VOLUME 6 | ISSUE 2

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

PLEA BARGAINING IN INDIA: A CRITICAL ANALYSIS

- Ram Tiwari[1]

Abstract

Plea bargaining was introduced into the Indian criminal justice system with the objective of providing relief to both accused and victims from lengthy trial processes while reducing the backlog of cases in courts. This paper critically analyzes the implementation and effectiveness of plea bargaining in India, examining its historical evolution, procedural aspects under the Criminal Procedure Code, and reasons for its limited success. Through comparative analysis with plea bargaining models in England and Canada, and by contrasting it with the more successful mechanism of compounding of offences, this research identifies structural, ideological, and practical challenges that have hindered plea bargaining's effectiveness in India. The study concludes with recommendations for reform to make plea bargaining a more viable alternative dispute resolution mechanism within India's criminal justice system.

Keywords: *plea bargaining, criminal procedure, India, compounding of offences, comparative analysis, criminal justice reform.*

INTRODUCTION

When a case is decided by the court, the objective is always to meet the ends of justice. But as the jurisprudence of justice suggests that being highly subjective, it is certainly hard to meet the ends of justice in every scenario. Where once the process of the trial is a means to achieve the end, now that process is proving to be cumbersome and problematic. Plea bargaining as a concept has been introduced in the Indian criminal justice system with the objective of giving a relief to both the accused and the victim from the lengthy and time taking process of trial. It is in essence a method to reaching to a conclusion using a short-cut.

[1] Student at DNLU Jabalpur

For general queries or to submit your research for publication, kindly email us at ijalr.editorial@gmail.com

https://www.ijalr.in/

To give a formal definition to this term, it can be defined as the defendant's agreement to plead guilty to a criminal case with a reasonable expectation of receiving some considerations from the state[2] Now whether these considerations are justified in giving justice to both the accused and the victim is a question that is left to be discussed. But in this research paper the focus is on understanding the reasons for the failure of this concept in India.

The first chapter of the paper states the judicial trends that that kept on changing during the passage of time and explains the procedure and type of plea bargaining. In the second chapter first it is established with the help of facts that plea bargaining is a failure in India, then the reasons for the same has been provided and then in the end it has been explained why compounding of offence is a success and plea bargaining is a failure in India. The last chapter compares the model of plea bargaining in India with that of in England and Canada.

RESEARCH PROBLEM

The Indian model of plea bargaining which was introduced with the objective of clearing the huge backlog of cases to ensure speedy trial has failed to take appropriate precautions against the misuse of this concept leading to the failure of the concept in Indian scenario.

OBJECTIVES OF THE RESEARCH

1. To understand the judicial history of plea bargaining in India
2. To find the reasons behind the failure of plea bargaining in India.
3. To compare the model of plea bargaining in India with that of in England & Canada.

HYPOTHESIS

Plea bargaining is efficient in reducing the pendency in courts and providing speedy justice to the accused.

LITERATURE REVIEW

1. **THE BARGAIN HAS BEEN STRUCK: A CASE FOR PLEA BARGAINING IN INDIA**, *SonamKathuria.*

[2]Alschuler A.W, Plea Bargaining and Its History, 1 Colum. L. Rev. 3 (1979).

The author has analyzed the traditional objections to plea bargaining and has given justification that how these objections are flawed. After explaining the Indian model of plea bargaining, the author commented on the traditional objections to plea bargaining. He streamline three concerns that led to the criticism of the concept of plea bargaining. Those three objections were: Punishment and societal Interest, unfairness of result and procedural fairness and the defendant. He gave counter arguments to these objections in order to justify the fairness and constitutionality of plea bargaining. Further before concluding his arguments, the author explained the reason because of which the Supreme Court objected this concept before it was inserted in CrPC. According to him the Supreme Court held the concept unconstitutional because it was not a procedure established by law.

2. **PLEA BARGAINING IN INDIAN CONTEXT**, *JK Mathur*.
The author defined plea bargaining as a process of negotiations between the prosecution and the accused or his lawyer resulting in the accused pleading guilty for a promise to reduce the charge, to drop some of the charges or getting a lesser punishment. After explaining the model of plea bargaining in USA, he talked about the judicial response of Supreme Court of USA on the concept of plea bargaining. The judiciary in USA has a very positive response to this concept and is almost placed on an equal footing as a contract. While talking about plea bargaining in Indian context it took ideological, constitutional and practical problems or aspects into consideration.

3. **JUSTICE IN PLEA BARGAINING: IS IT COERCION TO COMPROMISE**, *Amrit Pal Kaul & Aarti Goyal.*
The author explained the origin of plea bargaining and the reasons for introducing this concept into the Indian criminal justice system which was substantially to assist speedy disposal of cases. The author explained the three types of bargaining, charge, sentence and fact. Then it explained the procedure of plea bargaining in CrPC. While critically analyzing plea bargaining, the author said that the involvement of police in the process will lead to coercion and corruption.

4. **PLEA BARGAINING AND OUR CRIMINAL JUSTICE SYSTEM**, *Shakeel Ahmad.* The author began by defining plea bargaining which according to author is different according to different jurisdictions. The author resorted to black's law dictionary to define the term. According to the author plea bargaining might place undue pressure on the innocent people to plead guilty. The author pointed out that this concept will lead to overcharging wherein the prosecutor might brought more severe charges on the accused with the hope that this will strengthen his or her positions in the subsequent negotiations with the defense attorney. Though the author put certain drawbacks of the concept it concluded the article by saying that it is really a measure and redressal which will add a new dimension in the realm of judicial reform.

5. **PLEA BARGAINING: AN INDIAN APPROACH**, *Shaista Amin.* According to the author plea bargaining occurs when the prosecutor induces a criminal accused to confess guilt and to waive his right to trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudicated guilty following trial. According to the author it is a contract with the state. The author that elaborated the differences between the Indian and American model of plea bargaining. The important difference between the two models is that Indian model is restrictive in nature and the American model is not. Pointing the drawbacks of the concept, according to the author the involvement of court in the process might raise question on court's impartiality.

RESEARCH QUESTIONS

1. Why plea bargaining in India is failure and compounding of offence is a success, considering the fact that both are introduced with the intention of speedy disposal of cases?

2. What are the differences between the plea bargaining model of India, England and USA?

SCOPE AND LIMITATION

The research is limited to the conceptual analysis of the topic and since it is a doctrinal research, the current data relevant to the topic is not taken into consideration.

RESEARCH METHODOLOGY

The project is based on the doctrinal method of research using Bluebook Citation (20th Edition) Citation style has been used.

UNDERSTANDING THE CONCEPT OF PLEA BARGAINING

The concept of plea bargaining is not new to the criminal justice system. It has been practiced in different countries by different names for a very long time. But it is interesting to note that there is no standard definition of plea bargaining because "its definition varies depending on the jurisdiction and on the context of its use"[3]. Though it is difficult to give a standard definition to this term, but in order to understand the concept and establish a base for the further chapters it becomes pertinent to discuss the definition of plea bargaining in Indian context.

To start with, *Black's Law Dictionary* defines Plea Bargaining as "'*the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge*[4]. This definition emphasizes on the phrase "mutually satisfactory disposition", which is also been substantially used under the provisions for plea bargaining under the Procedural code (CrPC)[5] To give a more simple meaning to the concept the law commission in its 142nd report defines the concept in its most traditional and general sense as "*pre-trial negotiations between the defendant, usually conducted by the counsel and prosecution, during which the defendant agrees to plead guilty in exchange for certain concession by the prosecutor*"[6]. Though not much attempt is made by the Indian judiciary to define the concept of plea bargaining but it has given a mixed response on the constitutional validity of the concept which will be discussed later in this chapter.

[3] Shaista Amin, *Plea Bargaining an Indian Approach*, 4 GJLDP 67 (2014).
[4] *Plea Bargaining*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[5] The Code of Criminal Procedure, 1973, § 265C, No. 2, Acts of Parliament (1974).
[6] LAW COMMISSION OF INDIA, 142^nd^ REPORT ON CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGINING, (20th March, 2021), https://lawcommissionofindia.nic.in/101-169/Report142.pdf.

In order to understand the concept of plea bargaining we need to first understand the latin term "Nolo Contendere". In literal sense, this phrase means "no contest" or "I do not wish to contend"[7] The plea of "Nolo Contendere" originated in the united state, is a prominent feature of the American Criminal Justice System.[8]But it is important to understand here, the difference between guilty plea and the plea of "Nolo Contendere". The later is not an 'admission of guilt', but rather a 'willingness to accept declaration of guilt', rather than to go to trial[9]. In other words, the plea of "Nolo Contendere" is nothing but a means to avoid the long drawn trial the result of which might not possibly go in favor of the accused or rather call defendant. Therefore the person contending the plea of "Nolo Contendere" is not admitting his guilt rather he is simple accepting the already declared guilt provided with certain incentives. Further, Guilty plea is admissible as evidence against the defendant but plea of "Nolo Contendere" is not[10]

The Indian concept of plea bargain is inspired from the doctrine of "Nolo Contendere". The procedure established by law contains the essence of the doctrine of "Nolo Contendere". It can be traced by reading section 265E where the court after a mutually satisfactory disposition (under section 265C & 265D) awards lesser punishment to the accused for him accepting the guilt[11] Further the section 265K bars the use of the statements or facts stated by the accused in the application of plea bargaining filed under section 265B for any other purpose expect for the purpose of this chapter[12] Having discussed the base of the Indian concept of plea bargaining, it is also important to remember that Indian model of plea bargaining is not the exact copy of that of United state, rather it has been molded according to the social and economic needs of the country.

HISTORY OF PLEA BARGAINING UNDER INDIAN CRIMINAL JUSTICE SYSTEM

[7] *Nolo Contendere*, LEGAL INFORMATION INSTITUTE, (20th March, 2021), https://www.law.cornell.edu/wex/nolo_contendere

[8] Rosie Athulya Joseph, *Plea Bargaining: A Means to an End*, MANUPATRA (20th March, 2021), http://www.manupatra.com/roundup/326/Articles/Plea%20bargaining.pdf.

[9] Justice JN Bhatt, *For Fast Track Justice Doctrine Of "Nolo Contendere" Does It Not Deserve A Trial?*, LAW COMMISSION OF INDIA, (21st March, 2021), https://lawcommissionofindia.nic.in/adr_conf/nolo%20contendere%204.pdf

[10] Ibid

[11] The Code of Criminal Procedure, 1973, § 265E, No. 2, Acts of Parliament (1974).

[12] The Code of Criminal Procedure, 1973, § 265K, No. 2, Acts of Parliament (1974).

Plea bargaining has been discussed an examined by the courts of the country in many cases, both before and after the introduction of the concept in the procedural law. The interesting part of the process is that the stance of judiciary on plea bargaining which was first negative became positive with the coming of the amendment in 2005. In this chapter the journey of plea bargaining has been traced with the help of the judicial trends over the years.

The very first case in which the court examined the concept of plea bargaining was *Madanlal Ram Chandra Daga v. State of Maharashtra*[13]. The high court gave an opportunity to the accused convicted for the offence of cheating to reduce the punishment by compensating the loss that he has caused to the victim. The Supreme Court while condemning the view of the high court said that:

"*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 a bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court*[14]

The case of Madan Lal did not discuss the concept at length. In 1976, again the question on plea bargaining was brought before the hon'ble Supreme Court. In the case of *Murlidhar Meghraj Loya v. State of Maharashtra*[15] the Hon'ble Supreme Court for the first time got an opportunity to examine Plea Bargaining[16] The court clarified that the duty to enforce the law is of the state. The state cannot escape from this duty by bartering with the accused for a lesser sentence. The court termed the concept of plea bargaining as "necessary evil" and advocated against the introduction of this concept in the Indian criminal justice system.

In the year 1980 the Supreme Court in the case of *Ganeshmal Jasraj v. Govt. of Gujarat*[17](1980), *Kasambhai Abdul Rehmanbhai Sheikh v. State of Gujarat*[18] (1980)

[13]1968 AIR 1267
[14]Shakeel Ahmad, *Plea-Bargaining and our Criminal Justice System*, 20 ALJ 139 (2012-13).

[15]1976 AIR 1929
[16]Amrit Pal Kaul & Aarti Goyal, *Justice In Plea Bargaining--Is It A Coercion To Compromise*, Bharati Law Review 213 (2016).
[17]1980 AIR 264
[18](1980) 3 SCC 120

and *Kachhia Patel Shantilal Koderlal v. State of Gujarat*[19] (1980), held the practice of plea bargaining as unconstitutional and illegal, having a strong capacity to "encourage corruption, collusion and pollute the pure fount of justice"[20]. The Supreme Court in the case of *Thippeswamy v. State of Karnataka*[21](1983) held the similar view.

The Supreme Court while condemning the order passed by the high court, in the case of *State of Uttar Pradesh v. Chandrika*[22](1999) said that plea bargaining is not recognize under Indian law and is against the public policy under our criminal justice system.

The attitude of the court till this time was negative towards using the practice of plea bargaining. But the case of *State of UP v. Nasruddin*[23] (2000), became the first instance where the court showed a positive attitude towards the practice. The court in this case did not declared the whole concept of plea bargaining as unconstitutional but only held that "reduction of sentence with respect to period already undergone as a result of plea bargaining would lead to serious miscarriage of justice[24]

While the judiciary was giving mixed response to the introduction of plea bargaining the government introduced a well designed procedure for plea bargaining by The Criminal Law (Amendment), 2005. This amendment made plea bargaining a procedure which is now established by law. After this amendment, the stance of court became more positive towards this concept.

The Gujarat high court in the case of *State of Gujarat v. Natwar Harchanji Thakore*[25] (2005), observed that plea bargaining should be introduced to fulfill the objective of law which is to provide easy, cheap and expeditious justice by resolving the disputes. It would be substantial to state the lines from the judgment:

"...the very object of law is to provide easy cheap and expeditions justice by resolutions of disputes, including the trial of criminal cases and considering the present realistic profile of the

[19]1980 CriLJ 553
[20]*Supra*, note 13
[21](1983) 1 SCC 194
[22]AIR 2000 SC 164
[23]2000 CriLJ 4996
[24]*Supra*, note 13
[25](2005) 1 GLR 709

pendency and delay in disposal in the administrations of law and justice, fundamental reform are inevitable. There should not be anything static".

Therefore, the journey of plea bargaining has been rocky where the Supreme Court first opposed the practice by upholding it as unconstitutional but with the passage of time observed it as a method to provide speedy justice in criminal law cases.

PLEA BARGAINING UNDER CrPC: THE PROCEDURAL ASPECT

The Criminal Law (Amendment) Act, 2005 inserted Chapter XXIA by the name of Plea Bargaining into the Code of Criminal Procedure, 1973. The chapter consisted of twelve sections from 265A to 265L that elaborated the procedure for the plea bargaining.

1. **Application of the chapter:** Section 265A establishes the applicability of this section. It makes the remedy of plea bargaining available only in respect of offences for which the punishment is less than seven years of imprisonment. This remedy is not made available for the offences for which "the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided"[26]. Also this chapter will not have an application for the socio economic offences or offences committed against women or children below the age of 14 years. With reference to clause 2 of this section the government listed 19 offences as offences affecting the socio economic conditions of the country by an order dated July 11th, 2006[27]

2. **Application for plea bargaining:** As per Section 265B the accused is entitled to file an application for plea bargaining in the court in which the trial of his case is pending. Such application shall include:

    - Name of the offence to which the case relates &
    - Affidavit showing the voluntariness of the accused in filing the application after understanding the nature and extent of punishment for the offence and declaring that he has not been previously convicted by the court for the same offence

[26]The Code of Criminal Procedure, 1973, § 265A, No. 2, Acts of Parliament (1974).
[27] Ibid

After the application is filed the court call the accused and examines him in camera to satisfy that he has filed the application voluntarily. If, after the examination, the court is satisfied that the application is filed voluntarily by the accused, the court then gives time to both the parties to workout a Mutually Satisfactory Disposition (MSD)

3. **Mutually Satisfactory Disposition:** Section 265C provides the guidelines for a Mutually Satisfactory Disposition. It states that when the case is instituted on a
    - police report, court issues notice to the Public Prosecutor, Investigating Officer, accused and victim &
    - otherwise than on police report, court issues notice to the accused and the victim, to work out a Mutually Satisfactory Disposition where the court shall have the duty to ensure that such proceedings is completed voluntarily by the parties.
4. **Disposal of Case after MSD:** Section 265D imposes the duty on the court to make a report of the disposition which shall be signed by the presiding officer of the court and all the persons who participated in the meeting. After the report, the court disposes the case in the manner mentioned under section 265E. The court hears both the parties and then gives the compensation to the victim in accordance with the disposition and decides the quantum of punishment for the accused. The court may release the accused on probation or provide half of the minimum punishment given under the law for the offence committed by the accused or sentence the accused to one-fourth of the punishment for that offence.
5. **Powers of the court:** Section 265F says that the judgment shall be delivered in an open court and "will be final and no appeal (except under Article 226 and 227 of the Constitution) will lie."[28] Further as per section 265H, the court under this chapter will have the same power as it has in respect of Bail, trial of offences and other matters relating to disposal of case.

[28]The Code of Criminal Procedure, 1973, § 265F, No. 2, Acts of Parliament (1974).

6. **Statements of the Accused:** Section 265K bars the use of the statements or facts stated by the accused in the application of plea bargaining filed under section 265B for any other purpose expect for the purpose of this chapter.

TYPES OF PLEA BARGAINING

Plea bargaining can be mainly divided into three types:

1. Charge bargaining
2. Sentence bargaining
3. Fact bargaining

Charge Bargaining: It is a more common and widely used form of plea bargaining. It refers to a process in which the defense and the prosecutor involves in the negotiation of the specific charges or crime that the defendants will face at trial.[29] In more simple words, it is a bargain or promise between the prosecutor and defendant to deduct some of the charges brought against the defendant in exchange of guilty acceptance[30] In this case it is on the complete discretion of the prosecution to approve whether bargain of charges can be made or not. After the charge bargaining the defendant will face only those charges for which both the parties have agreed.

For example, "a defendant may face the charges of burglary, rape and sodomy. The defendant may agree to the charges of burglary and rape in exchange of the state's agreement to drop the sodomy charge"[31].

Sentence Bargaining: In this kind of bargain "the defendant agrees to plead guilty in exchange for a promise by the prosecutor to recommend a lighter sentence or to refrain from making any sentence recommendations"[32]. In sentence bargaining the accused shall have the complete information about the sentence that might be imposed on him if he does not pleads guilty.

[29]Mohd. Ashraf & Absar Aftab Absar, *Plea Bargaining in India: An Appraisal*, 23 ALJ (2015-16)
[30]*Supra*, note 15.

[31]*Supra*, note 2
[32]*Supra*, note 13

Further, "a sentence bargain may allow the prosecutor to obtain a conviction to the most serious charge, while assuring the defendant of an acceptable sentence"[33].

Fact Bargaining: This form of bargaining is the least popular form of bargain. It is not widely used in disposing the cases under the criminal justice system. "In fact bargaining, a prosecutor agrees not to contest an accuser's version of the facts or agrees not to reveal aggravating factual circumstances to the court. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines."[34]

PLEA BARGAINING & COMPOUNDING OF OFFENCES: A CASE OF FAILURE AND SUCCESS

PLEA BARGAINING: A CASE OF FAILURE IN INDIA

As discussed in the previous chapter that the practice of plea bargaining was not always appreciated or supported by the judiciary. It was after the amendment of 2005, when the practice became a part of "procedure established by law"[35], this practice was accepted by the judiciary. The inherent assumption behind upholding plea bargaining as a constitutional mechanism is that it is considered as a voluntary practice, without any inducement, harassment and misrepresentation[36] But even after the acceptance of this practice by the judiciary, it has not been a successful remedy availed by the accused. The reasons for the same can be culled out from the critics of this concept which will be dealt in detail under the next heading of this chapter. For the purpose of this chapter, the author has restricted itself to demonstrating the state of plea bargaining in India with the help of data available on the same.

After the amendment in 2005 and introduction of plea bargaining into the Indian criminal justice system as a means to fast tracks the disposal of the cases in the courts, no data has been collected

[33] *Supra*, note 2.

[34] Ibid

[35] The Criminal Law Amendment Act, 2005, No.2, 2005

[36] Ajay Kumar & Aditya Kumar Singh, *Plea Bargaining: Why it has Failed so Far: Indian Experience*, 4 AEBM, 375 (2017), (21^st^ March, 2021), https://www.krishisanskriti.org/vol_image/23Jul2017060727x25%20%20%20%20%20%20%20%20Ajay%20Kumar%20%20%20%20375-375.pdf

on cases disposed by using plea bargaining until 2015. The National Crime Records Bureau (NCRB) in its crime report of 2017, points out that this method of bargaining is hardly resorted to and it has not brought forth the desired outcome, considering how pendency of cases continues even after years of its legalization.[37]

As per the report of 2017, out of the total cases pending for trial from the previous year in all the state which was around 1,15,24,490, only 31,857 cases were disposed off through plea bargaining[38] Therefore, only 0.27 percent cases has been disposed of using plea bargaining.

Further in 2015 only 0.5% of the persons charged with crimes under IPC opted for Plea bargaining in India.[39]

This data shows the utter failure of plea bargaining in becoming a popular remedy for the accused and helping in speedy disposal of cases. Further these statistics puts forth a big question mark on Plea Bargaining as an effective tool for a speedy criminal justice.

Apart from these statistics, in order to better understand the position of plea bargaining in India, we could first resort to the objectives with which this remedy has been introduced in the criminal justice system and then analyze with the help of the statistics whether this remedy has been able to achieve its objectives.

The introduction of plea bargaining in the Indian criminal justice system is largely a response to the deplorable status quo, reflected in the delay in disposal of criminal cases and appeals, the huge arrears of cases and the appalling plight of under trial prisoners in jails[40] The 142nd law commission report while outlining the need for introducing plea bargaining in Indian criminal

[37]Raj Shekhar & Mohd Rameez Raza**,** *The Catholicon for Indian Criminal Justice System: Tracing the Evolution and Implementation of Plea Bargaining in India,* CCJA, (21^st^ March, 2021), https://ccjarmlnlu.wordpress.com/2020/05/29/the-catholicon-for-indian-criminal-justice-system-tracing-the-evolution-and-implementation-of-plea-bargaining-in-india/

[38]CRIME IN INDIA, VOL.1, NCRB, 1097 & 1098 (22^nd^ March, 2021) https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%203_0.pdf

[39]*Supra*, note 35

[40]Sonam Kathuria, *The Bargain Has Been Struck: A Case for Plea Bargaining in India*, 19 Student B. REV 55 (2007)

jurisprudence emphasized the objective that this practice might seek to achieve which was to reduce the delay in the criminal trial and to alleviate the sufferings of under trial prisoners.[41]

As per the statistics available on cases pending in Indian courts, it states that 3.65 Crore cases in total are pending in Indian courts as of February 1, 2020. Interestingly around 2.5 crore of the 3.4 crore cases pending in lower courts are criminal.[42] Coming to the statistics of under trial prisoners in India, as per the Prison Statistics India report by NCRB, a total of 3,27,508 Indian national inmates consisting of 3,14,403 Males and 13,105 Females were confined in various jails in the country as of December 31, 2019.

One might argue that there can be various other reasons for the pending cases in the court and for the overcrowding of jails by under trial prisoners. But this is a need to understand that from the data on plea bargaining it can very well be concluded that it has not been used for disposing of the cases. Further the data on pendency of cases and increasing number of under trials is mentioned only to indicate that plea bargaining which was exclusively introduced to reduce the number of pending cases and under trial prisoners has completely failed to do either of it. It is stated for the purpose of questioning the effectiveness of the procedure and concept of plea bargaining in Indian scenario.

REASONS FOR FAILURE OF PLEA BARGAINING IN INDIA

In the previous heading it has been established that plea bargaining has proven to be a failure in India. Now under this head various reasons has been pointed out because of which plea bargaining has not been successful in India. These reasons can broadly be divided into three categories:

1. Ideological
2. Practical
3. Structural

[41] *Supra*, note 5
[42] BQ Desk, *India's Pending Court Cases on the Rise*, Bloomberg Quint, (22nd March,2021)

Before elaborating the reasons, one thing needs to be kept in mind that the accused is the frontrunner in the process. It is the accused who needs to give his voluntary consent to plead guilty. This consent, most of times becomes the reason for the failure of this process in the Indian society. Further, this process makes it mandatory for the accused to plead guilty in front of the court. Pleading guilty produces stigma against the accused in the society which had became another strong reasons that hold the accused against plea bargaining.

- The first and foremost function of the judiciary is to give justice to the people, whenever they may approach it. It awards punishment to those who after trial are found guilty of violating the laws of the state or the rights of the people.[43] In the process of plea bargaining, the courts have been provided with an important role in making this bargain happen. With the plea bargaining being conducted in the courts, it will become a trading house and command as much awe and respect as such a place can.[44] The participation of judges in the process makes them a party to this bargain or rather say the trade, and makes them hard traders, taking away the image of the judges as an "impartial fountains of justice"[45]

The solution of this issue is given in the 142nd law commission report where it was suggested that a "competent authority" shall be instituted for this process. The authority will include a Metropolitan Magistrate or a Magistrate of the First Class specially designated as a "Plea-Judge" by the High Court in case of offences punishable with imprisonment for less than seven years.[46] But this recommendation of the law commission was not accepted by the government and not "competent authority" was instituted for this purpose.

This drawback might not directly be construed as a reason for the failure but it a substantial drawback in the ideological base of the concept.

[43]Judiciary: Functions, *Importance and an Essential Quality of Judiciary*, (23^rd^ March, 2021), https://niu.edu.in/sla/online-classes/Judiciary-Functions,-Importance-and-an-Essential-Quality-of-Judiciary.pdf

[44]Jack Wright and Peter W. Lewis, *Plea bargaining in Indian Context*, 34 Modern Criminal Justice 429 (1978).

[45] Ibid

[46]*Supra*, note 39

- Criminal law while justifying the concept of punishment often resorts to the deterrence effect of the punishment on an individual. In order to effective deter a criminal while using the concept of punishment one of the principles used is that the punishment should fit the crime. It is also an accepted fact that the focus has been shifted from retribution to restoration. But it is also equally true that punishment is an integral part of providing justice to the victim and maintaining law and order in the society.

The concept of plea bargaining is all about bartering a lesser sentence for the accused by compensating to the victim. In such scenario the conviction of the accused and the punishment given to him is not at par with the gravity of the offence committed by the accused. "The offenders who receive benefit from plea bargaining receive a lower sentence than they deserve. Lower sentence goes against the principle that punishment should fit the crime."[47]

This aspect lowers the interest of those victims who are interested in retribution and are not in favor of showing leniency to the accused. Therefore this becomes one of the reasons for the failure of plea bargaining.

- The structure of the model of plea bargaining in India is prone to encourage coercive practices. Right from the beginning the process of plea bargaining the involvement of police under section 265C (a) to the free hand given to the prosecutors, the bargain becomes a coercion sometimes even for the one who is actually guilty and sometimes even for the innocents. It might place an undue pressure upon innocent person to plead guilty. Now the incentive for the prosecutors to coerce the accused into pleading guilty is that they are interested in getting convictions which will project them as efficient[48]. They can do so without even preparing for and conducting the trial. Even the defense lawyer also tries to manipulate his client into pleading guilty. They do so because for the same fee they will only have to negotiate with the prosecutor, instead of conducting a fully fledged trial spending all the labor and time[49]. The affect of such influence is the worst on the innocents.

[47] *Supra*, note 13
[48] *Supra*, note 44
[49] Ibid

- Another factor for the failure of this scheme is because of the lack of resources to successfully implement this scheme. Most of the time an accused is not even aware of the contract that he might be entering into. Apart from the accused the "important point is that 96 percent of Police officials who really works on the ground and are the main part of an investigation of any crime are ignorant of plea bargaining"[50]. It seems like that the "scheme ignores the fact that many lack the resources for proper legal representation and is more a formalization of the unwritten rule of showing leniency to those who plead guilty rather than plea-bargaining".
- Section 265A restricts the application of plea bargaining to the offences for which punishment is less than seven years of imprisonment. This provision completely diverts with the objective with which the concept if introduced. One of the objective of introducing plea bargaining is to reduce the backlog of cases pending in Indian courts especially lower courts. Now, the socio economic offences which are outside the scope of plea bargaining cover many legislations starting from the Dowry Prohibition Act, 1961 to protection of women from Domestic violence act, 2005.[51] Since most the cases that comes before the court are related to these acts, keeping them away from the scope of plea bargaining would defeat the whole purpose of plea bargaining and is a reason for the failure of this scheme.

COMPOUNDING AS A SUCCESS AND BARGAINING AS A FAILURE: DIFFERENCES AND REASONS

Compounding of offences can be defined as "an arrangement or settlement of difference between the injured party and the person against whom the complaint is made."[52] Section 320 of CrPC provides the provision for compounding of offences which provides a remedy in the form of arrangement in the case of certain minor offences, where the interest of the public are not vitally affected in which the complainant should be permitted to come to terms with the party against

[50]Hari Kishan, *Darker side of plea bargaining: The worldwide scenario with future perspectives*, 3 IJARnD 28 (2018).
[51]The Code of Criminal Procedure, 1973, § 265A , No. 2, Acts of Parliament (1974).
[52]Emperor v. Ali Bhai Abdul, 1915 ILR 39 Bom 326.

whom he complains in respect of offences specified in the section.[53] For the purpose of this paper it is not necessary to elaborate the procedure for availing this remedy but it is important to understand the objective and purpose behind coming up with this method of disposal of cases. In the case of *Ramgopal v. State of MP*, the Supreme Court stated that the purpose of compounding is to increase efficiency and further the concept of Restorative Justice under the Indian criminal justice system. Therefore somewhere or the other the objective of both plea bargaining and compounding of offences is to increase efficiency in Indian courts and to provide speedy justice.

In order to understand that why plea bargaining is a failure where compounding is a success, there is first a need to understand the reason of dealing with this aspect. The reason behind discussing this aspect is that since most of the times plea bargaining is considered akin to compounding of offences (which is partially correct), the success of one concept and the failure of another, intrigues the interest in finding the reason behind the existence of such scenario.

Both these methods involve the concept of Alternate Dispute Resolution (ADR) where the lengthy process of trial is avoided by coming to mutually agreed terms. Compounding of offences and plea bargaining both are an attempt to encourage the system of restorative justice. But there lies a very important line of difference between these two concepts. Where plea bargaining is based on admission of guilt by the accused, in compounding of offence there is no admission of guilt by the accused. "Compounding of an offence has the effect of an acquittal."[54]

This particular difference between the two concepts is the root cause of the success of one concept and the failure of another. It is well established that if an accused admits his guilt a stigma will be created against him by the society. And since plea bargaining necessitates the admission of guilt, the fear of being stigmatized encourages the accused to choose compounding of offence over plea bargaining.

PLEA BARGAINING IN INDIA VIS-À-VIS PLEA BARGAINING IN ENGLAND & CANADA

CONCEPT OF PLEA BARGAINING IN ENGLAND

[53]Biswabahan v. Gopen, AIR 1967 SC 895.
[54]Biswabahan v. Gopen, AIR 1967 SC 895.

A very basic theory of common law of procedure and evidence in criminal law is that the guilt of an accused will be determined by a formal adversarial process in which evidence will be presented in front of the court and trial will conducted. However, the system of England somewhat differs from this conventional method. "It has long been recognized, that courts and legal practitioners, in England operate according to a quite different assumption: that the right to be tried by jury will only exceptionally be exercised and that the great majority of cases will be settled by a plea of guilt."[55] The possible reason for this could be that the lower courts in England "are under growing work pressure, and the close professional and social relationships of the legal actors in court make it possible, sometimes even necessary, for deals to be arranged"[56]

This topic in England is a very little discussed subject but is constantly used by the judges and legal practitioners. It is not that plea bargaining in its actual or direct form is excluded in England. The English system produces a number of effective techniques and principles which supports the possibility of activity similar to plea bargaining. For example in one of the studies made by Zander, it was found that 80% of the defendants in the London magistrate courts pleaded guilty.

In 1970, the court of appeals laid down the principles governing plea bargaining in England in the case of *R v. Turner*[57]. The essence of this case was that the court shall not give any advice related to the sentence that should likely be imposed on the accused if he pleads guilty and if he does not pleads guilty. "The only exception to that rule being, that it should be permissible for a judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence."[58] It is said that this case has somewhere restricted the application of plea bargaining.

[55]John Baldwin and Michael McConville, Plea Bargaining and Plea Negotiation in England, 13 Law & Society Review, 287 (1979), https://www.jstor.org/stable/pdf/3053255.pdf?refreqid=excelsior%3Aa0375671a25050c539b7320ab5c35903.
[56]*Supra*, note 39
[57]Philip A Thomas, *Plea Bargaining in England*, 69 Journal of Criminal Law and Criminology, 170
[58]Monty Raphael, *Plea Bargaining and the Role of Lawyer*, EUROPEAN CRIMINAL BAR ASSOCIATION, (27th March, 2021), https://ecba.org/extdocserv/conferences/brat2008/PleaBarg_Monty.pdf

But the report of Royal Commission in 1993 "recommended that Judges should be able to indicate to defense counsel the highest sentence they would impose in response to guilty plea at the point at which the discussion was taking place"[59]. Therefore the actual point of conflict in the concept of plea bargaining comes on the aspect of involvement of judges in the process.

CONCEPT OF PLEA BARGAINING IN CANADA

"For many years, plea bargaining has been one of the most controversial -- and, perhaps, least understood -- practices in the Canadian criminal justice system."[60]It can be understood from the fact that plea bargaining is neither legislatively sanctioned nor prohibited in Canada. In Canada plea bargaining occurs when the attorney on behalf of the defendants feels that their case is not strong or the crown itself feels that his case is not airtight and offers to reduce the charges.

In the plea bargaining model of Canada, victims have no role whatsoever in the entire process. Defendants are also frequently isolated from, ignorant of, or confused by this 'behind-the-scenes' process dominated by lawyers[61]

Since plea bargaining is not completely recognized as a legitimate practice in Canada there are no uniform set of rules governing the process. The whole functioning of this process depends upon the nature and kind of relationship between the magistrate, crown attorney and defense counsel.[62]

COMPARISON OF PLEA BARGAINING MODEL OF INDIA WITH THAT OF ENGLAND AND CANADA

Table 1: Comparative Analysis of Plea Bargaining Models

[59]Sarfaraz Ahmed Khan, *Restorative Justice Under The Criminal Justice System In India: With Special Reference To Plea Bargaining And Compounding Measures*, SSRN (27thMarch,2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566126.
[60]Plea Bargaining in Canada, DEPARTMENT OF JUSTICE (27th March, 2021), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3.html
[61]*Supra*, note 59
[62]Hedeih Nasheri, *Betrayal of Due Process, A Comparative Assessment of plea bargaining in USA & Canada*, (27th March, 2021), http://www.gbv.de/dms/spk/sbb/recht/toc/280258399.pdf

Point of Difference	Plea Bargaining in India	Plea Bargaining in England	Plea Bargaining in Canada
Applicability	Section 265A states that the remedy of plea bargaining can be availed only for the offences for which the punishment is less than seven years of imprisonment. It is not available for socio-economic offences.	Plea bargaining in England extends to all kinds of offences. In England the first case where plea bargaining is formally introduced in a fraud case which is a socio-economic offence.	The code of Canada does not speak of plea bargaining other than in rules 5.1-7 and 5.1-8 in the section "Agreement on Guilty Plea".[63] In these provision no restriction is stated as to the application of plea bargaining. Therefore, plea bargaining in Canada can be used in all kinds of offences.
Codification	The process is well codified under Chapter XXIA of CrPC from section 265A to 265L. It has been introduced through The Criminal Law Amendment, 2005.	The nature of plea bargaining in England is scattered rather than been codified. The criminal justice act, 2003, Criminal courts sentencing act, 2000, Serious Organized Crime and Police Act, 2005	In Canada there is no formal process "by means of which Canadian courts are required to scrutinize the contents of a plea bargain and to ensure that there is adequate protection for the rights and interests of all of the affected parties -- the Crown, the accused,

[63]Zina Lu Burke Scott, *An inconvenient bargain: The Ethical Implications of Plea Bargaining in Canada*, 81 Saskatchewan Law Review 53 (2018).

Point of Difference	Plea Bargaining in India	Plea Bargaining in England	Plea Bargaining in Canada
		contains provisions which regulate plea bargaining.	the victim(s) and members of society in general"[64].
Role of judges	In India Judges plays a very important role in conducting the proceedings of plea bargaining. It is the judge who affirms the voluntariness of the accused and acts as a moderator for all the activities in the process.	The role of judges in England is limited. Their role is somewhere restricted to deciding the sentence which the accused will face if he pleads guilty. The duty of assessing the voluntariness of the accused is divided between the judge and the prosecutor.	The criminal code of Canada does not require the judges to know the existence of a plea bargain in the course of the pre-trail hearings. Also it is not the duty of the court to investigate the circumstance underlying a plea bargain.
Form of practice	It takes the form of a mutually satisfactory disposition where formal negotiations take place, with the judge playing an active role in it. Here	"It takes the form of insinuating reduction of sentence on particular occasions by the judge in discussion with the counsel on both sides.	A pre-trail conference initiated on an application by the prosecutor, the accused or the court, takes place between the prosecutor and the defense counsel presides over by a

[64] *Supra*, note 60

Point of Difference	Plea Bargaining in India	Plea Bargaining in England	Plea Bargaining in Canada
	both the parties and their counsels after the disposition mutually agrees on the terms of the bargain.	It does not involve formal negotiations between the counsels of both the parties."[65]	judge.
Sentence for guilty pleas	The determination of sentence after the plea bargaining is provided under section 265E of the code which states four cases and the punishment that should be provided by the court in each case.	In order to determine the reduction in sentence in cases of plea bargaining, the law in UK divides it on the basis of the stage in the proceedings for the offence at which the accused has applied for plea bargaining.	It is in the complete discretion of the court. "A joint recommendation by the prosecution and defense lawyers regarding the sentence in a case of plea bargaining is not binding on the judge".

SUGGESTIONS AND CONCLUSION

There is no doubt that plea bargaining, if implemented properly will be an asset for our judicial and criminal justice system. But as of now this process has become more of a toll in the hands of the lawyers by which they puts undue pressure and coercive the accused into pleading guilty. Some of the suggestions, the author would like to put forward for the better implementation of this practice are as follows:

[65]Swati Mohapatra, Plea Bargaining: An Analysis in Context of India and UK, ACADEMIA, (29th March, 2021),

1. Instead of involving the court in the process, a competent authority shall be instituted which was suggested by the law commission in its 142nd report.
2. The role of victim in the process is highly neglected by the law makers. It shall also be ensured that the victim has also voluntarily entered into the plea.
3. Proper resources shall be instituted for the better implementation of the process.
4. The involvement of police in the process shall be reduced to minimum.

To conclude it can be said that this concept has been a failure in India and the main reason is not that it is wrong in principle or is a sacrifice of justice. The main reason for the failure is the defect in the practical implementation of the concept. The concept of plea bargaining has been a tremendous success in other developed countries. India is also capable of making this concept a success but it has to be understood that the same parameter for measuring the success of this concept cannot be used for India also. Therefore one has to work for making this a success by keeping in mind the nature of Indian society.

BIBLIOGRAPHY

JOURNALS & BOOKS

1. Zina Lu Burke Scott, *An inconvenient bargain: The Ethical Implications of Plea Bargaining in Canada,* 81 Saskatchewan Law Review 53 (2018).
2. Hari Kishan, *Darker side of plea bargaining: The worldwide scenario with future perspectives,* 3 IJARnD 28 (2018).
3. Jack Wright and Peter W. Lewis, *Plea bargaining in Indian Context,* 34 Modern Criminal Justice 429 (1978).
4. Sonam Kathuria, *The Bargain Has Been Struck: A Case for Plea Bargaining in India,* 19 Student B. REV 55 (2007)
5. Mohd. Ashraf & Absar Aftab Absar, *Plea Bargaining in India: An Appraisal,* 23 ALJ (2015-16) 104.

6. Amrit Pal Kaul & Aarti Goyal, *Justice In Plea Bargaining--Is It A Coercion To Compromise*, Bharati Law Review 213 (2016).
7. Shakeel Ahmad, *Plea-Bargaining and our Criminal Justice System*, 20 ALJ 139 (2012-13).
8. Shaista Amin, *Plea Bargaining an Indian Approach*, 4 GJLDP 67 (2014).
9. Alschuler A.W, Plea Bargaining and Its History, 1 Colum. L. Rev. 3 (1979).
10. R.V Kelkar, *Criminal Procedure*, (7^th^ ed.) 2021.

ONLINE SOURCES

1. LAW COMMISSION OF INDIA, 142^nd^ REPORT ON CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGINING, (20^th^ March, 2021), https://lawcommissionofindia.nic.in/101-169/Report142.pdf.
2. *Nolo Contendere*, LEGAL INFORMATION INSTITUTE, (20^TH^ March, 2021), https://www.law.cornell.edu/wex/nolo_contendere.
3. Rosie Athulya Joseph, *Plea Bargaining: A Means to an End*, MANUPATRA (20^th^ March, 2021), http://www.manupatra.com/roundup/326/Articles/Plea%20bargaining.pdf.
4. Justice JN Bhatt, *For Fast Track Justice Doctrine Of "Nolo Contendere" Does It Not Deserve A Trial?*, LAW COMMISSION OF INDIA, (21^st^ March, 2021), https://lawcommissionofindia.nic.in/adr_conf/nolo%20contendere%204.pdf.
5. Ajay Kumar & Aditya Kumar Singh, *Plea Bargaining: Why it has Failed so Far: Indian Experience*, 4 AEBM, 375 (2017), (21^st^ March, 2021), https://www.krishisanskriti.org/vol_image/23Jul2017060727x25%20%20%20%20%20%20%20%20Ajay%20Kumar%20%20%20%20375-375.pdf.
6. Raj Shekhar & Mohd Rameez Raza**,** *The Catholicon for Indian Criminal Justice System: Tracing the Evolution and Implementation of Plea Bargaining in India*, CCJA, (21^st^ March, 2021), https://ccjarmlnlu.wordpress.com/2020/05/29/the-catholicon-for-indian-

criminal-justice-system-tracing-the-evolution-and-implementation-of-plea-bargaining-in-india/.

7. CRIME IN INDIA, VOL.1, NCRB, 1097 & 1098 (22^nd^ March, 2021) https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%203_0.pdf.

8. BQ Desk, *India's Pending Court Cases on the Rise*, Bloomberg Quint, (22^nd^ March, 2021), https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts.

9. Judiciary: Functions, *Importance and an Essential Quality of Judiciary*, (23^rd^ March, 2021), https://niu.edu.in/sla/online-classes/Judiciary-Functions,-Importance-and-an-Essential-Quality-of-Judiciary.pdf.

10. John Baldwin and Michael McConville, Plea Bargaining and Plea Negotiation in England, 13 Law & Society Review, 287 (1979), https://www.jstor.org/stable/pdf/3053255.pdf?refreqid=excelsior%3Aa0375671a25050c539b7320ab5c35903.

11. Philip A Thomas, *Plea Bargaining in England*, 69 Journal of Criminal Law and Criminology, 170, (1978), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6067&context=jclc.

12. Monty Raphael, *Plea Bargaining and the Role of Lawyer*, EUROPEAN CRIMINAL BAR ASSOCIATION, (27^th^ March, 2021), https://ecba.org/extdocserv/conferences/brat2008/PleaBarg_Monty.pdf.

13. Sarfaraz Ahmed Khan, *Restorative Justice Under The Criminal Justice System In India: With Special Reference To Plea Bargaining And Compounding Measures*, SSRN (27^th^ March,2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566126.

14. Plea Bargaining in Canada, DEPARTMENT OF JUSTICE (27^th^ March, 2021), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3.html.

15. Hedeih Nasheri, *Betrayal of Due Process, A Comparative Assessment of plea bargaining in USA & Canada*, (27^th^ March, 2021), http://www.gbv.de/dms/spk/sbb/recht/toc/280258399.pdf.

16. Swati Mohapatra, Plea Bargaining: An Analysis in Context of India and UK, ACADEMIA, (29^th^ March, 2021), https://www.academia.edu/9589240/PLEA_BARGAINING_AN_ANALYSIS_IN_CONTEXT_OF_INDIA_AND_United_Kingdom.