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# EXAMINING THE FACETS OF IMPLEMENTING PLEA BARGAINING IN INDIA

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## **I. Introduction to the Indian Criminal Justice System**

The Indian Criminal Justice system (“CJS”) is an institution comprised of multiple law enforcement organs that serve the purpose of regulation of crime, penalization of offenders and providing justice to those who have been wronged. The CJS is primarily based on the ‘adversarial system’ of law, a legacy of the colonial era. Procedurally, the CJS involves a long and complex procedure, beginning from the commission of the offence. Once the act has taken place, the victim or a witness may approach the Police and register a ‘First Information Report’ (“FIR”). Thereafter, the Police, once they are satisfied that the act constitutes a cognizable offence, shall commence investigation. The investigation period ranges from 60 to 90 days for crimes committed under the Bharatiya Nyaya Sanhita, 2023 and formerly the Indian Penal Code, 1860 and for special statutes such as the Unlawful Activities (Prevention) Act, 1967, a longer period is prescribed. On completion of investigation, the Police or Central Bureau of Investigation (“CBI”), whichever authority has been assigned the case, must file a chargesheet, containing all the crimes, that upon investigation and acquisition of requisite proof, the investigating authority believes that the suspect is guilty of. After this process is completed, the court which has jurisdiction takes cognizance and the trial process is commenced. This long and tiresome process has led to an immense number of pending cases and is psychologically taxing on all involved parties. Although the judiciary is the most trusted organ of the State, a new mechanism for speedier delivery of justice is required, to ensure the efficiency of the CJS. Alternative Dispute Resolution (ADR) has been integrated into the CJS of several other systems and has yielded satisfactory results, not only in terms of efficiency but also proving less strenuous on the victims and perpetrators. Through an analysis of the Indian legal framework, this paper seeks to examine whether the introduction of alternate mechanisms of dispute resolution, through plea bargaining, in the criminal justice system would be feasible in the Indian context and whether it will aid the transformation of the criminal justice system from retributive to restorative.

## II. Plea Bargaining:

Plea Bargaining is “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”.<sup>1</sup> Plea bargaining is a method commonly used to speed up the lengthy procedure of the Criminal Justice System, typically practiced in the United States of America and the United Kingdom. There are two types of plea bargaining, namely charge bargaining, wherein “a defendant may plea his/her guilt and negotiate to reduce the number of criminal charges that a prosecution may bring against him/her”,<sup>2</sup> and sentence bargaining, wherein “a defendant may plea for specific charges brought against him/her and negotiate for lower sentence against those charges”.<sup>3</sup> Plea bargaining has existed as an informal practice for centuries, but was formalized in the case of *Brady v. United States*,<sup>4</sup> wherein the Supreme Court of the United States upheld the constitutional validity of plea bargaining.

In the Indian Context, the constitutional validity of plea bargaining in India was decided by the apex court in *Murlidhar Meghraj Loya v. State of Maharashtra*,<sup>5</sup> wherein it was ruled that the process of plea bargaining “intrudes on society’s interests by opposing society’s decision expressed through pre-determined legislative fixation of minimum sentences and by subtly subverting the mandate of the law”,<sup>6</sup> and thereby declared it as unconstitutional. However, in 2005, vide the Criminal Law (Amendment) Act, 2005, plea bargaining was introduced in the Code of Criminal Procedure (“Cr.P.C.”) in Chapter XXIA, which is now Chapter XXIV of the Bharatiya Nagarik Suraksha Sanhita, 2023. According to section 290 of the new statute, “a person accused of an offence may file an application for plea bargaining within a period of thirty days from the date of framing of charge in the Court in which such offence is pending for trial”.<sup>7</sup> The application must contain a brief description of the case, including the offence and shall be accompanied by an affidavit, whereby the accused swears that he has voluntarily opted for plea bargaining after understanding the nature and extent of punishment provided

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<sup>1</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

<sup>2</sup> Jamila A. Chowdhury, 'ADR in Criminal Cases and Decriminalisation of Violence: A Gender Perspective' (2016) 7 Indian JL & Just 1.

<sup>3</sup> Jamila A. Chowdhury, 'ADR in Criminal Cases and Decriminalisation of Violence: A Gender Perspective' (2016) 7 Indian JL & Just 1.

<sup>4</sup> 397 U.S. 742 (1970).

<sup>5</sup> 1976 AIR 1929.

<sup>6</sup> 1976 AIR 1929.

<sup>7</sup> §290(1), The Bharatiya Nagarik Suraksha Sanhita, 2023.

under the law for the offence. A necessary condition is that the accused must not have any antecedents. Although initially, the Supreme Court had adjudicated upon the concept and deemed it unconstitutional, since the amendment, the process has been considered mandatory and as laid down by the Kerala High Court in the case of *P.J. Joseph v. State of Kerala*,<sup>8</sup> “if such mandatory procedures are violated, then it will amount to denial of the procedural safeguards, which are inbuilt as due process in Article 21 of the Constitution of India and the corollary of such failure to observe those procedures would amount to deprivation of the personal rights of an accused on account of his conviction”.<sup>9</sup> However, there are several fallacies in the provision, as well as procedural lapses which render the implementation of the practice impossible and procedurally unsound, given the current legal framework.

### **III. Why the implementation of Plea Bargaining is not feasible in India:**

#### **A. Right Against Self-Incrimination**

The Right against Self-Incrimination is deeply engrained in the Indian legal system, through Article 20(3) of the Constitution of India, which states that “no person accused of any offence shall be compelled to be a witness against himself”.<sup>10</sup> In essence, the Constitutional scheme safeguards the rights of any person who may have committed a crime from incriminating himself by virtue of a confession, unless it is voluntary. In the case of *Kasambhai Abdulrehmanbhai Sheikh v. State of Gujarat*,<sup>11</sup> the Supreme Court ruled that it is “contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty he will be let off”,<sup>12</sup> and that such procedure would be “clearly unreasonable, unfair and unjust and would be violative of this new activist dimension of Article 21 of the Constitution”.<sup>13</sup> Additionally, according to the ruling of the Apex Court in *Aghnoo Nagesia v. State of Bihar*,<sup>14</sup> if a statement contains an admission of an offence, every other admission of an incriminating fact contained in the statement is part of the confession, but not the admission of the commission of the offence.<sup>15</sup> As per Section 22 of

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<sup>8</sup> AIR 1958 SC 296.

<sup>9</sup> AIR 1958 SC 296.

<sup>10</sup> Art. 20(3), The Constitution of India, 1950.

<sup>11</sup> AIR 1980 SC 854.

<sup>12</sup> AIR 1980 SC 854.

<sup>13</sup> AIR 1980 SC 854.

<sup>14</sup> AIR 1966 SC 119.

<sup>15</sup> AIR 1966 SC 119.

the new Bharatiya Sakshya Adhiniyam, 2023, (formerly, the Indian Evidence Act, 1872) a “confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, coercion or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him”.<sup>16</sup> The wording of this provision, specifically “having reference to the charge against the accused person”, implies that any inducement pertaining to the charge that the accused is facing renders the confession inadmissible. With regards to plea bargaining, it can be understood that pleading guilty to a crime would amount to a confession and since such confession has been made under the premise of a ‘promise’ of leniency in sentencing, such confession cannot be considered admissible in a Court of law. If the Constitutional framework clearly lays down a safeguard against self-incrimination, implementing plea bargaining as a regularised process will be contrary to legally established and widely accepted procedure.

## **B. Procedural Lapses**

In India, the adversarial system of trial is followed, whereby a person is considered innocent until proven guilty. As elucidated earlier, the investigation and trial process in India are designed in a way that it provides an equal footing for the victim and the accused to present their case before an impartial judge who will decide the case based on merits and the evidence provided. “A prosecutor engages in plea bargaining when he gets a criminal defendant to plead guilt and relinquish his right to trial in return for a more lenient criminal sentence than would be imposed if the defendant were found guilty after trial”.<sup>17</sup> If plea bargaining is to be implemented, it would interfere with the unbiased process that is already established, by putting a stop to the trial and examination of evidence by the judge, and instead agree to a reduced sentence, but still admit to guilt, whether or not the accused is actually guilty. The current mechanism for plea bargaining enables persons accused for crimes with a sentence not exceeding seven years to utilise this alternative dispute

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<sup>16</sup> §22, The Bharatiya Sakshya Adhiniyam, 2023.

<sup>17</sup> Rajasri Reddy Dwarampudi, 'Alternate Dispute Resolution Mechanisms, Plea Bargaining and Criminal Justice System in India: A Critical and Analytical Study' (2023) 5 Indian JL & Legal Rsch 1.

resolution mechanism. Offences such as causing death due to negligence, attempt to commit culpable homicide, voluntarily causing grievous hurt, etc. can be resolved through plea bargaining. However, persons who are accused of more serious crimes cannot avail of this remedy, even though there may be mitigating circumstances. For example, Section 107 of the Bharatiya Nyaya Sanhita, 2023 pertains to attempt to murder, wherein the prescribed sentence is ten years which could also extend to life imprisonment, while Section 108, which pertains to attempt to commit culpable homicide has a prescribed sentence of three years which can only be extended to seven years. Culpable homicide and murder are often used interchangeably, although proving murder requires a higher threshold of knowledge and intent. However, both these provisions merely deal with the attempt, and not the actual commission of the act. The distinction made between offences for which plea bargaining is permissible and those where it cannot be utilised is not legally sound. If such remedy is to exist, it should extend to all offences under the penal code. Additionally, there exists a lack of legal formality in the process of plea bargaining, wherein the process of negotiation within the plea bargain itself is not legitimate and requires intervention of the Court. One of the foremost arguments in favour of plea bargaining is that it is a speedier process that circumvents litigation. However, as per the statute, the accused has thirty days from the date of framing of charge to file his application, following which the Court shall issue notice to the Public Prosecutor and the accused to appear on a fixed date.<sup>18</sup> Following the appearance, the Court must provide upto sixty days to work out a mutually satisfactory disposition. Finally, it is upto the discretion of the Court whether the application is to be permitted or not, based on its voluntariness. The process clearly does not serve as a means to resolve a dispute outside of the Court because the Court is inevitably involved.

### C. Waiver of Right to Appeal

As per Section 295 of the BNSS, “the judgement delivered by the Court under this section shall be final and no appeal...shall lie in any Court against such judgement”.<sup>19</sup> An application for plea bargaining will *ipso facto* waive the accused’s right to appeal. It is against the interests of accused persons to lose a forum for further remedy, if and when required. Apart from Special Leave Petitions under Article 136 and Writ Petitions under Articles 226 and 227, no challenge can be made to the final plea bargain. This goes against

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<sup>18</sup> §290, The Bharatiya Nagarik Suraksha Sanhita, 2023.

<sup>19</sup> §295, The Bharatiya Nagarik Suraksha Sanhita, 2023.

the essence of the Constitution, which regards the right to appeal as an implicit right under Article 21. This affects the victim primarily because the State, through the Public Prosecutor makes the plea bargain with the accused, with a reduced sentence. Further, the victim is not made a party to the process and therefore “he sees the process as not vindicative of his interests as promised by law- almost a denial of justice to him”.<sup>20</sup> This may be perceived as an unjust decision by the victim, who seeks justice from the Court. In such situation, the victim cannot appeal for enhancement of sentence, thereby infringing upon their right.

#### **D. Coercion and Duress**

Plea bargaining in certain scenarios benefits the law enforcement authorities like the police and the CBI, as they are able to avoid trial. During the trial, the judge not only addresses the culpability of the accused, but also checks whether the procedure established by law has been followed during the investigation period. This process “keeps a check on the illegalities and excesses by the police”.<sup>21</sup> Additionally, due to the prevalence of corruption, it is extremely important that the Courts oversee the investigation and subsequent processes. “Non-trial would keep these deviations under cover. In addition to there being no check to find them, it will also motivate the police to avoid trial by extracting a plea of guilt”.<sup>22</sup> Organised crime is extremely prevalent, and it is often seen that the leader of such crime syndicate would coerce his/her subordinates to take the plea, in order to avoid further action taken during trial. They would be “keen to plead guilty to conceal the modus operandi, and also bargain a lesser sentence”.<sup>23</sup> Several persons that are being charged with a crime may agree to the plea, thinking that it would be their best option, given the common man’s distrust of the judiciary. Further, under pressure from the prosecutors, police and judge, an accused who may even be innocent would be compelled to plead guilty.<sup>24</sup>

#### **E. The Indian Demography**

The Indian demography displays a wide gap between the educated, urban dwellers and the rural persons, wherein a vast majority of people, owing to illiteracy, are unaware of their

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<sup>20</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

<sup>21</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

<sup>22</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

<sup>23</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

<sup>24</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

rights and legal processes. Additionally, due to the several barriers in access to justice, particularly for those from disadvantaged socio-economic backgrounds, access to a good, competent lawyer is not always possible. In such situations, the best interests of the victim and perpetrator cannot be adequately put forth. Additionally, if a person is unaware of the legal remedies available to them, they would not know of the existence of such options, which may disadvantage them. Additionally, “it is only a socially or economically weak person who is afraid of the trial, even if he is innocent. Using plea bargaining instead of strengthening the investigation and trial process will result in punishing the weaker persons only”.<sup>25</sup>

#### **IV. Why the implementation of Plea Bargaining in India is feasible:**

##### **A. Solving the Problem of Overcrowding in Prisons**

Due to the pendency of cases in criminal courts around the country, there is a large population of undertrial prisoners in jails. The National Crime Records Bureau (NCRB), in their Prison Statistics India (2022) report revealed that 75.8% of prison population comprises of undertrial prisoners.<sup>26</sup> The socio-economic conditions of most prisoners and their inability to furnish bail even when granted by the Court, is one major reason for overcrowding of prisons. The implementation of plea bargaining would resolve this issue, as plea bargaining is a pre-trial procedure. Since the settlement is made prior to the trial and the accused admits to his/her guilt and accepts a sentence, the accused would then be classified as a convict and not an ‘undertrial’. With an increase in the number of cases settled through plea bargaining, comes a reduction in the undertrial population in prisons.

##### **B. Transformation of the Criminal Justice System from Retributive to Restorative**

With the introduction of the revised criminal law acts, we were able to decipher the legislature’s intent to transform the criminal justice system from punitive and retributive to restorative. The previous set of laws were all a legacy of India’s colonial history, and the new bills serve as an attempt to decolonise the legal system, creating laws that focus less

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<sup>25</sup> Mathur JK, ‘PLEA BARGAINING—IN INDIAN CONTEXT’ (1992) 34 Journal of the Indian Law Institute 429.

<sup>26</sup> Singh U, ‘Prison Statistics India 2022: Above 75% Prisoners Are under Trials, Actual Occupancy of 131% in Indian Prisons; 1.9% Incidence of Recidivism; Reasons of 63 Unnatural Deaths in Prisons Un Known’ (*Live Law*, 7 December 2023) <<https://www.livelaw.in/news-updates/ncrb-releases-prison-statistics-india-report-2022-243973>> accessed 9 April 2024.

on the draconian system of punishments and more on the rehabilitation and reintegration of convicted persons into mainstream society. “ADR in the criminal context is indicative of a movement toward restorative justice, that sees offences or crimes as violation of an individual’s rights by another and stresses easing the victim’s suffering in a criminal context”.<sup>27</sup> The retributive system focuses on making a person repent for their actions, and by inflicting severe punishments for an offence, produce a deterring effect for other persons. The restorative model focuses on rehabilitating the offenders, understanding their needs and helping them in becoming a productive member of society. It is often seen, that for persons with relatively long sentences, due to the lack of income generated in the period that they were incarcerated, they face severe financial troubles and even turn destitute, often causing them to commit more crimes to make ends meet, simply repeating the cycle of crime. The restorative model, in turn enables convicts to seek the help they require and learn skills which would help them earn a living once they are released.

### C. Right to Speedy Trial

The Right to Speedy Trial is an implicit right under Article 21 of the Constitution and was reaffirmed in the case of *Abdul Rahman Antulay v. R.S. Nayak*,<sup>28</sup> wherein the Apex Court held that “Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily”.<sup>29</sup> The primary advantage of alternative dispute resolution is that it “provides faster resolution of disputes compared to the traditional court system”.<sup>30</sup> Since the current framework for plea bargaining only pertains to crimes with sentences only upto seven years, it allows the judiciary to focus on the trial of cases of a more serious nature, and not be bogged down with petty crimes that can be resolved without trial.

### D. Victim Compensation

Under Section 291 of the Bharatiya Nagarik Suraksha Sanhita, 2023, the Court issues notice to the Public Prosecutor, the investigating officer, the accused and the victim to participate

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<sup>27</sup> Satakchhi Priya Verma, 'ADRS in Criminal Justice System: An Indian Perspective' (2022-2023) 4 Indian JL & Legal Rsch 1.

<sup>28</sup> 1992 1 SCC 225.

<sup>29</sup> 1992 1 SCC 225.

<sup>30</sup> Rajasri Reddy Dwarampudi, 'Alternate Dispute Resolution Mechanisms, Plea Bargaining and Criminal Justice System in India: A Critical and Analytical Study' (2023) 5 Indian JL & Legal Rsch 1.

in a meeting to work out a mutually satisfactory disposition of the case.<sup>31</sup> In this meeting, “the negotiation of such a mutually agreeable settlement is left to the prosecutor and the defendant’s free will”,<sup>32</sup> and that “if a settlement is reached, the court might grant the victim compensation”.<sup>33</sup> With regards to the nature of crimes that fall under the ambit of Chapter XXIV, monetary compensation would benefit the victim, considering that they are possibly victims of economic crimes. Additionally, it provides remedies other than watching the perpetrators of the offence serve a prison sentence, which in several contexts may have more utility.

## V. Conclusion

In consideration of all the points made above, I am of the opinion that the implementation of plea bargaining in the Indian jurisdiction is not feasible, since it is contrary to the Right Against Self-Incrimination, a Constitutional safeguard. The provisions of the Bharatiya Nagarik Suraksha Sanhita, 2023 cannot overrule the Constitution of India. Additionally, given the demography of the country and the prevalence of custodial duress, plea bargaining would serve as a means to convict people without properly examining the procedure of investigation, the evidence and the circumstances of the crime which may even serve as a mitigating factor. The primary argument in favour of plea bargaining is that it reduces the workload of the Courts; however, since plea bargaining cannot occur without the intervention and adjudication of the Court, this argument stands refuted. Indeed, it is a speedier process, but merely hastening the procedure does not ensure that justice is served. In light of the aforementioned reasons, plea bargaining cannot become a widespread, preferred means of resolving disputes in the criminal justice system. In order to enable its seamless implementation, several legal frameworks must be amended; for example, Article 20(3) should be amended so as to include an exception for an application of plea bargaining under Section 290 of the Bharatiya Nagarik Suraksha Sanhita, 2023.

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<sup>31</sup> §291, The Bharatiya Nagarik Suraksha Sanhita, 2023.

<sup>32</sup> Rajasri Reddy Dwarampudi, 'Alternate Dispute Resolution Mechanisms, Plea Bargaining and Criminal Justice System in India: A Critical and Analytical Study' (2023) 5 Indian JL & Legal Rsch 1.

<sup>33</sup> Rajasri Reddy Dwarampudi, 'Alternate Dispute Resolution Mechanisms, Plea Bargaining and Criminal Justice System in India: A Critical and Analytical Study' (2023) 5 Indian JL & Legal Rsch 1.