

# Plea Bargaining – Procedure with Victimology Approach : An Analysis

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## Introduction:

The golden principle of “Presumption of Innocence” of Criminal Justice System favours towards the accused or the person alleged to have committed an offence. The Substantive and the Procedural Criminal Legal system in India are aiding the accused. The position or the status of the victim is absolutely depending on the Prosecution and the State. The right to determining the appropriate justice or remedy is a myth for every victim. Our Criminal Justice System and the Administration undoubtedly working for the victims without understanding the expectation of the victims. Application of Criminology and victimology in every criminal jurisdiction will satisfies both the ends of justice. Plea bargaining is one of such concepts which is paving way for the victims to decide their remedy and imposing penal sanction on the accused. This paper will discuss about the concept of plea bargaining.

## Historical Background of Plea Bargaining:

Plea bargaining was introduced in the Code of Criminal Procedure (herein after referred to as the ‘CrPC’) in the 2005 through the Criminal Law Amendment Act, 2005. Chapter XXIA was inserted with provisions 265A to 265L. The contribution of the Law Commission of India and its members are remarkable in bringing out this concept in Indian Criminal Justice System. The objective of the 142<sup>nd</sup> Law Commission is solely to study about an alternative mechanism to reduce the pending cases before the judiciary. Speedy disposal is fundamental rights which is enshrined in our Constitution is at stake due to pending of cases. The problem of under-trial prisoners, convict prisoners waiting for the disposal of appeal cases is a big menace to the judicial administration. To overcome these issues, the Law Commission of India (herein after referred to as the ‘LCI’), deliberated various remedial mechanism by inviting suggestions and recommendation from the stakeholders. In 142<sup>nd</sup> Report, the LCI elaborated the need for introducing

plea bargaining in Indian Criminal Justice System.<sup>2</sup> They compared the working pattern of plea bargaining in USA and UK and recommended the same in India with necessary modifications.

## Need for New Mechanism – Reflections of 142<sup>nd</sup> Law Commission Report, 1991

The LCI referred the following factors for implementing a new model of mechanism such as:

### a. Delay in disposal of Criminal Cases:

Right from the lower judiciary to the apex court, long pending of cases poses a threat to speedy disposal and justice. In some Magistrate Courts, not even the cognizance was taken, and the persons are languishing in prison without proper trial. The conditions in prison are worsen than this and, in some cases, innocent persons were suffered. The same situation prevailed in appeal Court jurisdiction also. The LCI mentioned that appeals from the year 1979 too pending in High Courts.<sup>3</sup> Frequently the Supreme Court (herein after referred to as the ‘SC’) of India disposing of cases filled on challenging the pending cases. In some cases, the apex court issues directions and guidelines to the concerned Government to dispose the cases. In the celebrated case of *Hussainara Khatoon v. State of Bihar*<sup>4</sup> the SC concerned about the status of over crowding in prison due to pending of cases for disposal. It further emphasised that some offences are very slight for which the imprisonment may less when compared to the period of imprisonment serving as under trial prisoners. Further the Court observed that,

*“...what faith can those souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them...because the bail procedure is beyond their meagre means and trials don’t commence and, even if they do, they never conclude”*

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<sup>2</sup>The full text of the 142<sup>nd</sup> Law Commission Report is available at <https://lawcommissionofindia.nic.in/101-169/Report142.pdf>

<sup>3</sup>142<sup>nd</sup> Report of Law Commission of India, pp.2

<sup>4</sup>AIR 1979 SC 1360

- b. Non availability of information regarding pending cases:

The Law Commission of India faced hurdles in collecting the data relating to pending cases. Some High Courts and lower judiciary didn't show proper assistance to the LCI. State Governments also reluctant in maintaining the data and information regarding this. The LCI with categorised the pending cases according to number of years pending and magnitude of the charges.

### Plea Bargaining in the United States of America

Plea bargaining is a successful concept practised in the USA as a traditional practise. They defined plea bargaining as “*pre-trial negotiation between the respondent and the prosecution*” in which the accused is agreed to plead guilty for some concession from the prosecution. They practised two types of plea bargaining such as.

- i. Charge bargaining – in which the prosecution agreed to either reduce or withdraw some charges against the accused.
- ii. Sentence bargaining – in which the prosecutor promises to render specific sentence or restrain from sanction.

The Law Commission of India also referred the quantum of cases settled through the plea bargaining. It was evident from the cases in various American States. For eg: New York City ¼ cases settled through plea bargaining during 1839 and in 1920's in Alameda County, 88 guilty plea cases recorded for felony.<sup>5</sup>

### Arguments for and against Plea Bargaining in the USA

Some set of people favoured the implementation and continuance of plea bargaining for the following reasons; (a) no need for trial when the offender accepts the charges; (b) saving public fund; (c) cut the litigation costs for the accused; (d) both the sides are benefiting out of this.

Some set of people are against this concept for (a) disgrace offer; (b) dangerous offenders slips through plea bargaining;

(c) unfair for the innocence; (d) study shows some innocents will be acquitted if trial would have been conducted.

### Constitutional Validity of Plea Bargaining in USA

There are controversial views regarding the Constitutional validity of Plea bargaining in USA. As mentioned above, some set of people opined that plea bargaining will reduce the liability of the offenders. The rights protected under Fifth and Sixth Amendment of the Federal Rules of Criminal Procedure of the United States of America *inter alia* (i) right to a Jury Trial; (ii) right against self-incrimination and (iii) right to confront witnesses will be taken away from the accused if they pleaded guilty.<sup>6</sup> The Supreme Court of the US declared that plea bargaining as constitutional though the accused waiving his rights in several cases *Brady & Santobello*.<sup>7</sup> The determining factor of the validity of plea bargaining is ‘*voluntary guilty plea*’ this act was stressed in *William J. McCarthy v. United States*.<sup>8</sup> Jurisprudence on guilty plea or plea bargaining evolved in various cases such as *Moore v. Michigan*<sup>9</sup>-accused should be counselled regarding waiving their rights before pleading guilty, *Lynch v. Over Holser*<sup>10</sup>- pleading guilty by false promise will not achieve the purpose, *Hutto v. Ross* – The SC of the USA observed that pleading guilty is an essential part of criminal process and highly desirable part, *Chaffin v. Stynchcombe*– it was observed as pleading guilty to be encouraged as an essential component of the administration of judiciary, *Blackledge v. Allison* – pleading guilty has been practised as visible legitimate concept. By referring the above notes, the LCI in its 142<sup>nd</sup> Report recommended the importance of new model.<sup>11</sup>

### 154<sup>th</sup>, 177<sup>th</sup> & 178<sup>th</sup> Report of Law Commission of India.

The 152 Law Commission, 1996 reiterated the recommendations of the 142<sup>nd</sup> Report for Treatment of Offenders. In the 154<sup>th</sup> report, the members of the LCI accepted the suggestions made out in the 142<sup>nd</sup> Report as (i) plea bargaining is a reformatory approach such as Probation u/s 360; (ii) it will end the uncertainty; (iii) saves the anxiety cost and litigation cost; (iv) rehabilitation of the offender, (v) reduces over crowding in prison, (vi) supported by the

<sup>5</sup>Refer the full text of 142<sup>nd</sup> Report of the Law Commission of India

<sup>6</sup>To view the details of the Federal Rules of Criminal Procedure of the USA visit [https://www.law.cornell.edu/wex/plea\\_bargain](https://www.law.cornell.edu/wex/plea_bargain)

<sup>7</sup>*Brady v. United States* 397 U.S. 742 (1970), *Santobello v. New York*, 404 U.S. 257 (1971) full text of the decision is

available at <https://www.law.cornell.edu/supremecourt/text/397/742>

<sup>8</sup>U.S. 459 (1969) to read the full judgement please visit <https://www.law.cornell.edu/supremecourt/text/394/459>

<sup>9</sup>335 U.S. 155 (1957)

<sup>10</sup>369 U.S. 705, 719 (1962)

<sup>11</sup>142<sup>nd</sup> Report of the Law Commission of India, pp. 8,9.

jurisprudence evolved in the U.S. Criminal Justice System. The LCI in its 152<sup>nd</sup> Report traced the origin of pleading guilty in Indian Legal System and the observations made by the SC of India. Though the concept of plea bargaining was not discussed legally with provisions of the Code, but the SC discussed the matter for pleading guilty. In *Muralidhar Megharaj v. State of Maharashtra*<sup>12</sup> the SC rejected the informal pleading guilty and in *Kasambhai v. State of Guajrath*<sup>13</sup> and in the *State of Uttar Pradesh v. Chandrika*<sup>14</sup> rejected the guilty plea and plea bargaining as illegal, unconstitutional and against the public policy. The Court further observed that guilty plea and plea bargaining will lead to corruption and pollute the judiciary. In *Thippaswamy v. State of Karnataka*<sup>15</sup> the apex court decided that was clear violation of Art.21 of the Constitution of India. Further in that the Court held that in appeal or revision against such orders should set aside the order of plea bargaining and remand the case to the trial court to conduct the trial and impose proper sentence. But in the year 2005 in *State of Gujarat v. Natwar Harchandji Thakor*<sup>16</sup> the apex court has observed that

“...every “plea of guilty” which is construed to be a part of the statutory process in the criminal trial, should not be understood as a “plea bargaining” ipso facto. It is a matter of matter and has to be decided on a case to case basis.”<sup>17</sup>

After considering the suggestions of the 142<sup>nd</sup> LC Report, the members of the 154<sup>th</sup> LC recommended plea bargaining with some conditions such as (a) imposing minimum sentence; (b) ascertaining the voluntariness of the accused before recording plea bargaining; (c) order of compensation to paid to the victim by the accused; (d) permit only for lesser gravity charges.<sup>18</sup>

Further in the 177<sup>th</sup> Report, the Law Commission discussed about plea bargaining and compounding of offences. It recorded the views submitted stakeholders, particularly the opinions of Police Officials that, “...in view of the low rate of conviction in our country, there is no inducement for any

accused to go in for plea bargaining and that any such scheme would not be successful or effective in our country...”, but this view was not accepted by the members through the counter statement such as “the harassment involved in defending himself in a criminal court including attending the criminal court on every date of hearing over several years – which is the normal span of a criminal case in this country – should be a sufficient inducement for the accused to resort to plea-bargaining and thereby avoid the inquiry and trial and all the hassles that go along with it from the very first date of hearing. He would be rid of the botheration.”<sup>19</sup> According to the Reports submitted by the 142<sup>nd</sup> and 154<sup>th</sup> Law Commission, the 177<sup>th</sup> Law Commission recommended for insertion of New Chapter in the Code of Criminal Procedure as XXIA to deal with the concept of Plea Bargaining. The Criminal Law Amendment Act, 2005 introduced the Plea-Bargaining Chapter in the CrPC and same was came into force from 5<sup>th</sup> July 2006. The 177<sup>th</sup> Report observed that plea bargaining shall not be extend to the habitual offender, offences relating to socio-economic graver in nature, offences against women and children. With the above insights, plea bargaining is now in practise in addition to other modifications.

## Plea Bargaining and Code of Criminal Procedure

Chapter XXIA of the Code of Criminal Procedure was introduced and came into force from 2006. Sections 265A-265L of CrPC dealt with Plea Bargaining. These provisions include (i) Application and Limitations; (b) Affidavit and guidelines to file an affidavit; (iii) Satisfactory meeting; (iv) Report and Disposal of cases; (v) Pleading guilty statement and its application etc.

### (i) Application and Limitations of Plea Bargaining under the Code

Sections 265A of the Code discuss about the application and the limitations of the concept of Plea bargaining. The eligibility criteria for applying plea bargaining application are as follows:

<sup>12</sup>AIR 1976 SC 1929

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

<sup>14</sup>*State of Uttar Pradesh v. Chandrika*, 2000 Cr.L.J 384

<sup>15</sup>*Thippaswamy v. State of Karnataka* (1983) 1 SCC 194

<sup>16</sup>*State of Gujarat v. Natwar Harchandji Thakor*, (2005) 1 GLR 709

<sup>17</sup>Lokesh Vyas, 2018 “Concept of Plea Bargaining under the Indian Laws”. Full text of the paper is available at <https://blog.ipleaders.in/plea-bargaining-practice-india/>

<sup>18</sup>154<sup>th</sup> Report of the Law Commission pp. 53-58, the full text is available at <https://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf>

<sup>19</sup>177<sup>th</sup> Law Commission Report, pp. 110-112, to view the full text visit, <https://lawcommissionofindia.nic.in/reports/177rpt1.pdf>

- a. According to the Final Report submitted by the investigating agency u/s 173, the charges shall not be an offence which is punishable with death or life imprisonment or imprisonment for the term exceeding 7 years – in short offences punishable up to 7 of imprisonment are eligible for pleading guilty.
- b. If the case is other than the police report, the JM/MM shall have taken cognizance of the case and examined the witnesses.<sup>20</sup>

### (ii) Limitations of application of Plea bargaining

- a. Pleading guilty shall not be applicable to cases punishable more than 7 years of imprisonment
- b. Shall not be applicable to offences relating to Socio-Economic conditions which affects the country
- c. Shall not be applicable to offences committed against women or child below the age of 14 years.
- d. Other list of special laws which are notified by the Central Government in 2006 as limitation of application of plea bargaining<sup>21</sup>.

These limitation and restrictions were imposed according to the suggestions and recommendations made out in the 142<sup>nd</sup> and 154<sup>th</sup> Reports of the LCI.

### (iii) Affidavit & Guidelines for conducting satisfactory disposal meeting

An affidavit or a petition shall be preferred by the accused for pleading guilty of his charges before the trial court. The petition shall be accompanied with an affidavit of the accused to ascertain his unequivocal consent and voluntariness in filing the petition. He should inform the court that he has understood the consequences of pleading guilty and possibility of punishment provided for the charges he is being tried with. The accused shall not be a habitual offender and shall not be convicted earlier for the same nature of offence. The Prosecutor of the defence counsel shall be issued with the notice of this application and the accused will be summoned to appear before the court.

The examination of the accused person before going for the satisfactory disposal meeting shall be held as *in camera* proceedings, only the accused will be permitted and other parties shall not present. After verifying the voluntariness of the accused, the court shall fix a date for Satisfactory disposal meeting with the prosecutor or the defence counsel as the case may be. The meeting includes the sentence bargaining and the compensation going to be paid by the accused to the victim and other necessary expenses. Upon examination of the accused in the *in camera* proceedings, if the court found that the application has been filled on false promise or involuntarily filled, the court proceed the case according to the trial procedure under normal circumstances.<sup>22</sup>

The Code also prescribed the guidelines to be followed for the mutual satisfactory disposal of cases. Mutual satisfactory disposal includes both the accused and the victim. If the victim not satisfied with the terms of the accused, he/she may withdraw the application. The guidelines impose an obligation on the Court to maintain and monitor the meeting. Depending upon the nature of the case either on the basis of the Police report or filed under private complaint, the Court shall issue notice to the parties of the case directing them to participate in the meeting to arrive for a satisfactory disposal. It shall be the duty of the court to ascertain the voluntariness of the accused person throughout the meeting. The Court shall permit the accused to participate in the meeting with his counsel if he desires. In the same nature, if the case is instituted otherwise than on the police report, the victim is permitted to participate in the meeting with his/her counsel.<sup>23</sup>

### (iv) Report and Disposal of the case

If the satisfactory disposal meeting has been worked out and both the parties agreed to each other terms and condition, the Court shall prepare a detailed report of the meeting and it must be signed and sealed by the Presiding Officer of the Court. If no such conclusion arrived between the parties, the Presiding Officer has to

<sup>20</sup>U/s. 200, 204 of the Code of Criminal Procedure

<sup>21</sup> The list of legislations notified as limitations u/s 265A are (i) Dowry Prohibition Act, 1961; (ii) The Commission of Sati Prevention Act, 1987; (iii) The Indecent Representation of Women (Prohibition) Act, 1986; (iv) The Immoral Traffic (Prevention) Act, 1956; (v) The Protection of Women from Domestic Violence Act, 2005; (vi) The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulations of Production, Supply and Distribution) Act, 1992; (vii) Provisions of Fruit Products Orders, 1973; (viii) Provisions of Meat Food Product Orders, 1973; (ix) Offences relating to

animals protected under the Wildlife (Protection) Act, 1955; (x) The SC/ST (Prevention of Atrocities) Act, 1989; (xi) Protection of Civil Rights Act, 1955; (xii) Offences listed in the Juvenile Justice (Care and Protection of Children) Act, 2000; (xiii) The Army, Air Force and Navy Act, 1950 & 1957 and other Acts relating to Metro Railway, Explosive Substances, Cable TV Network Regulations and Cinematography Act

<sup>22</sup>U/s 265B of the CrPC

<sup>23</sup>Sec 265C of the Code of Criminal Procedure



record the same in the report and proceed the case accordingly. The Court is under obligation to dispose the case according to the outcome of the satisfactory meeting. If any compensation is discussed and agreed by the accused person, it has to be heard with the parties which is equal to sentence bargaining. The compensation shall be awarded to the victim and the quantum of sentence shall be decided. The punishment may be releasing the accused person on Probation of good conduct or after admonition u/s 360 of the Code if the accused person's charge falls within the provisions. Upon hearing the parties, the accused may be released on Probation. If the cases don't fall within the Probation release, the Court may hear upon to decide the minimum sentence provided for such charge under the Act and may sentence the accused to one half of the minimum sentence. If the charge not satisfying the above two situations, then the court may sentence the accused to 1/4<sup>th</sup> of the prescribed sentence.

#### (v) **Judgement and its finality**

After determining the sentences, the Court shall deliver the judgement in the open Court and signed by the Presiding Officer which is final. There shall not be any appeal lie against this order except on Special Leave Petition under Art. 136, and Writ Petitions under Arts. 226 & 227 of the Constitution.

#### (vi) **Protection of Right against self-incrimination**

The period already undergone by the accused either as remand period or under trial period shall be set off from the final sentence u/s 428 of the Code<sup>24</sup>. The statement or the affidavit submitted by the accused as the nature of pleading guilty shall not be used for any other purpose except for the purpose of Chapter XXIA of the CrPC.<sup>25</sup> This provision protects the accused person from being incriminated through his statement of admission of the act. This provision encourages the accused to come forward to accept his guilt whereby the same is protected very confidentially throughout the disposal of the case.

### **Conclusion**

The concept of plea bargaining will definitely satisfy the victimological perspective of remedial mechanism. There shall be interlink between criminal law

and criminology to achieve the purpose of penology. Our Indian Criminal Justice System have not reached this stage in appreciating a case by invoking the principles of criminology and victimology. Our Criminal Law is totally drafted in protecting the rights and human rights of the accused person rather than the rights of the victim. In deciding the appropriate justice and remedy, the victim should also be part of it. This will be realized through the concept of plea bargaining. On the other hand, in recent past the question raised by the criminologists regarding the sanction of imprisonment, whether the victim will be satisfied by sending the wrong doer to the prison will erase the pain and sufferings? The legal system must modify according to the needs of the victims. The concept of Plea Bargaining not only providing compensation or monetary relief to the accused and also imposing penal sanctions on the accused on accepting his guilt. This will reduce the over burden of the judiciary. Further the limitations of application of Plea Bargaining restrict serious offences to be disposed off simply by paying compensation. Above everything, the legal provisions have been in such a way that both the parties shall meet together and discuss about the possibilities of settlement and in sentence bargaining the role of victim must be established. The only concept which gives direct space for the victim is plea bargaining needs to be implemented with wide scope to overcome several hurdles such as long pending of cases, protection of victims, effecting the reformatory theory of punishment etc.,. Through plea bargaining the accused also tends to show reformation as habitual offender shall not be eligible for this release. This is not arbitrary or affect the independency of the judiciary or leads to corruption. In every stage the voluntariness of the accused and the victim is tested and confirmed by the Court. Let the victim be given with the power and rights to decide his/her remedy by permitting them to participate in the determination of justice.

<sup>24</sup>Section 428 of the Code of Criminal Procedure reads as Period of detention undergone by the accused to be set off against the sentence of imprisonment: Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction shall be set off against the term of

imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him. Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.

<sup>25</sup>Sections 265-I & 265K of the CrPC