

# AN ANALYSIS OF ALTERNATE DISPUTE RESOLUTION IN INDIAN CRIMINAL JUSTICE SYSTEM: SCOPE & WAY FORWARD

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## I. INTRODUCTION

ADR is an Alternative Dispute Resolution (hereinafter referred to as ADR). ADR, as the name speaks for itself, is an unconventional method of resolving the legal dispute in contrast to process adopted traditionally of resolving dispute through adversarial litigation by approaching courts. The Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) which lays down procedure to be followed in criminal cases, does not explicitly provides for ADR but it has been incorporated in it in the form of (i) Plea Bargaining, Ch-XXI A of the Code, (ii) Compounding of offenses under section-320 of the Code and to some extent (iii) section-482 of the Code wherein the parties seek to quash the proceedings after settling the matter mutually amongst themselves, which is still evolving.

Justice Warren Burger's saying that "the notion which prevails among masses that litigants desire to have fine courtrooms, smart lawyers, judges in black-robe"<sup>1</sup> appears to be incorrect in India in the present context because of slow pace of litigation and pendency of cases in courts. Litigants who are suffering due to their problems, need justice and relief as early as possible and that too in the cheapest possible means. In India, there exists a backlog of almost 4 crores cases spreading over the Apex Court, distinct High Courts and Subordinate Courts. One-third of cases pending in High Courts are criminal cases whereas, in the subordinate courts, the number is much higher i.e., approximately 2.5 crores cases out of 3.4 crores pending cases are criminal.<sup>2</sup>

Taking into account the existing pendency and incessant rise in the same, more so in the light of pandemic, ADR can be perceived not only as an effective and cheapest method for dispensation of justice but also it has become the need of the hour for maintenance of

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<sup>1</sup> 222<sup>nd</sup> Law Commission Report on Need for Justice-Dispensation Through ADR Etc., Law Commission of India, Government of India, April 2009.

<sup>2</sup> BQ Desk In Chart, *available at*: <https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts> (last visited on March 10, 2021).

peace and harmony in the society. But the question which arises time and again and has been raised by many eminent professionals and jurists that whether these methods serve the purpose of imparting justice to the victim, reforms the offender and further prevents recidivism?

Fundamentally, crime is a wrongdoing not against the individual alone but the society at large and hence the individual alone should not be allowed to discharge the accused person from his culpable liability. Nevertheless, cases which are more of civil in nature in essence or private (non-cognizable offences) in nature and does not involve heinous and grave offences can be resolved through such ADR methods which are expeditious in nature.

The incorporation of such methods for dispensation of justice in criminal jurisprudence reflects the shift from the traditional retributive justice approach to restorative justice. Restorative justice being in stark contrast to retributive justice is more victim oriented than offender focused and emphasizes more on repairing the injury caused to the party who suffered the harm, by the accused than penalizing him. Keeping this aspect in mind the concept of Plea Bargaining has been incorporated in the Code.

## **II. PLEA BARGAINING**

Plea bargaining is a discussion occurring before the trial begins, between the prosecution and the accused whereby the accused person in lieu of certain reduction in sentence offered by the prosecution, pleads guilty. Plea bargaining are of various types i.e., fact bargaining, based on facts, sentence bargaining based on reduction in sentence to be awarded, and charge bargaining based on the mollifying the charge to be framed. Here, all these types of bargaining will be collectively referred to as plea bargaining.

The concept of plea bargaining has been borrowed from United States. In America, this practice of “plea-bargaining” can relate back to more than a century. As per study, it existed in Alameda County of California even in about 1880s.<sup>3</sup>Plea bargaining is one of the most significant methods to dispose of criminal cases in US. A vast majority of cases as much as 90% of criminal cases are disposed of by the way of plea bargaining and only a few criminal cases registered reach to the stage of trial<sup>4</sup>.

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<sup>3</sup> Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any bargaining, 142<sup>nd</sup> Report by Law Commission of India published on Aug. 22, 1991 at p. 5.

<sup>4</sup> 142<sup>nd</sup> Report on Concessional Treatment for Offenders who on their own initiative choose to plead guilty

In *Bradley v. United States*<sup>5</sup>, the first significant case wherein the constitutional validity of convictions by way of plea bargaining was raised. The constitutional validity of this method of dispensation of justice was upheld by the Apex Court of United States provided the same has been done by the volition of the parties, was deliberate and informed. Justice White, who delivered the opinion of the Court, observed that:

*“The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. It is this mutuality of advantage that perhaps explain the fact that at present well over three-fourth of the criminal convictions in this country rest on the pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.”*<sup>6</sup>

In *Santobello v. New York*<sup>7</sup> also, the Supreme Court of US upheld the constitutional validity of plea-bargaining and also highlighted the needed precautions which are required to be taken care of.<sup>8</sup> Justice Douglas:<sup>9</sup> while delivering the judgement observed that:

*“These plea-bargains are important in the administration of justice both at the State and at the Federal levels and, as the Chief Justice says, they served an important role in the disposition of today’s heavy calendars.”*

### ***A. Plea Bargaining in India***

In 142<sup>nd</sup> report, the Law Commission of India for the first time supported the insertion of ‘Plea bargaining’ in the Code. Thereafter, this idea was further sustained by the Law Commission of India in its later 154<sup>th</sup> and 177<sup>th</sup> reports as well. A committee headed

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without any bargaining, Law Commission of India published on Aug. 22, 1991.

<sup>5</sup> 397 U.S. 742, 90 S. Ct. 1463 (1970).

<sup>6</sup> (25 L.Ed. 2d. P.758) [Emphasis added].

<sup>7</sup> 404 U.S. 260 (1971).

<sup>8</sup> *Supra* note 3 at 7.

<sup>9</sup> *Id.* at 257.

by Justice Malimath presented a report in the year 2000 on the reforms required to be brought in Criminal Justice system, reiterating the need to introduce plea bargaining in Indian Criminal Justice system and stated that the success of the same can be gauged in future in disposing of the criminal cases and reducing the heavy backlog in criminal litigation is evident of the fact that plea-bargaining is an effective means not only to dispose of cases but to expedite the delivery of justice in criminal cases.<sup>10</sup> Thereafter, based on the recommendations of Law Commission of India in above reports, Chapter- XXI–A of Plea Bargaining (section- 265A- 265L) was incorporated and was made an integral part of the Code through the Criminal Law (Amendment) Act 2005. Such concession of plea bargaining is available only to an accused person for an offence, punishment provided for which is less than seven years and has not been committed against women or children and is not a socio-economic offence.

### ***B. Response of Judiciary to Plea Bargaining in India***

The judiciary in India was initially reluctant to accept the concept of plea bargaining in the Indian criminal justice system and did not approve of any settlement arrived between the accused person and the victim as crime is essentially a wrong against the society.

The court stated in *Murlidhar Meghraj Loya v. State of Maharashtra*<sup>11</sup>, that these arrangements benefit everyone except distant victims and the quiet society. The court believes that the "state" is incapable of compromise. It is required to "enforce the law."

In *Kasambhai Abdul Rehmanbhai v. State of Gujarat*<sup>12</sup> the Supreme Court observed unequivocally that such a procedure would be manifestly illogical, unfair, and unjust, and would be contrary to public policy, as well as a violation of Article-21's new activist component. "it is trite that plea bargaining as a concept is not given recognition and is considered to be against public policy in criminal justice system of India".

But post introduction of the provisions of the Plea bargaining in the Code, we are witnessing a positive response from the judiciary.

In *State of U.P. v. Chandrika*<sup>13</sup>, the Supreme Court reiterated again and observed

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<sup>10</sup> Neeraj Aarora, "Plea Bargaining- A New Development in the Criminal Justice System", Dec. 18, 2010, available at: [https://cyberpandit.org/?article\\_post=plea-bargaining-a-new-development-in-the-criminal-justice-system](https://cyberpandit.org/?article_post=plea-bargaining-a-new-development-in-the-criminal-justice-system) (last visited on March 11, 2021).

<sup>11</sup> A.I.R. 1976 SC 1929.

<sup>12</sup> A.I.R 1980 SC 854.

<sup>13</sup> A.I.R 2000 SC 164.

that:

*“Nothing should be static and it should change time and need of the hour. The very purpose of any law is to provide justice and that too in the cheapest and the fastest way possible. Given the heavy backlog especially in the criminal field, it is not only required to bring such reforms but have become an inevitable remedy which shall not only help in expediting the dispensation of justice but shall at the same time advance the judicial reforms”.*

In *State of Gujarat v. Natwar Harchanji Thakor*<sup>14</sup>, the High Court of Gujarat observed that:

*"Justice delayed is justice denied" is a legal maxim meaning that "if legal redress is available for a litigant who has suffered some harm but is not made available in a timely manner, it is effectively the same as having no redress at all."*<sup>15</sup>

Given the complexity in the justice dispensation system and the menace of pendency looming over, courts are not being able to provide justice to the victims.<sup>16</sup> The former Hon'ble Chief Justice of India Sh. T.S. Thakur had broken into tears once while delivering a speech about the condition of judiciary, if this does not speak volume of the need of speedy justice then, what else would.<sup>17</sup>

### III. COMPOUNDING OF OFFENCES

Commission of crime in each case necessarily does not lead to initiation of a criminal case or may not lead to conviction. The parties to the litigation (the accused and the injured party) may reach to a compromise wherein the harm caused by the accused is repaired not necessarily in terms of money but in whatever way it satisfies the victim. Such arrangement of compromise between the parties of a crime is given under sec-320 of the Code.

Sec-320 (1) provides for the offences which can be compounded by the parties even

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<sup>14</sup> 2005 CriLJ 2957, (2005) 1 GLR 709.

<sup>15</sup> Justice Delayed Justice Denied (Wikipedia).

<sup>16</sup> *Ibid.*

<sup>17</sup> PTI, "CJI Breaks Down, Tells PM not to Shift Entire Burden of Judiciary" *The Tribune*, Apr. 24, 2016 (last visited on Apr. 10, 2022).

without the permission of the Court whereas under sub-section (2), permission of the Court is required prior to compromise. The effect of such compromise is acquittal but between the parties only and such compromise cannot be raised as a valid defense against a third party.

In *Preeti Gupta v. State of Jharkhand*<sup>18</sup>, the Court dealt with the cases of false implications and increasing misuse of this provision.

In *Gurudath K. v. State of Karnataka*<sup>19</sup>, the Court stated, “Even if the offences are non-compoundable, if they relate to matrimonial disputes and the Court is satisfied that the parties have settled the same amicably. Section 320 CrPC would not be a bar to the exercise of power of quashing of FIR or criminal complaint in respect of such offences.”

### III. MUTUAL SETTLEMENT AND QUASHING OF FIR UNDER SECTION 482 OF THE CODE

The High Court has the inherent power under sec-482 of the Code which can be used by it to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.<sup>20</sup>

The Andhra Pradesh High Court in *A. Srinivasa Rao v. State*<sup>21</sup> has observed that High Court has no inherent power under sec-482 to accord permission to compound a non-compoundable offence, as it would amount to a direction to the lower court to act in contravention of law. However, it can be seen in plethora of judgments that parties can arrive at a mutual settlement and can seek quashing of FIR in non-compoundable offences. This trend has been on rise which led to conflicting decisions of the Supreme Court in *Narinder Singh v. State of Punjab*<sup>22</sup> and *State of Rajasthan v. Shambhu Kewat*.<sup>23</sup>

To resolve this conflict, a three-judge bench of the Apex Court comprising of Justice A K Sikri, Justice M R Shah and Justice S Abdul Nazeer, in the case of *State of Madhya Pradesh v. Lakshmi Narayan* laid down certain guidelines which have to be kept in mind by the High Courts while quashing any criminal proceedings in non-compoundable offences by exercising the inherent power as provided under section 482 of the Code. Further, while examining the judgments in conflict with each other, the Apex Court said that power of criminal court is regulated by Section 320 of the Code in cases of compoundable offences

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<sup>18</sup> (2010) 7 SCC 3363.

<sup>19</sup> Criminal Petition No. 7258 of 2014, order dated 20-11-2014.

<sup>20</sup> Section 482 of Code.

<sup>21</sup> 1995 CrLJ 3964 (A.P).

<sup>22</sup> (2014) 6 SCC 466.

<sup>23</sup> (2014) 4 SCC 149.

while on the other hand the inherent power to quash the criminal proceedings is guided totally by the evidence or material on record as to whether it is in the interest of justice to exercise such inherent power.

The Apex Court gave the above guidelines to be followed while quashing any criminal proceeding in non-compoundable offences and the main emphasis has been put on the nature of the case while invoking inherent power under section 482 of the Code. Cases predominantly of civil nature and no criminal antecedents are favorable factors and on the other hand when a case is of heinous or grave nature or a crime under a special statute then, the High Courts should refrain from exercising the inherent powers. Further, in case of offences under section 307 IPC, it has to be seen whether such charge is prima facie made out or have been added in the charge sheet just for the sake of it while quashing the FIR.

#### **IV. ANALYSIS, SCOPE AND EFFECTIVENESS OF ADR IN IMPARTING JUSTICE TO VICTIM AND REFORMING THE OFFENDER**

As it is said that “justice should not only be done but seen to be done”. It is not a mere saying but it holds fundamental importance in justice dispensation mechanism. Earlier, in India, the focus in the criminal justice system was on the offender and to punish him for the crime he committed so that the punishment can act as deterrence for the future potential criminals. The victim was a mere spectator of the whole system and did not have any say in the whole process, be it trial or sentencing despite him being the aggrieved one. In India, the mounting arrears of cases and delay in trials led to more acquittals than convictions because of various factors like witnesses turning hostile, fading memory etc. Does the present system serve any purpose of serving justice to the victim when the majority cases terminate in acquittals after decades of harassment and having gone through such mental agony and physical exhaustion, financial constraints for so many decades in a full-fledged trial is in itself a form of injustice to the victim. Pursuit of justice seems to be a far-fetched dream for a victim especially for people from marginalized sections of the society. Retributive justice has been followed in India which focuses not on the reformation of the offender and harmonizing the relationship of the parties living in the same society but on punishing the offender which has promoted and perpetuated the animosity and unforgiving attitude combined with delay in trials have led to instances of celebration of instant justice of encounters etc.

Now, there can be seen reformation in Indian Criminal Justice system wherein

provisions of probation have been incorporated which promotes reformation of the offender and also serves the purpose of maintaining harmony in the society.

Further, there can be seen shift towards victim recognition and his inclusion in the system. Such exemplar shift was first proposed in 1996 by the Law Commission in its 154<sup>th</sup> Report. Accordingly, definition of a victim was incorporated in the Code in a new clause (Wa) in Section 2 and the victim was given right to have a private counsel to assist the prosecution, both by Section 2 of the CrPC (Amendment) Act, 2008 (Act No. 5 of 2009). These amendments read with section 301 (2) and 302 provided rights to victim to participate in the trial beyond just as a witness. More so, victim focused provisions like victim compensation scheme under section 357A, treatment to victims under section 357C of the Code are welcome move. Further, the recent amendment in section 439 of the Code relating to provision of bail, the presence of the informant or any person authorized by him has been made mandatory during the hearing of the bail of the accused for the offences committed under sections 376, 376AB, 376DA of Indian Penal Code.

Such inclusion and allowing participation of the victim as a part of restorative justice leads to much more satisfaction of the victim and a sense of justice as they have been having the desire to be kept informed at all the stages of the case. A study conducted in 2007 further found that such inclusion had a much higher rate of satisfaction of victims and also the accountability of the offender as compared to the traditional means of delivering the justice.<sup>24</sup>

In view of above discussions on restorative justice and its far-reaching satisfaction and sense of justice amongst the victims support the idea of ADRs in criminal justice system. For victim, justice is receiving his fair share be it in terms of money or property or closure.

In plea bargaining, unlike US, in India, the victims are involved and informed at each and every stage of the negotiation and also it being supervised by the court, therefore, the fear of coercion and non-voluntariness are unfounded. Heinous crimes have already been kept away from the domain of plea bargaining and hence, not completely taking away the scope of retributive justice.

#### ***A. Open and public justice***

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<sup>24</sup> Lawrence W Sherman & Heather Strang, "Restorative Justice: The Evidence" (University of Pennsylvania, 2007).

It may not be open justice in traditional form as it is not open for public scrutiny but it is open and transparent between the parties to the litigation as the whole process of bargaining has taken place under the supervision of Court. Thus, the whole scheme ensures the legitimacy of the proceedings and tends to build confidence amongst the parties and harmonize their relationship as well.<sup>25</sup>

Apart for satisfying the victim, plea bargaining can also be justified on a utilitarian basis as it saves money as well as time of both the State and the parties.

The uniqueness of this remedy was noticed when for the first time Asia's largest prison complex Tihar Jail saw a reduction of nearly 2,000 inmates in 2007. The Director General (Prison) said that reduction from the 2006 figure of 13,500 inmates to 11,500 in 2007 was a milestone in the history of Tihar Jail. He further said that "Much of this can be attributed to the plea-bargaining system introduced by the Delhi Legal Services Authority which has benefited 664 prisoners here." Thus, this experience proves the usefulness of plea bargaining.<sup>26</sup> As many as 34.8 percent (2,97,624) of trials for theft have been pending for over five years, and 3.1 percent trials (26,919) have been pending for over ten years. The picture is even more grim when we consider the figures for criminal breach of trust. Under this section, 44.2 percent of trials (46,670) have remained pending for over three years, while 4.1 percent of trials (4,416) trials have remained pending for over ten years.<sup>27</sup>

In nutshell the implementation of plea bargaining requires right amount of balance between speed and efficiency on one hand and justice, dignity and integrity of the court on the other hand.

Similarly, compromise of the offenses as available under the Code can be used as a great tool to reform the offender and harmonise the relationship of the parties by keeping the interest of both the parties in mind.

For the compounding of non-compoundable offences by mutual settlement and then quashing of FIR, it has to be seen that at times it is not the deterrence which is more

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<sup>25</sup> 1995 CrLJ 3964 (A.P).

<sup>26</sup> <https://www.news18.com/blogs/india/ekta-prakash/plea-bargaining-unique-remedy-to-reduce-backlogs-in-indian-courts-13296-744393.html?msclkid=34a2862ac51111ecaa3f4d00996a260d> (last visited on March 10, 2021).

<sup>27</sup> Neeraj Pandharipande, "NCRB data shows long-drawn out trials and low conviction rates the norm; criminal justice system crying out for reform", Nov. 11, 2019, *available at*:

<https://www.firstpost.com/india/ncrb-data-shows-long-drawn-out-trials-and-low-conviction-rates-the-norm-criminal-justice-system-crying-out-for-reform-7636091.html> (last visited on March 11, 2021).

important but the case requires more of correctional measure and resolves the private dispute, those cases can be settled mutually.

Recidivism is also a significant feature of reformatory justice. Current statistics on this aspect is not present in India right now as these provisions have not been brought in use that much.

Also, restorative justice is based on Gandhian principle that punitive approach would bring more chasm between the parties. As said by Mahatma Gandhi, “eye for an eye will make the whole world blind.”

## V. CONCLUSION

With the backdrop of pendency of huge number of cases and delay in Indian justice delivery system coupled with less victim satisfaction, above discussed methods of ADR can prove to be really effective. This ensures the certainty of the punishment as the offender has to repair the harm and that is in itself a sufficient punishment for him and makes him realize his fault and deters him from repeating the same in future. On the other hand, it satisfies the victim, as he has the ultimate veto power in plea bargaining and actively participates at all stages. Illiteracy or poverty can be seen as a stumbling block but that fear seems to be unfounded as these provisions are more of logic and are carried out under supervision of court only. However, it remains a dead-letter despite its introduction in the system before 15 years.

As Gandhi ji truly said that embrace the power of “accepting and letting go”.

In economic offences and crimes against property, the proposed way of settlement before filing of charge-sheet may reduce the burden of investigating authorities as well as the Court.

High Courts have power under civil as well as criminal procedure code to frame rules and accordingly, as per the peculiar circumstances prevailing in the respective States, rules have been formed. As per *Dayawati*<sup>28</sup> judgment, process followed in civil matters can be followed in criminal cases as well. Further, guidelines framed in *Yashpal Chaudhrani v. State*<sup>29</sup> judgment has made the position clearer in regard to mediation process in criminal laws. Although these judgments are applicable in Delhi only but do have persuasive value in

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<sup>28</sup> CRL. REF.No. 1/2016.

<sup>29</sup> Delhi High Court judgment dated April 22, 2019.

other states. These rules and guidelines may be adopted by other states as well for conducting mediation in criminal cases or rules may be framed by the High Court by exercising power under section 477 in CrPC.

Also, as per Prof. G.S. Bajpai, Justice is not opposed to forgiveness; rather it is the bedrock of forgiveness. And it is the key reform that criminal justice system needs.<sup>30</sup>

The concept of settling a non-compoundable case and seeking quashing of proceedings under section 482 of Code is still evolving and can be used effectively by Constitutional courts and litigants to tackle the menace of huge pendency.

Waiting for decades in pursuit of justice in criminal cases cause more agony and injustice to the victim than a sense of justice having been prevailed even when after decades the final verdict arrives as during all that period when they were being treated as mere spectators of justice they suffered injustice more in the hands of system dispensing justice than by the offender himself. In other words, some justice is better than no justice at all.

## VI. WAY FORWARD

Despite positive attempt by the legislature to tackle the ever-growing pendency, there has been lack of implementation of such provisions. Following are the few suggestions for better implementation of such beneficial legislations:

- i Unawareness among the litigants is one of the major reasons. Public has to be made aware of the system of plea bargaining and positive feedback of it has to be spread as it is perceived to be anti-poor.
- ii The victims who chose this path and were satisfied from this process should be motivated to spread their perception and experience to broader public which may further help it in being perceived as a fair process and also it can then be widely accepted.
- iii Litigants should be encouraged for compromise of cases wherever possible.

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<sup>30</sup> “Forgiveness is the key reform that criminal justice system needs” *The Indian Express*, available at: <https://indianexpress.com/article/opinion/the-option-of-forgiveness-in-criminal-justice-system-6252378/> (last visited on March 10, 2021).