Plea Bargaining: A Comparative Analysis between India and United States

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Abstract

Plea bargaining is very popular and regularly used in America. More than 90% criminal cases are settled through plea bargaining trial rather than jury trial. Delay in justice, huge pendency, overcrowded jails and decline rate of conviction are the major problems before Criminal Justice System in India. To overcome these problems The Criminal Law (Amendment) Bill, 2003 introduced the measures in which plea bargaining is an important one. Accordingly the new Chapter XXI-A Plea Bargaining, Sections 265-A to 265-L is being incorporated in Code of Criminal Procedure, 1973 and brought into force on 5th July 2006. But after one decade in India, the purpose of Law Commission is not fulfilled.

This research paper covers the comparative study of plea bargaining in India and United States. The comparative study covers the concept of plea bargaining, meaning, types, origin and history, Constitutional validity, statutory provisions, role of judges, restrictions on offences and conclusion.

KEYWORDS – Plea bargaining, comparative analysis, India and United States

Introduction

Plea bargaining is a pre trial negotiation between the defendant and prosecution, in which defendant agrees to plead guilty in exchange for certain concession in punishment by the prosecution. In simply we say that plea bargaining is an agreement by accused to plead guilty in return for the promise of some benefiting in punishment.

Albert W. Alshuler defines plea bargaining as follows

> Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction. These concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offense charged or a variety of the other circumstances; they may be explicit or implicit; and they may proceed from any of a number of officials. The benefit offered by the defendant, however, is always the same: entry of a plea of guilty.[1]

Law Commission in its 142nd Report analyse the concept of plea bargaining as

> What is "plea bargaining"? In its most traditional and general sense, "plea bargaining" refers to pre-trial negotiations between the defendant, usually conducted by the counsel and the prosecution, during which the defendant

[1] Albert W. Alschuler, Plea Bargaining And Its History, 79, Columbia Law Review 1 (1979) 3 ,4. Available at http://chicagounbound.uchicago.edu/juornal_ articles (last visited April 4,2016).

> agrees to plead guilty in exchange for certain concessions by the prosecutor. "Plea bargaining" falls into two distinct categories depending upon the type of prosecutorial concession that is granted. The first category is "charge bargaining" which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the defendant in exchange for a guilty plea. The second category, "sentence bargaining" refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea. Both methods affect the dispositional phase of the criminal proceedings by reducing defendant's ultimate sentence.[2]

There is no simple and complete definition of plea bargaining. Neither Indian provisions nor U.S. provisions define plea bargaining. Different jurist defines it different way. Plea bargaining is also called as "plea agreement' or 'plea deal' or 'copping a plea' or 'plea in mitigation'. While the term plea of *nolo contendere* is recognized in U.S. A plea of "*nolo contendere"* means the defendant neither admits nor disputes the charge. This plea is also called plea of "*no cotest"* or a "*nolo"*. Plea bargaining is a wholesome, economic and expeditious form of criminal justice. In criminal justice system, regular trial can take months, years and years. While plea bargaining can be disposed off within a few days. It saves time and money of defendant as well as prosecution, court, police also. There are three different types of plea bargaining i.e. charge bargaining, sentence bargaining and fact bargaining.

Though pleading guilty and bargain in sentence is basic principle in plea bargaining, United States and India have different practice as well as provisions. This study shows the comparative analysis between these two States on different points prescribed as follows-

A. Historical Background -

U.S. history of plea bargaining:

United State is the pioneer State, who is the first State, accepted plea bargaining concept and applied regularly in criminal courts. In criminal trials American judiciary accepted this concept in the 19th century and become successful …… In fact, plea bargaining become a significant part of criminal justice system in United State, where 90% criminal cases are settled through plea bargaining trial rather than jury trial. Thus it shows that plea bargaining plays an essential role in American criminal justice system.

Practice of plea bargaining is very common in U.S. The well-known author George Fisher in his book 'Plea Bargaining's Triumph: A History of Plea Bargaining in America', recorded the history of plea bargaining since 1780 and continued till 1900. Also, he illustrated the past of the criminal courts Middlesex County, Massachusetts in the years 1780-1900. Through this example, he explains how the seeds of the plea bargaining system were sown and how they have grown.[3]

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[2] LAW COMMISSION OF INDIA, 142nd REPORT, 5 (1991).

[4] http://www.lawcourts.org/LPBR/reviews/Fisher1103.htm (last visited April 4, 2016).

In Almeda County, from the year 1880 to 1910, near about 10% of all accused persons changed their "not guilty" pleas to "guilty of lesser charge" or pled guilty to reduce charges. At present, the plea bargaining becomes a required part of the criminal justice system. The greater part of cases, more than 90 percent in many jurisdictions, are resolved through any type of plea bargaining.[4]

Dr. Suman Rai, in his book 'Law Relating to Plea Bargaining', specified the early history of plea bargaining in America. He stated that

> "The practice of "plea bargaining" in America goes back a century or more. One study found it, for example, in Alameda County, California, in about 1980s. Judges in County even talked about the way they gave credit for guilty pleas. "plea bargaining" was not as pervasive as it is now….nor even close to it….but it was by no means rare.[5]

Various Crime Commissions demonstrated in the 1920's that plea bargaining had become common and that the use of this route to conviction had increased in the immediately preceding decades. Now a days plea bargaining is become a significant part of U.S. criminal justice system. The vast majority of criminal cases are settled by plea bargaining rather than jury trial. At present, the plea bargaining becomes a required part of the criminal justice system. The greater part of cases, more than 90 percent in many jurisdictions, are resolved through any type of plea bargaining.

Indian history of plea bargaining: Indian legal system is about 150 years old. The present system followed in India is an outcome of British rule. The uniform law system came into existence all over India. The Acts, Codes like Indian Penal Code, 1860 (herein after I.P.C.), the Indian Contract Act, 1862, the Indian Evidence Act,1872, The Criminal Procedure Code 1898 were comes into force in all over India. To punish the offenders was the main objective of the British legal system. After independence, we accepted this system as it is as. Plea bargaining practice was not established in India. However, for quick disposal of petty offences and to reduce congestion in the Court of Magistrate the special provision were incorporated in Sections 206(1) and 206(3) of the Cr.P.C. Also Section 208(1) of Motor vehicle Act, 1988 provided the summary procedure.

From last two decades, in India Criminal court fails to provide speedy trial; wholesome and economic justice. The huge pendency in courts, abnormal delay in the trial, low rate of conviction and overcrowded jails are the main reasons behind this inefficiency. Not only judiciary but investigation machinery and jail administration also affected due to these problems. For the speedy trial, the mechanisms like Fast track Court, Lok Adalat, Conciliation, Mediation, and Arbitration etc. working from last two decades, but problems are not going to sort out by these mechanisms.

Large numbers of accused persons languished in jail. All jails are overcrowded with thousands of inmates. Due to delays in trial, about 75% prisoners are under-trial prisoners languished in jail. Criminal trials are pending for a number of years and end with a decade or more periods. A number of trials commence with a long period as

[4] www.history.com/this-day-in-history/plea-bargaining-gains-favour-in american- courts (last visited April, 4,2016).

[5] SUMAN RAI, LAW RELATING TO PLEA BARGAINING, 6 (Orient Publishing Company, 2nd ed. 2014).

three/four/five or more. In this period accused is under judicial custody and remitted in jail. The rate of conviction is very poor, the majority of cases end with an acquittal. On the other hand, large numbers of accused have not been able to secure a bail due to the poor economic condition. They spend their time with harden criminals and face other inhuman conditions in jail. In these entire situations, the accused have to go through the mental suffering and also have to spend lots of money for legal expenses. The life of under-trial prisoners remains in a state of uncertain condition. Due to which they are unable to settle down their life and only awaiting the completion of trials remains in his hand.

On the other hand Judiciary, police department and jail administration are also working with the burden and unable to work effectively. The State has become helpless to handle this situation and not able to provide huge funds. In this background, the Law Commission recognizes the essentials of situation and moves for some curative legislative measures for reducing the delays in clearance of criminal cases and appeals and also distresses the pains and distress of under-trial prisoners. In its 142nd Report, the Law Commission introduced the concept of plea bargaining.

Law Commission also recommended the concept of plea bargaining in its 142nd[6], 154th[7] and 177th[8] Report continuously. Law Commission has taken the initiative to overcome the problem of huge pendency in criminal cases. In its 142nd Report Commission studied the plea bargaining concept first time. Thereafter in 154th Report also recommended the plea bargaining as an alternative and optional method to deal with the vast pendency of criminal cases. Then in 177th Report Commission also discussed on issues related to plea bargaining. These recommendations of the Law Commission supported by the Report of Criminal Justice System Reform Committee[9], which was headed by Dr. (Justice) V.S. Malimath (hereinafter called Malimath Committee). Try to deal with an ever-growing number of criminal cases Malimath Committee also recommended some suggestions including plea bargaining. To improve existing criminal justice system the Criminal Law (Amendment) Bill, 2003 introduced the measures in which plea bargaining is important one.

On the recommendation of the various committees for criminal reform and advice of the Supreme Court, the legislature has acted and passed the Criminal Law (Amendment) Act, 2005 and introduced the much-needed plea bargaining concept.

Though the plea bargaining concept was unknown or not used in our criminal court practice, after consideration of its importance and recommendation by Law Commission it is taken into account, that it is an alternative method to solve the problems faced by criminal courts. Thus, in India, we accepted it with a practical approach. Keeping a view of success in the developed countries practice of plea bargaining, this concept will become landmark step and to reform Indian legal system.

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6 THE LAW COMMISSION OF INDIA, 142ND REPORT on Concessional treatment for offenders who on their own initiative choose to plead guilty without any bargaining (1991).

7 THE LAW COMMISSION OF INDIA, 154TH REPORT on the Code of Criminal Procedure, 1973 (1996).

8 THE LAW COMMISSION OF INDIA, 177TH REPORT on Law relating to Arrest (2001).

9 THE COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REPORT (2003).

B. Constitutionality of plea bargaining –

United States:

In 1970, the constitutionality of plea bargaining and its legality were established in *Brady v. United States*[10] in this case Supreme Court observed that – "Although the fact that the prevalence of guilty pleas as the basis of convictions is explainable because of mutuality of advantage to the defendant and the State does not necessarily validate such pleas nor the system which product them, nevertheless it is not unconstitutional for the State to extend the benefits of a lesser penalty than after trial to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his crime and to enter the correctional system in a frame of mind that affords hope for success I rehabilitation over a shorter period of time than might otherwise be necessary."
Again in *Santobello v. New York*[11] United States Supreme Court also upheld the constitutional validity of plea bargaining.

India:

Prior to 2006 i.e. before amendment in Cr.P.C., Supreme Court of India as well as other High Courts in India many time discussed the issue of constitutionality of plea bargaining and declared this unconstitutional. In 1968, *Madanlal Ramchandra Daga'*s case first time Supreme Court opinioned that to enter into a bargaining is very wrong for a Court. Thereafter in many cases the Supreme Court and High Courts time to time declared that the concept of plea bargaining is not recognized and is against the public policy under our criminal justice system and hence unconstitutional and it is against the provisions of law.

But after Law Commissions 142nd Report and 154th Report the view of the Court was changed and in 2005, *State of Gujarat v. Natwar Harchandji Thakor,*[12] the Gujarat High Court considered the utility of plea bargaining. Also Law Commission noticed the utility of plea bargaining and accordingly amendments took place in Cr.P.C. and the concept of plea bargaining becomes legal provision and constitutional too.

After the Criminal Law (Amendment) Bill, 2003, in *State of Gujarat v. Natwar Harchandji Thakor*[13] the Gujarat High Court first time discussed positively on plea bargaining issue. The High Court discussed that –

"It is true that the idea of "plea bargaining" in jurisdictions in India is not permissible, but in the view of the changed circumstances and present state of affairs of the criminal justice delivery system in our country, a Bill has been introduced by the Government, known as "The Criminal Law (Amendment) Bill, 2003 (Bill No. LX of 2003)" in which Chapter XXI-A, relating to "plea bargaining" is proposed to be introduced in the Code of Criminal Procedure, 1973. In the said Bill, new Sections, i.e. Section 265-A to 265-L are proposed to be added in the Code of Criminal

10 397 US 742 (1970)
11 404 US 257 (1971)
12 2005 CriLJ 2957, (2005) 1 GLR 709.
13 2005 CriLJ 2957

Procedure so as to provide for raising the "plea bargaining" in certain types of Criminal Cases."[14]

In this case High Court noticed the utility of plea bargaining as a need of time. On this view the High Court discussed that –

"We are tempted to maintain here that the law should be stable but not standstill. The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. As such, "Change is only constant thing in the world". If the individual, society or for that purpose, nation feels allergic to the change for the reforms and remaining oblivious to the realism and prevalent situations, the very existence may be in jeopardy. It is, therefore, rightly said that all must have an open mind, as mind is like parachute; it starts working when it is open. Although, hereto, as a part of colonial legacy, "plea bargaining" has not been recognized, so far in our system and Criminal Jurisprudence. However, keeping in mind the huge arrears and long time spent in trials and result hardship to parties, and particularly, the accused and the victims of the crimes, the benefit of "plea bargaining" as an alternative method to deal with the dispute or question of offence requires serious consideration, which would not be admissible and available to the habitual offenders. We should remember a saying that "every saint has past and every sinner has a future" and also that "law and justice should not be distant neighbours."[15]

Thus after amendments in Code of Criminal Procedure, the plea bargaining provisions are inserted in chapter XXI-A and this concept becomes legal and constitutional.

C. Statutory Provisions –

Statutory provisions in United State: Now a days, plea bargaining becomes essential as well as desirable part of criminal justice system. There are two types of systems in America i.e. State System and Federal System.

In State system, plea bargaining is so common in the Superior Courts of California. The Judicial Council of California has published an optional seven page form to help prosecutors and defence attorneys reduce such bargains into written plea agreements. This form contains all mandatory advisements required by federal as well as State law.

While in Federal System, the Federal Rules of Criminal Procedure provides two main types of plea agreements. Rule 11(a)(1) provides general provisions in which the defendant have three options i.e. to plead not guilty, guilty or *nolo contendere*. If defendant refuses to accept the plea of guilty, the court must accept it and enter his plea of not guilty. In plea of guilty or *nolo contendere*, a defendant may enter with the consent of the Court and Government. In case plea of *nolo contendere* before the accepting this plea the Court must consider the parties view and the public interest in the effective administration of justice.

[14] 2005 Cri.L.J. 2978

[15] 2005 Cri.L.J. 2979.

In case of accepting a guilty or *nolo contendere,* in open court the Court must address the defendant personally and inform his rights, nature of charge, possibility of penalty etc. Also, the court accept defendants plea under oath and determine that the plea is voluntarily and not result of any threat, force or promises. Finally before entering judgment on a guilty plea, the Court must determine the factual basis for a plea.

Rule 11(c) provides procedure for plea agreement. At the time of proceeding, an attorney for government the defendant's attorney and or defendant may discuss on the issue of bargaining and reach plea agreements. In this discussion the Court must not participate.

The plea agreement may specify that an attorney for the Government will –

- Not bring or will to move to dismiss other charges;
- Recommend or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing guidelines, or policy statement, or sentencing factor does or does not apply.
- Agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the sentencing guidelines, or policy statement, or sentencing factor does or does not apply

After completion of procedure of plea agreement, the parties must disclose plea agreement in open Court. According to this rule there are two main types of plea agreements. An agreement under Rule 11(c)(1)(B) does not binding on the Court, while it is binding under Rule 11(c)(1)(C).

After that, if the agreement is under Rule 11(c)(1)(A) or (C), the Court may accept or reject the agreement or defer a decision until the Court has reviewed the present report. If the agreement is under Rule 11(c)(1)(B), the Court must advise the defendant that the defendant has no right to withdraw the plea if the Court does not follow the recommendations or request.

If Court accepts plea agreement filled under Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment. If the Court rejects this agreement then, the Court must inform the parties that the Court rejects the plea agreement and advice the defendant personally that the Court is not required to follow the plea agreement and if plea is not withdrawn, the Court may dispose the case less fevourable. Also gives opportunity to withdraw the plea.

The defendant may withdraw a plea of guilty or *nolo contendere* before the Court accepts or after accepts the plea, but before sentencing. The Court also rejects a plea agreement under Rule 11(c)(5) or the defendant can show a fair and just reason for requesting the withdrawal. But after the Court imposes the sentence, the defendant may not withdraw a plea of guilty or *nolo contendere*. The plea may be set aside only on direct appeal or collateral attack. The admissibility or inadmissibility of plea, plea discussion and related statement is as par provisions of Federal Rule of Evidence.

When defendant enters the plea must be recorded by a Court reporter or by suitable recording device. The record must include entire procedure including inquires and advice to the defendant required under Rule 11(b) and (c).

Thus under rule 11 provides provisions for not guilty, guilty plea and *nolo contendere.* This rule specifies what the court must do before accept a defendants plea of guilty. According to provision mention inthis rule, the court address the defendant personally in open court and make sure that the defendant understands the exactly meaning of plead guilty and related procedure. The court must satisfy that a defendant is pleading guilty voluntarily.

Statutory Provisions in India:

To reduce the problem of huge pendency in criminal courts and to avail this problem in the Cr.P.C. the plea bargaining concept is introduced in India. The plea bargaining is being incorporated in Cr.P.C. The Chapter XXI-A, with section 265-A to section 265-L is inserted by the Criminal Law (Amendment) Act, 2005 (2 of 2006) and brought into force on 5th July, 2006. This amendment is the outcome of the recommendations of the Law Commission.
The chapter XXI-A Plea Bargaining, section 265-A to section 265-L provides following provisions

Sec. 265-A Application of chapter

Sec. 265-B Application for plea bargaining

Sec. 265-C Guidelines for mutually satisfactory disposition

Sec. 265-D Report of the mutually satisfactory disposition to be submitted before the court

Sec. 265-E Disposal of the case

Sec. 265-F Judgment of the court

Sec. 265-G Finality of judgment

Sec. 265-H Power of the court in plea bargaining

Sec. 265-I Period of detention undergone by the accused to be set off against the sentence of imprisonment

Sec. 265-J Savings

Sec. 265-K Statements of the accused not to be used

Sec. 265-L Non-applicability of the chapter

According to the provisions of this chapter, the accused voluntarily filed application for plea bargaining in the court where his trial is pending. The time is given to both parties for settlement of a case. In this settlement parties may discuss on quantum of punishment and compensation to victim and other related issues of the case. When this settlement is worked out, court heard the parties, delivers judgment and imposes the concessional punishment on accused accordingly. The sentence will be one fourth of the punishment provided for such offence by law. The statements or facts stated in plea bargaining application by the accused shall be used only for the purpose of this chapter and not used any other purpose. The order of the court is final and like other trials the provision of appeal against judgment shall not be applicable in plea bargaining cases.
Though this provision is incorporated before one decade it is not accepted and regularly used in criminal trials. The legal awareness in society and general apathy in the legal fraternity are main reasons of poor implementation of this concept.

D. Frequency of Use -

United States: more than century practice seen in United States. Vast majority of cases followed plea bargaining procedure. More than 90% cases goes trial under plea bargaining.
India: used in rare cases.

E. Procedural Safeguards -

United States: Rule 11 of Federal Rules of Criminal Procedure, contains provisions and procedural safeguards governing plea agreements.
India: legislative provisions under Code of Criminal Procedure, 2973. Chapter XII-A, sections 265-A to 265-L contains provisions of plea bargaining.

F. Restrictions in offences -

United States: plea bargaining allowed in every types of cases, including murder and terrorism cases, but prosecutor may refuse or to be instructed to refuse to negotiate in particular case.
India plea bargaining is not allowed all types of cases. According to provisions under section 265-A, plea bargaining is allowed to cases where punishment is below seven years and not allowed to offences against women and child, socio-economic offences, offences against State and habitual offenders.

G. Role of Judges -

United States: Rule 11 prohibits Judges from any substantive involvement in plea negotiations. In Federal Court process Judges role is extremely limited.
India: Judge plays important role in mutually satisfactory disposition of the case.

H. Public debate -

United States: debate in public as well as in legal community seen. The factors of debate are- the racial disparity and continuing revelation that innocent person plead guilty and are sentenced to prison pursuant to plea agreement.
India: some people oppose on the ground that Country's social conditions do not justify this concept. The social and economic condition is different than United States. The poor victim will be the ultimate victim of the concept and social benefits seen in this concept. Plea bargaining may increase the incidents of crime etc. while some people welcomed his concept as helpful to solve problems like huge pendency, late trial procedure, overcrowded jails etc.

Conclusion -

The origin of plea bargaining is found in America. This concept is constitutional and became a necessary and integral component of United States criminal justice system. In India, the approach towards plea bargaining, in the initial years does not appear to be encouraging. In United States, there is no restriction or limitations on the kind of offence. While in India, the provision of plea bargaining is applicable only offences having punishment under seven years. In United States application for plea bargaining is filed only after negotiations between the accused and the prosecutor is over. To ascertain of voluntariness of application is not binding on judge. While in India, at

the time of beginning the criminal trial, the defendant file an application in court where his trial is pending. The court must ascertain the voluntariness of the plea bargaining application. The Indian provisions are more broad and precise than United States provisions. But after one decade, plea bargaining is not properly implemented in India.