CHAPTER VII

CONCLUSIONS AND SUGGESTIONS

The concept of plea bargaining, as has been seen in the earlier chapters, has not only evolved in the foreign countries of the world but has reduced the pendency of criminal cases to a great extent. Specially, the US has been a great beneficiary of the theory. However, in India, it is still not totally accepted inspite of its commencement for the last seven years. The courts are even reluctant to follow this procedure and the accused do not even understand the profits and gains of its acceptability.

The crime loses its gravity with the increase in the gap between the incidence of crime and the punishment of the offender. Plea Bargaining has, thus, been introduced in the realm of the criminal jurisprudence of India owing to the result of the prolonged trials and the unseen cases that pile up over the years. Plea bargaining as a recognized and practiced concept has come a long way from its inception. Plea Bargaining in India has moved from being pronounced illegal, unconstitutional and immoral to a great messiah for the criminal justice system and a welcome and inevitable change. Plea Bargaining is indeed a welcome change, but only as long as one considers the chief aim of the criminal justices system to be swift and inexpensive resolution of cases. However, if one were to agree that the chief aim of criminal justice system is to rehabilitate criminals into society, by making them undergo specified sentences in prison, then plea bargaining looses most of its charm.
Additionally, the justifications for plea bargaining do not consist solely of the need for an efficient administration of justice. Problems associated with plea bargaining may exist as a result of flaws in the assumptions of the different justifications. Instead of calling for a complete abolition of plea bargaining, critics should accept plea bargaining as a natural, although not necessarily inevitable, component of our adversary system.

Plea bargaining is undoubtedly, a disputed concept. Few people have welcomed it while others have abandoned it. The Researcher has studied the concept of Plea Bargaining in India and its comparative study. The comparison has been made with America, Australia and other commonwealth countries. The different approaches of the States have been analyzed. Their justifications for formalization of plea Bargaining have been studied. The main object of the study is to analyze whether the Indian Criminal Jurisprudence is adaptable to the concept of Plea Bargaining as the other Countries are. While analyzing this, observations have been made regarding the plea being voluntary and role of the Court and the prosecution. The vital contribution of plea Bargaining in the sense of considering the status of the victim and compensating him has also been studied. All this has been done by way of Empirical Research. Immediately, followed by the introduction of Plea Bargaining its conceptual framework, its meaning, types, procedure, evolution, characteristics and critical analysis, all are included in Chapter I titled “Introduction”.
Chapter-II titled 'Plea Bargaining in India' has been divided into four major parts. Firstly, the Researcher has studied the recommendations made by 142nd Law Commission of India. The Commission focused on the magnitude of the problem of delay in criminal cases. The Commission found that at that time the Supreme Court was dealing with Criminal Appeals relating to the year 1979. This enormous delay was the matter of cognizance taken by the Commission. Infact, the Apex Court in Hussainara Khatoon V. State of Bihar\(^1\) dealt with this matter and noticed that an alarmingly large number of men and women-children including—are behind prison bars or years awaiting trails in courts of law. It was observed by the Supreme Court that-

"The offences with which some of them are charged are trivial, which, even proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimen of humanity are in jail deprived of their freedom for periods ranging from three to ten years without even as much as their trial having commenced".

The Commission took notice of it and recommended introduction of Plea Bargaining. The Commission also conducted a survey in various States and reinforced the view that an improved version of the practice suitable to law and legal ethos of India needs to be considered with

\(^1\) AIR 1979 SC 1360
seriousness and with a sense of urgency. The Commission dealt with the objections that were raised when the survey was conducted\(^2\). The Commission has concluded that the legal aid apparatus, schemes, active role of a judicial officer, fairness by prosecution etc. would be the answers to the objections raised.

Another major segment of the chapter is the law incorporated in Chapter XI-A of Cr.P.C. This chapter dealing with Section 265-A to 265-L has taken care of the applicability, procedure, examination of accused mutually satisfactory disposition report prepared by the Court and the judgment pronounced on the basis of the report. The application of plea bargaining is confined to certain cases.\(^3\) It has been made clear that plea bargaining shall apply in respect of an accused against whom a charge sheet has been filed under Section 173 accusing him of an offence punishable with imprisonment upto seven years. The same conditions apply in a complaint after examining the complainant and witnesses under Section 200 and issuing process under Section 204.

Plea bargaining shall not apply in connection with offences affecting the socio-economic condition of the country or where such an offence has been committed against a woman or a child below the age of 14 years. But there is no bar on a woman taking the benefit of plea bargaining.

\(^2\) Para 7 point 2 to 7.17 of the Report.

\(^3\) Under Section 265 A (1) of Cr.P.C.
Offences affecting socio-economic condition of the country can be notified by the Central Government. A notification of the Ministry of Home Affairs dated 11th July 2006 exists which has been issued under sub-Section (2) of Section 265A of the Code. Under the said notification, offences, affecting the socio-economic conditions of the country have been notified, which are outside the purview of plea bargaining. These notified offences are:

ix). Offences with respect to animals that find place in Schedule I and Part II of the Scheduled II as well as offences related to altering of boundaries of protected areas under wildlife (Protection), Act 1972.

4 Under Section 265 A (2) of Cr.P.C.


xvii). The Explosives Act, 1884-XVIII. Offences specified in Section 11 to 18 of the Cable Television Networks (Regulation Act, 1952).

The process of plea bargaining starts with an application from accused. The application is to be filed before the trial court only. The application must be in writing, with brief description of facts of the case supported with an affidavit sworn by the accused affirming the genuineness of application as voluntarily submitted. Section 265 A (2) of the Code gives power to notify the offences to the Central Government. The Central Government issued Notification No SO 1042 (II) dated 11-7-2006 enumerating the offences with details of previous conviction of the accused. Upon receipt of application, the trial court has to issue notice to prosecution, or public prosecutor and to complainant in S. 190 (a) cases and also to the accused intimating the date of hearing of application.

5 Section 265 B of Cr.P.C.
While appearing before the Court, after receipt of notice from the Court, the examination of the accused shall be done in-camera, avoiding the presence of other parties. It is specifically required so as to ensure the genuineness and authority of application. Before proceeding further the Court has to ensure that the application is made voluntarily by the accused. If the Court feels, after examination of the accused, the application is involuntarily submitted or the accused is not eligible for plea bargaining on the ground of earlier conviction in a case charged with same offence, the Court has to drop the proceedings and proceed further with the trial from the stage, wherein the application is entertained by the Court.

After examination of the accused, if the Court feels the eligibility of the accused for plea bargaining, then proceed further for a settlement, giving time to prosecution and accused to work out a mutually satisfactory disposition of the case. Such a mutually satisfactory disposition includes awarding of compensation and other charges and legal expenses to the victim. There must be a notice to Public Prosecutor,⁶ Investigation Officer of the case, victim or defacto complainant and to the accused, in cases instituted upon police report, to work out the solution in a joint meeting of the parties. In cases instituted otherwise than a police report, there shall be notice to the accused and the complainant/victim to participate in the joint meeting. The accused can participate with his lawyer in the meeting. That means the actual presence of the accused is required

⁶ Defined under S 2(u) as explained in S. 25 of the Code
irrespective of a representation through the lawyer. Apart from that the Court shall ensure that every action of the parties during the meeting is voluntarily made and without any vitiating or coercive element. That means the presence of the Judicial Officer is necessary, during the process of joint meeting. The Court has to prepare a report, if a mutual satisfactory disposition of the case has been worked out and such report shall be signed by the presiding officer of the Court and the parties in the Joint Meeting. If no satisfactory disposition is made out, the Court has to proceed with the case, by dropping the proceedings in plea bargain and start the proceedings from the stage, wherein the application was entertained.

After completion of proceedings by preparing a report signed by the presiding officer of the Court and parties in the meeting, the Court has to hear the parties on the quantum of the punishment or accused’s entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused by passing the sentence.

While punishing the accused, the Court, at its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence. Apart from this, in

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7 Under Section 265 D of Cr.P.C.
cases of release or punishment, if a report is prepared under S 265 D, report on mutually satisfactory disposition, contains provision of granting the compensation to the victim the Court also has to pass directions to pay such compensation to the victim. The Court has to pronounce the Judgment, in terms of its findings under S. 265 D, either releasing the accused or punishing the accused. The Judgment passed is final and no appeal will lie against such Judgment under Chapter XXIX of the Code. However such Judgments are subject to challenge under Articles 226 and 227 of the Constitution before the High Court by filing Writ Petition and Article 136 of the Constitution before the Supreme Court by filing Special Leave Petition. A court, while proceeding with an application of plea bargaining has all the powers invested with a Court, under the provisions of the Criminal Procedure Code in respect of granting and rejecting bail, trial of offences and other general matters relating to disposal of case, particularly under provisions in Chapter XXIV of the Code.

In view of the aforesaid legal scenario Cr.P.C. has been assessed. The Researcher has concluded that the merits of this procedure are more than the merits of procedures in other systems of trial. The said scheme is available only in limited cases and not in all kinds of criminal cases as I have already discussed that the judges aren't ostracized from the scene, they exercise complete supervision over the procedure and have the discretion to reject the plea or take other substantial measures. Plea bargaining shall not benefit the habitual offenders, or established criminals, it is
meant to benefit only the freshers. The accused should have a voluntary motive to plead guilty. If the intention isn’t voluntary then the plea is liable to be dismissed ab initio. This procedure gives a chance to the victim to negotiate for a settlement. The status of the victim is to be considered by the prosecutor. In usual trial only the state prosecutor has the right to plead on behalf of the victim. This relieves the victim with a considerate amount of compensation.

Chapter-III titled 'Indian Judiciary and Plea Bargaining' has been the most interesting and practical part of the thesis as the Researcher has dealt with the outlook of the Courts on plea bargaining before and after 2005 i.e. when the Criminal Law Amendment Act 2005 came into the picture. Undoubtedly, in foreign countries especially America the legality, constitutionality and utility of plea bargaining has been upheld in the year 1970 in the then famous Brady Trilogy. But in India the concept has struggled a lot to gain constitutionality. Before 2005, the Courts have been declaring it as unreasonable, unfair and unjust. The court in Madanlal Ram Chandra Daga Vs. State of Maharashtra, wherein the Court held that the 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 a bargain by which money is recovered for the complainant through their agency.

9 1968 Cr.L.J. 553
In *Thippaswamy V. State of Karnataka*, Court observed that it would be violative of Art. 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly and then in appeal or revision, to enhance the sentence. In such cases, the Court of appeal or revision should set aside the conviction and sentence of the accused and remanded the case of the trial Court so that he accused can, if he go wishes, defend himself against he charge and if he is found guilty, proper sentence can be passed against him.

In *Murlidhar Meghraj Loya V. State of Maharashtra* the question of Plea Bargaining was considered and disapproved by observing that many economic offenders resort to practices the Americans call ‘plea bargaining, plea negotiation, trading out’ and compromise in criminal cases’ and the trial magistrate drowned by a docket burden nods assent to the *sub rasa ante-room* 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’. 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 excursion 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

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10 1983 U SCC 194.
11 1976 (3) SCC 684.
hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in India, 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 odor of purchased pleas of guilty and partly justify it philosophically as a sentence concession to a defendant who has by his plea 'aided in ensuring the prompt and certain application of correctional measures to him.

In Kasambhai Abdulrehmanbhai Sheikh etc. v. State of Gujarat,\textsuperscript{12} it was observed that conviction based on the plea of guilty entered by the appellant as a result of plea bargaining cannot be sustained. It was observed in this case that the accused was convicted under S 16(1)(a) (i) read with section 7 of the Prevention of Food Adulteration Act, 1954 by the Magistrate on the basis of plea bargaining which took place between prosecution, the defence and the Magistrate and accused was let-off with a nominal sentence of imprisonment till rising of the Court and a small fine. The High Court on its attention being drawn towards the order passed by the learned Magistrate initiated suo moto proceeding in the revision by issuing notice to the accused to show cause why the sentence imposed on him should not

\textsuperscript{12} 1980 PLR 549.
be enhanced. The High Court enhanced the sentence and sentenced the accused to imprisonment for a term of three months and a fine of Rs.500/-. That order was then challenged. The Court held that the conviction of the accused was based solely on the plea of guilty entered by the appellant as a result of plea bargaining between the prosecution, the defence and the Magistrate. It is contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty of an allurement being held out to him that if enters a plea of guilty he will be let off every lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of the new activist dimension of Article 21 of the Constitution unfolded in Meneka Gandhi’s case. It would have the effect of polluting the pure fount of justice, because it might induce an innocent accused to plead guilty to suffer a light and 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 the Judge also might be likely to be deflect 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 a guilty accused with a light sentence, this, subverting the process of law and frustrating the social objective and purpose of the anti-adulteration statute. This practice would also tend to encourage corruption and collusion and as a direct consequence,
contribute to the lowering of the standard of justice. There is no doubt that the conviction of an accused based on a plea of guilty entered by him as a result of plea bargaining with the prosecution and the Magistrate must be held to be unconstitutional and illegal.

In *State of U.P. v. Chandrika*\(^{13}\) the court discussed the constitutionality of Plea Bargaining in light of Article 21 of the Constitution of India and observed that the concept of plea bargaining is not recognized and is against public policy under our criminal justice system. Section 320 Cr.P.C. provides for compounding of certain offences with the permission of the Court and certain others even without permission of the Court. Except the above, the concept of negotiated settlement in criminal cases is not permissible. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. Neither the State nor the public prosecutor nor even the Judge can bargain that evidence would not be led or appreciated in consideration of getting flee bite sentence by pleading guilty.

However, after the Amendment Act of 2005 the Apex Court had occasion reconsider to its observations in the aforesaid cases it was held. *In Jeetu @ Jitendera Vs. State of Chhatisgarh*\(^{14}\) that the approach of the court in appeal or revisions should be to find out whether the accused is guilty or not on the basis of the evidence on record. If he is guilty, an appropriate sentence is required to be imposed or maintained. If the appellant or his counsel submits that he

\(^{13}\) 2000 Cr.L.J. 384.

\(^{14}\) 2013 (1) RCR (Criminal) 524.
is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime, then also the court's conscience must be satisfied before passing the final order that the said concession is based on the evidence on record. In such cases, sentence commensurating with the crime committed by the accused is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced.

It seems that the Court is still reluctant to follow Plea Bargain inspite of the fact that the concept has gained statutory recognition. Unlike then court the High Courts who have been stating the plea-bargaining as illegal, before 2005, have opened this beneficial legislation for the accused and the victims. The Bombay High Court in Guerrero Lugo Elvia Grissel vs The State Of Maharashtra¹⁵; Gujrat High Court in State vs Nitin;¹⁶ Madras High Court in V.Subramanian vs The State¹⁷, Uttarakhand High Court in Vijay Moses Das And Anr vs C.B.I¹⁸ Delhi High Court in Ranbir Singh v. State (Delhi)¹⁹ and Punjab and Haryana High Court in Manjinder Singh and others Vs. State of Punjab²⁰ has accepted this concept.

Chapter IV of the thesis deals with the comparative study of Plea Bargaining. In U.S. and Canada Plea

¹⁵ On 4 January, 2012 by the Bench of A.M. Khanwilkar, Rajesh G. Ketkar in Criminal writ petition No. 2109 of 2011
¹⁶ Cr. Appeal No. 989 of 2009.
¹⁷ Decided on 28 October, 2009 in Crl.R.C.No.109 of 2006
²⁰ Crl. Miscellaneous no.M-15710 of 2010 (O &M)
Bargaining includes Resolution discussion and embraces several practices. It includes charge discussions, procedural discussions, sentence discussions, agreements as to the facts of the offence and the narrowing of issues in order to expedite the trial. Although they may sometimes involve a judge, these private discussions occur primarily between the prosecutor and the accused and his lawyer.

The accused may plead guilty during trial or without trial. The Researcher has studied the doctrine of Nolo Contendere as prevailing in U.S. In U.S., in some jurisdictions the plea of “Nolo Contendere” or ‘no contest’ is not an ‘admission of guilt’, but rather a ‘willingness to accept, declaration of guilt’, rather than to go trial. It is treated as a guilty plea to serve one purpose not served by a guilty plea in a subsequent civil suit possibly arising out of same event. Guilty plea is admissible as evidence against the defendant but plea of Nolo Contendere is not. It may be stated that the expression, “defendant” is used in India in the civil dispute against whom civil action is taken whereas in U.S. this expression is used in criminal trial also and thus the defendant is an accused.

A judgment of conviction entered on a plea of Nolo Contendere may be used by the accused as the basis of plea of double jeopardy since conviction and punishment, after the nolo plea operate for the protection of the accused against subsequent proceedings, is as full as a formal conviction or acquittal after a plea of guilty or not guilty.

This doctrine is also expressed as an implied confession, a quasi confession of a guilt, a plea of guilty,
substantially though not technically a conditional plea of guilty, a substitute for plea of guilty, a formal declaration that the accused will not contend, a query directed to the Court to decide on plea guilt, a promise between the government and the accused, and a government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of particular case.

The accused cannot, by qualifying the plea of Nolo Contendere curtail the Courts discretionary power. The plea of Nolo Contendere is not recognized in any circumstances in some jurisdiction in U.S. The main ground assigned for refusing to recognize this plea is either that there is no provision for the plea in the criminal law statutes of the State or, by implication it is not available to the accused, or that the plea has been outlawed by express statutory provisions. True is the fact that in some jurisdictions, in some of the States, either expressly or by implication, such plea is recognized as a part of their legal system.

In U.S. in celebrated case in **Hudson Vs. United States**\(^\text{21}\), it has been held that in the absence of statute to the contrary, the Court cannot accept a plea of Nolo Contendere for capital offence. In some Courts, this plea is not accepted where imprisonment is mandatory on conviction of the offence charged. Such plea has been accepted in prosecutions of crimes against the persons, against the property, against the public peace, public

\(^{21}\) 363 U.S. 807.
decency or good morals, public justice and in prosecutions for other offences and statutory violations.

It is well known that arraignment is the event occurring at the general trial Court level that formally initiates the trial process. As such, it is the first official occasion at which the accused is given an opportunity to answer the accusation. Hence, at this stage, accused is required to enter a plea. Arraignment is held in open court and generally begins with a formal reading of the indictment or charge by which the accused is again formally advised on the charges against him. In U.S., at this stage, he is again advised of his constitutional guaranteed rights by counsel and protection against self-incrimination. Accused is, therefore, required to answer the charge by entering a plea at this juncture. No doubt, the plea may take one of the several forms.

Although Nolo contendere is in practice in U.S. But there is a fine distinction between a plea of Nolo Contendere and plea of guilty. A plea of guilty has a confession that binds in other proceedings, but the plea of "Nolo Contendere" has no effect except in a particular case, in which it has been raised. Such a plea cannot be utilized against the accused in a civil suit for the same act, and it cannot be used as an admission of a guilt even in any other criminal case. The accused is entitled to raise a plea of double jeopardy, in a case, when conviction is founded upon "Nolo Contendere", since both conviction, after the Nolo plea operate for the protection of the accused against subsequent
proceedings, is as full as a formal conviction or acquittal or not guilty.

It is, of course, within the discretion of the Court concerned to permit the plea to be withdrawn and replaced by another form of plea or to refuse to permit its withdrawal. Having been accepted by the Court, it is only the discretion of the Court to consider the request for the withdrawal upon the insistence of the accused. A rejection of the withdrawal, if not abused or judicial discretion, obviously, would not violate the constitutional rights of an accused. It would, also be noticed that a Court, that has accepted the plea of “Nolo Contendere” might also set it aside without any request from the accused, if the Court is convinced about the innocence of the accused. In Federal Courts in United States, the extent of Courts in United States, the extent if Courts power in regard to the withdrawal of such a plea is circumscribed by a statutory provision—generally the plea, may be permitted to be withdrawn only before sentence in imposed or imposition of sentence is suspended, but that the Court may permit withdrawal of such a plea even after such a plea is based on suspicion in order to correct latent, patent or manifest-injustice ensued to the accused.

In U.S. the prosecution keep the following fundamental consideration in mind—strength of the case, the likelihood of an appellable issue, relative trial skills of the defense counsel and the prosecutor, Budgetary and resource constraints and the ability of the defendant to assist in the indictment of the higher-level offenders.
The Fundamental observations in Canada on the concept of Plea Bargaining have also been discussed. The Plea Bargain is practiced in three major forms—Charge Bargain, Sentence Bargain and Fact Bargain.

The American Bar Association recognized that it is proper for the court grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served.

The Standards then recite six “considerations’ as guides for balancing the accused’s rights against the advantages of judicial efficiency:

1. The defendant has by his plea aided in ensuring the prompt and certain application of correctional measures to him. In view of the slowness with which the criminal justice system now processes defendants pleading not guilty, this rationale is perhaps the most compelling one in support of plea bargaining. If swiftness and certainty of punishment enjoy priority as goals of the system, lengthy sentences many become less necessary. The confessed criminal is separated from society more quickly. He is however, segregated from society for a short period of time. The inducement of a quick trial, moreover, can prove extremely effective in obtaining guilty pleas from jailed men unable to make bail. The individual already in jail is commonly interested as pleading guilty by him may mean immediate release.
2. Defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct. If the first reason listed is the most persuasive defense of plea bargaining, this second one is perhaps the most native. The number of defendants who plead guilty from a true feeling of repentance is impossible to determine, but is undoubtedly miniscule compared to those who plead guilty to obtain benefits more material than a cleansed soul. Rather than expressing remorse, the defendant is merely showing his ability to manipulate the system to his own advantage.

3. Concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent, or other purposes of correctional treatment. Substantial truth supports this contention. Concessions made in return for a guilty plea may maximize the possibilities for individualized justice. A jury faced with the extreme alternatives of guilty and not guilty lacks the opportunity or ability to form an intermediate judgment. Indeed, statutory law may force it to impose a mandatory minimum sentence. Pretrial negotiations, however, permit the prosecutor, defendant, and judge to circumvent statutory encumbrances in arriving at an appropriate punishment. Nevertheless, to require a guilty plea as a prerequisite to individualized justice reflects poorly upon the existing system.

4. Defendant has made public trial unnecessary when there are good reasons for not having the case dealt
with in public trial. This consideration may be relevant in cases of rape, for instance where testimony by the victim might be painful and embarrassing, or in cases where an open trial might reveal national security secrets.

5. Defendant may have given cooperation which may have resulted in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct. In most prosecutors office, standard procedure apparently includes giving a “break” to the cooperative defendant whose testimony is needed to convict other.

6. Defendant has aided in avoiding delay in disposition of other cases. This is perhaps the most commonly asserted justification for plea bargaining. Faced with a growing backlog of cases, prosecutors and judges feel the system simply cannot operate unless the great mass of defendants are induced to plead guilty. The contention’s accuracy invites speculation. Even if correct, it still invokes the name of efficient criminal administration to rationalize the tremendous disparity between sentence given who plead guilty and those given defendants who force the prosecution to prove its case. The accused contesting a case incurs no penalty, but that the practice merely rewards defendants who cooperate in conserving the system’s resources. The fact remains, however, that some defendants receive harsher sentences than others merely because the former exercise their constitutional rights.
While the A.B.A. has bestowed a gloss of legitimacy on these six justifications for plea bargaining, still other defenses of the practice enjoy currency. Some commentators have suggested that a guilty defendant who contests the charges against him should incur the penalty for perjury. Others have asserted that the system benefits because the defendant acquires a feeling of participating in the decision rather than having it imposed upon him. In any event maintenance of a high proportion of guilty pleas clearly depends upon offering defendants an inducement to plead guilty.

The effects of plea-bargaining on criminal justice system are far reaching. Some of them are -majority of defendants are convicted without a full adversary proceeding; plea bargaining may become a tool of coercion and a method of covering up bad cases; the practice promoted the image of the lawyer as a broker rather than a legal expert; negotiated plea may provide an efficient settlement; the use of the bargain by prosecutors to obtain convictions in weak cases and inequities in the practice.

In Victoria, plea-bargaining has been strongly recommended by Australian Justice Advisory Committee, 1994; Chan & Barnes, 1995; Corns, 1997; Karpin, 1990; SCAG, 1999, 2000; Shorter Trials Committee, 1985; Victorian Attorney General’s Department, 2004 and Victorian Sentencing Advisory Council, 2007. Victorian plea bargaining practices involve a Crown prosecutor or solicitor from the Office of Public Prosecutions (OPP) engaging in an informal discussion with defence
counsel on the defendant’s likely plea, the possibility of negotiating the charge(s) and/or case facts, and the Crown’s possible sentencing submission. Plea bargaining can involve face-to-face meetings, phone calls, emails or facsimiles, and can occur at any time prior to the trial’s conclusion. The primary aim of plea bargaining is to arrive at a mutually acceptable agreement between the Crown and defence counsel, according to which the defendant pleads guilty. At the very minimum, discussions aim to identify any issues not in dispute, thus reducing the length of subsequent criminal proceedings and limiting the likelihood of later delays—for example, through trial adjournments. Depending on the jurisdiction, this practice is also labelled ‘charge bargaining’, ‘plea negotiations’, ‘pre-trial discussions’ and ‘plea agreements’.

In Victoria, there are no official statistics kept detailing when or why plea bargaining occurs, or how often discussions result in guilty pleas. Importantly, plea bargaining is not recognised in or controlled in any Victorian statute. Thus not only is the process itself not monitored in any statistical or formal sense, but there is also no legal acknowledgement of plea bargaining in Victoria. Instead, it falls under the Crown’s discretionary powers, which means state we solely rely upon trusting those who engage in discussions to ensure the process, and resulting agreements, uphold the same basic principles and rules of procedure that apply to more transparent proceedings, like the trial. This is particularly concerning.

22 Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995; Samuels, 2002
given that agreements can alter the seriousness of the conviction and sentence imposed on defendants, and can remove the opportunity for the victim to provide testimony or for the Crown to prove its case within the confines of the contested trial. As it currently operates, plea bargaining undermines the established principle of public and open justice, whereby justice is seen to be done and the public have access to criminal proceedings except in rare cases under exceptional circumstances. In addition, because of this non-transparent way of providing justice, questions can emerge over the Crown’s motivations for plea bargaining, particularly given the potential for efficiency gains to be prioritised over victim, defendant and public interests. What is quite significant about this aberration from the principle of open and public justice is the lack of criminological and legal research examining plea bargaining’s non-transparency, its potential impact on the relevant parties to proceedings, and on the administration of justice. In particular, there is a prominent gap in criminology scholarship on the potential justifications for whether plea bargaining should, or how it could, be formalised.

The absence of a Victorian-based analysis of plea bargaining’s informality and of the lack of accountability surrounding the process was acutely evident following the Victorian case, R v GAS; R v SJK, or more specifically the appeal made to the Australian High Court. The Australian High Court’s ruling in this appeal was the first to provide

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23 Ashworth, 1994
24 (2002) VSC 94
any official recognition of plea bargaining. The case itself involved two offenders who sexually and physically assaulted a victim, which ultimately resulted in her death \((R \text{ v } \text{GAS}; R \text{ v } SJK)\)\(^{26}\). Due to forensic difficulties in identifying who was the primary offender, the Crown entered into discussions with both defendants. An agreement was subsequently made whereby both the offender pleaded guilty to manslaughter by an unlawful and dangerous act, on the provision that the Crown’s sentencing submission would state that they should be sentenced as aiders and abettors, meaning they should receive a lesser sentence than if they were charged as a principal offender.

Originally, the defendants were sentenced to six years imprisonment with a non-parole period of four years. The Crown then appealed on the basis that the sentences were manifestly inadequate, and that the judge had failed to consider all relevant issues, including the seriousness of the offence and general and specific deterrence \((R \text{ v } \text{GAS}; R \text{ v } \text{SJK})\)\(^{27}\). In hearing the appeal, the Victorian Court of Criminal Appeal increased both sentences to nine years imprisonment, with a non-parole period of six years. Two years later, the contents of the plea bargain and the Director of Public Prosecutions’s (DPP) decision to lodge the initial appeal were the focus of a defence appeal to the Australian High Court. In this case, the lack of control surrounding prosecutorial decision-making in plea bargaining resulted in negative consequences for all parties,

\(^{26}\) [2002] VSC 94
\(^{27}\) [2002] VSCA 131 at 36
particularly the victim’s family and the defendants. Initially, both the plea bargain and prosecutorial conduct were criticised because the victim’s family were not provided with accurate details of the agreement or told that there was any possibility that plea bargaining might occur, until just before the defendants pled guilty\(^\text{28}\). The victim’s family also claimed that the Crown informed them that the defendants would plead guilty to manslaughter because it was too difficult to establish the primary offender beyond all reasonable doubt; however, the family claimed they were further informed that, when pleading, the defendants would state that they murdered the victim. This did not occur. The defendants perceived themselves as victims of the unscrutinised process, because the Crown reneged on the initial agreement to which they entered their guilty pleas. The defendants agreed to plead guilty to manslaughter by an unlawful and dangerous act on the basis that they would be sentenced as aiders and abettors. The defence counsel argued that the DPP’s conduct in seeking a higher penalty by appealing the original sentences broke the agreement because the basis upon which the defendants had pleaded guilty was no longer upheld. Therefore, the increased sentences were perceived to be unjust and non-reflective of the original agreement. The lack of transparency surrounding the agreement and the Crown’s discretion in making and changing plea bargain agreements thus became

\(^{28}\) Hunt & Gardiner, 2002, p. 1
the focus of the defence appeal, which meant for the first time in Victoria’s history a court was required to address plea bargaining issues (R v GAS; R v SJK)\(^29\). Upon hearing the appeal, the Australian High Court predominantly focused on the required roles of the parties within proceedings, including that it is the Crown’s responsibility to determine which charges to proceed with (R v GAS; R v SJK) it is the defendant’s responsibility to decide whether to plead guilty and this decision cannot be made with any foreknowledge of the sentence, other than the advice provided by their representative on what might transpire and it is the judge’s role to determine an appropriate sentence, based on the facts presented to the court. In directly discussing the plea bargain, the court stated that while there may be an understanding between counsel as to what evidence will be provided or what sentencing or legal submissions will be made, this understanding does not bind the judge in determining the sentence, other than in the practical sense that the judge may be limited to the agreed summary of facts presented. The court then noted that any agreement made between counsel ‘which may later be said to be relevant to the defendant’s decision to plead guilty’ should be recorded in writing, and copies maintained by both parties. The court suggested that recording what was agreed, in an agreed form of words, should reduce the scope for misunderstanding what was to be, or had been, agreed.

It should serve to focus the minds of counsel, and the parties. Most importantly, it enables counsel for both sides to be clear about the instructions to be obtained from their respective clients and the matters about which, and basis on which, counsel should tender advice to their respective clients. There should then be far less room for subsequent debate about the basis on which an accused person chose to enter a plea of guilty. In making this statement, the court provided some recognition of plea bargaining and the potentially negative consequences of its lack of formality. The court also alluded to the need to provide transparency to plea bargaining by suggesting that written records of agreements be maintained. However, the court did not put forward any significant regulation or scrutiny of discussions, despite being given the opportunity to do so. The fact that the comments of the Australian High Court made in 2004 compromised the first, and to date remain the only, instance of a Victorian authority to acknowledge plea bargaining or attempt to provide transparency to the process, demonstrates a significant gap in legal policy which explicitly contradicts the principle of public and open justice. This gap is also concerning given the potential consequences and negative implications that can result from an unscrutinised agreement, as demonstrated by the 2002 case30.

30 R v GAS; R v SJK [2002] VSC 94
There are two Australian projects which motivated the analysis of Plea Bargaining in Victoria. The first conducted by Mack and Roach Anleu (1995) examined Australian guilty plea processes and offered the analysis of Plea Bargaining in national context. The 2nd conducted in Victoria by the Victorian Sentencing Advisory Counsel (VSAC) (2007) reported on a specified sentence discounts and sentence indications and provided an extensive examination of sentencing reform and guilty plea issues in Victoria. These two studies are dealt in detail in the chapter.

Further, the concept of plea-bargaining in Georgia, Nigeria, India and other countries has been discussed. In Georgia, Plea bargaining has been enshrined in Georgian law since 2004. The following objectives have been outlined by the Georgian government:

1. Achieving fast and effective justice;
2. Fighting corruption;
3. Reducing the pressure on Georgia’s penitentiary system;
4. Reducing judicial caseload.

In Nigeria, the term became known and applied with the establishment of the Economic and Financial Crimes Commission (EFCC) following increased level of corruption. The judiciary then began to apply the process in justice administration particularly in high profile cases prosecuted by the EFCC.

Chapter Five of the thesis deals with controls on plea-bargaining. Legislative and judicial controls are the effective
controls out of which legislative controls have been discussed in detail. The judicial control in India has been detailed in chapter three of the thesis and judicial control in other countries have been discussed at relevant places in chapter four of the thesis.

Section 24(c) of the Public Prosecutions Act 1994 (Vic) is one of the most important piece of legislation in Australia. It states that In the performance of his or her functions the Director must have regard to—
(a) considerations of justice and fairness; and
(b) the need to conduct prosecutions in an effective, economic and efficient manner; and
(c) the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime

Another law is section 9 of the Victims’ Charter Act 2006 (Vic) which imposes statutory requirements on prosecutorial conduct following discussions, by requiring that prosecutors keep victims informed of any alterations to charges.

These two pieces of legislation are the only statutory controls, however limited, of prosecutorial discretion when plea bargaining in Victoria.

The Australian High Court established in R v Maxwell (1995) that a judge cannot be forced to sentence an offender on a factual basis and the judge cannot
consciously accept. The trial judge has a residual discretion to reject the plea. It is impossible to define the circumstances in which it is appropriate for such discretion to be exercised more closely than by saying it is to be exercised where the interests of justice so require. This decision was upheld in the Victorian Supreme Court of Criminal Appeal in R v Duong.\(^{32}\)

Within the office of public prosecution the guidance on plea bargaining is detailed within two Practice Guides and one Director’s Policy. Director’s Policies are considered official policies in so far as they should be upheld whenever possible. However, there are no penalties applied for deviation, and no mechanisms exist to monitor whether the requirements of the Director’s Policies are followed. Practice Guides form part of an internal database within the OPP, and offer guidance on prosecutorial conduct in criminal proceedings. These guidelines are considered less official than the Director’s Policies, however, the Director of Public Prosecutions (DPP) recommends that prosecutors avoid deviating from them whenever possible (Prosecutor).

The most contentious element of the Guidelines, due to its potential to encroach upon judicial independence in sentencing and to significantly control prosecutorial pre-trial preparation, is s.C6. S.C6 was implemented in the Guidelines in June 2007, in response to the Lord Chief Justice’s comments in R v Cain and Others,\(^{33}\) where he

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33. 2006 EWCA Crime 3233.
criticised the lack of guidance presented to sentencing judges by prosecutors. S.C6 thus obliges prosecutors to prepare a Plea and Sentence Document, seven days prior to the Plea and Case Management Hearing in the Crown Court, regardless of whether there is a perceived likelihood of the defendant pleading guilty in India, the Criminal Procedure Code, 1973, deals with plea-bargaining in chapter XXI A from section 265A to 265L which has already been discussed.

In Chapter six, Researcher has concluded that plea Bargaining has been introduced in the Criminal procedure Code, but whether the same is being followed as a part of procedural law or the Courts are still reluctant to follow the same. To plea, actually, its not only the judicial officers whose efforts are required to bring this concept in regular Courts but the State agency through the public Prosecutors is also required to put same efforts in making this concept a successful procedure.

The Researcher conducted a survey at Kurukshetra Courts. The Researcher prepared two forms which were filled up the Court agencies forms no. 1 contained seven questions and was meant to be filled up the Public Prosecutors and Assistant Public Prosecutors. The questions were prepared by the Researcher after a deep study into the socio-economic and legal scenario of the local people at Kurukshetra and the researcher has an outcome of following points.
In the socio-economic circumstances prevailing in India, in most of the cases where the accused and the complainant enters into compromise the easiest way out that the courts, the parties and the State is following is that either the offence is compound with the compromise of the courts under Section 320 on Cr.P.C, or the complainant or the eye-witnesses deviate from the earlier statements given by them through investigation. In such circumstances with the witness do not support the case of the prosecution. They are declared hostile on the request of state and ultimately the case of the prosecution weakens and the accused are acquitted. This is a common procedure which is followed in Indian Courts. However, such a procedure further once action against the witness is legally meant deviate from their earlier statements or if their deviation is true, action has to be taken against the Investigation Agency who has recorded their statements which altogether adverse from the statements given by them in the court. Hence, it is not only a way out for acquittal of accused but on the same site. It also once action against the complainant witnesses and the Investigating Agency which ultimately leads to further prosecution. Hence, it is cumbersome as well as lengthy procedure. On the other hand, plea bargaining is not as lengthy as the aforesaid procedure is further more the deterrent theory of punishment, also works if plea bargaining is implemented. Hence, the views and the opinions given by the State Agency as well as the courts support the implementation and execution of plea
bargaining in India. The Researcher, therefore concludes that the survey remarks plea bargaining as a successful procedure to be adopted by the courts.

**Suggestions**

After studying the concept of plea-bargaining in India and its comparative study, the researcher has been able to point out some suggestions on the law of plea bargaining. Some of them are-

1. In order to implement plea bargaining successfully, first thing which is required is to spread awareness of this provision among the stakeholders in the criminal justice system.

2. The accused has do not that he has this right. Therefore, summons to an accused in all cases to which plea bargaining is attracted must contain this information that he is entitled to take the benefit of this system. For that the statutory format of summons may be alerted.

3. The awareness programme should be held in jail among trial prisoners who can come within the purview of Chapter XXI-A of the Code. If this is done, this will help decongest the overpopulated jails all over the country.

4. There is a greater chance of success in the plea bargaining programme, if it is first implemented in cases of persons who are already in custody and in respect of those offences which carry a maximum sentence of upto three years.
5. In order to successfully carry out this awareness programme, the Probation Officers, Welfare Officers of the jail and the Superintendent of Jails must be involved to conduct the programme among the under trial prisoners so that they may get “the informed knowledge” to take the benefit of the system.

6. For achieving the aforesaid goal, the State Legal Services Authority, District Legal Services Authority and Taluk Legal Services Authority must carry on an integrated programme in collaboration with Prison Administration, so that the under trial prisoners know about these provisions and doubts in their mind may be dispelled. Between the under trial prisoner and an accused who is on bail, the unter trial prisoner is likely to accept plea bargaining more readily than the person who is on bail.

7. A provision may be made in Chapter XXIA of the Code making it mandatory for the Court to inform the accused who appears in connection with trial of an offence, to which Chapter XXIA applies, that it is open to the accused to take the advantage of plea bargaining. Somewhat similar provision has been, made, obviously in a different context, in Order XXXIIA, Rule 3 of the Civil Procedure Code.

8. Once an application for plea bargaining is filed by an accused, he has no chance of withdrawing the same. If it fails, the matter reverts back to regular trial and the accused does not suffer any prejudice for whatever he
has stated in his application. Therefore, a Judge must have a changed mind set to see that such application does not fail. He should also develop negotiating skills.

9. Training of judicial officers at State Judicial Academy level and also at the level of National Judicial Academy, Bhopal on this subject is essential. This would certainly improve their dexterity and capability to achieve the desired results. Moreover, positive change of attitude and concern will be the result of intensive training to the judicial officers.

10. Chapter XXIA of the Code is a self-contained provision so far as our country is concerned. Judicial offices must have clear understanding of their role under the various provisions contained in Chapter XXIA. Unless they master the statutory provisions and understand the object behind it, they may not be able to implement plea bargaining effectively.

11. Legal Services Authorities have to perform a major role in the propagation of this concept. They must conduct seminars creating awareness among the lawyers about the problems of backlog and the relevance of plea bargaining as an alternative.

12. Lawyers have a vital role to play in view of their participation in the negotiation process. For this, the Legal Services Authorities with the help of various Bar Associations may conduct classes for lawyers and legal Aid Counsel. Services of judges and jurists can be sought for creating awareness.
13. Every prosecutor in the country must master the provisions of Chapter XXIA of the Code relating to plea bargaining. Intensive training at the instance of the State Legal Services Authorities for prosecutors is highly essential. Services of eminent judges and jurists can be utilized. Along with the prosecutors, investigating officers and officers working in correctional agencies also should be sensitized on the importance of these provisions.

14. Public prosecutors can co-ordinate investigating agencies, probation officers; so that the entire class of officers working in various departments of Government can be educated. Each prosecutor can develop a strategy to effectuate the plea bargaining process with the help of the State Legal Services Authorities. Trainings/Seminars can be conducted to disseminate knowledge on this aspect.

15. Adequate safeguards must be put in place to protect the innocent and punish the guilty, as pervasive bargaining without transparency and specific guidelines will perpetuate the image that justice is for sale and will inevitably lead to public cynicism.

16. It must fundamentally be considered whether any form of plea bargaining could possibly assist in the administration of justice in the context of the presumption that the accused is innocent.

17. 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 dominated substantially. Therefore, not only will the victims' needs be addressed but also the susceptibility of the system being misused by the public prosecutor, the police and even the affluent will be considerably reduced.

18. The accused must be represented by counsel.

19. The hearing must take place in the open court. Even Bentham observed, "Publicity is the very soul of justice. It keeps the judge himself, while trying, under trial. Under the auspice of publicity, the cause in the court of law and the appeal to the court of public opinion, are going on at the same time........ It is through publicity alone that justice becomes the mother of security."

20. The judge overseeing the implementation of the scheme must be impartial and in no way involved in the bargaining.

21. The judge must be satisfied that the accused is pleading guilty knowingly and voluntarily.

22. The judge must retain a broad discretion as to whether to accept or reject the plea bargain.

23. Any court order rejecting a plea bargaining application must be kept confidential to prevent prejudice to the accused.
24. In order to ensure due process and respect for the Indian criminal justice system, any plea bargaining scheme must be carefully regulated and visible. If all these measures are complied with and the government agencies work fairly and justly, it would not be out of place to say that the concept of plea bargaining will not only work in India but it will bring tremendous changes in the criminal jurisprudence. However, the real fate of the law is yet to see the light of the day and it is hoped that plea bargaining will be a big success.