

RIGHTS AND WAIVER: WHAT THE LAW IS AND WHAT THE LAW OUGHT TO BE**Sandeep Menon Nandakumar*****ABSTRACT**

This article explores the concept of waiver of rights, more specifically, waiver of fundamental rights in the context of plea bargaining by establishing a similarity between the American and Indian legal framework. This article examines the two concepts in detail and its application in the Indian and American context with the help of constitutional and statutory provisions and also with the help of landmark judgments. After examining the probable reasons for not incorporating the concept of waiver of fundamental rights in the Indian legal scenario and the reasons for incorporating the same in the American context, this article proceeds to draw an analogy between the instances/case laws where waiver of rights take place in both U.S. and Indian situation. This article argues that, to a certain extent, waiver of rights does happen in the Indian legal scenario after certain developments that took place in 2005 in our criminal justice system and that the same should find express mentioning in all the constitutional scholarly works.

Introduction

This work is to substantiate the existence of the doctrine/concept of waiver of fundamental rights in the Indian Constitutional framework and the need for finding some space in incorporating those in forthcoming scholarly books relating to Constitutional Law. The author's aim is to make the readers think outside the traditional concept of doctrine of waiver of fundamental rights in India so as to get an updated view on the concept. To make it simple,

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the aim is not just to make one think outside the box, but also to make one think inside the box and about the whole idea of boxes.¹

Waiver of Rights in the context of plea bargaining

The author seeks to establish the extent as well as scope of waiver and plea bargaining which would help in detailing out the central theme of this article.

A proper definition of the concept of waiver would be the following,

*“Waiver proceeds on the basis that a man not under legal disability is the best judge of his own interest and if, with knowledge of a right or privilege conferred on him by statute, contract or otherwise, for his benefit, he intentionally gives up the right or privilege, or chooses not to exercise the right or privilege, or chooses not to exercise the right or privilege to its full extent, he has a right to do so”.*²

The concept of waiver has also been defined by the Supreme Court in *M.P. Sugar Mills Co. Pvt. Ltd. v. State of U.P.*³ as an abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be an intentional act with knowledge. The Court expressly mentioned that there can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.

It is equally important that the concept of plea bargaining needs to be explained. A simple definition of Plea bargaining can be obtained from the decision of *State of Gujarat v. Natwar Harchanji Thakor*⁴ where it has been defined as pre-trial negotiations between the accused

¹ The phrase is taken from Andrew Pessin, “The 60 Seconds Philosopher: Expand your Mind on a Minute or so a Day”, (One World Publications, 2009), p.2

² Durga Das Basu, *Commentary on the Constitution of India*, (8th edn., Wadhwa Nagpur 2007), p.805

³ AIR 1979 SC 621

⁴ *State of Gujarat v. Natwar Harchanji Thakor*, 2005 Cri L.J. 2957

and prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution.⁵ The reasons for introducing the concept of plea bargaining in India is also evident from the very same case of *State of Gujarat v. Natwar Harchanji Thakor*⁶ wherein the Gujarat High Court observed that,

“Keeping in mind the huge arrears and long time spent in jails and resultant hardships to parties and particularly, the accused and 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”.

Rights can be categorized into those that are for the ‘benefit of general public’ and for the ‘benefit of individuals’. The reason for this differentiation here is that when we examine the concept of waiver of rights we are examining those rights that essentially fall under the category of ‘rights for the benefit of individuals’. Some authors are of the view that plea bargaining waives rights that are considered to be the fundamental, intrinsic aspect of due process such as privilege against self incrimination, right to trial, to confront adverse witnesses and to compulsory process for obtaining favourable witnesses.⁷ It cannot be denied that there exist certain rights (ordinarily considered as benefitting the public in general) that come under the ‘rights for the benefit of individuals’ when read together with relevant statutory provisions. When these rights can be waived under law it is nothing but waiver of certain fundamental rights. For instance, the recent specific developments in ‘the right to fair trial’ has transformed its character from ‘*the rights for the benefit of general public*’ to ‘*the*

⁵ It should be noted that the Code of Criminal Procedure, 1973 is silent on the definition of plea bargaining.

⁶ *Supra* n.4

⁷ Tina Wan, “The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a not-so-least Restrictive Alternative”, 17 *Review of Law and Social Justice* 33 (2007), Loftus E. Becker Jr., “Plea Bargaining and the Supreme Court”, 21 *Loy. L.A. L. Rev.* 757 (1988)

rights intended for the benefit of individuals'.⁸ The rights that form part of the right to fair trial such as the right to remain silent or in short, Miranda rights⁹; the right to legal counsel as protected under Article 22 of the Indian Constitution¹⁰; the right to examine witnesses on a person's behalf, to cross examine the prosecution witnesses and, most importantly, the right against self incrimination as protected under Article 20(3) of the Constitution¹¹ are so significant and specific when it comes to the protection at the individual level and it cannot be said that they are rights merely benefitting the public in general. All these above mentioned rights, in the author's opinion, are waived to a certain extent during plea bargaining.

The observation made in *Kalyani Bhaskar v. M.S. Sampornam*¹² by the Supreme Court of India that fair trial includes fair and proper opportunities allowed by law to prove one's innocence which includes adducing evidence in support of the defence and denial of that right means denial of fair trial should be noted at this point. The Apex Court also observed that it is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be zealous in seeing that there is no breach of them. All the above mentioned rights may be waived voluntarily or restricted in its application to a very large extent when we apply the concept of plea bargaining.

It is very natural to think that when the accused himself decides for plea bargaining there is no element of compulsion involved in that and hence there is no violation of Article 20(3) of the Constitution of India. The compulsion element in Article 20(3) may not always be

⁸ This statement should be read in the light of the observation of Das C.J. in the case of *Basheshar Nath v. Commissioner of Income Tax*, AIR 1959 SC 149 at 176 that the true test for the applicability of the doctrine of waiver should be whether the fundamental right is one primarily meant for the *benefit of individuals* or for the *benefit of the general public*.

⁹ *Miranda v. Arizona* 384 US 436 (1966)

¹⁰ For a detailed understanding, refer *Khatri II v. State of Bihar* (1981) 1 SCC 627, *Suk Das v. U.T. of Arunachal Pradesh* (1986) 2 SCC 401, *D.K. Basu v. State of W.B.* (1997) 1 SCC 216

¹¹ Article 20(3) of the Constitution of India: No person accused of any offence shall be compelled to be a witness against himself.

¹² (2007) 2 SCC 258

through torture by police or similar acts; it can be established in certain other situations as well. Confrontation by experienced and confident officers of the state and the threat caused by the full force of prosecutor's office could intimidate a defendant who is completely alien to the court proceedings into accepting a plea bargain and in such cases the guilty plea may not be truly just.¹³ Moreover, criticisms to judgments such as *North Carolina v. Alford*¹⁴ wherein the Supreme Court of United States held that the guilty plea of the defendant can be accepted by the court even while he is still protesting his innocence proves that there exists certain amount of compulsion, but in a different form, in plea bargaining. In this case, the guilty plea was made only on account of fear of death penalty. It is of no doubt that "confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights" as it was observed in the case of *Bordenkircher v. Hayes*¹⁵ as well as in *Chaffin v. Stynchcombe*¹⁶.

The Law at Present

The law that has been followed till date and which will possibly be followed is the viewpoint of Justices Bhagwati and Subba Rao in the case of *Basheshar Nath v. Commissioner of Income Tax*¹⁷ that there could be no waiver not only of the fundamental right enshrined in Article 14 but also of any other fundamental right guaranteed by Part III of the Constitution of India. According to them, the Indian Constitution made no distinction between fundamental rights enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy. It is also definitely correct to quote the latest

¹³ Timothy Sandefur, "In Defense of Plea Bargaining", *Regulation Fall* 28 (2003) available at <<http://www.cato.org/pubs/regulation/regv26n3/v26n3-8.pdf>> last accessed on 29th September 2014

¹⁴ 400 US 25 (1970)

¹⁵ 434 U.S. 357, 364 (1978)

¹⁶ 412 U.S. 17, 31 (1973)

¹⁷ AIR 1959 SC 149

judgments such as *Nar Singh Pal v. Union of India*¹⁸ where the Supreme Court held that fundamental rights cannot be bartered away and there can be no estoppel against the same.¹⁹ Most of the scholarly works in Indian Constitutional Law²⁰ narrate the landmark judgment of *Behram Khurshed Pesikaka v. The State of Bombay*²¹ wherein the majority observed that the fundamental rights, though, in practice, benefits individual beings, is incorporated as a matter of public policy and hence the doctrine of waiver cannot be applied to these rights. The observation by the Court goes thus,

*“These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State “You can discriminate”, or get convicted by waiving the protection given under articles 20 and 21”.*²²

¹⁸ (2003) 3 SCC 588

¹⁹ The observation of the SC is as follows, “*The appellant was a casual labour who had attained the “temporary” status after having put in ten years of service. Like any other employee, he had to sustain himself, or, may be, his family members on the wages he got. On the termination of his services, there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a meager amount of Rs.6,350/-, was utilized by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution*”.

²⁰ H.M. Seervai, *Constitutional Law of India*, (4th edn., Universal Law Publishing Co. Pvt. Ltd 2005), p. 422; M.P. Jain, *Indian Constitutional Law*, (6th edn., Wadhwa Nagpur 2007), p.925; Arvind P. Datar, *Commentary on The Constitution of India*, (2nd edn., Wadhwa Nagpur 2010), p. 58 and Mahendra P. Singh, V.N. Shukla’s *Constitution of India*, (11th edn., Eastern Book Co. Lucknow 2011), p.41.

²¹ AIR 1955 SC 123

²² The author believes that certain rights under the specified Articles, namely Articles 20 and 21 of the Indian Constitution are waived to a certain extent when it comes to plea bargaining.

The construction of the plea of estoppel in connection with the concept of waiver of fundamental rights as in *Olga Tellis v. Bombay Municipal Corporation*²³ is also worth mentioning under the concept of waiver of fundamental rights and the same can be found in most of the scholarly works.²⁴ In *Olga Tellis v. Bombay Municipal Corporation*²⁵, the pavement dwellers gave an undertaking that they would not claim any fundamental right to put up huts on pavements and that they would not obstruct the demolition of the huts after a specified time limit and when the same was sought to be done, the pavement dwellers claimed the protection of Article 21 of the Constitution of India. Though it was contended that the right under Article 21 could not be claimed on the basis of the undertaking that they gave, the Supreme Court held that,

“Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a Democratic Republic. It is in order to fulfill the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution”.

The Law ought to be

²³ AIR 1986 SC 180

²⁴ H.M. Seervai, *Constitutional Law of India*, (4th edn., Universal Law Publishing Co. Pvt. Ltd 2005), p. 423; Durga Das Basu, *Commentary on The Constitution of India*, (8th edn., Wadhwa Nagpur 2008), p. 803; M.P. Jain, *Indian Constitutional Law*, (6th edn., Wadhwa Nagpur 2007), p.926

²⁵ *Supra* n.23

The latest books on Fundamental Rights as well as on Indian Constitutional Law have discussed the concept of waiver of fundamental rights, but have failed to notice the importance of the observation of Das C.J. in the case of *Basheshar Nath v. Commissioner of Income Tax*²⁶. Though a specific observation has been made by him in the very same case regarding non application of waiver in the context of Article 14 of the Constitution of India that it is founded on sound public policy recognized and valued all over the civilized world, its language was the language of command and it imposed an obligation on the state of which no person could, by his act or conduct, relieve it, the author believes the observation he has made after that is more relevant in the present Indian legal scenario. He stated,

“Where, therefore, the Constitution vested the right in the individual, primarily intending to benefit him and such right did not impinge on the right of others, there could be a waiver of such right provided it was not forbidden by law or did not contravene public policy or public morals”.

The similarity which the learned Judge made in the above mentioned case between Indian and American Constitution carries much weightage than the observations of other Judges made in the very same case, that are being followed even now.²⁷ According to him, the true test for the applicability of the doctrine of waiver should be whether the fundamental right is one primarily meant for the *benefit of individuals* or for the *benefit of the general public*.²⁸ The author emphasizes on this point and would like to submit that it is on this basis that the concept of plea bargaining should be analysed in the context of doctrine of waiver.

²⁶ *Supra* n.17

²⁷ He observed, “*There was nothing in the two Preambles to the Indian and American Constitutions that could make the doctrine of waiver applicable to the one and not to the other; since the doctrine applied to the constitutional rights under the American Constitution, there is no reason why it should not apply to the fundamental rights under the Indian Constitution*”.

²⁸ AIR 1959 SC 149 at 176

Some scholars are of the opinion that plea bargaining is systematically unjust and unfair as certain rights such as the right to an impartial jury, the right to cross examination, right not be compelled to be a witness against himself²⁹ are waived which in turn vitiates the entire adjudication process³⁰ but the author does not intend to discuss the merits of those arguments here.

This is just an endeavour to illustrate that some of the judgments that are given under the doctrine of waiver in most of the constitutional scholarly works so to prove the existence of the doctrine in United States and the absence of the same in Indian context include judgments like *Edward Boykin Jr. v. State of Alabama*³¹ and other case laws. On a careful examination it is revealed that these judgments deal with nothing but the concept of plea bargaining. In such a situation instead of stating, in express terms, that the concept of waiver is absent in the Indian context, we should provide a detailed explanation on the relation between the concept of waiver and concept of plea bargaining in the Indian realm or else avoid using certain judgments like *Edward Boykin Jr. v. State of Alabama*³² for explaining that the concept of waiver is present in U.S. legal framework.³³

Probably, the same was due to the incorporation of the concept of plea bargaining too late in the Indian context, (by way of Amendment Act of 2005 in the Criminal Procedure Code, 1973)³⁴ and the Constitutional works were not updated much in the said area. It is true that before 2005, the Indian Courts have condemned the concept of plea bargaining which is

²⁹ V and VI amendments of the U.S. Constitution and Articles 21, 22 and 20(3) of the Constitution of India.

³⁰ *Supra* n.7

³¹ 395 US 238 (1969)

³² *Ibid.*

³³ The present statement will be clarified in detail in the following paragraphs of this article.

³⁴ Chapter XXI A of the Code of Criminal Procedure, 1973; It should also be noted that as per section 265G of the Cr.P.C, 1973, the judgment delivered under section 265G shall be final and no appeal shall lie against such judgment in any court except special leave petition under Article 136 and writ petition under Article 226 and 227 of the Constitution of India.

evident from the case of *State of Uttar Pradesh v. Chandrika*³⁵ where it was held that the Courts should not dispose of criminal cases on the basis of plea bargaining as the conviction based on plea of guilty as a result of plea bargaining is contrary to public policy and is unreasonable, unfair and unjust.

The 142nd Law Commission Report submitted in the year 1991 titled ‘Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining’ clearly states the influence of American practice of plea bargaining in the Indian legal structure. Para 1.2 of the report states,

“The practice of plea bargaining which has found acceptance in many states forming a part of the United States of America and has proved to be successful attracts attention to itself”.

Moreover, the Report also shows references to case laws such as *Hutto v. Ross*³⁶, *Chaffin v. Stynchcombe*³⁷, *Blackledge v. Allison*³⁸, *Weatherford v. Bursey*³⁹ and *Newton v. Rumery*⁴⁰ to confirm that the practice of plea bargaining does not collide with the fairness principle and to borrow it into the Indian legal system. The relevance of the 142nd report is clear from the Law Commission 154th report (Vol.1)⁴¹ which recommended insertion of Chapter XXIA in the Code of Criminal Procedure Code, 1973.

As mentioned earlier, the case of *Edward Boykin Jr. v. State of Alabama*⁴² is found cited in many Indian Constitution books to establish the fact that the concept of waiver does exist in

³⁵ AIR 1999 SC 164

³⁶ 429 U.S. 28 (1976)

³⁷ 412 U.S. 17 (1973)

³⁸ 431 U.S. 63 (1977)

³⁹ 429 U.S. 545 (1977)

⁴⁰ 480 U.S. 386 (1987)

⁴¹ Available at <<http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf>>, last accessed on 15th October 2014

⁴² 395 US 238 (1969)

the American context when compared to the Indian situation. The very same case law was concerned with the voluntariness of a guilty plea entered into by the accused as the record before the Court did not show that the petitioner had intelligently and knowingly pleaded guilty. It is interesting to note the observation made by the judges in the case that,

“Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self incrimination guaranteed by 5th amendment and applicable to the states by reason of the 14th. Second, is the right to trial by jury. Third, is the right to confront one’s accusers”.

It is hereby submitted that all those rights that are stated above are being waived in the Indian legal scenario as well after the introduction of the concept of plea bargaining in the year 2005. To support this contention, the observation in *United States v. Mezanatto*⁴³ may be noted where the Court held that the plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights. Even in the Indian situation, the accused exercising the right of plea bargaining for getting the benefit of lesser sentence is not new. In the case of *Thippaswamy v. State of Karnataka*⁴⁴, plea bargaining had taken place whereby the accused pleaded guilty to charge as a result of which he was not given rigorous punishment.

It is surprising to note that in order to bring about a distinction between the Indian and American legal systems in regard to the application of waiver of rights, the changes that accrued in the Indian legal system is completely ignored and the similar instances in the American legal system are still being used as an authority to prove the existence in that legal

⁴³ 513 U.S. 196 (1995)

⁴⁴ AIR 1983 SC 747

system. Either the case law of *Edward Boykin Jr. v. State of Alabama*⁴⁵ or similar ones that deal with plea bargaining should not be used to establish the difference between the application of waiver in the American and Indian legal systems, or there should be a specific mentioning in the constitutional books that the concept of non application of waiver in India was true till the introduction of plea bargaining in the Indian criminal justice system. The author believes that it is high time that the authoritative works relating to Indian Constitution point out that certain rights are waived so far as the application of plea bargaining is concerned and that there has been a substantial ‘change’ in the approach of Indian Courts in regard to the constitutional validity of the concept of plea bargaining.⁴⁶ The latter part can be achieved by mentioning case laws such as *Guerrero Lugo Elvia Grissel v. State of Maharashtra*⁴⁷ and *Vijay Moses and anr. V. C.B.I.*⁴⁸ wherein the Courts have upheld the validity of plea bargaining after elaborate discussions on the subject. In *Guerrero Lugo Elvia Grissel v. State of Maharashtra*⁴⁹, the Bombay High Court after examining the evolution of the concept of plea bargaining in India observes thus,

“Until the introduction of Chapter XXI-A in the Code, the law of the land was to discourage plea bargaining, being against public policy.”

⁴⁵ *Supra* n.31

⁴⁶ Though H.M. Seervai in his book titled *Constitutional Law of India*, (4th edn., Universal Law Publishing Co. Pvt. Ltd 2005), p. 422-434 has elaborately discussed on the concept of waiver in regard to fundamental rights in India, the concept of waiver vis-à-vis plea bargaining is not mentioned in the book. But it should be noted that Seervai’s work extensively discusses on comparison between Indian and American legal framework in relation to application of waiver of rights. Durga Das Basu in *Commentary on The Constitution of India*, (8th edn., Wadhwa Nagpur 2008), p. 3065-3077 specifically has a section on “Waiver of fundamental rights” wherein the position in U.S. is discussed in detail but it concludes that none of the fundamental rights included in Part III of the Indian Constitution can be waived. M.P. Jain, *Indian Constitutional Law*, (6th edn., Wadhwa Nagpur 2007), p.925-927 mentions only the cases of *Basheshar Nath v. Commissioner of Income Tax*, AIR 1959 SC 149; *Behram Khurshed Pesikaka v. The State of Bombay*, AIR 1955 SC 123 and *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180. On a comparative analysis, less mentioning can be found with regard to concept of waiver, and nothing regard to concept of waiver vis-à-vis plea bargaining in books such as Arvind P. Datar, *Commentary on The Constitution of India*, (2nd edn., Wadhwa Nagpur 2010), p. 58-59 and Mahendra P. Singh, *V.N. Shukla’s Constitution of India*, (11th edn., Eastern Book Co. Lucknow 2011), p.41.

⁴⁷ 2012 (1) Bom.C.R. (Cri) 328

⁴⁸ Criminal Misc. Application 1037/2006 decided on March 29, 2010

⁴⁹ 2012 (1) Bom.C.R. (Cri) 328

The court further lays down the reasons for accepting plea bargaining in India and the departure from the scheme of plea bargaining prevailing in other countries. The court observes,

“The intent behind Chapter XXI-A of the Code, although, was to help the litigant to end uncertainty, save litigation costs and anxiety costs, as also to reduce back-breaking burden of the Court and to reduce the congestion in jails; but, at the same time, a conscious decision is taken that we have to depart from the scheme of plea-bargaining prevailing in other countries and adopt such scheme so that substantive sentence of imprisonment in jail deserves to be imposed on an offender who pleads guilty whilst invoking the scheme for concessional treatment.”

There are umpteen number of judgments available, prior to as well as post 2005, both that of the High Courts as well as the Supreme Court so as to establish the so called ‘change’ in the attitude of the courts towards the concept of plea bargaining.⁵⁰

The law that was followed in United States of America before accepting the concept of plea bargaining is quite evident from the case of *Cancemi v. People*⁵¹ where the Court held that the defendant cannot waive a jury trial because even though the law recognizes the concept of waiver even to the extent of waiving constitutional private rights, as regards fair trial is concerned, the interest of the public in fair trial overrides the defendant’s right to choose his

⁵⁰ *Guerrero Lugo Elvia Grissel v. State of Maharashtra*, 2012 (1) Bom.C.R. (Cri) 328; *Vijay Moses and anr. V. C.B.I.*, Criminal Misc. Application 1037/2006 decided on March 29, 2010; *Thippaswamy v. State of Karnataka*, AIR 1983 SC 747; *State of Uttar Pradesh v. Chandrika*, AIR 1999 SC 164; *V.Subramanian v. The State by Sub Inspector of Police and ors.*, 2009-2-LW(Cri)1341; *Ranbir Singh v. State*, 2012(1) RCR (Criminal) 928; *Ashok Kumar Srivastava v. Raebareilly Kshetriya Gramin Bank and ors.*, 2006 6 AWC 6558; *State of Gujarat v. Natwar Harchanji Thakor*, 2005 Cri L.J. 2957; *Kasambhai Ardul Rehmanbhai Shaikh v. State Of Gujarat & anr.*, AIR 1980 SC 854; *Ganeshmal Jasraj v. Government of Gujarat and anr.*, AIR 1980 SC 264; *Muralidhar Megh Raj v. State of Maharashtra*, AIR 1976 SC 1929; *Madanlal Ramachander Daga v. State of Maharashtra*, AIR 1968 SC 1267

⁵¹ 18 NY 128 (1858)

own trial tactics. The later decisions, both those cited in this work and others⁵², clearly show that, at present, the law that is being followed is just the opposite of what was perceived in *Cancemi v. People*⁵³ and the concept of plea bargaining necessarily involve a waiver in many aspects, the most fundamental among them, being the trial by jury.

It is true that, the concept of waiver, as such, is not accepted in the Indian legal scenario, but when we have the concept of plea bargaining introduced into the system, it deserves mentioning under the concept of waiver in scholarly works. An in depth analysis of the same, in the light of latest Indian judgments and landmark U.S. decisions would help to a great extent in understanding a lot more about the concept of waiver as it stands today.

It is stated in D.D. Basu's *Commentary on the Constitution of India*⁵⁴ that "*once it is established that fundamental rights in the U.S. and the Indian Constitutions are in pari materia, and that public policy in America does not preclude the waiver of fundamental rights, no rational grounds can be suggested by which such waiver should be precluded in India*".⁵⁵ It is true that there are inherent differences between the fundamental rights that exist in the U.S. and the Indian Constitutions but we need to keep in mind that the Bill of Rights definitely played a major role at the time of drafting Part III of the Indian Constitution. Though substantial provisions of the present Constitution of India had been borrowed from the Government of India Act, 1935, many other were created due to the inspiration we derived from the constitutional structure of different countries such as United Kingdom, United States, Australia, Canada, Germany, Japan, Soviet Russia and so on. It has also been observed that the fundamental rights in India constitute a counter part of the American Bill of

⁵² See *State v. Kaufman*, 2 N.W. 275 (Iowa 1879); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)

⁵³ *Supra* n.51

⁵⁴ Durga Das Basu, *Commentary on the Constitution of India*, (8th edn., Wadhwa Nagpur 2007), p.806

⁵⁵ The same has also been mentioned expressly in H.M. Seervai, *Constitutional Law of India*, (4th edn., Universal Law Publishing Co. Pvt. Ltd 2005), p. 427

Rights⁵⁶ which makes it obvious that the structure of our Part III owes its origin to the U.S. Constitutional framework. The fact that public policy does not preclude the waiver of fundamental rights in America can be clearly understood from a variety of judgments even in cases that do not involve a plea bargain. Cases such as *Pierce v. Somerset Railway*⁵⁷, *Shepard v. Brown*⁵⁸ and *Pierce Oil Co v. Phoenix*⁵⁹ are examples of this. Furthermore, it is clear that the United States Federal Constitution is not the source of the rights enumerated in the Bill of Rights. In this context it has been specifically explained that,

*“The Declaration of Independence existed long before the U.S. Constitution. One has only to read that Declaration carefully to appreciate the source of our fundamental, unalienable rights. We are endowed by our Creator with certain unalienable rights. These rights are not endowed by the Constitution. They are inherent rights which exist quite independently of any form of government we might invent to secure those rights. We relinquish our rights if and only if we waive those rights knowingly, intentionally, and voluntarily, or act in such a way as to infringe on the rights of others”.*⁶⁰

The author believes that the same explanation has been given to the concept of fundamental rights in India relating the same to inalienable natural rights in landmark cases like *Maneka Gandhi v. Union of India*⁶¹, *Union of India v. Tulsiram Patel*⁶² and many others.⁶³ Hence even if we cannot, in all terms, establish that the fundamental rights in the U.S. and the Indian

⁵⁶ M.P. Jain, *Indian Constitutional Law*, (6th edn., Wadhwa Nagpur 2007), p.17

⁵⁷ 171 US 641 (1898)

⁵⁸ 194 US 553 (1904)

⁵⁹ 259 US 125 (1922)

⁶⁰ Paul Andrew Mitchell, *The Federal Zone: Cracking the Code of Internal Revenue*, (11th edn., Supreme Law Publishers, 2001) available at <<http://www.supremelaw.org/fedzone11/pdf/chaptr10.pdf>> last accessed on 3rd October 2014

⁶¹ AIR 1978 SC 597

⁶² AIR 1985 SC 1416

⁶³ See *I. C. Golaknath & ors v. State Of Punjab*, AIR 1967 SC 1643; *Gian Kaur v. State of Punjab*, AIR 1996 SC 946; *I.R. Coelho v. State of T.N.*, AIR 2007 SC 861

Constitutions are in *pari materia*, we can bring in a wide amount of similarities in theory and practice between the two.

Though the case laws of *Kasambhai Ardul Rehmanbhai Shaikh v. State Of Gujarat & anr*⁶⁴, *Ganeshmal Jasraj v. Government of Gujarat and anr.*⁶⁵, *Muralidhar Megh Raj v. State of Maharashtra*⁶⁶ and *Madanlal Ramachander Daga v. State of Maharashtra*⁶⁷ have opposed the concept of plea bargaining, the same is now a part of criminal justice system in India.⁶⁸ It is high time that we accept waiver of rights in India rather than to blatantly oppose its existence.

Conclusion

The objective was not to show that the concept of waiver of fundamental rights exists in express evident terms and that all the constitutional scholarly works should contain a section mentioning the presence of the concept in the Indian scenario. The objective was rather to show that if it is prudent to say that there exists the concept of waiver in the American constitutional framework in the light of the decisions cited, the same analogy can be brought in in the Indian context as well. This is especially important because plea bargaining has already attained the equivalent status as that of an ordinary trial and this is evident in the light of the recent decisions of *Lafler v. Cooper*⁶⁹ and *Missouri v. Frye*⁷⁰ wherein the majority of the Court held that the rejection of plea deal by the defendant on the advice of the defendant counsel and non communication of plea offer by the defendant counsel to the defendant has violated the rights of the defendant. Justice Scalia's dissenting opinions in both these judgments wherein he upheld the original, or rather, traditional mode of fair trial has raised

⁶⁴ *Kasambhai Ardul Rehmanbhai Shaikh v. State Of Gujarat & anr*, AIR 1980 SC 854

⁶⁵ *Ganeshmal Jasraj v. Government of Gujarat and anr.*, AIR 1980 SC 264

⁶⁶ *Muralidhar Megh Raj v. State of Maharashtra*, AIR 1976 SC 1929

⁶⁷ *Madanlal Ramachander Daga v. State of Maharashtra*, AIR 1968 SC 1267

⁶⁸ Chapter XXI A of the Code of Criminal Procedure, 1973 inserted by the Amendment Act of 2005.

⁶⁹ 132 S.Ct. 1376 (2012)

⁷⁰ 132 S.Ct. 1399 (2012)

several questions regarding plea bargaining.⁷¹ It would not take much time wherein these issues start to crop up in the Indian legal system and if that happens, we will be way behind in understanding the jurisprudence behind plea bargaining if we do not relate the same to the concept of waiver of fundamental rights in the first instance.

Though much of the books do not give a clear idea or discussion on waiver of rights, the book by Ioannis G. Dimitrakopoulos on *Individual Rights and Liberties under the US Constitution: The Case Law of the U.S. Supreme Court*⁷² explicitly mentions that a guilty plea, is not simply ‘an admission of the past conduct’, but also constitutes a waiver of constitutional trial rights such as the right to call witnesses, to confront and to cross examine one’s accusers and to trial by jury. The said statement derives its authority from the famous case law of *Brady v. United States*⁷³ where the Court held that the guilty plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial, that is, a waiver of his right to trial before a jury or a judge.⁷⁴ It would be really beneficial if the constitutional scholars take note of this and bring a detailed

⁷¹ Justice Scalia opined that “*the court opens a whole new boutique of constitutional jurisprudence (‘plea-bargaining law’) without even specifying the remedies the boutique offers*”. He further stated that “*even though there is no doubt that the respondent here is guilty of the offence with which he was charged; even though he has received the exorbitant gold standard of American justice a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his constitutional entitlement to plea-bargain. I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court*”.

⁷² Ioannis G. Dimitrakopoulos, *Individual Rights and Liberties under the US Constitution: The Case Law of the US Supreme Court* (Martinus Nijhoff, 2007), p. 86, 87

⁷³ 397 U.S. 742 (1970)

⁷⁴ It should be noted, at the same time, that in *Brady v. U.S.*, the court observed, “*The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.*”

comparative analysis related to concept of waiver of rights between the U.S. and Indian legal framework especially in the context of plea bargaining.

The concept of waiver may not be justified in full swing in India and the observation made in Durga Das Basu's *Commentary on the Constitution of India*⁷⁵ is apt to be referred at this stage. It goes by saying, "That India is a nascent democracy, and its people ignorant and illiterate, may justify a Court in scrutinizing with ease a plea of waiver, and in insisting on strict proof that a person alleged to have waived his right did so voluntarily with full knowledge of his rights". This may be exactly the reason for the Indian version of plea bargaining. This is the same with United States Constitutional framework and in tune with the practice of the U.S. Courts. The issue that the Courts adjudicate is not as to whether a guilty plea has been made resulting in waiver of certain fundamental rights, but whether the plea has been made voluntarily and knowingly.

The Indian system does not accept the concept of waiver. But in plea bargaining it is not indirect, but conscious waiver that takes place. One who pleads guilty gives up a bundle of rights related to the trial process namely the right to a trial itself, the right to a trial by jury, the right to make an argument and to call witnesses in defense, the right to put the state to its proof and so on.⁷⁶ Most of these rights are waived in India as well after the introduction of the concept of plea bargaining into the Indian criminal justice system in the year 2005. Hence it is submitted that very often, waiver of rights becomes necessary in the context of plea bargaining.

It is high time that the habit of mentioning case laws prior to the Amendment Act of 2005 to the Criminal Procedure Code, 1973 (incorporating plea bargaining) to argue that there is no concept of waiver of fundamental rights in India is changed. It is suggested that while citing

⁷⁵ *Supra* n. 54

⁷⁶ Lolfus E. Becker Jr, *Plea Bargaining and the Supreme Court*, 21 LOY L.A.L. REV 757 (1988)

the U.S. decisions under the concept of waiver, it would be of great help if the scholars lay down the facts of those judgments and analyze them to appreciate in which kind of cases the concept of waiver has been established. Thus a similarity with the recent Indian decisions on plea bargaining can be established which would help to classify those decisions within the concept of waiver of rights under the Indian Constitution. Once the facts of a cited decision is examined and if it is found linked to the concept of plea bargaining, it is hereby recommended to explain the equivalent that exists in the Indian legal framework. This scheme of articulation is better than what is followed at present. It is submitted that it is always desirable to be realistic and to accept that waiver takes place in India. This will help not only in finding solutions to the issues that may crop up in the Indian legal system regarding plea bargaining but also to have a theoretical cohesion so far as the concept of waiver and plea bargaining is concerned.