APPLICABILITY OF PLEA BARGAINING

COMPARATIVE STUDY BETWEEN INDIA AND AMERICA

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ABSTRACT

The concept of plea bargaining was introduced in the Indian Criminal System by the Criminal Amendment Act, 2005, on the recommendation of the Malimath Committee. Plea bargaining can be defined as a process whereby the accused bargain for lesser punishment from the prosecution Indian Judiciary borrowed the concept of plea bargaining from America, it has been instrumental in speedy disposal of cases. The research paper makes an attempt to critically evaluate the applicability of plea bargaining as well as a comparative study between India and America. Plea-bargaining can play an important role to address many of these issues. An attempt is made here to analyze the practices of plea bargaining.

INTRODUCTION

It is said that 'Justice Delayed is Justice Denied'. Keeping this in mind, right to speedy trial has been declared as a fundamental right under Article 21 of the Constitution. Unfortunately, the Indian judiciary has remained exceptionally slow in delivering justice. As a result Indian Judiciary introduced the concept of plea bargaining by the Criminal Amendment Act, 2005. Plea Bargaining can be defined as a pre trial negotiations between the accused and the prosecution during which the accused pleads guilty in exchange of certain concessions by the prosecution. Plea bargaining occurs prior to trial but may occur any time before a judgment. **Black's Law Dictionary** defines plea bargaining as: "The process whereby the accused and the prosecutor in criminal case work out a mutually satisfactory disposition of the case Subject to the Court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the courts of a multi-count indictment in return for a lighter than that possible for the graver charge".

A plea bargaining is considered as an agreement reached in a criminal case to finally settle it. In a case instituted on a police report, the parties to the agreement are the accused, the investigating officer, the prosecutor and the victim. All of them must agree to settle the criminal case in which the accused pleads guilty to the offence for which a trial is pending. In

any other case, the parties to the agreement are the accused and the victim. They must agree to settle the criminal case in which the accused pleads guilty to the offence for which a trial is pending. The agreement to settle a case must be under the guidance and the supervision of the Court.

In India, Plea Bargaining has certainly changed the face of the Indian Criminal Justice System. It is applicable in respect of those offences for which punishment is up to a period of 7 years. Moreover, it does not apply to cases where the offence committed is a Socio-Economic offence or where the offence is committed against a woman or a child below the age of 14 years. Also once the court passes an order in the case of Plea Bargaining no appeal shall lie to any court against that order.

CONCEPT OF PLEA BARGAINING

"Pleading Guilty and ensuring Lesser Sentence" is the shortest possible meaning of Plea Bargaining. Plea bargaining may be defined as an agreement between the accused and the prosecution through which the accused can get lesser sentence by admitting his or her guilt. There are three main players in a plea bargaining: the prosecutor, the accused and the judge. Bevier Law Dictionary defines it-"as to make an agreement in which the defendants plead guilty to a lesser charge and the prosecutors in return drops more serious charges". In 1975, the law commission of Canada defined plea-bargaining as any agreement by the accused to plead guilty in return for the promise of some benefit.[1]

TYPES OF PLEA BARGAINING

Plea Bargaining can be of three types: Charge Bargaining, Sentence Bargaining and Fact Bargaining.

- **Charge Bargaining:**

Charge bargaining involves a negotiation of the specific charges or crimes that the defendant will face at trial. Where there is only one charge against any person, the prosecution may promise the accused that a charge for a lesser offence will be brought in return for a plea of guilt. For example, a charge for culpable homicide instead of murder could be brought against any offender. Charge bargaining may include:

[1] Black, H. (2011), Black's Law Dictionary, 9thEdition, West Publishing Company, London, p.1270.

1. Reduction of a charge.
2. The withdrawal or stay of other charges.
3. An agreement by a prosecutor not to proceed on a charge.
4. An agreement to stay or withdraw charges against third parties.
5. An agreement to reduce multiple charges to one all-inclusive charge.
6. The agreement to stay certain counts and proceed on others, and to rely on the material facts that supported the staid counts as aggravating factors for sentencing purposes.

- **Sentence Bargaining:**

Sentence bargaining involves the agreement to a plea of guilty in return for a lighter sentence. It saves the prosecution from long trial as well as provides the defendant with an opportunity for a lighter sentence. Sentence Bargaining may include the following:

1. Recommendation by a prosecutor for a certain range of sentence.
2. A joint recommendation by a prosecutor and defense counsel for a range of sentence
3. An agreement by a prosecutor not to oppose a sentence recommendation by defense council.
4. An agreement by a prosecutor not to seek additional optional sanctions, such as prohibition and forfeiture orders.
5. An agreement by a prosecutor not to seek more severe punishment.
6. An agreement by a prosecutor not to oppose the imposition of an intermittent sentence rather than a continuous sentence.

- **Fact Bargaining:**

Fact bargaining arises when the Prosecutor agrees not to reveal any aggravating factual circumstances to the court because that would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines. In fine, plea bargaining refers to pre-trial negotiations between the accused and the prosecution in which the accused agrees to plead

guilty in exchange for certain concessions guaranteed by the prosecutor. Plea bargaining cannot be enforceable until a judge approves it.

PLEA BARGAINING IN AMERICA

The Plea Bargaining experienced a sharp rise in the 1920s in America as the criminal trials in United States provide to be most expensive and time consuming in the world. Criminal trial in the United States of those days was an elaborate exercise and compromised of peremptory challenges in a lengthy jury selection process, numerous evidentiary objections, complex jury instructions, motion for exclusion etc. Plea Bargaining emerged as an effective mechanism to avoid the complex process of criminal trail and soon it gained popularity. The practice of Plea bargaining was approved by the Supreme Court of the United States mainly on the assumption that the persons who are convicted on the basis of plea bargaining would ordinarily be convicted, if they has chosen to stand trial.

The plea won the approval of Supreme Court of United States and its endorsement as "an essential component for administration of justice" in Santobellov Case.[2] Chief Justice Burger explained that Plea Bargaining should be encouraged because;

If every criminal charge were subjected to a full scale trial, the states and central government would need to multiply by many times the number of judges the court facilities.

PLEA BARGAINING IN INDIA

To reduce the delay in disposal of criminal cases, the 154th Report of the law commission first recommendation the introduction of plea bargaining an alternative method to deal with huge arrears of criminal cases. The recommendation of the Law Committee finally found a support in "Malimath Committee Report". The NDA Government had formed committee, headed by the former Chief Justice of Karnataka and Kerala High Court, Justice Malimath to come up with some suggestions to tackle the ever growing needs of criminal cases. In this Report, the Malimath Committee recommended the system of Plea Bargaining introduced in Indian Criminal of System to facilitate disposal of criminal cases and to reduce the burden of courts.

The concept of Plea Bargaining attracted public debate. Critics said it is not recognized and against public policy under our criminal justice system. The Supreme Court also time and

[2] Santobellov. New York, 404 U.S. 257, 260, 1971

again blasted the concept of Plea Bargaining saying that negotiable in criminal cases is not permissible.[3]

In *State of Uttar Pradesh v. Chandrika* [4]the Supreme Court held that it is settled law that on the basis of Plea Bargaining Court cannot dispose of criminal case. The court has to decide it on merits. If the accused confesses his 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 ground for reduction of sentence, nor can the accused bargain with court that he is pleading guilty the sentence be reduced despite the hue and cry, the court found it acceptable and finally Sec. 265A - 265L have been added in The Code of Criminal Procedure so as to provide Plea Bargaining in certain types of Criminal Cases.

DIFFERENTIATING PLEA BARGAINING IN AMERICA AND INDIA

Plea Bargaining was upheld as constitutional in United States in the case of *Brady* v. *United States.*[5] Plea bargaining is heavily entrenched in the American criminal administration. There are three kinds of pleadings that are accepted by the US courts: the accused can plead guilty, not guilty or *nolo contendere.* Plea bargaining is based on the plea of *nolo contendere* which, as per *Fox* v. *Schedit* and *State Exrel Clark* v. *Adam*, is a quasi-confession. It is not an inherent right afforded to the accused, but once given by the court it cannot be conditional or retracted in any manner.[6] Essentially, in relation to punishment, it carries the same implications as a guilty plea, but subsequently, it is not admissible to establish guilt in the subsequent cases.

The Indian version of pleas bargaining leans heavily on the American provisions. However, there are a few significant differences between the Indian and the American scheme of plea bargaining:

- Firstly, in U.S.A, there is no restriction or limitation on the kind of offences for which plea bargaining can be sought. Plea bargaining may be applied for even in offences that carry a sentence of death penalty or life imprisonment. Further, Indian law implies that the victim has an active say in the bargaining proceedings, and may refuse or veto an unsatisfactory resolution. These differences are significant in the

[3] Malimath Committee Report
[4] AIR 2000 SC 164
[5] 397 U.S. 742
[6] Sec. 265B (4) of The Code of Criminal Procedure

sense that they help the Indian model avoid certain pitfalls that plea bargaining is identified with.

- Secondly, in America, an application for plea bargaining is filed only after negotiations between the accused and the prosecutor is over. However in India, the onus is on the defendant to file an application for plea bargaining. This is a safeguard for the accused and helps in preventing cases of coercion and underhand dealings.

- Further, there is a provision for the court to ascertain the voluntariness of the application. This too is an important safeguard, taking into account the socio-economic groups that are an intrinsic part of Indian society. It means that the judge can reject a plea bargaining application if he is of the view that there is prima facie no case against the accused, or if he feels that that the accused is getting away with a punishment that is less than what should be due, to the extent that it defeats the purpose of criminal justice or a disparity in the socio-economic status is being exploited to arrive at the bargain.

PROCEDURE FOR PLEA BARGAINING IN INDIA

The process of plea bargaining was brought in as a result of criminal law reforms introduced in 2005 Section 4 of the Amendment Act introduced Chapter XXIA to the Code having sections 265 A to 265 L which came into effect on 5th July, 2006.The following are the procedure of plea bargaining available to the accused under the Criminal Procedure Code, 1973:-

Section 265-A: It states that, the plea bargaining shall be available to the accused charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding seven years. Section 265 A (2) of the Code gives power to notify the offences to the Central Government..

Section 265-B: It provides that ,an application for plea bargaining shall be filed by the accused which shall state description of the case .The plea bargaining in his case and that he has not previously been convicted by a court in a case in which he had been charged with the same offence.

Section 265-C: This section prescribes the procedure to be followed by the court in working

out a mutually satisfactory disposition. In a complaint case, the Court shall issue notice to the accused and the victim of the case.

Section 265-D: It deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same.

Section 265-E: It prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out.

Section 265-F: It deals with the pronouncement of judgment in terms of such mutually satisfactory disposition.

Section 265-G: says that no appeal shall lie against such judgment.

Section 265-H: deals with the powers of the court in Plea Bargaining. A court for the purposes of discharging its functions under Chapter XXI-A, shall have all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case .

Section 265-I: makes Section 428 applicable to the sentence awarded on plea bargaining.

Section 265-J: contains a non obstante clause that the provisions of the chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A.

Section 265-K: It says that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose of the chapter.

Section 265-L: It makes the chapter not applicable in case of any juvenile or child as defined in Section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000

JUDICIAL TRENDS ON PLEA BARGAINING

As the concept of plea bargaining was gaining popularity in the USA, voices from different corners were coming for the induction of the concept of plea bargaining in India. But India, being a unique Nation due to its socio economic conditions repeatedly rejected this concept of plea bargaining. The Indian judiciary was no different and took a very stringent view against Plea Bargaining. The debate around plea bargaining mainly revolved around the question of morality and the Supreme Court held the view that it amounted to immoral

compromise in criminal cases. One of the earliest cases in which the concept of plea bargaining was considered by the Hon'ble Court was *Madanlal Ramachander Daga v. State of Maharashtra*[7] where a very strict view was taken and it was held that:

"In our opinion, it is very wrong for a Court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the Court should never be a party to bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court……"

In *Thippaswamy v. State of Karnataka*,[8] the Supreme Court held that enforcement or imposition of sentence in revision or appeal after the accused had plea bargained for a lighter sentence or mere fine in the trial court as unconstitutional being violative of Article 21.

Justice P.N. Bhagwati in *Kasambai Abdul Rahmanbhai Seikh v. State of Gujarat*,[9] declared Plea Bargaining as unconstitutional. In this case, judgment of the High Court was set aside by Supreme Court and the plea of guilty was ignored. Conviction of accused was set aside and the case was sent back to the Magistrate for trial in accordance with law. It was held that such a procedure would be unreasonable, unfair and unjust amounting to violation of Article 21 as interpreted in Maneka Gandhi's case.[10] 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 an 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 judge also might be likely to be deflected from the path of duty to do justice and he might either convict an innocent accused by accepting the plea of guilty or let off the guilty accused with a light sentence.

The Supreme Court again in *Kachhia Patel Shantilal Koderlal v. State of Gujarat and another*[11] held that the practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice.

[7] AIR 1968 SC 1267
[8] AIR 1983 SC 747
[9] AIR 1980 SC 854
[10] Maneka Gandhi v. Union of India, AIR 1978 SC 597
[11] (1980) 3 SCC 120

In *State of Uttar Pradesh v. Chandrika,*[12] the Supreme Court held that it is not permissible to dispose of the case on the basis of plea bargaining and observed:

"It is settled law that one basis of plea bargaining Court may not dispose of the criminal cases. The Court has to decide it on merits. If accused confesses hi guilt, appropriate sentence is required to be imposed…… Mere acceptance or admission of the guilt must not be a ground for reduction of sentence."

Major change in judicial thought process took place after the concept of plea bargaining was official added in the Code of Criminal Procedure. While recognising the concept of plea bargaining, the Gujarat High Court observed in the State *of Gujarat v. Natwar Harchanji Thakor,*[13] that the very object of the law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure of redressal and it shall add a new dimension in the realm of judicial reforms.

CRITICAL EVALUATION OF THE CONCEPT OF PLEA BARGAINING

According to the Asian Human Rights Commission "while the purpose of the new provision is ostensibly to reduce the long waits for trials endured by most accused, the introduction of plea bargaining is similar to treating the symptoms of an illness rather than the actual ailment."

Violation of the principles of criminal jurisprudence: Firstly, it is feared that plea bargaining may violate principles of criminal jurisprudence and deprive the accused of assured constitutional safeguards.

Failure to provide for an independent judicial authority: The failure to provide for an independent judicial authority for receiving and evaluating plea bargaining applications is a glaring error. A judge or magistrate may be biased against the accused, as in the event of the application being rejected. They may well oversee the trial knowing that the accused was previously prepared to plead guilty. This is clearly unfair to the accused.

[12] AIR 2000 SC 164
[13] (2005) Cr. L.J. 2957

Risk of prejudice against the accused: The failure to make confidential any order passed by the court rejecting an application could also create prejudice against the accused.

Problem of coercion: Another problem is coercion. The requirement of the plea being in a written format and accompanied by an affidavit allows scope for coercion by the police and the prosecution leading to the innocent pleading guilty.

Risk of public cynicism and distrust: The Court's examination of the accused in camera as opposed to open court may lead to public cynicism and distrust for the plea bargaining system.

Risk of Innocent pleading guilty: In India today an accused person may face the prospect of years in jail as an under trial there is a significant risk that innocent people will plead guilty under a plea bargaining scheme.

Probability of increase in the number of cases: Plea bargaining will not solve the delays in India's courts.

Chances of abuse by prosecutors: Critics claim that the plea bargain system can encourage prosecutors to overcharge at the start of the case which leads to caseload pressures or unusually severe penalties.

In favor of the high handed and the rich: The outcome of plea bargaining may depend strongly on the negotiating skills and personal demeanor of the defense lawyer, which puts persons who can offer good lawyers at an advantage. Thus it will give force to people who are high handed and that will badly affect people who are poor, unsupported, meek and feeble.

Problem of adequate legal representation for under privileged unsolved: Moreover such a system still does not solve the problem of acquiring adequate legal representation for those who are underprivileged.

CONCLUSION AND SUGGESTIONS

It would be correct to say that plea barging has changed face of criminal justice system. However earlier Indian courts hesitated for plea bargaining and they even called it immoral, unjust, unfair and unconstitutional. But this concept of Plea Bargaining is mechanism of providing convenience to the litigants who are facing delays in getting justice. This concept of plea bargaining should not only be judged on basis of legality, morality and constitutionality as we know that in spite of having free, fair and strong judicial system we are facing delays in administration of justice. Plea bargaining was always a disputed concept some advocated it some pointed out loopholes in it. Being taken from US legal system it was always said that the approach in India and U.S are different their socio economic conditions are different. Apart from that opponent of this concept says that this concept has soft corner towards accused and unfair with innocent also it could promote corruption while making compensation to victim. It was also face criticism on basis that it will lead to downfall of faith in judicial system by giving lesser punishment to rich class.

So there are the major drawbacks and loopholes in this system but its need of today. With the system of plea bargaining, it will solve less serious and petty offences and court could focus on major serious offence so that there is faster dispensation of justice. Plea bargaining can help in reducing backlogs in Indian judicial system. A radical criminal change measure should be adopted to make the legal system more effective and transparent.