PLEA BARGAINING

"THE DEAD LETTER OF INDIAN CRIMINAL JURISPRUDENCE."

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ABSTRACT

This paper attempts to study plea bargaining in the Indian scenario and analyze why it has not been a huge success. The paper is divided into three parts, the first part deals with plea bargaining process in India, a fairly new concept in the criminal jurisprudence, and then the paper studies the reasons why it has remained a dead letter in the criminal procedure code, comparing it with plea bargaining system in the USA, where it is frequently used. The paper tries to assert that the reasons for the failure of the system might be entrenched in the failure of the justice delivery system as a whole.

Key Words: Plea Bargaining, India, USA, criminal justice delivery system.

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INTRODUCTION

The Latin term of '*nolo contendere*', meaning 'I do not wish to contend' forms the basis of plea bargaining system. Plea bargaining is a procedure within a criminal justice system whereby prosecutors and defendants negotiate a plea and dispose of a case before trial. It is understood to serve the interest of judicial economy, although it is often pursued to secure the cooperation of defendants to serve as witnesses in other criminal cases in exchange for a "bargain" as to criminal charges against themselves.[2] The plea bargaining system can be easily understood as the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to the court approval. It usually involves the defendant's pleading guilty to lesser offence as to only one or some of the courts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.[3]

Simply put, plea bargaining is a system, where both parties namely the accused and the prosecutor along with the victim sit and make an agreement after assessment of the crime that has been committed, the damages suffered, and the compensation justified. The system makes sure that no one loses and no one is a winner, it takes care of both sides of the argument without any actual arguments in trial.

PLEA BARGAINING

In simple words plea bargaining is an agreement between the between the plaintiff and the defendant to come to a resolution about a case, without ever taking it to trial. Plea bargaining is an alternate method of resolution of cases, used to avoid long trials. It has long been used in various criminal justice systems around the world, however the American system of plea bargaining has been the most successful example so far. Although plea bargaining is often criticized, more than 90 percent of criminal convictions come from negotiated pleas in the United States. Thus, less than ten percent of criminal cases go to trial. For judges, the key

[2] Plea bargaining in various criminal justice systems, Judge Peter J. Messitte, Available at: https://www.law.ufl.edu/_pdf/academics/centers/cgr/11th_conference/Peter_Messitte_Plea_Bargaining.pdf, last accessed on: 17th June, 2017.

[3] Black's Law Dictionary, pg. 1173, 7th ed., 2009.

incentive for accepting a plea bargain is to alleviate the need to schedule and hold a trial on an already overcrowded list.[4]

In India the concept was frowned upon by the judiciary for a long period of time, the Supreme court in the case of *M. M. Loya*[5] remarked, "Many economic offenders resort to practices the American call 'plea bargaining', 'plea negotiation', 'trading out' and 'compromise in criminal cases' and the trial magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The business-man culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a being a plea of guilt, coupled with a promise of 'no jail'. These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to. higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old professions. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through pre-determined legislative fixation of minimum sentences and by subtly subverting the mandate of the law."

It was further opined by Justice Bhagwati that "It is to our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if enters a plea of guilty, he will be let off very lightly. It would have the effect of polluting the pure fount of justice, because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial which, having regard to our cumbrous and unsatisfactory system of administration of justice, is not only long drawn out and ruinous in terms of time and money, but also uncertain and unpredictable in its result and the Judge also might be likely to be deflected from the path of duty to do justice and he might either convict an

[4] http://criminallaw.uslegal.com/plea-bargaining/pros-and-cons/ Accessed on 26th june, 2016.
[5] M M Loya v. State of Maharashtra, 1976 FAC 38.

innocent accused by accepting the plea of guilty or let off a guilty accused with a light sentence, thus, subverting the process of law and frustrating the social objective and purpose of the anti-adulteration statute. This practice would also tend to encourage corruption and collusion and as a direct consequence, contribute to the lowering of the standard of justice".[6]

Moreover in State of *Uttar Pradesh v. Chandrika*,[7] the Apex court held that it is settled law that on the basis of Plea Bargaining court cannot dispose of the criminal case. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented. The court further held in the same case that, mere acceptance or admission of the guilt should not be a ground for reduction of sentence, nor can be the accused bargain with the court that as he is pleading guilty the sentence be reduced. Also in *Thippaswamy v. state of Karnataka*[8], the Supreme Court, opined that the procedure violates the article 21. However the constitutionality argument has been laid to rest by introducing the plea bargaining system in the criminal procedure code, and thus recognizing it as 'a procedure established by law'.

The American jurisprudence however disagrees, in the landmark case of *Bordenkircher v. Hayes*[9], the US Supreme Court opined that the constitutional rationale for Plea Bargaining is that no elements of punishment or retaliation so long as the accused is free to accept or reject the prosecutions offer. Further, the Supreme Court of USA in *Brady v. United States*[10] and *Santobello v. New York*[11] upheld the constitutional validity and the significant role of the concept of plea- bargaining plays in disposal of criminal cases.

However the law commission of India suggested, in their 142nd, 154th and 177th reports, to have an expansive view, keeping in mind the great number of pending cases and the delays of disposal of the cases, and hence, the law commission brought into Indian criminal jurisprudence the idea of plea bargaining as an effective tool against the large backlog of cases, it was suggested that the system would help both parties from a long arduous trial and would bring about speedy

[6] Kachhia Patel Shantilal Koderlal v. State of Gujarat, 1980 CriLJ 553.
[7] State of Uttar Pradesh Vs Chandrika, 2000 Cr. L.J. 384(386), A.I.R. 2000 S.C. 164.
[8] A.I.R 1983 S.C. 747.
[9] 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604, 1978 U.S.
[10] 297 U.S 742: 25 L.Ed. 2d 747.
[11] 404 U.S 257 (1971).

delivery of justice, quoting the supreme court in *Hussainara Khatoon*[12], the law commission suggested plea bargaining as a way out. The law commission suggested changes in the American model to adapt it to Indian circumstances and thus through the criminal law amendment of 2005, the plea bargaining system was added into the present criminal jurisprudence in India. The plea bargaining system of India is contained in the chapter XXI, from sections 265 A to 265L.

The salient features include:

- It is applicable in respect of those offences for which punishment is up to a period of 7 years.[13]
- It does not apply to cases where offence is committed against a woman or a child below the age of 14 years, or in cases of socio economic offences.
- It doesn't apply when the accused is a previous convict of such an offence and where the accused is a habitual offender.[14]
- The judgment of plea-bargaining cases are final and no appeal lies on such judgment. However, a writ petition to the State High Court under Article 226 and 227 of the Constitution or a Special leave petition to the Supreme Court under Article 136 of the Constitution can be filed by the accused. This acts as a check on illegal and unethical Bargains.[15]

The present system of plea bargaining in India thus covers all bases. In the next part the author examines, why plea bargaining is necessary, and why it is not yet used in India.

WHY PLEA BARGAINING REMAINS A DEAD LETTER

The system of plea bargaining is either charge bargaining, (It is basically an exchange of concessions by both the sides which may also mean that the defendant will plead guilty to a less serious charge, or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant will plead guilty to the original criminal charge in return for a more

[12] Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360.
[13] Section 265A, Criminal Procedure Code, 1970.
[14] Ratanlal and Dhirajlal, 'The code of criminal procedure', 21st ed., 2013.
[15] Section 265G, Criminal Procedure Code, 1970.

lenient sentence.) or sentence bargaining, (the process which is introduced in India where the accused with the consent of the prosecutor and complainant or victim would bargain for a lesser sentence than prescribed for the offence).

It was brought upon by the deplorable conditions of the criminal justice system as discussed earlier, however the present scenario of crimes and convictions hasn't changed much, according to the data from the NATIONAL CRIME RECORDS BUREAU, the total number of Violent Crimes was 3, 30,754 and conviction rate for these crimes was a dismal 25.7%.[16] Further, the total number pending cases is so high that concerns have been raised upon the fate of the system itself.

Under present system, 75% to 90% of the criminal cases result in acquittal, in this situation it is preferable to introduce this concept in India not to just increase the number of convictions but to give an incentive to all parties involved in a criminal justice system that they are not working idly and their work does not lay waste. A higher rate of convictions merely for the sake of increasing it rate is not what the author suggests, rather the author suggests that more number of people should be brought to book for their crimes. The idea of plea bargaining was brought in to increase the number of convictions and yet the numbers show otherwise, thus the important question arises as to why the system of plea bargaining is failing, or why does it remain a dead letter of the law despite 10 years of its existence.

The reasons might be multi layered, but one reason is that due to the high probability of criminal charges never being filed, the tenuous and long process of investigation and then cases being reduced to mere files, there may be no one to agree to the charges/ sentences in the first place, less than 50% of the cases are there in which charge sheet is filed[17], much less actually proceed to due trial. In this scenario one wonders where to fit the plea bargain system. The accused often remain at large and it remains one of the biggest worries of the justice system. Further the high acquittal rates in the Indian scenario, although plea bargain seems to be favourable to the prosecutors keeping the data in mind, this data could act as a deterrent for the defence to bargain, because if the chances of getting acquitted are present why would anyone accept a jail sentence,

[16] Figures of Crime in India, 2014, National Crime Records Bureau, Accessed on: 20th June, 2017.
[17] Ibid.

however lenient it might be. The problem thus is that the conviction rate which makes plea bargain a favourable option for the prosecution, gives a wrong signal to the defence.

Further in the US system of plea bargaining, the entire motion is initiated by the public prosecutor, while in India this entire initiative has been placed on the accused. And this forms a crucial reason considering the high rates of acquittal in India.[18]

The other problem of plea bargaining is that in the US System of plea bargaining, all courts allow for plea bargaining and for all crimes, In India this has been narrowed down to exclude socio economic offences and crimes against women and children, while the latter can be understood to effectuate the need to have lesser violent crimes against women and to protect them, the need to exclude plea bargaining in socio economic offences is not understandable, socio economic offences cover a very wide ambit, and to exclude all such crimes where even the probability of getting a bargain is higher, makes plea bargain just a dead letter.

Further the present system includes the involvement of police[19], now this has led to a lot of criticism, suggesting that inclusion of police would lead to coercion into plea bargain. The idea of lesser punishment in lieu of admission of guilt is systemic coercion of the mind, and thus the validity of the whole plea bargain system is questioned. In relation to this, the plea bargain agreement basically incriminates the person who signs the agreement, or self incrimination, the United States system upholds this, as fundamental rights can be waived there but in India, self incrimination being a fundamental right under article 20(3) cannot be waived and thus the question of constitutionality of plea bargain has been raised by several critics.[20] However this is laid to rest because of the argument that since it is the procedure established by law and reading article 20 and 21 together, there is no doubt as to the standing of the system. Further the criminal procedure code adds a safeguard against the use of statements of the accused for any other purpose, such uses are forbidden except as per the provisions of plea bargaining system.[21]

[18] The bargain has been struck: A case for plea bargaining in India, Sonam Kathuria, Available at: http://www.manupatra.co.in/newsline/articles/Upload/3BEB7B04-1EE3-48EB-8716-279FA2B9AF8A.pdf, Accessed on 15th June, 2017.

[19] Section 265C, Criminal Procedure Code, 1970.

[20] The Unconstitutionality of Plea Bargaining in the Indian Framework: The Vitiation of the Voluntariness Assumption, http://indialawjournal.com/volume7/issue-2/article8.html, Accessed on: 15th June, 2017.

[21] Section 265K, Criminal Procedure Code, 1970.

However it remains a dicey argument to hold this in favour of constitutionality of plea bargaining.

Another drawback of the plea bargain system is the threat to fair trial, once plea bargain application has been rejected, the question of whether the accused would ever be given a fair and unbiased trial after accepting guilt in his plea bargain, the evidence might not be used, but who can account for the psychological effect of the admission of guilt. The idea of fair trial is one of the basic human rights and basic fundamental principles of due process of law, however once the admission of guilt has been done, it would lead to a cognitive bias and even a shred of evidence would be construed as a proof of guilt. This remains one of the important concerns and a major reason for the failure of the plea bargaining system.

Plea bargain could also prove to be a disaster for the poor, who are often made scapegoat by the police, they could be coerced into admitting guilt and having the punishment rather than await trial which given the Indian circumstances, might never take place. This could lead to gross miscarriage of justice rather than deliverance of it.

Further it could lead to striking effect in cases involving state officers, accused of human rights abuse. In cases of Custodial torture, this is yet to be made a crime. An Indian police officer accused of torturing a person in his custody may instead only be tried for other offences, such as those punishable under sections 323, 324 or 330 of the Indian Penal Code. The punishments for these offences are within the limit prescribed for punishment under the law on plea-bargaining.This means that the new law may allow these torturers to escape with lighter penalties, even after knowing the fact that their offences fall into the gravest categories under international law.[22]

Involvement of the victim, in the plea bargain system, in the process of reaching a bargain agreement under section 265C of the criminal procedure code, not only undermines the security of the victim, it could lead to corruption and hence miscarriage of justice. The victim might be forced to accept lesser compensation and hence the system of involving the victim at the primary

[22] Plea- Bargaining: Present Status in India, Available at: http://www.legalservicesindia.com/article/article/plea-bargaining-present-status-in-india-658-1.html, Accessed on: 17th June, 2017.

level could induce severe emotional trauma as well as danger to the safety and security of the victim.

CONCLUSION/SUGGESTIONS

The causes highlighted above form the major reasons of why plea bargaining remains a dead letter, in the Indian Criminal Justice System. The idea of plea bargaining was introduced to tackle the problems of the system which included, large number of pending cases, huge numbers of under-trial prisoners, the need for proper rehabilitation of the victim by the accused, and the need to reduce delay in cases, all of which are related and incidental to each other, plea bargain was introduced as a solution to the ailing criminal justice system.

Even though the conviction rates have not increased, one way to increase plea bargain would be to introduce awareness amongst the accused about the option of plea bargaining, this forms a major hurdle, in successful implementation of the plea bargaining system. Another idea is to introduce plea bargain as a right that the accused could choose to exercise if they wanted, not a fundamental right, but rather a constitutional right, that they could choose to waive or to use it. If the plea bargain system was a right of the prisoners at their disposal, it might be possible that the accused could feel freer to choose it, without the fear of a biased trial if the plea bargain application was rejected.

The third idea would be to remove the victim from a primary role in the plea bargain agreement and to place them in a secondary role, so as to prevent them from suffering/facing unnecessary trauma and to hold the plea bargain procedure more neutrally, for victims tend to have retaliatory mindset and might reject the plea bargain agreement without fairness which would lead to the failure of the system. And more so, because once a crime has been committed, it is committed against the state which through its public prosecutor could act as an intermediary. The victim could be only involved in the process where the compensation agreed to by the state be directed towards them.

Plea bargaining is an effective way to control the increasing number of cases; the system needs to be utilized. It is the dark horse of the Indian criminal justice system which is ailing and failing

and it could prove to be a winner. The need of the hour is to overcome the long standing bias towards the plea bargaining system, to not look down upon it as barrier to deliverance of justice, rather to look upon it as the deliverer of speedy justice and a fair chance to all parties involved to acknowledge the crime done and move on with it.