



PLEA BARGAINING IN INDIA- A BARGAIN BESIDES THE BENCH

By Archie Garg
From Symbiosis Law School, Pune

Abstract

The Indian Criminal Justice structure has been disturbed by a massive backlog of criminal matters and the rising population of under-trials behind bars. The slow, cumbersome and expensive initial method usually causes an excessive delay in disposing of criminal matters. To resolve these concerns, the criminal system procedure was amended in 2005 to introduce plea-bargaining as an efficient Alternative Dispute Resolution system in India.

In subtle terms, plea bargaining incorporates a structure in which the victim, prosecution and an aware offender responsibly considers a criminal matter of its collectively acceptable arrangement, that may result in rational advancement of the conduct of justice. The participation of the bar and the judiciary is also very significant to accomplish the aim of plea bargaining. Nowadays, all nations are looking for certain alternative dispute resolution processes that might result in a complicated and extended process, but plea bargaining is the best option for the timely trial and quick settlement of matters. This idea offers the offender to plead guilty and the guilty plea of the offender represents that the State will not go against him that would end up his several constitutional rights. Hence plea bargaining can provide a win-win situation for both, the victim as well as the offender and is the most

effective tool to be applied in the current scenario.

Introduction

Black Law Dictionary describes “plea bargaining” as the process in which the accused and the offender and the prosecutor in a criminal matter figure out jointly acceptable arrangement of the matter dependent on the Court’s consent. It generally entails the offender pleading fault to a reduced crime or to just one or some of the charges of a multi-charge complaint in exchange for a milder punishment than that possible for a serious charge. There are different kinds of bargains that may be made particularly evidentiary bargains, charge bargains, sentence bargains and compensatory bargains. The description may be shaped to satisfy each kind and the jurisdiction where it is discussed, due to which a precise, comprehensive description has been hard to frame. The issue however is more of a conceptual debate instead of a realistic application. As a result, there emerges an immediate demand to examine the current status of plea bargaining in India, with respect to legal developments, landmark judgements, concerns involved with this process, its comparison with the traditional trial process prevalent in India and the contrasting features of the former in India and United States (that is considered the country of origin of plea bargaining).

Plea Bargaining was established under Part XXI-A (Section 265A- 265L) of the CrPC through the Criminal Law (Amendment) Act, 2005 in accordance with several suggestions from 142nd and 154th Law Commission Reports and the Justice Malimath



Committee. Section 265A¹ mentions that this process will be applicable only when the crime in focus does not invite either a maximum punishment of detention exceeding seven years or a capital punishment. Moving ahead, crimes against a woman or an individual below fourteen years of age, socio-economic crimes are not included within the ambit of this provision. It has been ensured that the application filed by the offender to give effect to this process,² is done willingly and for this, the procedure necessitates the court to observe the offender in camera in the absence of the other side.³ Once the Court is convinced of the willingness of the application it will permit the parties to jointly settle the matter.⁴ Section 265C⁵ lay down directions for attaining a jointly acceptable arrangement that outlines the structure of the deal to be worked out between the offender, the prosecution, the police official who probed the matter and the sufferer. Then a report⁶ is made that is signed by the governing official of the court and all other stakeholders. The Court is then obligated to provide required compensation to the sufferer and determine the amount of punishment for the offender.⁷ Right to appeal is not given except under

Articles 136,⁸ 226⁹ and 227¹⁰ of the Constitution.¹¹

Judicial Stance on Plea Bargaining

At first, Indian courts disagreed to include the concept within the structure of the criminal justice system. In the judgement of Murlidhar Meghraj Loya v. State of Maharashtra,¹² the apex court categorised plea-bargaining as a “simple trading act” in the course of delivery of justice. Later in Kasambhai v. State of Gujarat,¹³ Justice P.N. Bhagwati clearly stated that this concept will contravene constitutional ideals, since it gives away the magistrate’s obligation to examine evidence that is the principal necessity in the development of an individual viewpoint after application of one’s intellect to it. In this respect, the apex court in the judgements of Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr.¹⁴ and Thappaswamy v. State of Karnataka,¹⁵ also denied the concept and declared it unconstitutional. In Kripal Singh v. State of Haryana,¹⁶ the Supreme Court stated that minimum sentence stipulated by law cannot be avoided just because a plea bargain has been reached

¹ Code of Criminal Procedure, 1973, §265A, No. 2, Acts of Parliament, 1973 (India).

² Code of Criminal Procedure, 1973, §265B (1), No. 2, Acts of Parliament, 1973 (India).

³ Code of Criminal Procedure, 1973, §265B (4), No. 2, Acts of Parliament, 1973 (India).

⁴ Code of Criminal Procedure, 1973, §265B (4) (a), No. 2, Acts of Parliament, 1973 (India).

⁵ Code of Criminal Procedure, 1973, §265C, No. 2, Acts of Parliament, 1973 (India).

⁶ Code of Criminal Procedure, 1973, §265D, No. 2, Acts of Parliament, 1973 (India).

⁷ Code of Criminal Procedure, 1973, §265E, No. 2, Acts of Parliament, 1973 (India).

⁸ INDIA CONST. art. 136.

⁹ INDIA CONST. art. 226.

¹⁰ INDIA CONST. art. 227.

¹¹ Code of Criminal Procedure, 1973, §265G, No. 2, Acts of Parliament, 1973 (India).

¹² Murlidhar Meghraj Loya v. State of Maharashtra, A.I.R. 1976 S.C. 1929.

¹³ Kasambhai v. State of Gujarat, A.I.R. 1980 S.C. 854.

¹⁴ Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr., 1980 Cri.L.J. 553.

¹⁵ Thappaswamy v. State of Karnataka, (1983) 1 S.C.C. 184.

¹⁶ Kripal Singh v. State of Haryana, (1995) 5 S.C.C. 649.



(This was also held in the case of State of Uttar Pradesh v. Chandrika)¹⁷.

These judgements reflect that the Supreme Court had always looked at the concept from a critical viewpoint. This stance was modified after the 2005 amendment in CrPC. Substantiating this fact is the position adopted by the apex court on the opinion of applying the amendment in the judgement of State of Gujarat v. Natwar Harchandji Thakor,¹⁸ where it was held that plea bargaining as a concept, though involve theoretical errors, has become significant considering the modified scenario of criminal justice in our nation.

Concerns surrounding this process and respective solutions

The basic aim of criminal law is to provide for preventive measure to individuals from executing activities of damage. Criminal legislation is the mechanism with which the State assures that the rights of individuals shall not be violated by the individual actions of others. By penalizing an offender, the State establishes an example to community. Critics to plea bargaining assert that when a state enters into a deal with an offender, the entire purpose behind criminal law is defeated. In addition, the safety measures entailed in Part XXI-A of the Code affirms the fact that the concept is still witnessed from a fault-finding viewpoint. Though these safety measures do assist in alleviating the faults associated with the concept, they do not provide a

comprehensive solution to the general conceptual structure of the process.

a) **Does Plea Bargaining result in deterioration of safety measures as ensured in the traditional trial process?**¹⁹

Presumption of Innocence, prosecution bearing the burden of proof, etc. are certain legal safeguards that the trial provides to the offender.²⁰ Some academicians expressing their opinion of “shadow trials” are of the view that plea bargaining provides almost similar outcomes as produced by trials.²¹ Moreover, the latter is an option utilised. The disapprovals prefer to avoid the fact that a denial on plea bargaining will not prevent the offender from pleading his culpability on their own personal choice in the trial procedure due to factors such as expenditure involved in trial, repentance, etc.²² This option always exists and is just applied more prominently in plea bargaining.

Secondly, it is asserted that plea bargaining result in classification of offenders between offenders who determine to employ their constitutional right to trial and others who determine to surrender it. However, this concern is inappropriate as the process is based on the idea that the offender is provided complete choice to progress further on a course of his choice.²³ In India, this position gets affirmed even further since it is the offender who commences the process. Considering this reasoning, it can be concluded that all the safety measures associated with the trial process remain

¹⁷ State of Uttar Pradesh v. Chandrika, 2000 Cr.L.J. 384 (386).

¹⁸ State of Gujarat v. Natwar Harchandji Thakor, 2005 Cri.L.J. 2957.

¹⁹ K.D. Gaur, Textbook on Indian Penal Code 72 (LexisNexis 2014).

²⁰ Garrity v. New Jersey, 385 U.S. 493 (1967).

²¹ Frank H. Easterbrook, Plea Bargaining as Compromise, Yale L.J. 1011, 1969-1975 (1992).

²² Jeff Palmer, Abolishing Plea Bargaining: An End to the Same Old Song and Dance, 26 AM. J. CRIM. L. 505, 513-14 (1999).

²³ Border Kircher v. Hayes, 434 U.S. 357 (1978).



unharmful.²⁴ They are just transformed into the rights of the offender under the plea-bargaining mechanism.

b) **External Factors not considered within the concept-** In the landmark case of *Borden Kircher v. Hayes*,²⁵ plea bargaining was described as an arrangement between parties with “comparatively equal bargaining power.” This equal bargaining power originates from the fact that the sufferer who is involved in the matter has an option to arrive at an arrangement with the offender or not. Such viewpoints do not consider the sad reality that external factors do influence normal trial procedures also. Though courts have become responsive to the concern after the Aarushi Talwar Murder case and the Jessica Lal Murder case, witnesses turning aggressive, sufferers being pressurised, improper police investigation, are still a substantial stain on criminal procedures.

The financial status of the offender also plays an important role here. A wealthy offender can easily influence the parties in the matter, using his financial resources, particularly the sufferer or his family.²⁶ Since a jointly acceptable arrangement often entails an element of compensation, a poor offender might find himself at a losing end as compared to a rich offender. This situation is distinctly in contravention to Article 14²⁷ of the Constitution. This concern though

appears rational is not focussed upon much if executed with appropriate safety measures. There is a demand to reframe the aspect of legal aid as mentioned in Article 39A²⁸ of the Constitution and Section 304 of CrPC²⁹ so as to expand its use beyond the traditional trial process and to develop a strong link with the processes entailed in plea bargaining.

Comparison with USA in implementation of this process

a) **Trends and lawful practices-** The concept of punishment employed in USA is more retaliatory than remedial. In the Alabama criminal code, theft of the first degree³⁰ is categorised as a class B crime that proposes a punishment for a term which may not exceed 20 years but not less than 3 years. In comparison to this, Section 379 of the IPC³¹ lays down a punishment of detention for a term that may go to 3 years. The quantity of punishment itself turns out to be the foremost factor forcing innocents to enter into plea bargains. This has been considered as equal to “soft coercion.”³² Guilt-free, risk adverse respondents may not want to take the chance of employing the course of trial so as to obtain an extremely severe punishment, and rather, will prefer to plead culpability to assure a more tolerant sentence.³³ Clearly, the quantity of punishment given by Indian courts is much more practical. The

²⁴ Stephen J. Schulhofer, Is Plea Bargaining Inevitable? 97 Harv. L. Rev. 1040 (1984).

²⁵ *Borden Kircher v. Hayes*, 434 U.S. 357 (1978).

²⁶ Linus Y. Akor, Plea Bargaining and The Anti-Corruption Campaign in Nigeria, 3 Global J. Interdisc. Sci. 116-121 (2014).

²⁷ INDIA CONST. art. 14.

²⁸ INDIA CONST. art. 39A.

²⁹ Code of Criminal Procedure, 1973, §304, No. 2, Acts of Parliament, 1973 (India).

³⁰ Code of Alabama, 2013, §13A-8-3, U.S.C. (2013).

³¹ The Indian Penal Code, 1860, §379, No. 45, Acts of Parliament, 1860 (India).

³² Arthad Kurlekar & Sanika Gokhale, The Unconstitutionality of Plea Bargaining in the Indian Framework: The Vitiating of the Voluntariness Assumption, INDIAN L.J., (2016).

³³ Douglas D. Guidorizzi, Should We Really “Ban” Plea Bargaining? : The Core Concerns of Plea Bargaining Critics, 47 EMORY L.J. 692, 771-772 (1998).



punishment will not become a compelling factor in the context of India.

b) **Examination of legal aid scheme-** The US Congress established the Legal Services Corporation in 1974 to offer legal aid to individuals who couldn't afford it. This was in advancement of the VIth Amendment which offered for the right to be represented by a lawyer.³⁴ Execution of legal aid has experienced severe financial crisis, as per a report labelled as "Documenting the Justice Gap in America."³⁵ Deprivation often plays a prominent role compelling even guilt-free respondents to prefer plea bargain. Comparing this to India, the National, State and District level Legal Services Authorities have been offering legal aid in India. Until execution is complete and every deprived individual is guaranteed free legal aid by the State, initiating plea bargaining would be a risky option. Legal aid and plea bargaining go together. When an offender is ensured a fair trial along with legal representation and offered legal aid in case he can't afford it, this establishes the position that a guilt-free individual should not plea bargain just because of the apprehension that the system shall prevent him. Luckily, legal aid in India is working effectively at present.³⁶

Analysis

The basic idea behind plea bargaining is to display tolerance towards individuals who regret executing the offence and are ready to improve themselves. Considering this, there exists no rationale why offences with

approved maximum imprisonment exceeding seven years should not be incorporated under Chapter XXI-A of the CrPC. A distinction should be made between individuals accused of an offence, even a severe one, one of whom repents executing the crime and the other does not. E.g., the offences like rape, just increased punishment will not avert the future crimes. It is this patriarchal mindset of the society that should be confronted. For this, the reformative attitude which heals the root cause-the frame of mind of the rapist will be more efficient. This leads us to a conclusion that execution of plea-bargaining concept for offences against women will be more effective than not in the long run. This position may be expanded to incorporate all other severe crimes that are presently excluded from plea bargaining. Moreover, the choice to plead culpability also prevails for offences with a punishment of seven years or beyond, given to them. The prevalent reasoning behind permitting plea bargaining only for trivial offences weakens.

At the end of 2014, 3,540 under-trials had been imprisoned for 5 years or more.³⁷ Had they been permitted to plea bargain, at least their future could hold some assurance. If convicted under severe offences life Section 302 IPC,³⁸ these under-trials may be considered to stay behind bars infinitely. A plea bargain may permit those who consider themselves to be culpable to resolve their stance all at once.

³⁴ U.S. CONST. amend. VI.

³⁵ Documenting the Justice Gap in America, A Report of the Legal Services Corporation 5 (2012).

³⁶ National Legal Services Authority, <http://www.nalsa.gov.in> (last visited 13th October, 2022).

³⁷ Ministry of Home Affairs, <http://www.mha.gov.in> (last visited 13th October, 2022).

³⁸ The Indian Penal Code, 1860, §302, No. 45, Acts of Parliament, 1860 (India).



Conclusion

The present realities of the Indian criminal justice system have demanded a movement from the traditional adversarial trial system to modern kinds of alternate dispute resolution systems to give effect to fundamental right to speedy justice. Though legal recognition provided to plea bargaining has reformed the situation, its narrow scope has confirmed to be an impediment to the efficient enhancement of the judicial system. The conceptual structure of the idea demands a re-examination to broaden its scope and improve its performance. Inclusion of offences from the entire extent of criminal law may prove to be effective for the complete society in the long run. Approached rationally, plea bargaining may prove to be the cure the Indian judiciary is expecting. The concept must be linked with a strong legal aid scheme and a just pre-trial process. The structure of the process in the Indian context may be compared with the American framework so that the lessons are absorbed instead of mistakes. The disapprovals are still out there, so are the results.

