

## PLEA BARGAINING- NEW HORIZON IN CRIMINAL JURISPRUDENCE

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Is plea bargaining, synonymous to pleading guilty. Day by day, partakers in criminal justice system are either in confusion or in an intellectual debate on the innovative changes in sentencing system under the Indian Criminal jurisprudence. Of course, root cause is the introduction of Chapter XXIA, in the Code of Criminal Procedure, 1973, containing Sections 265 A to 265L, which deal with plea bargaining. Strictly speaking plea bargaining is a wider connotation, but pleading guilty is having a narrow sphere. While moving for a plea bargaining there is implied conduct of pleading of guilty but not in vice versa.

**General principles:** Law on pleading guilty is an area having clarity and certainty. But the sphere of plea bargaining is quite sticky to explain, understand and execute. Wikipedia, an internet dictionary, defines the term as “*a plea bargain (also plea agreement, plea deal or copping a plea) is an agreement in a criminal case in which a Prosecutor and a defendant arrange to settle the case against the defendant. The defendant agrees to plead guilty or no contest (and often allocute) in exchange for some agreement from the prosecutor as to the punishment. A plea bargain can also include the prosecutor agreeing to charge a lesser crime (also called reducing the charges), and dismissing some of the charges against the defendant.*” Thus when analyse with this general meaning, there can be two kind of plea bargaining, one is of bargaining as to the charge and other is as to the punishment.

When an offender is charged with aggravated assault/ battery, on his alleged conduct in a public street by associating a street fight, the offender before the Trial Court may voluntarily opt for a lesser charge of simple assault/battery or for a disorderly conduct in Public Street and the Court can award punishment for the lesser charge. This kind of bargaining is plea bargaining as to charges. In other kind of plea bargaining, such as bargaining as to punishment, the offender agrees to plead guilty to the original charge of aggravated assault/battery, without bargaining for a lesser charge, but bargaining for a lesser punishment, in exchange for a severe sentence that he would likely to receive if a Trial Court found him guilty at trial. Bargaining for a reduction in either the number, or

severity of criminal charges is referred to as **charge bargaining**. Bargaining for a favourable sentence, recommendation by the prosecutor, or bargaining directly with a trial judge for a favourable sentence is referred to as **sentence bargaining**. In cases of sentence bargaining, trial judges, ordinarily, opt to impose sentences not more severe than those recommended by prosecutors or else afford accused an opportunity to withdraw their guilty pleas.

Although charge bargaining and sentence bargaining are the most common forms of plea bargaining, they are not the only ones. Other kind is fact bargaining. In **fact bargaining**, a prosecutor agrees not to contest an accused'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. A prosecutor also may agree to provide leniency to an accused's accomplices, withhold damaging information from the court, influence the date of the accused's sentencing, arrange for the accused to be sent to a particular correctional institution, request that an accused receive credit on the sentence for time served in jail awaiting trial, agree to support the accused's application for parole, attempt to have charges in other jurisdictions dismissed, arrange for sentencing in a particular court by a particular judge, provide immunity for crimes not yet charged, or simply remain silent when a recommendation otherwise might be unfavourable.

Apart from this, taking into consideration of the other aspects, there are two kinds of plea bargaining, as endorsed in International jurisprudence. i.e., Express and implicit plea bargaining. **Express bargaining** occurs when an accused or his lawyer negotiates directly with a prosecutor or a trial judge concerning the benefits that may follow the entry of a plea of guilty. **Implicit bargaining**, on the other hand, occurs without face-to-face negotiations. In Implicit bargainings, the trial judges especially, establish a pattern of treating accused who plead guilty more leniently than those who exercise the right to trial, and the accused therefore come to expect that the entry of guilty pleas will be rewarded.

**Evolution and Foreign Experiences:** Till the midst of 20<sup>th</sup> Century, most of the courts and scholars, all over the World, tended to ignore the importance of plea bargaining, and when discussions of the practice occurred, it usually was critical. A strong criticism against it was that plea bargaining is a lazy form of prosecution that resulted in undue leniency for offenders. However in later part, the significance of plea bargaining has improved to a larger extent and it became integral part of the criminal justice system.

Law on plea bargaining has strong variations in Common Law Countries and European Continent. Guilty pleas have been regarded as a sufficient basis for conviction from the earliest days of the common law. In treating a guilty plea as conclusive, common law nations depart from the law of most nations on the European Continent. In serious cases, these nations do not treat any form of confession as an adequate basis for dispensing with the trial, even if trials are likely to be simpler and to focus mostly on sentencing issues when accused do not contest their guilt.

A study indicates, compared to the long Anglo-American history of guilty pleas, the history of plea bargaining has only a recent origin. The criminal justice system long has been rewarded some forms of co-operation by the accused, notably, co-operation in procuring the conviction of other alleged offenders committed serious crimes and offences. Only occasional instances of plea bargaining have been reported prior to the nineteenth century and recorded in the judicial history of the West and East. For example, scholars who have studied eighteenth-century crimes and prosecutions in the Old Bailey in London report no instances of plea bargaining. Ordinarily, the judges of the Old Bailey urged the accused who offered to plead guilty to reconsider it, and face the trial.

History narrates that although plea bargaining in felony cases before the nineteenth century was rare, non-trial dispositions in minor misdemeanour cases may have been the subject of express or implicit bargains. Such Courts could permit a plea, which allowed an accused to submit to conviction and pay a fine without admitting guilt. Judges, however, did not allow such pleas in serious cases, and in the early nineteenth-century in America, guilty pleas typically accounted for a minority of felony convictions. When occasional cases of plea bargaining began to appear in reported decisions in the second half of the century, appellate judges voiced strong disapproval of the practice.

Despite this disapproval, plea bargaining became routine in many places before the end of the century.

Plea bargaining is common in England, Canada, and most of the other nations of the British Commonwealth. Earlier Germany was a "land without plea bargaining". The formal plea of guilty was well-known in judicial proceedings in Germany, but prosecutors and judges did not promise or negotiate for in-court confessions. Subsequently, as trials in Germany and elsewhere became longer and more adversarial, as complex prosecutions for white-collar crime came before the courts in greater numbers, and as case loads increased, German prosecutors offered concessions to the accused not to contest their guilt. Italy, in fact, formally instituted a system of plea bargaining by statute. Plea bargaining remains less frequent in Continental Europe than in England and America. In Germany, now it is claimed that some kind of bargaining takes place in roughly twenty to thirty percent of all cases.

In United States of America, plea bargaining has a vital role in disposal of criminal cases as it is popular than Jury Trials, while settling the cases of criminal nature. In 1967, in the midst of high criticism of laziness of prosecutors, however, both the American Bar Association and the President's Commission on Law Enforcement and Administration of Justice approved the concept of plea bargaining. The American courts and most of the Jurist have tended to approve plea negotiation, at least in broad outline. However in 1973 report of the National Advisory Commission on Criminal Justice Standards and Goals, recommended the abolition of all forms of plea bargaining within five years, to be implemented.

Among the historical developments there are many other factors which gave major contributions in the growth of plea bargaining. Some of those factors are the increasing complexity of the trial process, which may have led to the greater use of non-trial procedures both for economic reasons and because officials sought to avoid the "technicalities" of trial; expansion of the substantive criminal law, particularly the enactment of liquor-prohibition statutes; increasing crime rates; larger case loads; the frequent political corruption of urban criminal courts, at and after the turn of the twentieth century; the greater use of professionals in the administration of criminal justice, by

police, prosecutors, and defense lawyers; and the increasing statutory powers of state controlled prosecutors.

**Advantages:** Significant feature of method of plea bargaining is that it helps the Courts and State to manage the case loads. It reduces the work load of the prosecutors enabling them to prepare for gravest case by leaving the effortless and petty offences to settle through plea bargaining. It is also a factor in reforming the offender by accepting the responsibility for their actions and by submitting them voluntarily before the law, without having an expensive and time consuming trial. In cases wherein the prosecution is weak, if trial is concluded, for want of proper witnesses or evidences and the ultimate result may be an acquittal, the prosecution will have a chance to find the accused as guilty, by co-operating with the accused for a plea bargaining.

An intelligent prosecutor may agree for a plea bargaining of an insignificant accused to collect evidence against other graver accused. Normally, in cases wherein aged or women witnesses have the vital role to prove a charge against the accused, their death or non co-operation, may be a real cause for adverse conclusion of the case. Here the prosecution avoids a chance of acquittal and the accused avoids a chance of conviction for more serious charges with higher punishment. From the angle of victim also, plea bargaining is a better substitute for his ultimate relief, as he can avoid a lengthy court process to see the accused, be convicted. The system gives a greater relief to a large number of under trials lodged in various jails of the country and helps reduce the long pendency in the courts.

There are some other supporting factors of plea bargaining which fall into three main categories. First, some jurists maintain that it is appropriate as a matter of sentencing policy to reward defendants who acknowledge their guilt. They advance several arguments in support of this position, notably, that a bargained guilty plea may manifest an acceptance of responsibility or a willingness to enter the correctional system in a frame of mind that may afford hope for rehabilitation over a shorter period of time than otherwise would be necessary.

A second view treats plea bargaining, not primarily as a sentencing device, but as a form of dispute resolution. Some plea bargaining advocates maintain that it is desirable

to afford the accused and the state the option of compromising factual and legal disputes. They observe that if a plea agreement did not improve the positions of both the accused and the state, one party or the other would insist upon a trial.

Finally, some observers supports plea bargaining on grounds of economy or necessity. Viewing plea negotiation less as a sentencing device or a form of dispute resolution than as an administrative practice, they argue that society cannot afford to provide trials to all the accused who would demand them if guilty pleas were unrewarded. At least, there are more appropriate uses for the additional resources that an effective plea bargaining could save.

**Disadvantages:** Plea bargaining is problematic for at least some reasons. First, the prosecution has the power to present accused with unconscionable pressures. Though, in procedure pleas as voluntary, there are every chances of being practically coerced. The prosecution has the incentive to maximize the benefit of pleading guilty in the weakest cases. The more likely an acquittal at trial, the more attractive a guilty plea is to the prosecution. But in a borderline case that does go forward, the prosecution may very well threaten the most serious consequences to those accused who may very well be innocent. The defense lawyers who represent accused do not have the resources to independently investigate every case.

Plea bargaining undercuts the requirement of proof beyond reasonable doubt and that plea negotiation is substantially more likely than trial to result in the conviction of innocent. Plea bargaining results in unjust sentencing. This practice turns the accused's fate on a single tactical decision, which, they say, is irrelevant to desert, deterrence, or any other proper objective of criminal proceedings. Some critics maintain that plea bargaining results in unwarranted leniency for offenders and that it promotes a cynical view of the legal process.

Critics of plea bargaining, from their foreign experiences, object to the shift of power to prosecutors that plea bargaining has effected, noting that sentencing judges often do little more than ratify prosecutorial plea bargaining decisions. They maintain that, even more clearly, plea bargaining makes figureheads of the probation officers who prepare reports after the effective determination of sentence through prosecutorial

negotiations. Plea negotiation, they say, very frequently results in the imposition of sentences on the basis of incomplete information. In the light of the conflict of interests prosecutors, defense lawyers, and trial judges, the critics sometimes contend that plea negotiation subordinates both the public's interest and the accused's to the interests of criminal justice administrators. In their view, the practice also warps both the initial formulation of criminal charges and, as accused plead guilty of crimes less serious than those that they apparently committed, the final judicial labeling of offenses. Critics suggest that plea bargaining deprecates human liberty and the purposes of the criminal sanction by "commodifying" these things, that is, treating them as instrumental economic goods.

As per the foreign thinkers, plea negotiation raises substantial legal and constitutional issues. For one thing, common law courts traditionally treated a confession as involuntary when it had been induced by a promise of leniency from a person in authority. Moreover, a guilty plea waives the constitutional right to trial and subordinates trial rights. Under the "doctrine of unconstitutional conditions," waivers of constitutional rights are invalid when they have been required as a condition for receiving favourable governmental treatment. Despite these negative dimensions, plea bargaining is the central feature of the adjudicatory process.

Defence Lawyer, Trial Judge and Prosecutor are the fundamental elements in the working of plea bargaining. Prosecutors plainly are influenced by the equities of individual cases, the seriousness of the accused's alleged crime, their prior criminal record, and so on. At times, prosecutors are influenced as well by their personal views of the law without a roving enquiry. In western experiences, although the victim of the crime has been called the "forgotten person" in plea bargaining, many prosecutors give substantial weight to the desires of victims.

Through plea bargaining, a prosecutor can avoid much of the hard work of preparing cases for trial and of trying them. In addition, prosecutors can use plea bargaining to create seemingly impressive conviction rates. The personal bias with the defence lawyers also may influence plea bargaining practices. So there may be desires for professional advancement either within a prosecutor's office or after leaving it. Although

most prosecutors probably do not deliberately sacrifice the public interest to their personal goals, the bargaining process may be influenced by conflict of interests, and prosecutors may rationalize decisions that serve primarily their own interests.

Private defense lawyers commonly are paid in advance, and their fees do not vary with the pleas their clients enter. Once a lawyer has pocketed the fee, his personal interest may lie in disposing of a client's case as rapidly as possible, that is, by entering a plea of guilty. "Cop-out lawyers" who plead virtually all of their clients guilty sometimes represent large number of accused for relatively low fees. Some of these lawyers have been known to deceive their clients in the effort to induce them to plead guilty. Engaged State briefs lawyers may suffer a similar conflict of interest. The relatively small amount of remuneration that he is likely to receive for representing an indigent accused may seem inadequate compensation for a trial, but this amount may seem adequate as a fee for negotiating a plea of guilty.

In theory, the decision to enter a plea of guilty is of the accused rather than the Lawyer. Nevertheless, many defense lawyers speak of "client control" as an important part of the plea negotiation process. When clients are reluctant to follow their advice, these lawyers may use various forms of persuasion, including threats to discontinue their representation, in an effort to lead the clients to what the lawyers regard as the appropriate course of conduct.

Although prosecutors and defense lawyers are the principal actors in the plea bargaining process, judicial participation in this process is far from rare. This participation may take various forms. In some courts, trial judges conduct in-chambers conferences and offer to impose specified sentences when accused plead guilty. In others, judges offer suggestions to prosecutors and defense lawyers, describe how they have treated certain cases in the past, or indicate a probable range of sentences.

Judges who do not participate in any form of explicit bargaining may engage in implicit bargaining by treating an accused's guilty plea as a reason for substantially reducing the penalty imposed. Primarily on the theory that judicial plea bargaining is more coercive than prosecutorial bargaining, some authorities are in an argument that judges should be prohibited from engaging in this practice. Personal presence of Judges

in the consultation process may amount to a prejudicial attitude, in the later course of trial, if no compromise is arrived between the prosecution and defense.

**Indian Law on plea bargaining:** As noted earlier, in India, the system of plea bargaining is in its experiment stage. The system was introduced as a result of criminal law reforms introduced in the Criminal Law (Amendment) Act, 2005 (Act 2 of 2006). Section 4 of the Amendment Act introduced Chapter XXIA to the Code having sections 265 A to 265 L. Though the Act was passed in 11<sup>th</sup> January, 2006, the provisions were notified and came into effect from 5<sup>th</sup> July, 2006 only.

**Applicability:** Section 265 A deals with applicability of the Chapter XXIA. Benefit of Plea bargaining can be extended in two circumstances. One is, if a report is forwarded by a Station House Officer of a Police Station after the completion of investigation to the Magistrate. The other is, if the Magistrate has taken cognizance of an offence on a complaint under S. 190 (a) followed by examination of a complainant and witness under S. 200 or S. 202 and issuance of process under Section 204. Thus, it means, after commencement of proceedings upon a private complaint under S. 190 (a) of the Code.

However, if the accused is involved in an offence, which is punishable to death, life imprisonment or of imprisonment more than 7 years, benefit cannot be extended. Apart from that for offences affect socio- economic conditions of the country, which are notified<sup>1</sup> by the Central Government or offences against woman or offences against a child below the age of fourteen years, benefit of plea bargaining is not available.

Under S. 265 L the provisions of plea bargaining is not applicable to any Juvenile or Child as defined under Juvenile Justice (Care and Protection of Children) Act, 2000. The Savings provisions under S. 265J has extended an independent existence to the Chapter, in case of inconsistency with other provisions of the Code.

**Procedure:** As per S. 265 B, the process of plea bargaining starts with an application from accused. The application is to be filed before the trial court only. The **application** must be in writing, with brief description of facts of the case supported with an affidavit sworn by the accused affirming the genuineness of application as voluntarily submitted

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<sup>1</sup> Section 265 A (2) of the Code gives power to notify the offences to the Central Government. The Central Government issued Notification No SO 1042 (II) dated 11-7-2006 enumerating the offences.

with details of previous conviction of the accused. Upon receipt of application, the trial court has to issue **notice** to prosecution, either to public prosecutor or to complainant in S. 190 (a) cases and also to the accused intimating the date of hearing of application.

While appearing before the Court, after receipt of notice from the Court, the **examination of the accused** shall be done in-camera, avoiding the presence of other parties. It is specifically required so, to ensure the genuineness and authority of application. Before proceeding further the Court has to ensure that the application is made voluntarily by the accused. If the Court feels, after examination of the accused, the application is involuntarily submitted or the accused is not eligible for plea bargaining on the ground of earlier conviction in a case charged with same offence, the Court has to drop the proceedings and proceed further with the Trial from the stage, wherein the application is entertained by the Court.

After examination of the accused, if the Court feels the eligibility of the accused for plea bargaining, then proceed further for a settlement, giving time to prosecution and accused to work out a **mutually satisfactory disposition** of the case. Such a mutually satisfactory disposition includes awarding of compensation and other charges and legal expenses to the victim. There must be a **notice** to Public Prosecutor (defined under S 2(u) and explained in S. 25 of the Code), Investigation Officer of the case, victim or defacto complainant and to the accused, in cases instituted upon police report, to work out the solution in a **joint meeting** of the parties. In cases instituted otherwise than a police report, there shall be notice to the accused and the complainant/victim to participate in the joint meeting. The accused can be participated with his Lawyer in the meeting. That means the actual presence of the accused is required irrespective of a representation through the Lawyer. Apart from that the Court shall to ensure that every actions of the parties during the meeting is voluntarily made and without any vitiating or coercive elements. That means the presence of the Judicial Officer is necessary, during the process of joint meeting. Under S. 265 D, the **Court has to prepare a report**, if a mutual satisfactory disposition of the case has been worked out and such report shall be **signed by the presiding officer of the Court and the parties in the Joint Meeting**. If no satisfactory disposition is made out, the Court has to proceed with the case, by dropping

the proceedings in plea bargain and start the proceedings from the stage, wherein the application is entertained.

**Disposal of Case on the basis of report:** After completion of proceedings under S. 265 D, by preparing a report signed by the presiding officer of the Court and parties in the meeting, the Court has to **hear the parties** on the quantum of the punishment or accused's entitlement of release on probation of good conduct or after admonition. Court can either **release the accused** on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or **punish the accused**, passing the sentence.

While punishing the accused, the Court, at its discretion, can pass **sentence of minimum punishment**, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a **sentence of one fourth of the punishment** provided for such offence. Apart from this, in cases of release or punishment, if a report is prepared under S 265 D, report on mutually satisfactory disposition, contains provision of granting the **compensation to the victim** the Court also has to pass directions to pay such compensation to the victim.

The Court has to pronounce the **Judgment**, under S. 265 F, in terms of its findings under S. 265 D, either releasing the accused or punishing the accused. The Judgment passed under S. 265 F is final and no appeal will lie against such Judgment under Chapter XXIX of the Code. However such Judgments are subject to challenge under Articles 226 and 227 of the Constitution before the High Court by filing Writ Petition and Article 136 of the Constitution before the Supreme Court by filing Special Leave Petition. A court, while proceeding with an application of plea bargaining has all the powers invested with a Court, under the provisions of the Criminal Procedure Code in respect of granting and rejecting bail, trial of offences and other general matters relating to disposal of case, particularly under provisions in Chapter XXIV of the Code.

An accused, while disposal of his application under plea bargaining, is entitled for setting off the period of detention from the sentence of imprisonment imposed under S. 265E. He is entitled to a set off the period of detention, he had already undergone in the same case, during the investigation, inquiry or trial, but before the date of conviction, in

compliance of the provisions of S. 428 only. This provision enables early release of under trial prisoners, who are the real victims of our delayed judicial process.

Thus the provisions of Chapter XXIA extends the scheme of plea bargaining in the Indian Criminal Jurisprudence, to a limited extend only, by giving discretion to the Court, restricting excess power to the prosecution, as seen from International jurisprudence, by giving sufficient measures to prevent the abuse of process. Though S. 265C does not state about the nature of bargaining, it is a consolidation of Charge, Sentence and Fact plea-bargaining, as the provision says about the mutual satisfactory disposition, which has wider connotation to canvass the characteristics of these kinds of plea bargaining.

### **Author's Readings**

*"The Defense Attorney's Role in Plea Bargaining." Yale Law Journal 84 (1975): 1179–1314.*

*"Plea Bargaining and Its History." Columbia Law Review 79 (1979): 1–43.*

*"Is Plea Bargaining Inevitable?" Harvard Law Review 97 (1984): 1037–1107.*

*{Most of the views expressed in this Article are not of the author. But it is a consolidation of foreign literatures on plea bargaining for better understanding of the subject.}*

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