Plea Bargaining: Antiquated Procedural Criminal Law Ensuring 'Justice' Dispensation

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Research Article

Abstract

The two-party criminal plea bargain negotiation generally takes place between a prosecutor and a public defender for a man prosecuted with aggravated assault. Multiple crimes concede to waive his or her constitutional privilege of having a jury trial in most of the nations. Thereby, a criminal defendant is provided with an opportunity to plead guilty to a lesser degree of charge by the prosecutor, in exchange for not bringing the higher charge. Therefore, in most of the developed countries practicing plea bargain, a person who is charged, perhaps with murder, might be able to slide his culpability down to manslaughter. Instead, in exchange for that, the prosecutor chooses not to hold a full trial. This promotes quick resolution of the criminal matters and faster relief to the victim. Plea Bargain is a relatively recent concept. It was absolutely unknown at the time the constitution was found and thereby makes no mention of plea bargaining whatsoever. The presumption both historically and in the letters of our, Constitution is that all criminal trials would be by juries. This paper highlights the aspects of Plea Bargaining in detail, while also representing its emergence as a concept in the global history and also in India. Further, the authors have carved out the practical notions of plea bargaining from the American Jurisprudence and the current acceptance of system. The concerned research has aimed on building a more practical approach towards the process of Plea Bargaining and its relevance to contemporary times.

Keywords: Plea Bargain, Jury Trial, Jurisprudence, Justice

1. Introduction

Plea Bargaining can be understood as an alternative tool in the domain of criminal justice system. Herein, an accused promises to plead guilty if the prosecution or the victim accedes to

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drop some charges against the accused or even plead for reduction of the punishment which he might be sentenced to. The accused may also undertake to pay monetary compensation to the victim. This tool of negotiation between the accused and the prosecution or victim is used appreciably by the criminal justice systems of developed nations like United States of America, England & many more. Though, it was not a popular concept since the very beginning of the time. It is claimed to be practiced in English Courts since three hundred years now while for America it had become a handy tool only from two decades, now.[3]

The idea fundamental to the concept is to enhance the conviction while ensuring that the confession of the accused helps in restoration of his criminal behavior. Further, by the provision of compensation it tries to restore the stance of victim to a certain possible level. Understanding, from a perspective of layman this may sound to be an impossible activity because the instances of crime invoke vengeance and not forgiveness; but it is the legal fraternity that can understand the vitality of plea bargaining as it is a speedy way of handling criminal matters. This is the most important reason as to why Indian Legal Fraternity must work towards better adoption and further refinement of the plea bargaining amid the era of millions and billions of pending cases in the Indian Courts.

Even when seen from the lens of morality, one can never deny that at times it is more essential to provide a second chance to a person who has committed an offence due to circumstantial factor rather than the culpable intent. However, the initial plausibility of the view that it is appropriate to give accused persons the option of plea bargaining out of respect for their autonomy that protection of plea bargaining is criticized on the ground that it is possible to compel accused persons to make plea bargaining.[4] It is also popularly known that traditionally during the process the prosecutor may hold out a threat to add more charges and the same was recognized as a legitimate component of bargaining by US Supreme Court in "*Bordenkirch* v. *Hayes".*[5] Other way round too, plea bargaining may lead to infringement of rights of victim who may be unwilling to settle without a trial, just because they were forced into being a part of the whole process. These possibilities may raise doubts as per the practicality of the whole concept and thereby people may understand it as a tool of exploitation of the innocent souls rather than a dispute resolving technique. It is one sensitive arena of dispute resolution which

[3] "J.K. Mathur, "Plea Bargaining- In Indian Context" 34(3) *Journal of the Indian Law Institute* 429-442 (1992)."
[4] "James S. Taylor, "Plea Bargaining, Constraining Options, and Respect for Autonomy" 18(3) *Public Affairs Quarterly* 249-264 (2004)."
[5] "434 U.S. 357 (1978)."

if left open without surveillance may cause resilient damage to the ever developing criminal jurisprudence. Plea bargaining stands as an opportunity at the need of the hour that may yield reform if its adoption and application is exercised by trained and sensible minds but at the same time opens the Pandora's box to the whole new world of vices.

2. Concept & Inclusion in Indian Criminal Justice System

India's efficiency in criminal examination, prosecution, and the trial procedure are facing a shroud of doubt over the credibility of the system because more than 70 percent cent of accused persons are exempted. Very often it is seen that when it is tough or impossible to protect evidence by prepared prosecution to stabilize crime, what are the options to have jail punishments for the criminals. One limited reason is 'plea bargaining' where guilty statements under judicial oversight can be negotiated, and can occur in rapid trial and sentencing.

In India, the percentage of convictions is steadily decreasing, suggesting a degrading state of 'law and order' or lack of it. The National Crime Record Bureau's reports on crimes show the inefficient operation of the system. In Maharashtra, more than 72 criminal cases such as murder, robbery, and riots pending in many courts throughout the nation with an elevated backlog of around 13 lakhs of cases.

3. Plea Bargaining in Criminal Case in India

It is a pre-trial tactic whereby, with the successful participation of the trial judge, a deal or compromise between the victim of a crime and the prosecutor is attacked. It can be explained further as:

a. Removal of one or more sanctions against an accused in rescue for a plea of guilty,
b. To reduce the penalty from a more serious penalty to a minor penalty in exchange for a guilty plea.
c. The prosecutor's advice to the sentencing judges as to the compassion of the penalty rather than a plea of guilty.

3.1 Charge Bargaining

Charge bargaining involves an arrangement whereby settlements is made on all points of view. It may also include defendant pleading guilty to a small serious penalty, or one of the different charges, in exchange of foregoing other charges. Alternatively, it may imply that in exchange for a more relaxed punishment, the defendant may plead guilty to the actual criminal charge.

3.2 Sentence Bargaining

It is the practice that is inaugurated in India, where the accused with the consent of the prosecutor and victim will bargain for a lesser punishment than what is prescribed for the offence.

Coercive plea bargaining has been strongly criticized because, as provided for in Article 8 of the European Convention on Human Rights, it abuses individual rights and privileges. Additional criticism against plea bargaining is that the costs of conducting justice will not be reduced. For example, if there is only a 25 percent chance of conviction and penalty exists for 10 years of incarceration, the defendant may make a one-year imprisonment plea deal and if plea bargaining is unavailable, the prosecutor may drop the case entirely. Two critical integrities, i.e., voluntary and judicial review, should be included in the plea bargaining.

Plea Bargaining was first, highlighted by the one hundred and forty second[6] then after in one hundred and fifty-four[7] report of Law Commission of India. Later on, endorsed by the Malimath Committee[8], it found a special position for itself in the Criminal Procedure Code of the nation in form of Chapter XXI A through Criminal law (Amendment) Act, 2005. The Indian model of Plea Bargaining is unique in its own ways and reflects eager approach of making it a fair and judicious procedure. Including it in the Indian Criminal Justice System was not just the up gradation required in wake of time but an essential step to accommodate ever piling stack of pending cases in Indian Courts. The inclusion was adopted as a small rescue to the apprehension that with the introduction of the concept the idol of justice in the ends of common people may shatter.

4. Understanding the key Provisions

Chapter XXI A of Criminal law (Amendment) Act, 2005 stretches over with the total of twelve sections and is moreover exhaustive as to how the whole procedure must be pursued. Plea Bargaining as per the very first provision of the chapter is available to an accused only if he is not held under any of the offence that provides for the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years.[9] In the American Criminal System

[6] "*Ibid.*"
[7] "Law Commission of India, 154th Report on The Code of Criminal Procedure 1973 (Act No. 2 of 1974) (1996)."
[8] "Justice Malimath Committee on Reforms of Criminal Justice System, Parliament of India, Report of the Committee on Reforms of Criminal Justice System (2003)."
[9] "The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 265A."

the Prosecutor has the authority to press charges against an individual and thereby he is usually the active initiator of the bargaining over the charges before approaching the Court and outside the premise of the Court but in India it is only the accused who can initiate the proceedings of plea bargaining by moving a legitimate application in the court.[10] Broadly speaking the Indian Legislation has adopted third fundamental model of Plea Bargaining, as mentioned above.

On receiving the application, it is the duty of the Court to examine the accused in camera[11] in order to ensure his free will to enter into negotiation and reject the application in case there is any sign of coercion[12] noticed by the Court. The Court may even reject the application if the concerned accused person is a repeated offender.[13] This highlights how the objective of the law is to serve to the first time offenders who are willing to make rectifications in themselves and rehabilitate the damage they have inflicted which is unlikely to be found in a repeated offender. After being satisfied with the same the Court may also give the victim, the accused, the public prosecutor and investigating officer, (if the case is one instituted on a police report), an opportunity to discuss and culminate the best possible option to settle the whole matter. This may even include the payment of compensation as well as coverage of other expenses of the victim by the accused person. The concerned chapter saves the authority of Court[14] and finality of its judgment in the matter[15], which means that case once disposed by the process of plea bargaining by the Court is not appealable.

For ensuring the complete protection of the rights of the accused person, it is explicitly provided in the Chapter that the statements made by the accused in pursuance of the application of plea bargaining in the matter should not be used for any other purpose.[16] It is further very interesting to note that Plea Bargaining in India is not applicable on juvenile offenders[17] as it is believed that individuals under eighteen years of age may easily be manipulated to enter in the set-up of pleading guilty with the bait of release from custody or lesser sentence and they are not considered to be competent enough to give free consent to the process of plea bargaining, in general. The Indian Legislature can be said to have gone to every length in order to assimilate plea bargaining in the Criminal Procedural law of the nation, while ensuring that there is very

[10] "*Id. at* s. 265B (1)."
[11] "*Id. at* s. 265B (4)."
[12] *Id. at* s. 265B (4)(b)."
[13] "*Ibid."*
[14] *Id. at* ss. 265E, 265H."
[15] *Id. at* s. 265G."
[16] *Id. at* s. 265K"
[17] *Id. at* s. 265L."

minimum or absolutely no scope of exploitation of the accused persons or any sort of misuse of the concept.

5. Rationale Scheme: Systematic Circumstantial Perspective of Different Jurisdictions Work- How Does It Work?

In the contemporary world, USA has emerged one flag-bearer of practicing Plea Bargaining. But back in history, the American Courts were not in favour of accepting it as a regular practice. The US Supreme Court held in "*Bokyn* v. *Albania"*[18] The negotiation of the plea requires the denial of three fundamental rights: (1) the right to trial; (2) the right to face adverse witnesses; and (3) the right to self-incrimination. Though it was being practiced as an established method of resolving criminal matters but it was always surrounded by moral as well as legal debates. There were three fundamental models of Plea bargaining[19]:

a. First method is known as the most traditional one, the prosecutor bargains with the defense counsel agreeing to drop some charges or to scale down the punishment. While doing so prosecutor can explicitly threaten the accused person.[20]
b. Then, there is the method in which the negotiation was moderated in the presence of the judge or was done by the judge. This is one method that prosecutors or the accused persons never preferred opting for; obviously, due to the active involvement of judge and thereby the courtesies which are attached to his position. In fact, American Bar Association and Presidents Crime Commission said that the very presence of judge on one hand coerces the accused to plead guilty and on the other end it tarnishes the image of the judge as an impartial person.[21]
c. Finally, there is the method in which the whole settlement is done between the prosecutor and the accused person but is regulated by the post-approval of the sitting judge. This helps in scrutinizing the free will of the accused person.

In 1839, every one out of four criminal matters in New York City rested on acceptance of guilt by the accused due to plea bargain and then in 1920s, guilty plea was accredited for 88 criminal matters out of 100.[22] Trials not only are test of the patience of involved parties but may also be

[18] "395 U.S. 238 (1969)."
[19] "*Supra* Note 3.
[20] "*Bordenkirch* v. *Hayes 434 U.S. 357 (1978).*"
[21] "*Supra* Note 3."
[22] "Law Commission of India, 142nd Report on Concessional Treatment of Offenders who on their own initiative choose to plead guilty without any bargaining (1991)."

an economic liability of the victim as well as accused person. So, the inclination of people towards the Plea Bargaining system seen now in USA appears to be justified as it is a kind of set-up in which both the parties give a little and gain a little; which is any way a more easy step than a wholesome trial to be pursued. As expected the idea attracted the law of natural justice and thus the essence of The US Constitution but the concept of Plea Bargaining was held constitutional time and again by the US Supreme Court. In the case of "*Bardy* v. *United States"*[23] & "*Santabello* v. *New York"*[24] it was held that plea bargaining which is voluntary and intelligent is valid even when it leads to lowered punishment levels for the offenders who in turn extend substantial benefit to the state through community service and are willing for rehabilitation of the victim.

In US, the concept has been a great success and it has not only been a concept of paper tiger but has really proved to be an effective step in the criminal justice system in USA. The available jurisprudence on this point speaks about the resounding success of its inclusion, in length. Few such remarkable decisions are reflected below for proper understanding of this concept and its implementation in the US Jurisdiction.

In *Carolina* v. *Alford*[25], the court was of the opinion that, "an accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. Therefore, the defendants may plead guilty without admitting culpability, meaning that they can plea bargain even when they feel they are factually innocent." This decision in itself is remarkable as it widened the scope of plea bargaining.

Very soon after this case United States Supreme Court ruled in "*Santobello* v. *New York"*[26], that, "the sentence of the defendant should be vacated because the plea agreement specified that the prosecutor would not recommend a sentence, but the prosecutor breached the agreement by recommending the maximum sentence. Thus, the U.S. Supreme Court established that, in order for a plea bargain to be legally valid, both the prosecutor and the defendant must honor the terms of the agreement. Consequently, all plea bargains must be approved by a judge to be considered legally binding." The Supreme Court ruled that if

[23] "397 U.S. 742 (1970)."
[24] "404 U.S. 257 (1971)."
[25] "400 U.S. 25 (1970)."
[26] "*Supra* note 24."

prosecutors violate terms stated in plea bargains, defendants are entitled to a legal remedy. The Court went so far as to argue that, for many reasons, plea bargaining is "not only an important part of the process but a highly desirable part." Plea bargaining has thus become an existing and covered routine.

As a consequence, considering the frequency and prevalence of plea deals, there are still those who consider that the defendant's greatest protections can actually be contained in contract law rather than in the law of procedural proceedings.

The 1978 judgment in "*Bordenkircher* v. *Hayes"*[27], which in American criminal jurisprudence is not among the most prominent cases, but it still stands as one of the most significant decisions. The Supreme Court ruled that 'vindictive prosecution' did not amount to plea bargaining.

Defendants have statutory safeguards for the proper exercise of their constitutional rights against vindictive retaliation by prosecutors and to prevent any form of prejudice involved in the trial process. Nevertheless, plea bargaining is essentially a negotiation without the participation of penalty or retribution and defendants have the right to choose whether to accept the offer of a lawyer. The fact that defendants can face some tough choices does not lead to an assumption of abuse.

The Court held that, as long as those charges are valid, prosecutors can threaten to bring additional charges against defendants who refuse to negotiate. According to the Court, "as long as the accused is free to accept or reject the offer of the prosecution," there is no unconstitutional coercion.

In a recent decision by U.S. Supreme Court in "*Missouri* v. *Frye"*[28], Justice Kennedy while penning down the majority judgment, pointed out the statistics wherein 97 percent of federal sentences result from guilty pleas and 94 percent from state convictions. States and localities have their own substantive and administrative laws and rules in view of the federalist structure of the United States. As a consequence, information on convictions by pleas of guilt varies from state to state, but they are all relevant.

[27] "*Supra* note 20."
[28] "566 U.S. 133 (Mar. 21, 2012)."

The Sixth Amendment, applicable to the States under the provisions of the Fourteenth Amendment, provides that, in all criminal proceedings, the accused shall be represented by counsel. The right to advice is the right to counsel with appropriate assistance.

The defense counsel has the responsibility to convey the prosecution's formal proposals to take a plea on terms and conditions that might be favorable to the accused. There is no need to discuss any exceptions to that rule here, for the deal was a formal one with a set expiry date. Defense counsel did not make the effective assistance provided by the Constitution when defense counsel permitted the offer to expire without consulting the defendant or enabling him to consider it.

Defendants must also show a fair likelihood that if they had the power to exercise the discretion under state law, the plea would have been entered without the prosecutor canceling it or the trial court refusing to consider it. In attempt to develop bias in this case, it is important to demonstrate a fair possibility that the outcome of the criminal proceedings will have been more advantageous by way of a plea for a lower charge or a penalty of less time in prison.

Such decisions of the US Supreme Court prove the metal of this concept in US and the approach of Judiciary as well. Such a pro jurisdiction has become a guiding light for many including that of India.

6. Indian Jurisprudence on 'Plea Bargaining' and the Way Forward

As we have already dealt in length regarding the law and the approach of the courts in US, it would be very interesting to note the take of Indian Courts on this concept. It is very surprising that on contrary to the growing acceptance of plea bargaining abroad, the Apex Court of India stood in denial of Plea Bargaining up until it was prescribed as part of the procedure. Practice of plea bargaining was reprimanded as an encouragement to the unconstitutional tool of resolving criminal matters. In the matter of "*Kasambhai* v. *State of Gujarat"*[29], the Supreme Court of India held that it was against the spirit of public policy to ask an accused to confess to the crime while enticing him with the promises of lower levels of punishment. One can see that there were obvious doubts about the judiciousness of the whole concept but still regulation and prescription of guidelines can help in making any doubtful procedure the best one.

[29] "AIR 1980 SC 854."

In a remarkable ruling of the apex court in "*Ganeshmal Jashraj* v. *Govt. of Gujarat and Anr"*[30], the court highlighted the effect of plea bargaining on evidence as well as the order of conviction. The court observed in following words:

"There can be no doubt that when there is an admission of guilt made by the accused as a result of plea bargaining or otherwise, the evaluation of the evidence by the Court is likely to become a little superficial and perfunctory and the Court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt. The entire approach of the Court to the assessment of the evidence would be likely to be different when there is an admission of guilt by the accused. Here it is obvious that the approach of the learned Judicial Magistrate was affected by the admission of guilt made by the appellant and in the circumstances, it would not be right to sustain the conviction of the appellant."

Digging further in the history of plea bargaining in India we come across more cases, like "*Murlidhar Meghraj Loya* v. *State of Maharashtra"*[31] here the Hon'ble Supreme Court for grappled with the Plea Deal idea for the first time. It was held that it is the responsibility of the state to execute the law and not to seek a lighter punishment with the accused. The Supreme Court ruled that the implementation of the Plea negotiation was a necessary evil. It should not, therefore, be incorporated into the Indian Penal System. The situation was simple, and we were not in any mood for this inclusion to be accepted. The stance was clear, and we were in no mood to accept this inclusion. Later to this, "Justice V.R. Krishna Iyer in the case of *Babu Singh* v. *State of Uttar Pradesh"*[32] remarked that, "speedy justice is a component of social justice since the community, as a whole, is concerned the criminal being condignly and finally punished with reasonable time and the innocent being absorbed from the inordinate ordeal of criminal proceeding." And thus, plea bargaining ensures speedy trial.

The decision of "*State of U.P.* v. *Chandrika"*[33] stated that it requires the attention when we are dealing with a concept that the Courts out rightly rejected. The Hon'ble Apex court in this judgment observed that:

"Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty sentence be reduced."

[30] "AIR 1980 SC 264."
[31] "AIR 1976 SC 435."
[32] "AIR 1978 SC 527."
[33] "AIR 2000 SC 164."

Lastly, in the case of "*State of Gujarat* v. *Natwar Harchandji Thakor*"[34], The Court acknowledged the value of plea bargaining and ruled that any "plea of guilty" that is deemed to be part of the criminal trial procedural procedure should not be understood as ipso facto "plea bargaining." It depends on the facts of the case and must be ascertained on a case-by-case basis. The court also agreed that the very object of the law, given the complicated nature of law and society, is to provide easy, cheap and expeditious justice by resolving disputes.

After dealing with the law and the approach of the Indian Judiciary, it is very much evident that our judges are in no mood to bargain for the punishment. It seems that they are of the opinion that such practice may affect the justice system and may lead to a practice where criminal in order to lessen their punishment would use this tool. However, this tool has been used in some petty cases but the very essence of its use is still absent. With the objective of creating a reformative society, we are of the opinion that we should step up and accept this tool in some criminal cases that the Act prescribes for. The judicial decisions discussed above effectively addresses the concern as to why this concept in India is just like a paper tiger that need to be transformed and brought into reality and practice.

7. Concern Surrounding the Concept

As a concept that rotates the wheel of speedy justice for the criminal matters, 'plea bargaining' will always stay surrounded by the moral debates of whether it is one judicious manner of dealing with the criminal matters. Further, as shown by the statistics about US and the functioning of the system in American society, that conviction rate has jumped several folds due to opting for plea bargain, actively; but it cannot be denied that it does not have any substantial effect on the rate of commitment of criminal actions.

As per a few professionals, revocation of the 'right to appeal' of the defendant if he chooses to plead guilty by the virtue of plea bargain[35] is one stigma that make the legal practitioners dubious about the procedure; but providing for the 'right of appeal' would make the path of applicability of the process further difficult. Thus, the questions pertaining to 'right to appeal' that revolve around the concept of plea bargaining formulate a vicious circle.

This contested Plea-Bargaining theory is more a system of amenity and common good than a morality, legality, or constitutionality problem. In the criminal justice mechanism, there is an

[34] "(2005) 1 GLR 709."
[35] "*Supra* Note 9, s. 265G."

unavoidable need for a revolutionary difference. It can be a nice improvement, but only when cases are determined quickly and fairly. If the main aim of the criminal justice system is to rehabilitate criminals into the country by making them face stipulated prison terms, so much of its beauty is forfeited by plea bargaining.

The many players in 'crime' and the criminal justice system exercise plea bargaining, whether it is known or not. Resolving this process in the form of judicial review opens up the possibility of equal alternatives to such negotiations. An inevitable part of the antagonistic system is plea bargaining in the present climate. The proposition of Plea Bargain has been time and gain criticized by the Indian Judiciary and their approach towards it gives a strong message to the society as well as the legislature that they are in no mood to adopt this system, at least in the current legal scenario. The adoption of this concept would take some more time in Indian Jurisdiction.

8. Conclusion

It is indisputable that the negotiation of pleas assists in the swift disposition of cases and eliminates the immense pressure on the courts. It allows the prosecutor and the defendant to achieve common understanding. It can be viewed as a form of alternative conflict resolution and a criminals' rehabilitative approach. Studies show that the involvement of victims in plea bargain deals has tended to curb their vengeful urges, mitigate their appraisal of the offender's excessively lenient procedure, and instill a sense of justice in the entire process. Increased victim trust will, in turn, improve the efficiency of the criminal justice system by promising future support from the system.[36]

Plea Bargain though is a new concept for Indian soil, but it has been actively professed in many countries like United States of America and the same is highlighted by this paper. The process takes the whole cycle of crime and its instances towards the domain of 'resolution'. It is a traditional belief that vengeance is one inherent aspect of victimhood and therefore, punishing the perpetrator is the one appropriate solution. In this whole understanding, the element of 'closure' for the sufferer is overlooked; since ages no attention has been given to the requirement of confrontation a victim feels. Plea Bargain therefore, does not only accommodate speedy trials and resolution of criminal matters but also provides for an alternate

[36] "*Supra* at 7."

platform to the victims for being heard. This is why Indian Criminal Justice system, needs to focus on better assimilation of the process and train the professionals along with the society to embrace it, in order to deliver justice.

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