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# BARGAINING JUSTICE: THE EVOLUTION OF PLEA BARGAINING IN THE INDIAN CRIMINAL JUSTICE SYSTEM

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*Justice delayed is justice denied* - William E. Gladstone, Former Prime  
Minister of the United Kingdom

## ABSTRACT

This paper traces the evolution of plea bargaining in the Indian criminal justice system, focusing on the post-independence development and codification of the concept of plea bargaining. While plea bargaining provides a simple, fast and inexpensive solution to dispose of cases quickly in a country like India, its utilization is negligible in contemporary times. Employing a doctrinal research method, this study examines reports of the law commission, report of the Justice Malimath committee, landmark decisions of the Hon'ble Supreme court as well as High Court and the provisions of the Code of Criminal Procedure, 1973 as well as the Bhartiya Nagarik Suraksha Sanhita, 2023 to map the trajectory of plea bargaining in the Indian criminal justice system. The paper reveals a shift from a narrow-minded approach towards plea bargaining to its legitimate codification. This paper concludes that, though plea bargaining has worked exceptionally in the west, the Indian diaspora is not yet ready to accept and utilize it.

**Keywords:** Plea Bargaining, Negotiation, Criminal, Justice, Criminal justice system, India, American, United States, Criminal Procedure Code, Bhartiya Nagarik Suraksha Sanhita

**Aim:** The aim of this paper is to trace the evolution of Plea bargaining in the Indian Criminal justice system and its contemporary relevance

**Objective:** In line with the aim of this paper, the primary objective of this paper is to trace the origin, scope and functioning of plea bargaining in the Indian criminal justice system. The paper also analyses the contemporary relevance of plea bargaining in India.

## I. Introduction

The concept of plea bargaining as we utilize in the current Indian criminal justice system is quite novel to India as it has been developed in the west. Plea bargaining in the modern form is the birth child of the American jurisprudence of the late 19<sup>th</sup> to Early 20<sup>th</sup> century. It is based upon the principle of “*Nolo Contendere*”, a Latin term which translates to “I do not wish to contend”. Plea bargaining gained its popularity in the United States as the conventional system for conducting trials was lengthy and expensive. and currently, approximately 98% of the convictions in the United States come from guilty pleas.<sup>1</sup>

According to the Black’s Law dictionary<sup>2</sup> Plea bargaining means, “*A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges*”. And from a legal point of view, plea bargaining is said to be a process where an accused is allowed to negotiate with the prosecution in exchange for the admission of their guilt of the crime they are accused of or a lesser crime. In Simple terms, Plea bargaining can be termed as an act of discussing, negotiating and requesting an agreement between the accused and the prosecution.

Plea bargaining as a concept was and is not greatly popular in India. Indian jurists have argued that plea bargaining is against the principles of the Indian constitution. The main argument of against plea bargaining has been that it violates the Article 20 (3)<sup>3</sup> of protection against self-incrimination and can be used to exploit the marginalized community. But eventually plea bargaining has been codified into the Indian law.

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<sup>1</sup> American Bar Association

<sup>2</sup> 8<sup>th</sup> Edition 2004

<sup>3</sup> Article 20 (3): No person accused of any offence shall be compelled to be a witness against himself.

## II. Historical development of plea bargaining

Plea bargaining can be traced back to some of the practices of ancient Rome and Athens. Practice of “*in iure cessio*”<sup>4</sup> in Rome and “Sycophancy”<sup>5</sup> in Ancient Athens are similar to plea bargaining. In India, admission of one’s own guilt has had a deeply spiritual, philosophical as well as legal significance. Ancient Indian law gave great significance to confession, i.e. the confession of one’s own sin. From the Rig Veda to the Manusmriti<sup>6</sup> to Narada’s book of Laws the ethos of confessing to your own sin and admission of your guilt is signified. But, admission of one’s guilt only purifies one from his Dharmic, not legal. Kautilya in his *Arthashastra* as well as the writers of the Gupta period also discussed about admission of one’s own guilt. Thus, it can be observed that the basic concept of confessing one’s sin was prevalent throughout the history of Indian Dharmic law but no formal and structured system like the modern concept of plea bargaining was provided.

The development of the modern concept of plea bargaining as we know and use today started in the 19<sup>th</sup> Century United States when India was still under British Raj. During the British rule in India, the Indian legal system was greatly revolutionized. A great deal of reforms was introduced by the British but, the colonial legislation did not introduce anything like plea bargaining. After India gained its independence, plea bargaining had begun to gain a great amount of traction in the western jurisprudence.

In the beginning of the 20<sup>th</sup> Century, there was an increase in the number of cases in the United States due to the “Prohibition era”. At that time, the prosecutors started using plea bargaining as a tool to ensure convictions and speedy trials. Although, many cases were disposed of using this method, plea bargaining was not yet formalised in the United States. Until the landmark decision of *Brady v. United States*<sup>7</sup> in the year 1970 which upheld the constitutional validity of plea bargaining in the United States.

India didn’t feel a need to introduce plea bargaining formally into its jurisprudence as plea bargaining was frowned upon by several critics and jurists. But, several reports of the law

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<sup>4</sup> Latin term translating to “Surrender in law”

<sup>5</sup> Behaviour in which someone praises powerful or rich people in a way that is not sincere, usually in order to get some advantage from them

<sup>6</sup> यथा यथा नरोऽधर्मं स्वयं कृत्वाऽनुभाषते ।  
तथा तथा त्ववैवाहिस्तेनाधर्मेण मुच्यते ॥ २२८ ॥

<sup>7</sup> 397 U.S 742

commission underlined a need of a practice like plea bargaining in India's criminal justice system. Finally, with the report of the Justice Malimath committee the need for plea bargaining was critically highlighted. Thus, the Criminal Law (Amendment) Act, 2005<sup>8</sup> was passed in the parliament which introduced Chapter XXI-A of Plea bargaining in the Code of Criminal Procedure (CrPC), 1973 in the year 2006.

### **III. Reports of the Law Commission and Justice Malimath Committee**

In the year 1991 the 142<sup>nd</sup> report of the law commission on "Concessional treatment of the offenders who on their own initiative choose to plead guilty without any bargaining" was published. The idea which was at the centre of discussion in this report was that the offenders who on their own, without any bargaining with the prosecution plead guilty could be granted concessional treatment. This report took the success and effectiveness of the American model of plea bargaining in consideration. Also, the report stated that such practice of plea bargaining would be in line with the constitutional principles and the principles of fairness. A survey was also conducted to support the report which showed that the legal community was positive towards adoption of such practice.

Then, in the year 1996 the 154<sup>th</sup> report of the law commission on "The Criminal procedure Code, 1973" was published. In this report it was urged to introduce plea bargaining to lessen the backlog of criminal cases and to help the under-trial prisoners. The report proposed an "experimental" scheme limited to offences punishable with less than 7 years of imprisonment, including offences under section 320<sup>9</sup> of the CrPC, 1973.

Then, again in the 171<sup>st</sup> report of the law commission published in 2002 the idea of introduction of plea bargaining was discussed. Later, in 2003 a committee headed by Justice V.S. Malimath, Former Chief Justice of Kerala and Karnataka High Courts was formed to advice upon the growing number of criminal cases in India. The recommendations in the report of the Malimath committee were in line with the recommendations of the 154<sup>th</sup> law commission report. The committee observed a need to introduce plea bargaining as a reform to reduce the burden of the courts as well as to ensure speedy disposal of cases. This report also pointed to the success of the American model of plea bargaining to further their point.

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<sup>8</sup> Act 2 of 2006

<sup>9</sup> Section 320. Compounding of offences

Lastly, Plea bargaining was formally codified and introduced in the CrPC, 1973 via the Criminal Law (Amendment) Act, 2005. Through this act section 265A to 265L were introduced in a new chapter XXIA of Plea Bargaining in the CrPC, 1973. Currently, after the introduction of new criminal laws in 2023, the provisions related to plea bargaining can now be read in the chapter XXXIII of plea bargaining in section 289 to 300 of the Bhartiya Nagarik Suraksha Sanhita, 2023.

#### IV. Judicial interpretation

Before the reforms of 2005 plea bargaining was criticized by the Indian Judiciary. The Apex Court was of the view that plea bargaining would be rather unconstitutional, illegal and would promote corruption and most importantly pollute the pure fount of justice.<sup>10</sup>

Further, the Apex Court disapproving the notion of plea bargaining was of the view 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 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 and for the same reason we would refrain from accepting the suggestion of Mr. Nuruddin Ahmed that we should increase the fine with a view to reducing the sentence of imprisonment."*<sup>11</sup>

Moreover, while observing the condemnation of the notion of plea bargaining by western jurists the hon'ble Supreme Court was of the view that, *"The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly justify it philosophically as a sentence concession to a defendant who has, by his plea 'aided in ensuring the prompt and certain application of correctional measures to him', 'In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute ... finds itself in the field of criminal law, 'Law Enforcement' repudiates the idea of compromise as immoral, or at best a necessary evil. The 'State' can never compromise. It must enforce the law." Therefore, open methods of com-*

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<sup>10</sup> *Kachhia Patel Shantilal Koderlal v. State of Gujarat*, 1980 3 SCC

<sup>11</sup> *Madanlal Ram Chandra Daga & Ors v. State of Maharashtra*, AIR 1968 SC 1267

*promise are impossible.”<sup>12</sup>*

Subsequently, the hon’ble Supreme Court laid down how plea bargaining would be violative of the principles under Article 21, *“It is obvious that such conviction based on the plea of guilty entered by the appellant as a result of plea bargaining cannot be sustained. It is to our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurements being held out to him that if enters a plea of guilty, he will be let off very lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of the new activist dimension of Article 21 of Constitution unfolded in the case of Maneka Gandhi v. Union of India, [1978] 1 SCC 248. It would have the effect of polluting the pure fount of justice, because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial which, having regard to our cumbrous and unsatisfactory system of administration of justice, is not only long drawn out and ruinous in terms of time and money, but also uncertain and unpredictable in its result and the judge also might be likely to be deflected from the path of duty to do justice and he might either convict an innocent accused by accepting the plea of guilty or let off a guilty accused with a light sentence, thus, subverting the process of law and frustrating the social objective and purpose of the anti-adulteration statute. This practice would also tend to encourage corruption and collusion and as a direct consequence, contribute to the lowering of the standard of justice. There is no doubt in our mind that the conviction of an accused based on a plea of guilty entered by him as a result of plea bargaining with the prosecution and the magistrate must be held to be unconstitutional and illegal.”<sup>13</sup>*

Further, in the case of *State of UP v. Chandrika*<sup>14</sup> the court was of the view that, *“Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the Court that as he is pleading guilty sentence be reduced.”*

But, in the case of *State of Gujarat v. Natwar Harchanji Thakor*<sup>15</sup> a fresh view could be observed. Here, the Gujarat High court suggested that plea bargaining could be reformatory in the Indian justice system. The court held that, *“To reduce the delay in the disposal of criminal*

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<sup>12</sup> Murlidhar Meghraj Loya Etc vs State of Maharashtra Etc, AIR 1976 SC 1929

<sup>13</sup> Kasambhai Ardul Rehmanbhai Shaikh vs State of Gujarat & Anr, (1980) 3 SCC 120

<sup>14</sup> AIR 2000 SC 164

<sup>15</sup> 2005 CrL.L.J. 2957 (Guj)

*trials and appeals as also to alleviate the suffering of undertrial prisoners, as well as, their dependents and keeping in mind the real purpose of Victimology, it has been rightly proposed to introduce the concept of "plea bargaining", as recommended by the Law Commission of India, in its 154th Report, on the Code of Criminal Procedure. The Committee of Criminal Justice Reforms under the Chairmanship of Dr. (Justice) V.S. Malimath (formerly, Chief Justice of the Kerala High Court), has also endorsed the Commission's recommendations, as well as, by Review Committee on Constitutional Reforms. The system of plea bargaining (as recommended by the Law Commission of India in its Report) should be introduced, as part of the process of decriminalisation. It means pre-trial negotiations between the parties during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. The benefit of "plea bargaining" would, however, not be admissible to habitual offenders."*

The court in this case rightly pointed out that plea bargaining has no legitimate standing until now but the idea of the same being introduced formally in our statutes would be revolutionary.

#### **V. Practical application of plea bargaining in Indian criminal justice system**

Initially plea bargaining was introduced via an amendment in the CrPC, 1973 but, after the introduction of new reforms of the major criminal laws the application and the procedure of plea bargaining is now laid down in the Section 289 to section 300 of the Chapter XXIII of the Bhartiya Nagarik Suraksha Sanhita, 2023. The comparison of the change in provisions is as follows:

| <b>BNSS,<br/>2023</b> | <b>CrPC,<br/>1973</b> | <b>Section title</b>                                                             |
|-----------------------|-----------------------|----------------------------------------------------------------------------------|
| 289                   | 265A                  | <i>Application of Chapter.</i>                                                   |
| 290                   | 265B                  | <i>Application for plea bargaining.</i>                                          |
| 291                   | 265C                  | <i>Guidelines for mutually satisfactory disposition.</i>                         |
| 292                   | 265D                  | <i>Report of mutually satisfactory disposition to be submitted before Court.</i> |
| 293                   | 265E                  | <i>Disposal of case.</i>                                                         |
| 294                   | 265F                  | <i>Judgement of Court.</i>                                                       |

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|-----|------|-------------------------------------------------------------------------------------------------|
| 295 | 265G | <i>Finality of judgement.</i>                                                                   |
| 296 | 265H | <i>Power of Court in plea bargaining.</i>                                                       |
| 297 | 265I | <i>Period of detention undergone by accused to be set off against sentence of imprisonment.</i> |
| 298 | 265J | <i>Savings</i>                                                                                  |
| 299 | 265K | <i>Statements of accused not to be used</i>                                                     |
| 300 | 265L | <i>Non-application of Chapter</i>                                                               |

Plea bargaining being borrowed from the US could not be copied as it is for India. It was adapted for the Indian conditions. Hence, mainly 3 types of plea bargaining prevail in India:

1. **Sentence Bargaining:** According to Black's Law Dictionary<sup>16</sup>, "*A plea bargain in which a prosecutor agrees to recommend a lighter sentence in exchange for a plea of either guilty or no contest from the defendant*". In simple terms, the accused pleads for a lesser sentence.
2. **Charge Bargaining:** According to Black's Law Dictionary<sup>17</sup>, "*A plea bargain in which a prosecutor agrees to drop some of the counts or reduce the charge to a less serious offense in exchange for a plea of either guilty or no contest from the defendant*". In simple terms, the accused plead guilty to a lesser charge.
3. **Fact Bargaining:** The accused agrees to admit certain facts only and in return prosecution agrees not to introduce certain other facts. This method is very rarely used in India.

Practically plea bargaining has a relatively narrow scope as it is applicable only for offences punishable with imprisonment up to 7 years and is not applicable to the offences affecting the socio-economic condition of the country and offences committed against women or a child below the age of 14 years<sup>18</sup>. Hence, plea bargaining in India compared to its American counterpart is heavily underutilized. Only 0.11% of the cases were resolved through plea

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<sup>16</sup> *Supra n 2*

<sup>17</sup> *Supra n 2*

<sup>18</sup> *Section 289 of BNSS, 2023*

bargaining in 2022<sup>19</sup>. Further, according to recent data from the National Judicial Data Grid (NJDG), India has currently more than 4.5 crores of cases pending in 2025<sup>20</sup> many of which could be easily resolved through plea bargaining.

During COVID-19 pandemic, the courts tried to encourage the use of plea bargaining in petty criminal cases to reduce prison overcrowding. Further, judicial officers have been encouraging the use of plea bargaining in the cases under section 138<sup>21</sup> of the Negotiable Instruments Act, 1881. Several High Courts have also endorsed plea bargaining in minor assaults and traffic offences.

## VI. Critical analysis

The intended goal of the introduction of the concept of plea bargaining was to reduce the burden from the courts but in reality, as it can be applied to a certain type of offences only it is still far from being a major contributor in relieving the burden of cases from the trial courts. Compared to the practices of mediation and Lok Adalat plea bargaining has not been able to gather much success in the Indian Criminal Justice System. Further, due to social stigma around admission of guilt and lack of awareness regarding this practice among the accused, lawyer and even courts result in its gross underutilization.

There is also a risk of convicting the wrong person involved in the cases resolved through plea bargaining. This notion could be observed globally as many a times the persons accused of a crime opt for plea bargaining to avoid the harsh trial procedures. In the Indian context, income inequality, harsh conditions of the under-trial prisoners and delays in the judicial process could make an innocent person bargain a plea without understanding the consequences of doing the same. This would defeat the whole meaning of providing free and fair justice.

## VII. Conclusion

The reform of plea bargaining is and was a well-intentioned reform which aimed at reducing the burden of the trial courts and cutting delays in justice. Its full potential is yet to be utilized in the Indian criminal justice system. The lack of awareness, social stigma and most importantly statutory restrictions plea bargaining has remained highly ignored, which needs to

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<sup>19</sup> Report reveals minimal use of plea bargaining in India, the Hindu

<sup>20</sup> National Judicial Data Grid

<sup>21</sup> Section 138. Dishonour of cheque for insufficiency, etc., of funds in the account

be changed.

Plea bargaining in India with careful reform could prove itself to be as impactful as it has been in the US. Reforms such as expanding its scope to include more non-serious offences under its ambit, spreading awareness to the persons accused of offences, providing legal aid to the accused and ensuring fair victim compensation should be introduced in the criminal justice system. Lastly, with proper careful reforms plea bargaining can be evolved from a mere procedural tool to a core mechanism for fair and efficient criminal justice in India.

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