A PLEA FOR A BETTER BARGAIN: AN ANALYSIS OF PLEA BARGAINING IN INDIA

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INTRODUCTION

The debate surrounding the introduction of plea bargaining in India[1]may only remain a moot point after 2006, but the implementation of the much-debated concept introduced as chapter XXI A[2], in the Code of Criminal Procedure, 1973 (hereinafter the 'Code') suggests that the legislature perhaps cannot see the wood for the trees.

Historically, the Supreme Court of India has never expressed its support for the concept of plea bargaining[3] and perhaps this is justifiable by the fact that introduction of plea bargaining has, unfortunately, not had the desired effect of reducing the number of cases pending before Courts in India. This paper aims to analyze some of the reasons that have hampered the utility of plea bargaining as a concept in India and makes suggestions regarding potential measures to make it more effective.

The Law Commission of India in its 142nd report[4]had pointed out the need for the implementation of a system of plea bargaining. Some of the principal points for the incorporation of plea bargaining in the Code include (i) Data revealed that in several cases, the time spent by the accused in jail before the commencement of the trial exceeds the maximum punishment which can be awarded to them if found guilty (ii) Plea bargaining would serve as a means for the disposal of accumulated cases and expedite the delivery of justice.

[1]For a summary on the debate for and against the introduction of plea bargaining, see Albert W. Alschuler Law & Society Review, Vol. 13, No. 2, Special Issue on Plea Bargaining (Winter, 1979), pp. 211-245
[2] Inserted by Central Act 2 of 2006 with effect from 05.07.2006.
[3]*Murlidhar Meghraj Loya and Another* v. *State of Maharashtra*, (1976) 3 SCC 684.
[4]*Concessional treatment of offenders who on their own initiative choose to plead guilty without any bargaining*, available at http://lawcommissionofindia.nic.in/101-169/report142.pdf.

While plea bargaining has been formally added to the Code by the insertion of chapter XXI A the question regarding its effective utilization remains open. If the number of cases pending before Courts in India can be relied upon as an accurate indication, the answer is in the negative. The reason for its underutilisation is obvious. Plea bargaining by an accused is optional not mandatory. More concerning is that it is optional at the advice of the defence (counsel), such advice not always being full proof or adequate[5]and does not involve any recommendations by the Court.[6]

CAUSE FOR DELAY

One of the least talked about and most significant causes for the delay of trials in India are defence lawyers deliberately prolonging trials to charge per appearance. All forms of trial sans summary trials have a provision for pre-trial hearing be it under sections 239, 245 or 227 of the Code. If at this stage the court deems it fit to discharge the accused, they are not required to face trial. These orders are, however, revisable orders. It is recommended that at this stage the Court should insist that the accused consider opting for a plea. In fact, as part of the order that records sufficient material to proceed against the accused, the court should also make recommendations as to the severity of the sentence that should visit the accused, should the trial conclude in a conviction or if the accused chooses to plead guilty at a later stage.

EXISTING FRAMEWORK WITHIN THE CODE

The most basic form of a guilty plea ina criminal proceeding can be found in Section 206 and Section 253 of the Code. Section 206 deals with special summons in case of petty offences (offences punishable with a fine not exceeding one thousand Indian rupees), Section 253 can be found in chapter XX which deals with a trial of summons cases by magistrate.[7] It deals with

[5]The Innocence Project makes interesting observations about inadequate defense in the context of plea bargaining in the United States and calls for some thought by the Indian legislators and judiciary alike.
[6]This appears to a common problem across jurisdictions. See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms,* 126 Harv. L. Rev. 150.
[7] Summons cases have an interesting definition under the Code of Criminal Procedure, 1973. Section 2(w) reads, "any case relating to an offence, and not being a warrant case". A warrant case as defined under Section 2(x) reads, "any case relating to an offence punishable with death, imprisonment for life or imprisonment for a period exceeding two years."

conviction on a plea of guilty in the absence of the accused in petty cases between Section 206 and Section 205. It can be inferred that any offence between a fine not exceeding one thousand rupees and a sentence not exceeding two years can be summarily disposed of by Magistrates. These sections do not require much alteration; however, it is felt that the substantive portions of the Indian Penal Code and other penal laws need to be revised to increase these fine amounts to substantial sums. A large population of India to which these sections apply unfortunately belong to the underprivileged strata of the society, however, an amendment revising the value of these fines would be welcome such that the deterrent element of these sections is bolstered.

The offences that have fines exceeding one thousand rupees and sentences exceeding more than three years may be dealt with as provided under chapter XVII, for offences triable before a Court of Session or under chapter XIX for trial of warrant cases by Magistrates. Section 265 A is the first Section under chapter XXI-A. It lists out the nature of cases that the chapter deals with. The chapter does not apply where such offences have been committed against a woman or a child below 14 years of age and to other offences that the central government by Notification, notify. Section 265 B deals with applications for plea bargaining. The language of the section indicates that the defence may make an application for plea bargaining, completely at the discretion of the accused or their counsel. There is no intermediate stage for the court to explain to the accused the likelihood of the success or failure in the case. Further, conditions are that the application are to be filled in by the accused voluntarily, after understanding the nature and extent of punishment provided under the law for the offence under which he or she has been charged. This application must be accompanied by an affidavit. Thereafter, the public prosecutor and / or the complainant as the case may be, are informed and to be heard, to work out a mutually satisfactory disposal of the case. It is rather ironic that while the Courts in India have gone to extraordinary lengths to ensure that the accused are given a fair trial and adequate explanations are provided at the time of recording plea, framing of a charge and at the stage of section 313,[8] where the court can enable the accused to explain any circumstance appearing in the evidence against him, yet, there has been scare attempts to ensure that the accused is made aware that they can plead a lesser sentence.

[8]*Basavaraj R. Patil and Others* v. *State of Karnataka and Others*, (2000) 8 SCC 740.

RECONSTRUCTION

The author feels that the ideal stage to implement plea bargaining is once orders are passed under section 226 of chapter XVIII and after orders are passed under eithersections 239 and 245, as the case may be, of chapter XIX. The rationale behind implementing the chapter on plea bargaining at these junctures is simple–thiswould be the first opportunity that the accused has to put forward their case before the court. Before the court passes an order it has an opportunity to peruse the material on record. This also provides an opportunity for the accused to point out all the defects in the complaint and other materials furnished by the prosecution / complainant. When orders are passed by the court having gone through the material available and the defence put forward, it is suggested that the time is ideal for the court to opine, in cases where the accused are not discharged, the minimum sentence that the accused should serve if they plead guilty or the maximum sentence that can be imposed if they choose to stand trial. These orders are revisable by appellate Courts. Moreover, even if the entire trial court's order does not call for setting aside, even the observations regarding sentencing alone can be modified. By implementing several of the recommendations above, several rationale that the Law Commission Report had discussed in favour of introducing the concept of plea bargaining, that unfortunately have not been resolved even post the introduction of chapter XXI A, can be achieved.

CONCLUSION

The Indian judiciary is heaving under the weight of administering justice to a population of well over a billion citizens. The need of the hour is more efficient methods to keep pace with this ever-increasing work load. Plea bargaining could be one of the solutions to curb the growing number of pending cases that is inhibiting the efficacy of the Indian justice delivery system, with chapter XXI A in its current form being limited to only certain classes of offences that do not affect the fabric of society. However, it is firmly believed that the implementation of plea bargaining as recommended above at the appropriate stages of trial will yield the following benefits, including: (i) reduce delay and backlog of cases and encourage speedy disposal of criminal cases; as a result, precious judicial time can be saved and utilised to hear other serious cases; (ii) save effort, expense and energy of the accused and the State,

significantly reducing the congestion and costs to the State for maintaining prisons; (iii) raise the number of convictions from its current low[910] to a fair level to bolster the credibility of the system; (iv) not to facilitate innocents or unproven accused to be incarcerated with hardened criminals during pre trial periods and after conviction, which otherwise has proven to leave a lasting negative impact on such persons; (v) victims of crimes will be benefited as they would be compensated sooner; and (vi) the accused will serve a reduced punishment if he opts for plea bargaining. The accused may even be released on probation or after admonition or receive the concession of considering the period undergone in custody as suffering the sentence.[11]

As regards certain reservations regarding plea bargaining and how the recommendations made above would affect them, the following points are in order: (i) lack of awareness and illiteracy cannot be a credible point against plea bargaining anymore, since per the recommendations made above, the order would be available to the accused and he can seek and benefit from multiple opinions, not just of his defence counsel but also external expert advice, before making an informed decision. Presently, the accused is at the mercy of his counsel due to the lack of findings by a competent court. With the order in writing, this reservation is at least partially resolved; (ii) the concern that the involvement of the police in the plea-bargaining process would tempt coercion on innocent people is unfounded since under the suggested scheme, the implementation of plea bargaining is only after the defence has put forth its arguments on the complaint and other materials provided by the prosecution and the Court has determined their veracity and (iii) the apprehension that if an application to plead guilty is rejected, then the accused would face greater hardship to prove himself innocent, is also put to rest since there will be judicial application of mind before recommendations are proposed and if the accused is dissatisfied with the order that has been passed he has the statutory remedy of revision.

In conclusion, the remedy for more efficient disposal of cases exists within the framework of the Code. The non-implementation could perhaps be attributed to unscrupulous lawyers who do not wish an expeditious resolution to their defence; however, the judiciary, whose primary objective is to deliver justice and expeditiously ought to act in the quickest manner within the framework of the law. All the concerns expressed by the Supreme Court in *Hussainara*

[9]The Law Commission Of India in its 154th Report on the Code of Criminal Procedure, 1973, at page 51, available at, http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf.
[10] According to Data collected by the National Crime Records Bureau, convictions are on a serious decline, all data pertaining to the rate of convictions in various crimes is available at http://ncrb.gov.in/.
[11] Section 428 of Code of Criminal Procedure, 1973.

Khatoon[12] and mirrored by the Law Commission of India in its 142nd report will have proven to have not been implemented and the number of cases pending before Courts in India will only continue to grow. In the same vein, it would be a worthwhile exercise for a comprehensive and impartial study to be conducted on the letter of the law vis-à-vis the reality facing the system, on the lines of the death sentence project conducted by the National Law School at New Delhi, in association with the Centre for Criminology at Oxford. This would ensure that at least an academic analysis is readily available for future review and implementation of plea bargaining in India. The report, subject to regular review and updating, can serve as a ready reckoner for all relevant information, including statistics and the evolution of case law in this regard.

[12]*Huhussainara Khatoon and Others (III)* v. *The Home Secretary, State of Bihar, Patna and Others*,(1980) 1 SCC 93.