

**PLEA BARGAINING : ANALYSING AND INTERPRETING THE  
PROVISION OF THE INDIAN CRIMINAL JUSTICE SYSTEM**

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**ABSTRACT**

Plea Bargaining is an agreement between the prosecution and the accused, particularly in a criminal case, wherein the accused consents to plead guilty as a compromise between both the parties i.e. in return for some concession from the prosecutor. Simply speaking, it is a process where the accused and the public prosecutor enter into a compromise. The paper deals with the concept of Plea Bargaining in India.

The paper attempts to understand the concept of Plea Bargaining as a whole and how and where it originated around the world. Further, the paper proceeds on to comprehend the introduction of this provision in India. Chapter XXI-A of the Criminal Procedure Code has been dealt in detail which discusses about the very concept of Plea Bargaining. Furthermore, the paper moves on to comprehend and analyse the various decisions of the Apex Courts and the High Courts and the change in Judicial stance before and after inception of the provision. It then discusses about the recommendations of the Law Commission in its various reports and how the present provision deviates from them has been analysed. The flaws in India have been presented via statistics and further discussed at length with proper recommendations which must be followed. The paper thus concludes with a critical appraisal of this provision.

An in depth analysis of the above mentioned theme has been presented along with an organisational conclusion of the subject matter. The paper has sought to resort to different reliable sources, both online and offline, inclusive of different online reports, surveys, statistics, studies, books and articles *inter alia* for the purpose of research, analysis, interpretation and execution of the subject matter and ensures maximum creativity, research work, and personal ideas in the same.

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## INTRODUCTION

*Hate the Crime, Not the Criminal.*

- Mahatma Gandhi

A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: The first being that people come to believe that inefficiency and delay will drain even a just judgment of its value.<sup>3</sup> The above statement has been made by Warren Burger in an address to the American Bar Association which points out the very significance of significance of speedy justice.

Plea Bargaining in its etymological sense would mean that – Plea – To come up with a justification or a defence and Bargaining – Negotiating the terms of a transaction which would be apparently favourable. Plea Bargaining is an agreement between the prosecution and the accused, particularly in a criminal case, wherein the accused consents to plead guilty as a compromise between both the parties i.e. in return for some concession from the prosecutor. Plea Bargaining can be described as “*pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution.*”<sup>4</sup>

This could as well mean that the accused would be pleading guilty to some or one of the many charges imposed upon him by the prosecution. This is done by the accused for a lesser sentence. The accused thus lets away with his right to plead not guilty before the Court and go for a complete court trial, but rather settles for a negotiation with the victim. A plea bargaining succeeds only when both the accused and the prosecution settles for the terms and conditions they have created and with free consent agree with the same without any other factors intervening.

## BACKLOG OF CASES

Noted jurist Nani Palkiwala rightly said, “The law may or may not be an ass, but in India, it is certainly a snail”. Indian Judiciary has failed comprehensively to dispose off the huge number

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<sup>3</sup> Warren E. Burger, “What’s Wrong With the Courts: The Chief Justice Speaks Out”, *U.S. News & World Report* (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).

<sup>4</sup> *State of Gujrat v. Natwar Hachandji Thakor* 2005 CrLJ 2957

of cases. Best efforts have been made now and then to curb this crisis but all in vain. The judicial system is unable to provide timely justice as there is a massive backlog of cases which tends to rise day by day. On an estimate 14,76,000 cases are listed everyday in the subordinate judiciary, leading to 29 crore hearings in a year.<sup>5</sup> It is an estimate that pendency of cases can never be cleared as more cases are being filed than disposed off every month. In such circumstances how can India strive to become a developed nation? It presents a question mark on our existence of being a developing nation as well.

The causes for this pendency and backlog have not been contributed by a single factor, nor can they be attributed to any external factor but the practice that takes place in the court premises itself, which has led to this disorder. The reasons are not contemporary but have been in existence since a very long time. Whereas a number of Committees and Commissions have dealt with the problem and given their report, but the issue still persists. 2,74,25,805 as a whole, are pending in the courts of our nation and surprisingly, they are to be decided by merely 18,828 judges, on an average 1,483 cases being decided by each judge.

It is certainly high time and a measure is indispensable to curb this high pendency which may perhaps be done by bringing the measure of Plea Bargaining in the Indian Criminal Justice system as done by the Indian Government.

## **INTRODUCTION OF PLEA BARGAINING : UNITED STATES**

Plea Bargaining was introduced in the United States in the 19<sup>th</sup> century. Though, it is said to be formally as well as officially declared constitutional by the US Supreme Court in 1970 while deciding *Brady v. United States*<sup>6</sup>. In the instant case, the petitioner had been indicted in the year 1959 for kidnapping and on charges of not liberalising the victim unharmed and thus the trial court imposed a maximum penalty of death if the jury's verdict would have so recommended. As and when he got the information regarding the co-defendant, that he had confessed, and he shall be pleading guilty and testifying against him, the accused altered his stance from not guilty to guilty. He later claimed that he shall not be punished as his sentence imposed was upon involuntary confession made by him. The Apex Court held that,

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<sup>5</sup> Daksh India. Access to justice survey 2015-16 <http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf> (accessed August 6,2017).

<sup>6</sup> 397 US 742 [1970]

'Petitioner's plea of guilty met the standard of voluntariness, as it was made "by one fully aware of the direct consequences" of that plea.'<sup>7</sup>

Later in another case, the US Supreme Court came up with another decision where it held that plea agreement had been violated as the prosecution promised that he would pray for the lowest charges but he rather pleaded for imposition of the maximum punishment post confession by the accused.<sup>8</sup> It was as well held by the Court that for plea bargaining to succeed both the parties must honour the terms of the agreement and it is a mandate, not following which plea bargaining would not succeed and is vitiated.

Presently, plea bargaining has reached such a situation that more or less 97 percent of the criminal cases are solved by plea bargains.<sup>9</sup> Undoubtedly, this is highly essential to reduce the pendency of cases and give time to the courts for more important business. Though, it shall not be the case that plea bargaining is made possible in every circumstance, there must be strict guidelines with respect to the same and shall be followed.

## **INTRODUCTION IN INDIA**

Plea-bargaining is a measure which has been created and established for the purpose and with the aim of reducing caseload from the Judiciary, and has been highly successful in the United States of America, so much so that it has now become the standard and a rule rather than an exception. Motivated by the accomplishment of plea-bargaining in the United States of America, our nation made several attempts to bring in and set up a similar formula. The Law Commission of India in its 142<sup>nd</sup><sup>10</sup> and 154<sup>th</sup><sup>11</sup> report recommended the introduction of provisions relating to plea bargaining. The recommendations of Law Commission were further endorsed by Malimath Committee. Nevertheless, recommendations for the introduction of plea-bargaining in India have been made time and again by the Law

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<sup>7</sup> Id.

<sup>8</sup> Santobello v. New York 404 U.S. 257 [1971].

<sup>9</sup> Viano, E. (2018). Plea Bargaining in the United States: a Perversion Of Justice. [online] Cairn.info. Available at: <https://www.cairn.info/revue-internationale-de-droit-penal-2012-1-page-109.htm> [Accessed 13 Mar. 2018].

<sup>10</sup> 142<sup>nd</sup> Law Commission Report , Law Commission of India. Available at <http://lawcommissionofindia.nic.in/100-150/report142.pdf>

<sup>11</sup> 142<sup>nd</sup> Law Commission Report , Law Commission of India. Available at <http://lawcommissionofindia.nic.in/reports/report154.pdf>

Commission of India and in 2005, plea-bargaining was incorporated into the Code of Criminal Procedure, 1973 through an amendment.<sup>12</sup>



The proposal for incorporation of plea-bargaining in the Indian criminal justice system was put forth in the year 2003 through the Criminal Law (Amendment) Bill, 2003. However, the provisions failed to come through and transform into a successful act due to some flaws and had to be reintroduced with few slender ramifications 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.<sup>13</sup> The provisions were thus finally incorporated into the Code of

<sup>12</sup> Wanna Make A Deal? The Introduction Of Plea-Bargaining In India, Sulesh Rewari. Available at : [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=1&do\\_pdf=1&id=977](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=977)

<sup>13</sup> Criminal Law Amendment Act 2005, Criminal Procedure Code. Available at : <http://nagapol.gov.in/PDF/The%20Criminal%20Law%20Amendment%20Act%202005.pdf>

Criminal Procedure, 1973 as Chapter XXI-A through the Criminal Law (Amendment) Act, 2005 and notified in the Official Gazette of India as Act 2 of 2006.

The act does not recognize any existing practice akin to plea bargaining but plea bargaining.

## **THE PROVISIONS**

The provisions regarding Plea Bargaining has been added in Chapter XXI of CrPC. Section 265-A of the Criminal Procedure Code lays down<sup>14</sup> :-

**265-A. Application of the Chapter** -(1) This Chapter shall apply in respect of an accused against whom

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

(b) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, issued the process under section 204, but 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 fourteen years.

(2) For the purposes of sub-section (1), the Central Government shall, by notification,

determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

**Analysing and interpreting** the above mentioned provision leads us to the understanding that plea bargaining is not available to the accused in the below mentioned :

1. The offence committed by the accused is a socio economic offence like food adulteration, theft and misappropriation of funds, evading taxes, trafficking and the like. The socio economic offence, as per the above section shall be determined by the Central Government exclusively.

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<sup>14</sup> Chapter XXI, Criminal Procedure Code 1973.

2. The committed crime is against a women or a child below the age of 14 years.
3. Where the offender is a habitual offender. 265B [2] provides that accused shall submit an affidavit to this affect that he has not been convicted by the court previously.
5. The offender is covered under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Further Analysing and Interpreting **Section 265-B** of the CrPC it can be deduced that it provides for the following:-

1. The application can only be filed in the court in which the trial is pending.
2. The application so filed has to necessarily bear a brief description of the case regarding which the application has been filed by the accused. It shall as well include the offence to which the case relates. The same has to be accompanied by an affidavit sworn in by the accused stating that he has voluntarily filed the same with proper understanding of the nature of punishment and the term provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a Court in a case in which he had been charged with the same offence.
3. The Court would thereupon issue notice to the Public Prosecutor or the Complainant as per the necessity and also the accused to be present on the date fixed for hearing.
4. The accused would be examined in camera proceedings in the absence of the other party to ensure that the decision has been taken by him voluntarily and without any enforcement of unfair means upon him.
5. Upon the satisfaction of his voluntariness the Court shall thereupon give time to both the parties to work out a mutually satisfactory disposition of the case which may include compensation or compensation in addition to other extra expenses incurred by the accused, and shall thereupon fixed a date for the further hearing.

**Section 265-C** provides guidelines for working out the mutually satisfactory disposition. Firstly all the stakeholders in the case namely the prosecution, accused, defence lawyer, accused and the victim are to be given notice for participating in the meeting for working out the mutually satisfactory disposition. This is significant as the victim is given the right to

participate and be part of a process meant to dispose of the case. Secondly the judicial officer is made responsible to ensure voluntariness throughout the meeting.<sup>15</sup>

**Section 265-D** talks about submission of such a report to the Court

1. Upon a satisfactory disposition of the case which has been reached upon, a report shall be prepared by the court signed by the presiding officer of the Court.
2. Whereby no such disposition could have been worked about between the parties, the Court shall proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of Section 265-B has been filed in such case.

**265-E** The section provides for directions for the final disposition of the case on working out of a successful disposition. This implies that opting for this procedure guarantees leniency in the sentencing as a matter of right. For instance If an offence has minimum punishment the Court may give half of it and where no minimum sentence has been provided it may give one fourth of the punishment provided.<sup>16</sup> It also directs him to make use of the provisions dealing with admonition under Section 360 of the Criminal Procedure Code and probation under the provisions of Probation of Offenders Act, 1958.

The judgement shall thereupon meeting the considerations as provided in the above mentioned section be delivered in an open court bearing the signature of the concerned judicial officer.<sup>17</sup> The judgement hereby delivered by the court shall be final and no such appeal lies against the said judgement. Notwithstanding the provision, Writ petition to the High Court under Article 226 and 227 and as well Special Leave Petition under Article 136 can be called for.<sup>18</sup>

**Section 265-I** of the Code provides that Section 428 of CrPC regarding allows for setting off the period of detention undergone by the accused against the sentence of imprisonment imposed under this procedure.

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<sup>15</sup>Plea Bargaining in India, Pathshala, Ministry of Human Resource Development, Available at : [http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp\\_content/law/05.\\_criminal\\_justice\\_administration/19.\\_plea-bargaining/et/5682\\_et\\_19\\_et.pdf](http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/05._criminal_justice_administration/19._plea-bargaining/et/5682_et_19_et.pdf)

<sup>16</sup> Id.

<sup>17</sup> Section 265-F, Criminal Procedure Code 1973.

<sup>18</sup> Section 265-G, Criminal Procedure Code 1973.

The statements of the accused herein provided under the pre mentioned sections shall only apply to plea bargaining and not in any other case.<sup>19</sup> Plea Bargaining is not permissible in the case of to Juveniles or Children.<sup>20</sup>

Though the involvement of a judge in plea bargaining is yet debatable because excessive intervention could compromise his position as we are not in an inquisitorial system rather adversarial and it would not let the judge be neutral leading to an unjust result. It appears that the Act gives the judge limited freedom in awarding compensation to the victim as the compensation is to be in accordance with the disposition.<sup>21</sup>

### INDIAN JUDICIARY'S APPROACH TOWARDS PLEA BARGAINING

The Indian Courts have been very much reluctant in applying the concept of Plea Bargaining in India until and unless the Amendment came up in the year 2005. The Courts had even rejected this concept whilst it was suggested by the Law Commission of India.

Hon'ble Supreme Court of India went on to the extent of calling this process of Compromise as immoral, necessary evil and impossible. The Apex Court observed in the case of *Murlidhar Meghraj Loya v. State of Maharashtra*<sup>22</sup>,

*"In civil cases we find compromises actually encouraged as a more satisfactory method of setting disputes between individuals than an actual trial. However, if the disputes 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 the case of *Uttar Pradesh V. Chandrika*<sup>23</sup>, a Single Judge bench of Allahabad High Court accepted the plea of a bargain by observing *inter alia* that as the incident had taken place long back and since the appellant had been in jail for quite some time as undertrial prisoner and as well as a convict, it was desirable to substitute his remaining period of jail sentence as awarded by the trial court and altered the sentence as stated above. The Apex Court overruled

<sup>19</sup> Section 265-K, Criminal Procedure Code 1973.

<sup>20</sup> Section 265-L, Criminal Procedure Code 1973.

<sup>21</sup> R.V. Kelkar, Lectures on Criminal Procedure, (2003) 209.

<sup>22</sup> AIR 1976 SC 1929

<sup>23</sup> 2000 Cr.L.J. 384(386)

the judgement delivered by the High Court and held that It is now a settled law that on the basis of plea bargaining court cannot dispose of the criminal cases as it is not meant to be for them, in the Indian conditions more specifically. The issues have to be strictly decided on merits and there exists no other alternative for the same. If the accused confesses its guilt, appropriate sentence is required to be implemented by the court of law. It was further acclaimed by the Court that Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Hence plea bargaining has no existence in our nation.

The Apex Court again strongly disapproved and heavily criticised laying down that the practice is violative of various Constitutional provisions and mandate by holding the same with clear and stern reasons in the case of ***Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr***<sup>24</sup>. The Court said :-

*“It is to our mind 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 in our mind 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.”*

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<sup>24</sup> 1980 Cri. LJ 553

In *Kachhia Patel Shantilal v. State of Gujrat*<sup>25</sup> the Court had very strongly dissented itself of plea bargaining and even went on to say that it would encourage corruption, collusion and pollute the front of justice. Further in the case of *Kasambhai v. State of Gujarat*<sup>26</sup> the court attributed the reason for non acceptance of plea bargaining in India and held that,

*“It had to be always remembered by every judicial officer that administration of justice is a sacred task and according to our hoary Indian tradition, it partakes of the divine function and it is with the greatest sense of responsibility and anxiety that the judicial officer must discharge his judicial function, particularly when it concerns the liberty of a person.”*

While discussions and deliberations were ongoing in the Indian Parliament in 2005 regarding the Amendment Bill of 2005, High Court of Gujarat in *State of Gujarat v. Natwar Harchanji Thakor*<sup>27</sup> affirmed the very practice of plea bargaining,

Later in 2007, in *Pardeep Gupta v. State*<sup>28</sup> the trial court did not even look into the provisions of Chapter 21 of CrPC and outrightly denied any compromise. The High Court found the situation to be somewhat like this, that since the applicant is involved in an offence under section 120-B Indian Penal Code and the role of applicant was not lesser than the other co-accused. But it was a fact in issue that none of the offences in which the petitioner has been booked attracted more than seven years punishment. The request of plea bargaining is ought to be considered taking into account the role of the accused and the nature of the offence. The trial court could not have rejected the application for plea bargaining and the attitude of the trial court shows that it did not even read the provisions of chapter XXI-A before considering the application. The Court commanded the trial court to reconsider the whole matter and not casually but meticulously. An almost same situation came up in *Vijay Moses Das v. Central Bureau of Investigation*<sup>29</sup> as well.

## STATISTICAL ANALYSIS

The statistical analysis is highly significant to be seen in this regard as this would present a picture of how successful has been this measure of Plea Bargaining in India. There is a

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<sup>25</sup> [1980] 3 SCC 120

<sup>26</sup> AIR 1980 SC 854

<sup>27</sup> 2005 Cr.LJ 2957.

<sup>28</sup> 2007(99) DRJ 198

<sup>29</sup> 2010(2) Cri.CC 857

negative picture according to the statistics of Plea Bargaining in India and it is straightaway flouting the provisions of the Legislature.

National Crimes Records Bureau for the first time took a step to report the cases which were disposed by the way of Plea Bargaining. In the year 2014, merely 34,000 cases of Plea Bargaining were disposed of, which accounts for merely 3% of such **disposable** cases. Over 14 lakh cases were decided in the year 2014 and thus it amounts to merely 2 % in that form. The state of Madhya Pradesh topped the list, with a very huge margin, of disposing cases by Plea Bargaining. Out of the 34,000 cases, as high as 25,000 cases were solely disposed off in Madhya Pradesh, as compared to as low as 250 in Delhi and 331 in the State of Maharashtra.<sup>30</sup> The most fundamental reason for the same can be due to lack of awareness.

It is highly disheartening that the provisions of Plea Bargaining as there in the Criminal Procedure Code have been flouted with. This is because of the case that cases which were not capable of being legally plea bargained have still been plea bargained. Over 4,000 cases of murder, robbery and crimes against women were disposed of by courts last year after plea bargaining pacts between parties in violation of law passed by Parliament a decade ago.<sup>31</sup> Courts have simply flouted the provisions of the CrPC made by the Parliament. The Courts have disposed of 3,584 cases concerning Crimes against women, out of which 2,200 were of cruelty by husband and his relatives i.e. Section 498A of IPC whereas 1,045 of them of assault with the intent to outrage the modesty of a women i.e. Section 354 of IPC. Furthermore, startling figures are with regard to other cases – As high as 27 cases of Murder, 55 of attempt to murder, 40 of rape and 27 of robbery by plea bargaining.<sup>32</sup> This is a serious flouting by the Courts and have to be strictly controlled until Parliament expressly provides for the same.

### **CONCERNING ISSUES OF PLEA BARGAINING**

There are various issues concerning the plea bargaining procedure in India. The initial issues with the same have been analysed as above in various case laws as laid down by the Supreme

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<sup>30</sup> National Crime Records Bureau, *Crime in India 2011-Statistics*. Available at : <http://ncrb.nic.in/StatPublications/CII/CII2014/Compendium2011.pdf>

<sup>31</sup> Crime records show widespread abuse of plea bargain law , Hindustan Times. Available at : <https://www.hindustantimes.com/india/crime-records-show-widespread-abuse-of-plea-bargain-law/story-rcq9UCrMeD13fbnJjGZffN.html>.

<sup>32</sup> National Crime Records Bureau, *Crime in India 2015-Statistics*. Available at : <http://ncrb.nic.in/StatPublications/CII/CII2014/Compendium2011.pdf>

Court that this practice is immoral, impossible as well as against the Constitution. Though the Court could not do much since it was incorporated in the Criminal Procedure Code by the Legislature. Though, it is not free from criticism and there lie various concerning issues which have to be necessarily resolved.

### **Status of the Victim**

The status of the victim in the whole process of Plea Bargaining poses a big question and creates a lot of doubts. It had been recommended by The Committee on Reforms of Criminal Justice System, 2003 that it should be mandated to give a role to the victim in the whole negotiation process which would be leading to settlement of criminal cases either through the courts, the specially set up lok adalats or this very process of plea-bargaining.<sup>33</sup> Prior to the Act, the law only envisaged the prosecutor appointed by the State to be the proper authority to plead on behalf of the victim.<sup>34</sup>

Although now the Act provides some extent to the participation of the victim in this whole process, which comparable to the United States, effectively provides for consultation with the prosecutor whose interests in disposing of the case may differ significantly from those of the victim. Factually, the mutually satisfactory disposition which is to be reached by the Respondent or Accused with the Public Prosecutor may provide for Compensation to the victim to some extent at least. The victim's participation has not been provided for expressly by any provision of plea bargaining as it might be provided in other cases which are not akin to plea bargaining.<sup>35</sup> As there is merely some involvement of the judge in the whole process it is difficult to ascertain whether the victim is satisfied with the whole process or not. The process of plea bargaining confers upon the judge merely the discretion with respect to sentencing, as traditionally and no decision when it comes to quantum of compensation which would be decide by a mutual agreement between both the parties respectively. It poses a big question as to the victim's interest being met or not in the whole process.

### **Possibility of innocent defendants pleading guilty**

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<sup>33</sup> Report of the Committee on Reforms of Criminal Justice System, 2003.

<sup>34</sup> Id.

<sup>35</sup> The Criminal Justice System, Ministry of Home Affairs. Available at : [http://www.mha.nic.in/pdfs/criminal\\_justice\\_system.pdf](http://www.mha.nic.in/pdfs/criminal_justice_system.pdf)

Our nation has always witnessed lengthy pre trial delays and it goes on to experience the same it might turn out to be case that the guilty pleas have been accepted by compelling the accused that it would be decided upon swiftly and in his favour and he would thus be exempted from the long drawn procedure and the sentence will be for no more than the amount of time already served. Such cases may lead to guilty pleading by the accused due to the pressure on him for not going to long trials and would cause a lot of injustice to the accused.<sup>36</sup> It might be thus it is hard to see how the prosecution can derive more than a purely statistical benefit from the conviction so obtained.

### **The Scope for Exploitation**

Initially, it is often contemplated regarding the principles of criminal jurisprudence and their violation when it comes to plea bargaining. It is as well debated whether the accused is losing his Constitutionally imbibed rights which are naturally provided to him by the provisions of Plea Bargaining. It is a debatable position but time and again negated by the American Jurisprudence alongside the Indian position now.

Secondly, another issue comes up with respect to the 'mutually satisfactory disposition' and the coercive methods that may be applied on any of the parties as there is no involvement of the judicial officers in the same and it is left upon the parties to discuss and decide upon the same. Even though there is a safeguard in place specifically provided by Section 265-B of the CrPC that the accused has to be examined by the Magistrate in his exclusive presence in camera proceedings that he has not been involuntarily forced to accept the charges and he is doing so in his free will and he is fully aware of what he is taking up. The plea being in a written format along with an affidavit provides further scope for it being coerced by the Police or the Prosecution. Moreover, such a system still does not solve the problem of acquiring adequate legal representation for those who are underprivileged.<sup>37</sup> This will cause the crimes to be a mere compensatory mechanism as the rich can easily afford the price of the victim when it comes to compensation and this would lead to the destruction of the very concept of the punishment of an offence being deterrent in nature. Though agreeably a very significant safeguard has been provided by Plea Bargaining and its provisions<sup>38</sup> that the

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<sup>36</sup> Justice Pasayat A. Plea Bargaining, 5 Nyaya Deep, National Legal Services Authority, 2007.

<sup>37</sup> Rai S. Law relating to Plea bargaining, 47 Orient Publishing Company, New Delhi, Allahabad, 1st ed., 2007.

<sup>38</sup> Section 265-K, Criminal Procedure Code 1973.

statements provided by the accused in the plea shall only be considered merely for this chapter and not any other chapter.

### **The Risk of Bias in the Whole Process**

It is often criticised that how would one evaluate the neutral behaviour and attitude of the judicial officers while deciding the case of a plea bargaining and how is that to be ensured.<sup>39</sup>

The very concept of examining the accused in camera proceedings and not in an open court may cause for another public cynicism and no trust for the plea-bargaining system as it would raise a question of the integrity of the Magistrate. The order upon these camera proceedings would as well be have the scope of being arbitrary as the accused has been heard by the Magistrate in merely his presence and this may give him a right to manipulate with the data.

Plea Bargaining has often been justified by the huge number of acquittal in criminal trials in India. The sole reason for this being that the victim turns hostile because of the constant threats by the criminal and he has no choice left due to the low confidence level of people in the Indian Policing System, by politicians who hold both power and money or because of enticement through money by the rich goons, and this leads to the acquittal of the accused and certainly he is never punished. However if the accused already possesses huge money or connections with big professional criminals or politicians for that matter it might be a case that he may never need to seek such provisions as he would be acquitted automatically.

### **The Answer to the Limitations**

Realising all this considerations and weaknesses as well as limitations of provisions added in the Criminal Procedure Code, the Law Commission of India had been since long suggesting other provisions which are substantially distinct than those provided for in the amendment. This poses a huge question that whether the Indian Government has failed to comprehend the situation of India while designing the concerned provisions. The question still remains unanswered.

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<sup>39</sup> Kirpal v. State of Haryana 1999 CrI. L.J. 503 1 [SC]

It is highly essential that for the success of Plea Bargaining in India it shall be the case that the deciding authority is distinct to that of the trial court so that the process remains relatively fair and also that rather than conferring powers upon the Public Prosecutor, they must be conferred upon such an authority. This would substantially reduce the risks of coercion over the accused as the authority would be the sole arbiter. Though it shall always be taken into consideration that the authority is not given with unfettered powers but they must be as well regulated by either the High Court of some other superior authority. This shall consistently give full opportunities to the victim to express his views and take away any arbitrary powers from the Public Prosecutor, the Police or the affluent people for that matter. Therefore, considering the same it clearly appears that the proposals made by the 142<sup>nd</sup> Law Commission are sound and prudent as they do not intend to follow the same procedure as that in the United States. Undeniably, the arrangement ignores the actuality that abounding abridgement the assets for able acknowledged representation and is added a formalisation of the accepted aphorism of assuming charity to those who appeal accusable rather than plea-bargaining. The recommendations as made by the Law Commission in its Report shall have been paid heed to and not had to be outrightly refused as they offer a much better picture of Plea Bargaining than what is there in our nation presently. Seriously there is a need to relook the same, though it is unlikely to happen in the near future.

### **Recommendations by the Law Commission of India**

142<sup>nd</sup> Report of the Law Commission of India was concerned with abnormal and abysmal delays in the Indian Criminal Justice system and subsequently recommendations to the same. At a similar time the concept of plea bargaining was advancing in the United States and thus it was further recommended by the Law Commission in the lines of the Supreme Court of US's approval of the same. 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.<sup>40</sup> The Report further suggested that this process would save upon considerable amount of resources and also lead to starting the process of rehabilitation of the accused as early as possible.

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<sup>40</sup> Wanna Make A Deal? The Introduction Of Plea-Bargaining In India , Sulabh Rewari. Available at : [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=1&do\\_pdf=1&id=977](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=977)

Further the Commission in its 154th Report, again stated the need for removal of the long drawn delays in the disposal of criminal cases and looking at the suffering of huge number of under trial prisoners as discussed above and thus plea bargaining was suggested by the Law Commission . The same was further suggested by the Law Commission in 177<sup>th</sup> Report.<sup>41</sup> The Commission had proposed a different scheme than that of what is presently seen in Chapter 21 of the Criminal Procedure Code 1973 which has been discussed below in brief :-

A competent authority should be established which shall consist of a competent Magistrate either Judicial Magistrate First Class or Metropolitan Magistrate and who shall be known as a Plea Judge, by the High Court of the concerned states for offences which would be involving punishment below 7 years.<sup>42</sup> This plea judge would not be entitled to try any other matter other than his job of plea bargaining so that so the process remains completely fair, equitable and without any prejudice. Though, it shall not be the only case that only offences which are punishable below 7 years would be open for plea bargaining but the Law Commission proposed that the competent authority shall consist of 2 Retired HC Judges who shall be appointed on consultation with the Chief Justice and his two senior most colleagues.

The process of plea bargaining shall then kick off post an application by the accused which is not in synchronisation with the procedure as there in the United States where the application is made upon a Mutual Agreement already reached upon by the accused alongside the Public Prosecutor. The complaint can be made by the accused anytime after filing of the Chargesheet framing charges against the accused or may also be initiated by the court *suo moto* upon ascertaining the willingness of the accused. The further procedure goes somewhat similar to the present procedure. The Law Commission attempted its level best in synchronising the provision as according to the Indian conditions by deviating from the US conditions :-

**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**

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<sup>41</sup> 177<sup>th</sup> Law Commission Report , Law Commission of India. Available at : <http://lawcommissionofindia.nic.in/reports/report177.pdf>

<sup>42</sup> *Supra* note 25.

**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.**<sup>43</sup>

### **Conclusion**

The concept of plea bargaining has been heavily criticised in India because of the Sections being not in confirmation with those suggested by the Law Commission rather more or less in line with USA. The practice appears to be coercive in nature in some form or the other as it compels the accused to forcefully accept the allegations upon him and agree to the charges.

Moreover the practice has to some extent led to doing away with the concept of deterrent effects of punishment, what the criminal laws are meant for essentially. Albeit it is also true that to remove the arrears and the backlogs of the cases the Judicial system had to come up with a step to revolutionalise the way in which justice is delivered, though it had to be informed well to the mass. It could not have been possible for every case to be looked into merits and thus this step has been considered necessary. In such a situation plea bargaining may be viewed as a ray of light bringing hopes in the minds of many under trial persons.<sup>44</sup>

Though, plea bargaining as a concept is important for India but with proper procedure and measures to as to not be violative of the values enshrined in the Constitution of India. Going with the following effects, it should be a case that it needs to be informed to the public with proper measures.

***“ In many courts, plea bargaining serves the convenience of the judges and lawyers, not the ends of justice because the courts simply lack the time to give everyone a fair trial.”***

**Jimmy Carter, 39<sup>th</sup> US President**

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<sup>43</sup> Recommendations of Malimath Commission Report. Available at :  
<http://www.hrdc.net/sahrdc/hrfeatures/HRF88.htm>.

<sup>44</sup> *Supra* note 34.