PLEA BARGAINING IN INDIA – A DECADE OF EXISTENCE

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INTRODUCTION

The rise of plea bargaining is generally taken to begin in the 19th century but it actually dates back hundreds of years to the advent of confession law and has probably existed for more than eight centuries[1]. Legal technicalities in adversarial system of jurisprudence resulted in causing delays in court procedures and often it became a challenging task for prosecutors to secure convictions for guilty defendants. Moreover, people remained under detention due to legal technicalities and delays in judgments of criminal cases. To alleviate these problems, United States became the pioneer in implementing the concept of plea bargaining. The number of federal convictions resulting from pleas of guilty rose from 50% to 72% during the first two decades of the 20th century. Though plea-bargaining rates rose significantly, appellate courts were still reluctant to approve such deals when appealed. Plea Bargaining emerged as a compromise to ensure that criminals were appropriately punished consistent with the policy of the law to ensure that punishment not only serves as deterrent to offenders, but has to be in the societal interest too. That the concept is very well accepted in USA and some of the Common Law countries is very well demonstrated by the fact that bulk of the cases are solved using the principle of Plea Bargaining and, in general, people tend to have faith in the system as fair and transparent practices are followed. From available statistics, 95% of criminal convictions in the United States have come from plea bargain otherwise known as negotiated pleas[2].

[1] John H. Langbein, *Understanding the Short History of Plea Bargaining* (Oct. 8, 2018, 12:36 AM), https://digitalcommons.law.yale.edu/fss_papers/544/.

[2] Ted. C Eze and Eze Amaka G, *A Critical Appraisal Of The Concept Of Plea Bargaining In Criminal Justice Delivery In Nigeria, Global Journal Of Politics And Law Research, Vol.3, No.4,* GLOBAL JOURNAL OF POLITICS AND LAW RESEARCH 31, 32-33 (2015)(Oct. 8, 2018, 12:41AM)http://www.eajournals.org/wp-content/uploads/A-Critical-Appraisal-of-the-Concept-of-Plea-Bargaining-In-Criminal-Justice-Delivery-in-Nigeria2.pdf.

Plea bargain was introduced into the Indian legal system in 2006[3]. The procedure is applicable in criminal proceedings involving offences which do and attract a punishment of more than 7 years. However, property offences in the nature of socio-economic crimes such as the looting of the public treasury and offences committed against a woman or a child less than 14 years of age are excluded from the application of the procedure

WHAT IS PLEA BARGAINING?

Plea Bargaining is an agreement reached between the defendant and the prosecutor in a criminal case in which the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor[4]. Bargaining may be of different types[5,6,7].

Charge bargaining

It is common and widely known form of plea. It involves a negotiation of the specific charges or crimes that the defendants will face at trial. Usually, in return for a guilty plea to a lesser charge, a prosecutor will dismiss the higher or other charges counts.

Sentence bargaining

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

Fact bargaining

It involves an admission to certain facts, thereby eliminating the need for the prosecutor to have to prove them, in return for an agreement not to introduce certain other facts into evidence.

[3] Criminal Law (Amendment) Act, 2005, No. 2, Acts of Parliament, 2006 (India).

[4] BRYAN A. GARNER, BLACK'S LAW DICTIONARY (2000).

[5] K. V. K. Santhy, *Plea Bargaining In Us And Indian Criminal Law Confessions For Concessions* (2013) (Oct. 10, 2018, 4:00 PM)http://www.commonlii.org/in/journals/NALSARLawRw/2013/7.pdf.

[6] K. T. Thomas, *Plea Bargain- A Fillip to Criminal Courts,* THE HINDU, MAR 22, 2012.

[7] S. RAI, LAW RELATING TO PLEA BARGAINING 47 (Orient Publishing Company, New Delhi, Allahabad 2007).

Counts Bargaining

It requires the defendant pleading guilty to a subset of multiple original charges.

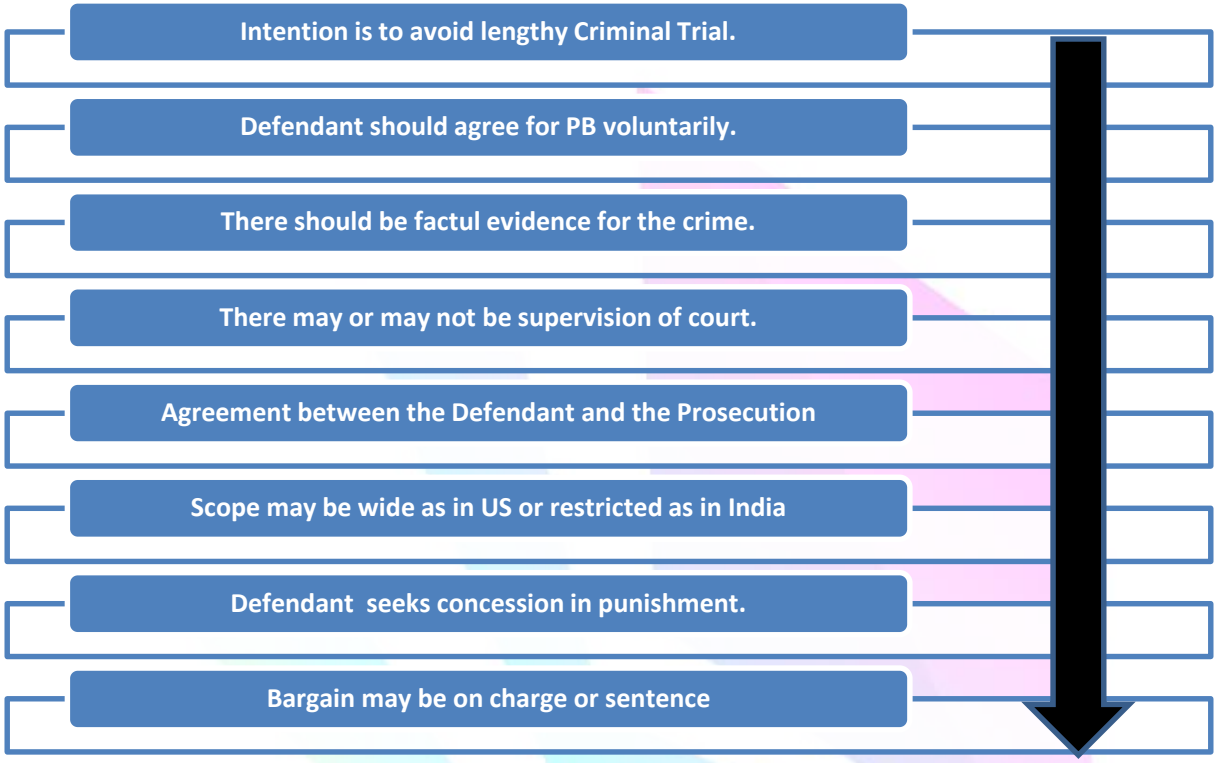

Figure – 1: General Characteristic Features of Plea Bargaining

The ever increasing mass of pending courts cases awaiting trial are assuming menacing proportions globally. The worst situation is that in most of the cases trials do not commence for 3 to 4 years. In India, for example, more than 65 % of all prisoners were under-trial[8, 9]. It is very important basically from this point of view that more and more countries make Plea Bargaining an integral part of their respective legal systems.

General characteristic features of plea bargaining are summarized in Figure – 1. Advantages of plea bargaining have been listed in Table – 1.

[8] 154th Report of Law Commission of India, the Code of Criminal Procedure (1996).

[9] http://ncrb.nic.in (Oct. 10, 2018, 7:32 PM).

PLEA BARGAINING IN UNITED STATES

The United States has used plea bargaining since the time it was a British colony. Interestingly, there are very few rules surrounding the use of plea bargaining either in individual states or at the federal level and almost anything goes in matters related to plea bargaining. In other words, United States does not limit the kind of case that can be plea bargained, allowing it for the minimum violation or offence up to the most serious crimes, including those which could have a potential for the death penalty. In general, a guilty plea must be voluntary and intelligent. For all practical purposes there are no rules surrounding how plea are negotiated. Prosecutors and defense attorneys are required to follow an ethical code of conduct, but these codes tend to be broadly worded and do not address plea bargaining directly. As a result, U.S. prosecutors enjoy wide latitude and power in the plea bargaining process and can agree to dismiss a case outright, or dismiss charges, allow an alternative sentence, such as a fine or community service, or negotiate a deal that includes a substantial amount of time in prison[10].

According to the provision in federal and state laws of USA, either side may begin negotiations over a proposed plea bargain, though obviously both sides have to agree before one comes to pass. Plea bargaining usually involves the defendant's pleading guilty to a lesser charge, or to only one of several charges. It also may involve a guilty plea as charged, with the prosecution recommending leniency in sentencing. The judge, however, is not bound to follow the prosecution's recommendation. Many plea bargains are subject to the approval of the court but in most of the cases prosecutors may be able to drop charges without court approval in exchange for a guilty plea to a lesser offense[11].

[10] Hans Sachs, *Introducing Plea Bargaining in Post-Conflict Legal Systems* (INPROL Research Memorandum, 2014)(Oct.10,2018,4:05PM),http://inprol.org/publications/13127/introducing-plea-bargaining-into-post-conflict-legal-systems.

[11] *How Plea Bargaining Works* (Oct. 10, 2018, 4:07), http://www.lawfirms.com/resources/criminal-defense/defendants-rights/how-plea-bargaining-works.htm.

Table – 1: Some Advantages of the Plea Bargaining Approach[7, 8, 10, 13]

S. No.	Criteria	Remarks
1	***Speedy Justice***	The most often cited reason for adopting plea bargaining is that it allows for efficient handling of cases. Plea bargaining can decrease the need for countless court appearances, hearings, and the days spent in trial. In the United States this first court appearance and the filing of charges often happens within forty-eight hours of arrest.
2	***Low Cost***	Money spent in preparation of the case and numerous hearings would be saved from both the sides – Defendant and the Prosecution.
3	***Better Working Relationship***	Develops cooperation and cordial relations between lawyers and functionaries of court.
4	***Adequate Allocation of Resources***	Another justification of plea bargaining is that it allows for the most efficient allocation of resources. The defendant wants to minimize his punishment, wholly without regard to its possible benefit to society or himself. The State wants to avoid the trial.
5	***On Grounds of Economy or Necessity***	Plea negotiation may be viewed less as a sentencing device or a form of dispute resolution than as an administrative practice. The society cannot afford to provide trials to all the accused who would demand them if guilty pleas were unrewarded.
6	***Alternative Dispute Resolution***	In a way Plea Bargaining provides a better way for the resolution of dispute
7	***Easy Release from Jail***	There are no unwanted long detentions in prison during the under trial period.
8	***Quick Disposal***	The cases in USA are often disposed of within a week. In Indian context disposal of case within 3 months may be considered good.

9	***Not affecting the Future of Accused***	Future of accused persons may not be affected as detrimentally as in long under trial captivity followed by conventional long trial stretching to years.
10	***Hassle Free***	Plea Bargaining is hassle free compared to conventional trials.
11	***Avoiding Public Eye***	Cases do not get public attention due to short procedure.
12	***Rehabilitation***	In a way Plea Bargaining has an aspect of rehabilitation of the accused.

The Federal Rules of Criminal Procedure provide for two main types of plea agreements. An 11(c) (1) (B) agreement does not bind the court and the prosecutor's recommendation is merely advisory. The defendant cannot withdraw his plea if the court decides to impose a sentence other than what was stipulated in the agreement. An 11(c) (1) (C) agreement, however, binds the court once the court accepts the agreement. When such an agreement is proposed, the court can reject it if it disagrees with the proposed sentence, in which case the defendant has an opportunity to withdraw his plea. Generally, once a plea bargain is made and accepted by the courts, the matter is final and cannot be appealed[12].

Some examples of famous plea bargaining judgments in United States include the 1970 judgment in *Brady v. United States.* In this case the Supreme Court held that merely because the agreement was entered into out of fear that the trial may result in a death sentence, would not make illegitimate a bargained plea of guilty[13]. The classic case of adoption of plea bargaining is the case of assassination of *Martin Luther King* in 1969. The accused James Earl Ray pleaded guilty to the murder of Martin Luther King to avoid death penalty. He got 99 years of imprisonment[14]. In the landmark *Bordenkircher v Haynes* case, while accepting the constitutionality of the plea bargaining, the US Supreme Court upheld the sentence of life imprisonment to the accused, who rejected the 'plead guilty' offer in return to 5 year

[12] P. J. Messitte, *Plea Bargaining in Various Criminal Justice Systems* (Oct. 10, 2018, 1:43 PM) http://www.law.ufl.edu/_pdf/academics/centers/cgr/11th_conference/Peter_Messitte_Plea_Bargaining.pdf
[13] 397 U.S. 742 (1970)
[14] WILLIAM BRADFORD HUIE, HE SLEW THE DREAMER: MY SEARCH FOR THE TRUTH ABOUT JAMES EARL RAY AND THE MURDER OF MARTIN LUTHER KING (Black Belt Press 1997)

imprisonment[15]. Hayes was indicted on charges of forgery. He and his counsel met with the prosecutor who offered a lesser sentence if he pled guilty. Hayes decided not to plead guilty and the prosecutor asked that he be tried under the Kentucky Habitual Criminal Act. Hayes was found guilty and sentenced to life as a habitual offender.

In the famous *David Headley Case*, Pakistani-American David Headley 49, LeT operative, charged with conspiracy in the Mumbai terror attacks, has pleaded guilty before a US court to bargain for a lighter sentence to avoid capital punishment. He was arrested by FBI in October 2009. David Headley has moved the plea bargain at a court in Chicago. He was facing six counts of conspiracy involving bombing public places, murdering and maiming persons in India and providing material support to foreign terrorist plots and LeT; and six counts of aiding and abetting the murder of US citizens in India[7].

THE INDIAN MODEL OF PLEA BARGAINING

Prior to the Criminal law (Amendment) Act 2005, the concept of plea-bargaining was totally alien to our Indian criminal justice process and the Apex court, while examining the concept of plea-bargaining in **State of U.P. v. Chandrika[16]** and **Kripal Singh v. State of Haryana[17],** observed that neither the Trial Court nor the High Court has jurisdiction to bypass the minimum sentence prescribed by law on the premise that a plea-bargain was adopted by the accused.

Based on the recommendation of the Law Commission, the new Chapter XXI-A dealing with Plea Bargaining in cases of offences punishable with imprisonment up to seven years has been included in CrPC and the same has come into effect from 05.07.2006[18]. Certain procedure prescribed for plea bargaining under Sections 265-A to 265-L of CrPC are to be complied to make it a valid plea bargaining. Conceptually, the Indian model of plea bargaining is very different from that of USA**[19]**. Application of the concept of Plea Bargaining is India is very restricted and it is yet to be accepted in the general masses as an integral part of the Indian

[15] 434 US 357 1978.
[16] SC (2000) Cr.L.J. 384 (386)
[17] SC 2000(1) ALD Cr.L.J. 613 (1999) 3 CALLT 89 SC
[18] Criminal Law (Amendment) Act, 2005, No. 2, Acts of Parliament, 2006 (India).
[19] *Plea Bargaining – A New Concept* (Oct. 10, 2018, 1:14 PM), http://upslsa.up.nic.in/plea.pdf.

Judicial System. The provisions, though, are not entirely in consistency and corroboration with the scheme recommended by the Law Commission of India in its 142nd and 154th Reports[20, 21] which have also been endorsed by the Mallimath Committee[22].

The salient features of the Indian Model of Plea Bargaining are as follows[23]:

- The initiative to move the legal machinery for negotiated pleas is to be taken by the accused person for only those offences for which the maximum punishment does not exceed seven years.

- The application for plea bargaining is to be filed in the court in which such offence is pending for trial. This is where the Indian scheme differs from the American scheme where the application is made by the public prosecutor and the accused after negotiations between them are over.

- On receiving the application, the court has to examine the accused in camera, and if it is satisfied that the application has been filed by the accused voluntarily, the victim, the accused, the public prosecutor and investigating officer, if the case is one instituted on a police report, are given time to work out a mutually satisfactory disposition of the case, which may include the accused giving compensation to the victim and other expenses incurred during the case.

- The judge is not a silent spectator, but has a significant role to play in the process. The court is responsible for ensuring that the whole process is carried out with the full and voluntary consent of the accused. Where a satisfactory disposition of the case has been worked out, the court is bound to dispose of the case after awarding compensation to

[20] LAW COMMISSION OF INDIA, 142nd Report On Concessional Treatment For Offenders Who On Their Own Initiative Choose To Plead Guilty Without Any Bargaining 24-34 (NEW DELHI, 1991).

[21] 154th Report of Law Commission of India, The Code of Criminal Procedure (1996).

[22] UNION MINISTER OF HOME AFFAIRS, Report of the Committee on Reforms of Criminal Justice System 179 (New Delhi, 2003).

[23] Neeraj Arora, *Plea Bargaining – A New Development in Criminal Justice System* (Oct. 10, 2018, 12:48 PM) http://www.legallyindia.com/plea-bargaining-a-new-development-in-the-criminal-justice-system.

the victim as per the settlement arrived at, and after hearing the concerned parties on the issue of quantum of punishment. It then has to award the sentence, and this may range from one fourth to one-half of the prescribed punishment for that offence.

- The law also makes it mandatory to pronounce the judgment in open court. A clause has been added in favour of the accused stipulating that the statement or facts stated by an accused in an application for plea bargaining shall not be used for any other purpose.

- The judgment delivered by the Court in case of plea bargaining shall be final and no appeal shall lie in any court against the judgment.

- Section 265A declares that plea bargaining cannot be availed of in respect of those offences for which punishment is more than an imprisonment of seven years and/or where the offence affects the socio-economic condition of the country (to be notified by the Central Government) or has been committed against a woman or a child below the age of fourteen years. The availability of the procedure is also restricted to first time offenders.

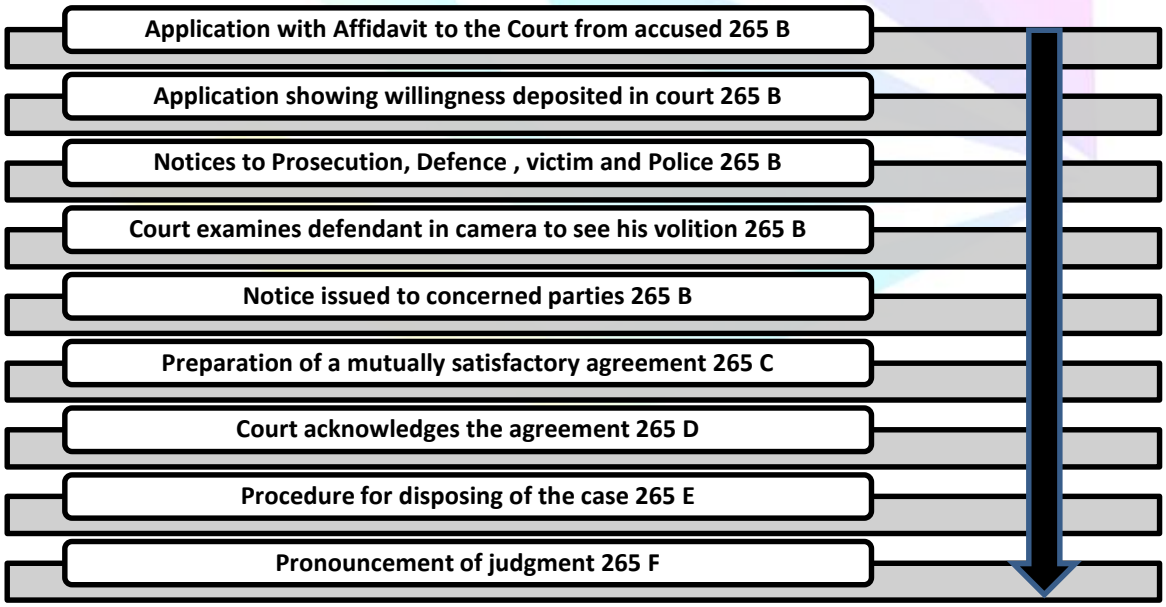

Figure – 2: Flow Chart Depicting the Procedures in a Plea Bargaining Case in India.

SOME INDIAN CASES RELATED TO PLEA BARGAINING

To some limited purposes sentence bargaining has been applied almost regularly in India in cases where changing the nature of punishment and reducing the quantum of sentence was within the discretionary power of the trial courts. However, the Supreme Court in its all judgments prior to the introduction of Plea Bargaining in the Indian Judicial System has shown strong opposition to this concept:

- In *State of UP v. Chandrika*[24], the Supreme Court decided that the disposal of cases on the basis of plea bargaining is not permissible. Mere acceptance of admission of guilt should not be a ground for reduction of sentence.

- Justice P.N. Bhagwati in *Kasambai Abdulrahmanbhai Seikh vs State of Gujarat*[25], declared plea bargaining as unconstitutional and illegal. In this case judgment of High Court is set aside by Supreme Court and the plea of guilty is ignored, conviction of accused is set aside and the case is sent back to the Magistrate for trial in accordance with law.

- Justice M.Hidayatullah in *Madanlal Ramchandra Daga v. State of Maharashtra*[26], disapproved the practice of plea bargaining by the succinct observation that "In our opinion, it is very wrong for a Court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the Court should never be a party to bargain by which money is recovered for the complainant through their agency".

- In *Thippaswamy v. State of Karnataka*[27], the Supreme Court held that enforcement or imposition of sentence in revision or appeal after the accused had plea bargained for a

[24] A.I.R. 2000 SC 164.
[25] A.I.R. 1980 SC 854.
[26] A.I.R. 1968 SC 1267.
[27] A.I.R. 1983 SC 747.

lighter sentence or mere fine in the trial court as unconstitutional being in violation of Article 21.

There have been mixed trends in judicial pronouncements after the introduction of Plea Bargaining system in India.

- While commenting on the concept of plea bargaining, the Gujarat High Court observed in the State of *Gujarat v. Natwar Harchanji Thakor*[28], that the very object of the law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure of redressal and it shall add a new dimension in the realm of judicial reforms.
- In Mumbai's first case[29], an application for plea bargaining was made before a sessions court when an ex-Reserve Bank of India clerk, accused in a cheating case, moved the court seeking lesser punishment in return for confessing to the crime. In the present case, Sakharam Bandekar, a grade I government employee, was accused of siphoning off Rs 1.48 crore from RBI by issuing vouchers against fictitious names between 1993 to 1997 and transferring the money into his personal account. Bandekar was arrested by the CBI on October 24, 1997, and later released on bail in November the same year. The case came up for trial before Special CBI Judge A R Joshi and charges were framed against Bandekar on March 2, 2007. However, the accused moved an application before the court on August 18, stating he was 58 years old and would seek plea bargaining. The court then directed the prosecution to file its reply. CBI opposed the application. Based on submissions of CBI, the court rejected Bandekar's application.
- In *Pardeep Gupta v. State*[30], Honourable Judge observed that "The trial court's rejection of the plea bargain shows that the learned trial court had not bothered to look into the provisions of chapter XXI A of Code of Criminal Procedure meant for the purpose of plea bargaining. The High Court directed the trial court to reconsider the

[28] 2005 Cr.L.J. 2957, 2005 1 GLR 709.
[29] Kartikeya, *US-Style Plea Bargain Comes To Mumbai*, TIMES OF INDIA, Oct 15, 2007 (Oct. 10, 2018, 7:42 PM).
[30] Pardeep Gupta vs. State, Bail Appln.No.1298/2007, High Court of New Delhi.

application of plea bargaining made by the accused in the light of provisions made in the Code of Criminal Procedure and not in a casual manner.

- In the latest development related to Plea Bargaining in India, Supreme Court has asked the states to consider Plea Bargaining to reduce the malaise of pendency of cases. In a multi-dimensional petition heard by Supreme Court consisting of the then Chief Justice Deepak Mishra, Justice A.M. Khanwilkar and Justice D.Y. Chandrachud, the court has asked the states to do so. The petition filed by a spirited citizen, a retired Army officer, Mr. Anil Kabotra sought from the court directions to reduce pendency of cases, to reduce the holidays and increase working hours in Courts till the problem of pendency of cases is solved to some extent and a ban on advocates being elevated as High Court judges where they have practiced and where any of their blood relative is a counsel[31].

CONCLUSION

The Chapter on Plea Bargaining incorporated in the Cr. P.C. after the Criminal Law (Amendment) Act 2005 is at divergence with suggestions made by the Law Commission of India in its Reports. The Law Commission had advocated for *concessional treatment for those who on their own choose to plead guilty without any bargaining*. The scheme envisaged the constitution of a Competent Authority - a Metropolitan Magistrate or a Magistrate of the First Class specially designated as a Plea Judge by the High Court in case of offences punishable with imprisonment for less than seven years. In case of other offences, the Law Commission had proposed appointment of two retired judges of the High Court to decide on whether or not to accord concessional treatment to an accused making an application for the same. Theoretically, therefore, there is no room for bargaining or underhand dealings with the prosecution or the judge trying the case. The scheme recommended was, therefore, only a formalization of the practice of showing some leniency in punishment to those who plead guilty, rather than plea bargaining in its conventional sense.

[31] Economic Times e-paper, *Supreme Court asks states to consider plea bargaining to reduce pendency of cases* (12th Nov. 2018, 22:23) //economictimes.indiatimes.com/articleshow/65106791.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

It is interesting to see that before the Criminal Law Amendment Act 2005, all cases with a component of plea bargain were rejected by courts. The situation has changed in post 2005 period to some extent but still the judiciary tends to have a mixed approach towards this valuable addition to the Criminal Law Justice System and by any standard it is grossly underutilized in spite of its already very restricted scope of applicability to offences attracting maximum punishment of 7 years.

It is therefore heartening to note that the Criminal Law Amendment Act (2005), which became a law with effect from 5th July, 2006, has at least taken some basic tenets of the conventional plea bargaining and with a cautious approach of restricting its applicability to only relatively less serious crimes, has kept the scope wide open for enhancing the applicability of plea bargaining to other domains of criminal law and make it more popular in the Indian judicial system.

Critics of plea bargaining argue its many disadvantages[32]. A major argument is that it is detrimental to the innocent defendant undermining the public image of the criminal justice system representing a system which sacrifices proper punishment of criminals in the name of judicial efficiency. Another observation of critics is that most guilty pleas are not as a result of genuine repentance and defendants pretend repentance to earn sentence reductions. Some other drawbacks of the concept of plea bargaining as mentioned by critics are unjust sentencing or disparity in sentencing and a general attitude of leniency of the court in pronouncing the punishment[33].

It is only a matter of arguments as to what weighs heavy – the merits or the demerits of the plea bargaining system. Going by the discussions above it may be inferred that the merits of the concept of plea bargaining are worth giving a consideration for applying the system on as large a scale as in USA with some adequate checks and precautions.

[32] A. K. Sikri & Ms. Arora, *Plea Bargaining – A New Form of ADR in Criminal Cases*,22 Punjab University Law Journal (2007).
[33] S. De, *Plea Bargaining – A New Path in Criminal Justice System*, 171 Cr.L.J.(2011).

It is very well understood that the Indian Legal System is not ready to adopt the Plea Bargaining System on the same scale as in USA as we do not have the required infrastructure for this nor do we have that mindset of arriving at some agreement between the concerned parties through ethical and transparent arguments and discussions. The way necessity-based changes have been brought in some aspects of our legal system during last 5 years or so give a hope that wider and more meaningful application of Plea Bargaining may be seen in the future. The most valid reason for bringing in plea bargaining in the Indian Legal System with wider applicability is that Indian Jails have over 65% inmates who are under-trial and the bulk of these are lodged in jails for 3 to 4 years or more for crimes which come under the ambit of plea bargaining.