CHAPTER 5
PLEA BARGAINING IN INDIA

“Discourage litigation, Persuade your neighbours to compromise whenever you can.
As a peacemaker the lawyer has superior opportunity of being a good man.”

- Abraham Lincoln

INTRODUCTION

The arrears of criminal courts awaiting trial are assuming menacing proportions. Grievances have been vented in public that the disposal of criminal trials in the courts take considerable time and that in many cases trials do not commence for as long as a period of three or four years after the accused was remitted to judicial custody.\(^1\) Statistics as regards the criminal justice system in India reveals that thousands of undertrial prisoners are languishing in prisons throughout India. As per the National Crime Records Bureau in 2011, the number of inmates housed in jails was almost 50,000 more than their capacity. It was estimated that 65.1% of all inmates were undertrials and of these 0.6% had been detained in jail for more than five years at the end of 2011.\(^2\) Large number of persons accused of criminal offences have not been able to secure bail for one reason of the other resulted to become languish in jails as under trial prisoners for years. It is also a matter of common knowledge that the majority of cases ultimately end in acquittal. The accused have to undergo mental torture and also have to spend considerable amount by way of legal expenses and the public exchequers has to bear the resultant economic burden. During the course of detention as under-trial prisoners the accused persons are exposed to the influence of hard-core criminals. Quite apart from this, the accused have to remain in a state of uncertainty and unable to settle down in life for a number of years awaiting the completion of trial.\(^3\)

Thus the courts have resulted in the informal system of pre-trial bargaining and settlement in some western countries, especially in United States. The system is commonly known as “plea bargaining”. A suspect may be advised to admit part or all the crime charged in return for a specified punishment or rather than await trial with the possibility of either

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3. Supra note 1.
acquittal or a more serious punishment. Plea bargaining as most criminal justice reformers believe, is more suitable, flexible and better fitted to the needs to the society, as it might be helpful in recurring admissions in cases where it might be difficult to prove the charge laid against the accused.\(^4\)

The idea of plea bargaining or mutually satisfactory disposition is to avoid expenses, unpredictable trials and the potential for harassment in all the small and medium crimes. It reduces the flow of criminal cases in the system and save the time, resources and energy of the system managers\(^5\) to deal with serious crimes, which threaten the national security and may cause large-scale damage to life and property. It is a device to ensure the victims to receive acceptable justice in reasonable time without risking the prospects of hostile witnesses, inordinate delay and unaffordable costs. It reduces the arrears and pendency in the system by diverting to large number of crimes for alternative settlement without trial under control of Court to ensure fairness in the process.\(^6\) This practice is prevalent in western countries, particularly the United States, England, and Australia. In the U.S., plea bargaining has gained very high popularity, whereas it is used only in a restricted sense in the other two countries.\(^7\)

On the recommendations of Malimath Committee,\(^8\) Code of Criminal Procedure has been recently amended by adding Chapter XXIA, consisting of 12 sections (sec 265-A to 265 L). The Central Government has notified the socio-economic condition of the country, which have been kept out of the purview of the plea bargaining. Not only will it expedite the disposal of cases, it may also result in adequate compensation for the victim of crime, since he along with prosecutor will be in a position to bargain with the accused.\(^9\)

In the present chapter an attempt has been made to discuss the emerging concept of plea bargaining in criminal justice system and its types, reasons, justification etc in the light of decided case laws along with the study of Law Commission of India.

**Definition of Plea Bargaining**

There is no perfect or simple definition of plea bargaining. As the term implies, plea bargaining involves an active negotiation process whereby an offender is allowed confess his


\(^{5}\) Police, prosecutors and Judges.


\(^{7}\) Thomas K. T., “Plea Bargain- a fillip to Criminal Courts,” www.gmail.com visited on October 7th, 2011

\(^{8}\) Supra note 1

\(^{9}\) Supra note 4.
guilt in court (if he so desires) in exchange of a lighter punishment that would have been
given for such an offence. Plea bargaining usually occurs prior to trial but may occur any
time before a judgment is rendered Black’s Law Dictionary defines it as:

“The process whereby the accused and the prosecutor in criminal case work out a
mutually satisfactory disposition of the case Subject to the Court approval. It usually
involves the accused pleading guilty to a lesser offence or to only one or some of the
courts of a multi-count indictment in return for a lighter than that possible for the
graver charge.”

From the point of view of the accused, it means that he trades conviction and a lesser
sentence, for a long, expensive and tortuous process of undergoing trial where he may be
convicted. In practice, it represents not so much of “mutual satisfaction” as perhaps “mutual
acknowledgement” of the strengths or weaknesses of both the charges and the defenses,
against a backdrop of crowded criminal courts and court case dockets. Thus, it involves an
active negotiation process by which the accused offers to exchange a plea of guilty, thereby
waiving his right to trial, for some concessions in charges or for a sentence reduction.

A plea bargaining is an agreement reached in a criminal case to finally settle it. In a
case instituted on a police report, the parties to the agreement are the accused, the
investigating officer, the prosecutor and the victim. All of them must agree to settle the
criminal case in which the accused pleads guilty to the offence for which a trial is pending. In
any other case, the parties to the agreement are the accused and the victim. They must agree
to settle the criminal case in which the accused pleads guilty to the offence for which a trial is
pending. The agreement to settle a case must be under the guidance and the supervision of the
Court.

There are three types of pleas: not guilty, guilty, nolo contendere. If an accused
refuses to plead, the court enters a plea of not guilty. Plea bargaining refers to pre-trial
negotiations between the defendant, usually conducted by the counsel and the prosecution,
during which the defendant agrees to plead guilty in exchange for certain concessions by the
prosecutor. It has also been defined as “the defendants’ agreement to plead guilty to a

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11 Supra note 4 at 6
12 Ibid
13 For the purposes of punishment, a plea of nolo contendere is the same plea of guilty. The
advantage of the defendant is that, unlike a guilty plea, it cannot be used against a defendant
as an admission of guilt in a subsequent civil or criminal case. For details, see, Whitebread C.H.
14 142nd Report of Law Commission of India on Concessional Treatment for offenders who on
criminal charge with the reasonable expectation of receiving some consideration from the state."\textsuperscript{15} Plea bargaining is, thus, a bargain of the accused with the prosecuting agency in the matter of punishment on condition that he would waive his right to be defended or to defend himself or to contest at the trial. In exchange for a plea of guilty, the accused would receive leniency in sentencing.\textsuperscript{16}

Thus there is no standard definition of Plea Bargaining used among the practitioners and academics and the definition of the term differ according to context of its use and depending on the jurisdiction in which it is negotiated. Plea bargaining serve many interests and are subject to both statutory and judicial restraints. Keeping this in view some most acceptable definitions are given as under:

As per Chief Justice of Supreme Court of United States, Warren Burger in \textit{Santobello v. New York}.\textsuperscript{17}

“Plea bargaining is an essential component of the administration of justice, properly administered, it is to be encouraged…..it leads to prompt and largely final disposition of most criminal cases.”

According to Oxford Dictionary, the word ‘Plea’ means appeal, prayer, request or formal statement by or on behalf of defendant and the word ‘Bargain’ means negotiation, settlement, deal, covenant, barter or pact. Hence, the word meaning of plea bargaining may be an appeal or formal statement by the defendant for negotiated settlement with the prosecution for the offence charged against him.\textsuperscript{18}

Albert W. Alshuler defines plea bargaining as follows:

“Plea-bargaining consists of the exchange of official concessions for a defendant’s act of self conviction. Those concessions may relate to the sentence imposed by the Court or recommended by the prosecutor the offence charged, or a variety of other circumstances.”\textsuperscript{19}

The Canadian Law Commission initially defined plea bargaining as follows:\textsuperscript{20}

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\textsuperscript{15} Saltzburg S.A., \textit{American Criminal Procedure: Cases and Commentary}, 750 2nd ed. (1984); In a 1975 working paper on control of process, the Law Reform Commission of Canada defined plea bargaining as ‘any agreement by the accused to plead guilty in return for the promise of some benefit,’ Cohen S.A. and Doob A.N., “Public attitudes to Plea bargaining” 32 Cri. L.Q. 86-87 (1989)


\textsuperscript{17} 404 US 260 (1971).


“Any agreement by the accused to plead guilty in return for the promise of some benefit.”

Robert E. Scott and William J. Stuntz defines Plea Bargaining as a contractual agreement between the prosecutor and the defendant concerning the disposition of a criminal charge. However, unlike most contractual agreements; it is not enforceable until a judge approves it.\textsuperscript{21}

Gerald D. Robin defines Plea-bargaining (sometimes also referred to as plea negotiation or copping a plea) is a process of discussion or negotiation between the defense counsel and prosecutor, aimed at reaching an agreement whereby the prosecutor use discretion to obtain a lighter sentence in exchange for the defendant’s entering a guilty plea.\textsuperscript{22} It is also termed as a deal whereby the prosecutor agrees to reduce the original charge to a somewhat lesser offence or he may agree to make a specific recommendation to the court regarding the sentence, in exchange of defendant’s guilty plea.\textsuperscript{23}

The Wikipedia Encyclopedia defines it as to make an agreement in which the defendants pleads guilty to a lesser charge and the prosecutors in return drop more serious charges.\textsuperscript{24} Therefore, we can say that ‘Plea Bargaining’ is nothing but a contract between the prosecution and the defendant or accused and both the parties are bound by this contract.\textsuperscript{25}

According to Guidorizzi a proper definition of Plea Bargaining must encompass the broad range of practices that constitute plea bargaining and must include both explicit plea bargaining and implicit plea bargaining. He defines plea bargaining as ‘the defendant’s agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the State.’\textsuperscript{26}

Other scholars define plea bargaining by focusing on the bargain’s benefits on the State. According to this view the State seeks to avoid a trial in most prosecutions by inducing the accused to plead guilty and does so by threatening to impose a harsher sentence should the accused be convicted at trial than it would impose if they pleaded guilty. The State’s paramount motives in seeking to avoid trial are to save money and assure conviction.\textsuperscript{27}

\begin{footnotesize}
\textsuperscript{22} Gerald D. R., “Introduction to Criminal Justice System,” 240. (1980).
\textsuperscript{24} Available at www.legalserviceindia.com on 21-April, 2009.
\textsuperscript{25} Ibid.
\textsuperscript{27} McCoy T. R. and Mirra M. J., “Plea Bargaining as Due Process in Determining Guilt,” 893 Stanford
\end{footnotesize}
N. M. Isakov and Dirk Van Zylsmit, on the other hand, refer to the process as:

“…the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence.”

From these definitions the following elements may be distilled:

(a) a mutually satisfactory disposition;
(b) judicial review
(c) a concession of some kind, made by the prosecuting authority

**Concept of Plea Bargaining**

The Concept- What is “plea-bargaining”? In its most traditional and general sense, “plea-bargaining” refers to pre-trail negotiations between the defendant, usually conducted by the counsel and the prosecution, during which the defendant agrees to plead guilty in exchange for certain concessions by the prosecutor. “Plea-bargaining” falls into two distinct categories depending upon the type of prosecutorial concession that is granted. The first category is “charge bargaining” which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the defendant in exchange for a guilty plea. The second category, “sentence bargaining refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea. Both methods affect the dispositional phase of the criminal proceedings by reducing defendant’s ultimate sentence.

**Origin:** The practice of “Plea-bargaining” in America goes back a century or more. One study found it, for example, in Alameda County, California, in about the 1880s. Judges in the County even talked about the way they gave credit for guilty please. “Plea-bargaining” was not as pervasive as it is now…. Not even close to it….., but it was by no means rare. Extent of prevalence—Entering a guilty plea is greatly prevalent in many American States. In 1839, in New York State, one out of every four criminal cases ended with a guilty plea. By the middle of the century, one out of three felony defendants pleaded guilty. In 1920s guilty pleas accounted for 88 out of 100 convictions in New York City, 85 out of 100 in Chicago, 70 out of 100 in Dallas and 79 out of 100 in Des Moines, Iowa. It has kept its dominance ever since. In short, one can trace a steady and marked decline in number of trials by jury in America from the early 19th century on.

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29 Supra note 14
30 Ibid
Types of Plea Bargaining

Plea bargaining can mainly be classified into three types:

1. **Charge Bargaining**

   This is the common and widely known form of plea. It involves a negotiation of the specific charges (counts) or crimes that the defendants will face at trial. Usually, in return for a plea of ‘guilty’ to a lesser charge, a prosecutor will dismiss the higher or other charge(s) counts. For example: A defendant charged with burglary may be offered the opportunity to plead guilty to attempt burglary.  

2. **Sentence Bargaining**

   Sentence bargaining involves the agreement to a plea of guilty (for the stated charge rather than a reduced charge) in return for a lighter sentence. It sources the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence.

3. **Fact Bargaining**

   The least used negotiation involves an admission to certain facts (“stipulating” to the truth and existence of provable facts, thereby eliminating the need for the prosecutor to have to prove them) in return for an agreement not to introduce certain other facts into evidence.

The Basic Requirements of Plea Bargaining

The prevalence of plea bargaining in America has led to the development of a few basic requirements which have to be compiled with in order to hold a case of plea bargaining valid. Any guilty plea, whether a straight guilty plea or a plea of nolo contendere, must meet two requirements. It must be voluntary and intelligent, and it must be supported by a factual basic development on the record.

   a) The requirement of ‘Voluntariness and Intelligence’

   Generally, a court may not accept a guilty plea until it has addressed the defendant personally, advised him of certain facts, and determined that the plea is voluntary and intelligent. Rule 11(c) of the Federal Rules of Criminal Procedure and Standards 14-1.4 of

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31 Supra note 19 at 7
32 Ibid
33 Id at 8.
34 Rule 11(c) Plea Agreement Procedure. (1) In General. An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B)
recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) **Disclosing a Plea Agreement.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) **Judicial Consideration of a Plea Agreement.** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) **Accepting a Plea Agreement.** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) **Rejecting a Plea Agreement.** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera): (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Standard 14-1.4. Defendant to be advised 
(a) The court should not accept a plea of guilty or *nolo contendere* from a defendant without first addressing the defendant personally in open court and determining that the defendant understands: (i) the nature and elements of the offense to which the plea is offered, and the terms and conditions of any plea agreement; (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the mandatory minimum sentence, if any, on the charge, or any special circumstances affecting probation or release from incarceration; (iii) that, if the defendant has been previously convicted of an offense and the offense to which the defendant has offered to plead is one for which a different or additional punishment is authorized by reason of the previous conviction or other factors, the fact of the previous conviction or other factors may be established after the plea, thereby subjecting the defendant to such different or additional punishment; (iv) that by pleading guilty the defendant waives the right to a speedy and public trial, including the right to trial by jury; the right to insist at a trial that the prosecution establish guilt beyond a reasonable doubt; the right to testify at a trial and the right not to testify at a trial; the right at a trial to be confronted by the witnesses against the defendant, to present witnesses in the defendant's behalf, and to have compulsory process in securing their attendance; (v) that by pleading guilty the defendant generally waives the right to file further motions in the trial court, such as motions to object to the sufficiency of the charging papers to state an offense or to evidence allegedly obtained in violation of constitutional rights; and (vi) that by pleading guilty the defendant generally waives the right to appeal, except the right to appeal a motion that has been made, ruled upon and expressly reserved for appeal and the right to appeal an illegal or unauthorized sentence. (b) If the court is in doubt about whether the defendant comprehends his or her rights and the other matters of which notice is required to be supplied in accordance with this standard, the defendant should be asked to repeat to the court in his or her own words the information about such rights and the other matters, or the court should take such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences. (c) Before accepting a plea of guilty or *nolo contendere*, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea. (d) If the defendant is represented by a lawyer, the court should not accept the plea where it appears the defendant has not had the effective assistance of counsel.
that the court may not accept a guilty plea until the court has addressed the defendant personally in open court, informing him of (and determining that he understands):

- the nature of the charge to which the plea is offered;
- the maximum possible penalty for the offence to which the plea is offered and the mandatory minimum penalty provided for by law, if any;
- the fact that he has a right to plead not guilty, or to persist in that plea if it had already been made and;
- the fact that by pleading guilty he waives the right to trial.36

In *Mc Carthy v. United States*,37 the Supreme Court held a guilty plea to be invalidly taken where the trial judge failed personally to inquire of the defendant whether he understood the charge against him and was aware of the consequences of the plea. It was held that informing the defendant the nature of the charge and the consequences of a plea is a crucial element in fashioning an intelligent and voluntary plea. In *Henderson v. Morgan*,38 the defendant was indicted for first degree murder, but pleaded guilty to second degree murder on the advice of counsel and with the agreement of the prosecutor. Five years later, he initiated state proceedings to vacate the conviction on the ground that his plea had been involuntary because he had not known that intent to cause death was an element of second degree murder. The court found the plea to be involuntary ‘as a matter of law.’ The court stressed that the plea did not meet the constitutional standards for voluntariness because the defendant could not intelligently admit that he committed an offence unless ‘he received real notice of the true nature of the charge against him.’

The plea of bargaining must, therefore, be made intelligently and understandingly by one competent to know the consequences and must not be induced by fear, misapprehension, persuasion, promises, inadvertence, ignorance or fraud. Due process39 of law would be violated where a guilty plea is obtained where a guilty plea is obtained by coercion or by deception or a trick.40

36 Right to trial is a fundamental right under the 5th and 6th Amendments of the Constitution of the U.S.A.
37 394 US 459
39 See 5th and expressly14th amendments of the Constitution of U.S.A. “…nor be deprived of life, liberty or property without due process of law…”
40 Rule 110 of the Federal Rules of Criminal Procedure expressly provides that the Court shall not accept a plea of guilty without first determining that the plea is voluntarily made and in federal prosecutions the failure to advise an accused will invalidate a plea of guilty.
b) The factual basis requirement

In U.S.A. for a plea of guilty to be valid, a judge should determine that there are facts sufficient to support finding of guilt. In federal courts, this is made mandatory by Rule 11(f). In North Carolina v. Alford, it was observed that the factual basis requirement is not compulsorily under the Constitution but that it should be observed whenever possible. Even though most guilty pleas contain an express admission of guilt, such an admission is not a constitutional requisite to the imposition of a criminal penalty. An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the crime.

Federal Rule 11 does not categorically address the issue of whether a judge may accept a plea of guilty when there is a factual basis for the plea but the defendant nevertheless

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41 Rule 11(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

42 There is a distinction between factual innocence (or guilt) and legal innocence (or guilt). Factual innocence or guilt relates to whether or not in fact the defendants committed the act charged. Actors in the system differ as to whether factually innocent defendants plead guilty. Most prosecutors and defense attorneys believe that factually innocent people do not plead guilty. Factual guilt may be determined by how the police and prosecutor obtain and screen information. The major procedural safeguard against conviction of the factually innocent is judicial inequity into the factual basis of the plea. But the extent of the inequity varies from judge to judge. Thus, the inquiry might not be infallible. On the other hand, a factually guilty defendant may be legally innocent because of a weak case which might be difficult to prove at trial; see also S.A. Saltzburg, “Pleas of guilty and the loss of Constitutional Rights The Current Price of Pleading Guilty,” 76 Mich.L.Rev. 1265 (1978).

43 Rule 11. Pleas (a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court’s consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties’ views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;
(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
(I) any mandatory minimum penalty;
(J) any applicable forfeiture;
(K) the court's authority to order restitution;
(L) the court's obligation to impose a special assessment;
(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and
(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.
(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
(A) not bring, or will move to dismiss, other charges;
(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.
(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):
(A) inform the parties that the court rejects the plea agreement;
(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:
(1) before the court accepts the plea, for any reason or no reason; or
(2) after the court accepts the plea, but before it imposes sentence if:
(A) the court rejects a plea agreement under 11(c)(5); or
(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.
asserts his innocence. ABA standard states that if the trial judge is otherwise satisfied that there is a factual basis for the plea, the offer to plead guilty should not be refused solely because the defendant refuses to admit culpability. The author is unable to appreciate this point under the American criminal justice system. There seems to be an inherent contradiction in the sense that the enforcement agencies are letting the defendant plea bargain ever though the defendant himself feels he is innocent. How can the accused be said to ‘voluntarily’ consent to the imposition of a prison sentence- notwithstanding that it is a lighter one- when he is unwilling to admit his participation in the crime? In the author’s opinion, in such a scenario, plea bargaining should be necessarily made to go to trial so as to give him a chance to prove himself innocent as he believes himself to be.  

POSITION OF PLEA BARGAINING IN OTHER COUNTRIES

It would be wrong to assume that the concept of plea bargaining found favour of courts only in the recent past. In fact it is used in the American Judiciary in the 19th century itself. The Bills of Rights makes no mention of the practice when establishing the fair trial principle in the sixth amendment but the constitutionality of plea bargaining had constantly been upheld there. It is significant part of the criminal justice system in the United States where 90% criminal cases are settled by plea bargaining rather than by a jury trial. Thus less than 10% of the criminal cases go to trial. The system of plea bargaining in the federal system was officially recognized with the passage of the 1974 amendments to Federal Rules of Criminal Procedure.  

The rules require that a defendant’s guilty plea be made knowingly, intelligently and voluntarily. These requirements are made because a guilty plea constitutes a waiver of a defendant’s important Fifth Amendment and Sixth Amendment rights. The

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(b) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Jha V. K., "To plea or not to plea : should plea bargaining be adopted in India,” 32 Indian Bar Review, vol. 28 (1) 2001

Supra note 19 at 92.

Federal Rules of Criminal Procedure, Rule 11(e)

“Sets out rules for indictment by grand jury and eminent domain, protects the right to due process, and prohibits self-incrimination and double jeopardy.”

“Protects the right to a fair and speedy public trial by jury, including the rights to be notified of the accusations, to confront the accuser, to obtain witnesses and to retain counsel.”
court must find that a guilty plea satisfies the requirements of Rule 1149 before the court can accept the plea. In the year 1969, James Earl Ray pleaded guilty to assassinating Martin Luther King, Jr. to avoid execution sentence. He finally got imprisonment of 99 years.

In a landmark judgment Bordenkircher v. Hayes,50 the US Supreme Court held that the constitutional rationale for plea bargaining is that no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution offer. The Apex Court, however, upheld the life imprisonment of the accused because he rejected the ‘Plea Guilty’ offer of five years imprisonment. The Supreme Court in the same case, however in a different context, observed that it is always for the interest of the party under duress to choose the lesser of the two evils. The courts have employed similar reasoning in the tort disputes between private parties also. In Santobello v. New York,51 the United States Supreme Court formally accepted that plea bargaining was essential for the administration of justice and when properly managed, was to be encouraged. Under Federal Law, as of January 27, 2007, the maximum a plea bargains can reduce jail sentences and fines are 50%.

COMPARISON OF INDIAN LAW WITH AMERICAN LAW

Plea bargaining in the Indian criminal procedure is different in its purpose and detail. Desire to reduce the pendency of criminal cases prompted the Indian law makers to give plea bargaining a try. Compensation to victim of crime by the accused is the extraordinary feature of plea bargaining in India. It is expected that 50 thousands out of 28.3 millions criminal cases pending trial would be disposed of through the process of plea bargaining. Unlike in American system, plea bargaining cannot be resorted to settle all types of crimes in India. Only sentence bargaining is allowed as per the provisions of plea bargaining in the Indian Code of Criminal Procedure. The complainant plays an important role in the concept of plea bargaining in Indian system because it is he who, on the request of the accused to the court, is given time by the court to work out a mutually satisfactory disposition of the case. Since it is sentence bargain only, the prosecution agency has a limited role to play and all the modalities of the bargain are to be work out mutually by the complainant and the accused person. In contrast, in America, the prosecutor plays an active role during charge bargain. The plea bargaining in Indian laws symbolizes part bargain and part compounding with the permission of the court. Plea bargaining is different from compounding of offence. The distinction between compounding of offence and plea bargaining of offence is that conviction is

49 Guilty plea made knowingly, intelligently and voluntarily
50 434 US 357 (1978)
51 Supra note 16
exempted in the former situation, whereas, lesser punishment is awarded in the latter situation. Compounding is stigma free where as plea bargaining attaches the stigma of a convict to the applicant.52

**Judicial Plea bargaining in England and Wales**--- In England and Wales the practice of judicial plea-bargaining is governed by the principles laid down by the court of Appeal in Turner53. The court held that there should be freedom of access between counsel and the Judge but that any discussion must be between Judge and both counsel. The defendant’s solicitor can be present if he chooses. The Judge should never indicate the sentence he is minded to impose or that he would impose one sentence on a verdict of guilty and one sentence on a plea of guilty. Parker LCJ stated:

“The Judge should … never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence, but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential.”54

The result is that nothing may transpire that could possibly be regarded as a bargain prior to a hearing or an inducement to the accused to forgo his right to a trial. The restrictions are in fact so severe as to render a trip to see the Judge in private something of a waste of effort. Later case law reinforces this initial impression. The exception to this is that the Judge can indicate that whatever course the defence adopts, the sentence will or will not take a particular form, e.g. imprisonment or fire. This enables a defendant who knows that he faces imprisonment if convicted to determine that he should plead guilty in order to obtain a reduction in his sentence. Parker LCJ, stated:

“… it should be permissible for a Judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine or a custodial sentence.”55

In Winterflood56 the Court of Appeal held that where possible, any discussions should take place in the Court room, in the absence of the jury it necessary, with a note made of the proceedings, with a note made of the proceedings. Roskill LJ stated:

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54 Id at 360-61.
55 Ibid .
“… it is undesirable, unless absolutely necessary, for a private discussions to take place between Judge and counsel during the trial, although what happened here was done with the best of intentions and produced in the result a shortening of the trial.”

**Judicial plea bargaining in Australia**—in Marshall\(^5\) the Supreme Court of Victoria indicated, following a full review of the then existing authorities, that the practice of asking a trial Judge in open Court as to what the appropriate sentence would be on a plea of guilty, was wrong. The Full Court (young CJ. McInerneys and Megarvie, JJ) stated as follows:

“ It has been said that an accused person needs to have (perhaps, is entitled to have) as much information before him as possible when he makes the decision between pleading guilty and pleading not guilty and that where it is possible to obtain for him it is possible to obtain for him information as to likely sentence to be incurred there is no reason why he should not be given that information and indeed positive reasons why he should be. What we have already said in the course of this judgement will show why we regard such and argument as specious and why an accused cannot be entitled to such information from the Court. It is the task and responsibility of an accused’s legal advisers to advise him as to the likely sentence. That responsibility cannot be transferred to the Court and it is not legitimate to attempt to do so.”

**Judicial plea Bargaining in Canada**—Most Canadian decision, despite the influence of U.S. Law, have deprecated the giving of advance indications of sentence. In Dubien\(^6\) the Ontario Court of Appeal (MacKinnon ACJO, Martin, Lacourciere JJ.A.) indicated as follows:

“ With great deference to a very experienced and able trial Judge, I am of the view that it is not advisable for a Judge to take any active part in discussions as to sentence before a plea has been taken, nor to encourage indirectly a plea of guilty by indicating what his sentence will be. It was apparent in the instant case that the sentence was going to be the same whether the respondent changed his plea or not, and there was no suggestion or implication as far as the trial Judge was concerned that the sentence would be lighter if the respondent changed his plea to guilty. A trial Judge can only determine what a just sentence should be after he has heard all of the

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\(^{5}\) (1979) 68 Cr App R 291.
\(^{6}\) Id at 293.
\(^{6}\) (1981) VR 725.
\(^{6}\) (1982) 67 CCC (2d) 341.
relevant evidence in open Court on that subject and listened to the submissions of counsel.”

In Roy, the Ontario Court of Appeal (Brook, Arnup and Howland JJ.A.) went so far as to hold that a trial Judge, sitting without a jury, would lose the appearance of objectivity by initiating a discussion as to sentence in the middle of a trial. In that case the trial Judge interrupted the trial and indicated that he wished to give the accused some idea as to “what range of sentence he may be faced with, it is only fair to him too” The Ontario Court of Appeal commented:

“A Judge conducting a trial without the intervention of a jury is of course the tryer of fact ad determines the question of guilt or innocence. In my opinion he cannot initiate such a discussion after entering upon the trial and hearing evidence and still preserve the appearance of impartiality and being of an open mind, which qualities are so essential to a fair trial and the meaning of the presumption of innocence. The fact that he initiates such a discussion and sends counsel to the accused with the talk of pleas of guilty and terms of sentence could reasonably result in apprehension by the accused that the Judge presiding at his trial had reached some conclusion about the case. It does not hurt to repeat again that justice must appear to be done. This is not limited simply to what is seen from the floor of the Court-room or by the public, but includes what transpired here. It is also vital that justice must appear to be done, to the accused man in particular. In these circumstances we think the trial lacked this quality and therefore it cannot stand.”

One of the problems that judicial plea bargaining can lead to is illustrated by the decision of the Ontario Court of Appeal in Rajaeevard. The accused was charged with assaulting his wife. He was represented by a student from a legal aid clinic. The trial Judge told the student in the Courthouse hallway that on a plea the accused could expect to get, a suspended sentence and probation but if convicted after a trial, the Judge would impose a sentence of ten to fifteen days in jail. The accused pleaded guilty but later submitted that the plea was not voluntary. The Ontario Court of Appeal quoted the following passage from the Martin Report on resolution discussions:

“The Committee is of the opinion that a Judge presiding at a prehearing conference should not be involved in plea-bargaining in the sense of bartering to

60 (1976) 32 CCC (2d) 97
determine the sentence, or pressuring any counsel to change their position. The Presiding Judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low or within an appropriate range.”

On the facts of the case the Court concluded that the Judge’s conduct improperly pressurised the accused into pleading guilty and that his plea of guilty was not freely and voluntarily given. The Canadian Sentencing Commission has argued that:

“The basic concern with active judicial participation in plea bargaining is the erosion of a Judge’s role as an objective, non partisan arbitrator. One Rationale for involving the Judge in the negotiation process is that it would enhance the intelligence of the guilty plea by informing the defendant of the anticipated sentence prior to the entry of the plea. However… the actual effect of such intervention could have the opposite effect. This research suggests that because the Judge is an authoritative, dominating figure in the process… the Court’s intervention could effectively coerce the accused into accepting the agreement and pleading guilty.”

HISTORY OF PLEA BARGAINING IN INDIA

A- VEDIC ERA

Since time immemorial, pursuing justice in cases which involve two human beings has been one of the primary aims of any civilization. Keeping this in view an effort is made by the researcher to trace the history of plea bargaining in India.

(i) Plea-Bargaining in Vedic Period

The concept of plea-bargaining in India has been in vogue since ancient times. Various ancient treatises and texts reveals that the practice of plea-bargaining in vogue as a means of self-purification by reducing or removing the effects of sin of committing offence. In Hindu jurisprudence the researcher find that much care was taken to avoid delay. Delayed justice was considered most dangerous to the state. In other words, “Delay in deciding cases is tantamount to denial of justice.” As regards the final decision regarding the quantum of penalty the power solely vested in the king. The quantum of penalty was required

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63 Dharamasastras and Smritis propounded Plea-bargaining as a means of self-purification; Also see, Rana, N, Plea bargaining as a tool of Criminal Justice System- A Comparative study of India and United States of America, unpublished
65 Sharma S. D., Administration of Justice in Ancient India, 190 (1988).
66 Id at 191.
to be decided by the king independently taking into account not only the charge proved but all other circumstances which were prescribed as relevant for deciding the same. The King was required to be kind to first offenders and also to those who committed the offence for the second and third time, but was required to impose corporal punishment thereafter, and this guideline appears to be in respect of non-heinous offences or minor offences.  

Apart from prescribing various kinds of punishments the Dharamasastras, in a separate chapter titled “Prayaschita” have suggested various models of self-purification by confessing the guilt. In Vedic period prayaschita was used as a basis of imposition of reduced penalty, which was justified by various scholars of sastras and smritis.

Manu Smriti prescribes the reduction of punishment on pleading guilty in the following verses:

राजा लगते सुधुरुपस्यातुम साहसम्।

(If Brahamana, Kshatriya and Vaisya guilty of our mahapatkas (grave sin) committed unintentionally, perform proper penance or confess their guilt then they should not be branded on the forehead by the King but should be awarded with the punishment prescribed for grave offences).

If a person, having committee some offence on the spur or moment, repents and confesses or voluntarily go to court and confesses, he should be awarded half the punishment appropriate for such offence.

On the other hand, when a person is punished and out of pain or being unable to bear the punishment gives an undertaking that he will not repeat the offence, his sentence may also be reduced to half (or as much as he is capable of bearing)-according to the discretion of the judge.

In another verse of Narada Smriti, that is:

राजा स्तेनेन गन्तव्यो गुलाकेशेन घवत।

It was justified by Narada that if thief comes running to the King and announces his
guilt; the King was to touch him (with the club as a symbolic gesture) and then let him off
and the thief become freed from sin by his confession of guilt).

In Hallayudha Kosh, Hallayudha also justified the reduction of half of the punishment
for those who voluntarily plead guilty. Pathinasi Smriti also supported the reduction of
punishment on repentance in following verses:

(There must be difference in the degree of punishment to the repentant according to
the degree of his repentance). Along with this, in Vedic period, disposal of cases through
arbitration also justified. According to Brishaspati:

“All cases expect these concerning violent crimes, could be decided through
arbitration by guild of artisans, assemblies of cohabitants; meeting of religious sects and by
other bodies duly authorized by the King.”

It is abundantly explicit that in Vedic period the reduction of punishment on voluntary
repentance or confession, similar to the principle of plea-bargaining was allowed and justified
by various Smrities. However, during vedic period such confession on punishment was not
the outcome of plea-bargaining in the sense that accused bargaining on the point of sentence
with the prosecutor but rather an outcome of remorseful and unconditional confession
without any secured bid for judicial mercy. The purpose of such relaxation in punishment
was to give a chance to the accused to regain his status in the society.

(ii) Plea-Bargaining in Post-Vedic Period

Mauryan period throw an abundant light on the existence of unofficial and informal
practice of plea-bargaining, in the form of conciliation which was one of the most important
method of dispute resolution, used as a state craft. Kautilya stated certain situation where the
accused could be exempted from punishment. In one of the episodically even, one can trace
out the existence of the practice of plea-bargaining in Maurya’s period. Kautilya came to
know through his secret spy that seith Chandan Das has given shelter to the family of accused
Amatya who had made conspiracy against the King Chander Gupta Maurya. Kautilya called

71 Swain B. Kishore, *Narda Smriti*, 322 (1996); Also see Rana, N., *Supra* note 63
72 Ibid.
Saith Chandan Das and asked him to handover the family of the accused to the King. But Saith Chandan Das refused to proposal and was ordered to be arrested by Kautilya.

Kautilya then used bargain as a tool to conciliate or resolve the dispute. He offered Seith Chandan Das that his offence of helping the accused. Amatya could be pardoned by the King if he handovers the accused’s family to the King. Simultaneously, he also offered accused Amatya to confesses his guilt and ready to be a Prime Minister of the King; Chander Gupta Maurya, his friend Seith Chandan Das could be exempted from the punishment of death. On the acceptance of the proposal by both the accused, Seith Chandan Das was released from the punishment of death and Amatya was made Prime Minister of Patilputra. Other co-accused was also released. This was how Kautilya used plea-bargain as a method of dispute resolution.

According to Kautilya conciliation was one of the important method of state craft which is justified by him in the following verse:

विजेतु प्रयत्नशीलाः युद्धन कदाचन। [138]
[Of the four method in State craft namely Sama (conciliation), Dam (winning over by gifts or presents), Bedha (creating division or split), and war, conciliation and its failure war are recommended).

Kautilya’s Arthasastra specifies five forms of conciliation, namely praising qualities, mention of relationship, pointing out mutual benefits showing future prospectus and placing oneself at the other’s disposal. Conferring benefits is gift.

Hence, in Kautilyan period, plea-bargaining was practiced informally and episodically in the form of conciliation, as one of method of state craft.

**B- PLEA BARGAINING IN MEDIEVAL ERA**

The Quisas system of Muslim Criminal Code can be treated s an analogue of practice of plea-bargaining in Mughal period. In Mughal period Muslim Criminal Code as applied to the criminals under which punishment for the offence against God was “the right of God”. (Haqq Allah) while for the offence against state and the offence against private individual the injured party may compound the offence with the wrong doer.

Plea-bargaining in the form of Quisas system flourished in the Mughal period. Quisas was a king of ‘blood money’ which was given by the accused to the deceased victim’s next

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kin in homicide cases. If the deceased victims’ next king agrees to compromise in exchange of blood money (*Diya*) offered by the accused neither *Quazi* nor the king was to take any further notice of the crime. This practice was supported by Muslim jurist on the basis that “the right of God’s creature should prevail” and only when aggrieved party had expressed his desire; the state should intervene. In case where the deceased person left to no heirs to demand punishment or blood money, there was no specific provision in *Quran* and in case where the next deceased victim was minor, the accused could not be punished capitally until the infant kind had grown up.

For example in the historical evidences regarding imposition of punishment:

(i) during the reign of Vikram Chola (1118 AD-1135 AD), a man forcefully pushed his wife. She fell and died. 1500 men from all corners assembled and declared the husband guilty. The husband also admitted his guilt and was ordered to pay fine for burning of a lamp in a temple;

(ii) in 1225 AD, a man was hunting at night. He missed his aim and shot a human being. It was decided that the accused should give 32 cows to a temple.

A popular story of *Mughal* Emperor Jahangir (1605-1627) which will reflect the passion of justice one day, Noorjahan queen of *Mughal* Jahangir targeted a deer from the King’s place apartment known as ‘Ahukhana’. The arrow, unfortunately hit the body behind a bush. It was an unintentional act that the boy received arrow stroke and died. The father of the boy was a washer man, knocked the metallic bell of cry for justice. The King immediately responded to the cry for justice and called the Friyadi to hear his complaint. On being briefed, he summoned the queen from the Royal Pavilion to the justice hall as an ordinary accused. Even the aggrieved washer man looked in disbelief that Jahangir would sacrifice his most beloved for the cause of justice. They begged for the life of the queen. Even the washer man bowed down as craved for mercy. In order to meet the strict claims of justice, he stood firm on his judgment until convicted and satisfied by the jury courtiers and there is concession in *‘Quranic Law’* that if the aggrieved party agrees, the strict of justice may meted out with plea bargaining. The victim’s father happily agreed to it and the condemned queen was thus relived of the punishment.

Similarly, in *Mughal* period the offence of robbery with killing was treated to be an offence against God and in such case punishment of death was considered as ‘*haqq Allah*’ and blood money was out of question. But if the thief has given back the article stolen before the charge was made, he was immune from the punishment of death. Thus in *Mughal* period plea-bargaining in the form of *Quisas* was practiced but it was narrow in sphere as it is
exceptionally practiced in murder cases by compensating the victim’s or the next kin, which was considered as right of individual.

C- PLEA BARGAINING IN MODERN ERA

(i) Plea Bargaining during British Rule

The system followed in India for dispensation of criminal justice is the adversarial system of common law inherited from the British Colonial rulers. The court of judicature established in 1672, by the East India Company inflicted punishment on the offender or else he was ordered to work for the owner whose articles were stolen by him. The Indian Penal Code, in quest for uniformly in criminal law, abandoned this principle in 1860. The concept of plea-bargaining found no place in the judicial system as introduced by Britishers during their rule in this country. The British legal system was aimed at punishing the offenders rather than bargaining away the punishment through compensation. However, it is notable that in the early days the British period no due attention was paid as it was not well organized. The practice of plea-bargaining as prevalent during the Mughal period got a setback when Lord Cornwallis made a recommendation on 3 December, 1790 in which he laid down that in murder cases there could be no mutual settlement between the heir of the deceased and the accused. They were not allowed to grant pardon or composition money as a price of blood. It was in the year 1860 when Indian Penal Code was given the shape of law and the Muslim Criminal Code was totally done away with this.

(ii) Plea-Bargaining - Role of Law Commission of India

In the initial years, the Indian approach towards the concept of plea-bargaining does not appear to be encouraging. It may be imperative to mention here that the Law Commission of India advocated the introduction of provisions relating to plea-bargaining in the 142nd, 154th reports. The initiative taken by the government in this regard may be as under:

A 142nd Report

In its 142nd the Law Commission discussed the matter of plea bargaining with many states and jurists and came to some of the following observations: 74

1) Only the offender himself may invoke the scheme.

2) There will be no negotiations for plea bargaining with the prosecuting agency or its advocate none of whom will have any role to play in the matter of moving the competent authority for invocation of the scheme.

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74 Supra note 14 at 142.53-54
3) The competent authority will be a ‘plea-judge’ designated by the Chief Justice of the considered High Court from amongst the sitting judges competent to try cases punishable with imprisonment of up to seven years. And a Bench of two retired High Court judges nominated in this behalf by the Chief Justice of the state concerned in respect of offences punishable with imprisonment for seven years or more.

4) The application will be entertained only after the competent authority is, upon ascertaining in the manner specified in the scheme, is satisfied that it is made voluntarily and knowingly.

5) The competent authority will hear the application in the presence of the aggrieved party and the public prosecutor and after affording a short hearing to them.

6) The competent authority shall have the power to impose a jail term or fine or direct the accused applicant to pay compensation to the aggrieved party for compounding the offence in regard to the offences, which are compoundable with or without the leave of court.

7) The competent authority shall award a minimum jail term of say six months or one year in respect of specified offences if the scheme is extended in this behalf in the light of the provisions in the scheme.

8) The Competent Authority may award a jail term not exceeding one half of the maximum provided by the relevant provision where the Competent Authority is not called upon to exercise the powers to release on probation under the Probation of Offenders Act, 1958 or under s.360 of the Code of Criminal Procedure, 1973 in accordance with the guidelines.

9) In the first instance, as an experiment measure, the scheme may be made applicable only to offences which are liable for punishment with imprisonment of less than seven years or fine if both the Central and the State Government so revolves by the notification issued by such government and published in Government Gazette.

10) The scheme may be made applicable to offences liable to be punished with imprisonment for seven years and more after properly evaluating and assessing the results of the application of the scheme to offences liable to be punished with imprisonment for less than seven years.
B 154th Report

In its 154th report, Law Commission has given the following recommendations in para 9 of the report: 75

1) The process of plea bargaining shall be set in motion after issue of process and when the accused appears, either on written application by the accused to the court or *suo moto* by the court to ascertain the willingness of the accused. On ascertainment of the willingness of the accused, the court shall require him to make an application accordingly.

2) On the date so fixed for the hearing the court shall ascertain from the accused whether he made the application voluntarily without any inducement or pressure from any quarters, particularly from public prosecutor or police. The court shall ensure that neither the public prosecutor nor police is present at the time of making the preliminary examination of the accused.

3) Once the court is satisfied about the voluntary nature of the application, the court shall fix a date for hearing the public prosecutor and the aggrieved party and the accused applicant for final hearing and passing of final order. If the court finds that the application has been made under duress or pressure, or that the applicant after realizing the consequences is not prepared to proceed with the application, the court may reject the application.

4) Such an application may be rejected either at the initial stage or after hearing the public prosecutor and the aggrieved party. If the court finds that, having regard to the gravity of the offence or any of the circumstances, which may be brought to its notice by the public prosecutor or aggrieved party, the case not a fit one for exercise of its powers on plea bargaining the court may reject the application supported by the reasons therefore.

5) The order passed by the court on the application of the accused-applicant shall be confidential and will be given only to the accused if he so desires. The making of such application by the accused shall not create any prejudice against the accused at the ensuing trial.

6) We are of the view that such a plea bargaining can be availed by the accused in the categories of offences mentioned above before the court at any stage after the charge-sheet is filed by the investigating agency in police cases and

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75 *Supra* note 1 at 154.52-54
in respect of private complaints at any stage after the cognizance is taken. An order passed by the court on such a plea shall be final and no appeal shall be against such an order passed by the court accepting the plea.

7) In cases where the provisions of Probation of Offenders Act, 1958 or s.360 of Cr.P.C are applicable to an accused applicant, he would be entitled to make an application that he is desirous of pleading guilty along with a prayer for availing for the benefit under the legislative provisions referred in above. In such cases, court after hearing the public prosecutor and the aggrieved party, may pass an appropriate order conferring the benefit of those legislative provisions. The court may be empowered to dispense with necessity of getting a report from the probation officer in appropriate cases. The provision regarding confidentiality of the making of application and the consequences of rejection outlined in paragraph 9.5 will be applicable if court rejects the application.

8) If an accused enters a plea of guilty in respect of an offence for which minimum sentence is provided for, the court may, instead of rejecting the application in limine, after hearing the public prosecutor and the aggrieved party, accept the plea of guilty and pass an order of conviction and sentence to the tune of one-half of the minimum sentence provided.

9) The court shall on such a plea of guilty being taken, explain to the accused that it may record a conviction for such an offence and it may after hearing the accused proceed to hear the public prosecutor or the aggrieved person as the case may be:
   i) Impose a suspended sentence and release him on probation;
   ii) Order him to pay compensation to the aggrieved party; or
   iii) Impose a sentence, which commensurate with the plea bargaining; or
   iv) Convict him for an offence of lesser gravity than that for which the accused has been charged if permissible in the facts and circumstances of the case.
REASONS TO GROWTH IN INDIA

A Backlog in Jails:
The failure of democracy to deliver justice within a time frame has brought a sense of frustration, loss of faith and dissatisfaction amongst them. On this point as famous Jurist Late Nani A Palkhivala has gone on record to say,

“If I asked to mention the greatest drawback of the administration of justice in India today, I would say that it is DELAY. There are inordinate delays in the disposal of cases. We, as a nation, have some fine qualities, but a sense of value of time is not one of them. Perhaps here are historical reasons for our relaxed attitude to time. Ancient India had evolved the concept of eternity and infinity. So what do thirty years, wasted in litigation, matter against the backdrop of eternity? Further, we believe in reincarnation, what does it matter if you waste this life? You will have many more lives in which to make good. I am not aware of any country in the world where litigation goes on for as long a period as in India. Our cases drag over a length of time, which makes eternity intelligible. The law may or may not be an ass, but in India it is certainly a snail and our cases proceed at a pace, which would be regarded as unduly slow in a community of snails. Justice has to be blind but I see no reason why it should also be lame: here it just hobbles along, barely able to walk.”

Further this point of view has been enlightened by Mr. Justice A.K. Sikri in his article that Indian Judiciary, though fair and powerful, is awfully overcrowded and slow. The problem of delay in dispensation of justice is a major problem being faced by the Indian Judiciary. Besides being highly stressful, it has also become exorbitantly expensive and time consuming for the litigants. In last 56 years, due to its impartial and fearless role in dispensation of justice, it has won the confidence of the people of this country who find it to be the last resort to get their legitimate due. At the same time however one factor, which is becoming responsible for questioning the efficacy of justice delay system is the delays in deciding cases.

Backlog and delay are among the most significant problems in the Indian Judiciary. One of the reasons or the huge backlog indicated by 120th Report of Law Commission,

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78 Supra note 4
being inadequate strength of Judges compared to the population of the country. The strength of the Judges and of Judicial Officers has not been proportionately increased either with the growth of population or with augmentation of litigation. Therefore, this problem of justice delays has caught up the attention of judiciary and legislature alike. It is in the background, the Law Commission felt that some remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under-trial prisoners. The Law Commission in its 142nd Report on Concessional Treatment of Offenders who on their own initiative Choose to Plead guilty without any Bargaining (1991), considered the question of introduction of the concept of concessional treatment for those who choose to plead guilty by the way of plea bargaining.  

Thus in India, the problem of delay and backlog is rather acute in criminal cases, as compared to civil cases. The third hypothesis i.e. there is problem of backlogs and docket management leading to prolonged trials completely stands validated here as its increasing impact on the Indian Criminal Justice Process that it appears to be on the verge of collapse which is visible from the following figures:

Besides it, the need of plea bargaining in India has been analysed. The statistics in table given below reveals that there are huge arrears in India:

**Table No.5.1 Snapshots of Jails-2011***

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Total numbers of jails in India</th>
<th>1,382</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>Total capacity of jails in India</td>
<td>3,32,782</td>
</tr>
<tr>
<td>3.</td>
<td>Total numbers of jail inmates as on 31-12-2011</td>
<td>3,72,926</td>
</tr>
</tbody>
</table>

**Table No. 5.2 Jail Inmates as on 31-12-2011***

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Types of jail inmates</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Convicts</td>
<td>1,28,592</td>
<td>34.5</td>
</tr>
<tr>
<td>2.</td>
<td>Under trials prisons</td>
<td>2,41,200</td>
<td>64.7</td>
</tr>
<tr>
<td>3.</td>
<td>Detenues</td>
<td>2,450</td>
<td>0.7</td>
</tr>
<tr>
<td>4.</td>
<td>Others</td>
<td>684</td>
<td>0.2</td>
</tr>
</tbody>
</table>

Source: [www.ncrb.nic.in](http://www.ncrb.nic.in)

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80 Supra note 1
The tables reveal that thousands of under trial prisoners are languishing in prisons throughout India. As per the National Crime Records Bureau in 2011, Table 5.1 shows the number of inmates housed in jails was almost near about 40,000 more than their capacity i.e. 40,144. It was estimated that 64.7% of all inmates were under trials and of these 0.7% had been detained in jail for more than five years at the end of 2011 (as shows in Table 5.2 & Figure

**Figure 5.1 Percentage Distribution of various types of Prison Inmates at the end of 2011**

- Convicts 34.5%
- Undertrials 64.7%
- Detenues 0.7%
- Others 0.2%

**Figure 5.2 Percentage Distribution of Undertrial Prisoners by different periods of Detention in the country at the end of 2011**

- Upto 3 months 40.1%
- 3-6 months 20.8%
- 1-2 years 12.5%
- 6-12 months 17.2%
- 2-3 years 5.6%
- 3-5 years 3.2%
- Above 5 years 0.6%
In India, large number of persons accused of criminal offences have not been able to secure bail for one reason of the other resulted to become languish in jails as under trial prisoners for years. The Figure 5.2 depicting periods of detention of prisoners shows that more than 60% of the prisoners are in detention for upto 3 and 3-6 months. About 17.2% are languishing in jails for 6-12 months and about 21.2% are in the jail for 1 year or more. It is also a matter of common knowledge that the majority of cases ultimately end in acquittal. The accused have to undergo mental torture and also have to spend considerable amount by way of legal expenses and the public exchequers has to bear the resultant economic burden. During the course of detention as under-trial prisoners the accused persons are exposed to the influence of hard-core criminals. Quite apart from this, the accused have to remain in a state of uncertainty and unable to settle down in life for a number of years awaiting the completion of trial.

Thus these huge figures stare us in the face and call for urgent steps to find a solution of heavy backlog of cases in courts and inevitable delay in dispensing justice within a time frame. For this purpose, various strategies and tools have to be evolved to lessen the burden of trials, and to ensure speedy disposals of cases. One such strategy is PLEA BARGAINING, which is prevalent in many western countries particularly United States, United Kingdom. Though the system of plea bargaining is new to India, the same has been institutionalized in United States for quite some time. In U.S. according to some commentators, as many as 95% of all criminal cases are disposed off through guilty pleas. In *Santobello v. New York*, the U.S. Supreme Court has upheld the constitutionality of plea bargaining.

In this regard, Dr. Manmohan Singh, Prime Minister of India, while inaugurating the conference of Chief Justices of High Courts and Chief Ministers on Administration of Justice on Fast Track, also acknowledged the positive results of plea bargaining when he said: “Our Government accords high priority to judicial reforms. The National Common Minimum Programme envisages judicial and legal reforms as one of the thrust areas in promoting good governance. In that direction my Government has already undertaken certain initiatives. It has amended the procedural laws with a view to improving the Criminal Justice System. Plea bargaining has been introduced in the Cr.P.C. I must place on record here my very sincere appreciation of the fulsome support and cooperation our Government has received from leadership of our judiciary in this regard.………The most important issue is that of pendency when the accused are denied bail for one reason or the other, they are exposed to the influence of hardened criminals who can put them under pressure to confess to charges not subsisting in the case. As a result, as many as 95% of the cases end with guilty pleas in U.S. with only 5% cases coming up for trial. Consequently, our Supreme Court has decided to adopt this system of plea bargaining in cases of criminal nature.”

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82 Supra note 1
83 Supra note 16
84 Delivered on 8-4-2007 and reported in (2007) 4 SCC J-9
and the growing backlog of cases in Courts. There are huge arrears of more than $2^{1/2}$ crores of cases in Courts. Over $2/3^{rd}$ of these are criminal cases. Unless the rate of disposal improves the backlog would keep mounting. There is an urgent need to improve the through out of cases.”

**B Backlog in Judiciary:**

On March 2010, the pending cases in India were more than 31.28 million. The Law Commission of India in its 120th Report observed that the strength of judicial officers in India is far less than in a number of other countries. It can be observed from the Table 5.3 & 5.4 that almost all the developed countries have requisite number of judges. India has roughly 10.5 judges for per million people whereas this figure for Australia, Canada, England and United States stands at 41.6; 75.2; 50.9; and 10.7 respectively.

Table No.5.3 Judge-Population ratio in some advanced countries:

<table>
<thead>
<tr>
<th>Country</th>
<th>No. of judges per million</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>41</td>
</tr>
<tr>
<td>Canada</td>
<td>75</td>
</tr>
<tr>
<td>England</td>
<td>51</td>
</tr>
<tr>
<td>USA</td>
<td>10.7</td>
</tr>
</tbody>
</table>

And in India there are 14,576 judges as against the sanctioned strength of 17,641. The ratio of judges at the end of 31st December, 2009 was 10.5 for a million of population in India, which is lowest in the world. The sanctioned strength of judges in the Supreme Court is 31 out of which 2 remain to be filled up (as on 31.03.2010). Similarly, the sanctioned strength of judges in 21 High Courts of the country is 895 out of which 284 remain to be filled up as on 01.08.2011. Further, in the subordinate courts the sanctioned strength of the Judges/Magistrates is 13,204 out of which 2010 posts were lying vacant.

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86. Supra note 79
89. Supra note 85
Table No. 5.4 No. of vacant posts of judges as on January 2008

<table>
<thead>
<tr>
<th>Name of the Court</th>
<th>Total strength of Judges</th>
<th>Actual No. of Judges</th>
<th>Number of vacant Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>26</td>
<td>26</td>
<td>0</td>
</tr>
<tr>
<td>High Court</td>
<td>877</td>
<td>593</td>
<td>284</td>
</tr>
<tr>
<td>District Courts</td>
<td>15,917</td>
<td>12,524</td>
<td>3,393</td>
</tr>
</tbody>
</table>

Punjab & High Court alone has 20 vacant posts as reported in The Tribune in November, 2011

CONCEPT OF PLEA BARGAINING IN INDIA

The recommendation of the 154th Law Commission report was that plea bargaining should be incorporated in the Indian criminal justice system (as a separate chapter in the Code of criminal Procedure-Chapter XXI-A), for offences, which are liable to be punished with imprisonment of less than seven years and/or fine vis-à-vis nature and gravity of offence and quantum of punishment. It should not be available for grave offence- those against women and children, and socio-economic offences. Plea bargaining will initiate after the accused makes an application to the court (he court may suo moto make an offer for plea bargaining, which is the accused accepts, he has to make an application), and preliminary examination by the court (in the absence of the public prosecutor or the police) to ascertain the voluntariness of the accused. The court shall also examine the prosecutor and the aggrieved party, and at any point, if it is convinced that the accused has agreed to plea bargain, under duress, or without realizing the consequences, it will reject the application.

The Commission further recommended that on such an application being accepted, the Court could exercise the option, which may summarize as under

(i) imposing a suspended sentence and releasing him/her on probation,
(ii) ordering him/he to pay compensation to he aggrieved party,\(^95\)
(iii) imposing a sentence, commensurate with plea bargaining,\(^96\)
(iv) convicting him for an lesser gravity than that for which the accused has been charged, if the facts and circumstances of the case permit\(^97\)

**SALIENT FEATURES OF PLEA BARGAINING**

The Criminal Law (Amendment) Act, 2005, which was passed in the winter session of the Parliament, has introduced plea bargaining in India, embodied in the Chapter XXIA of Code of Criminal Procedure. A notification has been issued which gives effect to the new provision, which has come into effect since 5\(^{th}\) July, 2006.\(^98\) The salient features of the provisions are

1. The plea bargaining is applicable only in the respect of those offences for which punishment of imprisonment is upto seven years;\(^99\)
2. It does not apply where offences that affect the socio-economic condition of the country or has been committed against a woman or a child blow the age of 14 years;\(^100\)
3. The application for plea bargaining should be filed by the accused voluntarily;\(^101\)
4. A person accused of an offence may file an application for plea bargaining in the court in which such offence is pending for trial;\(^102\)
5. Once the court is convinced that the accused is participating in the plea bargain voluntarily, it will allow time to both parties to reach mutually satisfactory disposition,\(^103\) which may include giving to the victim by the accused, compensation\(^104\) and other expenses incurred during the case;
6. Where a satisfactory disposition of the case has been worked out, the Court shall dispose of the case by sentencing the accused to one-fourth of the punishment provided or extendable, as the case may be for such offence;\(^105\)

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\(^95\) Supra note 93
\(^96\) Id., S. 265-A
\(^97\) Id.
\(^98\) Ibid.
\(^99\) Pt. II, S. 1, Dated 12-1-2006
\(^100\) Id., S. 265-B, 4 (a)
\(^101\) Ibid.
\(^102\) Id. S. 265-C
\(^103\) Id., S. 265-E (a)
\(^104\) Id., S. 265-E (d)
7. The statement or facts stated by an accused in an application for plea bargaining shall not be used for any other purpose other than for plea bargaining.\textsuperscript{106}

8. The judgment delivered by the Court in the case of plea bargaining shall be final and no separate appeal shall lie in any court against such judgment (except the special leave petition under article 136 and writ petition under articles 226 and 227 of the Constitution).\textsuperscript{107} If the accused is a first time offender, the court will have the option of releasing him/her on probation.\textsuperscript{108} Alternatively, the court may grant half the minimum punishment for the particular offence.\textsuperscript{109}

Some critics say the backlogs on Indian courts, and the prolonged trials in India are due to systemic failures, and lack of infrastructure and funds. Instead of addressing the root of the problems, the government has chosen a shortcut solution by way of introducing plea bargaining. Several defense lawyers are anguished as they suspect it will eat into their volume of work.\textsuperscript{110}

The graphic summary of the provisions related to Plea Bargaining as follows:

\textsuperscript{106} Id, S. 265-K
\textsuperscript{107} Id, S. 265-G
\textsuperscript{108} Id, S. 265-E (b)
\textsuperscript{109} Id, S. 265-E (c)
\textsuperscript{110} Supra note 51
PLEA BARGAINING

Applicability

Application under S.265B in accordance with S.265A(8)

Issuance of Notice to the Public Prosecutor or Complainant, and the Accused to appear on the date fixed. S.265B(3)

Examination of the Accused in Camera to ascertain whether the application has been filled voluntarily S.265B(4)

Voluntarily filed: time provided to work out a Mutual Satisfactory Disposition S.265B(4a)

Issuance of notice for participation in the meeting to work out mutual satisfactory disposition S.265C.

Voluntarily filed or accused has been previous convict: The Court shall proceed further with the case S.265B(4b)

Statement of accused not to be used. S.265K

Report of Mutual satisfactory disposition to be prepared and signed S.265D

Award of compensation to the victim S.265E (a)

Disposal of the case S.265E

Relaeeasing the accused on probation S.265(b)

If minimum punishment provided for, then sentenced to half of such minimum punishment S.265E (c)

If probation of Offenders Act doesn't apply, then sentenced to 1/4th of the punishment provided or extendable for such offence S.265 (d)

Judgement to be delivered in open court and is final S.265F

Non-Applicability

Socio-Economic Offences Against Women, Children and Habitual Offender, above 7 years imprisonment, Life Imprisonment, Death Sentence

Hearing parties on quantum of punishment
When are plea bargains made?

A plea bargain may be made by an accused when-

(a) The report has been forwarded by the officer in charge of the police station under s. 173 Cr.P.C. alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

(b) A Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complaint and witnesses under Section 200, issued the process under s. 204.111

Who can file an application for plea bargaining?

- Any accused person above the age of 18 years and against whom a trial is pending, can file an application for plea bargaining.
- But, there are some exceptions to this general rule.
- The offence against the accused should carry a maximum sentence of less than 7 years.
- The offence should not have been committed by the accused against a woman or a child below the age of 14 years.
- The accused should not have been covered under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000.
- The accused should not have earlier been convicted for same offence.
- The offence should not affect the socio economic condition of the country.112

Arguments in favour of Plea bargaining

The principal benefit of the plea bargaining, for most of the accused, is to receive a lighter sentence for a less severe charge than what might result from taking the case to trial and losing. Another fairly obvious benefit that accused can reap from plea bargaining is that they can save an advocates’ fees. It almost always takes more time and effort to bring a case to trial than to negotiate and handle a plea bargain. There may be other benefit as well such as:113

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111 Supra note 4 at 7
112 Id at 8
113 Supra note 76 at 33
1 Speedy justice

The Indian judiciary at present is overburdened and underfunded. There are number of cases in the Courts at the moment which will perhaps take years to reach a decision. Resorting to plea bargaining would provide a relatively quick, efficient method of handling large caseload. The fundamental goal of plea bargaining is to provide clear space in the legal system for cases 'worth' a trial. Because plea bargaining permits a prompt resolution of criminal proceedings with all the benefits that result from final disposition and avoids delay and the uncertainties of trial and appeal,

2 Low cost

A large amount of money along with the time is spent on preparing for the arguments in the Court only to find that other party is seeking extension of date of hearing. Thereby, the money spent in preparation will become a waste. On the other hand plea bargaining would help to eliminate this problem.

3 Better working relationship

Plea bargaining may also satisfy what some scholars argue is "an irrepresible tendency toward cooperation among members of the courtroom work group." It allows this "courtroom work group" to satisfy their "mutual interest in avoiding conflict, reducing uncertainty and maintaining group cohesion."

4 Adequate allocation of resources

Another justification of plea bargaining is that it allows for the most efficient allocation of resources. "The bargain is recognized explicitly as a transaction in which unrelated objectives of the defendant and the State are served. The defendant wants to minimize his punishment, wholly without regard to its possible benefit to society or himself. The State wants to avoid a trial."

5 On grounds of economy or necessity

Viewing plea negotiation less as a sentencing device or a form of dispute resolution than as an administrative practice, they argue that society cannot afford to provide trials to all the accused who would demand them if guilty pleas were unrewarded. At least, there are more appropriate uses for the additional resources than an effective plea bargaining could save.

6 Alternative Dispute Resolution

A second view treats plea bargaining, not primarily as a sentencing device, but as a form of dispute resolution. Some plea bargaining advocates maintain that it is desirable to afford the accused and the State the option of compromising factual and legal disputes. They
observe that if a plea agreement did not improve the positions of both the accused and the State, one party or the other would insist upon a trial.\textsuperscript{114}

7 **Easy release from Jail**

An accused who is held in custody and does not qualify for release on his own recognizance or who either does not have the right to bail or cannot afford bail may get out of jail immediately following the judge’s acceptance of a plea. Depending on the offence, the accused may get out altogether, on probation, with or without some community service obligations. The accused may have to serve more time, but will still get out much sooner than if he or she insisted on going to trial.

8 **Quick disposal of cases**

A trial is usually requires a much longer wait and causes much more stress than taking a plea bargain.

9 **Refine the record of accused for his bright future**

Pleading guilty or no contest in exchange for a reduction in the number of charges or the seriousness of the offences looks a lot better on an accused person’s record than the convictions that might result following trial. This can be particularly important if the accused is ever convicted in the future.

10 **Hassle free**

Some people plead guilty especially to routine, minor first offences without engaging a lawyer. If they waited to go to trial, they would have to find a good lawyer and spend both time and money preparing for trial.

11 **Avoiding Public eye**

All persons who depend on their reputation in the community to earn a living and people who don’t want to bring further embarrassment to their families may chose to plead guilty to keep their names out of the public eye. While news of plea itself may be public, the news is short lived compared to news of a trial. And rarely is an accused person’s background explored in the course of a plea bargain to the extent it may be done at trial.

12 **Rehabilitative approach**

If rehabilitation and reformation of the offender commences early and he can start a fresh life without loss of time. And when the offender pleads guilty he feels cleansed of the feeling of guilt. Through this the faith in honesty is reinforced.

\textsuperscript{114} De S., “Plea Bargaining: A New Path in Criminal Justice System,” 171 Cr.LJ (2011)
ARGUMENTS AGAINST PLEA BARGAINING

Critics of plea bargaining, refuse to acknowledge its inevitability and instead argue its many disadvantages. A central argument against plea bargaining is that it is detrimental to the innocent defendant. It is argued that plea bargaining not only under mines the public image of the criminal justice system but also subverts many of its values and erodes the values of presumption of innocence and the right to trial. The quick disposition of cases through plea bargaining may conserve judicial resources but the problem is that it allows guilty defendants to obtain unwarranted reductions in sentences by threatening an overworked system with requiring a time-consuming and pointless trial. Thus, it represents the system as one which sacrifices proper punishment of criminals in the name of efficiency. Another observation made by critics of this system is that most guilty pleas are not the fruit of genuine repentance. Instead, defendants feign repentance to earn sentence reductions and therefore, the argument pertaining to acknowledgment of guilt does not hold good.

In State of Uttar Pradesh v. Chandrika, the Supreme Court has observed: ‘It is settled law that one basis of plea bargaining Court may not dispose of the criminal cases. The Court has to decide it on merits. If accused confesses hi guilt, appropriate sentence is required to be imposed……. Mere acceptance or admission of the guilt must not be a ground for reduction of sentence. Some of the drawback as follows:-

1. Unjust Sentencing:

This practice turns the accused's fate on a single tactical decision, which they say, is irrelevant to desert, deterrence, or any other proper objective of criminal proceedings. Some critics maintain that plea bargaining results in unwarranted leniency for offenders and that it promotes arsenical view of the legal process.

2. Legal issues

Critics stress that plea bargaining circumvents the standards of proof and due process imposed in trials. The defendant is encouraged to waive hi constitutional right to trial in lieu of receiving a harsher sentence at trial. The defendant also waives his privilege against self-incrimination and the right to confront adverse witnesses. These breeds contempt and resentment instead of remorse and resolve-on the part of the defendant and undermines the justice system's credibility and legitimacy in the eyes of the public.

\[115\] AIR 2000 SC 164
3. **Scope of disparity in sentencing**

Plea bargaining also results in leniency of sentencing. Critics argue that plea bargaining not only results in less severe sentences but also greater sentencing disparity, which tends to undermine the entire criminal system. Critics insist that plea bargaining and the resulting leniency allows the criminal to escape full punishment. A plea of guilt based on plea-bargaining, as it would be opposed to public policy, if an accused were to be convicted by inducing him to plead guilty, by holding out a light sentence as an allurement.\(^\text{116}\)

It proves fourth hypothesis that concept of plea bargaining is a potent tool to disburse criminal administration of justice. It has merits along with demerits. But the merits outweigh the demerits. So it helps in reducing the burden of judiciary.

**COMPoundABLE OFFENCES**

S.320 (1) The offences punishable under the sections of the Indian Penal Code(45 of 1860), specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table:-

<table>
<thead>
<tr>
<th>Offence</th>
<th>Section of the Indian Penal Code applicable</th>
<th>Person by who offence may be compounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uttering words, etc., with deliberate intent to wound the religious feelings of any person.</td>
<td>298</td>
<td>The person whose religious feelings are intended to be wounded.</td>
</tr>
<tr>
<td>Causing hurt.</td>
<td>323, 334</td>
<td>The person to whom the hurt is caused.</td>
</tr>
<tr>
<td>Wrongfully restraining or confining any person.</td>
<td>341, 342</td>
<td>The person restrained or confined.</td>
</tr>
<tr>
<td>Assault or use of criminal force.</td>
<td>352, 355, 358</td>
<td>The person assaulted or to whom criminal force is used</td>
</tr>
<tr>
<td>Criminal trespass</td>
<td>447</td>
<td>The person in possession of the property trespassed upon.</td>
</tr>
<tr>
<td>House trespass.</td>
<td>448</td>
<td>The person in possession of the property trespassed upon.</td>
</tr>
<tr>
<td>Criminal breach of contract of service.</td>
<td>491</td>
<td>The person with whom the offender has contracted.</td>
</tr>
<tr>
<td>Adultery.</td>
<td>497</td>
<td>The husband of the woman.</td>
</tr>
</tbody>
</table>

\(^\text{116}\) Id at 172
Enticing or taking away or detaining with criminal intent a married woman.

*Defamation, expect such cases as are specified against Section 500 of the Indian Penal Code (45 of 1860) in Column 1 of the Table under sub-section (2).[^17]

Printing or engraving matter, knowing it to be defamatory.

Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.

Insult intended to provide a breach of the peace.

Criminal intimidation except when the offence is punishable with imprisonment for seven years.

Act caused by making a person believe that he will be an object of divine displeasure.

(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:—

<table>
<thead>
<tr>
<th>Offence</th>
<th>Section of the Indian Penal Code applicable</th>
<th>Person by who offence may be compounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Voluntarily causing hurt by dangerous weapons or means.</td>
<td>324</td>
<td>The person to whom hurt is caused.</td>
</tr>
<tr>
<td>Voluntarily causing grievous</td>
<td>325</td>
<td>The person to whom hurt is</td>
</tr>
</tbody>
</table>

[^17]: This portion substituted by Act No. 45 of 1978, S. 25.
hurt.
Voluntarily causing grievous hurt on grave and sudden provocation
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety or others.
Wrongfully confining a person for three days or more.
Wrongfully confining for ten more days.
Wrongfully confining a person in secret.
Assault or criminal force to woman with intent to outrage her modesty.
Assault or criminal force in attempting wrongfully to confine a person
Theft, where the value of property stolen does not exceed two hundred and fifty rupees.
Theft by clerk or servant or property in possession of master, where the value of the property stolen does not exceed two hundred and fifty rupees.
Dishonest misappropriation of property.
Criminal breach of trust, where the value of the property does not exceed two hundred and fifty rupees
Criminal breach of trust by a carrier, wharfinger, etc., where
335 The person to whom hurt is caused.
338 The person to whom hurt is caused.
343 The person confined.
344 The person confined.
346 The person confined.
354 The woman assaulted to whom the criminal force was used.
357 The person assaulted to whom the criminal force was used.
379 The owner of the property stolen.
381 The owner of the property stolen.
403 The owner of the property misappropriated
406 The owner of the property in respect of which the breach of trust has been committed.
407 The owner of the property in respect of which the breach of
the value of the property does not exceed two hundred and fifty rupees.

Criminal breach of trust by a clerk or servant, where the value of the property does not exceed two hundred and fifty rupees.

Dishonesty receiving stolen property, knowing it to be stolen, when the value of the stolen property does not exceed two hundred any fifty rupees.

Assisting in the concealment or disposal of stolen property, knowing it to be stolen, where the value of the stolen property does not exceed two hundred and fifty rupees.

Cheating.

Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.

Cheating by personation.

Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.

Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.

Fraudulently preventing from trust has been committed.

The owner of the property in respect of which the breach of trust has been committed.

The owner of the property stolen

The owner of the property stolen

The person cheated.

The person cheated.

The person cheated.

The person cheated.

The creditors who are affected thereby.

The creditors who are affected
being made available for his creditors a debt or demand due to the offender.

Fraudulent execution of deed of transfer containing false statement of consideration.

Fraudulent removal or concealment of property.

Mischief by killing or maiming animal of the value of ten rupees or upwards.

Mischief by killing or maiming cattle, etc., of any value or of any other animal of the value of fifty rupees or upwards.

Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.

House-trespass to commit an offence (other than theft) punishable with imprisonment.

Using a false trade or property mark.

Counterfeiting a trade or property marked used by another.

Knowingly selling, or exposing or possessing for sale, or for manufacturing purpose, goods marked with a counterfeit property mark.

Uttering again during the lifetime of a husband or wife.

Uttering words or sounds or
making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4)(a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf, may, with the permission of the Court compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under section 401 may allow any person to compound any offence which such person is competent to compound under this section.

(7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section.

The offences that may lawfully be compounded are those that are mentioned in this section. The offences other than those mentioned cannot be compounded. The offences punishable under laws other than the Penal Code are not compoundable.

**Plea Bargaining and Compoundable Offences**

S.320 of the Cr. P.C. deals with the compoundable offences and chapter XXI-A deals with plea bargaining. The concept of plea bargaining is a new concept and has been inserted in 2006 and compoundable offences are added from the beginning of the criminal code. Both the concept
deal with leniency towards accused by reducing some charges or sentence. There are some differences between both which are as under:

(1) Plea bargaining is wider than compoundable offences.

(2) In plea bargaining victim and accused both are benefitted but in compoundable the accused only take the whole benefit.

(3) In plea bargaining compensation is mandatory if the case is solved by it but in compoundable there is no such provision.

(4) Plea bargaining is applicable to all the cases in which the sentence is upto 7 years but excluded socio economic offences and the offences related to women and children whereas only those offences are compounded which are mentioned under s.320 specifically.

(5) Plea bargaining is general and compounding of offences is specific in nature.

**JUDICIAL TRENDS PRE AMENDMENT**

Because so much of plea bargaining occurs behind the scenes, critics further argue that the above abuses go largely unchecked, and, consequently, the risk of convicting innocent defendants may increase.118 To some limited purposes sentence bargaining has been applied almost regularly in India in cases where changing the nature of punishment and reducing the quantum of sentence was within the discretionary power of the trial courts. Constitutionality and legality of ‘sentence bargaining’ so resorted to by Indian courts have been examined by the apex courts in several cases.119 In State of UP v. Chandrika,120 the Supreme Court decided that the disposal of cases on the basis of plea bargaining is not permissible. Mere acceptance of admission of guilt should not be a ground for reduction of sentence. This practice would also tend to encourage corruption and contribute to the lowering of the standard of justice. Justice P.N. Bhagwati in Kasambai Abdulrahmanbhai Seikh v. State of Gujarat,121 declared plea bargaining as unconstitutional and illegal. In this case judgment of High Court is set aside by Supreme Court and the plea of guilty is ignored, conviction of accused is set aside and the case is sent back to the Magistrate for trial in accordance with law. This procedure would be clearly unreasonable, unfair and unjust and would be violative of the new activist dimension of Art. 21 In the case of Maneka Gandhi’s Case.122 It would have the effect of polluting the pure fount of justice, because it might induce an innocent

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118 Supra note 19
119 Supra note 52 at 14
120 Supra note 115
121 AIR 1980 SC 854
122 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
accused to plead guilty to suffer a light and an inconsequential punishment rather than 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 and judge also might be likely to be deflected from the path of duty to do justice and he might either convict an innocent accused by accepting the plea of guilty or let off the guilty accused with a light sentence. Justice M.Hidayatullah in Madanlal Ramchandra Daga v. State of Maharashtra,\textsuperscript{123} disapproved the practice of plea bargaining by following succinct observation:

“ In our opinion, it is very wrong for a Court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the Court should never be a party to bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court……”\textsuperscript{124}

In Thippaswamy v. State of Karnataka,\textsuperscript{125} the Supreme Court held that enforcement or imposition of sentence in revision or appeal after the accused had plea bargained for a lighter sentence or mere fine in the trial court as unconstitutional being violative of Article 21. It is clear that plea bargaining was never appreciated by the Apex court as a concept in Indian Criminal System.

**JUDICIAL TRENDS POST AMENDMENT**

While commenting on the concept of plea bargaining, the Gujarat High Court observed in the State of Gujarat v. Natwar Harchanji Thakor,\textsuperscript{126} that the very object of the law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure of redressal and it shall add a new dimension in the realm of judicial reforms.

In Delhi’s first case of plea bargaining on April 11, 2007, a trial court sentenced accused to seven days in jail and fined him Rs. 500/- for barging into his neighbor’s house ten years

\textsuperscript{123} AIR 1968 SC 1267
\textsuperscript{124} Id at 1270.
\textsuperscript{125} AIR 1983 SC 747
\textsuperscript{126} 2005 Cr.LJ 2957.
ago. By continuing with the trial and pleading guilty, accused could have been sentenced up to three years in jail. Disposing of the case, Metropolitan Magistrate Pulastya in his order said, “Since the accused has appealed voluntarily and both parties have reconciled, his sentence is reduced to seven days.”

In Mumbai’s first case,\footnote{\textit{Times of India}, October 15th, 2007} an application for plea bargaining was made before a sessions court recently when an ex-Reserve Bank of India clerk, who is accused in a cheating case, moved the court seeking lesser punishment in return for confessing to the crime. In the present case, Sakharam Bandekar, a grade I government employee, was accused of siphoning off Rs 1.48 crore from RBI by issuing vouchers against fictitious names between 1993 to 1997 and transferring the money into his personal account. Bandekar was arrested by the CBI on October 24, 1997, and later released on bail in November the same year. The case came up for trial before Special CBI Judge A R Joshi and charges were framed against Bandekar on March 2, 2007. However, the accused moved an application before the court on August 18, stating he was 58 years old and would seek plea bargaining. The court then directed the prosecution to file its reply.

The CBI, while opposing the application, said that “The accused is facing serious charges and plea bargaining should not be allowed in such cases.” CBI also said, “Corruption is a serious disease like cancer. It is so severe that it maligns the quality of the country, leading to disastrous consequences. Plea bargaining may please everyone except the distant victims and the silent society.” Based on these submissions, the court rejected Bandekar’s application. Although Bandekar’s plea was rejected, the case indicates an emerging legal trend. According to experts, plea-bargaining could reduce the heavy backlog of cases in Indian courts. Since it requires the accused to confess to his crime and does away with a lengthy trial, the time period can be reduced drastically. For the accused, the real benefit is that by confessing to his crime and bargaining for the prison term, he may escape with a lesser punishment.

In Pardeep Gupta v. State,\footnote{Delhi High Court, Bail Application No. 1298/2007, Judgment dated September 03, 2007} Shiv Narayan Dingra J. observed that “the trial court’s rejection of the plea bargain shows that the learned trial court had not bothered to took into the provisions of chapter XXI A of Code of Criminal Procedure meant for the purpose of plea bargaining and rejected the application on the ground that since the applicant is involved in an offence under section 120-B Indian Penal Code and the role of applicant was not lesser than the other co-accused. But none of the offences in which the petitioner has been booked
attracted more than seven years punishment. The request of plea bargaining is ought to be considered taking into account the role of the accused, and the nature of the offence, etc. The trial court could not have rejected the application for plea bargaining on the ground that he was involved in section 120-B Indian Penal Code and therefore, the request for plea bargaining is not available to him. The attitude of the trial court shows that it did not even read the provisions of chapter XXI-A before considering the application. The High Court directed the trial court to reconsider the application of plea bargaining made by the accused in the light of provisions made in the Code of Criminal Procedure and not in a casual manner.

In Guerrero Lugo Elvia Grissel & Ors. v. State of Maharashtra,\textsuperscript{129} the compensation of 55 Lac to the victim along with imprisonment of 21 months to the accused is awarded. In this case the Magistrate agreed with the submission of the Special Public Prosecutor that accepting the argument of the petitioners would result in re-writing of clause (d) of s.265- E of the Code. The Magistrate opined that the two words “provided” and “extendable” used in the said provision were joined with conjunction “or”. That means that the Court may sentence the accused with one-fourth of the punishment “extendable.”\textsuperscript{130} court has no discretion to sentence the accused with lesser punishment than one-fourth of the punishment, provided if it is fixed punishment under law and one-fourth punishment extendable if the law prescribed extendable punishment upto a fixed limit.

It is clear from the review of pre as well as post amendment judgments that plea bargaining is in a poor state in Indian criminal justice system as the number of cases reported under plea bargaining are very few.

**AN APPRAISAL**

A Criminal Justice System, which is crippling under its own weight, experimentation is the only hope through which the confidence of the masses can be restored in the system. Plea bargaining should be viewed as one such experiment designed to reduced tendency of under-trial cases. The outcome of the experiment would depend on the honesty of the Criminal Justice System in implementing the policy. At this stage, it would be premature to declare the success of the new concept of plea bargaining. The impact of plea bargaining on Justice Delivery System should be watched and analyzed carefully from time to time. It should be discarded if it pollutes the soul of criminal jurisprudence. It should be welcomed if it helps the cause of justice in the society. Till then, it would be more apt to see plea bargaining as a

\textsuperscript{129} 2012 Cri.L.J. 1136 (BOM.)

\textsuperscript{130} Id at 1140
positive and constructive step in the direction of expediting trials of criminal case of medium severity.\textsuperscript{131}

To Conclude, plea bargaining is undoubtedly, has become a critique in the minds of jurists. Few people have welcomed it while others have abandoned it. It is true that plea bargaining speeds up caseload disposition, but it does that in an unconstitutional manner. But perhaps we have no other choice but to adopt this technique. The criminal courts are too over burdened to allow each and every case to go on trial. Only time will tell that the introduction of this new concept is justified or not.\textsuperscript{132} Thus presently this concept of plea bargaining has not found place in the heart of judges because there is hardly few cases where this concept of plea bargaining has been taken but one way or other higher courts have not given proper attention in this regard. But this is a beginning of a new era started in India to which horizon is the limit of practice; let us accept it with hopes for the best and positive results on the society.

\textsuperscript{131} Supra note 52 at 17.