

An Examination of the Rights of Crime Victims in Plea Bargain Agreements in Nigeria

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Abstract

The meaning of justice to crimes victims varies significantly from one case to another. While an apology simpliciter may satisfy one victim, another may consider the harm done, too great to be settled diplomatically and may desire capital sentence against the criminal defendant. Above these desires, lies the overriding prosecutorial discretion to quickly settle the case with the criminal defendant through plea bargaining, sometimes without victims' knowledge or participation and, in utter disregard for other victims' rights and interests. This not only undermines the significance of victims' inputs in assisting the court to reach appropriate sentencing decision, but also erode public confidence in the judicial system. This paper employs doctrinal research methodology to examine crime victims' rights in plea bargain under Nigerian criminal justice administration and found that, the progressive enactment of the Administration of Criminal Justice Act, (ACJA) 2015 which accords crime victims some measure of rights in plea bargain agreements ostensibly to protect them against the tyranny of prosecutors is rather symbolic than substantive, since the ACJA provides no remedy for the violation of victims' rights. Recommendations are made including the education of victims to avoid unrealistic victim expectations; the amendment of the ACJA to accord crime victims the right to address the court on the impact of the crime on them, and the filing of a certification of compliance with victims' right by prosecutors before a court can accept a plea agreement.

Key words: *Criminal justice, impact statement, plea bargain, prosecutorial discretion, victims' rights.*

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Introduction

Criminal offences are considered an affront to the society as a whole. This notion finds ideal expression in victimless crimes like drug offences,¹ illegal possession of firearms,² prostitution,³ unlawful gaming,⁴ road traffic offences,⁵ and so on where no individual can claim to have suffered any direct injury but the injury or potential injury is to the society as a whole. There are other offences like murder,⁶ armed robbery,⁷ rape,⁸ and theft⁹ where certain persons or their families or care givers suffer direct injury more than the rest of the society. Such categories of persons are described as crime victims.

Crime victims bear the direct brunt of crimes, despite this fact, society has however vested the powers and discretion to commence, maintain or discontinue criminal prosecution in the state.¹⁰ Where suspects are arrested and brought before the court, the prosecutor on behalf of the state has the discretion to insist on full trial of the case or may offer or accept to enter into a plea bargain agreement with the criminal defendant to summarily settle the case. In the United States, the criminal justice system has changed dramatically with plea agreements now the rule rather than trials.¹¹

In practice, prosecutors tend to ignore the rights and interests of crime victims during plea negotiations. They sometimes conclude the cases without the knowledge of the victims or use their discretionary powers to ludicrously reduce the charges to the amazement and annoyance of the victims. For instance, in the case of

¹ National Drug Law Enforcement Agency Act Cap. N30 Laws of the Federation of Nigeria (LFN) 2004, ss.11-25.

² Robbery and Firearms (Special Provisions) Act (RFA) Cap. R11 LFN 2004, s.3.

³ Criminal Code Act (CCA) Cap. C38 LFN 2004, s.225A.

⁴ CCA 2004, s.236.

⁵ Federal Road Safety Commission (Establishment) Act, LFN 2007, ss.20- 27.

⁶ CCA, 2004, ss.316 & 319.

⁷ RFA 2004, s.1

⁸ CCA 2004, ss.357 & 358

⁹ CCA 2004, ss.383 & 390

¹⁰ The Attorney General of the Federation and of the States wield general and supervisory powers over criminal prosecution under s.174 and s.211 of the Constitution of the Federal Republic of Nigeria 1999 as amended respectively.

¹¹ Dana Pugach and Michal Tamir, 'Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements' (2017) (28) *Hastings Women's Law Journal* 46.

*R v. AEM (Snr)*¹² five accused all males kidnapped two 16 years old girls by forcing them into a car and in possession of a knife took the victims to a house where they were subjected to aggravated sexual and physical assaults and as well stole the victims' money. The accused were charged with serious sexual and physical assault, theft and kidnapping. Pursuant to a plea agreement, however, the prosecution changed the summary of facts of the case to read that the victims voluntarily went to the house, that no knife was used and no reference were made to the theft or physical assault while the criminal defendants entered guilty pleas to a sexual assault charge only. At the end of the case, both victims felt cheated and one of them stated that:

I did expect (proceedings) to give me some sort of closure ... But it's been the exact opposite. It's just made things worse, because ... now my story has been changed by the legal system ... The facts were changed and I want to stop that. My story should be told the way it happened. ... Personally, I would rather go through the process of court because at least my story is getting told and they are actually sentenced on what they did and not what they didn't do.¹³

The violation of victims' right to participate in plea bargain may be owing to a number of factors including the desire of the prosecutors and judges to hastily accept plea bargain to shed their workload or use same as a tool for swift administration of criminal justice, thereby deliberately or inadvertently ignoring the rights of victims. Whether deliberate or not victims' rights are often violated, and this ignites a feeling of neglect by the very institution that should protect them and so they suffer secondary victimisation leading to loss of confidence in the criminal justice system.

¹² (2002) NSWCCA 58 (13 March 2002).

¹³ Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, Parliamentary Library — Parliament of New South Wales, 2002). Cited in Asher Flynn, 'Bargaining with Justice: Victims, Plea Bargaining and the Victims Charter Act 2006 (Vic)' (2017) (37) (3) *Monash University Law Review* 87.

Nigeria recently enacted the Administration of Criminal Justice Act (ACJA), 2015 which makes provisions for the practice of plea bargaining at the Federal High Court and courts in the Federal Capital Territory, Abuja. To protect the rights and interest of victims, the ACJA accords crime victims, some measure of rights including the right to consent to plea bargaining; the right to be consulted or informed and the right to make representation to the prosecution on the content of the plea agreement. This paper explores the rights and role of crime victims in plea bargaining under the ACJA and analyses the obstacles to their fulfilment, as well as suggests ways to overcome the major hurdles. Copious references are made to the laws and practice of plea bargaining in other jurisdictions especially the United States, since the concept is relatively new in Nigeria.

Nature of Plea Bargain

The concept ‘plea bargain’ originated from the United States and became established in 1959 in the case of *Robert M. Brady v. United States*¹⁴ where the criminal defendant was charged with kidnapping and faced a maximum penalty of death. He pleaded guilty to the charge and was sentenced to 50 years imprisonment. Since the seal of approval by the United States Supreme Court, plea bargain has been treated as a contract between the prosecution and the criminal defendant.¹⁵

In Nigeria, plea bargaining was first introduced by the enactment of the Administration of the Criminal Justice Law (ACJL) of Lagos State 2011.¹⁶ Prior to the ACJL, the Economic and Financial Crimes Commission practiced some form of plea bargaining pursuant to section 14 (2) of the Economic and Financial Crimes Commission (Establishment) Act¹⁷ however the section relied upon rather provided for compounding of offences and not literally plea bargain. With respect to administration of criminal justice in Abuja and the Federal High Court, plea bargain properly so called was introduced by section 270 of the Administration of the

¹⁴ 397 U.S. 742 (90 S.Ct. 1563, 25 L.Ed 2d 747).

¹⁵ See *Romrig (Nig) Ltd. v. FRN* (2018) 15 NWLR (pt. 1642) 284 at 318 para C. SC.

¹⁶ ACJL of Lagos State 2011 s.75.

¹⁷ EFCC Act No.1 LFN 2004.

Criminal Justice Act 2015. Many States in Nigeria have also enacted laws introducing plea bargaining.

Plea bargain simply put is the process whereby a criminal defendant and prosecutor reach a mutually satisfactory disposition of a criminal case in writing, subject to court's approval.¹⁸ It is defined by the Black's Law Dictionary¹⁹ to mean a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence 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.²⁰ The Supreme Court of Nigeria in the cases of *Gava Corp. Ltd v. FRN*²¹ and *PML (Nig.) Ltd v. FRN*²² defined plea bargain in the same manner as the Black's Law Dictionary above.

There are two types of plea bargain agreement that is, charge bargain and sentence bargain.²³ Charge bargain is a plea bargain in which a prosecutor agrees to drop some of the counts or reduce the charge to a less serious offence in exchange for a plea of either guilty or no contest from the defendant.²⁴ Sentence bargain on the other hand, is a plea bargain in which the prosecutor agrees to recommend a lighter sentence in exchange for a plea of either guilty or no contest from the defendant.²⁵ Parties can enter into either or both kinds of plea bargain in a criminal trial based on their agreement, which must be made explicitly and in writing to prevent inconsistencies that trail oral evidence.²⁶

Under the ACJA, there appears to be no ceiling on the kind of offences to which plea agreements may be negotiated, plea agreement may be negotiated whether it is a misdemeanour or a capital offence. In other jurisdictions like Chile, plea bargaining is only permitted for crimes carrying a penalty of less than 5 years

¹⁸ *Gava Corp. Ltd v. FRN* (2019) 10 NWLR (pt. 1679) 139 at 160.

¹⁹ Garner, BA and others (ed). *Black's Law Dictionary* 9th edn. (West Publishing Co., 1999) 1173.

²⁰ *Ibid.*

²¹ (2019) 10 NWLR (pt. 1679) 139 at 178 paras G.

²² (2018) 7 NWLR (pt. 1619) 448 at 480 paras B-C. SC.

²³ *Gava Corp. Ltd. (n, 18)* at 178 para. H.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Romrig (Nig) Ltd. v. FRN* (2018) 15 NWLR (pt. 1642) 284 at 319 paras. B-C.

imprisonment while in Italy, it is allowed only for crimes carrying a sentence of less than 7½ years imprisonment upon conviction.²⁷

Plea bargaining does not require the calling of witnesses and are sometimes conducted even without the knowledge of crime victims, though contrary to express provisions of law. There are basically only two parties to a plea agreement, the prosecutor and the criminal defendant, though crime victims are allowed to participate through consultation and making representation to the prosecutor. Plea bargaining begins with an offer either from the prosecutor or the defendant. Before the prosecutor initiates or accepts to begin plea bargaining, he is required by the ACJA 2015 to first seek the consent of the crime victim or his representative.²⁸ While during negotiation the prosecution must afford the crime victim or his representative the opportunity to exercise his right to make representations to the prosecutor regarding: (a) the content of the agreement; and (b) the inclusion in the agreement of a compensation or restitution order.²⁹ The prosecutor is expected to consider victims' input in the plea negotiation.

Where a plea agreement is reached between the prosecution and the defendant, it is reduced to writing³⁰ and the prosecution shall inform the court of the agreement reached.³¹ The court is under obligation to inquire from the criminal defendant to confirm the term of the agreement³² and ascertain whether the criminal 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. Where the court is satisfied that the criminal defendant is guilty, convict him, and award the compensation to the victim in accordance with the terms of the agreement.³³ Where for any reason the defendant cannot be convicted of the offence the court

²⁷ Esther Steyn, 'Plea-Bargaining in South Africa: Current Concerns and Future Prospects' (2007) (2) SACJ 209.

²⁸ ACJA s.270(2).

²⁹ ACJA s.270(6).

³⁰ ACJA s.270(7).

³¹ ACJA s.270(9).

³² *Ibid.*

³³ ACJA s.270(10) (a).

shall record a plea of not guilty in respect of such charge and order that the trial should proceed.³⁴

Crime Victims' Rights and Roles in Plea Agreement

The meaning of the concept 'victim' was in ancient society connected to the notion of sacrifice.³⁵ It was used in relation to a person or an animal put to death during a religious ceremony in order to appease some supernatural power or deity. The term has, over the century, picked additional meaning and is currently used in relation to individuals who suffer injuries, losses, or hardships for any reason.³⁶ For instance, there are victims of natural disasters, diseases, accidents *etcetera*. According to Black's Law Dictionary,³⁷ a victim is a person harmed by a crime, tort or other wrong.³⁸ Section 42, Article 1 of the Oregon Constitution defines a victim to mean 'any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of crime and, in the case of a victim who is a minor, the legal guardian of the minor.' A major deficiency in all the above definitions of 'victim' or 'crime victim' is the exclusion of the family of a person killed. Therefore, a crime victim is a person who has suffered physical, psychological, financial or emotional injury or loss resulting from the commission of a crime and, may also include the family or caregiver of a person who was injured or killed.

The feelings and meaning of justice to crime victims vary significantly from one case to another. While an apology, compensation or restitution without a guilty plea may well appease one victim; another victim may wish to ventilate his grievances by telling his story in open court and may desire stiff or capital punishment against the criminal defendant. The complex needs of victims, may be dependent upon a range of factors relating to, the

³⁴ ACJA s.270(10) (b).

³⁵ Md.Atiqur Rahman, 'Victimology: Concept and History of Victimology' available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257668> accessed on 1st April, 2020.

³⁶ *Ibid.*

³⁷ Garner, BA and others (ed). *Black's Law Dictionary* 1562.

³⁸ *Ibid.*

individual victim, the offence and the victim's relationship with the accused.³⁹

Since victims bear the direct harm of crimes, they have a stake entitling them to participate in the administration of 'their' case, but are usually denied the power of public prosecution. Plea bargain, even though does not involve the calling of witnesses, provides an opening for victims to express their feelings and opinion on how the case should be conducted. In the United States, victims are granted the rights to participate at two stages in plea bargaining, first is when conferring with the prosecution during plea negotiation and second by addressing the court, either orally or in writing, before the entry of the plea.⁴⁰ That is victims have the right to confer with the prosecutor during plea bargaining and the right to address the court before the entering of the plea. In Nigeria before the prosecution enters into plea bargaining, he is required by law to seek the consent of the victim which means victims have a right to consent before the prosecution enter into plea bargaining. This work discusses three basic crime victims' right to wit: the right to consent to plea bargaining, the right to confer with the prosecution and the right to address the court. There are other rights which are corollary to and discussed alongside the above rights like the right to be informed, the right to demand and be granted compensation or restitution and the right to make representation or victim-impact statement to the prosecutor or the court.

Crime Victims' Right to Consent to Plea Bargain

Plea bargaining begins with an offer either from the prosecutor or the criminal defendant. By section 270 (2) of the ACJA, before the prosecutor enters into plea bargaining with the defendant, he is required to first seek and obtain the consent of the crime victim or his representative.⁴¹ The law provides that 'the prosecution may enter into plea bargaining with the defendant, with

³⁹ Asher Flynn, 'Bargaining with Justice: Victims, Plea Bargaining and the Victims Charter Act 2006 (Vic)' (2017) (37) (3) *Monash University Law Review* 73.

⁴⁰ Marie Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining: A Fair Deal for Victims of Crime' (2012) (58) *Criminal Law Quarterly* 411, 415. See also Pugach and Tamir, 'Nudging the Criminal Justice System' 49.

⁴¹ ACJA s.270(2).

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...'⁴²

The law did not explain the import of the phrase 'with the consent of the victim' nor state the consequences for withholding consent or a refusal to consent to plea bargain by victims. The silence of the Act is capable of at least two interpretations. First, it connotes crime victims' right to veto prosecutorial discretion. From this angle, the consent of the crime victim can be said to be mandatory for initiating plea bargaining. That is where the prosecutor exercises his discretion to either offer or accept to enter into plea bargain, he has to do so with the consent of the crime victim first sought and obtained. Victims' right to veto prosecutor's discretion to enter into plea bargain connotes the privatisation of public prosecution, by giving victims determinative powers and making them *dominus litis* in plea bargain proceedings. This reasoning cannot stand in view of its manifest contradiction with constitutional provisions vesting criminal prosecution in the state through the Attorney-General.⁴³ The CFRN 1999 as amended vests in the Attorney-General of the Federation, public prosecution of federal offences, in any court in Nigeria, except court-martial, which power is exercisable by him in person or through officers of his department; and the same powers is vested in the Attorney-General of a State under section 211⁴⁴ with respect to state offences. In the United States case of *State v. Johnson*⁴⁵ the Minnesota Court of Appeals illustrates this principle when it held that 'the prosecuting authority makes the decision to commence and maintain criminal prosecutions. A private citizen/victim does not have the unilateral right to start or stop a criminal prosecution... The victim's wishes regarding prosecution, although important, are not determinative.'⁴⁶

⁴² *Ibid.*

⁴³ In the case of *Romrig (Nig) Ltd. v. FRN* (2018) 15 NWLR (pt. 1642) 284 at 308 para A, the Supreme Court of Nigeria held that the Attorney-General of the Federation has an unfettered right to institute a charge before a court.

⁴⁴ CFRN 1999 as amended s. 211.

⁴⁵ No. C4-92-2517, 1993 Minn. App. Lexis 617 (Minn. App. June 9, 1993).

⁴⁶ *Ibid.*

Therefore, granting crime victims the right to veto prosecutorial discretion is an affront to constitutionalism.

Secondly the phrase ‘with the consent of the victim’ can be interpreted to mean the victim’s right to confer with the prosecutor. This as discussed below largely connotes crime victims playing an advisory role. In this regard, the right to consent is an unnecessary repetition of the right to confer since the right is already provided for in the Act. In both cases, the phrase serves no useful purpose, but is rather a source of confusion and an amendment to delete same is apposite. Also, it may be more expedient to adopt the position in the United States where the Arizona State Rules of Criminal Procedure explicitly state that the victim does not have the right to veto a proposed plea bargain.⁴⁷

Crime Victims’ Right to Confer With Prosecution

The right to confer with the prosecutor during plea bargain has been made the law in at least twenty-two states of the United States and has as well been resisted in other jurisdictions as costly and ineffective in practice.⁴⁸ The meaning ascribed to the right differs from one jurisdiction to another. In New York, Vermont and Los Angeles, victims’ right requiring prosecutors to confer or consult with victim before entering into plea bargain appears to be limited to advising, notifying or informing victims of a plea bargain that has already been reached before the proposed plea is presented to the court.⁴⁹ In other States like Illinois, Iowa and Georgia, the right to confer further extends to obtaining the victim’s views and opinions concerning the proposed plea. Victims’ right to confer involves at least two main perspectives that is the right to be informed and

⁴⁷ Simon N. Verdun-Jones, and Adamira A. Tijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform* (Department of Justice Canada 2002) v & 8.

⁴⁸ Michael M. O’Hear, ‘Plea Bargaining and Victims: From Consultation to Guidelines’ (2007) (91) *Marquette Law Review* 324.

⁴⁹ John W. Gillis, ‘Victim Input into Plea Agreements’ Legal Series Bulletin #7 (U.S. Department of Justice 2002) available at <https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html> accessed on 1st April, 2020.

victim's right to express his views by making representation to the prosecution.⁵⁰

Right to Be Informed

The right to be informed entails timely bringing to the knowledge of crime victims their rights and roles, as well as the progress of negotiation including the rationale behind the decision reached by the prosecution in plea bargaining.⁵¹ The right is also suggested to include educating victim on the customary sentences for a specific crime in issue or the particular circumstances of the defendant that may be determinant for a sentence⁵² and the relationship between the prosecutors and victims, especially, the fact that victims are not *dominus litis* in order to prevent unrealistic victim expectations and loss of confidence in the justice system when their expectations are not met.

Victims' rights to be informed in plea negotiations are sometimes violated by the prosecution for various reasons including lack of resources and time-constraints. Prosecutors may decide to resolve a case rather quickly without consulting the victim or notifying them about their rights. For instance in the Rhode Island case of *Bandoni v. Rhode Island*,⁵³ the claimants-a husband and wife-while riding on a motorcycle were struck down by a drunk driver. The wife suffered only minor injuries, while the husband sustained serious injuries including a shattered left leg and pelvis. The drunk driver was charged with one count of driving while intoxicated. However, the prosecutor and the criminal defendant (drunk driver) quickly negotiated and entered into a plea to a reduced charge without the victims' knowledge. Upon discovery of that fact, the victims brought this suit against the state for failure to notify them of their rights to be informed on the pending criminal case and for monetary damages. The court dismissed the claimants' case on the ground that neither the Rhode Island Constitution 1986 nor the

⁵⁰ Pugach and Tamir, 'Nudging the Criminal Justice System.' 49.

⁵¹ A. Manson, and others, *Sentencing and Penal Policy in Canada*, (2nd edn, Emond Montgomery, 2008). See also Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining' 421- 422.

⁵² Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining' 422.

⁵³ 715 A.2d 580 (R.I. 1998).

State's Victim's Bill of Rights 1957 provide for monetary damages in the event that officials charged with notifying crime victims of their rights fail to do so.

In Nigeria, the ACJA attempts to provide for victims right to be informed under section 270(5)(a) by simply granting victims the right to be consulted by the prosecutor. The law, however, fails to make detailed provisions for the enforcement of victims' rights and also fails to provide consequences or avenue for obtaining remedies for failure to observe victims' rights. A victim who may attempt to enforce his right to be informed, where violated in Nigeria, is likely to suffer the same fate as the claimants in the above *Bandoni case*.

The United States Federal Crime Victims' Rights Act (CVRA) 2006,⁵⁴ has means of redress for victims' right violation. The law explicitly provides that, victims though not parties, have the rights to receive court notice and 'to be reasonably heard at any public proceeding in the District Court involving release, plea, sentencing, or any parole proceeding.'⁵⁵ Prosecution and other department of justice agencies are required by the law to make their best efforts to see that crime victims are notified, and accorded their rights.⁵⁶ The law also provides that a victim may submit, and thus become a party to, a motion for relief and writ of mandamus, enforcing his rights in appellate court when his rights are denied by the trial court.⁵⁷ And in certain cases, the victim may make a motion to re-open a plea or a sentence.⁵⁸

Also, the laws of many American States introduced the mechanism of certification in order to ensure compliance and promote transparency and respect for victims' rights by prosecutors. This requires prosecutors to file a certification of compliance in court providing details of the fact that victims' rights and interest have been observed and considered or reasonable efforts have been made to consider their rights and interest. For instance, by the provisions of section 135.406 of the Oregon Revised Statutes 2007, before

⁵⁴ CVRA, 18 U.S.C. s 3771(a)(4) (2006).

⁵⁵ *Ibid*.

⁵⁶ See *United States v. McVeigh*, 958 F. Supp. 512 (D. Colo. 1997).

⁵⁷ CVRA, 18 U.S.C s. 3771(d)(3) (2006).

⁵⁸ CVRA, 18 U.S.C. s 3771(d)(5) (2006).

accepting a guilty plea, the judge must ask the prosecutor if the victim requested to be notified and consulted regarding plea discussions, and if so, if the victim agrees or disagrees with the plea discussions and agreement, and the victim's reasons for agreement or disagreement.⁵⁹ The law however states that failure to comply with this duty does not affect the validity of the plea bargain.

In Arizona, section 13-4423 of the Arizona Revised Statutes 2000⁶⁰ explicitly provides that the court cannot accept a plea agreement unless the prosecutor certifies that the victim's rights have been observed. The section reads as follows:

The court shall not accept a plea agreement unless:

1. The prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer with the victim pursuant to section 13-4419.
2. Reasonable efforts are made to give the victim notice of the plea proceeding pursuant to section 13-4409 and to inform the victim that the victim has the right to be present and, if present, to be heard.
3. The prosecuting attorney advises the court that to the best of the prosecutor's knowledge notice requirements of this chapter have been complied with and the prosecutor informs the court of the victim's position, if known, regarding the negotiated plea.⁶¹

The Arizona model is more suitable for adoption in Nigeria since the law unequivocally provides the consequences for non-compliance to victims' rights. Where the court refuses to accept a plea agreement in such circumstances, it may avail the prosecution an adjournment to confer and file the certification of compliance. Many victims in Nigeria do not engage lawyers to assist them in securing their rights in what is usually termed 'watching brief' in criminal litigation. Therefore, the requirement for filing in court a certification of compliance to victims' rights will reasonably provide

⁵⁹ Oregon Revised Statutes s. 135-406 (2007), see also Oregon Constitution Art. 1, s.42.

⁶⁰ Arizona Revised Statutes s. 13-4423 (2000).

⁶¹ *Ibid.*

a system of checks that can help preserve victims' rights to be informed and participate in plea bargaining.

Right to Make Representation to the Prosecution

Crime victims' right to make representation to the prosecution in plea bargain entails the right to present to the prosecutor a victim-impact statement and comment on the propriety or otherwise of the plea agreement, as well as on the agreement terms including the charges to be maintained or dropped, the sentence and compensation or restitution to be recommended before a plea agreement is consummated. A victim-impact statement is a statement of the financial, physical, and psychological impact of the crime on the victim, the victim's family or caregiver.⁶²

This right is only advisory though it provides crime victim an opportunity to influence the prosecutor's decision, while the ultimate discretion in determining the terms including the compensation and sentencing recommendations to be agreed upon with the criminal defendant before acceptance by the court rest with the prosecution. Most victims are under the mistaken belief that prosecutors are supposed to represent them and they become increasingly dissatisfied with the criminal justice system when their expectations as expressed in their representation go unfulfilled.⁶³ This is considered as one of the drawbacks for allowing crime victims participate in plea bargain. That is allowing them the right to participate may create the impression that they can control the system since it is their person or property that is injured. This can however be surmounted where the prosecutor adequately inform victims of their role in plea negotiation and the working of the criminal justice system been based upon public interest and not private subjective interest. Criminal prosecution are for the overall public interest and public interests encompass some measure of solicitude for crime victims and utilitarian considerations such as crime control, accurate guilt determination, and proportionate

⁶² Garner and others *Black's Law Dictionary* 1562.

⁶³ O'Hear, 'Plea Bargaining and Victims' 333.

punishment including the reaffirmation of victim dignity in ways that resonate with more retributive ways of thinking.⁶⁴

Section 270 (6) (a) & (b) of the ACJA⁶⁵ accords crime victims in Nigeria the right to make representation to the prosecutor regarding the content of the plea agreement; and the inclusion in the agreement of a compensation or restitution order. The provisions for victims' right to make representation to the prosecution however suffer at least two main pitfalls. First, the law fails to require the prosecutors to keep records of representation made by victim or address the manner in which victims are to make their views known to the prosecutor, whether orally or in writing. In South Dakota, victims are permitted by law to provide their views both orally and in writing.⁶⁶ In Georgia, a victim's impact-statement is mandatorily required to be attached to the prosecutor's case file and as well presented for use by the court in considering the plea agreement where requested.⁶⁷

Secondly, the ACJA, also fails to provide any remedy where crime victims are left out in the plea negotiation process or their representation totally ignored by the prosecutor. It is trite law that a right without a remedy is no right at all and this finds expression in the case of *Bandoni v. Rhode Island*,⁶⁸ where it was held that in order for a cause of action for damages to resonate from the deprivation of a crime victim's rights, the legislature must create specific provisions or mechanisms.⁶⁹ The suggestion for a mandatory certification of compliance before the court's acceptance of a plea bargain is also apposite here to answer question as to whether victims made any representation and if not, why? And whether or not victims' views were taken into consideration before sealing the plea agreement, as this will subject prosecutorial discretion to greater transparency and public accountability. By the provisions of the ACJA,⁷⁰ prosecutorial discretion in plea bargain is generally guided by their subjective

⁶⁴ *Ibid*, 326.

⁶⁵ ACJA s.270 (6) (a) & (b).

⁶⁶ South Dakota Codified Laws ss. 23A-28C-1, 23A-7-8 (Michie 2001).

⁶⁷ Georgia Code ANN. s 17-10-1.1 (2000).

⁶⁸ 715 A.2d 580 (R.I. 1998).

⁶⁹ *Ibid*.

⁷⁰ ACJA s.270 (3).

notion of the interest of justice, public interest, public policy and the need to prevent abuse of legal process.⁷¹

The ACJA did not limit the content of the representations a victim may make to the prosecution in so far as it is to be included in the plea agreement. However, some scholars in the United States argue that victims' representation to the prosecution during plea bargaining be limited to detailing the harm that resulted from the crime and their reasonable fears for future harm excluding any suggestion regarding sentence.⁷² This argument is hinged on the grounds that victims are not professionally trained to suggest sentences and have little idea of the range of sentence imposed.⁷³ Also, victims being potentially vengeful or forgiving if allowed to advance sentences may impede on the fairness and proportionality of the process and interfere with prosecution's independence by introducing private subjective views in an inherently public-driven process.⁷⁴ In as much as the argument is sound, victims are not experts in law and would not understand circumstances where punishment should be retributive or reformatory, they can however be guided. By virtue of their right to be informed, they can be guided by the prosecutor or their counsel where they engage any. Also, allowing the victim to express his views including sentencing options without dictating to the prosecutor is not harmful since the issue of sentence may be deliberated upon with the criminal defendant during plea negotiation, and be approved or reviewed by the judge whose decision is based on predetermined criteria and typically justified with some specificity.⁷⁵

The ACJA, did not make provisions for victims to be present during plea negotiation but to make representation to the prosecution for consideration during the bargain. The Arizona Rules of Criminal Procedure 2001 permits judges to participate in plea negotiations and allowing crime victims to be present and heard during any settlement

⁷¹ *Ibid.*

⁷² Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining' 420.

⁷³ J.V. Roberts, "The Role of the Victim at Sentencing and Corrections" in K. Reitz and J. Petersilia, eds., *The Oxford Handbook of Sentencing and Corrections* (New York: Oxford University Press, 2011).

⁷⁴ Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining' 421.

⁷⁵ O'Hear, 'Plea Bargaining and Victims' 329.

discussions attended by the criminal defendant.⁷⁶ In as much as victims' presence during plea negotiation is desirable, it is however not necessary or advisable since victims usually have emotional attachment to 'their' cases which may get out of control in an informal deliberation rendering impossible the conclusion of the entire process. Also, victims' participation is not so readily incorporated into plea negotiations because such negotiations are private adhoc interactions in which the prosecutor makes decisions without public explanation based on criteria that are often unarticulated.⁷⁷

Crime Victims' Right to Address Court in Plea Bargain Proceedings

Crime victims' right to address the court entails the hearing of victims' views in open court before the court accepts or rejects a plea bargain. Ordinarily, victims of crime are not parties to criminal proceedings in court and do not have rights to be heard except as witnesses. Plea bargain proceedings do not require the calling of witnesses and so victims do not get to be heard at all. However, several American States like Arizona,⁷⁸ Colorado,⁷⁹ and Idaho⁸⁰ have laws according victims the right to address the court before the acceptance of a plea bargain.

Victim's address in court can influence the court's decision to reject a plea bargain. In the cases of *State v. Clark*⁸¹ the Vermont Supreme Court rejected a plea agreement as being too lenient after hearing the victims' impact testimony. Conversely Judges may view victims' rights to address the court as an unnecessary obstacle. For instance in the case of *United States v. Laraneta*,⁸² the court observed that allowing victims to intervene in criminal cases:

⁷⁶ Arizona State RCRPR 17.4 (2001).

⁷⁷ O'Hear, 'Plea Bargaining and Victims' 324.

⁷⁸ Arizona Constitution art. II, s.2.1; Arizona Revised Statutes s.13-4423 (2000).

⁷⁹ Colorado Revised Statutes s.24-4.1-302.5 (2001).

⁸⁰ Idaho Constitution art. II, s. 16a; Idaho Code s.19-5306 (Michie 2000).

⁸¹ 566 A.2d 1346 (Vt. 1989).

⁸² 700 F.3d 983, 985-86 (7th Cir. 2013).

...would be a recipe for chaos. Imagine plea bargaining in which intervening crime victims argue for a different bargain from that struck between the government and the defendant... or participate in the sentencing hearing in order to persuade the judge to impose a harsher sentence than suggested by the prosecutor.⁸³

One basic problem in plea bargains is that judges do not possess any information beyond that which is given to them when the plea is presented. Allowing victims the right to address the court will provide judges with in-depth information that can significantly assist judges in reaching an appropriate sentencing decision. Additionally, it may provide a vehicle by which victims can ventilate their feelings.⁸⁴

In Nigeria, victims do not have statutory right to address the court in plea bargain proceedings. Plea bargain proceedings before Nigerian courts entail hearing only from the criminal defendant. The ACJA provides that where a plea agreement is presented by the prosecution the duty of the court is to inquire from the criminal defendant to confirm the term of the agreement,⁸⁵ 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 where the court is satisfied of his guilt as pleaded, convict him.⁸⁶

Since the ACJA did not make any provision to hear from crime victims and there is equally no provision for filing a certification of compliance, crime victims are totally at the mercy of the prosecutors as their impact-statements cannot reach the court. The amendment of the ACJA to confer the right to address the court is desirable as it accords crime victims an avenue for re-examination of their neglected rights by the prosecution. This right should

⁸³ *Ibid.*

⁸⁴ John W. Gillis, 'Victim Input Into Plea Agreements' Legal Series Bulletin #7 (U.S. Department of Justice 2002) available at <
https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html>
 accessed on 1st April, 2020.

⁸⁵ ACJA, s. 270(9).

⁸⁶ ACJA, s. 270(10)(a).

however be exercised only where the crime victim objects to the terms of the plea agreement.

The Need for Crime Victims' Rights in Plea Bargain

There is a dire need to secure crime victims' rights in plea bargain agreements. This is discussed below in relation to the various victims' rights particularly the right to be informed, the right to make representation to the prosecution and the right to address the court.

The rationale for victims' right to be informed is predicated on the facts that without being informed of such crucial information relating to their case, victims may be unable to exercise their rights and may feel alienated and suffer from secondary victimisation.⁸⁷ Secondary victimisation is the harm caused to the victim by the criminal justice system's lack of respect and consideration.⁸⁸ In this way victims are regarded as 'double losers,' by 'losing' to the offender and 'losing' to a system that denies their rights of participation.⁸⁹ This may ignite dissatisfaction and a feeling of being short-changed in the administration of criminal justice.

Research shows that victims who suffer from secondary victimisation by the state experience additional stress which arguably diminishes their psychological well-being and increases the period needed for psychological recovery.⁹⁰ The participation of the victim in the plea agreement has an ability to restore the dignity of the victims, while protecting them against unjust manipulation or secondary victimisation.⁹¹

The importance or rationale for safeguarding victims' right to make representation to the prosecution is predicated on the fact that while prosecutors and judges may hastily accept plea bargain to shed their workload and use it as a tool for swift administration of criminal justice, victims often view criminal trials as an evaluation of

⁸⁷ Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining' 422.

⁸⁸ Douglas E. Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' (1999) Utah Law Review 295–297.

⁸⁹ Nils Christie, 'Conflicts as Property' (1977) (17) *British Journal of Criminology* 3.

⁹⁰ E. McCabe, 'The Quality of Justice: Victims in the Criminal Justice System', in J. Scherrer and G. Sheperd eds., *Victimization of the Weak* (III, 1982).

⁹¹ Pugach and Tamir, 'Nudging the Criminal Justice System' 53.

the harm done to them.⁹² Victims' representations may be the only source of very important and detailed account of the crime's physical, financial and emotional consequences on the victims. These facts are necessary to place the prosecutor on the right footing in exercising his discretion during plea negotiation, in enhancing the accuracy of guilt determination and in proposing more appropriate or proportionate sentence and compensation or restitution.⁹³ Research found that victims' involvement in pleas led to greater levels of victims' satisfaction, and a more balanced pleas by taking into consideration victims' as well as defendants' interests, so that it would not necessarily lead to more contentions in court.⁹⁴

A victim's information may as well enable the prosecutor to better appreciate whether or not there is the need for restitution or the need for incarceration to prevent revictimisation.⁹⁵ Victims' representation to the prosecutor before the consummation of a plea bargain guarantees the victim some measure of voice in the process—a voice that may be considerably more meaningful than an opportunity to make representation before the court, by which time, in many cases, the most important decisions in plea bargaining have already been made. Expressing a victim's view in court may be too late, as the plea has already gathered momentum and the judge might be quite reluctant to reject the agreement, even where the victim raises significant reservations.⁹⁶ More especially, as courts may always be willing to accept a swift dispensation of justice than allow victims to occasion a full trial. Also, the public interest as canvassed by the prosecution may be different from the interest of crime victims and it is important to take cognizance of the separate interest to strike a balance or make an informed decision. Though victims sometimes make statements to the police while reporting a crime or during investigations, this cannot however take the place of the impact statement made during plea negotiation since some important

⁹² Beloof, Cassell and Twist, *Victims in Criminal Procedure*, 433.

⁹³ Manikis, 'Recognizing Victims' Role and Rights during Plea Bargaining' 418.

⁹⁴ Pugach and Tamir, 'Nudging the Criminal Justice System' 68.

⁹⁵ O'Hear, 'Plea Bargaining and Victims' 329.

⁹⁶ Pugach and Tamir, 'Nudging the Criminal Justice System' 68.

issues like compensation or restitution are often not considered at that stage.

The need for victims to address the court in person or through their legal representative is predicated first on the fact that it provides an opportunity for victims to ventilate their grievances since they cannot be called as witnesses to tell their story. Secondly, in plea bargain proceedings, judges do not possess any information beyond that which the prosecutor in his discretion decides to present at the plea hearing, victims' participation is apposite to provide detailed information that can significantly assist the judges in reaching an appropriate sentencing decision. Additionally, the participation of the victim in the plea agreement has an ability to restore the dignity of the victim, while protecting him against unjust manipulation or secondary victimisation.

Conclusion/Recommendations

Plea bargain involves the swift settlement of criminal cases through negotiation between the prosecutor and the criminal defendant without the calling of witnesses. Since witnesses are not necessary, crime victims are often sidelined in the adjudication of 'their' cases. Plea negotiation and the rationale behind same is not open to the general public but always at the discretion of the prosecutor guided by the interest of justice, public interest, public policy and the need to prevent abuse of legal process.⁹⁷ This undermines the established principle of public and open justice, where justice is not just seen by the public but manifested and undoubtedly seen to be done.⁹⁸ The unguarded discretion of the prosecutor in plea bargain occasions violation of victims' rights leading to the feeling of secondary victimisation- where victims are regarded as 'double losers,' by losing to the offender and losing to a system that denies their rights. This also occasions loss of confidence in the criminal justice system.

In Nigeria, the ACJA attempts to accord crime victims a number of rights including the right to consent to plea bargaining

⁹⁷ ACJA s.270 (3).

⁹⁸ *RV. Sussex Justices: Ex parte McCarthy* (1924) 1 KB 256, 259. See also *Kotoye v. CBN* (1989) 1 NWLR (pt. 98) 419.

before the prosecution can enter into plea negotiation; the right to be informed about the progress of the case and their roles in the process as well as the rights to make representation to the prosecution including demanding compensation or restitution order. However, these seemingly brilliant rights are rather illusory than real. This is because there is a dearth of detailed provisions on the import and meaning of these rights. Also, the rights are accorded without mechanisms for remedy, thereby rendering them valueless. It is also found that the right to consent is pointless, null and void in the face of the constitutional right to initiate, take over and continue or discontinue public prosecution of 'all criminal cases' exercisable by the Attorney-General of the Federation and of the States or officers in their department. It is as well found that the ACJA does not make provisions for victims to address the court thereby leaving victims at the mercy of the prosecutors and where prosecutors deny victims of their rights, the harm caused may well be irreparable as there is no avenue for redress.

The above underscores the need for adequate safeguard of victims' rights. First, it is recommended that victims be availed adequate information to educate them on the circumstances that might lead to a plea bargain and be informed of the determinants for sentencing to prevent unrealistic victim expectations and maintain confidence in the administration of criminal justice.

Secondly, it is recommended that, the phrase 'with the consent of the victim' in section 270(2) of the ACJA be deleted and rather express provisions be made in tandem with the constitutional right to public prosecution, by stating that victims have no right to veto prosecutorial discretion to plea bargain. This will also clarify any false notion of victims' right to control prosecutor's discretion in plea agreement by giving or withholding consent to enter into plea bargain.

Thirdly, it is recommended that the ACJA be amended to impose on prosecutors the duty of filing a certification of compliance with victims' right before the court may accept or reject a plea agreement in order to force erring prosecutors to provide crime victims with adequate information and the necessary attention during

plea negotiation. This will help convert the abstract and shadowy rights accorded crime victims into substantive rights.

Finally, the ACJA be amended to accord crime victims, where they disagree with any plea bargain agreement, the right to address the court on the terms of the plea agreement including the right to make victims impact-statement which may assist the court in reaching an appropriate sentencing decision and making proportionate compensation or restitution order.