

PROSECUTORIAL DISCRETION IN THE ADMINISTRATION OF CRIMINAL JUSTICE AND THE APPLICATION OF PLEA BARGAINING IN NIGERIA AND THE UNITED STATES: A CORRELATIVE ANALYSIS

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Abstract

Prosecutors confront a broad spectrum of circumstances in the administration of criminal justice and are vested with substantial discretion in determining the appropriate course of action in each case. Though this autonomy has historically been a defining attribute of the prosecutorial function, it operates within the confines of legal provisions and policy directives intended to guide and structure decision-making. Despite these frameworks, ongoing concerns highlight the need to balance prosecutorial independence with the imperatives of fairness, transparency, and accountability. This tension is most pronounced in the context of plea bargaining, where prosecutors may offer reduced charges or recommend mitigated sentences in exchange for a guilty plea. The scope and application of this discretion differ significantly across jurisdictions. Adopting a doctrinal method of research, this article critically examines the relationship between prosecutorial discretion and plea bargaining, focusing on Nigeria and the United States. The discussion in the paper principally evaluates the breadth of prosecutorial discretion and its impact on negotiated pleas, identifying issues relating to potential overreach, unequal bargaining positions, and procedural safeguards. The article further considers statutory and institutional limitations, alongside judicial attitudes toward prosecutorial choices. It concludes by proposing reforms aimed at promoting accountability, enhancing consistency, and strengthening public trust in Nigeria's criminal justice process.

Keywords: Prosecutorial discretion, plea bargain, prosecutorial power, public interest

1. Introduction

The administration of criminal justice relies heavily on the role of the prosecution, which serves as the primary mechanism for determining how alleged offences are processed and adjudicated. Though prosecutorial systems differ across countries, their primary objective remains the same: to ensure that criminal laws are enforced fairly, efficiently, and in the public interest.¹ In Nigeria and the United States, prosecutorial authority is central to the criminal justice process, shaping which cases proceed to trial, which are resolved through negotiated settlements, and which are discontinued.² The structure, scope, and limitations of this authority, however, differ significantly between the two jurisdictions, reflecting distinct legal traditions, institutional frameworks, and policy priorities.³

In Nigeria, the Attorney-General exercises broad constitutional powers that have, in some cases, led to controversial decisions, including alleged charge-stacking or selective prosecutions.⁴ In the United States, prosecutors also wield extensive authority, but their actions are generally moderated by federal and state guidelines, institutional oversight, and judicial review aimed at promoting

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¹ Jocelyn Simonson, 'The Place of "The People" in Criminal Procedure' (2019) 119 (1) Columbia Law Review 249 – 308.

² *ibid.*

³ *ibid.*

⁴ O. Oyewo, 'Power of the Attorney General in the Administration of Justice: Establishing Constitutional Control' (1997) (1) Journal of Public Law 111.

fairness and consistency.⁵ Prosecutors possess extensive discretion in charging, plea bargaining, and sentencing, enabling efficiency in case management, yet there are concerns regarding fairness, coercion, and potential abuse of power.⁶ Both systems, therefore, demonstrate the delicate balance between independence and accountability in prosecutorial decision-making.

Plea bargaining exemplifies one of the most prominent applications of prosecutorial discretion. Through negotiated guilty pleas, prosecutors may offer reduced charges or recommend lighter sentences in exchange for the defendant's admission of guilt.⁷ This mechanism alleviates court congestion, reduces trial costs, and ensures efficient case management. At the same time, it raises critical concerns regarding fairness, voluntariness, transparency, and equal treatment under the law.⁸ The exercise of discretion in plea bargaining underscores the importance of regulating prosecutorial authority to prevent abuse and maintain public confidence in the justice system.⁹

This paper comparatively examines prosecutorial discretion using the Nigerian criminal justice system, and the United States as case studies. It explores the conceptual foundations, scope, and challenges of prosecutorial discretion and analyses its role in the plea-bargaining process.

This paper is structured into eight distinct yet coherent parts. It begins with a conceptual clarification of terms as it defines terms such as Plea Bargain, Public Prosecution prosecutorial powers. It also examines the emergence of Plea Bargain and Prosecutorial discretion in the two jurisdictions. Subsequent sections explore the nexus between prosecutorial discretion and Plea Bargain, the limitations to prosecutorial discretion and issues bedeviling prosecutorial discretion and Plea Bargain respectively. The final part offers recommendations aimed at addressing the issues identified in both criminal justice systems.

2. Conceptual Clarification of Terms

a) Public Prosecution in Nigeria

Public prosecution refers to the formal process through which the state brings charges against individuals or entities accused of committing crimes.¹⁰ Its primary aim is not merely to prove guilt but to secure convictions based on evidence that satisfies the high legal standard of proof beyond a reasonable doubt. By representing the state in criminal proceedings, the prosecution ensures that justice is served while maintaining public order and reinforcing the rule of law.¹¹ The prosecution operates under key principles, including the presumption of innocence, which establishes that an accused person is considered innocent until proven guilty. The burden of proof rests on the prosecution, which must present evidence to secure a conviction beyond a reasonable doubt.¹² Another guiding principle is due process, which guarantees fair treatment for defendants. This includes the right to legal representation, the right to challenge evidence, and the right to an impartial trial. By adhering to these principles, prosecution balances the need to punish offenders with the protection of individual rights.¹³

⁵ Darryl K Brown, 'Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute' (2018 – 2019) Minn. L. Rev. 843

⁶ *ibid.*

⁷ GO Adeleke, 'Prosecuting Corruption and the Application of Plea Bargaining in Nigeria: A Critique (2012) Int'l J. Advanced Legal Stud. & Governance 53

⁸ *ibid.*

⁹ *ibid.*

¹⁰ Yue Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) International Criminal Justice Review 190 – 211.

¹¹ *ibid.*

¹² *ibid.*

¹³ Nasimah Hussin, 'Punitive Justice in the Malaysian Criminal Law: Balancing the Rights of Offenders with those of the Victims' (2011) 7(13) Journal of Applied Sciences Research 2399 – 2404.

Public prosecution ensures that those suspected of criminal conduct are brought before competent courts for fair trials and, if found guilty, punished appropriately. Criminal acts and omissions violate public order and statutory law, making it the state's duty to initiate legal proceedings.¹⁴ In this way, prosecution acts as a mechanism for upholding justice, deterring crime, and fostering accountability, thereby enhancing public confidence in the legal system.¹⁵ The process of prosecution begins with law enforcement investigations, followed by the prosecutor's decision to initiate charges, negotiate plea bargains, or terminate proceedings based on evidence and public interest considerations.¹⁶ Plea bargaining, where applicable, allows prosecutors to offer reduced charges or recommend lighter sentences in exchange for a guilty plea. This not only ensures efficiency in case management but also allows the justice system to focus resources on more serious offences.¹⁷

In Nigeria, the Attorney-General of the State leads public prosecution at the state level, while the Attorney-General of the Federation or the head of a statutory prosecuting agency heads federal prosecution.¹⁸ However, prosecution functions within a wider criminal justice framework that involves law enforcement agencies, legal practitioners, courts, and correctional institutions. Police officers and other investigative bodies gather evidence, conduct inquiries, and make arrests.¹⁹ Legal practitioners provide representation and guidance, while judges oversee trials, ensuring adherence to legal principles. Correctional institutions implement sentences when convictions are obtained.²⁰

b) The Concept of Plea Bargaining

A plea bargain is a legal process in criminal cases where the defendant agrees to plead guilty to a lesser charge or one of several charges in exchange for concessions from the prosecution.²¹ These concessions often include a reduced sentence, dismissal of certain charges, or a recommendation for leniency.²² The primary purpose of plea bargaining is to speed up the legal process and reduce the burden on courts, which are often overwhelmed by time-consuming and costly trials.²³ For defendants, it can result in lighter sentences, while for prosecutors, it ensures convictions and saves resources.²⁴

Plea bargaining relies heavily on prosecutorial discretion, which allows prosecutors to negotiate terms, decide which charges to pursue, and determine the concessions offered. While this discretion improves efficiency, it also raises concerns about fairness, accountability, and potential abuse.²⁵ Critics argue that defendants with limited resources or weak legal representation may feel pressured to accept deals, even if they are not guilty.²⁶ The largely unregulated nature of

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Lauren M Ouziel, 'Prosecution in Public, Prosecution in Private' (2021-2022) 97 Notre Dame L. Rev. 1071

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ Jeffrey Bellin, 'Theories of Prosecution' (2020) 108 (4) California Law Review 1203 - 1253

²⁰ *ibid.*

²¹ Abiodun Ashiru, 'A Comparative Analysis of the Role of the Court in Plea Bargain Agreements in Nigeria' (2019) 2 Elizade University Law Journal 1-27; see also Lawrence Azubuike, 'Plea bargaining in Nigeria under the Administration of Criminal justice Act' (2021) 13(3) African Journal of Legal Studies 195-217

²² Olayanju Oluseyi, 2012, 'The Relevance of Plea bargaining in the Administration of justice system in Nigeria', LASU Law Journal, 8 (2), 35 – 45; see also Michael M O'Hear, 'Plea Bargaining and Procedural Justice' (2008) 42 Ga. L. Rev. 407.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Robert Osamor, 'Plea-Bargaining in Nigeria: When Crime Pays' (2022) 3 LASJURE 27

²⁶ *Ibid.*

prosecutorial discretion can also result in inconsistent outcomes across cases or jurisdictions, highlighting the need for transparency and oversight.²⁷

In Nigeria, plea bargaining is formally recognized under Sections 270 and 494 of the Administration of Criminal Justice Act (ACJA), 2015. Section 494 expressly defines it as

Plea bargain” means 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;

There are two main types: charge bargaining, where some charges are reduced or dropped, and sentence bargaining, where a lighter sentence is negotiated in exchange for a guilty plea. Agreements must be documented in writing to avoid disputes.²⁸

c) The Concept of Prosecutorial Powers

Prosecutorial powers refer to the legal authority vested in prosecutors to make critical decisions in the criminal justice process.²⁹ These powers allow prosecutors to determine whether criminal charges should be initiated, modified, or discontinued, as well as to negotiate plea agreements, recommend sentences, and guide the course of prosecutions in accordance with the law.³⁰ Prosecutorial authority is central to the administration of justice, as it directly influences which cases proceed to court, how resources are allocated, and ultimately, whether justice is served both for the state and the accused.³¹

At its core, prosecutorial power is discretionary. Prosecutors are entrusted with the responsibility to assess evidence, consider public interest, and weigh the interests of justice before deciding whether to prosecute.³² This discretion extends to determining the nature of the charges, the timing of prosecution, and whether alternative resolutions such as plea bargains are appropriate. By exercising this discretion responsibly, prosecutors contribute to an efficient and effective criminal justice system, preventing unnecessary trials and conserving judicial resources for more serious or complex cases.³³ Prosecutorial powers are not confined solely to decision-making about charges. They also encompass the authority to oversee investigations, direct law enforcement efforts in gathering evidence, and participate in trial strategy.³⁴ In some jurisdictions, prosecutors can influence sentencing recommendations, determine the terms of probation, or advocate for restorative justice measures.³⁵ Such authority positions prosecutors as pivotal actors within the criminal justice systems, with their decisions often having significant consequences for defendants, victims, and society at large.³⁶

The scope of prosecutorial powers varies between jurisdictions but generally includes three primary functions: charging decisions, plea bargaining, and case management.³⁷ Charging

²⁷ Ibid.

²⁸ Sule Peter Echewija, 'Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique' 2017 7(2) IAFOR Journal of Ethics, Religion & Philosophy 35 – 47.

²⁹ Jeffrey Belin, 'The Power of Prosecution' (2019) 94 (2) New York University Law Review 171.

³⁰ Ibid.

³¹ Ibid.

³² J.A. Sklansky, 'The Nature and Function of Prosecutorial Power' (2016) 106(3) Journal of Criminal Law and Criminology 483.

³³ Ibid.

³⁴ Ibid.

³⁵ Oren Gazal-Ayal, Hagit Turjeman and Gideon Fishman, 'Do Sentencing Guidelines Increase Prosecutorial Power: An Empirical Study' (2013) 76 (131) Law and Contemporary Problems.

³⁶ Ibid.

³⁷ Ibid.

decisions involve evaluating whether sufficient evidence exists to proceed with prosecution and which specific charges are appropriate.³⁸ Plea bargaining allows prosecutors to negotiate mutually acceptable resolutions with defendants, including reduced charges or lighter sentences, which can expedite the resolution of cases and alleviate court congestion.³⁹ Case management encompasses the broader oversight of prosecutions, including prioritizing cases, ensuring adherence to procedural rules, and coordinating with law enforcement and other criminal justice actors.⁴⁰ Though prosecutorial powers are broad, they are not unlimited. They are subject to legal, ethical, and institutional constraints designed to prevent abuse, protect the rights of the accused, and maintain public confidence in the justice system.⁴¹ For instance, prosecutors must avoid selective or vindictive prosecution, ensure fairness in plea negotiations, and act in accordance with established policies and guidelines.⁴² In many jurisdictions, their decisions are indirectly monitored through judicial oversight, professional codes of conduct, and internal review mechanisms.⁴³

3. Prosecutorial Discretion in Nigeria and the United States

Prosecutorial discretion in Nigeria is a core feature of the criminal justice system, granting prosecutors significant authority to determine how criminal cases are handled.⁴⁴ This discretion allows the Attorney-General at both the federal and state levels, as well as other authorized prosecutors, to decide whether to initiate, continue, or discontinue criminal proceedings.⁴⁵ It also extends to determining the charges to be preferred, the acceptance of plea bargains, and recommendations regarding sentencing.⁴⁶ The primary aim of this discretion is to ensure that justice is administered fairly, efficiently, and in line with public interest.⁴⁷

The Nigerian Constitution, statutes, and judicial precedents provide both the foundation and limits of prosecutorial discretion.⁴⁸ Section 36(12) of the 1999 Constitution ensures that no one can be convicted of a criminal offense unless it is clearly defined in a written law.⁴⁹ This legal safeguard limits prosecutors from acting arbitrarily, as their decisions must relate to conduct recognized as a criminal offense under Nigerian law.⁵⁰ Similarly, statutory frameworks such as the Administration of Criminal Justice Act (ACJA) 2015 reinforce these boundaries by regulating the process for plea

³⁸ Bennett L. Gershman, 'Prosecutorial Decision making and Discretion in the Charging Function' (2011) 62 *Hastings Law Journal* 1259.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Daniel S Medwed, 'Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution' (2010) 31 *Cardozo Law Review* 2187.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Yewande Fatoki, 'A Legal Analysis of the Challenges of Criminal Prosecution in Nigeria' (2023) 4 *LASJURE* 8.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ Bruce A. Green, 'Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry' (2019) 123 *Dickinson Law Review* 589.

⁴⁸ Abdulkarim Kana, 'Perspectives and Limits of Judicial Discretion in Nigerian Courts' (2014) 29 *Journal of Law Policy & Globalization* 157.

⁴⁹ *ibid.*

⁵⁰ Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) specifically provides that: Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

bargaining and other prosecutorial actions.⁵¹ These provisions ensure that discretion is exercised within the confines of legality, fairness, and accountability.⁵²

Prosecutorial discretion in Nigeria serves several important purposes. First, it helps manage the criminal justice system's limited resources. Courts in Nigeria often face backlogs, and not every offense merit full trial proceedings.⁵³ By exercising discretion, prosecutors can prioritize serious offenses, allocate resources efficiently, and avoid overloading the courts with minor or frivolous cases.⁵⁴ Second, discretion allows prosecutors to consider broader societal interests. Factors such as the age of the offender, the circumstances surrounding the offense, the public interest, and the potential impact of prosecution on the community can influence whether a case proceeds.⁵⁵ Third, prosecutorial discretion plays a crucial role in plea bargaining, giving prosecutors the ability to negotiate agreements that resolve cases efficiently while still serving justice.⁵⁶ Despite its utility, prosecutorial discretion in Nigeria is not without challenges. Concerns often arise over abuse of power, lack of transparency, and potential bias.⁵⁷ The broad and sometimes unchecked powers of the Attorney-General have, in some instances, led to perceptions of favoritism or selective prosecution.⁵⁸ To counter these risks, judicial oversight is essential. Courts retain the authority to review the lawfulness of prosecutions, reject plea bargains that do not meet legal standards, and ensure that the exercise of discretion aligns with the principles of justice.⁵⁹

In practice, prosecutorial discretion in Nigeria is a balancing act between efficiency, justice, and accountability.⁶⁰ When exercised responsibly, it ensures that the criminal justice system functions effectively while protecting the rights of the accused.⁶¹ However, misuse of discretion can undermine public confidence, erode the rule of law, and compromise the fairness of criminal proceedings.⁶² Consequently, ongoing reforms and clear guidelines, such as those in the ACJA, aim to strengthen the accountability of prosecutors and enhance the transparency of their decisions. It empowers prosecutors to make critical decisions while ensuring that cases are handled in a manner that balances public interest, justice, and efficiency. Properly exercised, it supports the administration of fair and effective criminal justice, but it must remain subject to legal limits and judicial supervision to prevent abuse and safeguard the rights of defendants.

Prosecutorial discretion in the United States is a cornerstone of the criminal justice system, granting prosecutors extensive authority to shape the outcome of criminal cases.⁶³ U.S. prosecutors, whether at the federal or state level, have the power to decide whether to charge an individual, what charges to file, whether to offer plea agreements, and what sentences to recommend.⁶⁴ This discretion allows prosecutors to manage heavy caseloads efficiently, focus on

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ BE Ewulum, 'Alternative dispute resolution mechanisms, plea bargain and criminal justice system in Nigeria' (2017) 8(2) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 119-124.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Osita Mba, 'Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: An Imperative of the Rule of Law' (2010) 2 Oxford University Comparative Law Forum.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ Christian Iheanyi Alozie, 'Role of the Judiciary in Shaping Policy and Upholding the Rule of Law in Nigeria: Challenges and Prospects' (2025) 9 (3) Socialscientia: Journal of Social Sciences and Humanities.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*, n 85.

⁶³ Jordan A. Sklansky, 'The Nature and Function of Prosecutorial Power' (2016) 106 (3) Journal of Criminal Law and Criminology.

⁶⁴ *ibid.*

more serious offenses, and allocate limited resources effectively.⁶⁵ It is widely recognized as the “key characteristic” of the American prosecutor, giving them a central role in the administration of justice.⁶⁶ The scope of prosecutorial discretion in the U.S. is exceptionally broad. At the federal level, prosecutors follow Department of Justice policies and guidelines, such as those in the Justice Manual, which provide direction on initiating cases, accepting pleas, and evaluating public interest.⁶⁷ These guidelines emphasize factors such as the seriousness of the offense, the strength of the evidence, prior criminal history, victim interests, and the deterrent effect of prosecution.⁶⁸ State-level prosecutors, including elected district attorneys, exercise similarly wide discretion, although their decisions are often influenced by local law, resources, and political considerations.⁶⁹ Despite these guidelines, U.S. prosecutors enjoy considerable independence, with limited statutory or judicial constraints on their decision-making.⁷⁰

Prosecutorial discretion serves multiple functions in the American system. One key purpose is efficiency: the sheer volume of criminal cases in U.S. courts makes full trials impractical for every matter.⁷¹ By exercising discretion, prosecutors can prioritize cases, settle matters through plea bargains, and ensure that the most serious offenses receive appropriate attention.⁷² Discretion also allows prosecutors to consider broader social and policy objectives, such as reducing recidivism, promoting rehabilitation, and addressing disparities in the justice system.⁷³ Additionally, discretion gives prosecutors the flexibility to respond to unique circumstances of individual cases, balancing justice with practicality.⁷⁴ However, the breadth of this power also raises concerns. Critics argue that unchecked discretion can lead to unequal treatment, coercion in plea negotiations, and inconsistent sentencing.⁷⁵ For example, legal scholars have noted that broad discretionary powers may permit disparities in charging decisions and sentencing outcomes, particularly where there is limited judicial oversight or clear prosecutorial guidelines.⁷⁶ Additionally, critics contend that plea bargaining can place pressure on defendants to accept guilty pleas to avoid the risk of harsher penalties at trial, thereby raising concerns about fairness and voluntariness.⁷⁷ Others argue that inconsistent use of discretion contributes to sentencing inequalities, undermining public confidence in the criminal justice system.⁷⁸ Defendants with fewer resources or less effective legal representation may feel pressured to accept plea deals, even when evidence of guilt is weak.⁷⁹ To mitigate these risks, judicial oversight is required: courts review plea agreements to ensure they are voluntary, legally valid, and consistent with public interest.⁸⁰ Furthermore, constitutional protections, such as bans on selective and vindictive prosecution, act as additional safeguards

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ Ja'von Long, 'the Powerful Actors of the Criminal Justice System: Understanding Prosecutorial Discretion from the Viewpoint of Prosecutors. A Public Administrator's Perspective' (2023) West Chester University Doctoral Projects. 231.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *Ibid.*

⁷¹ Robert Heller, 'Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion' (1997) 145 (5) University of Pennsylvania Law Review 1309 – 1358.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ R Nobles, & D.Schiff, 'Criminal justice unhinged: The challenge of guilty pleas.' (2019) 39 (1) Oxford Journal of Legal Studies, 100-123.

⁷⁶ *ibid.*

⁷⁷ Michael Conklin, 'In Defense of Plea Bargaining: Answering Critics' Objections' (2020) 1 W. St. UL Rev. 47.

⁷⁸ *ibid.*

⁷⁹ Jeffrey Berlin and Jenia Turner, 'Sentencing in an Era of Plea Bargains' (2024) 102 N.C. L. Rev. 179

⁸⁰ *ibid.*

against the abuse of discretion.⁸¹ In practice, prosecutorial discretion in the United States is a delicate balance between autonomy, accountability, and fairness.⁸² It is a practical necessity, enabling the criminal justice system to handle massive caseloads while allowing prosecutors to tailor their approach to individual cases.⁸³

4. Nexus Between Prosecutorial Discretion and Plea Bargaining

The administration of criminal justice worldwide relies heavily on discretion at multiple stages, including investigation, prosecution, and sentencing.⁸⁴ Among these, prosecutorial discretion holds particular significance because prosecutors act as gatekeepers of the justice system. They determine whether a person should face criminal charges, which offenses to pursue, and whether alternative measures such as diversion programs or plea negotiations are appropriate.⁸⁵ Through this discretion, prosecutors can secure guilty pleas, discontinue cases, or set conditions to divert offenders from the formal justice process.⁸⁶ However, this power has long been described as “the most dangerous power of the prosecutor” due to its potential for misuse for political or unethical ends.⁸⁷

Prosecutorial discretion is especially crucial in plea bargaining, where it fundamentally shapes negotiations between the state and defendants.⁸⁸ It gives prosecutors authority over key decisions, including whether to file charges, what charges to bring, whether to propose a plea deal, and the terms of such agreements.⁸⁹ This discretion allows the criminal justice system to operate more efficiently, particularly in courts burdened with heavy caseloads.⁹⁰ By determining which cases are suitable for plea agreements, prosecutors can conserve judicial resources, reduce trial backlogs, and focus attention on more serious or complex matters.⁹¹ Beyond efficiency, prosecutorial discretion enables prosecutors to consider the unique circumstances of each case.⁹² Not all offenses or offenders are the same, and strict, uniform prosecution could result in unfair outcomes.⁹³ Discretion allows prosecutors to weigh factors such as the defendant's background, level of remorse, cooperation with authorities, and the nature of the offense, promoting justice that is both fair and proportionate.⁹⁴

In both Nigeria and the United States, plea bargaining is closely tied to prosecutorial choice. In Nigeria, Section 270 of the Administration of Criminal Justice Act (ACJA) empowers prosecutors

⁸¹ *ibid.*

⁸² Ryan O' Sullivan, 'Balancing Accountability and Independence: Prosecutorial Discretion in the United States and Italy' (2024) <https://ssrn.com/abstract=4783527> Accessed 26th November 2025.

⁸³ *ibid.*

⁸⁴ D. H. Choe, 'Discretion at the Pre-Trial Stage: A Comparative Study' (2014) 20 *European Journal on Criminal Policy and Research* 101 – 119.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Asher Flynn, 'Plea-negotiations, prosecutors and discretion: An argument for legal reform' (2016) 49(4) *Journal of Criminology*.

⁸⁹ *ibid.*

⁹⁰ Mary Patrice Brown and Steven E Bunnell, 'Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia' (2006) 43 *American Criminal Law Review* 1063.

⁹¹ *ibid.*

⁹² Nordquist, Cecilia Y., 'The Weight of the Bargain: Investigating Prosecutors' Emotions in Plea Bargaining Interactions in a United States Criminal Court' (2025) Being a PhD dissertation presented at the Acta Universitatis Upsaliensis

⁹³ *ibid.*

⁹⁴ *ibid.*

to engage in plea negotiations, subject to court approval.⁹⁵ In Nigeria, Plea Bargain can be traced to landmark cases like *FRN v. Tafa Balogun*⁹⁶ wherein the EFCC arraigned the defendant, a former Inspector General of Police (IGP), on 70 counts of money laundering and theft of about 13 billion naira, from 2002 to 2004. Upon a plea bargain the charges were reduced by 88.6 percent to 8 counts, to which he pleaded guilty.

Additionally, in the landmark case *FRN v. Cecilia Ibru*⁹⁷, the former Managing Director of Oceanic Bank Plc pleaded guilty to multiple counts of corporate fraud and mismanagement. Through a plea bargain, she agreed to forfeit over 191 billion in cash and assets including over 80 properties globally in exchange for a 6-month prison sentence.⁹⁸ The Defendant was initially faced a 25-count charge relating to securities fraud and reckless lending. Through a plea bargain agreement, she pleaded guilty to three reduced charges involving the approval of loans beyond authorised credit limits and the falsification of financial accounts.⁹⁹ On 8 October 2010, the Federal High Court of Nigeria in Lagos, presided over by Justice Dan Abutu, sentenced her to three concurrent six-month prison terms, effectively amounting to six months' imprisonment. Owing to ill health, she was permitted to serve her sentence at Reddington Hospital in Victoria Island, Lagos, rather than in a conventional correctional facility.¹⁰⁰

Generally, prosecution decide whether to initiate discussions, determine the concessions offered, and evaluate whether the agreement serves the public interest. Exercising this discretion responsibly is critical to preventing abuse or perceptions of bias.¹⁰¹ At the same time, broad discretion raises concerns about accountability and consistency. Because prosecutors significantly influence case outcomes, there is a risk of arbitrary decisions influenced by personal biases, political pressures, or public opinion. Systems with limited oversight are particularly vulnerable.¹⁰² For this reason, discretion must be guided by clear policies, ethical standards, and judicial oversight when necessary to ensure fairness and transparency.¹⁰³ Moreover, prosecutorial discretion can serve as a safeguard against wrongful convictions and overly harsh punishments.¹⁰⁴ In cases where evidence is weak or a trial could produce unjust outcomes, carefully negotiated plea agreements may better achieve justice. By balancing efficiency with fairness, prosecutorial discretion becomes an essential tool in the effective administration of criminal justice.¹⁰⁵

5. Issues with Prosecutorial Discretion Vis-À-Vis Plea Bargaining

One of the most significant ways Prosecutorial Discretion manifests is through plea bargaining. Although plea bargaining can streamline court proceedings and reduce the burden on an overtaxed judicial system, it raises several concerns regarding fairness, consistency, and justice.¹⁰⁶ A primary issue with prosecutorial discretion in plea bargaining is the potential for inconsistency and

⁹⁵ Section 270 of the ACJA provides that a 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.

⁹⁶ (2005) 4 NWLR (Pt. 324) 190; see also *FRN v. Alamiyeseigha* (2006) 16 NWLR Pt. 1004; *FRN v. Nwude & Ors.* (Unreported) Suit No. ID/92C/2004.

⁹⁷ *Federal Republic of Nigeria v. Dr (Mrs) Cecilia Ibru*, Charge FHC/L.297C/2009.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ Maximo Langer, 'Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure' (2006) 33 American Journal Criminal Law 223.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ Doug Lieb, 'Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future' (2014) 123 Yale Law Journal 1014.

arbitrariness.¹⁰⁷ Prosecutors operate with wide latitude in determining the terms of plea deals, often without clear guidelines or oversight. This can lead to situations in which two individuals who commit similar offenses receive vastly different outcomes depending on the discretion of the prosecutor handling their cases.¹⁰⁸ Such disparities undermine the principle of equal justice under the law, fostering public perception that the system is biased or unpredictable.¹⁰⁹

Another concern is the coercive nature of plea bargaining. Defendants may feel pressured to accept a plea deal even if they maintain their innocence, simply to avoid the risk of a harsher sentence if convicted at trial.¹¹⁰ For instance, this was clearly demonstrated in the famous *Beltway Sniper Attacks*¹¹¹ where in one of the Defendants, Lee Boyd Malvo entered an Alford plea, a form of guilty plea in which a defendant maintains innocence while acknowledging that the prosecution possesses sufficient evidence likely to secure a conviction.¹¹² This clearly demonstrates how defendants may accept pleas primarily to avoid the risk of harsher punishment, particularly the death penalty. Malvo's plea agreement ultimately resulted in multiple life sentences rather than capital punishment.¹¹³

The legitimacy of this coercive was also affirmed by the United States' Supreme Court case of *Brady v. United States*¹¹⁴ wherein the court found that a guilty plea is not unconstitutionally compelled when a defendant pleads guilty because they would prefer a certain or probable lesser penalty to the risk of a greater penalty. In this case, a kidnapping offence could attract the death penalty if the victim was harmed before release. To avoid the risk of receiving a death sentence, Brady chose to plead guilty to a lesser kidnapping offence. Before accepting the plea, the trial judge questioned Brady twice to ensure that his decision was made voluntarily. After his conviction, Brady attempted to withdraw the plea, arguing that it was involuntary because he pleaded guilty only to escape the possibility of capital punishment. However, his application for post-conviction relief was rejected.¹¹⁵

This pressure is particularly acute for individuals who lack access to effective legal representation or resources, highlighting the intersection of prosecutorial discretion with socioeconomic inequality.¹¹⁶ In this way, the power of the prosecutor can inadvertently or in some cases deliberately coerce guilty pleas, raising ethical and legal questions about voluntary consent and the true fairness of the process.¹¹⁷ Moreover, prosecutorial discretion in plea bargaining can affect the broader goals of the criminal justice system, including deterrence and accountability. By allowing prosecutors to reduce charges or sentences through negotiation, there is a risk that serious offenses may be treated too leniently, undermining public confidence in the justice system and potentially failing to hold offenders fully accountable.¹¹⁸ Critics argue that this discretion can

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Tyler Rose Clemons, 'Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System' (2014) 51 *American Criminal Law Review* 689.

¹¹⁰ *ibid.*

¹¹¹ Neal Augenstein, 'Without Warning': Exhibit tells story of victims, takedown in 2002 DC sniper case' (2026) WTOP News <https://wtop.com/local/2026/05/without-warning-exhibit-tells-story-of-victims-takedown-in-2002-dc-sniper-case/> Accessed 20th May 2026.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ 397 U.S. 742 (1970).

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ R. Richard Banks, Jennifer L. Eberhardt and Lee Ross, 'Discrimination and Implicit Bias in a Racially Unequal Society' (2006) 9(4) *California Law Review* 1169 – 1190.

¹¹⁸ *ibid.*

create a “justice by negotiation” model, where outcomes depend more on bargaining skill than on the merits of the case or the severity of the offense.¹¹⁹

Transparency is another critical issue. The plea-bargaining process often occurs behind closed doors, with limited public scrutiny or formal record-keeping.¹²⁰ This opacity can make it difficult to assess whether prosecutorial discretion is being exercised fairly and consistently.¹²¹ Without accountability measures, such as independent review or reporting requirements, the risk of abuse or arbitrary decision-making increases, eroding public trust in the system.¹²²

While prosecutorial discretion in plea bargaining offers practical benefits such as efficiency and flexibility, it also presents serious challenges.¹²³ Inconsistency, coercion, inequity, and lack of transparency are central concerns that can compromise the fairness and integrity of the criminal justice process.¹²⁴ Addressing these issues requires careful oversight, clear guidelines, and mechanisms to ensure accountability, balancing the pragmatic advantages of discretion with the fundamental need for justice.¹²⁵

6. Limitations to Prosecutorial Discretion

It is important to begin by stating that the powers of prosecutors in Nigeria, particularly Attorneys-General, are not limitless.¹²⁶ A key restriction is set out in Section 36(12) of the 1999 Constitution, which provides that no one can be convicted of a crime unless the act is clearly defined as an offence under written law and a penalty is prescribed.¹²⁷ Written law includes statutes enacted by the National Assembly, laws of the States, or any subsidiary legislation made under these statutes.¹²⁸ This means that the discretion to prosecute or to negotiate a plea bargain can only be exercised in relation to conduct that is recognized as criminal under Nigerian law.¹²⁹ No agreement can validly be made regarding acts or omissions that are not legally defined as offences.¹³⁰ This constitutional safeguard reflects the long-standing principle in criminal law expressed in the maxim *nullum crimen, nulla poena sine lege* which means that there is no crime and no punishment except as provided by law.¹³¹ Prosecutors cannot create offences by implication, nor can they enter plea agreements based on vague or undefined conduct. Any such attempt would violate the constitutional rights of the accused and constitute an abuse of discretion.¹³²

Courts also act as an important check on prosecutorial power, particularly in plea bargaining. Under the Administration of Criminal Justice Act (ACJA) 2015 and the corresponding Administration of Criminal Justice Laws (ACJLs), judges retain the authority to review plea agreements before approving them.¹³³ The court is not automatically bound to accept the terms

¹¹⁹ *ibid.*

¹²⁰ Stephanie Stern, 'Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System' (2015) 52 Harv. J. on Legis. 245.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ Yue Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12(1) International Criminal Justice Review.

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ CFRN, s 36(12)

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ J. Koni, 'An Appraisal of the Powers of the Attorney-General of the Federation to Prosecute Violators of the Presidential Order Suspending the Operations of Twitter in Nigeria' (2021) 8(4) NAUJCPL 66.

¹³⁰ *ibid.*

¹³¹ *Aoko v Fagbemi* (1961) 1 All NLR 400.

¹³² Mustapha Shehu Sheka, Ahmad Haruna Danmaigauta, Usman Uwais Usman, 'An Examination of the Selective Application of the Doctrine of Plea Bargain in Nigeria' (2021) 2(2) UMYU Law Journal 228- 241.

¹³³ *ibid.*

negotiated between the prosecutor and the defendant; instead, it must ensure the agreement is lawful, fair, and serves the interests of justice.¹³⁴ When presented with a plea agreement, the court generally has three options: accept the agreed sentence: impose a lesser sentence or Impose a Heavier Sentence (with Consent).¹³⁵ This framework balances prosecutorial flexibility with judicial oversight, ensuring that plea bargains serve the interests of justice while protecting the rights of defendants. It preserves efficiency in criminal proceedings but prevents the misuse of prosecutorial power, reinforcing fairness and the rule of law.¹³⁶

7. Judicial Attitudes to Prosecutorial Discretion Vis-À-Vis Plea Bargaining

Judicial attitudes toward prosecutorial discretion in plea bargaining have evolved amidst growing concerns about fairness, consistency, and transparency in the criminal justice system.¹³⁷ Prosecutors exercise significant power in deciding whether to file charges, what charges to pursue, and the terms of plea agreements.¹³⁸ While courts generally defer to this discretion, judicial scrutiny has increasingly focused on the potential for abuse, coercion, and inequality, reflecting a tension between efficiency and justice.¹³⁹

Historically, courts have shown substantial deference to prosecutorial discretion. Similarly, in many common law jurisdictions, courts treat decisions to initiate or settle cases as executive functions, intervening only when there is clear evidence of illegality, discrimination, or violation of constitutional rights.¹⁴⁰ Despite this deference, courts have also voiced concerns over coercion and voluntariness. Defendants may feel pressured to accept a plea bargain to avoid the risk of a severe sentence at trial, raising questions about whether their consent is truly voluntary.¹⁴¹ Judicial oversight often focuses on ensuring that pleas are informed and entered without undue pressure.¹⁴² Courts have also addressed the problem of disparity in plea bargaining outcomes.¹⁴³ Critics argue that prosecutorial discretion can lead to unequal treatment of defendants charged with similar offenses.¹⁴⁴ Judicial approach, while still deferential, increasingly acknowledges the need to guard against arbitrary outcomes.¹⁴⁵ For example, appellate courts have occasionally intervened when plea deals result in sentences that are grossly disproportionate, demonstrating a willingness to review prosecutorial decisions in the interests of fairness.¹⁴⁶

¹³⁴ *ibid.*

¹³⁵ For Instance, section 270(9) & (10) provides that When the prosecution and defence reach a plea agreement, the prosecutor must inform the court. The judge or magistrate will then ask the defendant to confirm the terms of the agreement. The judge must ensure that the defendant admits the charge, is guilty, and entered the agreement voluntarily. If satisfied, the judge may convict the defendant based on the guilty plea and order compensation to the victim according to the agreement. If not satisfied for example, if the defendant cannot be properly convicted or the agreement violates the defendant's rights the judge must enter a plea of not guilty and proceed with a full trial.

¹³⁶ *ibid.*

¹³⁷ Anna D Vaynman, 'Prosecutorial Discretion, Justice, and Compassion: Reestablishing Balance in Our Legal System' (2023) 52 Stetson Law Review 31.

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ Abiodun Ashiru, 'A Comparative Analysis of the Role of the Court in Plea Bargain Agreements in Nigeria' (2019) 2 Elizade University Law Journal 1-27.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ Porche' A. W. Okafor, Patricia Y. Warren, and Eric A. Stewart, 'Plea Bargaining and Trial Decisions in Context: An Examination of Disparities in Punishment' (2022) 38(4) Journal of Contemporary Criminal Justice

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ Christopher Slobogin, 'Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism To Preventive Justice And Hybrid-Inquisit e Justice And Hybrid-Inquisitorialism' (2016) 57 (4) William and Mary Law Review.

Transparency and accountability are additional concerns shaping judicial attitudes. Courts have stressed the importance of documenting the rationale for plea offers and ensuring that defendants fully understand the consequences.¹⁴⁷ In some jurisdictions, judicial commentary has urged reforms to create standardized procedures, reducing the risk of inconsistent or opaque plea practices.¹⁴⁸ These measures reflect a cautious but active role for courts in supervising prosecutorial discretion.¹⁴⁹

In conclusion, judicial attitudes toward prosecutorial discretion in plea bargaining navigate a delicate balance between deference and oversight. Landmark cases illustrate that while courts recognize the necessity of prosecutorial flexibility for efficient case management, they remain vigilant against coercion, inequality, and lack of transparency. The judiciary thus functions as a critical check, ensuring that discretion enhances efficiency without undermining justice, fairness, or public confidence in the criminal justice system.

8. Suggestions for Reforms

Prosecutorial discretion in plea bargaining plays a critical role in managing the criminal justice system, but it also raises concerns regarding fairness, consistency, and transparency. While discretion allows prosecutors to streamline cases and allocate resources efficiently, unchecked powers can result in coercion, arbitrary outcomes, and public distrust. To address these challenges, several reforms have been suggested to enhance accountability, fairness, and procedural integrity. A primary reform involves the establishment of clear guidelines for plea bargaining. Many jurisdictions currently lack formal standards, leaving prosecutors with broad and largely unchecked discretion. Implementing codified criteria, such as standard ranges for sentence reductions, guidelines for offering lesser charges, or protocols for assessing the strength of evidence, can reduce arbitrary or disproportionate outcomes. Clear standards would promote consistency in decision-making while still allowing room for case-specific considerations. However, it is important to state that several guidelines have been adopted to enhance the administration of plea Bargain Nigeria. For instance, the Plea-Bargaining Guidelines for Federal Prosecutors 2023, etc., provide specific guidelines on the conduct, powers, and duties of prosecutors, including the criteria for initiating and discontinuing prosecutions, standards of evidence, and ethical obligations. These foundations collectively ensure that public prosecutors respect the rights of individuals, maintain public trust, and contribute to the speedy and fair administration of justice by prosecuting offences diligently and impartially.

Transparency and documentation represent another crucial area for reform. Currently, plea negotiations often occur behind closed doors, and the rationale for offers is rarely recorded in detail. Requiring prosecutors to document the reasons for each plea offer, including the evidence, mitigating factors, and the interests of the victim and community, would make the process more transparent. This documentation could also be reviewed by courts or independent oversight bodies, creating an additional layer of accountability and reducing the perception of unfairness or bias.

Judicial oversight and review mechanisms should be strengthened. While courts traditionally defer to prosecutorial discretion, enhanced supervision could help prevent coercion and ensure voluntariness. For example, judges could be empowered to scrutinize plea agreements more closely, especially in cases where there are significant disparities between the charges and the sentence offered. Mandatory judicial review could ensure that plea bargains are entered voluntarily, that defendants fully understand the consequences, and that sentences align with broader principles of justice.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ Stephanos Bibas, 'Plea Bargaining outside the Shadow of Trial' (2004) 117(8) *The Harvard Law Review Association* 2463-2547.

Improved access to legal counsel is another vital reform. Many defendants, particularly those from marginalized or low-income backgrounds, accept plea deals due to limited legal knowledge or inadequate representation. Ensuring that all defendants have timely access to competent legal advice would mitigate coercion and help them make informed decisions. Public defender systems may need additional funding and resources to handle the demands of plea negotiations effectively. Data collection and monitoring can also improve fairness and policy-making. Systematic collection of data on plea bargains including types of charges, sentences, and demographic patterns would allow policymakers to identify trends, disparities, or potential biases in prosecutorial decisions. This evidence-based approach could inform further reforms and promote equitable practices.