LAW COMMISSION OF INDIA

One Hundred Forty Second Report

ON

Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining

1991

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LAW COMMISSION

GOVERNMENT OF INDIA

SHASTRI BHAVAN

NEW DELHI

JUSTICE M. P. THAKKAR
Chairman

D. O. No. 6(3)/90-LC(LS).

August 22, 1991

To

Shri K. Vijay Bhaskar Reddy,
Minister of Law, Justice and
Company Affairs,
Government of India,
Shastri Bhavan,
NEW DELHI.

Dear Minister,

Ref. : Presentation of 142*nd Report.*

A problem exercising the minds of all concerned with the administration of Justice, that of the mounting arrears of criminal cases and unconscienable delays in disposal thereof, has engaged the attention of the Law Commission of India. The *suo motu* exercise undertaken by the Commission in respect of one facet of the problem has culminated in the 142nd Report of the Commission being presented hereby bearing the caption:—

CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGAINING

It is hoped that the recommendations made therein will prove of great value in tackling the problem.

With warm Regards

Yours faithfully,

Sd./

(M.P. THAKKAR)

Encl. : 142nd Report.

CONTENTS

CHAPTER I

INTROUDCTION

1.1. **The Objective.**—The Commission has been exercised by the problems arising on account of abnormal delays in the disposal of criminal trials and appeals. And by the explosion of the number of under-trial prisoners languishing in jails for very many years. The Commission, accordingly felt that some remedial legislative measures to reduce delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under-trial prisoners in jails awaiting the commencement of the trials were called for. The Commission, therefore, *suo moto* took up this matter and invested considerable time and deliberations in order to formulate proposals on this subject. *The present report recommending the introduction of the concept of concessional treatment for those who choose to plead guilty without any bargaining* under the authority of law informed with adequate safeguards, is the culmination of this exercise on the part of the Commission.

1.2. **Experience of American Courts.**—In this context the practice of plea-bargaining which has found acceptance in many states forming a part of the United States of America and has proved to be successful attracts attention to itself. In Canada a serious move is already afoot to introduce this practice by way of a special legislation. The Law Commission of Canada which was earlier disposed against it appears to be veering round to the view that it deserves to be introduced, albeit, with adequate safeguards.

1.3.1. **Evolving a new model.**—On the part of the Commission an endeavour has been made to evolve a system on an entirely new model which allays the fears and apprehensions entertained by those who are averse to the aforesaid concent and steers clear of the pitfalls to a great extent in this back drop.

1.3.2. What is more, the model being evolved is required to take care of the provisions relating to (1) release of offenders on probation and (2) to compounding of offences, which aspects do not figure in the plea-bargaining practice obtaining elsewhere. In shaping the model scheme these aspects have been taken care of.

1.4. It is hoped that the scheme being proposed by this Report will, by and large, meet all objections and achieve the purpose of the exercise.

CHAPTER II

MAGNITUDE OF THE PROBLEM OF DELAYS IN CRIMINAL CASES

2.1. **Delay in the disposal of criminal trials and appeals.**—Grievances have been vented in public that the disposal of criminal trials in the courts of the Magistrates and District and Session Judges takes considerable time. *It is said that the criminal trials do not commence for as long a period as three to four years after the accused was remitted to judicial custody.* In the meantime the accused languish in jails. It was further represented that the conditions prevailing in the jails are appealing and the accused are obliged to live in sub-human conditions mixed up with hard-core criminals. *It is said that in several cases the time spent by the accused in jails before the commencement of trials exceeds the maximum punishment which can be awarded to them even if they are found guilty of offences charged against them.*

2.2. An appeal is generally carried against the Order of the trial court, especially in Sessions cases. Experience has shown that in the High Courts, (barring exceptions), it would take at least five to eight years for a criminal appeal to be decided. *In High Courts like Allahabad and Bombay, the Commission gathered the period of waiting for the disposal of the Appeals is as long as ten years.* If the matter should be carried on further appeal to the Supreme Court, *it would be another* 10 *years by the time the Supreme Court decides the matter.* As on date, the Commission found, the Supreme Court is dealing with criminal Appeals relating to the year 1979. This enormous delay in the disposal of criminal matters in courts which should normally receive speedy attention is the result of docket explosion.

2.3. **Supreme Court takes cognizance of the matter.**—The facts stated in the immediately preceding paragraph came to the notice of the Supreme Court in a number of cases, most important among which is that of *Hussainara Khatoon* V. *State of Bihar*[1], dealing with the above case originating from the State of Bihar. The Supreme Court passed a number of Orders in this connection commencing from AIR 1979 SC 1360.

2.4. It was brought to the notice of the Supreme Court that an alarmingly large number of men and women—children including—are behind prison bars for years awaiting trails in courts of law. It was observed by the Supreme Court that,[2]

> "the offences with which some of them are charged are trivial, which, *even if 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*".
>
> [Emphasis added].

2.5. The Supreme Court noticed that several under-trial prisoners have been in jails for as many as five, seven or nine years and a few of them even more than ten years without their trial having begun. The Supreme Court lamented:[3]

> "What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail *and the courts have no time to try them.* It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular servitude for little offences because the bail procedure is beyond their meagre means and *trials don't commence and, even if they do, they never conclude*".

The Supreme Court had further found :[4]

> "There is also one other *infirmity of the legal and judicial system which is responsible for this gross denial of justice to the under-trial prisoners and that is the notorious delay in disposal of cases.* It is a sad reflection on the legal and

judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough ; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice."

[Emphasis added]

2.6. The Commission noticed that over the years the situation has not improved. Long delays continue to occur in the disposal of trials and appeals. In the state of affairs as now existing it is extremely difficult to expedite the process of criminal trials in the subordinate courts and the disposal of appeals in the appellate courts. Extent and duration of cross examination cannot be curtailed without creating other problems. Nor can arguments be curtailed for the same reason. There is, therefore, little scope for streamlining the system to achieve more expeditious disposal. Besides, the Commission has reason to believe that the increase in the number of courts and the Judges would not necessarily result in eliminating the delays in the disposal of trials and appeals mitigating the hardships suffered by the under-trial prisoners. In spite of the stern warning administered by the Supreme Court bail procedures continue to be as unsatisfactory as they were. It is not reported that there is any improvement in the duration of the time spent by the under-trial prisoners in jails awaiting their trials to commence. The Commission feels that perhaps the conditions have further deteriorated calling for immediate reform in the matter.

2.7. **Unavailability of relevant statistical data regarding under trial prisoners.**— Unfortunately, the relevant statistics are not available. The State Governments have to be approached for furnishing the number of under-trial prisoners languishing in jails awaiting trials to commence and the period of which they have been in jails. *The State Governments are generally reluctant to collect the information and furnish the same. The State of Bihar, which was a party before the Supreme Court in Hussainara Case,*[5] *failed to furnish the information even though specifically directed by the Supreme Court.* Eventually, the Supreme Court had to proceed on the basis that the information contained in the affidavits filed by the petitioners and the newspaper reports was correct as the State of Bihar did not refute the same. The absence of vital statistics has, to some extent, hampered the Commission in processing the matter. Realising that fruitful results are not likely to follow, no attempt has been made to write to the State Governments for information in this regard. The Commission drew upon its own experience and the innumerable representations being made by sociologists and others to pursue consideration of the matter. In one sense, the statistics are not indispensable because the practices and the principles are not, and cannot be, in dispute.

2.8. The High Courts in the country were addressed to furnish relevant statistical data. Information was called for concerning the period for which criminal trials are pending in Sessions Courts and Magistrates Courts and also the number of cases disposed of classified into cases resulting in conviction and cases resulting in acquittal. This information was called for with a view to examine two aspects. Firstly, the length of time for which trials are pending in subordinate courts and secondly, the percentage of acquittals eventually after the conclusion of the trials. The High Courts were also requested to state the number of criminal appeals pending, classified yearwise, and also the number of appeals disposed of with results. Some High Courts had complied with the request of the Commission. Andhra Pradesh, Karnataka and Maharashtra forwarded statements from the District Judges, Metropolitan Magistrates and Chief Judicial Magistrates. Unfortunately, however, the statements forwarded do not cover all the courts in the jurisdiction of the concenred High Courts with the result that consolidation of the particulars was not possible. It was obviously for these reasons that even the High Courts did not endeavour to consolidate the particulars furnished by the District Courts. The statements as such were forwarded to the Commission. There is very meagre response from the remaining High Courts in the sense that only a handful of statements were forwarded from the Sessions Judges, etc. without the slightest possibility to consolidate the information for the entire State. The Commission noticed some kind of reluctance on the part of the High Courts to engage actively in this matter obviously in view of the workload involved. For obvious reasons, the Commission could not also persuade the High Courts to strictly comply with the requests.

2.9. The information available to the Commission was examined. *The State of Andhra Pradesh perhaps was the only exception in regard to criminal appeal pending in the High Court.* The Commission noticed that appeals upto and including the year 1988 had been disposed of and High Court is now engaged in the process of disposal of criminal appeals for the year 1989—a very satisfactory state of affairs indeed. *The position is not happy in regard to the other High Courts.* Pendency of trials in the Sessions Courts as well as the Courts of the Metropolitan Magistrates and Chief Judicial Magistrates is quite alarming. *A close study of the statistical data furnished by the Judges would indicate that criminal trials are pending from the year* 1982 *onwards.* The statistical information furnished regarding the result of trials indicates extraordinary results. *The acquittals constitute over* 90 *per cent and convictions are a paltry* 10 *per cent and less. The information furnished by Judges in some courts revealed that "all" the cases resulted in acquittals.* The Judges who personally appeared before the Commission were asked to state exceptional reasons for a high percentage of acquittals. There was a uniform reply from all the Judges. It is pointed out that during the period the trials remain pending, situations completely change; some witnesses vanish and some witnesses on whose testimony the prosecution sought to rely make total somersaults. The reasons may be two-fold. Firstly, due to passage of time memories fail and the happening of events passes outside the comprehension of the witnesses resulting in serious discrepancies when they go to the witness box during the course of the trial years after the event. Secondly, the ingenuity of the accused and the lawyers influences the course of trial. The result is the Judges are very often faced with exceedingly unsatisfactory prosecution cases. They are helpless and the cases result in acquittal for want of satisfactory evidence. *The Judges stated that if the period of waiting could be reduced, there may be a greater possibility of the evidence forthcoming more effectively.* That confronts us again with the same problem of reducing the delays in the courts.

2.10. Some press reports cause distress and dismay. A recent press report[6] relates to the story of a criminal case which occupied 33 years. It cost the public exchequer about one crore of rupees though it pertained to defalcation of a sum of Rs. 19000 (Rs. 12000+Rs. 4000 + Rs. 3000). Another[7] pertains to the state of docket in City Civil & Sessions Court, Bombay. In 1988, 124 (One hundred and twenty-four) rape cases were recorded but only 1 (one) was disposed of. In first half of 1989, *67* cases were recorded but *none* was disposed of. This information makes one wonder whether culprits would be brought to book for decades, what with appeals and further appeals. And if 90 per cent of cases terminate in acquittals even after decades, is any social purpose served by the present system?

2.11. It cannot, therefore, be again said that the problem is a grave one and clamours for urgent attention. The concept of plea-bargaining as obtaining in the USA needs to be examined in the light of this ungainly situation.

CHAPTER III

CONCEPT OF PLEA-BARGAINING—A PRACTICE BEING SUCCESSFULLY PRACTISED IN U. S. A.

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

3.2. **Not practised in India.**—Criminal jurisprudence of India does not recognise the concept of "plea-bargaining" as such. Reference may, however, be made to section 206(1) and section 206(3) of the Code of Criminal Procedure and section 208(1) of the Motor Vehicles Act, 1988. These provisions enable the accused to plead guilty for petty offences and to pay small fines whereupon the case is closed. But there is no bargaining between the prosecution on the one hand and the accused on the other. For examining the pros and cons of the practise it is, therefore, necessary to make an intensive study of this concept as practised in America and other countries and the results thereof. The views in favour of the concept as well as against it deserve to be carefully assessed. It would be desirable to deal with this concept in some detail so that there is proper appreciation of the matter.

3.3.1. **Origin.**—The practise of "Plea-bargaining" in America goes back a century or more. One study found it, for example, in Alameda County, California, in about the 1880s. Judges in the County even talked about the way they gave credit for guilty pleas. "Plea-bargaining" was not as pervasive as it is now.... not even close to it....but it was by no means rare.

3.3.2. **Extent of prevalance.**—Entering a guilty plea is greatly prevalent in many American States. In 1839, in New York State, one out of every four criminal cases ended with a guilty plea. By the middle of the century there were guilty pleas in half the cases. In Alameda County, one out of three felony defendants pleaded guilty. In 1920s guilty pleas accounted for 88 out of 100 convictions in New York City, 85 out of 100 in Chicago, 70 out of 100 in Dallas and 79 out of 100 in Des Moines, Iowa. It has kept its dominance ever since.[1] In short, one can trace a steady and marked decline in number of trials by jury in America from the early 19th century on.

3.4. **Reasoning of proponents.**—A sizeable section of public opinion favours the practise. Five reasons are advanced by its support :—

(1) Most people arrested, they say, are guilty any way ; why bother with a trial ?

(2) Why waste public money ?

(3) "Plea-bargaining" is a compromise ; both sides give a little and gain a little.

(4) Trials consume time and costs.

(5) It is best (for both sides) to avail it since on the one hand there is always a chance that even if the defendant is guilty and the evidence is adequate there is a chance of a slip up. On the other the defendant saves time and money and earns a concession in the form of a less serious offence or sentence.

2—104 Min. of LJ & CA (ND)/93.

3.5. **Opponents view points.**—On the other hand a growing number of people in America feel that "Plea-bargaining" is a disgrace and offer three criticisms viz:—

(1) "Law and order people" think, it shows too much softness towards defendants. Dangerous criminals cop a plea and slip through the nets.

(2) Others claim that the process is unfair to the innocent.

(3) One study claimed that up to one-third of the people who plead guilty would be acquitted if they went to trial.

3.6. Some people, however, think that while it does not mean that those who secured acquittal were innocent of the crime, "plea-bargaining" provides only a legal excuse where the evidence is weak. In any event, "plea-bargaining" (so the argument goes) makes a mockery of criminal process. It does not fit into the image of due process.

3.7. Several prosecutors have tried to end "plea-bargaining". In Wyne County, Michigan, the prosecutor ordered his staff not to bargain in any case when defendant used a gun. The Attorney General of Alaska in 1975 banned the practice of "plea-bargaining".

3.8. **Need to assess the system as it is.**—With the public opinion being sharply divided in U.S.A., demands for reform have been surfacing from many quarters. Nevertheless, the system is in vogue in a number of States even today and the number of trials settled by guilty pleas constitute a very large proportion of the total cases disposed of. The system as it is functioning as at present, may, under the circumstances, be subjected to scrutiny with advantage in the light of the positive features of the practise without disregarding the negative features thereof.

3.9. **Assumption that ordinarily the innocent would not plead guilty.**—*The Superme Court of the United States has explicitly approved the practise mainly on the assumption that defendants who are convicted on the basis of negotiated pleas of guilt would ordinarily have been convicted had they elected to stand trial.* The principle consists of the promise of reduction of charge from the one levelled against a defendant to a less serious charge or of sympathetic treatment in sentencing. For the accused what is important is saving of expenses (legal and otherwise) and the desire to start a new life after suffering the agreed sentence as early as possible and also to avoid detention pending the trial. In most cases some or all the considerations indicated hereinbefore that induced pleas of guilty.

3.10. **Do the really guilty escape lightly.**—Public attention in America has also focussed on one important aspect of this problem : The extent to which "plea-bargaining" has permitted the defendants to escape the just consequences of their crimes by pleading guilty to reduced charges. The variance between the offence charged and the offence accepted on plea provides highly visible and dramatic evidence of the extent to which the State's interest has been compromised. The fairness of bargaining practices, however, also depends on how likely it is that the accused would have been convicted if no bargain had been offered. If the case against the accused is weak his plea of guilt can be attributed to inducements that may taint the trustworthiness of his admission. More fundamentally it needs to be examined whether strong pressure has been exercised to compel a confession in weak case and when the prosecutor's zeal to obtain a confession by "consent" begins to collide with the defendant's privilege against self-incrimination.

3.11. **U.S. Supreme Court upholds constitutionality and recognises the value of plea-bargaining.**—It would, perhaps, be appropriate to refer to two leading cases of the American Supreme Court *sustaining the constitutional validity and also the important role the concept of "plea-bargaining" plays in the disposition of criminal cases.*

The costitutional validity of "plea-bargaining" has been upheld by the United States Supreme Court in *Brady* v *United States*[2] Justice White, who delivered the opinion of the Court, observed :

> "The issue we deal with is inherent in the criminal law and its administration because *guilty pleas are not constitutionally forbidden,* because the criminal law characteristically *extends to judge or jury a range of choice in setting the sentence*

in individual cases, and because *both* the State and the defendant often find it advantageous *to preclude the possibility of the maximum penalty authorised by law. For a defendant who sees slight possibility of acquittal,* the advantages of pleading guilty and limiting the probable penalty are obvious—his *exposure is reduced, the correctional process can begin immediately, and the practical burdens of a trial are eliminated. For the State* there are also advantages—the more *promptly imposed punishment after an admission of guilt may more effectively attain the objectives* of punishment; and with the avoidance of trial, *scarce resources are conserved for those cases in which there is a substantial issue of the defendant's* guilt or in which there is substantial doubt that the State can sustain its burden of proof. *It is this mutuality of avdantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on the pleas of guilty,* a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty then might be imposed if there were a guilty verdict after a trial to judge or jury." (25 L. Ed. 2d. P. 758).

[Emphasis added]

3.12. **The Supreme Court held that guilty pleas are valid if they are voluntary and intelligent.**—There must be material to show that the guilty plea is voluntary, deliberate and informed; the record must affirmatively disclose that a defendant who pleads guilty enters his plea understandingly and voluntarily. It was observed by the Supreme Court that a guilty plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial.....a waiver of this right to trial before a judge.

The Supreme Court further observed :

"Pleas of guilty—made by some people because their *reach of a Statutee law is alone sufficient reason* for surredering themselves and accepting punishment, by others because *apprenhesion and charge, both threatening acts by the Government, far them into admitting their guilt,* and by still others because the *post indictment accumulations of evidence may convince* the defendant and his counsel that a *trial is not worth the agony and expense to the defendant and his family—are all valid,* and are not improperly compelled, in spite of the State's responsibility for some of the factors motivating the pleas." (p. 751 Para 10).

[Emphasis added]

3.13. **The Supreme Court also found that the award of lesser punishment pursuant to please bargain is not invalid.** It observed :—

"Although the fact that the prevalence of guilty pleas as the basis of convictions is explainable because of the mutuality of advantage to the defendant and the State does not necessarily validate such pleas nor the system which produces them, nevertheless it *is not unconstitutional for the State to extend the benefit of a lesser penalty than after trial to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his crime and to enter the correctional system* in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." (p. 751, Para 14.)

[Emphasis added]

The Supreme Court further observed :

"This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking *guilty* pleas presently employed in this country are necessarily valid in all aspects, *his mode of conviction is no fool proof than full trials to the court or to the jury.* Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." (p. 761, Para 24).

[Emphasis added]

3.14. Validity of plea bargaining was also upheld by the United States Supreme Court in *Santobello vs New York.*[8] Chief Justice Burger, who delivered the opinion of the Court, observed at p. 261-262.

"Disposition of charges after plea discussions *is not only an essential part of the process but a highly desirable part for many reasons.* It leads to *prompt and largely final* disposition of most criminal cases; *it avoids much of the corrosive impact of enforced idleness during pre-trial confinement* for those who are denied release pending trial; it *protects the public from those accused persons who are prone to continue criminal* conduct even while on pre-trial release; and *by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects* of the guilty when they are ultimately imprisoned.

Of course the court highlighted the need for precautions by pointing out that:—

However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused *pleading guilty must be counselled, absent a waiver. Moore* vs. *Michigan* 335 US 155 (1957). Fed. Rule Crime Proc. 11, governing pleas in federal courts, now makes clear that the *sentencing Judge must develop,* on the record, *the factual basis for the plea,* as, for example, by having the accused describe the conduct that gave rise to the charge. The *plea must, of course. be voluntary and knowing and* if it was induced by promises, the essence of those promises must in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. *Lynch* vs. *Over holser,* 369 US. 705, 719 (1962) Fed. Rule Crim. Proc. 11. *A court may reject a plea in exercise of sound judicial discretion.*

"This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilt, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

In concurrent judgment Mr. Justice Douglas observed : (p. 257)

"these plea-bargains are important in the administration of justice both at the State and at the Federal levels and, as the Chief Justice says, *they served an important role in the disposition of today's heavy calendars.*"

3.15. *The United States Supreme Court has reiterated the view, in the following cases that, when properly administrered, "plea-bargaining" is a proper method for administering justice :*

(i) **In Hutto v Ross** [4]the Supreme Court observed, inter-alia,

"If every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilitised. Disposition of criminal charges after plea discussions or plea-bargaining is not only an essential part of the criminal process but a highly desirable part."

(ii) In **Chaffin v Stynchcombe** [5]the Supreme Court reiterated its earlier view in Santobello case that the legitimacy of the practice of "plea-bargaining" cannot be doubted and where properly administered, it is to be encuraged as an essential and desirable component of the administration of justice.

(iii) **Blackledge v Allison,**[6] the Supreme Court noted that it was only recently that "plea-bargaining" had become visible practice accepted as a legitimate component of the administration of criminal justice and that it was not until the decision in Santobello that lingering doubts about the legitimacy of the practice were dispelled.

(iv) **Weatherford v Bursey**[7] The same views were reiterated by the Supreme Court in this case.

3.16. **In Newton v Rumery**[8], **Justice Stevens of the U.S. Supreme Court observed** (at page 426).

"The net result of every plea bargain is an admission of wrongdoing by the defendant and the imposition of the criminal sanction with its attendant stigma. *Although there may be some cases in which an innocent person pleads guilty to a minor offence to avoid risk of conviction of a more serious charge, it is reasonable to presume that such cases are rare and represent the exception rather than the rule*.....the plea bargain represents a practical compromise between the prosecutor and the defendant that *takes into account the burdens of litigation and its probable outcome as well as society's interest in imposing appropriate punishment upon an admitted wrongdoer. The dependent admits wrongdoing for conduct upon which the guilty plea is based and avoids further prosecution; the prosecutor need not go to trial; and an admitted wrongdoer is punished* all under close judicial supervision. By simultaneously establishing and limiting defendant's criminal liability, *plea bargains delicately balance individual and social advantage.*"

[Emphasis added]

3.17. **An Analysis of U.S. Supreme Court Judgments.**—It would be seen from the cases discussed referred hereinabove that the reasoning which appealed to the American Supreme Court was to an extent built on the assumption that those who are induced to plead guilty would, in any event ordinarily be convicted. *The U.S. Supreme Court has expressed the view that "plea-bargaining" provides advantages for both the defendant and the State.* The Court has observed to the effect that for a defendant who sees a slight opportunity of securing an acquittal the advantages of pleading guilty and limiting the penalty are obvious. On the other hand from the stand point of the State the plea which results in avoiding a fullfledged trial serves to conserve the judicial and prosecutorial resources for being utilized only for those cases in which there is substantial doubt that the State can sustain its burden of proof. *The Supreme Court further held "among the virtures, a guilty plea enhances whatever may be the rehabilitative process of the guilty when they are ultimately imprisoned."*

3.18. **Conclusion.**—The moral of the discussion is that the practise does not collide either with the constitution or the fairness principle and is on the whole worthy of emulation with the awareness as regards providing appropriate safeguards. What the Commission has in mind is a scheme, specially evolved or designed in the context of the existing legislation and the National ethos by getting rid of all objectionable features and introducing some basic improvements in several areas. But before addressing this question, it is appropriate to assess the import of certain observations made by the Supreme Court of India, albeit in the existing legal framwork of law which does not recognise such a practise.

CHAPTER IV

COMMISSION MAKES A SURVEY

4.1. Taking a note of all the above aspects of the matter, the Commission felt that a sample survey should be made and well-informed opinion gathered within the country before finally taking a decision in the matter. The Commission thought that opinion may be gathered by contacting members of the Bar and Bench in four States and one Union Territory. Accordingly, Andhra Pradesh, Karnataka, Maharashtra and Uttar Pradesh and the Union Territory of Delhi were selected by way of a sample survey for the purpose of eliciting opinion not only on the basic question whether the concept of "plea-bargaining" should be introduced in our criminal jurisprudence, but also on the various allied matters that arise for consideration. A brief note, along with a questionnaire (ANNEXURE 'A') was sent to all the High Courts with a request that it may be circulated among all the Hon 'ble Judges of the High Court and the Sessions Judges and Magistrates. The said note and questionnaire were also circulated among persons whom the Commission proposed to contact personally.

4.2. Adequate programmes were drawn up in each of the four States and the Union Territory of Delhi to contact High Court Judges, Sessions Judges, Metropolitan and Chief Judicial Magistrates, Law Officers like Advocate General, Public Prosecutor, Government Pleader etc., President of the Bar Association, Chairman of the Bar Council, Senior Counsels on the trial as well as the appellate side of the criminal courts and finally Academicians and sociologists. The High Courts of Andhra Pradesh, Karnataka, Maharashtra and Uttar Pradesh helped the Commission in drawing up suitable programmes to contact the above category of persons. The High Court of Delhi has also issued directions to some Sessions Judges to appear before the Commission and state the necessary views in the matter. The Commission deputed one of its Members to visit the above States personally and hold sittings in the respective High Courts and record the views of the Hon'ble Judges of the High Court, judicial officers, law officers and the counsel specially invited to meet the Members of the Commission for the purpose. The Learned Member accordingly visited the States and recorded the views of the experts appearing before him in response to the request made by the Commission. The High Courts have also circulated the questionnaire and forwarded the same to the Law Commission. The views personally expressed by the persons who appeared before the Member of the Commission and also the views expressed in the answer to the questionnaire issued were duly tabulated in the Commission's office.

4.3. The following Table shows particulars of the various persons whose views were recorded in the States of Andhra Pradesh, Karnataka, Maharashtra and Uttar Pradesh and the Union Territory of Delhi. The Table also contains particulars regarding the number of persons who sent replies to the questionnaire issued. It may be pointed out that apart from Andhra Pradesh, Karnataka, Maharashtra, Uttar Pradesh and Delhi, Punjab and Haryana, Kerala, Himachal Pradesh and West Bengal have also forwarded responses to the questionnaire issued.

State	Number of persons whose views were recorded	Number of persons responded to the questionnaire	Total
Andhra Pradesh	17	41	58
Karnataka	12	42	54
Maharashtra	35	34	69
Uttar Pradesh	30	26	56
Delhi	3	17	20
Punjab and Haryana	..	84	84
Kerala	..	18	18
Himachal Pradesh	..	22	22
West Bengal	..	41	41
TOTAL	97	325	422

4.4. A classification of the persons whose views were personally recorded may be seen from the following Table :

State	No. of High Court Judges	District and Sessions Judges, Chief Metropolitan Magistrates and CJMS. Registrars of High Courts etc.	Law Officers, Advocate General, Public Prosecutors, Govt. Advocates etc.	Lawyers including trial Lawyers and appellate lawyers on the criminal side	Total
Andhra Pradesh . .	5	3	4	5	17
Karnataka . . .	4	4	3	1	12
Maharashtra . . .	5	4	5	21	35
Uttar Pradesh . . .	4	7	5	14	30
Delhi	..	3	..	..	3
TOTAL . .	18	21	17	41	97

The responses to the questionnaire received from the High Courts were from the Sessions Judges, Metropolitan Magistrates, Chief Judicial Magistrates, whose views were not personally recorded.

4.5. An analysis was made of the views recorded from persons from various States and also of the views expressed by the judicial officers in the response sent from various States.

4.6. Basically two questions arise for consideration. *The first question is whether the scheme of "plea-bargaining" deserves to be introduced in the Indian Criminal Jurisprudence* ? If the answer to this question is 'No', further questions do not arise. *The second basic question*, if the answer to the first question is in the affirmative, is *whether the scheme should be applied to all categories of offences without any discrimination or only to specified offences* ?

4.7. Out of the persons whose views were recorded personally. 65 PERSONS EXPRESSED THE VIEW THAT IT WOULD BE APPROPRIATE AND BENEFICIAL TO INTRODUCE THE CONCEPT of "plea-bargaining" whereas 32 PERSONS INDICATED THEIR MIND "AGAINST" THE INTRODUCTION OF THE CONCEPT. OUT OF THE 65 PERSONS WHO REACTED "FAVOURABLY" to the introduction of the concept, 27 PERSONS WERE OF THE VIEW THAT THE SCHEME COULD BE APPLIED TO 'ALL' offences without discrimination. THE REMAINING 38 PERSONS QUALIFIED THEIR VIEW BY ADDING A RIDER. According to them the scheme could be applied to ONLY SPECIFIED OFFENCES. Particularly speaking. THESE PERSONS HOLD THE VIEW THAT THE SCHEME SHOULD NOT BE EXTENDED TO MAJOR OFFENCES AND ECONOMIC OFFENCES. There is again a wide divergence in the concept of "major offences". SOME ARE OF THE VIEW THAT THE EXCLUSION SHOULD BE ONLY OF OFFENCES WHICH ARE LIABLE TO BE PUNISHED BY DEATH SENTENCE OF LIFE IMPRISONMENT; SOME PUT IT AS OFFENCES FOR WHICH IMPRISONMENT IS MORE THAN 10 YEARS; YET OTHERS PUT IT AS OFFENCES PUNISHABLE WITH IMPRESONMENT FOR 7 YEARS AND MORE. Such are the views of those persons favourably disposed towards the concept being introduced in our criminal jurisprudence.

4.8. It may be ponited out that there is an almost near unanimity in the view that the scheme should not be extended to socio-economic offences and offences involving moral turpitude.

4.9. It was already mentioned that *responses were received from* 325 *judicial officers* by way of replies to the questionnaire. Out of these, 242 *judicial officers expressed their views in 'favour'* of introduction of the concept while the *remaining* '83' *officers are against the introduction. Out of the* 242 *officers,* 41 *officers are in 'favour' of the* introduction of the scheme *to 'all offences'* whereas 201 *officers expressed themselves against extention of the principle to all offences.* The 201 officers who expressed themselves against the application of this scheme to major offences hold *the view that it can be applied to less serious offences.* They are willing to classify

less serious offences as offences *for which imprisonment is seven years and more : offences for which imprisonment as* 10 *years and more ; and offences which are liable for punishment with death or life imprisonment.*

4.10. The statistical data may be summed up as under :

No. of persons who appeared before the Commission in persons and expressed their views.	97	
No. of persons who answered the questionnaire .	325	422
No. persons in favour of introduction of the concept	307	
No. of persons opposed to the introduction . .	115	422
No. of persons in favour of introduction of the concept to all offences.	68	
No. of persons in favour of introducing the concept only to specified offences	239	307

The survey reinforces the view that an improved version of the practise suitable to law and legal ethos of India needs to be considered with seriousness and with a sense of urgency. But before proceeding to do so it might be useful to take into account the thinking taking place on this very subject in Canada where the Law Commission has issued a working Paper recommending the practise of plea-bargaining in Canada where just like India it does exist at present. That will be the endeavour in the next Chapter.

CHAPTER V

CANADIAN LAW COMMISSION EXAMINES THE CONCEPT IN A WORKING PAPER OF 1989 AND RECOMMENDS INTRODUCTION THERE OF IN CRIMINAL JURISPRUDENCE

5.1. During the course of investigation, the Commission realised that the concept of plea-bargain was examined in detail by the Law Reforms Commission of Canada. Working Paper No. 15 was issued by the Canadian Law Commission in the year *1975* entitled "Criminal Procedure : Control of the Process". The Canadian Commission did not view favourably the introduction of the concept of "plea agreement" and expressed *serious reservations* both as to its utility and as to its desirability as a vehicle for furthering the ends of justice. The matter was re-examined in the year 1985 and eventually a working paper No. 60 was issued in the year *1989* recommending the consideration of the concept in criminal jurisprudence. The following observations of the Canadian Law Commission in its Working Paper in the year 1989 explain *why the Canadian Law Commission reconsidered the matter and recommended* the introduction of the concept in the Canadian Criminal Jurisprudence:

"We believe now, as we did in 1975, that *justice should not be and should be seen to be, something that can be purchased at the bargaining table.* At the same time, however, we are obliged to recognize that *our legal system has undergone significant change in the intervening years,* and that it is in the process of undergoing further change. Although we remain attuned to the *practical and theoretical difficulties inherent in the practice of plea negotiation,* we believe a cautious re-examination of the subject to be only prudent and appropriate in the light of a number of recent and ongoing developments having potentially far-reaching effect on the workings and character of our justice system.

[Page 4]

"....In short, the nature of our criminal justice system has evolved, and is constantly in the process of evolving. Our recognition of this fact, in turn, has caused us to explore in some detail the problems associated with plea negotiation, as it is currently practised, *and to consider what measures (short of total abolition) might be employed to deal with these problems in an effective* and principled way.

[Page 5]

"We believe it is safe to say, therefore that the plea negotiation process *has not generally enjoyed a very flattering public image.* Being a largely *unregulated* practice, moreover, plea negotiation has been *susceptible to abuse.* Having considered the question at length, however, and having taken into account recent studies dealing with possible effects that attempts to abolish plea negotiation might have, we are not convinced *that abolition (as opposed to regulation), is the* soundest remedial alternative. We note that in its recent report on *Sentencing Reform,* the Canadian Sentencing Commission has alluded to studies indicating that efforts to abolish plea negotiation may in fact present their own difficulties.....

[Page 7]

"In its policy document on *The Criminal Law in Canadian Society,* the Government of Canada quite clearly *did not view the process of plea negotiation as being incompatible per se with the basic precepts it espoused.* Rather than condemn the process outright, it expressed the hope that *suitable prosecutorial guidelines would be developed in the area, as part of an effort* to control discretion and thereby enhance accountability and equality in the criminal process.

[Page 8]

"In our estimation, it would *be a mistake to dismiss plea negotiation as a distasteful practice made necessary only by the unhappy reality of an overburdened criminal justice system.* Plea negotiation is not an inherently shameful practice; it

3—104 Min. of LJ & CA (ND)/93.

ought not, on a theoretical level, be characterised as a failure of principle. If practised properly it should, to the contrary, *be recognised as the expression and merging of* two complementary principles : those of efficiency and restraint.....

[Page 98]

"Nor should prosecutorial *Compromise necessarily be regarded* as a means of *shortchanging justice*. If the prosecution of a particular accused person without plea negotiation results in conviction *for more offences, or conviction for a more serious offence*, than that to which the accused was prepared to plead guilty (and results in the imposition of a more severe sentence, or more severe sentences, than might otherwise have been imposed), does this mean inevitably that justice has been properly served? *Often, we believe, the ordeal of a full scale trial may create its own injustice.*
[Page 9]

[Emphasis added]

5.2. Weighing the pros and cons the Commission finally expressed the view in favour of statutorily recognising the scheme of plea-bargaining which the Commission chose to designate as "*plea discussions and agreements.*" The Commission observed :

".... people are more likely to expect that a sentence imposed following a negotiated guilty plea and joint submission will be appropriate.*If they are assured that the presiding judge has been apprised, in open court, of the process by which the agreement was reached.* They also appear more likely, in such circumstances, *to express confidence in the fairness and propriety of the judges handling of the case.*"
[Page 13]

[Emphasis added]

5.3. In Chapter II of its Working Paper, the Candian Law Commission has twenty-three recommendations made by the Commission which are appended to this Report.[1] (*ANNEXURE 'B'*).

5.4. A close study of the views expressed by the Law Commission of Canada and the recommendations made there supports the conclusion articulated in the eariler Chapters as regards the desirability and need for serious and urgent consideration of this subject. The Commission will proceed to do so after dealing with some observations made by the Supreme Court of India in the context of the existing legal frame work which does not recognise the practice of plea-bargaining.

CHAPTER VI

OBSERVATIONS OF SUPREME COURT OF INDIA CONCERNING "PLEA-BARGAINING" IN THE CONTEXT OF THE PRESENT LEGAL FRAME

6.1. Courts in India had not had occasion to consider directly the impact of the practice of plea-bargaining on the administration of crimnal justice. It cannot be doubted that in quite a few trials and in the appeals against trial convictions, sentences are awarded taking into account suggestions made by the counsel for the defendant and agreed to by the prosecutors. These informal compromises do not have the sanction of law. Nevertheless, they are often acted upon without making specific reference to the compromise in the judgements of the courts concerned.

6.2. The Commission noticed that the Supreme Court has had occasion to make some observations in regard to the efficacy of "plea-bargaining" in two cases to which we shall presently refer. Since these observations emanate from the Supreme Court the Commission feels that it will be expedient to carefully assess the weight and importance thereof. The two cases are :

(i) Murlidhar Meghraj Loya etc. Vs State of Maharashtra, etc. AIR 1976 SC 1929 (Krishna Iyer, Goswami, JJ).

(ii) Kasambhai Abdulrehmanbhai Sheik etc. Vs State of Gujarat and another AIR 1980 SC 854 (Bhagwati, Sen, JJ)

6.3. In Murlidhar Meghraj Loya's case the Supreme Court gained an impression that the defendants pleaded guilty. The Supreme Court felt that the plea must have been entered pursuant to an informal inducement on holding out the prospect of a light sentence. When the matter was carried on appeal against the light sentence, the appellate court reversed the trial court conviction and enhanced the sentence. Thereupon the accused approached the Supreme Court by way of an appeal.

6.4. In para 13 at page 1933, the Supreme Court observed :

"Many economic offenders resort to practices the Americans 'call' plea bargaining' 'plea negotiation', 'trading out' and 'compromise in criminal cases' and the trial magistrate drawned by a docket burden nods assent to the sub rosa 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'.....It is idle to speculate on the virture of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through pre-determined legislative fixation of minimum sentences* and by subtly subverting the mandate of the law. The jurists across the Atl antic partly condemn the bad odour of purchased pleas of guilt 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".

[Emphasis added]

6.5. The Supreme Court did not interfere with the enhanced sentence as the minimum sentence was prescribed by the Statute. The Supreme Court, however, observed that :

"the State must do its duty by justice to the citizens and relieve over-worked courts by more judicial agencies and streamline procedure instead of leaving the uninformed public blindly to censure delayed disposals."

[Emphasis applied]

6.6. **Three factors deserve to be highlighted :**

(1) The offence in question was an economic offence pertaining to food adulteration which affects the health and well being of unwary citizens.

(2) The Legislature had prescribed a minimum jail sentence and the trial court had brazenly flouted the legislative will and mandate by not sending the convict to jail for 3 months.

(3) There was no legal authority for invoking the plea-bargaining procedure not recognized by the Criminal Jurisprudence of India.

6.7. It may be pointed out, with respect, that plea-bargaining as invoked in American Courts does not necessarily involve "no jail" as was observed by the Supreme Court in Murlidhar's case. Observa tions to this effect are obviously based on a misapprehension that in every case where an accused enters a plea of guilty and negotiates for a compromise, he is let off without any sentence of imprisonment. On the contrary, in most cases the pre-trial negotiations can only result in a reduced sentence and defendant is not given a holiday from undergoing imprisonment in jail. We may, perhaps, refer to a latest instance of plea-bargaining in the United States Federal Court involving a New Delhi businessman who had been sentenced, pursuant to a plea-bargain, to 33 months of imprisonment instead of the maximum of 42 months. An economic offence was involved in this case in that the businessman attempted illegal export of hi-tech equipment from the United States. The businessman pleaded guilty. *As a resolt of the plea-bargain, the sentence of imprisonment was reduced from 42 months R.I. to 33 months R.I.* A report regarding the above matter appeared in the New Delhi edition of Indian Express dated 11-11-90. *It will therefore, be correct to observe that the bargain consists of a promise of "no jail" on the part of the prosecution or the outcome of the plea-bargaining in every case is that the offender gets off lightly with sentence of fine without undergoing a sentence of jail.*

6.8. The Commission does not consider, in the circumstances aforementioned, that the evidence the understanding, but the Supreme Court felt, considering the circumstances of the case, that the sentence must be due to an understanding. The Supreme Court observed (para 2 page 854) :

> "*It is highly regrettable that the prosecution as well as the learned Magistrate should have been a party to any such "plea-bargaining" in a prosecution for adulteration involving the health and well-being of the community*".

Disapproval of the concept of plea-bargaining implicit in the observations of the Supreme Court has to be understood in the context highlighted hereinbefore.

6.11. The Statute provided a minimum sentence of three months imprisonment and a fine of Rs. 500/-. The High Court enhanced the sentence *suo moto* to conform to the minimum provided by the Statute. Surely there was no legal sanction for the learned Magistrate to disregard the minimum sentence provided by the Statute and to award a lesser sentence. It was in these circumstances that the Supreme Court upheld the High Court's action in disregarding the understanding between the parties at the trial stage and enhancing the conviction.

6.12. In para 4 at page 855 the Supreme Court made some observations of a general character. These may be referred to :—

> ".... The conviction of the appellant was based solely on the plea of guilty entered by him and *his confession of guilt was the result of plea-bargaining between the prosecution, the defence and the learned Magistrate.* It is obvious that such conviction based on the plea of guilty entered by the appellant as a result of plea-bar gaining cannot be sustained. *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 on an allurement being held out to him that if he enters a plea of guilty he will be let off very lightly.*"

> "*Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of the new activist dimension of Atricle* 21 *of the Constitution,* unfolded in Maneka Gandhi's case. Next, 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 pimishment rather than go through a long and arduous criminal trial* which, having regard to out coumbrous 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 deflected from the*

path of duty to do justice and he might either convict an innocent accused by accepting the plea of guilty or let off a guilty accused with a light sentence, thus, 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*".

[Emphasis added]

6.13. Although the observations are made in the context of a serious economic offence for which a minimum sentence of jail is prescribed, they reflect the Supreme Court's views, generally speaking in the context of the American practice being adopted in the Indian Court without any authority of law. It is, therefore, necessary to carefully deal with the said objections.

6.14. **Illegality.**—The observations of the Supreme Court that a conviction based on the plea of guilty entered by the appellant as a result of plea-bargaining cannot be sustained *should be understood in the context of the plea-bargaining entered in an informal way without legal sanction.* If a law provides for entering a voluntary plea of guilty and a concessional treatment being accorded in the light of the statutory authority of law in accordance with the prescribed guidelines by a judicial authority, it would not be possible to say that the conviction based on the plea of guilty is erroneous.

6.15. **Public Policy.**—Inducing an accused to make a voluntary confession of guilt is undoubtedly against public policy as observed by the Supreme Court. In the fact of the case before the Supreme Court there was material to indicate that the accused entered plea of guilty because of an "inducement" by the prosecution and the Magistrate. In *suggesting the enactment of a law providing for a scheme of concessional treatment, the Commission has ensured that, no inducement is offered. On the contrary, the provisions of the proposed law would make it abundantly clear that it is entirely up to the accused to consider whether a plea of guilt should be entered or not* and there would be no negotiations with the prosecution. The law as suggested does not suffer from any infirmity on this count.

6.16. **Constitutionality.**—The next objection of the Supreme Court is that the procedure by which a person is convicted on a plea-bargaining made as a result of inducement, would be violative of article 21 of the Constitution.

6.17. Article 21 of the Constitution provides that :

"No person shall be deprived of his life or personal liberty except according to procedure established by law".

The observation on this score has been made in the context of the fact that as at present neither the Code of Criminal Procedure nor any other law authorises plea-bargaining of the American model. It was without any authority of law that the practice was adopted in the case in question. It was in this backdrop that reference to violation of article 21 as regards "procedure established by law" has been made. If there was a legal provision authorising the procedure, the objection would disappear. *That was the reason why in Meghraj's case the Supreme Court observed that a "streamlined procedure" should be devised if the State should administer justice by recourse to plea-bargaining.* The observations made by the Supreme Court in Kasambhais case regarding the possible violation of article 21 should be, therefore, confined to the situation where without legal sanction and appropriate procedure a court takes note of a voluntary plea of guilty and convicts the accused ignoring the mandate of law. These observations will be inapplicable in a situation where a law governing concessional treatment without higgle-haggling or bargaining (not plea-bargaining of the American model) is enacted as is being proposed.

6.18. Reference may usefully and with advantage be made to the two leading cases of the United States Supreme Court, namely, BRADY v UNITED STATES [25 L. Ed. 2d 747] and SANTOBELLO v NEW YORK [404 United States 257 (1971)] (upholding the constitutional validity of plea-bargaining) which were not brought to the notice of out Supreme Court in the aforesaid two decisions.

6.19. For the sake of convenience, the propositions which emerge from the aforesaid two decisions of the U.S. Supreme Court may be broadly stated whilst annexing for the sake of preciseness, the verbatim extracts of the relevant passages at ANNEXURE 'C'. Broadly stated, the U.S. Supreme Court has taken the view that—

(1) the Constitution does not forbid the plea of guilty;

(2) the constitutional right to trial can be waived provided the waiver is made voluntarily and with sufficient awareness of the relevant circumstances and the likely consequences of such waiver;

(3) well over 75% of the criminal convictions in the U.S.A. rest on the pleas of guilty;

(4) convictions based on guilty plea are not free from hazards for the innocent but experience shows that there is not much likelihood of defendants advised by competent counsel condemning themselves falsely. This view is based on the expectation that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and there is no reason to question the accuracy and reliability of the admission made by the defendants that they committed the crimes with which they are charged. All trial courts are now required to interrogate the defendants who entered guilty plea so that the waiver of these fundamental rights will affirmatively appear in the record;

(5) plea-bargaining is an essential component of the administration of justice and, if properly administered, it deserves to be encouraged;

(6) the practice is considered desirable because—

(a) otherwise if every criminal charge were subjected to full-scale trial, it would be necessary to multiply by many times the number of judges and court facilities;

(b) it leads to prompt and largely final disposition of most criminal cases;

(c) it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial;

(d) the public is protected from those who are prone to continue criminal conduct even while on pre-trial release;

(e) by shortening the time between the charge and the disposition, it enhances the rehabilitative prospects of the guilty when they are ultimately imprisoned;

(f) judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt whether the State can sustain its burden of proof;

(g) a promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment whilst avoiding trial;

(7) both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorised by law;

(8) for a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probably penalty are obvious, namely :—

(a) his exposure is reduced;

(b) the correctional process can, begin immediately;

(c) the practical burdens of a trial are eliminated;

(9) the defendant may choose to plead guilty as he may consider a breach of the law as sufficient reason for surrendering himself and accepting the punishment;

(10) the defendant may choose to plead guilty on realising that it is not worth the agony and expense of a trial to himself and his family in view of the evidence gathered by the prosecution.

6.20. Whereas even the "plea-bargaining" as it obtains in the American system has been held constitutional by the United States Supreme Court, what is being proposed is a system where—

(1) there will be no bargaining at all between prosecution and defence;

(2) the accused alone can take the initiative to move the machinery for concessional treatment or benefit of probation leaving no scope for inducement from the prosecution;

(3) while the plea judges will hear the plea for concessional treatment, there will be no prior assurance to the accused and the judicial mind will determine the sentence;

(4) for serious offences punishable with punishment exceeding 7 years, a high-powered two member Bench of retired High Court Judges will exercise the jurisdiction;

(5) the application will be entertained only if the plea court is fully satisfied that it is voluntarily made without inducement or coercion and only if there is some *prima facie* material; and

(6) all possible safeguards are provided.

There is no scope for successfully assailing the constitutionality of the concerned provisions of law.

6.21. In view of the foregoing, the Commission is confident that the constitutional validity of a law setting out such a scheme for concessional treatment is not open to question and there is no violation of the provisions contained in article 21 of the Constitution.

6.22. **Conclusion.**—In the view of the Commission, the observations contained in the aforesaid two Supreme Court judgements do not militate against the enactment of a law carefully setting out the scheme broadly on the aforesaid pattern laying down appropriate guidelines and procedure governing the matter as is being proposed. It is, therefore, proposed to proceed to evolve a scheme specially designed for the legal environment in India after dealing with the objections brought into focus during the survey undertaken by the Commission as reflected in Chapter IV.

CHAPTER VII

OBJECTIONS TO THE INTRODUCTION OF THE CONCEPT IN INDIAN LEGAL SYSTEM ANSWERED

7.1. The Commission has carefully considered the various objections to the introduction of the concept in Indian criminal jurisprudence. The objections raised and the Commission's views in relation to the same are dealt below.

7.2. **Country's social conditions do not justify the introduction of the concept.**— Several respondents point out that the scheme of "plea-bargaining" might have succeeded in America and a few other European countries because of the social conditions existing in those countries. Literacy, it is pointed out, is of a high order and people in those countries, by and large, realise the consequences of invoking the scheme involving a confession to the commission of crime. It is said that the position is not the same in out country where literacy is very low.

7.3. It has to be realised that even illiterate persons with their robust common sense are capable of realising the consequences of making recourse to the scheme. The legal aid apparatus is also available for consultation if they cannot afford legal counsel.

7.4. It may be pointed out that defendants are generally advised by their trusted lawyers and there are no grounds to think that a defendant, except in very rare cases and circumstances, would make confession of guilt entailing personal and social consequences to him not with standing his innocence. Besides, the scheme which is being proposed takes care of this objection in as much as a judicial officer acting as a plea judge or a committee of two retired High Court judges would be explaining to the accused persons the consequences of pleading guilty under the scheme.

7.5. **Pressures from prosecuting agencies may result in convictions of the innocents.**—One of the fears expressed is as regards the likelihood of pressure being exercised by the prosecuting agencies and even innocent persons yielding to such pressures. This fear can be allayed if a judicial officer explains the implications, and satisfies himself in the absence of any police officer that no coercion is exercised by the police and if the application is made at the initiative of the accused himself as is being provided in the scheme being evolved by us.

7.6. **The poor will be the ultimate victims of the concept.**—It is forcefully contended by some that acquittals in criminal trials are as high as 90 to 95 percent and consequently an accused and his counsel generally hope to secure acquittal in the course of a regular trial. It is claimed that a wrongdoer will not come forward to make a confession if there is the slightest possibility of acquittal. It is further claimed that a person will be willing to spend any length of time in jails as an under-trial prisoner in the hope that he will secure an acquittal when regular trial is taken up. In any event, it is pointed out that the rich, influential and well-informed accused would seldom undertake the risk of social and personal consequences of a confession as they look forward to a clean acquittal in course of time. It is eventually the poor who may come forward to making confessions and suffer the consequential conviction.

7.7. It does appear that the rate of acquittals in our criminal trials is very high. The principal reason for the acquittals, which was rightly advanced by several, Session Judges, is the long delay involved in taking up the trials. It was brought to the notice of the Commission that during the interregnum when accused are awaiting trials, many manipulations take place. Witnesses who were initially willing to speak truth back out because of the temptations offered on behalf of the accused to retract from the original testimony. Passage of time also affects the veracity of the evidence tendered by the witnesses who are subjected to critical cross-examination. Memories fade during the long time taken for conducting the trial and the witnesses confuse themselves of the actual course of events when they are put to severe cross-examination. *It would be wrong to say that most of the trial result in acquittals because the defendants did not actually commit the crimes. The*

defendants escape convictions because of the aforesaid factors. Be that as it may, the argument that the scheme may not succeed is merely a conjecture and a matter of opinion to which we do not subscribe. It is not a good reason to oppose the scheme.

7.8. It is also not possible to proceed on the assumption that persons would be willing to spend three to eight years in jails as under-trial prisoners if there is a possibility of their release from the jail much earlier. Most people know that long periods of stay in jail bring about economic and social ruin. It is reasonable to think that such defendants will look forward to rehabilitate themselves as quickly as possible if there is a possibility of their being convicted for similar periods and released from jail.

7.9 **Counsel representing the accused would be unwilling to advise confession invoking scheme.**—This is a point forcefully put forward by the counsel in Allahabad High Court. It is claimed by them that the counsel representing the defendant are not likely to advise the clients to make recourse to the scheme. Firstly, it is said that the moment any such advice is given the defendant loses faith in the counsel representing him and will engage another counsel. Secondly, it is pointed out that after release a person who suffered conviction may be told that he would not have undergone the sentence had it not been for the advice given by his counsel. He would be told that as in several cases his case would also have resulted in acquittal. This objection also does not appear to be sound. Nor does it provide a good ground for abandoning the idea. Counsel will doubtless give such advice as is considered to be in the interest of their clients. And the likelihood of failure of the scheme, as expressed by some, cannot justify inaction on the part of the law makers.

7.10. **Plea-bargaining may increase the incidence of crime.**—It is suggested by some that adoption of the scheme may increase the incidence of crime in the country. It is claimed that because of the expectation that a person may be let off lightly by reason of pleading guilty, offences may be committed by persons so minded. There may also be temptations to repeat the commission of offences, it is argued.

7.11. In the first place, the scheme does not envisage that an application, if made, shall be necessarily accepted. The authority considering the acceptance or otherwise of the request for concessional treatment would weigh all pros and cons and, more particularly, look into the nature of offences broadly and exercise discretion to accept or reject the request. Secondly, the scheme may be restricted to a *first offender*. Even in the present state of law, a first offender is entitled to be enlarged on probation in respect of many offences. The fear is thus ill-founded.

7.12. **Criminals may slip through the net with impunity.**—Equally untenable is the apprehension that by resorting to the scheme criminals may slip through the net with impunity and escape due punishment. The scheme being evolved ensures that in regard to serious offences a minimum substantive sentence of imprisonment is imposed. The scheme is for "concessional treatment" not for 'no punishment'. The deterrent effect of a jail term operates with equal force whether the stigma is associated with a term of 6 months or 18 months. Besides, in the present scenario even after a protracted trial more than 75 per cent of the cases result in acquittals as discussed elsewhere. This point of criticism is, therefore, devoid of merit.

7.13. **No social benefits accrue.**—This criticism is unwarranted. There are numerous advantages e.g.:—

(1) Saving of time cost and resources cost to courts which are already over loaded.

(2) Saving of money cost to the community as also to the accused.

(3) The faith in honesty is reinforced.

(4) Rehabilitation and reformation of the offender commences early and he can start a fresh life without loss of time.

(5) When the offender pleads guilty he feels cleansed of the feeling of guilt.

Commentary.—When an offender is punished after a trial consequent to his "plea of not guilty" he is lowered in his own eyes. The society by implication

conveys to him that his protestation of innocence is found to be untrue. In the eyes of the society also he is lowered. If on the other hand hehimself feels contrite and confesses his guilt the burden of guilt carried by him becomes lighter.

Attonement by the offender satisfies his conscience sets him free of the feeling of guilt in the inner-most recesses of his heart. It thus becomes the most important pathway on the ascent to moral heights and strengthens his resolve to lead a blemish free and pro-social life. If the atonenemt is deep and sincere, the offender is likely to have an abiding awareness that he has been morally reinstated. It also results in the object of protecting society being achieved along with attainment of the object of moral and social re-generation of the criminal.

7.14. **Public debate.**—Before closing this Chapter, we may point out that the National Law School of Bangalore conducted a Seminar and the Director of the institute reported that the learned members participating in the seminar expressed their unqualified view that the concept of "plea-bargaining" should be introduced.

7.15. A seminar was also conducted by a public institution known as Jagrut Bharat, Dharwad, Karnataka. The Editor of the organisation is an advocate. The seminar was held on 8-9-1990 which was largely attended by the citizens, advocates, judges etc. The institution communicated to the Commission the views expressed in the seminar. It would appear that the learned members participating in the seminar expressed the view that the concept of "plea-bargaining" should be introduced in the criminal jurisprudence.

7.16. **Conclusion.**—On weighing the pros and cons of the matter it is felt that scheme for concessional treatment in respect of those offenders who on their own volition invoke the scheme which takes care of appropriate safeguards may prove beneficial.

7.17. It will also make the provisions relating to release on probation which are already on the statute book really effective. For, it is of little use to invoke these provisions, at the conclusion of a full-fledged and full-dressed trial "after" investing time, effort and money in recording evidence and recording a finding of guilt. If the scheme is invoked an offender can seek the benevolent provisions relating to probation without having to undergo the rigours of a trial. The idea, therefore, need not be abandoned. In fact the crying need to evolve a suitable scheme cannot be disregarded.

CHAPTER VIII

WHETHER TO MAKE THE CONCEPT APPLICABLE TO ALL OFFENCES

8.1. Reference has already been made to quite a substantial number of persons agreeing to the introduction of such a scheme in our criminal jurisprudence with the rider (1) that socio economic offences are excluded, (2) that its application should be limited only to "less serious offences."

8.2. **Non-application of the Scheme to certain offences.**—The Commission has carefully considered the aforesaid suggestions. In regard to the suggestion that the scheme should not be made applicable to offences involving moral turpitude and socio-economic offences, the scheme envisages exclusion of such offences from the purview of the scheme in the first phase. The scheme also envisages extension thereof with the rider that in any event a substantive sentence of imprisonment of a minimum specified term, say, one year is imposed. It is also envisaged that it may be so extended after assessing the results of the working of the pilot scheme, and after a public debate.

8.3. It may be pointed out that in the present statutes relating to economic offences there are several technical offences which are liable for punishment. Failure to file certain statutory returns within time, failure to furnish required information to the designated authorities within time, etc. are some of the technical offences which are liable for punishment with imprisonment as well as fine. Whether or or not to extend the scheme with a similar rider in the light of the experience gathered during the first phase will have to be considered in the light of a public debate at an appropriate time.

8.4. As regards the suggestion from several quarters that the scheme should be made applicable only to "less serious offences", the Commission is of the opinion that the scheme as framed may encompass all offences subject to the rider that in the first instance, the scheme may be made applicable only to offences under all Central Acts, which are liable to imprisonment for *less than seven years.* The extension of the scheme to offences liable for imprisonment under the respective statutes to *more than seven years may be considered after careful assessment of the* results of the scheme as applied to offences liable for imprisonment for *less than seven years.* If after such assessment of the results, it is felt that the scheme deserves to be extended to other offences, it may be so extended in the light of the experience gathered and in the light of the public opinion generated in the context of the experience so gathered.

8.5. As regards the application of the concept to offences under various laws enacted by the States, the Commission feels that it should be left to the respective state Governments to take a decision in this behalf having regard to the fact that the State Governments of each State may have its own perception in regard to this matter.

8.6. As regards the category of serious offences it can be further sub-divided for the purpose of phased application. The sub-category comprising of offences punishable with death or imprisonment for life may be excluded in the first phase initially and the application of the scheme may be extended to this sub-category only later on, in the light of the experience gathered in the working of the other sub-category and the public debate generated in its wake.

8.7. It is proposed to now proceed to evolve the scheme in the aforesaid perspective.

CHAPTER IX

GUIDELINES AND PROCEDURE TO BE INCORPORATED IN THE STATUTE

9.1. For the sake of implementing the scheme and the smooth functioning thereof, it would be necessary to incorporate in the statute by amending Code of Criminal Procedure and by incorporating a separate Chapter in this behalf the procedure to be followed and the broad guidelines to be applied on the lines indicated hereafter.

9.2. *In order to unfold the broad reasoning underlying the proposed procedure an explanator commentary has been added which is calculated to buttress the basis for the recommendation.*

9.3. **Competent Authority.**—The jurisdiction for the exercise of the powers under the scheme shall be exercised by the Competent Authority as defined under the scheme :

(a) In respect of criminal cases where the relevant statute provides for imprisonment of less than 7 years for the offences alleged to have been committed, a metropolitan magistrate or a magistrate of the first class, especially designated as a "Plea-Judge" by the High Court, will be empowered to act as the Competent Authority;

(b) In respect of criminal cases where the relevant statute provides for imprisonment for 7 years or more for the offences alleged to have been committed a Committee consisting of two retired High Court Judges, duly appointed by the concerned Government in consultation with the Chief Justice and his two seniormost colleagues, for the purpose of receiving and considering applications under the scheme will act as the Competent Authority under the Scheme.

9.4. **Commentary.**—The machinery for the implementation of the Act has been bifurcated into two categories for the reasons being articulated presently. In respect of offences alleged to have been committed by an accused punishable with imprisonment of 7 years or more, it is considered appropriate to constitute a high powered authority comprising of two retired High Court Judges constituting a Bench for the purpose of exercising the powers. It has been considered so necessary having regard to the gravity of the offences in respect of which the provisions of the scheme may be invoked by the concerned accused. Offences which are punishable with imprisonment of 7 years or more under the relevant statute, by the very nature of things. are serious offences which call for close consideration at the hands of an authority of high stature, in whose ability, capacity, wisdom and integrity, trust can be reposed with a degree of safety. That is why the composition of the authority needs to be of appropriately high level. At the same time, in respect of minor offences and offences of relatively lesser gravity, it would be counter-productive to invest the powers in such a ghpowered authority. It would result in the time of the high authority being taken by relatively less important matters and may result in over-crowding of matters and making the Committee of High Court Judges do work of lesser importance. It would also become unworkable, for if such a high-powered Committee were to be bothered by relatively minor offences like theft or assault or trespass, etc., the Committee would not be able to discharge its functions with efficiency and with due degree of serious application of mind. That is why in respect of offences punishable with imprisonment of less than 7 years, a practical formula has been devised, namely, that of investing a metropolitan magistrate or a magistrate of the first class to be designated as a "Plea-Judge". To ensure that a competent official enjoying a good reputation whose confidential records are satisfactory is selected , it has been suggested that the selection of the magistrate or metropolitan magistrate as Plea-Judge should be made by the High Court which would be expected to know about the antecedents and suitaiblity of the Judge concerned. The Plea-Judge will not try any case as a regular Judge to ensure that matters are disposed of expeditiously and to ensure that the accused invoking the machinery will not have any apprehension that in case of his application being rejected, the case may

be tried by the Plea-Judge who might entertain bias by reason of the fact that the accused had invoked the machinery to plead guilty in order to claim the benefit of the scheme.

9.5. So far as the *machinery in respect of offences alleged to have been committed by an accused which are punishable with imprisonment of 7 years or more* is concerned, it has been suggested that the appointment should be made in consultation with the Chief Justice and his two seniormost colleagues so that the retired Judges of the appropriate stature enjoying high reputation are selected for the purpose. For the purpose of inspring the confidence of the public and the administration, it has been suggested that the Competent Authority shall comprise of two retired Judges constituting a Division Bench. The mode of selection suggested hereinabove. and the qualifications prescribed for the Competent Authority should be sufficient to allay apprehension, if any, on the part of the administration and the public as also the accused and to inspire the confidence of all concerned.

9.6. **How to set in motion the machinery.**—It is appropriate to provide that the machinery shall be set in motion by a written application to be made by an accused desirous of seeking the benefit of the scheme.

9.7. In the scheme prevailing in U.S.A. and which has been proposed in the Working Paper by the Law Reforms Commission of Canada, the framework of the scheme provides for making an application by the public prosecutor and the accused after a process of negotiations between them. The scheme evolved by the present Commission makes a departure and contemplates machinery being moved solely at the instance of the accused. There are four good reasons for making this departure. *In the first place*, the Commission considers it inappropriate that any negotiations or bargaining between the accused and the public prosecutor should take place. Such bargaining or higgling haggling results in the confidence of the people being shaken. When a crime has been committed, the last word must be with a judicial officer acting as Competent Authority and the public prosecutor should not have any role to play as a negotiator for the purpose of bargaining. In fact, bargaining itself may be considered somewhat odious. This can be avoided only provided the bargaining and higgling haggling part is done away with and the accused alone is authorised to move the Competent Authority to invoke the scheme. *In the second place*, in the present times, even the probity of a public prosecutor may be considered suspect by a section of the public or by the administration. An apprehension may perhaps be entertained that some underhand understanding might have been arrived at between the public prosecutor and the accused on account of oblique considerations. All this can be avoided if the public prosecutor has no role to play in moving the machinery under the scheme and the initiative in this behalf is to be taken solely by the accused person. *Thirdly*, the apprehension that the public prosecutor might have exercised some pressure on the accused to make him plead guilty would also be removed if there is no contact between the public prosecutor and the accused and the public prosecutor has no authority to initiate the proceedings under the scheme whereas the accused alone can do so. When the making of the desicion whether or not to move the application rests solely in the hands of the accused, there is practically no risk of any pressure having been exercised on him by the public prosecutor. *Fourthly*, it will also ensure that the application has been moved voluntarily and after due deliberations, having considered the pros and cons of the step taken by the accused.

9.8. **When can the application be made ?**—An application may be made at any time after the filing of the charge sheet in a case instituted by the police by lodging an FIR.

9.9. **Commentary.**—Till the charge sheet is filed, the investigating agency would be engaged in collecting the material supporting the prosecution case. It is, therefore, considered appropriate that the application may be made only after the charge sheet is filed.

9.10. *In respect of complaints initiated by private persons*, that is to say in respect of complaints lodged otherwise than by lodging an FIR by the police, the application may be moved at any time after the court issues a process.

9.11. *In summons cases* an accused may make an application before his plea is recorded under section 251 of Code of Criminal Procedure.

9.12. *In warant cases* an application may be made *when the matter is ripe for charge but before charge is framed.*

9.13. **Commentary.**—It is not necessary to provide for any time lag because in a private complaint the material would have been already gathered by the complainant before the complaint is lodged and he or she can make it available to the Competent Authority for the purposes of taking an appropriate decision.

The application has to be made by the accused before making his plea because by the very nature of things plea of guilty can be made only before the Competent Authority if the scheme for concessional treatment is to be resorted to and plea of not guilty can be followed only by a trial.

9.14. **Procedure to be followed on institution of an application.**—The competent Authority shall fix a date for preliminary hearing of the application and apprise the applicant thereof in writing or an officer of the court may apprise him personally about the date of hearing and obtain his signature in token of the accused having been so apprised after receiving the relevant record pertaining thereof from the trial court which should be transmitted by the trial court within 10 days of the receipt of the requisition in this behalf.

9.15. On the date fixed for hearing or any other date to which the hearing may be adjourned, *the Competent Authority shall ascertain from the accused in the open court whether the application under the scheme was made by him voluntarily and willingly without any inducement or pressure from any quarters.* At the time of making this preliminary examination of the accused, the *Competent Authority shall satisfy himself that neither the public prosecutor nor any police officer other than the security officer, if any, posted in the court is present in the* court room so that the possibility of any direct or indirect pressure is excluded and the voluntary character of the application is assured.

9.16. **Apprising the accused of the implications of the proceedings.**—The next step, after the applicant has been apprised of the aforesaid facts and the Competent Authority is satisfied about the voluntary nature of the application, is that the Competent Authority may fix a date for hearing the public prosecutor and the aggrieved party and/or the other side and for final disposal and passing a final order. If the Competent Authority is not satisfied that the application is voluntarily made or that the applicant, after realising the consequences, is not prepared to proceed with the application, he may reject the application.

9.17. **If the application is not rejected.**—The Competent Authority shall explain to the accused that on his pleading guilty, the Competent Authority may, after hearing the public prosecutor or the aggrieved person, record a conviction for such offence as appears to have been committed and, after hearing the public prosecutor and the aggrieved party, may, after hearing the accused or his advocate, if any,—

(i) recommend imposing of a suspended sentence and release him or on probation or impose an appropriate sentence and release him or probation, or

(ii) direct him to pay such compensation to the aggrieved party as may be considered appropriate after hearing both the sides, or

(iii) impose sentence considered appropriate by the Competent Authority.

9.18. **Rejection of application.**—An application may be rejected either at the initial stage of after hearing the public prosecutor or the aggrieved party. If the Competent Authority is of the opinion that, having regard to the gravity of the offence or any of the circumstances which may be brought to his notice by the public prosecutor or the aggrieved party, the case is not a fit one for exercise of his powers as it would amount to miscarriage of justice or that it is a matter which ought to go to trial or that there is no material which *prima facie* spells out the offence charged or any other offence, he may reject the application briefly indicating his reasons.

9.19. **Summoning of record if application is not rejected.**—The Competent Authority shall have the power to send for and obtain the record relating to the case from such court or office as may be having custody thereof.

9.20. **The effect of rejection of application.**—An order pass by the Competent Authority rejecting the application shall be confidential and a copy thereof shall not be given to anyone other than the accused to whom it may be supplied if he so desires. The making of such application on the part of the accused or the rejection by the Competent Authority shall not create any prejudice against the accused at a regular trial which may follow in due course.

9.21. **Commentary.**—If by the making of an application which is rejected the accused is to suffer any prejudice he would be deterred from invoking the beneficial provisions of the scheme. It would, therefore, be necessary to provide to the effect that neither a copy of the application that has been rejected or the brief reasons therefor, if any, shall be made available to anyone other than the accused and that it should be statutorily provided that even if this fact comes to the notice of the court trying the case in the event of the matter going for a regular trial, it shall not result in any prejudice to the accused person. It shall also be provided by statute that the public prosecutor of the aggrieved party shall not be entitled to mention the making of such an application or the fact that it was rejected in the trial court or the appellate court in case of an appeal arising from the order of the trial court and that if any mention is made, it shall constitute contempt of court punishable with a minimum sentence of imprisonment for 7 days.

9.22. **The hearing of the application.**—At the hearing of the application, the accused or his counsel, if any, the public prosecutor and the aggrieved party, if any, shall be heard as regards the prayer of the accused for release on probation or the quantum of the sentence and/of the amount of compensation to be paid to the aggrieved party. The Competent Authority shall pass an order considered appropriate by him having regard to all the circumstances of the case. He shall not be bound to set out the arguments advanced by each of the parties but shall pass a order mentioning in brief such reasons as he might consider appropriate and shall pass an appropriate order having regard to the cirscumtances.

9.23. **Commentary.**—The Competent Authority has to exercise his discretion having regard to all the circumstances and it would be counter-productive to require him to reproduce all the submissions urged by the concerned parties and to deal with the same as if he was writing a judgment. It would be sufficient to mention the brief reason which operates on his mind in appropriate cases for the sake of the appropriate functioning of the scheme. The submissions also should be only on the aspect indicated hereinabove and the submissions should be circumscribed to the aforesaid extent lest the very purpose of the scheme is defeated. The public prosecutor has to be heard so that the relevant aspects which require consideration from the point of view of the prosecution are at the disposal of theCompetent Authority for the sake of fair disposal. So also the aggrieved party should have an opportunity to place his point of view for the sake of fairness so that he feels that he has brought to the notice of the Competent Authority the relevant aspects

9 24. **Procedure to be followed in cases to which the probation of Offenders Act (P.O. Act. for short) and/or the provision of section 360 Cr. P.C. is applicable.**— In cases where the beneficial provisions of the P.O. Act and/or section 360, Cr. P.C., are attracted to an applicant, he would be entitiled to make an application mentioning that he is desirous of pleading guilty coupled with a prayer for granting him the benefit under the P. O. Act and section 360, Cr. P.C. In such cases, after hearing the public prosecutor and the aggrieved party, the Competent Authority shall pass appropriate orders having regard to the circumstances of the case in the light of the concerned provisions in conformity with the conditions embodied in the same. The Competent Authority may be staturorily authorised to dispense with the reqirement to call for the report of the probation officer if considered appropriate in the circumstances of the case in order to save time and to dispense with an exercise considered unnecessary. In cases where it appears to the Competent Authority that, having regard to the P.O. Act and section 360, Cr. P.C., and having regard to the circumstances of the case, the case is not a fit one for granting the benefit of the said provisions or that it is not lawful to do so, the application as a whole may be rejeted without recording any order of conviction. The provision regarding confidentiality of the making of the application and the consequences of rejection, as outlined in paragraphs 9.22 and 9.23 will be applicable in such cases of rejection as well.

9.25. **Commentary.**—The P.O. Act and the provision embodied in section 360, Cr. P.C., constitute benevolent provisions calculated to benefit the community as a whole as also to extend humnane treatment with an eye on the reformation of the offender in respect of matters where the imposition of a substantive term of jail would be counter-productive both to the community as well as to the offender. As indicated in the Statement of Objects and Reasons of the P.O. Act and in a catena of court cases;

(1) There has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and selfreliant member of society without subjecting him to deleterious effects of jail life;

(2) A conviction coupled with supervision through the Probationary Officers may result in reformation and make the offenders useful members of the community and prevent them from indulging in anti-social behaviour in future:

(3) Many of the offenders are not habitual or dangerous criminals but are weak characters who have surrendered to temptation or through misfortune have been brought into the operations of the police and the courts. They, therfore, deserve to be given an opportunity to behave as responsible citizens in future;

(4) The offender is not thrown in the company of hardened criminals and exposed to being led to deeper waters or more serious crimes and adopting a criminal way of life in future, having earned a stigma of undergoing a jail sentence and having lost respectability in the society;

(5) Recourse to probation in preference to sentencing to a term in jail results in reducing the burden on jails which are already over-crowded and saves the community from spending on the upkeep of those who have harmed the community in the past and those who are exposed to be initiated on a path harmful to the community;

(6) A person who has once gone to jail may not mind going to jail once again for another offence, for the harm to his character and standing in the community has already be fallen him and having once been painted black, his social visage would remain tarnished.

The Court would, therefore, make an enlightened approach and extend the benefit of these provisions to such offenders who seek to avail of the benevolent provisions. But as at present, it is both common knowledge and it is gathered in the course of the interviews with the persons concerned with the administration of these provisions as well as the members of the Judiciary and the members of the Bar, these provisions are availed of but infrequently. It is common knowledge that only very few persons avail of the beneafit of these provisions. The factor which is responsible for the apathy in invoking and applying these provisions is not difficult to identify. Recourse to these provisions can be made by an offender who pleads guilty in a summons case as soon as he appears. There is no attraction to do so unless his prayer for release on probation is likely to succeed. If he pleads not guilty he can make recoruse only after a protracted trial which results in conviction. An offender who has already undergone the heart-breaking travails of a criminal trial involving tremendous time-cost, money-cost and effort-cost till the conclusion of the trial has little incentive to avail of these provisions if and when the trial ultimately results in conviction. He would have already spent considerable amount in legal cost in securing the services of a professional lawyer and would have spent considerable time in making innumerable visits to instruct his lawyer at his office and numerable visits to the court where, after having to wait for hours, his matter would have been adjourned from time to time. He would have lost many working hours and many working days in the cource of this exercise. At the conclusion of the trial, because of the inavailability of some witness or on account of the failure of the witness to give a and ansistent coherent account after a lapse of a long time between the date of the occurrence and the date of his giving evidence on account of some technical lacuna on the part of the prosecution, he would have secured an unmerited acquittal even if he was really guilty of an offence with which he was charged. In case he was convicted, he would still have hope of securing an acquittla in the appela or revisional court, Having suffered for a long time, he would not mind suffering for somemore time in pursuing an appeal or a revision. If ultimately the conviction is confirmed,

[[the statistics show that the ratio of conviction is perhaps less than 20%], he may at least secure a short sentence. Under the circumstances, there is a little enthusiasm to invoke the aforesaid provisions of the Act. If, however, he has the option to approach the Competent Authority under the scheme to avail of the benefit of these provisions at a very early stage when he has not expended his money, time and energy resources, he would be in a better position to realise the advantages of these beneficent provisions. It is, therefore, desirable to enable an offender to make a composite application containing a prayer for allowing him to plead guilty and releasing him on probation, etc., in accordance with the letter and the spirit of the aforesaid provisions. *The Competent Authority must, however, be authorised by the statute itself to dispense with the requirement as regards calling for the report of the probation officer if the Competent Authority considers it fit case for dispensing with the same so that time is saved in fit cases.* The purpose of the community would have been served in view of the conviction recorded in the case which would uphold the banner of rule of law. So also the purpose of giving an opportunity to the offender to cleanse himself would have been served. It would, therefore, be advantageous to all concerned to make a provision in this behalf on the lines indicated hereinabove. If the Competent Authority is of the view that having regard to the gravity of the offence of having regard to the limitations engrafted in the provisions or having regard to the particular circumstances of the case, it is not a fit case for exercise of the powers, the Competent Authority would reject the application for pleading guilty, for recording conviction and release on probation and direct that the matter shall be tried by the trial court in the regular court in the regular manner and the offender shall undergo trial. It would not result in prejudice either to the prosecution or defence in that event, for the making of the application itself would remain a confidential matter and there would be a statutory prohibition against this fact being mentioned in the court holding the trial or this factor being taken into consideration for reaching the conclusion in the trial which would have to be disposed of in accordance with law on merits on the basis of the evidence on record.

9.26. The plea judge shall follow the same procedure as prescribed by section 360 Cr. P.C. and so far as practicable, shall be informed by the same spirit and record reasons for declining the prayer for release on probation as envisaged by section 361 of Code of Cr. Procedure.

9.27. **Procedure to be followed in cases arising out of offences alleged to have been committed which are compoundable under section 320 of Cr. P.C.**—As per the law declared by the Supreme Court in *Biswabahan Das v. Gopen Chandra Hazarika and others* [AIR 1967 SC 895], the policy of the Legislature adopted in section 320 relating to compoundable offences is that in the case of certain category of offences [which have been identified in the Table incorporated under sub-section (1) of section 320] where the interests of the public are not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains. It would appear that the Table under sub-section (2) of section 320 relates to offences which are considered to be compoundable without detriment to the community in case the court before which the prosecution is pending accords permission to compound. But even compoundable offences may not be compounded by the complainant for a number of reasons, such as, by reason of either being vindictive, or being desirous of obtaining either an apology or a monetary compensation or advantage by using the pending prosecution as a lever, etc. Having regard to the fact that the Legislature itself in a way considered these offences as wrongs curable without sentencing an offender to a term in jail albeit with the consent of the complainant and has considered that the interest of the community may not suffer if the offences listed in the Table under sub-section (1) are compounded whereas the interest of the community would not be affected if the offences listed in the Table under sub-section (2) are considered by the court itself to be such that permission can be granted having regard to the circumstances of the case to compound the offence, there is no reason why an offender should be obliged to undergo the misery of a trial at the money-cost, time-cost and energy-cost to the community, the complainant, as also to the offender if the court itself can remedy the wrong substantially by directing the offender to pay monetary compensation of a reasonable order to the complainant who may have refused to compound the offence on account of his intransigence or feeling of hurt which he may not have been able to overcome. Of course, in such cases, the offender would be able to invoke the powers of the court only provided he is prepared to plead guilty and accept an order

of conviction. The Competent Authority shall take into account the gravity of the offence, the gravity of the injury where injury has been occasioned to the person or property and take into account the paying capacity of the accused as also the submissions of the public prosecutor, the offender and the complainant or the aggrieved party. The Competent Authority may thereafter direct imposition of a sentence of fine a term in jail coupled with a direction suspending the sentence of jail in the event of the offender depositing in the court the amount of compensation determined by the Competent Authority within the time prescribed by such authority not exceeding six months commencing from the date of the order. The offender shall undergo the jail sentence imposed on him if he fails to deposit the compensation but the suspended sentence shall not be executed if the compensation is deposited for being paid to the victim of the offence or the aggrieved party as directed by the Competent Authority. Such a provision would protect the complainant or the victim or the aggrieved party from being deprived of the compensation ordered to be paid to him notwithstanding the order of the Competent Authority and the compensation awarded by the Competent Authority would be realised by the person entitled thereto without having to make recourse to any other proceeding in any court of law. It may also be provided that in case the complainant (aggrieved party) and the offender are agreeable to compound the offence the proceedings may be terminated by recording the compromise (where leave of court is not necessary) and the offender may be acquitted. If leave is needed and the Competent Authority is of the opinion that leave deserves to be granted an appropriate order may be passed in that behalf.

9.28. **Procedure to be followed in cases where minimum sentence is provided for the offence alleged to have been committed by an offender.**—If an application is made for availing of the benefit of the scheme by a person who is charged of an offence in respect of which the Legislature has provided a minimum sentence and the competent authority is satisfied that it is not a case where public interest demands the rejection of the application *in limine*, the competent authority may, after following the procedure for fixing the date of hearing and apprising the public prosecutor and the aggrieved party as outlined earlier, accept the plea of guilty and record an order of conviction and impose a sentence to the tune of one-half of the minimum term of jail provided by the statue for the concerned offence.

9.29. **Commentary.**—It is no doubt true that the Legislature would provide a minimum sentence having regard to the fact that the Legislature considers the offence to be a very serious one and is desirous to ensure that no sentence less than the minimum is imposed by a court in order that the minimum sentence may have the desired deterrent and punitive effect. But then even in cases where minimum sentence is provided, the ratio of convictions is very low by reason of the fact that sometimes there is tampering with the evidence, sometimes some technical lacunae are found and sometimes there is laxity on the part of the prosecution in several respects. If, however, by making recourse to the scheme, an offender pleads guilty by reason of feeling contrite and wanting to make amends or an offender is honest and candid enough to plead guilty in the hope that the community will treat him with a degree of compassion and consideration due to a person who honestly admits his guilt and feels contrite unlike a person who by virtue of his money-power or the power to withstand the hardship of litigation reposes faith in contesting notwithstanding his awareness of the factum of guilt, treating an honest person who wants to make amends alike a person who wants to contest knowing his guilt and the injury caused to the community is treating unequals as equals. It is also unjust and unfair. In such an event, even an honest person would be discouraged from availing of the benevolent scheme for concessional treatment. Under the circumstances, it may be in the overall interest of the community to enable a person who honestly wants to own up his guilt and make amends by undergoing a term in jail to show some consideration to the person who wants to make amends. If, therefore, the Competent Authority is authorised to impose a substantive jail sentence to the tune of one-half of the minimum prescribed by the relevant statute, the scheme may become workable and may yield a just and fair result which would uphold the sanctity of law as also accord a compassionate treatment to an honest person. A statutory provision empowering the Competent Authority to do so notwithstanding anything contained in any other law would, of course, have to be made in order that the provision prescribing the minimum sentence in the relevant law is not violated. It may be mentioned that so long as a person guilty of an offence which the community considers to be grave meriting a minimum jail term

undergoes actual imprisonment with the resultant loss of reputation, status and with the attendant stigma and dishonour, whether he undergoes for the prescribed period of, say, one year or the concessional period of six months, it would hardly make any difference. For, the deterrent effect and the punitive purpose of the law would have been served without compromising the interest of the community and the will of the legislature. It is in this background that recommendation in this behalf is being made which, it is hoped, will be appreciated in the aforesaid perspective and spirit underlying the recommendation.

9.30. **Power to convert the section under which charge is levelled to a section constituting a lesser offence.**—The Competent Authority shall have the power to record a conviction for an offence of lesser gravity than that for which the offender has been charged in the charge sheet or, the relevant documents or case papers if on the perusal of the same, the Competent Authority is satisfied that the facts constituting the alleged act and the material in support thereof, even if taken at their face value would constitute an offence of a lesser gravity.

9.31. Commentary.—It is necessary to make such a provision because very often the prosecuting agency mentions a more rigorous provision which constitutes a more serious or graver offence than the one which is spelt out by the facts and circumstances disclosed by the record even if the acts attributed to the offender and the material in support thereof is accepted at its face value. This is the desire of the prosecutor to bring the offence under a provision attracting a more severe punishment which often operates on the mind of the prosecuting agency and is in a way understandable even though one may not approve of it. The prosecuting agency might well say it is the function of the court to decide whether the acts attributed to the offender constitute an offence of lesser gravity than the one with which he may be charged in the record. For the sake of fairness and with a view that the scheme may operate in a just manner, the judicial officer constituting the Competent Authority is, therefore, required to be empowered to act in a fair manner in exercise of this power. Of course, he would be expected to closely and carefully examine the material on record in order to satisfy himself that the offender does not get away lightly and secure an undue advantage by invoking this power. Since the final opinion would be formed by the Competent Authority armed with his wide knowledge, experience and expertise with the assistance of the comments of the prosecuting agency as well as the offender as also the aggrieved party, there is sufficient assurance that this power will not be liable to be misused in an improper manner but will be exercised in a just and proper manner with the end in view to promote the ends of real justice as demanded by the facts and circumstances of each individual case.

9.32. **Guidelines for determining the quantum of substantive punishment of imprisonment in jail in cases [excluding cases relating to offences punishable with death or imprisonment for life] other than the cases where the P.O. Act or section 320, Cr. P.C., or the provision pertaining to compoundable offences is not made applicable.**—The guidelines spelt out earlier at the appropriate stage deal with the question as to how matters where the power to release on probation under the relevant provisions or the power to record a finding of guilt and direct payment of compensation to the aggrieved party instead of imposing a substantive sentence of imprisonment in jail are required to be exercised by the Competent Authority. However, in cases [excluding those relating to offences punishable with death or imprisonment for life] where the Competent Authority forms the opinion that, having regard to the gravity of the offence and the circumstances of the case viewed in totality, the ends of justice demand that substantive sentence of imprisonment in jail deserves to be imposed on an offender who pleads guilty whilst invoking the scheme for concessional treatment, appropriate guidelines will have to be formulated.

9.33. In considering this aspect, it is necessary to examine the background in which the scheme is being framed.

Since it is considered inadvisable to adopt the scheme for plea-bargaining which obtains in U.S.A. for weighty reasons in the context of the prevailing conditions in India, a practical difficulty requires to be overcome. In the American system, an offender would approach the court in a situation where the prosecution is agreeable to a concessional treatment as well as the 'extent' of the concessional treatment. In other words, when he invokes the plea-bargaining procedure before the court,

he is assured of the extent of concession he is likely to secure in the event of the application being granted by the court. In case the application is rejected, he is not worse off. But in case the application is granted, he is sure of the extent of concession that he is likely to obtain by pleading guilty. Unless there is a reasonable chance of his securing some advantage, no offender would be able to persuade himself to avail of the scheme. He would feel persuaded only if he can foresee either an advantage or a situation where he is not worse off. In other words, if the only option open to him is to give up his right to claim a trial at the risk of gaining no advantage or even possibly facing the maximum sentence, no offender is likely to avail of the scheme which may remain a dead letter on the statute book.

It is true that if he is given an option to withdraw the application in case the proposed punishment is considered to be inacceptable to him, every offender might like to take a chance in the hope of gaining an advantage and the competent authority would be flooded with work which may ultimately come to nought. But then if there is no attraction for him and, on the other hand, he is facing an unknown hazard, no offender would avail of the scheme. Since bargaining with the prosecutor which provides the offender with an attraction to avail of the scheme is considered hazardous in the Indian context, some other formula requires to be evolved in order to make the scheme reasonably attractive or workable.

The formula which is considered just, fair, proper and acceptable would appear to be to make a provision in the scheme that in the event of the application for concessional treatment being entertained by the competent authority, he may impose such punishment as may be considered appropriate in the facts and circumstances of the case subject to the rider that the jail term that can be imposed shall not exceed one half of the maximum term provided by the statute for the concerned offence. If this formula is adopted in a case where the maximum sentence is 10 years, the competent authority would have an option to impose a sentence not exceeding 5 years. In that event, the scheme can be made applicable to all offences excluding the offences punishable with death or imprisonment for life. If the serious offences, such as murder, for which penalty of death or imprisonment for life is provided, are excluded, the scheme might be considered to be acceptable without any reservation.

9.34. **Guidelines as regards punishment to be imposed : cases relating to offences in which the offender is charged with an offence punishable with death or imprisonment for life but the competent authority on an application being made in this behalf by the offender or offenders is satisfied from the perusal of the records that accepting the acts attributed to the offender and the material supporting the prosecution case at its face value, the offence deserves to be reduced to one under section 304(1) or 304(2) or 326.**— In cases of this category, the task of the Competent Authority would be extremely difficult and delicate. It is in such cases that the apprehension with regard to the shaking of the confidence of the public in the administration would understandably come into play in a significant manner. Experience shows that in several cases, the statements recorded and the material gathered by the police taken at its face value would go to show that it is a case of—

(1) exercise of right of private defence, or

(2) the offender having acted under grave and sudden provocation, or

(3) the death being caused by some rash or negligent act or mischance or mishap rather than a case falling under the category of culpable homicide amounting to murder.

For instance, an incident might have occurred at the house of the offender which was surrounded by a hostile aggressive crowd which had gathered in front of his house or surrounded his house with the members of the crowd armed with deadly weapons and administering threats. In such an event, if the offender uses reasonable force inexercise of his right of private defence, though technically exceeding what the law permits, the act may fall under a provision constituting a less serious or lesser offence. Or there may be a case where in the heat of moment, the offender gives a kick or a fist blow on the body of the victim who has a diseased vital organ. In such cases, it would be futile to make the offender undergo rigours of an arduous trial which may visit the offender with considerable avoidable misery even though he may be prepared to plead guilty of a lesser offence. An offender may, therefore, be permitted to invoke the machinery under the scheme exercising his preparedness to accept and to plead guilty to any lesser offence as the court might consider to

govern the facts and circumstances of the catse. In that event, the Competent Authority may after hearing the public prosecutor, the aggrieved party, or the next of kin of the victim and the offender accept the plea of guilty upon being wholly satisfied that the act attributed to the offender and the material in support thereof taken as accepted at its face value would constitute a lesser offence. But even in that event, the court may award a minimum jail term of 4 years R.I. in offences falling under section 304(1), 3 years R.I. in offences falling under section 304(2) and minimum 1-1/2 years R.I. where the offence would fall under section 326 under the Indian Penal Code so that the rule of law is upheld, the public confidence is not shaken, and the offender does not escape lightly.

It is just and fair with regard to matters falling in this category to evolve a formula similar to the one which has been recommended in respect of the offences to which P.O. Act and section 360 of the Cr. P.C. are applicable, namely, that the accused may make an application for pleading guilty to a lesser offence and the Competent Authority may have the power either to accept it and impose appropriate sentence or to reject it subject to the applicability of the provision that the making of the application will not result in any prejudice to the offender invoking the scheme and that even the factum of the making of the application would be treated as confidential and may not be adhered to at the trial. It may also be provided that the prosecutor who appears before the Competent Authority shall be disqualified from appearing at the regular trial or in the appeal arising from an order passed by the trial court.

The Commission is of the opinion that a provision in the aforesaid regard may be made after public debate and full consideration of pros and cons if considered acceptable on due deliberation. If it is considered to be inappropriate at the present juncture, the offences punishable with death or imprisonment for life may altogether be excluded from the purview of the scheme. In the absence of a public debate, the Commission is not in a position to make any firm recommendation in this regard though the Commission is prima facie *in favour of it.*

9.35. **Certain categories to be excluded from the scheme totally or in the first phase.**—The categories of offences specified hereunder may be excluded from the purview of the scheme either altogether or at least in the first phase—

(a) Second timers i.e. persons who have been convicted for an offence under the same provision at any time in the past.

(b) Persons who have invoked the scheme once at any time in the past.

(c) Persons who are charged with a non-technical socio-economic offence.

(d) Persons who are charged with offences against women and children.

9.36. **Commentary.** —(a) For reasons of safety and in order to foreclose misuse, it would be proper to restrict the applicability of the scheme to first offenders only so that there is no room for apprehension that those who secure a concessional treatment may indulge in the same activity under the beilef that concessional treatment may be extended to them.

(b) For the same reason it would be appropriate to exclude those who have secured the concessional treatment once, from again seeking a similar treatment in future.

(c) Public opinion is against the extension of the scheme to socio-economic offences of a non-technical nature altogether. It being a sensitive issue, prudence demands that these offences are excluded from the purview of the scheme. However, the scheme may be extended to such offences in future in the light of the experience gathered in the working of the scheme in other areas and in the light of a public debate in the context thereof. The option to extend the scheme to this area may be kept open, for, the scheme may perhaps be applied with the rider that a minimum substantive sentence of say six months or an year or of a specified term shall be imposed on the offenders. Once an offender is made to undergo the rigours of a jail sentence it would serve the objective of deterrance to the offender himself as also to those who are like minded. It is not as if an offender will commit a crime if he has to undergo a substantive jail for say 6 months but will not do so if he is *liable* to be punished to a longer term. In fact with an acquittal ratio of 75% to 90%, the temptation to commit crime is already there as it is. On the other hand, a plea of guilty will result in early conviction and swift sentence with the purpose of

punishment being served better. It is, therefore, desirable to keep the option open and extend the scheme to such offences also in future taking into a account the result of the working of the scheme in relation to other offences and the public debate in the light thereof.

(d) The same reasoning will apply with equal force as regards offences against women and children which may be excluded from the purview of the scheme presently. The guidelines in the aforesaid terms may serve the purpose.

9.37. The scheme may be made applicable in a phased manner. Initially it may be made applicable to offences punishable with a jail term of less than seven years. It may be extended to the offences punishable with a jail term exceeding 7 years (but excluding those punishable with death or imprisonment for life) in the second phase. And to the excluded category only in the third phase provided the working of the scheme in the first phase is found satisfactory in the wake of a public debate in the light of the experience gathered in the course of the first phase.

9.38. **Need for amendment of section 357 of Cr. P.C.**—Moreover, under section 357(1) of Cr. P.C. it is only from out of the fine imposed by the court that compensation can be awarded. And under section 357(3) compensation can be awarded only whilst imposing a sentence other than that of fine. As at present, compensation cannot be awarded in matters in which parties compound an offence under section 320 of Code of Cr. Procedure because the compounding usually takes place by agreement between the parties in compoundable matters even before the commencement of trial. Stipulation for payment of compensation cannot under the circumstances, be made a part of an order of the Court or the Competent Authority without recording a conviction. So also larger amount of compensation cannot be ordered where there is a ceiling on the imposition of fine. In order to give effect to the scheme, it is therefore, necessary to amend this section to enable the competent authority to direct payment of compensation to the aggrieved party even in the absence of a plea of guilty and regardless of whether fine is imposed or not. That is why it is recommended that section 357 of Cr. P.C. be amended so as to empower the Competent Court to order payment of compensation even in cases where no conviction has been recorded and regardless of whether fine is imposed or not if an offence is compounded before the Court or the Competent Authority under the scheme.

9.39. **Definition of 'aggrieved'**—The expression 'aggrieved' shall mean, the victim of the crime if alive or his/her next of kin if the victim is dead, wherever it occurs in this Chapter or elsewhere in this Report.

9.40. It is now proposed to highlight the positive features of the scheme and, thereafter proceed to formulate appropriate conclusions and recommendations.

CHAPTER X

HOW THE PROPOSED SCHEME OVERCOMES THE OBJECTIONS AND APPREHENSIONS ENTERTAINED BY THOSE WHO DOUBT THE FEASIBILITY OF THE CONCEPT

10.1. The scheme being propounded by this Report is basically different from the plea-bargaining schemes prevailing elsewhere in five important areas, namely :—

(1) *There will be no contact between the public prosecutor and the accused for the purpose of invoking the scheme. The initiative will be solely with the accused who alone can make the application.* The public prosecutor will have no role to play.

(2) *The decision to accord concessional treatment will rest solely with a judicial officer functioning as a Plea-Judge* in respect of offences punishable with imprisonment for less than 7 years or Tribunal comprised of two retired High Court Judges in respect of offences punishable with imprisonment for 7 years or more and *will not be the result of an outcome of higgling haggling between public prosecutor on one hand and accused on the other.*

(3) *There will be no bargaining with the judicial officers* and an application once made will not be allowed to be withdrawn and the accused will not know what the judicial officers will do. *He will only make a representation and plead for such concessional treatment as, according to him, would be appropriate.*

(4) *The sole arbiter will be the judicial officer and, therefore, there will be no risk of underhand dealings or for coercion or improper inducement by the prosecution.*

(5) The aggrieved party and the public prosecutor will have a right to be heard and place their points of view.

10.2. In view of these distinctive features, the apprehensions in regard to the feasibility of the scheme will stand allayed, as discussed hereafter:—

(1) *In the plea-bargaining scheme prevailing elsewhere, an agreement is an outcome of negotiations and higgling haggling between the prosecution on one hand and the accused on the other. In the proposed scheme, this feature which is considered less than desirable has been eliminated.* The higgling haggling process is viewed with scepticism by the public at large and undermines the faith of the public in the outcome of the process. It also gives scope for doubting the *bona fides* and the integrity of the prosecutor involved in the negotiations. The criticism on this score is overcome in the proposed scheme which does not envisage any role to be played by the public prosecutor. It also does not visualise any higgling haggling process. The proposed scheme contemplates that the initiative for invoking the powers for concessional treatment under the scheme must originate from the accused and the application must be addressed directly to the Plea-Judge or the Tribunal constituted in this behalf who will decide whether or not to entertain the application and if it is decided to entertain the same, the Plea-Judge or the concerned Tribunal will decide what concessional treatment would be afforded having regard to all the relevant circumstances in the light of the guidelines and the statutory provisions.

(2) *In the scheme obtaining elsewhere, there is a risk of improper inducement being offered inasmuch as there is a contact between the prosecutor and the accused in negotiations for entering a plea of guilty. In the proposed scheme, as the initiative comes from the accused, this risk is substantially eliminated.* The possibility of threats or improper inducement having been offered in a clandestine manner also is eliminated since the proposed scheme *visualises ascertainment by the competent authority as to whether the application has been made voluntarily* without any inducement or threat by making an enquiry *in the open court whereat no police officer or person objected to by the accused would be allowed to remain present.* Thus, there is an inbuilt safety mechanism to guard against inducement or threat.

(3) *The risk of an innocent person pleading guilty is also taken care of in the proposed system since a judicial officer would apply his mind to the material on record and would be required to reject the application if there is* prima facie *no material* spelling out the offence with which the applicant has been charged.

(4) The less than desirable feature of higgling haggling which may be considered less than becoming also does not exist in the proposed scheme, for *the accused can only plead and place his point of view before the competent authority but cannot higgle haggle* for he will have no power to withdraw the application if the court is not inclined to take as lenient a view as may be considered appropriate in the circumstances of the case.

(5) *The risk of a guilty person escaping with unduly lenient punishment will also not exist inasmuch as the competent authority* [composed of two retired High Court Judges in relation to offences punishable with imprisonment of 7 years or more] *alone would decide what would be the appropriate punishment in the circumstances of the case* and also because the aggrieved party will be heard before the competent authority passes an order under the scheme. *Besides, the guidelines envisage imposing of a minimum jail term in regard to specified offences as elaborated in Chapter IX.*

10.3. *It can, therefore, be said with a degree of assurance that the proposed scheme does away with all objectionable features of the American practise and can be safely implemented and there is no cause for entertaining any apprehensions regarding the feasibility or desirability of this course being adopted.*

CHAPTER XI

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

I

The Commission is of the considered opinion that a scheme, to be known as "*scheme for granting prayer for concessional treatment made by accused pleading guilty voluntarily*" requires to be introduced in the criminal justice system in India by way of enacting a legislation according statutory recognition and authority to the scheme.

II

The need for introducing the scheme has become compulsive in a situation where the trial of a criminal case culminating in an acquittal can take as many as 33 years in a relatively petty case (involving alleged misappropriation of Rs. 12,000, Rs. 4,000 and Rs. 2,000) and result in an expenditure of as much as a crore of rupees to the State exchequer[1], with no corresponding benefit to the community. And in a situation, as reported on 16-8-1989 in Indian Express, where the courts in a city like Bombay in 1988 *recorded* 124 *rape cases but could dispose of only one* and in first six months in 1989 *recorded* 67 *cases but could dispose of not a single case*

III

There is more than ample justification for introducing the scheme in as much as:—

(1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to the community.

(2) It is desirable to infuse life in the reformative provisions embodied in section 360 of the Criminal Procedure Code and in the Probation of Offenders Act which remain practically unutilized as of now.

(3) It will help the accused who have to remain as undertrial prisoners awaiting the trial as also other accused on whom the sword of damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as—

(a) end of uncertainty,

(b) saving in litigation-cost,

(c) saving in anxiety-cost,

(d) being able to know his or her fate and to start a fresh life without fear of having to undergo a possible prison sentence at a future date disrupting his life or career,

(e) saving avoidable visits to lawyer's office and to court on every date of adjournment.

(4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.

(5) It will reduce congestion in jails.

(6) In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining.

(7) Under the present system 75% to 90% of the criminal cases if not more, result in acquittals.

6—104 Min. of LJ & CA (ND)/93.

RECOMMENDATIONS

I

The Commission, therefore, recommends that a scheme for concessional treatment to offenders willing to plead guilty on their own volition without any plea-bargaining or higgle haggling as outlined in Chapter IX (highlights whereof are set out hereunder) be statutorily introduced by adding a Chapter in the Code of Criminal Procedure of 1973.

Highlights of the Scheme

(1) The scheme may be invoked only by the offender himself. (See para 9.6).

(2) There will be no negotiations for plea-bargaining with the prosecuting agency or its advocate none of whom will have any role to play in the matter of moving the Competent Authority for invocation of the scheme. (See para 9.7).

(3) The Competent Authority will be a 'plea-judge' designated by the Chief Justice of the concerned High Court from amongst the sitting judges competent to try cases punishable with imprisonment of upto 7 years. And a Bench of two retired High Court Judges nominated in this behalf by the Chief Justice of the State concerned in respect of offences punishable with imprisonment for 7 years or more. (See paras 9.3 and 9.5).

(4) The application will be entertained only after the Competent Authority is, upon ascertaining in the manner specified in the scheme, is satisfied that it is made voluntarily and knowingly. (See paras 9.15 and 9.16).

(5) The Competent Authority will hear the application in the presence of the aggrieved party and the public prosecutor or an assistant public prosecutor and after affording a short hearing to them. (See paras 9.17 & 9.18).

(6) The Competent Authority shall have the power to impose a jail term, and/or fine and/or direct the accused applicant to pay compensation to the aggrieved party for compounding the offence in regard to the offences which are compoundable with or without the leave of the Court. (See paras 9.17 (iii) and 9.27).

(7) The Competent Authority shall award a minimum jail term of say six months or one year in respect of specified offences if the scheme is extended in this behalf in the light of the provisions in the scheme. [See paras 8.2, 9.36 (c)].

(8) The Competent Authority may award a jail term not exceeding one half of the maximum provided by the relevant provision where the Competent Authority is not called upon to exercise the powers to release on probation under the Probation of Offenders Act or under section 360 of the Code of Criminal Procedure in accordance with the guidelines. (See paras 9.24, 9.32, 9.33).

(9) In the first instance, as an experimental measure, the scheme may be made applicable only to offences which are liable for punishment with imprisonment of less than seven years and/or fine if both the Central and the State Government so resolves by notification issued by such Government and published in Government gazette. (See paras 8.4 and 9.37).

(10) The scheme may be made applicable to offences liable to be punished with imprisonment for 7 years and more after properly evaluating and assessing the results of the application of the scheme to offences liable to be punished with imprisonment for less than 7 years. (See paras 8.4, 8.6 and 9.37).

[*The scheme has been outlined elaborately in Chapter IX.*]

II

The scheme may be made inapplicable to socio-economic offences of a non-technical nature in the first phase provided, however, that it may, later on, be made applicable with a rider that an offender will have to undergo a minimum jail term of not less than six months or 1 year or such other period as may be specified, if considered appropriate in the light of the public debate.

Note : In making this recommendation the factors that weigh are :—

(1) a punishment meted out quickly serves a better public purpose than a punishment meted out after a decade of litigation tiring to both the sides and shaking the faith of the public at large.

(2) once an offender is made to suffer a substantive jail term from the point of view of deterrence, it may not matter much whether it is for 1 year or whether it be for a longer term. (See para 9.35).

III

The scheme may be made inapplicable to offences against women and children including offences of rape, bride burning, dowry deaths, demand and acceptance of dowry etc. which are viewed by the community with social worth in the context of the age-long history of injustice and suffering on the part of these sections of the society. [See para 9.35 (d)].

IV

Moreover, under section 357(i) of Cr. P.C. it is only from out of the fine imposed by the court that compensation can be awarded. And under section 357(3) compensation can be awarded only whilst imposing a sentence other than that of fine. As at present, compensation cannot be awarded in matters in which parties 'compound' an offence under section 320 of Code of Cr. Procedure because the compounding usually takes place by agreement between the parties in compoundable matters even before the commencement of trial. Stipulation for payment of compensation cannot under the circumstances, be made a part of an order of the Court or the Competent Authority without recording a conviction. So also larger amount of compensation cannot be ordered where there is a ceiling on the imposition of fine. In order to give effect to the scheme, it is therefore, necessary to amend this section to enable the competent authority to direct payment of compensation to the aggrieved party even in the absence of a plea of guilty and regardless of whether fine is imposed or not. That is why it is recommended that section 357 of Cr. P.C. be amended so as to empower the Competent Court to order payment of compensation even in cases where no conviction has been recorded and regardless of whether fine is imposed or not if an offence is compounded before the Court or the Competent Authority under the scheme. (See para 9.38).

V

The scheme may be restricted to first offenders only. [See paras 9.35(a) and (b)].

It is hoped that if appropriate legal measures are taken as soon as practicable in the light of this report it will go a long way in resolving the alarming problem of the mountain of arrears of criminal matters which problem brooks no delay.

We recommend accordingly.

Sd./-
(M.P. THAKKAR)
CHAIRMAN

Sd./-
(Y.V. ANJANEYULU)
MEMBER

Sd./-
(P.M. BAKSHI)
MEMBER

Sd./-
(MAHESH CHANDRA)
MEMBER

Sd./-
(G.V.G. KRISHNAMURTY)
MEMBER SECRETARY

NEW DELHI, Dated the August 22, 1991.

NOTES AND REFERENCES

CHAPTER II

1. AIR 1979 SC 1360.
2. AIR 1979 SC 1360, page 1361, para 1.
3. AIR 1979 SC 1360, page 1361, para 2.
4. AIR 1979 SC 1360, page 1364, para 5.
5. AIR 1979 SC 1377, page 1382, para 8.
6. See "The Hindu", dated 20-12-1990, New Delhi Ediion.
7. See "The Hindu", dated 20-12-1990, New Delhi Edition

CHAPTER III

1. Source : American Law—Crimes & Punishments, P. 168-169.
2. 297 US 742-25 L. Ed. 2d 747.
3. 404 US 257 (1971).
4. 50 L. Ed. 2d 876, 878.
5. (1973) 412 US 17.
6. 52 L. Ed. 2d 136.
7. (1977) 429 US 545.
8. 94 L. Ed. 2d 405.

CHAPTER V

1. See Annexure 'B'.

CHAPTER XI

1. See "The Hindu", dated 20-12-1990, New Delhi Edition.
2. See "The Hindu", dated 20-12-1990, New Delhi Edition.

ANNEXURE 'A'

FEASIBILITY OF INTRODUCING THE CONCEPT OF PLEA-BARGAINING

The Law Commission of India has undertaken a study of the aforementioned subject in the context of the situation obtaining in the sphere of administration of criminal law throughout the country, namely :—

(1) The dockets of the courts are over-crowded. The arrears of criminal cases awaiting trial have assumed menacing proportions.

(2) Large number of persons accused of criminal offences who have not been able to secure bail or are unable to furnish bail have to languish in jails as under-trial prisoners for years.

(3) A majority of the cases ultimately end in acquittal and even so the time of the court is pre-empted by the protracted trial stretching over a number of years in respect of such cases.

(4) The accused have to undergo mental torture of an impending trial and potential conviction for a number of years.

(5) The accused have also to spend considerable sums of money by way of legal expenses.

(6) The accused have to remain in a state of uncertain ty and are unable to settle down in life for a number of years awaiting the completion of the trial.

(7) The jails are over-crowded and the public exchequer has to bear the resultant economic burden.

(8) During the course of the detention as under-trial prisoners, the accused persons are exposed to the influence of hardened criminals.

2. The aforesaid background makes it expedient to examine the feasibility of introducing the concept of plea-bargaining in the administration of criminal justice. It requires to be examined whether it should be restricted to the area of the nature of the offence or should be extended to the area of the extent of the sentence, including releasing the convict on probation in exercise of powers under sections 360 and 361 of the Code of Criminal Procedure.

3. For this purpose, it has become necessary to gather the relevant information and to obtain the views of judicial officers and members of the Bar concerned in the trial of criminal cases. You are, therefore, requested to extend your cooperation by providing the necessary information and by offering your views by way of answering the following queries :—

(1) Do you think that a statutory scheme of plea-bargaining, hedged in by appropriate safeguards and guidelines, can be safely introduced?

(2) What, in your opinion, are the pitfalls to be guarded against and what safeguards can be devised in order to avoid the apprehended pitfalls?

(3) Please draw upon your wide experience to make an approximation as to the percentage of cases tried/handled by you which have resulted in acquittals over a period of, say, last one year.

(4) (a) In the context of your experience of the working of the trial court, do you think that in a sizeable number of cases the court could have legitimately accepted the plea of guilty for an offence lesser than the offence with which the accused was charged with upon perusal of the F.I.R., the complaint, the relevant record and papers or the record of the committal court, as the case may be?

(b) Can you give a rough estimation of the percentage of such cases over a period of, say, last one year ?

(5) (a) Having regard to your wide experience, do you think that in quite a number of cases tried/handled by you, on a bare perusal of the complaint or the F.I.R. or the relevant papers and records, you felt that the allegations taken at their face value disclosed extenuating circumstances justifying the taking of a lenient view in the matter of sentence?

(b) Do you think that if in such cases the accused had the option of plea-bargaining, he would have pleaded guilty if the possibility of a lesser sentence was present in his mind?

(6) Where the Legislature has prescribed the minimum sentence subject to the power to impose a lesser sentence for reasons to be recorded, do you think that an accused would have entered a plea of guilty and confined himself to the extenuating circumstances in a sizeable number of cases if the plea was available?

(7) Do you think that in a sizeable number of cases where section 360 of the Code of Criminal Procedure is attracted, the accused would have pleaded guilty at the very inception in case the option of plea-bargaining was available to him and it was realised that, having regard to the circumstances of the case, the court would be inclined to release him on probation even on recording a conviction on the basis of plea of guilty ?

(8) Do you consider it expedient to extent the concept of plea-bargaining also to cases involving major offences tried by Session Judges including offences liable for sentence of death or life imprisonment ?

(9) Do you consider it desirable to exclude some category of serious anti-social or aconomic offences for the purpose of applying the concept of plea-bargaining? If so, please state the details.

(10) A plea of "guilty" has to be entered voluntarily by the accused. What precautions do you suggest to ensure that no coercion, pressure, or influence is brought on the accused to enter a plea of guilty?

(11) Do you consider that pre-trial negotiations towards plea-bargaining should be conducted before a plea judge (other than the Trial Judge)? Or, do you think the matter could be dealt with by the Trial Judge himself ?

(12) Do you consider that the negotiations for plea-bargaining should be conducted in open court or should be conducted in camera in the chambers of the Judge?

(13) Do you consider it necessary that a complete record of all the discussions and representations should be made and preserved in pre-trial negotiations where the plea is accepted?

(14) What safeguards would you suggest that collusion does not take place between the prosecution and the accused as a consequence of which the accused is let off lightly?

(15) (a) Do you think that there is a possibility of the judge before whom plea-bargaining negotiations are conducted being put to embarrassment by being involved in unnecessary controversy?

(b) If yes, what safeguards do you suggest to overcome this problem?

(16) Do you consider that plea-bargaining should be available only for the first offence should be available equally for the subsequent offences?

(17) Do you think that the incidence of crime will increase by reason of a feeling that a person can get away lightly by taking advantage of the plea-bargaining ?

(18) Do you consider the system of plea-bargaining would help the rehabilitative process of the criminal ?

(19) Do you think that provision should be made for minimum substantive punishment to be imposed in the category of serious offences?

(20) Do you think that a provision should be made that the victim of the offence or his or her near relatives should be given an opportunity to oppose the plea-bargaining? If the accused enters a plea of guilty pursuant to plea-bargaining negotiations, should the victim of the offence or his or her near relatives be given a right o requesting that a reference be made to a higher forum for approving the proposal for entering plea-bargaining?

(21) Do you consider that in socio-economic offences a minimum substantive sentence should be prescribed?

(22) Have you any other suggestions to make in the matter?

Proforma of Statistical Information to be Furnished by the Metropolitan Session Judge and District and Sessions Judges

COURT OF .....

1. No of criminal trials pending as on 31-12-89 :

2. Classification of the above trial cases with reference to the year of filing :

3. Classification of the above trial cases under convenient heads, namely :—

   (a) offences liable for sentence of death or life imprisonment :

   (b) offences liable for sentence of imprisonment of seven years or more :

   (c) offences liable for sentence of imprisonment of less than seven years :

4. No. of criminal appeals pending as on 31-12-89 (yearwise) :

5. No. of cases disposed of in the calendar year 1989 :—

   (a) resulting in conviction :

   (b) resulting in acquittal :

6. No. of cases in which benefit of section 360, Code of Criminal Procedure, was given to the accused persons of 21 years of age and above during the calendar year 1989 :

Statement of Criminal Cases (Trials) Dipposed of during the Calender years 1988 and 1992

COURT OF.....

.....

Sl. No.	No. of the Cases	Offence charged	No. of accused acquitted	No. of accused convicted	The offence for which convicted	Sentence imposed (See note 2 below)
1	2	3	4	5	6	7

Note :

1. Cases under the Prevention of Corruption Act, Terrorist Act and Nanecotics Act are not to be included in the above statement.

2. If in any case benefit under Section 360 Cr. P.C. or Probation of offenders Act has been given to the accused, the same may be indicated in Col No. 7 of the statement.

ANNEXURE 'B'

RECOMMENDATION MADE BY THE LAW REFORM COMMISSION OF CANADA IN WORKING PAPER 60

1. The term "plea agreement" should be defined as meaning any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.

2. The term "plea discussion" should be defined as meaning a discussion directed towards the conclusion of a plea agreement.

3. (1) There term "improper inducement" should be defined as meaning any inducement that necessarily renders suspect the genuineness or factual accuracy of the accused's plea, and as including the following conduct when it is engaged in for the purpose of encouraging the accused to plead guilty :

(a) the laying of any charge not believed to be supported by provable facts :

(b) the laying of any charge that is not usually laid with respect to an act or omission of the type attributed to the accused ;

(c) a threat to lay charge of the type described in paragraphs (a) or (b) above ;

(d) a threat that any not guilty plea entered by the accused will result, upon the accused's conviction, in the prosecutor's asking for a sentence more severe than the sentence that is usually imposed upon a similar accused person who has been convicted, following a not guilty plea, of the offence with which the accused is charged ;

(e) any offer, threat or promise the fulfilment of which is not a function of the maker's office;

(f) any material misrepresentation; and

(g) any attempt to persuade the accused to plead guilty notwithstanding his or her continued denial of guilt.

(2) The term "improper inducement" should be defined so as to make it clear that encouraging the accused to enter into a plea agreement, as defined in Recommendation 1, is not in itself an improper inducement.

4. (1) The prosecutor and the accused, or counsel for the accused on his or her behalf, should be permitted to have plea discussions.

(2) No judicial officer before whom proceedings in respect of the accused are or will be held should take part in plea discussions.

(3) Notwithstanding part (2), it should be permissible for the Chief Justice, or a judge whom he or she has designated, to initiate and preside over plea discussions between the prosecutor and the defence, provided it is emphasized that the accused will not be appearing before that judge and is not obliged to conclude any plea agreement.

(4) A judge may, in general terms, inform the prosecution and defence as to the potential benefit of plea discussions, and may provide them with an opportunity to have such discussions.

5. A prosecutor, police officer or defence counsel should not offer any improper inducement to an accused.

6. No judicial officer before whom proceedings in respect of the accused are or will be held should offer any inducement for the purpose of encouraging an accused to plead guilty to any offence.

7. (1) A prosecutor should not, when the accussed has retained counsel, have plea discussions directly with the accused in the absence of the accused's counsel.

(2) A prosecutor with whom an unrepresented accused wishes to have plea discussions should inform the accused that.

(a) representation by counsel may be advantageous to the accused ; and

(b) if the accused cannot afford to retain counsel, he or she should ascertain from the provincial legal aid plan whether he or she is eligible for assistance.

and should not thereafter have plea discussions directly with the accused unless the accused has informed the prosecutor unequivocally that he or she will not be retaining counsel.

8. (1) Prosecutor should afford accused persons in similar circumstances the same opportunities for engaging in plea discussions.

(2) A prosecutor should endeavour to ensure, in the course of plea discussions, that accused persons in similar circumstances receive equal treatment.

9. Counsel for an accused person should not conclude on the accused's behalf any plea agreement that requires the accused to plead guilty to an offence of which the accused maintains he or she is innocent.

10. A prosecutor should not suggest, conclude or participate in any plea agreement that:

(a) requires the accused to plead guilty to an offence that is not disclosed by the evidence;

(b) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's provable conduct, unless, in exceptional circumstances, they are justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused ;

(c) requires the prosecutor to withhold or distort evidence; or

(d) contemplates a disposition that departs significantly from that which, in the absence of a plea agreement, would have resulted upon the accused's pleading guilty to the same offence, unless, in exceptional circumstances, it is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused.

11. (1) A prosecutor should, unless the circumstances make it impracticable to do so, solicite and weigh carefully the views of any victims before concluding a plea agreement.

(2) A prosecutor who concludes a plea agreement should endeavour to ensure that victims are told the substance of, and reasons for, that agreement, unless compelling reasons, such as a likelihood of serious harm to the accused or to another person, require otherwise.

12. (1) A prosecutor and an accused who have concluded a plea agreement should, before the accused's plea is entered, disclose to the court

(a) the substance of, and reasons for, that agreement; and

(b) whether any previous plea agreement has been disclosed to another judge in connection with the same matter and, if so, the substance of that agreement.

(2) The disclosure and justification contemplated by part (1) of this recommendation should be made in open court unless compelling reasons, such an a likelihood of serious harm to the accused or to another person, require otherwise.

13. Upon being informed that the prosecutor and the accused have concluded a plea agreement, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether the accused understands the substance and consequences of that plea agreement.

14. No plea agreement or submission should be binding on judge.

15. In any case in which the judge, having informed of the existence and substance of a plea agreement and of the reasons for that agreement, determines that an accused should not be judicially disposed of in the manner contemplated by the plea agreement, the judge should inform the accused of this fact.

16. Before any guilty plea is accepted from an accused, the judge should be able, where he or she considers it necessary to do so, to ascertain by questioning whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.

17. In any case in which the prosecutor and the accused have concluded a plea agreement, the judge should be able, before any guilty plea is accepted from the accused, to make such inquiry as he or she considers necessary in order to be satisfied that a factual basis for the accused's guilty plea exists.

18. In determining whether to accept an accused's plea of guilty to any offence other than the offence charged, the judge should consider the substance of, and reasoned for, any plea agreement concluded between the accused and the prosecutor.

19. The judge should reject an accused's guilty plea if *inter alia* he or she has reasonable grounds to believe.

(a) that the plea was entered as a result of an improper inducement;

(b) that the plea was entered as a result of a judicial officer's having offered an inducement for the accused to plead guilty;

(c) where the accused, pursuant to what is currently section 606(4) of the Criminal Code, is pleading "not guilty of the offence charged but guilty of [another] offence arising out of the same transaction ...." that the offence to which the accused is pleading guilty inadequately reflects the gravity of the accused's provable conduct; or

(d) that no factual basis for the accused's guilty plea exists.

20. An accused who has entered a guilty plea should be entitled to withdraw that plea before sentence, or to appeal against a conviction based thereon,

(a) if it was entered as a result of an improper inducement;

(b) if it was entered as a result of the judge's having offered an inducement for the accused to plead guilty;

(c) if it was entered as a result of a significant misapprehension as to the substance or consequences of a plea agreement concluded between the accused and the prosecutor ; or

(d) if the prosecutor has breached a plea agreement concluded with the accused.

21. Where an accused has pleaded guilty to an offence and, upon his or her conviction, has received a sentence that is permitted under the Criminal Code in the circumstances and that accords with, or is within the range anticipated by, a plea agreement, the prosecutor should not be permitted to appeal against the sentence received by the accused unless it is shown.

(a) that the prosecutor, in the course of plea discussions, was willfully misled by the accused in some material respect ; or

(b) that the court, in passing sentence, was willfully misled in some material respect.

22. In any case in which the accused has pleaded guilty to an offence in accordance with a plea agreement concluded between the accused and the prosecutor, any proceedings taken subsequently against the accused in contravention of that agreement should be prohibited unless the prosecutor.

(a) was, in the course of plea discussion, willfully misled by the accused in some material respect, or

(b) was induced to conclude the plea agreement by conduct amounting to an obstruction of justice.

23. Evidence of a guilty plea, later withdrawn, or of an offer to plead guilty to an offence, or of statements made in connection with any such plea or offer, should be inadmissible on the issue of guilt or credibility in any proceeding.

ANNEXURE 'C'

VERBATIM EXTRACTS OF THE RELEVANT PASSAGES FROM THE TWO LEADIND CASES OF U. S. SUPREME COURT

[See Chapter VI, Paras 6.19 and 6.21]

The United States Supreme Court in BRADYV UNITED STATES examined the position thoroughly and came to the conclusion that if a constitutional right to trial by a court or by jury is waived by a subject by entering a voluntary plea of guilty, it is not invalid if the waiver is voluntary and is made with sufficient awareness of the relevant circumstances and likely consequences. Justice White, who delivered the opinion of the Court, observed:

"It is the defendant's consent that judgment on conviction may be entered without a trial ....waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. On neither score could the plea of guilty be held to be invalid".

Justice White further observed: (Page 757)

"The State to some degree encourages pleas of guilty on every important step in the criminal process. For some people their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction".

2. The following observations of Justice White at pages 758 and 759 are illuminating :

"The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorised by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment ; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury".

3. The following observations occuring at pages 761-762 are also pertinent:

"This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants admissions that they committed the crimes with which they are charged".

6.21. In the second leading case, namely, SANTOBELLO, the United States Supreme Court once again reiterated the constitutional validity of the plea-bargaining. Chief Justice Burger, who delivered the opinion of the court, observed (pages 260, 261) :

".... The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea-bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

"Disposition of charges after plea-discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of

most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial ; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

"However, all of these considerations pre-suppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counselled, absent a waiver. Moore *v.* Michigan, 355 US 155 (1957). Fed. Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge ....".

[Emphasis added]

5. Douglas, J, in his concurring opinion observed that, while plea-bargaining is not *per se* unconstitutional, a guilty plea is rendered voidable by any threats that may be held out as a consequence of which the accused enters any plea of guilty. The learned Judge further observed that :

"In order to assist appellate review in weighing promises in light of all the circumstances, *all trial courts are now required to interrogate the defendants who enter guilty pleas so that the waiver of these fundamental rights will affirmatively appear in the record*".

[Emphasis added]

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