A Case for Plea Bargaining

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Most of the enforcement actions of Securities Exchange Commission (SEC), US are resolved by settlement with defendants (accused), who generally consent to the entry of judicial or administrative orders without admitting or denying the allegations against them. These orders usually require the defendants to agree to be censured, to a cease and desist order, to be barred from appearing/practising/ dealing in a certain manner / before an authority, to a permanent injuction, to pay a civil monetary penalty, to pay disgorgement of illegal gain or illegally avoided loss, or to comply with numerous other undertakings. A sample of such significant actions during 2001 has been listed in the first chapter of the 2001 Annual Report of the SEC. Just to have a flavour, one such listing is reproduced below:

"…. the Commission filed a settled civil injuctive action against MicroStrategy Inc.'s top three officers: Michael Saylor (co-founder and CEO), Sanjeev Bansal (co-founder and COO) and Mark Lynch (former CFO) for materially overstating its revenues and earnings from the sales of software and information services from the time of its IPO in June 1997 through March 2000. By prematurely recognising its revenue, the company's public financial reports during this time showed positive net income when in fact MicroStrategy should have reported net losses from 1997 through the present. The defendants consented to the entry of permanent injuctions and agreed to disgorge over $10,000,000 and to each pay a civil penalty of $350,000. In addition, Lynch consented to the entry of an administrative proceeding barring him from practising before the Commission as an accountant, with a right to reapply after three years. The Commission also instituted a settled order against MicroStrategy ordering the company to cease and desist from violating the federal securities laws and to engage in certain undertakings to effect future compliance with such laws….."

The above is an example of settlement of an offence through plea bargaining. This is used not only for offences in the securities market, but also for other, even criminal, offences. Some countries have explicit written rules to govern and encourage plea bargaining as means of resolution of disputes, while some others have it in disguise. Most countries have some form of plea bargaining or its variants like guilty pleas, settlement, immunity, compounding of offences etc. Despite its extensive use, scholars as well as policymakers still debate the propriety of plea bargaining.

Indian Situation

Though not formally recognised, plea bargaining pervades Indian criminal justice system. Compromise, its most common variant, where there is a question of doubt, and the parties agree not to try it out, but to settle it between themselves by a give and take agreement, is widely prevalent in the country side in India. Some other variants have found place in statutes also. For example, the Motor Vehicles Act, 1988 empowers police to discharge a person who has violated traffic rules by paying up a prescribed amount. The Foreign Exchange Management Act, 1999 authorises Enforcement Directorate and also Reserve Bank of India to compound (condone for money) any specified contravention on an application made by the person committing such contravention. The Code of Criminal Procedure, 1973 provides for compounding of certain offences with the permission of the court and certain others even without the permission of the court. The Companies Act, 1956 authorises central government to compound any offence punishable under the Act, not being an offence punishable with imprisonment, either before or after the institution of prosecution. The laws relating to Income Tax and Central Excise and Customs provide for immunity from prosecution and reduction / waiver of penalty, fine and interest, if the assessee has cooperated with the authorities and made full and complete disclosure. Some of the statutes also provide for summary trials of offences. The statutes have enumerated types of offences, which can be compounded/granted immunity, who can do so and at what stage of prosecution. The authority normally has no discretion to refuse compounding/immunity in case the accused desires it. These statutory provisions aim at avoiding lengthy and costly litigation, while conserving judicial resources. The facilities similar to plea bargaining, are, however, not available for securities market related

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offences.

Indian courts have generally discouraged plea bargaining. In the matter of Kasambhai Abdulrehmanbhai Sheikh Vs. State of Gujarat (AIR 1980 SC 854), Supreme Court held: "It is contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty, he will be let off very lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of new activist dimension of Article 21 of the Constitution." The Court observed that it would pollute the pure fount to justice, because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather go through a long and arduous criminal trial which, having regard to our cumbrous and unsatisfactory system of administration of justice, is not only long drawn out and ruinous in terms of time and money, but also uncertain and unpredictable in its result. The Judge might either convict an innocent accused by accepting the plea of guilty or let off a guilty with a light sentence.

What is Plea Bargaining?

Black's Law Dictionary defines plea bargaining as the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge. The three ingredients of plea bargaining, therefore, are: (i) it leads to mutually satisfactory disposition. Unless it satisfies both the parties, theoretically they would not agree to the settlement. However, there can be cases where one of them derives relatively more benefit from the settlement if the other party has week bargaining strength for whatsoever reason. For example, the prosecutor may make a highly favorable offer to a defendant if he apprehends evidentiary problems at trial. On the other hand, he may present the defendant with an equally unfavorable choice if he is in possession of credible evidence or he has some other interest. (ii) The settlement arrived through plea bargaining is subject to court approval. It suggests some sort of judicial review to ensure reasonable fairness in the settlement and to prevent the same issue being raised again. However, such settlement without court approval is not rare. (iii) It usually involves the defendant's pleading guilty to a lesser offence in return for a lighter sentence. Thus, plea bargaining essentially envisages that the defendant forgoes the right to trial and hence loses any chance for acquittal, but avoids conviction on a more serious charge, while the prosecutor avoids a long, costly trial and loses the chance for conviction on all the probable charges, but ensures conviction on at least certain counts.

For Plea Bargaining

The plea bargaining has at least something good for all participants in the criminal justice system, namely judiciary, prosecutors, defendants and, to a certain extent, victims. It provides both prosecutor and defendant with some control over the result and removes uncertainty about the outcome of the trial. Besides, since trials take years or sometimes decades while plea bargains can often be arranged in minutes, it serves the interest of judiciary and the victim in the quick and efficient disposal of cases.

For Defendants: The most obvious beneficiary is the defendant. He receives sentence-related concessions or the dismissal of some of the charges in the indictment in exchange for agreeing (without admitting or denying the allegations) to a settlement without trial. In the process he loses the chance of an acquittal, but escapes the maximum sentence prescribed in the statute. Other benefits include: (i) A defendant in custody or charged with non-bailable offence gets out of jail immediately on acceptance of the settlement by the judiciary. (ii) He is relieved of the stress of being charged with a crime and also of the anxieties and uncertainties of a trial. (iii) His record remains cleaner than what would have been following convictions from trial, and therefore he leads a better social life. (iv) It is economical for a defendant to plead guilty, especially to routine/minor offences instead of going through hassles of hiring a lawyer and complying with a full-fledged trial. (v) If the defendant depends on his reputation in the society to earn a living or does not want to bring further embarrassment to his family, he choses to plead guilty to avoid public attention. (vi) A defendant may plead guilty to take the blame for someone else, or to end the case quickly so that others who may be jointly responsible are not prosecuted.

For Prosecutor. It provides an alternative approach to dispose of the criminal caseload. As the prosecutor/state operate with limited resources, plea bargaining comes handy to them in quick, efficient handling of a large caseload. They can concentrate their efforts/resources on the more serious and high profile cases, which are of greater concern to the public. Other benefits to prosecutor include: (i) He is assured of conviction. Howsoever long, expensive and valiant battle he may fight and howsoever strong evidence he may produce, he is never sure of outcome of a trial. (ii) It provides him flexibility in the sense that he can offer a deal to a defendant who, though guilty, can give testimony about a co-defendant or help resolve some other troubling case.

For Judiciary: The judiciary (also state) gains considerably from plea bargaining. The quick disposition of cases through plea bargaining conserves scarce judicial resources in the sense that the judicial involvement for a guilty plea is much less than for a trial. A judge accepts a plea bargain to move along a crowded calendar, as he simply does not have time to try every case that comes through the door.

For Victim: It gives the victim an immediate sense of closure and an assurance that that the defendant would not go unpunished for the offence. He also avoids the rigours of testifying at trial and the possibility of the defendant escaping a conviction.

These obvious benefits to participants and avoidance of wastage of resources have made plea bargaining an essential part of the justice system in many countries.

Against Plea Bargaining

The most serious criticism against plea bargaining is that it undermines the integrity of the criminal justice system. On the one hand it helps the criminals avoid the appropriate sanction for their crime, while on the other hand, it enables state, given its bargaining power, to coerce innocent defendants to plead guilty. As a result, the accused gets punishment disproportionate (more or less) to his offence, which supports the arguments in favor of abolition of plea bargaining.

Constitution and various legislations provide detailed and explicit rules for guidance of judiciary in determination of exact nature of offence and award of appropriate punishment. Plea bargaining circumvents these rigorous standards of due process of law. An offence is determined and the accused is punished without judicial determination (full and impartial investigation and scrutiny of evidence) as required under the law, but by the administrative determination (convenience) of the prosecutor. The determination by the prosecutor crucially depends on his ability to prove the offence at trial vis-à-vis the scope of the defendant to escape the charges.

It allows defendants to get away with lenient sentences. In fact, unless the sentence is less stringent, he has no incentive to resort to plea bargaining. In a typical situation, the prosecutor plays the dual role of an adversary and administrator of justice, while the defendant (or his counsel) plays the singular role of an adversarial negotiator. The probability of success at trial weakens the bargaining position of the prosecutor.

At times, an innocent defendant may be made to plead guilty by coercion. Since prosecutor, which is generally the state, has a broad range of options, powers and resources, it can threaten the defendant with most severe sentence if the latter does not plead guilty. Or it may be so costly for him to engage in a full-fledged trial that he prefers to plead guilty. If he is risk averse, he would avoid risks of a trial and accept the prosecutor's offer, even to his disadvantage. Thus plea bargaining can be misused against the defendants.

Improving Plea Bargaining

It is thus evident that plea bargaining is not an unmixed blessing. But we need it because of our cumbrous and unsatisfactory system of administration of justice. Due process of law is so cumbersome and it is so difficult to prove *mens rea* at trial that it would serve public interest better to have some conviction than none at all or some conviction after ages. It is akin to having a bird in hand than two in the bush. If judiciary (prosecutor, state and victim) can secure adequate justice, that is, can have both the birds from the bush within an acceptable time frame, it is worth sacrificing the bird in hand. This would be possible if we can have unlimited judicial resources which works efficiently and where justice can be obtained in days. But if we do not have this ideal situation, which obtains in reality, we should not refuse to accept the bird in hand. In pursuit of best, let us not forego the good. Just because there is a possibility of securing adequate justice from trial in distant future, let us not forego the benefits of the certainty of conviction and the efficiency of process of plea bargaining.

The problems associated with plea bargaining are not unsurmountable to justify its abolition. The concerns such as the circumvention of due process of law, award of sentences disproportionate to offences, can be addressed through statutory provisions. The law should enumerate the offences amenable to plea bargaining, concessions and its extent that can be granted, the procedure to be followed and judicial scrutiny/review of the settlement. For example, it may provide that a defendant must be represented by a counsel during the plea bargaining. The judiciary must ensure that the defendant pleads guilty knowingly and voluntarily and finds that the settlement arrived at is fair *prima facie*. The concessions in sentences that can offered should be predetermined and vary according to the predefined circumstances. This will remove the bargaining element and hence discretionary powers of the prosecutor. The settlements arrived at should also be given wide publicity.

Securities Market Offences

The SEC lets the offenders who simply pay up without admitting to an offence. This prevents every case being locked up in court. Given the pendency of cases in Indian Courts and efficiency of administration of justice (It is

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Table 3: Impact of Higher Investment Management Fee

(In Rs.)

Year	Value at the beginning of the year	Value at the end of the year	Expenses	Net Value of Invest--ments	Foregone Earnings due to Expenses
1	10000.0	10900	299.75	10600.25	651.03
2	10600.25	11554.27	317.74	11236.53	633.12
3	11236.53	12247.82	336.81	11911.00	615.71
4	11911.00	12982.99	357.03	12625.96	598.78
5	12625.96	13762.30	378.46	13383.83	582.31
6	13383.83	14588.38	401.18	14187.20	566.30
7	14187.20	15464.05	425.26	15038.79	550.73
8	15038.79	16392.28	450.79	15941.49	535.58
9	15941.49	17376.22	477.85	16898.38	520.85
10	16898.38	18419.23	506.53	17912.70	506.53

Foregone earnings on expenses	Rs. 5760.94
Foregone earnings on entry load	Rs. 0.00
Gross reduction in earnings to the investor	Rs. 5760.94
Effective rate of return to the investor	6.003%
Foregone earnings on expenses:	Rs. 3812.25

The higher recurring expense has taken away nearly 25% of the investor's earnings, resulting in an effective return of 6% (Table 3). Clearly, a higher fee for a no-load fund favours the investment manager more than the investor. It can be found that the recurring expense rate that keeps the investor indifferent between the initial load and higher investment management fee is 2.36%, or about 60 basis points higher.

It is necessary that investors understand the impact of costs on their investments and holding period, particularly at a time when we are examining pension reforms. Assets managers, who compete for such long term funds, will have to view the competitiveness of their services in the terms of impact of the cost of their services on long term returns to investors. At a policy level, the trade-offs between loads and recurring expenses will have to be determined on the basis of the impact on investor return. The choices to the investors should be based on points of indifference between various costs and their impact. The 1% premium to investment managers of no-load funds clearly is not based on such reasoning.

The investment manager's fees, which forms the bulk of the operating expenses of a mutual fund, are also regulated, and subject to a ceiling. It is obvious that this element of costs is subject to scale economies, and that larger the fund size, smaller the investment manager's fees, as percentage of total costs. Regulatory ceilings are expected to serve the purpose of passing on such scale economies to the investors, and therefore should be based on the relationship between size and fund management costs. In the Indian context, though, the investment manager's fees are almost completely out of sync with market reality. On the first Rs. 100 crore the fees are 1.25% of the net assets, and for the rest of the funds, 1% of net assets. It is common knowledge that mutual fund asset sizes are far higher than the Rs. 100 crore envisaged in the regulation. It is ironical that no scale economies are available to investors, as given this regulatory ceiling, fund managers are likely to seek the maximum permissible fees. There is also the provision that debt funds charge 0.25% less investment management fees. It is not clear if this distinction is based on an understanding of scope economies in the asset management business.

The regulatory ceiling on expenses also freezes at 1.75% for assets above Rs. 700 crore. If recurring expenses can significantly impact the earning to investors, it is necessary that the components and their sensitivity to scale and scope of funds managed is understood, and forms the basis for both large investor mandate and regulatory policy.

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believed that at the present pace of disposal of cases, Indian judiciary would take 300 years to dispose off 3 crore pending cases.), and intangible nature of securities market offences (It is difficult to track evidence since most of the securities are issued, traded, cleared, settled and transferred electronically and in demat form.), the securities market regulator, SEBI, requires similar facilities if the offenders are to be punished on priority. This would also help regulator to bring all the co-accused (Generally many parties are involved in a securities market offence.) to book or solve a difficult case if one accused provides leads by agreeing to a plea bargaining in exchange of a lenient sentence. This requires explicit statutory provisions.

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