1. Introduction

According to Oxford Dictionary, the word 'plea' means appeal, prayer, request or formal statement by or on behalf of the 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. The trial of a criminal case generally begins with the framing of a formal charge of an offence against the accused and this charge is read over to the accused who is called upon to plead guilty or not guilty to the said charge. This plea of the accused is recorded by the court and the court may convict the accused on this plea of guilty in case the court is satisfied that it is made voluntarily in full knowledge and understanding of its implications and is not made out of fear, threat, coercion or weakness or ignorance or due to extraneous reasons. Half way between the plea of guilty or non guilty is the plea which may be called plea bargaining.

“When one’s own legal system flounders, one naturally looks towards practices in other countries, which seem to provide the solution. Statistics as regards the criminal justice system in India are startling in 2001; the number of inmates housed in Indian jails was almost 1,00,000 more than their capacity. It was estimated that 70.5% of all inmates were under trials and of these 0.6% had been detained in jail for more than 5 years at the end of 2001.”
The practice of what has come to be known as 'plea bargaining' has been the subject of considerable debate over the last few decades. In Canada, the discussion has centered on the exact nature of the practice and on the term by which it should be known. In 1975, 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'. But over the years, considerable objections grew against designating the practice in any way that implied that justice could be purchased at the bargaining table. Consequently, there was a movement away from the use of the term 'plea bargaining' and toward more neutral expressions such as 'plea discussions', 'resolution discussions', 'plea negotiations' and 'plea agreements'. The use of such expressions marked an evolution in the practice itself, since they implicitly acknowledged it to be much more wide ranging than simple bargaining and to involve the consideration of issues beyond merely that of an accused pleading guilty in exchange for a reduced penalty.

The Indian concept of Plea Bargaining is inspired from the Doctrine of Nolo Contendere. The doctrine has been under consideration by India for introduction and employment in the Criminal Justice System. Indian Criminal Justice System has been ineffective in providing speedy and economical justice. Because Courts are flooded with astronomical arrears, the trial life span is inordinately long and the expenditure is very high. Subsequently majority of cases are arising from criminal jurisdiction and the rate of conviction is very low.

Recently the Government of India has accepted the Doctrine of Nolo Contendere or Plea Bargaining, on the Recommendations of the Law Commission. Doctrine of Nolo Contendere has been considered in a manner according to social and economical conditions prevailing in the country. Appropriate amendment has been incorporated in the Criminal Procedure Code, 1973. The new concept of
Plea Bargaining will be fruitful in resolving pending criminal cases and under trial in jails for years.

Plea bargaining has been inserted through Chapter XXI A in the Criminal Procedure Code. It provides for pre-trial negotiations between the defence and the prosecution during which an accused might plead guilty in exchange for certain concessions by the prosecution. The judge would decide if the plea bargaining was resorted to with malafide or bonafide intention. There are certain exceptions laid down to plea bargaining under the Bill. It has been proposed that there will be no plea bargaining in three cases namely, offences against women, children below the age of 14 years and socio-economic offences (like offences under Food Adulteration Act etc). There can be plea bargaining for offences where punishment prescribed is 7 years or less.

Nevertheless, if a system akin to plea-bargaining has to be implemented in India, then the deciding authority must be independent from the trial court and instead of the Public Prosecutor retaining most of the power, the deciding authority must be given a greater role in the process. If the deciding authority is the sole arbiter, the risk of coercion into pleading guilty and of underhand dealings can be eliminated substantially. Therefore not only will the victims needs be addressed but also the susceptibility of the system of being misused by the Public Prosecutor, the police and even the affluent will be considerably reduced. In this respect, the scheme proposed by the 142nd Report of the Law Commission of India is prudent, as it does not seek to carelessly replicate the American model of plea-bargaining. It cannot be denied that the scheme ignores the fact that many lack the resources for proper legal representation and is more a formalization of the unwritten rule of showing leniency to those who plead guilty rather than plea-bargaining. Nonetheless, given that reformation of the present system is unlikely to occur in the near future, the proposal outlined by the 142nd Report of the Law
Commission of India should not have been overlooked and may have proved to be a far more practicable solution to the problem.

I). The Origin And Rise Of Plea – Bargaining

A. CRIMINAL LAW OF ENGLAND

In English criminal law, in some cases, accused may not like to defend the charge against him on facts unlikely to secure acquittal for him and by means which are likely to fail ultimately. In others he may be charged with a serious offence, the facts of which he does not contest but gravity of which he does not wish to admit. For example X is accused of murder, X contends that he was provoked and is willing to plead guilty to the offence of manslaughter a less grave offence in its degree of culpability. The court may allow the plea of guilty and sentence him for the offence of manslaughter but it has a discretion to refuse if nothing appears in the prosecution evidence to support the reduction of the offence charged. In such cases the defence counsel may advise a plea of guilty to the accused to the offence charged or to a milder offence in the hope of receiving a lesser sentence and for this object may discuss the position with the trial judge and the prosecuting counsel. This is called plea bargaining. This term may have different connotations.

i) It means an agreement between the judge and the accused that in case he pleads guilty to the offence charged against him the sentence will or will not take a certain form. Plea of guilty made in these circumstances is a nullity.

ii) It can mean an undertaking by the prosecution that in case the accused admits to certain charges the prosecution shall not bring serious charges against him or will make a request to the judge to award a relatively lenient sentence.

This form of bargaining is also not possible under the English Criminal justice System as the Crown Court officer frames the charge (Indictment) independently and at the stage of awarding sentence the function of the prosecutor is to state the facts of the case and not to suggest appropriate sentence.

iii) Plea bargaining may mean prosecution making agreement with the accused that in case he pleads guilty to a lesser offence that plea to a lesser offence shall be admitted by the prosecution.

iv) Plea bargaining may refer to prosecution leading no evidence on one or more counts (head of charges) during the trial of the case against the accused in case he pleads guilty to the remaining charges.

The plea bargaining of third and fourth type stated above are approved frequently by the English criminal courts. It is in public interest that where the accused is prepared to admit to the less serious charges and there is something to believe that the accused may not be found guilty of the full offence ultimately, it shall be prudent to accept a plea of guilty to the lesser offence and court time and money should not be wasted on pursuing his conviction on full offence. Such bargains are usually struck between the prosecuting and defence counsels in agreement with the judge before the commencement of the trial of the case.3

Where the prosecution proposes to lead no evidence on one count (charge) in exchange to pleading guilty by the accused on another count, the permission of the judge is necessary. This consent of the judge is to be sought in open court.4

In R v Turner5 Lord Parker C.J observed that in case of plea bargaining four principles apply which have been approved by the court of appeal in a number of cases:-

a) Counsel must be free to give his client the best advice he can which may include strongly persuading him to plead guilty, emphasizing that he must not do so if he has not committed the acts constituting the offence charged.
b) The accused must have complete freedom of choice as to his plea.
c) There must be freedom of access between counsel and judge, but any discussion must take place with the counsel for the prosecution present. On the other hand justice should take place in open court, so circumstances justifying private discussions must necessarily be limited; it could be proper, for instance, where the accused is willing to plead guilty to a lesser offence.6
d) The judge should never indicate the sentence which he is minded to impose if there is any suggestion whatever explicit or implicit that it would be different if the accused pleaded guilty or not guilty as the case may be7.

B) AMERICAN CRIMINAL LAW

In a criminal trial in the United States, the accused has three options as far as pleas are concerned guilty, not guilty or a plea of nolo contendere. A plea-bargain is a contractual agreement between the prosecution and the accused concerning the disposition of a criminal charge. However, unlike most contractual agreements, it is not enforceable until a judge approves it. Plea-bargaining thus refers to pre-trial negotiations between the defence and the prosecution, in which the accused agrees to plead guilty in exchange for certain concessions guaranteed by the prosecutor.

Plea-bargaining has, over the years, emerged as a prominent feature of the American criminal justice system. While courts were initially skeptical towards the practice, the 1920s witnessed the rise of plea-bargaining making its correlation with the increasing complexity in the American criminal trial process

6. R. v Winterflood (1979) 69 Cr. App, R.249
apparent. In the United States, the criminal trial is an elaborate exercise with extended voir dire and peremptory challenges during jury selection, numerous evidentiary objections, complex jury instructions, motions for exclusion, etc. and though it provides the accused with every means to dispute the charges against him, it has become the most expensive and time-consuming in the world. Mechanisms to evade this complex process gained popularity and the most prominent was of course, plea bargaining.

Thus, plea-bargaining gradually became a widespread practice and it was estimated that 90% of all criminal convictions in the United States were through guilty pleas. In 1970, the constitutional validity of plea-bargaining was upheld in Brady v. United States, where it was stated that it was not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the State. One year later, in Santobello v. New York 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.

The fact that courts resources would have to be significantly increased to provide a trial for every charge has been cited as both justification and reason for the inevitability of plea-bargaining. Proponents of plea-bargaining argued that it would remove the risks and uncertainties involved in a trial, thus introducing flexibility into a rigid, often-erratic system of justice. It would also enable the court to avoid dealing with cases that involve no real dispute and try only those where there is a real basis for dispute. Victims would be spared the ordeal of giving evidence in court, which could be a distressing experience depending on the nature of the case.

C. INDIAN CRIMINAL LAW
a) Plea Bargaining In India
i) Position prior to the amendment incorporating plea bargaining in the Code of Criminal Procedure:
No plea bargaining in non compoundable offences:

In State of U.P. v. Chandrika the division bench of Supreme Court observed that the concept of plea bargaining has not been recognized under the Indian system of criminal administration being against public policy. The provision of compounding of certain offences is contained in section 320 of the Cr.PC with the permission of the court and others without permission of the court. Remaining offences which are serious in nature and affect the society at large are non compoundable, where there is no provision of negotiated settlement. In such types of serious cases the method of plea bargaining requires no encouragement. The state or the public prosecutor or the judge can not bargain that the evidence shall not be led or appreciated in consideration of imposing lenient sentence by pleading guilty to the offence. In such circumstances where the accused confesses his guilt, appropriate sentence is to be awarded.

In case of appeal or revision the appellate courts approach should be whether the convict is or is not guilty on the basis of evidence on record. In case he is proved guilty appropriate sentence is to be passed or maintained. In case the appellant counsel submits not to challenge the verdict of conviction as there is sufficient evidence to connect the accused with crime in that event also the court must satisfy it self that the concession if any to be given to the appellant is based on the evidence on record. In such cases sentence proportionate to the crime committed by the accused is required to be imposed. Mere admission of the guilt should not be a ground for reducing the sentence. The accused can not bargain with the court that since he is pleading guilty so his sentence be reduced. In the instant case the High Court in an appeal against the order of sentence of eight years imposed under section 304 I.P.C, accepted the bargain and altered the sentence of the

8 AIR 2000 SC 164.
appellant to the period of already undergone. The Supreme Court set aside the order of the High Court reducing sentence which was based on the concept of plea bargaining.

In case of Madan Lal Ramchander Daga v. State of Maharashtra\textsuperscript{9} the apex court observed as follows:

"In our opinion, it is very wrong for a court to enter into a bargain of this character. Offence 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 must never be a party to a 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{10}

The question of plea bargaining was again considered by the Apex court in Murlidhar Megh Raj Loya v. State of Maharashtra\textsuperscript{11} and was disapproved with the following critical observation:

"We are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully, induced by an informal, tripartite understanding of light sentence in lieu of nolo contendere stance. Many economic offenders resort to practices the American call 'plea bargain', 'plea negotiation', 'trading out' and 'compromise in criminal cases' and the trial magistrate drowned by a docket burden nods assent to the sub rosa anteroom settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, 'trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail'.

\textsuperscript{9}AIR 1968 SC 1267
\textsuperscript{10} Ibid
\textsuperscript{11}AIR 1976 SC 1929
These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old professions. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly" justify it philosophically as a sentence concession to a accused who has, by his plea 'aided in ensuring the prompt and certain application of correctional measures to him."

"In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute... finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or at best a necessary evil. The "State" can never compromise. It must enforce the law." Therefore open methods of compromise are impossible."

In Kasambhai Abdulrehmanbhai Sheikh v. State of Gujarat¹³ and Kachhia Patel Shantilal Koderlal v State of Gujarat¹⁴ the Supreme court ruled that the practice of plea bargaining is unconstitutional, illegal and would tend to encourage
corruption, collusion and pollute the justice system because it might induce an innocent accused to plead guilty and to suffer a lighter and inconsequential punishment instead of going through a long and arduous criminal trial which is not only expensive and time consuming but also uncertain and unpredictable in its result. The judge may also be deflected from the path of justice and may convict the innocent by accepting the plea of guilty or let off a guilty accused with a lighter sentence.

In Kirpal Singh v. State of Haryana\textsuperscript{15} in a case under sections 392 and 397 I.P.C. where a minimum punishment of seven years of rigorous imprisonment has been provided it was held by the apex court that the concept of plea bargaining can not be adopted to circumvent the minimum punishment prescribed by law. Neither the trial court or the High Court has the jurisdiction to bye pass the minimum limit of sentence prescribed by law on the pretext that a pre bargain was clinched by the accused on the assumption that the court would award him punishment even less than minimum prescribed by law and let him off lightly. This procedure was held to be unfair, unjust and unreasonable and hence violative of article 21 of the Constitution of India. Similar observations were made by the apex court in State of U.P. v. Nasruddin\textsuperscript{16} in a case under section 304 of the I.P.C. where plea bargaining on the question of sentence was held to be not permissible under the law.

ii) Position after the amendment in-corporating plea bargaining in the Code of Criminal Procedure:

A new Chapter (Chapter XXI A) on Plea Bargaining has been inserted in the Criminal Procedure Code 1973. A notification to bring into effect the new provision has been issued and it has come into effect from 5th July, 2006. Plea

\textsuperscript{15}1999 Cri.L.J. 5031.
\textsuperscript{16}2000 Cri.L.J.4996 (1)
Bargaining was introduced through the Criminal Law (Amendment) Act, 2005 which was passed by Parliament in the winter session of 2005. The salient features are as follows:

The Plea Bargaining is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years. It does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman or a child below the age of 14 years. The application for Plea Bargaining should be filed by the accused voluntarily.

A person accused of an offence may file an application for Plea Bargaining in the court in which such offence is pending for trial. The complainant and the accused are given time to work out a mutually satisfactory disposition of the case, which may include giving to the victim by the accused, compensation and other expenses incurred during the case. 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. 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. The judgment delivered by the Court in the case of plea-bargaining shall be final and no appeal shall lie in any court against such judgment.

A formal proposal for incorporating plea-bargaining into the Indian criminal justice system was put forth in 2003 through the Criminal Law (Amendment) Bill, 2003 (hereinafter referred to as the Bill). However, those provisions failed to come through and were reintroduced with slight changes through the Criminal Law (Amendment) Bill, 2005, which was passed by the Rajya Sabha on 13-12-2005 and by the Lok Sabha on 22.12.2005. The provisions were thus finally
incorporated into the Code of Criminal Procedure, 1973 as Chapter XXI-A through the Criminal Law (Amendment) Act, 2005, notified in the Official Gazette of India as Act 2 of 2006 (hereinafter referred to as the Act).

Recognizing that there are significant differences in criminal procedure as well as in the role and status of various agencies, the Act does not give recognition to any existing practice akin to plea-bargaining. Instead, it enables an accused to file an application for plea-bargaining in the court where the trial is pending. The court, on receiving the application, must examine the accused in camera to ascertain whether the application has been filed voluntarily. The court must then issue notice to the Public Prosecutor or the complainant to work out a mutually satisfactory disposition of the case. The negotiation of such a mutually acceptable settlement is left to the free will of the prosecution (including the victim) and the accused.

If a settlement is reached, the court can award compensation based on it to the victim and then hear the parties on the issue of punishment. The court may release the accused on probation if the law allows for it; if a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such minimum punishment; if the offence committed does not fall within the scope of the above, then the accused may be sentenced to one-fourth of the punishment provided or extendable for such offence. The accused may also avail of the benefit under Section 428 of the Code of Criminal Procedure, 1973 which allows setting off the period of detention undergone by the accused against the sentence of imprisonment in plea-bargained settlements.

The court must deliver the judgment in open court according to the terms of the mutually agreed disposition and the formula prescribed for sentencing including victim compensation. It may be noted that this judgment is final and no appeal lies apart from a writ petition to the State High Court under Articles 226 and 227.
of the Constitution or a special leave petition to the Supreme Court under Article 136 of the Constitution.

The positive aspect of the Act is that the offences in which a mutually satisfactory agreement can be reached are limited. Secondly, the judge is not completely excluded from the process and exerts supervisory control. Therefore at least theoretically, administrative control of the process of granting concessions to those who plead guilty is ensured.

Thirdly, the Act ensures that such an opportunity will not be available to habitual offenders. Fourthly, the fact that the Act does not provide for an ordinary appeal from the judgment in such a case is a step towards expediting the disposal of cases. At the same time, a process for reviewing illegal or unethical bargains does exist though it may be noted that Article 136 of the Constitution does not confer a right of appeal on a party as such but confers a wide discretionary power on the Supreme Court to grant special leave. Also, though the remedy under Articles 226 and 227 of the Constitution can be made use of, it is unclear whether the victim of the offence can utilize this remedy.

II). Recommendations by the Law Commission of India

The subject of the 142nd Report of the Law Commission of India and the subsequent conclusions and recommendations were motivated by the abnormal delays in the disposal of criminal trials and appeals. In this context the system of plea-bargaining in the United States drew attention to itself and the Law Commission outlined a scheme of plea-bargaining for India. The Commission noted that because no improvement had been made in the situation and there was little scope for streamlining the system, the problem was a grave one and clamored for urgent attention.
Based on an analysis of plea bargaining as it exists in the United States, the report stated that the practice was not inconsistent either with the Constitution or the fairness principle and was, on the whole, worthy of emulation with appropriate safeguards. The Commission conducted a survey to ascertain whether the legal community was in support of plea-bargaining and also to gather opinions on the applicability of the practice if the earlier response was in the affirmative. Of those surveyed, a high percentage was in favour of the introduction of the scheme; additionally, most were in favour of introducing the concept only to specified offences. The report concluded that an improved version of the scheme suitable to the law and legal ethos of India should be considered with seriousness and with a sense of urgency.

The report also attempted to address some reservations that were expressed as regards the introduction of plea-bargaining: The scheme would not be successful in India due to illiteracy, which is comparatively much higher than in the United States and thus people would not adequately understand the consequences of pleading guilty. The Commission was of the opinion that because the contention fails to distinguish between literacy and common sense, it does not hold ground. Further, the proposed scheme accounts for this objection by providing for judicial officers to be plea judges, who would explain to the accused persons, the consequences of pleading guilty under the scheme.

Prosecution pressures may cause innocent people to yield and forego their right to trial. The Commission opined that such concerns could be dispelled if the judicial officer explained the implications of the scheme and was satisfied that the application was made by the accused of his own volition and not as a result of coercion or duress.

In the existing situation where the acquittal rate is as high as 90% to 95%, it is the poor who will be the victims of the concept and come forward to make
confessions and suffer the consequent conviction. The Commission stated that the argument that the scheme may not succeed was merely a matter of opinion and was not good enough a reason to oppose the scheme. Also, in the trade-off between languishing in jail as an under trial prisoner and suffering imprisonment for a lesser or similar period, the latter would be the rational choice as long periods in jail brought about economic and social ruin.

The incidence of crime might increase due to criminals being let-off easily. The Commission regarded this concern as unfounded as the authority considering the acceptance or otherwise of the request for concessional treatment would weigh all pros and cons and look into the nature of the offence and exercise its discretion in granting or rejecting the request.

Criminals may escape with impunity and escape due punishment. The Commission stated that the scheme provides for concessional treatment and not for any punishment and the stigma of conviction would persist.

As additional justifications, the Commission stated that considerable resources would be saved and that the rehabilitation process of the offender would be initiated early. The Commission concluded that the scheme for concessional treatment in respect of those offenders, who on their own volition invoked the scheme, which incorporated appropriate safeguards, might prove beneficial.

The Commission envisaged that in due time, the scheme would encompass all offences, but proposed that initially the scheme should be extended only to offences that provide for imprisonment for a period of less than seven years. The extension of the scheme would then be considered after a scrutiny of the results and in the light of public opinion. The Commission also suggested further subdivision for a more effective and phased application.
In its 154th Report, the Law Commission reiterated the need for 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 177th Report of the Law Commission, 2001 also sought to incorporate the concept of plea-bargaining. The Report of the Committee on Reforms of the Criminal Justice System, 2003 stated that the experience of the United States was an evidence of plea-bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice; the Committee thus affirmed the recommendations of the Law Commission of India in its 142ndth Reports and 154.

The 154th Report of the Law Commission points out that an order accepting the plea passed by the competent authority on such a plea shall be final and no appeal shall lie against the same.

As regards the procedure to be followed in cases where a minimum sentence is provided for the offence, the competent authority may, after following the aforementioned procedure, accept the plea of guilty and record an order of conviction and impose a sentence to the tune of half of the minimum term of jail provided by the statute for the offence concerned. A statutory provision empowering the competent authority would have to be made so that the provision prescribing the minimum sentence is not violated.

The competent authority shall have the power to record a conviction for an offence of lesser gravity than that for which the offender has been charged in the charge-sheet or if the facts and materials constitute an offence of lesser gravity.

The Law Commission was of the opinion that bargaining with the prosecutor which provides the offender with an attraction to avail of the scheme is hazardous in the Indian context, and that a just, fair, proper and acceptable scheme would be that the competent authority can impose such punishment as may seem
appropriate as regards the facts and circumstances of the case subject to a limit of one-half of the maximum term provided by the statute for the offence concerned.

The scheme also bars habitual offenders, that is, persons convicted for an offence under the same provision from invoking the scheme. There is, therefore, no merit in the apprehension that those who secure concessional treatment may indulge in the same activity again in the hope of being let off lightly once more. Persons charged with offences against women and children are also excluded from the purview of the scheme.

The scheme allows for no negotiation between the accused and the State or the prosecutor or with the court itself, which is a fundamental difference the scheme maintains from the practice, as it exists in the United States. The scheme does not mention any provision or procedure for withdrawal of pleas. These include subsequent withdrawal of the nature of stating that the plea was not taken voluntarily. The scheme however maintains a difference between the courts examining the case on merits and a totally separate institution i.e. the competent authority for the purposes of the plea bargaining proceedings. It is important to note that this separation ensures that the right to fair trial is not eroded.

Since the competent authority is an autonomous body to decide the fate of the accused over the application made by him voluntarily and knowingly which has the effect of eliminating the possibility of the prosecuting agency obtaining the plea through fraud, misrepresentation or coercion.

As regards determination of the quantum of substantive punishment, it needs to be noted that in the American system, an offender would approach the court in a situation where the prosecution is agreeable to a concessional treatment as well as the extent of the same. Thus, in the United States, the offender is assured as to the extent of the concession that is likely to be secured in the event of the court
agreeing to the bargain. In India, the offender would be facing an unknown hazard, and may prompt him to avoid availing of the scheme.

However, this is qualified to the extent that the competent authority, upon acceptance of the plea of guilty, is more or less limited in terms of the sentence that can be awarded and the accused can be assured as to a substantial level of leniency on most occasions. Such a situation creates an undue level of pressure on the accused to plead guilty so as to avail of the scheme. The trade-off for an innocent accused with a strong case against him amounts to a choice between:

- The expected difference between sentence at trial and sentence subsequent to availing of the scheme which would become an increasingly safe prediction in time; and

- The risk of continuing with the trial and maintaining his innocence.

This situation will result in the innocent pleading guilty unless the equilibrium situation is corrected by reducing the difference between sentences at trial and sentences awarded by the competent authority. The unpredictability of the trial is also a factor that should also be taken into account. The innocent will plead guilty due to the feeling of hopelessness at attempting to rebut the evidence of the police, the severity of the sentence anticipated, and the weariness of the case dragging on and the attractiveness of the existent scheme.

It should be noted that no programme of rehabilitation can be effective on a prisoner who is convinced in his own mind that he is in prison because he is the victim of a mindless, undirected, and corrupt system of justice and in this manner the very basis of a criminal justice system will be undermined. Understandably, the entire scheme owes its existence to the severe pressure on the resources of the court. However, the scheme fails to make the distinction between efficiency at the
level of inception and the same being the motivation for guilty pleas from the accused. The motivation for leniency is acknowledgement of error and a desire to reform, not the conservation of resources. The failure to take into account this basic distinction is a fallacy that needs to be addressed.

Also, accused will inevitably assume some level of leniency in an implicit manner. In a natural state that is, in the absence of plea bargaining, 50% to 75% of accused plead guilty. Increase in pendency of cases pressure may affect plea-bargaining but it would be fallacious to assume that plea-bargaining is caused solely by case load. This is however, the reason for introducing the scheme under the 142nd Report of the Law Commission. In fact, prosecutors are the main propagators of plea-bargaining. It is contended that plea-bargaining went hand-in-hand with the imposition of mandatory sentencing, which implies that prosecutors will plea-bargain when judicial discretion is bound.

Thus, it may be inferred that even the scheme proposed by the Law Commission of India may not be advantageous. At this juncture, it may be helpful to examine compounding of offences under Section 320 of the Code of Criminal Procedure, 1973. The issue is whether expanding the list of compoundable offences will be an effective solution for the problem of overcrowded courts and whether this can then serve as an alternative to the introduction of plea-bargaining. Since a crime is essentially a wrong against society, a compromise between the accused and the victim does not ideally serve to absolve the accused from criminal responsibility. However, offences, which are essentially of a private nature, are recognized as compoundable offences while some others are compoundable with the permission of the court. Compounding of offences has the effect of an acquittal and there is no admission of guilt envisaged in the process.

The extension of the list of compoundable offences seems to be inconsistent with the logic underlying the same, which is that the offence is essentially a private
one. Also, the compounding of offences has the effect of an acquittal, which certainly cannot be maintained for serious offences. The scope for consideration being involved in the transaction is prima facie against public policy especially for more serious offences and the same would operate to the detriment of the financially weaker classes. The compounding of offences does not require the admission of guilt, which is an essential requirement of commencing the rehabilitation and reformation of the accused. It is on this basis that the argument for extending compoundable offences so as to allow courts to function expeditiously is misplaced, as the scope of any such expansion will be severely restricted due to the aforementioned reasons.

a). Supporters of Plea Bargaining

"Supporters of plea bargaining view it as promoting efficiency, lessening the cost of eventual trial, avoiding lengthy appeals, and diminishing the overload on the justice system, but mostly as a process that leads to a better understanding of the offence and to fairer charges and as one that is closer to justice. The cost of abolishing plea bargaining and society's willingness to pay the increased cost must be included in any serious consideration of the abolition of plea bargaining. In larger cities, eliminating plea bargaining would require more judges and even larger courthouses. Is society willing to pay for the additional judges, prosecutors, defence attorneys, and jury costs necessary if all cases are to go to trial or are only pleaded out for the original charge? The additional cost would be astronomical, and it must be recognized that this is a major factor in why plea bargaining exists." (Plea Bargaining: Injustice for All?, 1998)

Along with and apart from the above statement, the defence of plea bargaining has generally taken one or more of three forms. First, many have concluded that plea bargaining is indispensable to the system of criminal justice - that without it, the courts would be overwhelmed by a mass of trials they would be unable to
handle. A second defence is that plea bargaining is both legally permissible and morally acceptable, since both sides voluntarily engage in and benefit from the practice. Finally, some commentators suggest that the elimination of plea bargaining would be impossible because lawyers would continue the practice even if higher authorities tried to curb it.

b). Plea bargain — a fillip to criminal courts.

WHEN PARLIAMENT amended the Code of Criminal Procedure by Act 2 of 2006 adding a new chapter 21(A), the concept of "Plea Bargaining" became a reality and part of our criminal jurisprudence. Plea bargaining means "the process whereby accused and the prosecutor, in a criminal case, work out a mutually satisfactory disposition of the case, subject to the approval of the court." It involves the accused pleading guilty to the offence or to a lesser offence in return for a lighter sentence than otherwise imposable for that offence. 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 applied only in a restricted sense in the other two countries.

In India, plea bargaining cannot be availed of in respect of offences punishable with a sentence exceeding seven years. In other words, plea bargaining would not apply to serious offences. Three more categories of offences have also been excluded from its purview. First are those offences affecting socio-economic conditions of this country, which the Central Government would notify. On July 11, 2006 the Central Government actually issued a notification cataloguing 19 statutes as affecting the socio-economic conditions of the country and the

\( \text{K.T. Thomas (former Judge of the Supreme Court of India.)} \)
offences in those statutes now stand excluded from the plea bargaining process. The second category of exclusion comprises offences committed against women.

The third consists of offences committed against children below the age of 14. Despite such vast areas of exclusion there are many offences for which the accused will be entitled to avail themselves of the advantages of plea bargain.

The process of plea bargaining commences when the accused files an application in the court concerned supported by an affidavit stating that he knew the extent of the punishment of the offence or offences he is indicted for and that he is willing to plead guilty to the charge of the particular offence or offences. (If the accused had a previous conviction for the same offence, he is barred from making the application for plea bargaining). The court would then issue notices to the Public Prosecutor concerned, the investigating officer, and the person aggrieved (who usually is the complainant or the victim of the offence) to appear in the court on a day fixed for that purpose. The court has to be satisfied that the averments in the affidavit are genuine. The court shall then give time to the above parties to work out a "mutually satisfactory disposition of the case". Next is the turn of all those who were notified to sit together and work out a mutually satisfactory disposition. When the court is informed that such disposition has been worked out, the magistrate has to prepare a report which shall be signed by all the persons concerned. This has to be followed by a judgment imposing lighter sentences on the accused and providing compensation to the victims/aggrieved persons. The provisions mandate the court to afford ameliorative relief to the accused, including the benefit of The Probation of Offenders Act, set off the pre-trial jail period, etc. However, there will be no appeal against such a judgment. The significant feature of the new system is that it affords protection to the accused who avails himself of the benefits of this facility against any other action. It is emphasized so in the provision, which says that "no statement of facts made by
the accused in the application for plea bargaining can be used for another purpose."

One of the merits of the new system is that it helps the court to manage its load of work, and hence it would result in a reduction of the backlog of cases; another is that it relieves the magistrate of the burden to prepare a detailed judgment. This system offers advantage to the Public Prosecutors by relieving them of the burden of examining fragile and feeble witnesses like children and women of the household. Plea bargaining secures significant advantages to the accused, as he could save a great deal of time, energy, and court expenses.

However, this innovation in our criminal jurisprudence holds not just advantages, and there are demerits also. Conceptually, the plea bargaining process reduces the administration of criminal justice to a barter system, where the haggling is between legal punishment and gains to the wrongdoer. Secondly, even the innocent accused would capitulate to wrong compromises and wrong convictions in order to escape from the ordeal of a prolonged and expensive trial. Thirdly, cases in which the accused might finally secure acquittal would be converted into cases of unmerited conviction. Such accused can develop a scornful attitude to the justice dispensing system. Finally, plea bargaining can be construed as violating the principles enshrined in Article 21 of the Constitution that no person shall be deprived of his liberty except according to the procedure established by law. The main criticism in the U.S. has emanated from human rights activists on the ground that plea bargaining impairs the human rights of the accused. Nonetheless, on balance, I feel that the advantages would outweigh the demerits. In this perspective, plea bargain would greatly improve the current disturbing criminal jurisprudential system.

Plea bargaining is indispensable to the system of criminal justice - that without it, the courts would be overwhelmed by a mass of trials they would
be unable to handle: Given that trials can last weeks or even months, when plea discussions are not permitted, our already overburdened criminal justice system would become hopelessly bogged down, or even collapse; the number of full-scale trials resulting from the consequent increase in the number of not guilty pleas would result in chaos.

• It is common to hear the statement, "I personally do not approve of plea negotiation, but we have no choice because, without it, the system would break down."

• "plea bargaining eases the administrative burden of crowded court dockets" (President Johnson's Crime Commission, 1967)

• A landmark 1993 study (by the Martin Committee) commissioned by Ontario's former NDP government endorsed the notion of plea bargains, saying that they are sometimes needed to streamline a slow and backlogged court system - "It is appropriate...to recognize these cases for what they are, and permit their resolution without the expense, inconvenience and trauma of a full trial" (retired judge, Arthur Martin, who headed the study)

Plea bargaining is both legally permissible and morally acceptable, since both sides voluntarily engage in and benefit from the practice.

In the United States, plea bargaining has been recognized by 'criminal justice experts' and the Supreme Court as a valid, even necessary, exercise of discretion. New York State Supreme Court Justice Carolyn E. Demarest (1994) holds the opinion that bargains are attractive, efficient and ethical and should not be viewed as a cop-out for the inadequacies or laziness of prosecutors, defence attorneys, or judges - she points out that testifying and cross-examination can be difficult for the young, the old, the fragile, or victims of rape or sexual abuse who frequently refuse to go to trial, especially in rape cases because of shame or embarrassment. Many believe that one is better off plea bargaining and being sure
of punishment, rather than risking acquittal at trial; i.e. a plea bargained conviction is better than no conviction at all

- "Plea negotiation is not an inherently shameful practice; it ought not, on a theoretical level, be characterized as a failure of principle. If practiced properly it should, to the contrary, be recognized as the expression and merging of two complementary principles: those of efficiency and restraint." (Law Reform Commission of Canada)

- Plea bargaining "preserves the meaningfulness of the trial process for those cases in which there is a real basis for disputes" (President Johnson's Crime Commission, 1967) defenders of plea bargaining argue that a negotiated settlement is not inherently less just or less accurate than the outcome of a fully litigated trial the Martin Committee Report (one of the first set of recommendations governing plea negotiation in Canada) in 1993 stated that plea bargaining "is an essential part of the criminal justice system in Ontario, and, when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally."

The elimination of plea bargaining would be impossible because lawyers would continue the practice even if higher authorities tried to curb it without a change in the way of trying cases, the criminal justice system would be paralyzed without plea bargaining many experts argue that plea bargaining has become a necessary part of the legal system, despite its imperfections recent attempts to ban plea bargaining (especially charge bargaining) in states like Alaska, have been unsuccessful - plea bargaining, even when outlawed, is still implicitly practiced by the major actors in the judicial system

B. Opponents Of Plea Bargaining

Authors of a 1998 article Plea Bargaining: Injustice for All? pursue the questions most relevant to plea bargaining and the concept of justice. They ask
"Can plea bargaining be viewed as an injustice to all? To the ethics of the prosecutor and the defending attorney who are aware of presenting to the judge a defendant who has accepted a bargained guilty plea? To the innocent defendant who may be victimized because of scare tactics or to the guilty defendant who does not benefit from a just, congruous, and rehabilitative sentence? To the victim, who sees himself or herself treated as a party that is secondary and not central to the legal debate? And to society at large, which is exposed to the frequent recidivism of defendants who sense that justice may be short-circuited."

Plea bargaining, opponents of the process say, denies justice altogether. Convicted criminal offenders allege that they were coerced or misled into admitting guilt for their offences without being given an opportunity to defend themselves. Victims of crime complain that they are not afforded an opportunity to recount in court the details surrounding attacks by criminals; that offenders are not punished on the basis of each crime perpetrated; and that the victim has little or no opportunity to participate in the selection of the sanction that is imposed against an offender that has caused him/her harm. Police, it may be assumed, have likely lost respect for the courts as well, through the common occurrence of an offender receiving a 'slap on the wrist' for multiple offences, and then being set free again right away.

Opponents of plea bargaining, as discussed above, point out four central oppositions to the practice of plea bargaining (in no particular order): (1) the injustice done to the innocent; (2) the injustice done to the victims.

1). Injustice done to the innocent

- "Plea bargaining bears a risk, the extent of which is unknown, that innocent defendants may plead guilty" (President Johnson's Crime Commission, 1967) plea bargaining tends to extort guilty pleas from the innocent who may fear worse if they go to trial, and coerces such defendants to waive their rights to
such a trial the few innocent here and there (those the system was originally designed to protect but probably no longer does) are labeled with a criminal conviction and are sure to feel betrayed by the justice system.

2) Injustice done to the victims
There is much outrage at the thought of 'bargaining' with criminals many say that offenders are let off too lightly as a result of plea bargaining, that many bargains are unjust and in fact socially harmful we can not expect our society's laws to deter people from crime when criminals know that by copping a plea they can greatly reduce the penalty for their conduct are we in fact satisfied with less because we want to get it over quickly? both the sentence imposed and the absence of an opportunity to participate meaningfully frustrates victims plea bargaining undermines our efforts to appropriately punish the guilty and provides criminals with excessive leniency David Lynch, former lawyer in the US (1994): "I have witnessed cases in which the charge of rape was ultimately reduced to harassment; armed robbery that should have called for a five-year sentence reduced to a sentence of a few months; and countless cases calling for some jail time reduced to probationary cases. In such situations, no good is done. The guilty get off so easily." plea bargaining has led to more lenient and less consistent punishment for crime Injustice done to the public (community) is the safety of the community not routinely compromised by plea bargaining?

The Illinois Crime Survey (1929) argued that plea negotiation "gives notice to the criminal population of Chicago that the criminal law and the instrumentalities for its enforcement do not really mean business. This, it would seem, is a pretty direct encouragement to crime" plea negotiation tends generally to undermine public confidence (already low) in the appropriateness of sentences the criminal justice system's effectiveness in the eyes of the public, continues to be diminished by plea bargaining.
3. Searching For Some Middle Ground

If plea bargaining is to be used, it should be used to further justice, to seek a disposition that reflects the alleged crime and provides a proportionate charge, plea negotiations should not be used to reduce case backlog. Some even argue that the notion that a large quantity of cases necessitates speedy handling and secretive negotiations is mistaken. Students of the criminal justice system have shown that non-trial methods of disposing of cases have been quite effective in years past. It follows that plea negotiation is not the only means by which such strain can be eased. Other measures which have been suggested such as an increase in the practice of diversion, in the general efficiency of prosecutorial and court procedures, or in the funding of our criminal justice system, might be sufficient to deal with the 'numbers problem'. In reference to trials, David Lynch, a former US attorney suggests: "in some jurisdictions it is not only administratively feasible to run a court system with vastly more trials than now take place, but it is possible to do so without generating enormous resentment from the leading actors in the criminal justice bureaucracy".

Perhaps the focus of the debate, rather than whether plea bargaining is 'good' or 'bad' should be how we can better use it and not abuse it. There is no doubt that plea bargaining is a system that may work and produce justice in some cases, but overuse of the practice and the abuse of it have created great concern among the public and criminal justice officials alike. In addressing these issues of overuse and abuse, the Canadian Sentencing Commission (1988):

(1) contend that the practice of at least some types of bargaining could be eliminated by legislation;

(2) suggest that sections of the Criminal Code concerning the corruption and disobedience of public officials and the obstruction of justice could be used to restrain plea bargaining;
(3) take the position that improvement of the process (by making it more visible and making the participants more accountable) is a more realistic goal than the removal of plea bargaining altogether.

One of the key issues when discussing what should be done about the practice of plea bargaining revolves around the victim's role, or lack thereof. In cases in which it is felt that plea bargaining should be used, the optional involvement of the victim or the victim's relatives in the discussion of that plea bargaining should definitely be considered. It seems rather absurd to not provide such an option, when the victim or victims are those most affected by, and are those with the most interest in the sentence (other than the offender himself/herself). Participation by not only the victim(s) but also by the defendant in plea negotiations is clearly an issue that needs to receive a great deal of attention. As a US Department of Justice Report in 1979 pointed out:

If the victim is interested in retribution, he/she may be frustrated by the imposition of a low sentence without explanation of the reasons for leniency or the opportunity to participate meaningfully in the process of reaching a disposition. If the victim is not interested in retribution, there is little other satisfaction to be gained. Victims seldom get an apology, seldom are reconciled with the offender, and seldom receive restitution."

Humanizing the plea bargaining experience would without question provide great psychological benefits for both the victim(s) and the defendant - just by knowing that they were able to share their side of the story, and contribute at least some input to the discussion of sentencing. There are those, on the other hand, who fear that victims will be disruptive and troublesome to the process because of high emotions on their part. However, in cases in the United States that have allowed victim participation, this irrational notion has proved to be inaccurate. The solution is then perhaps not to discard the plea bargaining system altogether but to
be more aware of the perspectives of both the victim(s) and the defendant, to be more aware of the potential abuses by the participants, and to cut down on its overuse.

4.Conclusion
Plea bargaining has been introduced as a prescription to the problem of overcrowded jails, overburdened courts and abnormal delays. It cannot be denied that the practice may result in faster disposal of cases; because delayed trials are problematic in many aspects, the proposal may seem appealing. However, this introduction is unlikely to succeed, for the practice had existed in the United States long before it received any legislative backing and was thus, merely given recognition. Therefore, the success of plea-bargaining in the United States cannot be looked at in isolation of its origin, a supporting American culture and radically different roles for entities like the prosecutor, etc. Additionally, the nature and extent of plea-bargaining in England indicates that plea-bargaining cannot simply be transplanted from the United States. There is thus, no reason to believe that the practice will achieve the same scale and magnitude of success in India that it has in the United States. Further, the scheme incorporated by the Criminal Law (Amendment) Act, 2005, is grossly inadequate because many factors crucial to the functioning of such a system in India have not been taken into consideration.

The reasons that are cited for the introduction of plea-bargaining include the tremendous overcrowding of jails, high rates of acquittal, torture undergone by prisoners awaiting trial, etc. can all be traced back to one major factor, and that is delay in the trial process. Since one reason for overburdened dockets in the United States was the nature of jury trials, the experience of some jurisdictions suggested that shortening the trial period could solve the problem.

In India, the reason behind delay in trials can be traced to the operation of the investigative agencies as well as the judiciary. Expanding the list of
compoundable offences is not a wise option and what is actually needed is not a substitute for trial but an overhaul of the system, in terms of structure, composition as well as work culture to ensure reasonably swift trials. If then the trial procedure itself proves to be too long drawn out and unmanageable, then one may think of launching an alternative to trial. Therefore reformation of the existing system may be a more prudent approach rather than introducing a parallel arrangement (as recommended by the Law Commission) or supplementing the present arrangement (as suggested by the Act).

Nevertheless, if a system akin to plea-bargaining has to be implemented in India, then the deciding authority must be independent from the trial court and instead of the Public Prosecutor retaining most of the power, the deciding authority must be given a greater role in the process. If the deciding authority is the sole arbiter, the risk of coercion into pleading guilty and of underhand dealings can be eliminated substantially. Therefore not only will the victims needs be addressed but also the susceptibility of the system of being misused by the Public Prosecutor, the police and even the affluent will be considerably reduced. In this respect, the scheme proposed by the 142nd Report of the Law Commission of India is prudent, as it does not seek to carelessly replicate the American model of plea-bargaining. It cannot be denied that the scheme ignores the fact that many lack the resources for proper legal representation and is more a formalization of the unwritten rule of showing leniency to those who plead guilty rather than plea-bargaining. Nonetheless, given that reformation of the present system is unlikely to occur in the near future, the proposal outlined by the 142nd Report of the Law Commission of India should not have been overlooked and may have proved to be a far more practicable solution to the problem.