and Huo, scholars argue that for a variety of logical reasons, the criminal justice system must embrace the concerns and demands of the victim (ibid).

> "First, a person's perception of whether a decision making process was fair does not depend solely on the outcome, but also on various attributes of the process used to reach the outcome. These attributes include: (1) whether the person had an opportunity to tell his or her side of the story ("voice"); (2) whether the authorities were seen as unbiased, honest, and principled ("neutrality"); (3) whether the authorities were seen as benevolent and caring ("trustworthiness"); and (4) whether the person was treated with dignity and respect. 36 The perception of voice, neutrality, trustworthiness, and respect can promote the acceptance of decisions that are otherwise believed to be incorrect or substantively unfair (ibid)."

But in his work on victim compensation and restitution, Henderson opposes the idea of victim participation in criminal justice, asserting that 'restitution' is a civil remedy and not an appropriate criminal sanction. This notion however fails to put into context certain historical realities of criminal justice that suggests, even after civil and criminal law were separated, restitution still continued to be regarded as a criminal sanction (Harland, 1987).Principally, it is difficult to completely separate the retributionary and restitutionary interests of the victim. This is because, as retribution entails the principle that justifies punishment of offenders, restitution is in fact a criminal sanction used to achieve a retributive goal (Stark weather, 1991).Therefore, if the victim's interest in restitution is to remain unimpaired, it is necessary that restitution be made broadly to include physical, monetary and psychological loss (ibid). Even though it is evident that in most cases where psychological trauma is involved, criminal justice often places more premium on obtaining a conviction than on responding to the victim's injury (ibid). Some scholars also argue that because of lack of any participatory role for the victim, even the common demand that judges ensure the voluntariness and the factual nature of pleas only benefit the defendant (LaFave, 1985). In the sense that, the basis for such inquiry is mainly to provide the court with information to assess the voluntariness of the defendant's plea and protect him against any manipulation or threat arising from the bargain (ibid). Mindful of these flaws, many scholars have insisted on reforms that will accord the victim the right to be heard by the court before any negotiation is accepted, although most of these propositions have stopped short of advocating the right of the victim to appeal (Welling, 1987).

3. Opposition to Victim's Participation

Opponents of victim participation maintain that any attempt to introduce the victim into the process of negotiation will only complicate the process because, it will affect both the interest of the defendant and of the justice system (McDonald and Cramer, 1980). They premised their objection on the basis that, once victims are granted the opportunity to give testimony in open court, it will inadvertently increase the risk of judges rejecting most negotiations (ibid). This will subsequently affect the defendant's interest for penal concession and those of the justice system for

expedited and efficient disposition of cases (ibid). But in principle, there have been numerous attempts to strengthen the role and rights of the victim in plea bargaining. For example, emphasis on this was once given by the U.S Supreme Court. The provisions of the US Federal Sentencing Guideline also insist on the interest of the victim for full restitution. Similarly, recent reforms in UK, US and Canada equally allow for the victim to have some participatory role in criminal justice processes by giving what is termed as 'victim statement' (Verdun-Jones, Simon and Tijerino, 2005). Even though this only extends to cases on trial and not those subjected to plea bargaining (ibid),some scholars view these reforms as logical strides that promote the interest of all parties and also boosts the credibility of the justice system (O'Hear, 2007). It also seen as a reform that ensures appropriate restitution, enhances the possibility of a proportionate sentence for offences, and endorses the dignity of the injured (ibid). Paradoxically, the interest of the victim and those of the defendant are seen by some as diametrically opposed. In the sense that, any proposition that calls for the victim to be involved in criminal process raise the tension between what is termed as 'the protection of the victim's right' and 'the significance of the defendants' rights' (Welling, 1987). Likewise, the constant expression of concern for the accused' rights are considered by others to be at the expense of those of the victim (Garland, 2001). But as noted earlier, this sort of argument is more or less a zero-sum argument. Essentially, process rights should be dealt with on the basis of objectivity and within the standards of judicial fairness to all parties.

4. Proponents to Victim's Participation

The debate on the need to bring the victim into the centre of the criminal justice process and to restore his loss or injury has been a polarised subject in legal scholarship. It was for instance argued that any justicesystem that does not depend only on punitivism must give attention to the interest of the injured, and should work to restore them (Zedner, 2004). Similar concerns have been raised by the proponents of the 'victim's movement' through campaigns targeted at bringing reforms that will guarantee victim participation. This amplified emphasis on the victim has also resulted in numerous propositions and legislations. For example, as early as 1985, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Similar other protocols such as the International Covenant on Civil and Political Rights and other related documents have emphasised the prospect of promoting the victims' role (Ashworth, 2015). In the domestic circle, similar attempts have been made in jurisdictions such as England where initiatives were introduced in the 'Victims' Charter 'of 1996 to grant victims of serious crimes easy access to information about their case and its progress (Erez, Edna and Rogers, 1999). But some scholars have criticised this policy based on the research studies that show how the 'Victim Statement' policy projects a false view of the victim's role (Sanders and Andrew, 2001). The study reveals that only a few victims showed willingness to give these statements, of which only a third were satisfied with the process (ibid). Some scholars maintained that it is in fact the legal profession that is complicit in circumventing the spirit of this reform, on the thinking that, allowing for victim input will have some sort of detrimental effect on sentencing processes and outcome (Erez, Edna and Rogers, 1999). Broadly, many scholars are of the conventional view that many of the reforms on victim participation did not achieve the desired impact (Morris, Allison and Maxwell, 2000). What is significant and worthy of consideration is that whether deeply involved or not, most victims are interested in proportionate retribution and or reparation for their loss or injury (Stark weather, 1991). It is, therefore, key that plea bargaining and all other methods of justice administration present the legal impetus and moral assurance that the plight of the victim is not subsumed under the rhetoric of efficiency or bureaucracy. The general idea of justice must remain considerate of the rights of all parties, whether the goal is to achieve restoration, retribution or reparation. The victim, for the most part, has a stake in how the law works in ensuring justice. Likewise, the community is always keen about the way the law treats those unlawfully injured. Hence, the interest of the victim and those of the community are in most cases intertwined.

5. Conclusion

It is evident that in most western democracies, the concept of criminal justice has witnessed some significant transformation. These changes have affected both the role of parties in the judicial system and the have resulted in a great deal of governmental strategies in justice administration are being addressed through interagency cooperation of both public and private. There is also an evident emergence of new forms of crime control strategy that are more centred on techniques of classifying groups by their level of dangerousness. This according to Norris and Armstrong has shifted the objective of criminal justice to become more about prevention and containment. Some scholars also contend that there are growing indication of a broader transition in the structure criminal justice legislation that is driven by populism and resulting in punitivism. All of these are indeed a pointer to how deeply the field of criminal justice is being reconfigured. As a result, the field is witnessing a substantial alteration of those trajectories that define most of the criminal justice aims and processes. These were explained these as the fulfilment of the symbolic idea of 'neo-liberalism' in a polity that is struggling with the crisis of legitimacy, and progressively losing both the capacity to control crime and to establish favorable economic policies in an increasingly competitive world.

Another aspect that is particularly interesting is the extent to which the idea of 'plea bargaining' has impacted on the nature of criminal justice administration. This idea of settling cases through negotiations, which has progressively expanded beyond its traditional Anglo-American adversarial frontiers, has produced a new territory of scholarly debate. With some fiercely arguing that the idea of justice has been turned into a bureaucratic process that takes place in corridors instead of the courtroom.

Since the Chicago debate, criminal justice and macroeconomics have become part of a wider scholarship. In the midst of this is the continued quest for a method in criminal justice that is efficient. Scholars have come to terms the deep influence of global capitalism, technological advancement and corporatism in the field of criminal justice. Added to this is

the significant effect of penal populism, over criminalisation and the emergence of non-state actors in the area of criminal justice administration. These are all factors that have potentially affected how crimes are defined and treated, how evidence is gathered and presented, how trials are conducted and how negotiations are struck. All of these trajectories have all come to play a very significant role in the way criminal justice is administered. In the midst of these developments is the widespread practice of plea bargaining. A system that is seen to have tremendously reshaped the role and relevance of the main parties in criminal justice administration i.e. the prosecutor and judges. Some, scholars maintain that judges and prosecutors are the principal beneficiaries of plea bargaining, contending that the accused and the victim appear not to share in this advantage. Instead, they are marginalised by the process.

Generally, the institution of criminal justice is undergoing some major restructuring. While there is almost a unanimous consensus of its accomplishments in developed democracies such as the UK and the US in the last three decades, even this is now coming under a new scrutiny, which suggest that the field is now open for yet another debate. Similarly, the institution of plea bargaining which has seen a significant amount of research that began since the 1960s in the US, the UK and other continental European countries is also a field now ripe for further research. This is because, the idea of negotiation in criminal justice has now transcend all continental frontiers, making it essential for scholars to have a new look in exploring the extent to which it is affecting its new-found frontiers and legal systems across the world. This is especially so as this practice has particularly started emerging in developing countries where there is still an enormous challenge of judicial corruption, prosecutorial high-handedness, undue interference in the process of justice and the lack of adherence to the fundamental principles of the rule of law.

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