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ON THE TOPIC:

NEED FOR REFORMS IN THE CRIMINAL JUSTICE SYSTEM IN INDIA: STUDY INTO RIGHTS, MEDIA TRIALS AND PLEA BARGAINING

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CERTIFICATE

This is to certify that Mr. Govind G. Nair, having Reg. No. LM0120011 has submitted their dissertation titled **'Need for Reforms In The Criminal Justice System In India: Study Into Rights, Media Trials And Plea Bargaining'** in partial fulfilment of the requirement for the award of degree of Master of Laws (LL.M.) in Constitutional and Administrative Law submitted to the National University of Advanced Legal Studies (NUALS), Kochi under my guidance and supervision. It is also affirmed that the dissertation submitted by him is original, bona-fide and legitimate.

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DECLARATION

I, Govind G. Nair, do hereby solemnly declare that this dissertation submitted by me titled **'Need for Reforms In The Criminal Justice System In India: Study Into Rights, Media Trials And Plea Bargaining'** in partial fulfilment of the requirement for the award of degree of Master of Laws (LL.M.) in Constitutional and Administrative Law submitted to the National University of Advanced Legal Studies (NUALS), Kochi under the valuable guidance and supervision of Dr. Balakrishnan K. is an original, bona-fide and legitimate work.

Place: Thiruvananthapuram
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'Everything is not on my merit, but on thy grace' - The Holy Bible

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LIST OF ABBREVIATIONS

AC	Appeal Cases
AD	Anno Domini
AIR	All India Reporter
All ER	All England Reports
All. LJ	Allahabad Law Journal
Anr.	Another
BC	Before the Common Era (Before Christ)
Cir.	Circuit
Cr.	Criminal
Cri. LJ	Criminal Law Journal
CrPC	Code of Criminal Procedure
CTVN	Cable Television Networks
EC	European Case
eg.	For example
etc.	Et cetra
EWHC	England and Wales High Court
ex.	Example
F.2d	Federal Reporter 2nd Series
HARV. L. REV.	Harvard Law Review
ie.	That is
IPC	Indian Penal Code
J.	Justice
L. Ed.	United States Supreme Courts Reports Lawyers' Edition
LC	Lord Chancellor
Ltd.	Limited
MANU	Manupatra
Mohd.	Mohammed
Mr.	Mister
Ors.	Others
p.	Page
pp.	Pages
QB	Queen's Bench
SC	Supreme Court

SCC	Supreme Court Cases
SLL	Special and Local Laws
TRP	Target Rating Point
TV	Television
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UOI	Union of India
UP	Uttar Pradesh
USA, US	United States of America
v.	Versus
viz.	Which is
vol.	Volume
WLR	Weekly Law Reports

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Sukhdev Singh v. State of Punjab

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Union Public Service Commission v. S.Papiah

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Harry Bridges v. State of California

HM Attorney General v. MGN Limited and News Group Newspapers Limited

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R. v. Lord Chancellor, ex p Witham

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Woolmington v. Director of Public Prisons

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Chapter I

Introduction

"Everything has been said already, but as no one listens, we must always begin again." - Andre Gide

The above words by the French philosopher and writer, which are the opening words of the Report submitted by the V.S. Malimath Committee on Reforms of Criminal Justice System in 2003 still find force in discussing and researching on the Criminal Justice System in India. Criminology and criminal justice as we know today is an age-old concept, which touches principles of behavioural, psychological and socio-legal sciences. It involves cardinal institutions like our society, law enforcement, penal institutions, criminal laws and punishments. The modern system of penal laws can be considered to be mostly borrowed from the British with only few provisions which are in consonance with Indian scenarios. The criminal justice system is always in close interaction with the general public of our country, and problems that arise in the system can easily be observed and are manifest to a researcher. Therefore, no amount of study would suffice the ever-emerging need for constant reforms in the criminal justice system, and the researcher seeks assurance in the words of the above cited French philosopher that although everything has been said already, it is of limited use as there are various pitfalls in the present criminal justice system, which require constant revisit and reforms, and therefore 'we must always begin again'.

The ultimate goal of criminal law is to safeguard one's right to personal liberty from encroachment by others — to protect the weak against the strong, to protect the law-abiding

against the lawless, and to protect the peaceful against the violent. To defend people' rights, the state establishes standards of conduct, sanctions for violations, enforcement machinery, and procedures to safeguard that machinery. The deprivation of life, liberty, and property of other people is the result of total selfishness, greed, and intolerance, necessitating the intervention of the state to preserve citizens' rights. James Madison writes in his book The Federalist that "if men were angels no government would be necessary". The government's principal responsibility is to preserve people's basic rights to life and property. Persons must be protected by the state against lawlessness, disorderly behaviour, violent acts, and deception by others. Without the government's protection of citizens' basic rights, liberty cannot exist.[1]

To this end, the primary goal of criminal justice administration is to preserve and defend the rule of law, which includes social control of the law, maintaining order, speedy trials, penalising offenders, rehabilitating offenders through the judicial system, and providing comfort to victims of crimes. It can be said that various flaws and loopholes plague the present criminal justice system. The legal approach is time-consuming and generally geared towards the mind of the accused. Sometimes, we often feel that if the rights of the accused are not favoured, then the rights of the victim are heavily favoured ignoring the rights guaranteed to the accused. The current criminal justice system can be considered to be unsuccessful in delivering speedy and prompt justice to people and guaranteeing the certainty of penalization to perpetrators of crime. As a result, a new perspective on the many parts of the criminal justice system in the field of justice for people, as well as the growing difficulties of criminal justice reform, is required.

The Constitution of India in Articles 20 and 22 expressly, and in Articles 14 and 21 impliedly, protects the interests of accused and brings about a base for the criminal justice system to work

[1] Malimath Committee Report pp. 5, 6.

on. However, as seen in recent times, most of the principles of criminal justice are not subscribed to in the nascent stages of a criminal case. Although milestone judgments like *D.K. Basu* v. *State of West Bengal*[2] wherein the Supreme Court stepped in to protect the rights of the accused with the backing of the provisions mentioned above, and in *Neelabati Behra and Ors.* v. *State of Odissa*[3] that held that prisoners and detainees are not deprived of their Fundamental Rights under Article 21 and only the restriction permitted by law could be imposed on the enjoyment of the Fundamental Rights of prisoners and detained, were propounded by the Supreme Court, the researcher tries to analyse the effect it has on our criminal justice system at large.

Looking at the statistics from the National Crime Records Bureau, a total of 66,01,285 cognizable crimes comprising 42,54,356 Indian Penal Code (IPC) crimes and 23,46,929 Special & Local Laws (SLL) crimes were registered in 2020. It shows an increase of 14,45,127 (28.0%) in registration of cases over 2019 (51,56,158 cases). Crime rate registered per lakh population has increased from 385.5 in 2019 to 487.8 in 2020. During 2020, registration of cases under IPC has increased by 31.9% whereas SLL crimes have increased by 21.6% over 2019. Percentage share of IPC was 64.4% while percentage share of SLL cases was 35.6% of total cognizable crimes during 2020. The following tables show the details regarding charge-sheeting, trial and acquittal rates of the crimes in India.[4]

[2] (1997) 1 SCC 416.
[3] (1993) 2 SCC 746.
[4] "Crime in India: Statistics, Volume I" https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf

S. No.	Crime Head under IPC	Total Cases for Investigation	Cases Charge-Sheeted	Charge-sheeting Rate	Total Cases for Trial	Total Cases Convicted	Conviction Rate
1.	Murder	50,258	24,015	85.3	2,32,859	4,536	44.1
2.	Rape	43,196	23,693	82.2	1,69,558	3,814	39.3
3.	Kidnapping & Abduction	1,56,358	32,081	37.3	2,64,117	3,381	35.6
4.	Rioting	81,846	43,063	89.2	5,19,589	4,613	29.5
5.	Hurt (including acid attack)	7,67,762	4,73,822	88.7	29,04,719	50,694	41.9

S. No.	Crime Head under SLL	Total Cases for Investigation	Cases Charge - Sheeted	Charge-sheeting Rate	Total Cases for Trial	Total Cases Convicted	Convi-ction Rate
1.	The Excise Act	3,43,518	2,79,768	97.6	9,60,659	1,45,279	94.1
2.	Narcotics Drugs & Psychotropic Substances Act, 1985	92,042	54,024	98.3	2,72,135	14,340	81.6
3.	The Arms Act	82,754	66,000	98.7	4,56,443	28,030	86.3

Broadly, this paper looks into three main aspects within the criminal justice system. They are i) the rights of the accused, victim and witnesses; ii) effect of media trials on criminal cases; and iii) concept of plea bargaining and its impact in the present system.

The three broad topics identified by the researcher give insight into the various limbs of the system and to study them in a mutually exclusive manner, but at the same time not ignoring the inclusive nature of their effect on the criminal justice system. The researcher tries to understand each topic in its essence in the forthcoming chapters, and tries to identify the role they play in upholding the constitutional values in ensuring a fair trial. Moreover, as a criminal case involves various stakeholders, the appreciation of the problems of each and every one of them is also paramount to ensure a fair trial, and justice to the victim. When the system is busy ensuring that

fair trial is guaranteed to the accused and justice is delivered to the victim, the witnesses might be neglected, and they may face harassment from the side of either parties to testify in a particular manner. Therefore the researcher tries to identify if a balance of rights can be brought.

The next aspect of discussion is media trials and their effect on criminal cases. It goes without saying that media trials are a menace to the justice delivery institutions and we always find the media to cross that thin line of good and respectable journalism over to conducting full fledged media trials completely disrespecting the processes of the criminal justice system. The researcher tries to understand the concept of media trials, and the ways in which they influence actual proceedings before a court of law. It is important to stress that the media need to show high levels of deference when it reports crimes and conduct their own investigation into them.

The third part is the concept of Plea Bargaining. Introduced in our criminal codes in 2006 by amending the Code of Criminal Procedure to include Chapter XXIA, the concept has failed to gain momentum as a viable alternative to full fledged trials in all cases that are charge-sheeted. Being a very contemporary concept, the researcher tries to understand it on a deeper level, and find out the applicability of the same in the Indian context. It is to be noted that Plea Bargaining remains a Western concept. The lawyers and the offender are often fully convinced as to the merit of their cases and are not always likely to give in to the fact that the court may in fact find the accused guilty and give them a maximum punishment. They are confident that they will be awarded an acquittal and therefore will be very hesitant to even explore the possibility of Plea Bargaining. Therefore, the researcher tries to study this topic, and tries to understand if it can be fully implemented in India.

The researcher, in order to completely understand the ground reality of each of the above mentioned topics, have met and spoken to over 100 lawyers who are part of the Trivandrum Bar Association, in Thiruvananthapuram District of Kerala and has conducted an empirical study with the help of a questionnaire. This study aims at finding what these lawyers think about all the different aspects of each of the topics, and the actual practice and implementation of the same in the courts that they often appear in.

Objective of the Study

The objective of the study is to analyse the various aspects of the criminal justice system in India, and further concentrate on three main issues, ie. rights of stakeholders, effect of media trials on criminal cases, and impact of concept of plea bargaining. Further, the researcher tries to study the present justice system and its workings in correlation with these three aspects, and to find out whether the rights of the accused, victim and witnesses are protected in a balanced manner in our system, whether media trials have an effect on criminal cases, and whether the concept of plea bargaining has been fully implemented and actively utilized in courts in the country. In doing so, the researcher tries to attain the objective of analysing the need to have stringent reforms in the criminal justice system with regard to the three issues discussed in this paper.

Hypothesis

- Although there exists an established criminal justice system, there is a constant requirement for reforms especially with relation to enforcement of the rights of the accused, victim and witnesses.

- Media Trials complicate criminal cases and make it hard for the criminal justice system to ensure fair trial.
- Plea Bargaining is not effectively utilized and practiced in the courts in India.

Research Questions

- Whether the rights of accused, victims and witnesses are adequately protected in a balanced manner by the criminal justice system in the country?
- Whether media trials affect the course of a criminal case and influence the mind of the court in deciding that particular case?
- Whether Plea Bargaining is understood and effectively used by the criminal justice system?
- How important is the need for constant reforms in the criminal justice system?

Research Methodology

The research methodology used in this paper is mainly doctrinal research. The researcher also uses an empirical study by questionnaire method to find out the practical level implementation of the research topic.

Limitations

The 20th edition of Bluebook prescribes for citing certain contents in the main body itself. However, to ensure uniformity in citing, the researcher has not used that form of citation method. The sample size of the empirical study is 106 participants. These participants were selected at random from various age groups having different years of experience and backgrounds. They only form a small part of the larger group of lawyers who regularly practice in courts in

Thiruvananthapuram. The sample size includes lawyers who have experience practicing in other courts in the state of Kerala including the High Court, therefore the researcher has assumed that the sample size is capable of representing all practicing lawyers in the State of Kerala and the views of the participants reflect the views of lawyers of other part of the state also.

Scheme of Chapters.

This paper is divided into two parts.

Part A:

Part A consists of 4 chapters.

Chapter 2. Criminal Justice System in India and Concept of Fair Trials-

This chapter gives a brief about the criminal justice system in India, its history, its main components and its relation with the protection of human rights. The second part of this chapter deals with the concept of fair trials.

Chapter 3. Right of Accused, Victims and Witnesses.

Divided into three, this chapter firstly discusses the rights of accused in the system, secondly about the rights of victims and thirdly, about the rights of witnesses. The Witness Protection Scheme of 2018 is also discussed.

Chapter 4. Effect of Media Trials on Criminal Cases.

Media Trials are studied in this chapter by understanding the tussle between free speech v. fair trial, and the international perspectives on media trials are also discussed in relation to the Indian context.

Chapter 5. Impact of Plea Bargaining in India

This chapter discusses the concept of Plea Bargaining, its evolution and introduction in India and the judicial response towards this concept.

Part B:

Chapter 6. Empirical Study and its Findings

The chapter dissects the empirical study conducted, and all findings which were derived from the study are included under this chapter.

Chapter 7. Analysis and Conclusions

This chapter analyzes the result of the research and concludes the study and tries to formulate answers to the research questions.

Chapter 8. Suggestions and Recommendations

PART A

Chapter II

Criminal Justice System in India

"Whatever views one holds about the penal law, no one will question its importance to society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. Nowhere in the entire legal field is more at stake for the community or for the individual."[5] - Herbert Wechsler

The main purpose of criminal justice administration is to preserve and protect the rule of law, which implies, enforcement of law, maintenance of order, just, fair and speedy trial, punishment of offenders, rehabilitation of offenders through correctional system and justice to victims of crimes. The existing criminal justice system is infested with various problems, not fully attributable to the way in which it is structured, but due to a variety of different aspects like delay, accused centric system, lack of coordination between police and prosecution, lack of protection to various stakeholders, higher rates of acquittal, lack of guarantee of fair trial, etc. The existing criminal justice system is said to have failed to provide citizens with timely and accurate justice while also assuring the certainty of punishment for criminals. The failure of the criminal justice system in ensuring crime prevention, certainty of punishment, equity and quick justice and law enforcement is likely to threaten the very foundation of the Rule of Law.

[5] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

History

The legal framework of Ancient India, primarily Hindu-ruled, was moulded by the concept of 'Dharma', or 'rules of right conduct', as interpreted in the various manuals explaining the Vedic scriptures such as 'Puranas' and 'Smritis'. Only deriving power from the concept of Dharma, the King or ruler was expected to uphold it and had no other independent authority. While criminal wrongs were associated with sins and righteousness, civil wrongs mainly related to wealth.[6] The Mauryas Dynasty, which ruled over large swaths of the Central and Eastern regions in the 4th century B.C., had a strict penal system that included mutilation and the death sentence for even minor infractions. Manu, a prominent Hindu jurist, created the Dharmasahtra code around the 2nd or 3rd century A.D. Assault and other bodily injuries were recognised, as were property offences like theft and robbery. The judicial hierarchy was established during the reign of the Gupta Dynasty (4th to 6th centuries A.D.). The guild, the folk-assembly or council, and the monarch himself made up the judiciary. Legal writings were followed in judicial decisions, as well as social usage. Judicial decisions conformed to legal texts, social usage and the edict of the king, who was himself prohibited from violating the decisions.[7] Beginning in the eighth century A.D., India was subjected to a series of Muslim invasions which ended in the 15th century with the establishment of the Moghul Empire by a mixed race of Persians, Turks, and Mongols. They dominated the majority of the Northern region and imposed a Mohammedan criminal code that ranked all offenses on the basis of the penalty which each merited. Retaliation (blood for blood), specific sanctions (for theft and robbery), and discretionary penalties were among them.[8]

[6] Jois, Rama, M., Legal and Constitutional History of India, Vol. I & II. Bombay: N.M.Tripathy Ltd., 1990.
[7] Thapar, Romila., A History of India, Volume I. London: Penguin, 1990.
[8] Pillai, Atchutan, Criminal Law, Bombay N.M. Tripathi, 1983.

The East India Company progressively acquired territory across the subcontinent beginning in the early 17th century, initially for trade purposes only, but eventually assuming significant governing powers. The Company implemented various reforms through a series of laws that adjusted or broadened the definitions of some offences, added new offences, and changed penalties to make them more logical and reasonable, believing the existing Muslim criminal law to be irrational and draconian.[9] In 1857, the large possessions and the authority enjoyed by the Company were transferred to the British Monarch by an Act of Parliament. Until this time, India was a loose collection of kingdoms, interactions between whom were nominal, Following the arduous work of the First Law Commission, particularly its Chairman Lord Macaulay, an Indian Penal Code (IPC) was adopted in 1860, defining crime and assigning suitable punishments. In 1861, a Code of Criminal Procedure was enacted as a follow-up to the IPC, establishing the regulations to be followed at all phases of investigation, trial, and punishment. In 1974, this code was repealed, and a new one took its place. These two statutes, as well as portions of the Indian Evidence Act of 1872, make up India's criminal law. A slew of special and local laws, such as the Arms Act, the Prohibition Act, the Immoral Traffic (Prevention) Act, and others, deal with a variety of additional crimes and offences.[10]

Components

The criminal justice system is a system which comprises an organizational arrangement, consisting of different components viz., the legislature, the police, the prosecution, the Court and the correctional organization, working jointly or individually towards a specific goal.

[9] Supra note 6.
[10] World Factbook of Criminal Justice Systems - India. https://bjs.ojp.gov/content/pub/pdf/wfbcjsin.pdf

In any state's criminal justice system, the legislature plays a critical role. They write the laws that tell us what is and is not permissible, as well as the punishments for engaging in banned behaviour. These laws allow the courts to determine guilt or innocence, as well as the correctional subsystems to punish or rehabilitate the convict. As a result, the legislature's enactments are the foundation of our criminal justice system's operation. However, the legislature does not constitute an operational component of the system, except that the entire system's rationale depends upon the laws, which they make and whose violations are required to be controlled or reduced.[11]

The police, or law enforcement sub-system, is the next component of the criminal justice system. Police are responsible for maintaining peace, law and order, preventing crime, and apprehending lawbreakers. The rest of the criminal justice system subsystems simply can not function without a law enforcement subsystem. Legislators can pass thousands of laws, but if the police do not enforce them, the law will be violated. If people are unable to go about their everyday lives in a safe and predictable manner, the state is said to have failed to function efficiently. The police, as the primary law enforcement agency, are responsible for not just enforcing numerous laws, but also for ensuring that the rule of law is followed. In this area of judicial responsibility to the law of the land, the police acts are closely scrutinised by the courts. In other words, the judiciary and the executive guarantee that the law is followed at various levels. To sum up, there is three fold accountability of the police, to the people, to the law and to the organization.[12]

Another component of the criminal justice system is the prosecution. The prosecutor is the person who determines whether an alleged violator will be processed by the judicial sub-system.

[11] S. Venugopal Rao, *Criminal Justice. Problems and Perspectives,* Delhi, Konark Publications 4 (1991).
[12] S. K. Ghosh, *Torture and Rape in Police Custody,* New Delhi, Ashish Publications 9 (1991).

If the prosecution feels that the case is appropriate, then formal charges are framed. But he has no power to interfere in the investigation.

The judiciary is the next most important component of the criminal justice system. The court plays a more important and critical function in the criminal justice system than any other component. The court's primary function is to administer justice in a free, fair, timely, and unbiased manner. Judges must carry out their duties with extreme caution and care so that public trust in the legal system is not undermined. The presiding judge must be conscious that his decision in the case will leave an indelible impression on the accused and victim about justice or injustice, depending on whether the accused was rightfully acquitted or convicted. An independent, unbiased and able judiciary is the first requirement of justice. Without any limits, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any purpose, the judiciary shall decide the matters before it impartially, on the basis of facts, and in conformity with law. It must be realized that an unjust acquittal is as much a miscarriage of justice as an unjust conviction. 'Rule of law' is the operating instrument of justice in a civilized society.[13]

Correctional institutions are the final major component of the criminal justice system. The goal of the criminal justice system is to rehabilitate the offender so that he or she will not break the law again. It is intended that by punishing the perpetrator, other people will be deterred from breaking the law. In the corrections system, there are two basic options: probation and prison, both of which impose some constraints on one's freedom.[14] Correctional services, which include prisons as well as other rehabilitative institutions such as probation, juvenile justice, and

[13] Rao, K. Sreedhar. "CRIMINAL JUSTICE SYSTEM — REQUIRED REFORMS." *Journal of the Indian Law Institute*, vol. 43, no. 2, 2001, pp. 155–173. *JSTOR*, www.jstor.org/stable/43951765.
[14] 58th Report of Law Commission of India.

correctional homes, can be viewed not only as agencies to incarcerate or reform offenders, but also as a yardstick of the criminal justice system's overall effectiveness. Prisons and related institutions might then be considered a boundary sub-system, because the offender who eventually passes through these institutions is either reformed or reinforced in his criminal attitude, while working under specified aims and operational restrictions.[15]

It's difficult to see the criminal justice system as a cohesive system when it's in its many stages of functioning. On the contrary, it appears to be a loosely linked group of organisations, including the police, prosecution, judiciary, and corrections, all working toward the same aim of successful crime control. When one of the components fails or fails to work as expected, the entire system becomes disorganised and may collapse. As a result, these sub-systems of the criminal justice system are not mutually exclusive. What happens in one area has a direct impact on the other, and the two intersect frequently throughout the criminal justice system.

Criminal Justice System for the Protection of Human Rights

When human rights issues are raised in national and international fora, our criminal justice system is criticised as old, obsolete, and repressive. When criticism comes from our own human rights activists, scholars, writers, and media, the criminal justice system keeps a low profile, but when criticism comes from international sources such as Amnesty International, World Watch, and many others, there are vehement rebuttals bordering on contemptuous disregard for the allegations. The reality is that both silence and rebuttals are frequently unwelcome and uncalled for. The tragedy of the situation is that two-thirds of the criminal justice system, which consists mostly of policy and prisons, frequently violates human rights and perpetuates human wrongs,

[15] Rao, S. Venugopal. "PERPLEXITIES IN CRIMINAL JUSTICE." *Journal of the Indian Law Institute*, vol. 27, no. 3, 1985, pp. 458–468. *JSTOR*, www.jstor.org/stable/43952251.

while the judiciary seeks to defend and promote human rights. The two sub-systems accuse the Supreme Court and some of its human-rights-minded judges of being unrealistic idealists. The Court, on the other hand, churns out judgements upon judgment about police and prison derelictions. As a result, our criminal justice system has two faces: one that hurts and the other that tries to heal. In the midst of a crisis that characterises our criminal justice system, we have established an Ombudsman - the National Human Rights Commission - with the best of intentions to rectify the situation and address serious human rights issues in the country. The Commission, like the Supreme Court, unfortunately has a full docket.[16]

Because human rights violations have become regular, and a sense of pessimism pervades our thoughts and actions, the country finds itself in an embarrassing situation, both internally and externally. Since its orders to police, jails, and other institutions, the Supreme Court, the sentinel of human rights, has only been able to bring about cosmetic reforms, and its directives are more respected in breach than in observance. The Writ Courts are too far away and too expensive to be of any use to destitute and illiterate victims of human rights violations. In the lack of execution and enforcement, the rights given by the courts are illusory.[17]

Concept of Fair Trials

One of the cornerstones of a just society is the right to a fair trial. Innocent people are condemned without fair trials, and the rule of law and public trust in the justice system crumble. Maintaining law and order on behalf of the entire society is a critical job for any government. A fair trial is one that is observed by a trial judge who is not biassed. Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political

[16] Dr. R. Thilagarj: *Human Rights and Criminal Justice Administration* 4 (2002).
[17] Parag Agarwal, Human Rights and Criminal Law https://www.jusdicere.in/human-rights-and-criminal-law/.

Rights, Part 3 of the Indian Constitution, and countless other constitutions and declarations around the world express various rights related to a fair trial.[18]

Article 10 of Universal Declaration of Human Rights, in fact laid down the foundation of the international principles of judicial independence and provides that:

> "Everyone is entitled in full, equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him."

To the same effect is Article 14 of International Covenant on Civil and Political Rights:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, on his rights and obligations in suit at law, every one shall be entitled to a fair and public hearing by competent, independent and important tribunal established by law."

Several regional and international human rights accords have defined the right to a fair trial. It is one of the most comprehensive human rights, with multiple articles enshrined in all international human rights instruments. International human rights documents describe the right to a fair trial in substantially the same terms, notwithstanding differences in phrasing and placement of the numerous fair trial rights. The aim of the right is to ensure the proper administration of justice. As a minimum the right to fair trial includes the following fair trial rights in civil and criminal proceedings: the right to be heard by a competent, independent and impartial tribunal; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation. States may limit the right to a fair trial or derogate from the fair trial rights only under circumstances specified in the human rights instruments.

[18] Doswald-Beck, Louise. Fair Trial, Right to, International Protection, *Max Planck Encyclopedia of Public International Law*.

In a democratic society, even the rights of the accused are sacrosanct. The right to fair trial means that people can be sure that the process will be fair and certain, it prevents the state from abusing its power. The Supreme Court in *Zahira Habibullah Sheikh* v. *State of Gujarat*[19], observes thus:

> "36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

The adversarial system, based on the accusatorial approach, is the system adopted by the Criminal Procedure Code of 1973. In an adversarial system, the prosecution is responsible for the production of evidence, with the judge acting as a neutral referee. The right to a fair trial is based on the premise that each criminal matter should be handled by a competent, independent, and unbiased court. Because the state is the prosecuting party in a criminal case and the police is also a state institution, it is critical that the court be free of all suspicions of executive influence and control, whether direct or indirect. In India, the entire task of ensuring a fair and unbiased trial

[19] (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 at p. 395.

falls on the shoulders of the court. The fundamental concept is that no one can be a judge in his or her own case. A judge or magistrate cannot try a case in which he is a party or otherwise personally involved, according to Section 479 of the Criminal Procedure Code. The disqualification might be lifted with the approval of the appellate court.

In light of the above understanding of the criminal justice system, let us look into the various components which are discussed below..

Chapter III

Rights of Accused, Victim and Witnesses

Our criminal system is most often considered to be an accused centric system with even certain provisions of the fundamental rights of the Constitution speaking about certain unalienable rights accorded to them. The victim of crimes and the witnesses in a criminal trail are given the back-seat, having some rights enforceable by a court of law. The adequacy of the protection given to these important stakeholders in the Criminal Justice System define the actual development and maturity of the System. A System where all these stakeholders are protected in an even fashion giving protection or specific rights to each one as per their own rite is integral in the fairer delivery of criminal justice. Crimes may leave behind wounded bodies, but they certainly leave behind many wounded minds, including the one of the aggressor. A system having full regard to all angles and complexities of a crime, and understanding that all stakeholders need protection from the abuse of process of law, and from each other are mandatory for the smooth functioning of our System.

Rights of Accused

The whole law as to administration of criminal justice and trial revolve around the accused. He is the pivot who embarks upon trial and appellate judges, prosecutors, defence lawyers and various personnel of law enforcement agencies to play their specific parts assigned to them in procedural codes and substantive acts and enactments. Prosecutors with their full strength of teeth and mind do their best to hold the accused guilty whereas defence counsel with the same vigour and

determination, art of advocacy and nice technicalities, utilising the various lacunae in our legal system endeavour to acquit this accused. Judges bound by oath make every effort to disengage the truth from falsehood and to sift through the evidence before them and preside over criminal trials to see that no innocent man is punished and no guilty man escapes. The victim and the witnesses add to this evidence before the judges and aid the prosecution to confirm the guilt of this accused. In such a system, there has to be established rights which are given to the accused to prevent the abuse of law.

The overarching aim of the Criminal Justice System should be to find out the truth. The person who is most likely to know the truth of an offence which has been committed, is the offender himself. It must be emphasised that the suspect/accused like the other players in the Criminal Justice System can also contribute to the search for truth. It is true that except where there has been a voluntary confession, the suspect/accused is unlikely to incriminate himself; to which in a democracy, he is entitled to under the rights guaranteed to him by the Constitution. The rights of the accused include the obligation on the part of the State to follow the due processes of law, a quick and impartial trial, restraint from torture and forced testimony, access to legal aid etc. The present day approach of the Courts - in their attempt to find out whether or not there is evidence "beyond reasonable doubt"that the accused has committed a particular offence – is only to look at the evidence for or against the accused and balance the evidence rather than seek the truth. In attempting to get away from a situation of such balancing of evidence and the Judge acting as an umpire, the Committee feels that it would be useful to put in place the search for truth as the basis.[20]

[20] Malimath Committee Report, 2003, p. 59.

Accused has a right not to be convicted for any offence for the commission of an act which was not an offence at the time of the commission of the act nor to be subjected to a penalty greater than the one prescribed at the time of commission of the Act[21]. The rights of the accused under the Constitution and laid down by the Supreme Court in, *Joginder Kumar* v. *State of Uttar Pradesh*[22] and *D.K. Basu* v. *State of West Bengal*[23] are as follows:

1. Accused has a right against double jeopardy.[24]
2. Accused has a right not to be compelled to be a witness against himself.[25]
3. No accused shall be deprived of his life or personal liberty except in accordance with procedure established law which is just, fair and reasonable. Accused has a right to fair and speedy trial.[26]
4. Accused has a right to assistance of a Counsel.[27]
5. Right to be produced before the Magistrate within 24 hours of arrest excluding the time for travel. Right not to be detained in custody beyond 24 hours after arrest excluding the time for travel without the order of the Magistrate.[28]
6. An arrested person being held in custody is entitled, if he desires, to have one friend, relative or other person, who is known to him or likely to take an interest in his welfare, told as far as practicable that he has been arrested and where he is being detained.
7. The police officer shall inform the arrested person when he is brought to the police station of this right.

[21] Article 20(1) of the Constitution.
[22] A.I.R. 1994 S.C. 1349
[23] Supra Note 2.
[24] Article 20(2) of the Constitution.
[25] Article 20(3) of the Constitution.
[26] Article 21 of the Constitution.
[27] Article 22(1) of the Constitution.
[28] Article 22(2) of the Constitution.

8. The entry shall be required to be made in the diary as to who was informed of the arrest.
9. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
10. When the arrested person is produced before the Magistrate, he has a duty to enquire with the accused as to when he was arrested and the treatment meted out to him including subjecting him to third degree methods, and about the injuries if any on his body.

For the purpose of this paper, I would be focusing on a primary right available, ie. presumption of innocence.

Presumption of Innocence and Burden of Proof

Every man is presumed to be innocent until he is proved guilty. This is the cardinal principle of criminal law. In recognition of this right of the accused the burden of establishing the charge against the accused is placed on the prosecution. The concept of burden of proof is one of the most important contributions of Roman law to the criminal law jurisprudence. This principle is based on fairness, good-sense and practical utility and accepted in the English Common Law. In the case of *Woolmington* v. *Director of Public Prisons*[29] the law has been lucidly restated by Viscount Sankey, LC as follows:

> "Throughout the web of the English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of, and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention the prosecution has not made out the case, and the prisoner is entitled to acquittal."

[29] 1935 AC 462.

This principle has been followed in India by the decision of the Supreme Court in *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*[30]. This is a universally recognised right and Article 14(2) of the International Covenant on Civil and Political Rights, 1966 provides "Every one charged with a criminal offence shall have the right to be presumed innocent until he is proved guilty according to law". It is left to the law making authority to prescribe the procedure for proof.

Section 101 of the Evidence Act provides that the party who seeks a Judgement from the court about any legal right or liability dependent on the existence of certain facts must prove that those facts exist. Section 102 provides that the burden of proof lies on that person who fails, if no evidence at all is given on either side. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless otherwise provided by law. Section 105 provides that burden of proving that the case of the accused comes within any of the exceptions lies on him. Section 106 provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Section 3 defines the expression "proved" as follows:

> "A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Section 3, while adopting the standard of the prudent man as an appropriate concrete standard by which to measure proof also contemplates giving full effect to the circumstances or condition of probability or improbability. Section 3 does not speak of proof beyond reasonable doubt.

[30] AIR 1964 SC 1563.

However, the cardinal principle of criminal law jurisprudence that the burden rests on the prosecution of proving its case has been deviated in several statutes. Under Sections 105 to 114(A) of the Indian Evidence Act, burden of proof is shifted to the accused. There are other provisions where burden of proof shifts to the accused after the prosecution establishes certain facts, e.g. sections 107, 108, 109, 110, 111-A, 112, 113-A, 113- B, 114-A. Similar provisions are found in several special statutes.

A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

It is therefore clear that "proof beyond reasonable doubt" is not an absolute principle of universal application and deviations can be made by the legislature. Deviations can take different forms such as shifting the burden of proof to the prosecution or prescribing a standard of proof lower than "proof beyond reasonable doubt". As long as the accused has the opportunity to adduce evidence to nullify the adverse effect such deviation will not offend Article 14 or 21 of the Constitution.

While the concept of "presumption of innocence" maintains its pivotal position in the criminal law jurisprudence, there is a steady shifting of burden of proof to tackle the new problems such as growing socio-economic problems, emergence of new and graver crimes, terrorism, organised crimes, poor rate of conviction, practical difficulties in securing the evidence etc.

Rights of Victims

In the case of crime victims, many governments recognise two sorts of rights. They are, first, the victim's right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard, and right to assist the court in the pursuit of truth) and, second, the victim's right to seek and receive compensation for injuries suffered as well as appropriate interim reliefs from the criminal court itself.

In criminal proceedings, the victim or his agent has a very active role in the European system. In France, for example, everyone who suffers harm as a result of an offence has the right to become a party to the proceedings from the beginning of the investigation. When an investigation is delayed or skewed for whatever reason, he can aid the investigation and approach the court for appropriate directives. His active participation in the trial will be extremely beneficial in the hunt for the truth without causing the prosecution any problems. He has the authority to propose questions to the court to be asked of witnesses who appear in court. If the public prosecutor fails to use reasonable diligence, he may conduct the proceedings. He has the ability to contribute to the prosecution's evidence and make his own arguments. He could assist the court in choosing whether or not to grant or cancel the trial.. For all these reasons and more, it is clear that if the criminal proceedings have to be fair to both the parties and if the court were to be properly assisted in its search for truth, the law has to recognize the right of victim’s participation in investigation, prosecution and trial. If the victim is dead, or otherwise not available this right should vest in the next of kin. It should be possible even for Government Welfare bodies and voluntary organizations registered for welfare of victims of sexual offences, child victims, those

in charge of the care of aged and handicapped persons to implead themselves as parties whenever the court finds it appropriate for a just disposal of the case.[31]

Current Scenario

In the process of the transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the State) to the offender and how he is dealt with by the State. Criminal justice has come to understand everything there is to know about crime, the criminal, how he is dealt with, the procedure of proving his guilt, and the final penalty he receives. The victim's monetary and other losses were meant to be covered by the civil law. Victims were sidelined, and the State acted as the victim in order to prosecute and punish the perpetrators. Not only was the victim's right to compensation overlooked, with the exception of a token provision in the Criminal Procedure Code, but he also lost his right to participate as the primary stakeholder in criminal proceedings. He has no right to present evidence, cannot contest it through cross-examination of witnesses, and cannot make arguments to sway the judge's verdict.

The victim of a crime initiates the criminal justice system by providing information to the police, who are then expected to reduce the information to writing.[32] The victim as an informant is entitled to a copy of the FIR "forthwith, free of cost".[33] If a police station's officer refuses to act on such information, the victim can write to the Superintendent of Police, who will then be expected to conduct an investigation into the complaint.[34] If these methods fail, the victim can

[31] Malimath Committee Report p. 76.
[32] S.154 (1) of the Code of Criminal Procedure, 1973 (Cr. PC)
[33] S.154 (2) Cr. PC
[34] S.154 (3) Cr. PC

file a complaint with a Magistrate,[35] who will then question the complainant under oath and investigate the case herself or order a police inquiry before taking cognizance.[36] The victim does not participate in the investigation after that, save when contacted to confirm the identification of the accused or the material objects recovered during the investigation, if any.[37]

The victim has a say in whether or not an accused is granted bail. As construed by the courts, Section 439 (2) Cr.PC recognises the right of the complainant or any "aggrieved party" to petition the High Court or the Court of Sessions to have a bail granted to the accused revoked.[38] The court will not accept the prosecution's closure report unless the informant is heard.[39] Compounding of an offence is also impossible without the involvement of the complaint. [40]

Restitution to Victims

Despite the lack of separate legislation in India to provide justice to victims, the Supreme Court has taken a proactive approach and taken decisive steps to defend the rights of victims of crime and power abuse. Beginning in the 1980s, the court adopted the notion of restorative justice and granted victims compensation or restitution, or increased the amount of compensation.[41]

Guidelines for Victim Assistance in Rape Cases

In *Bodhisattwa Gautam* v. *Subhra Chakraborty*[42], the Supreme Court ruled that if a court has power to give compensation at the end of a rape case, it also has the authority to award interim

[35] S.190 Cr. PC.
[36] S.200, 202 Cr. PC
[37] S.9 Evidence Act 1872.
[38] *Puran v. Rambilas* (2001) 6 SCC 338 and *R.Rathinam v. State* (2000) 2 SCC 391.
[39] *Union Public Service Commission v. S.Papiah* (1997) 7 SCC 614.
[40] S.320 Cr.PC.
[41] *Sukhdev Singh* v. *State of Punjab* (1982 SCC (Cr) 467), *Balraj* v. *State of U. P.* (1994 SCC (Cr) 823), *Giani Ram* v. *State of Haryana* (AIR 1995 SC 2452), *Baldev Singh* v . *State of Punjab* (AIR 1996 SC 372).
[42] AIR 1996 SC 922.

compensation. It is a landmark case in which the Supreme Court issued a set of guidelines to help indigenous rape victims who cannot afford legal, medical and psychological services, in accordance with the Principles of UN Declaration of Justice for Victims of Crime and Abuse of Power, 1985.

Recommendations of Commissions and Committees on Justice to Victims in India

There has been a considerable shift in the judiciary's attitude toward victims' human rights over the last decade. The necessity for a legislation on victim compensation or a comprehensive law on victim justice has been expressed by the courts and judicial commissions and committees in their judgements and reports.

1. The Law Commission of India, 1996

The Law Commission, in its report in 1996, stated that, "The State should accept the principle of providing assistance to victims out of its own funds, (i) in cases of acquittals; or (ii) where the offender is not traceable, but the victim is identified; and (iii) also in cases when the offence is proved"[43]

2. The Justice Malimath Committee on Reforms of Criminal Justice System (Government of India, 2003)

The Justice V. S. Malimath Committee has made many recommendations of far-reaching significance to improve the position of victims of crime in the Criminal Justice System including the victim's right to participate in cases and to adequate compensation. Some of the significant recommendations include:

[43] Law Commission of India Report, 1996.

1. The victim, and if he is dead, his or her legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years' imprisonment or more;
2. In select cases, with the permission of the court, an approved voluntary organization shall also have the right to implead in court proceedings;
3. The victim has a right to be represented by an advocate and the same shall be provided at the cost of the State if the victim cannot afford a lawyer;
4. The victim's right to participate in criminal trial shall include the right: to produce evidence; to ask questions of the witnesses; to be informed of the status of investigation and to move the court to issue directions for further investigation; to be heard on issues relating to bail and withdrawal of prosecution; and to advance arguments after the submission of the prosecutor's arguments;
5. The right to prefer an appeal against any adverse order of acquittal of the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation;
6. Legal services to victims may be extended to include psychiatric and medical help, interim compensation, and protection against secondary victimization;
7. Victim compensation is a State obligation in all serious crimes. This is to be organized in separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration;

8. The Victim Compensation Law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. (Government of India, 2003).

3. The National Commission to Review the Working of the Constitution

The Commission to review the working of the Constitution (Government of India, 2002) has advocated a victim-orientation to criminal justice administration, with greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/compensation particularly for victims of violent crimes.[44]

[44] Chokalingam, K., Measures For Crime Victims in The Indian Criminal Justice System, The 144th International Senior Seminar Visiting Experts' Papers, Resource Material Series No. 81, p. 102, 103.

Rights of Witnesses

"A trial without witnesses, when it involves a criminal accusation, a criminal matter, is not a true trial; it really isn't." - Bill McCollum[45]

The right to a fair trial has long been acknowledged as the cornerstone of criminal law and one of the most fundamental aspects of democratic governance. Witnesses are essential ingredients in a criminal trial since it is the testimonies of the witnesses that establish the accused's guilt.[46] As a result, the independence and freedom of the witnesses called before the Court for evidence are also essential to a fair trial. In *Zahira Habibullah Sheikh & Anr.* v. *State of Gujarat & Ors.*[47], the Supreme Court has said explicitly that threatening witnesses or forcing them to submit false testimony will not result in a fair trial.

It is not uncommon for witnesses to become hostile during a trial. Threats, intimidation, various forms of inducement, the use of money and muscular power, and other factors are only a few of the factors that cause witnesses to withdraw their testimonies in court and become hostile.[48] In *Mahender Chawla and Ors.* v. *Union of India and Ors.*[49], One of the main causes for the witnesses' hostile behaviour, according to the Court, is that they are not provided with adequate protection by the State. Clearly, threats to one's life, whether produced by force, compulsion, assault, or other means, can cause witnesses to turn away from the truth, even if it goes against their conscience or will.

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[45] Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton: Floor trial proceedings, *Volume 2 of Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton*, United States. Congress. Senate, at p. 1458.
[46] *National Human Rights Commission v. State of Gujarat,* MANU/SC/0713/2009
[47] Supra Note 19.
[48] *Ramesh and Ors. v. State of Haryana,* (2017) 1 SCC 529.
[49] 2019 (14) SCC 615.

The Law Commission of India, beginning with its 14th Report, and the National Police Commission, beginning with its 4th Report, thoroughly investigated and suggested substantive steps to reduce witness issues. The Law Commission also conducted an extensive study on Witness Identity Protection and Witness Protection Programs in its 198th Report, concluding, among other things, that there were no Witness Protection Programs in India that dealt with the protection of victims and witnesses outside of court proceedings. As a result, along with its Report, the Law Commission presented and annexed the "Witness (Identity) Protection Bill, 2006." However, no Draft Bill regarding Witness Protection Programmes was proposed.[50]

The Indian judiciary has often highlighted the need of witness protection. In *National Human Rights Commission* v. *State of Gujarat and Ors*[51], the Supreme Court correctly recognised the need of witness protection and emphasised the state's involvement in this regard. The Court was pleased to permit the Special Investigation Team/SIT so constituted in the said case to, inter alia, decide "which witnesses require protection and the kind of witness protection that is to be made available to such witnesses" after thoroughly reviewing the laws, policies, and precedents regarding witIn the case of *Mahender Chawla* v. *Union of India,*[52] the Supreme Court issued explicit orders to the states outlining the procedures taken/to be done for witness protection. At the same time, India's (then) Attorney General was asked to submit his recommendations in the form of a model scheme. The "Witness Protection Scheme, 2018" ("Scheme") was finalised by the Central Government, in conjunction with the National Legal Services Authority, and based on the proposals of many States/Union Territories. Following that, the Court, in its decision in

[50] Kumar, S. and Goyal, A., *Witness Protection: Safeguarding The Eyes And Ears Of Justice - Litigation, Mediation & Arbitration India*, https://www.mondaq.com/india/trials-appeals-compensation/914274/witness-protection-safeguarding-the-eyes-and-ears-of-justice
[51] Supra note 46.
[52] Supra note 49.

the same case, underlined the critical importance of having a witness protection mechanism or scheme in India. However, considering the absence of statutory regime, the Scheme was duly adopted and declared to be law by the Court, in terms of Article 141 of the Constitution, until a suitable law in this regard was framed.[53]

The Witness Protection Scheme 2018

Witness Protection Scheme, 2018 provides for protection of witnesses based on the threat assessment and protection measures inter alia include protection/change of identity of witnesses, their relocation, installation of security devices at the residence of witnesses, usage of specially designed Court rooms, etc.[54]

In its 'Scope of the Scheme' it states :

> "Witness Protection may be as simple as providing a police escort to the witness up to the Courtroom or using modern communication technology (such as audio video means) for recording of testimony. In other more complex cases, involving organized criminal group, extraordinary measures are required to ensure the witness' safety viz. Anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs of a witness may have to be viewed on case to case basis depending upon their vulnerability and threat perception."

The Scheme provides for three categories of witness as per threat perception: Category 'A': Where the threat extends to life of witness or his family members, during investigation/trial or thereafter; Category 'B': Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter; and Category 'C': Where the

[53] Supra note 50.
[54] https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1578108

threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.[55]

It also establishes the State Witness Protection Fund, which will be run by the Department/ Ministry of Home under the State/ Union Territory Government and will be used to cover the costs of implementing the Competent Authority's Witness Protection Order. The filing of an application in the prescribed form before the Competent Authority of the concerned District, through its Member Secretary, is the starting point for a Witness Protection Order, according to the Scheme. Clause 6 of the Scheme outlines the procedure for processing such applications based on the Threat Analysis Report ("TAR") prepared by the Additional Commissioner of Police/Deputy Commissioner of Police in charge of the concerned Police Station and its disposition within five working days of receipt. The Competent Authority is also empowered to provide interim protection orders until a final decision is reached on the witness' application, as well as to monitor and review the final order of protection on a monthly basis. Monitoring of mails/phone calls; ensuring witness and accused do not come face to face during investigation/ trial; concealment of identity; holding in-camera trial; regular patrolling around witness' house, etc. are all examples of Witness Protection Orders that may be issued, which are proportionate to the threat and for a specific duration and subject to monitoring/review. The Scheme also includes measures for witness protection, change of identity, witness relocation, confidentiality, and record retention, among other things. Furthermore, under Clause 12 of the Scheme, every state is required to publicise the scheme widely, and the Investigation Officer and Court are required to inform witnesses of the Scheme's existence and key features.[56]

[55] Clause 3 of the Witness Protection Scheme, 2018.
[56] Clauses 9-13 of the Scheme.

India has made significant progress in terms of safeguarding the protection and security of witnesses, who are an important component of the criminal justice system. However, the lack of a statutory mechanism with harsh punitive consequences may leave the entire mechanism, which was adopted through the judicial process in limbo. As a result, the existence of an effective and stringent Witness Protection Scheme cannot be overstated. As Jeremy Bentham rightly put it, ‘witnesses are the eyes and ears of justice’.

In the above chapter, we saw how important the rights guaranteed to each of the stakeholder is very important in the criminal process, and the implementation of it is key in ensure a fair trial. Now, let us look at how Media Trials impact these rights discussed above.

Chapter IV

Media Trials and Impact on the Criminal Justice System

Media is popularly known as the fourth pillar of democracy in a state. Judiciary on the other hand is considered one of the main three pillars of democracy. Media operates under the established freedom of speech and expression by the state. In India, this freedom laid down under Article 19(1)(a) of the Constitution of India is not guaranteed as it can be subjected to reasonable restrictions. In the recent years with the growth of technology and broadcasting, media has increasingly played a dominant role when it comes to reporting on sensational cases pending adjudication of the judiciary. This has been a cause for the judiciary to be critical of the media in this role as it tends to hamper the process of fairness and justice intended to be provided by the Court. 'Trial by media' as it is popularly known is something that different states and their judiciary such as that of U.K., U.S.A have struggled to face and come with a balancing solution considering the fact that media has an incredible influence on the public. In India the law commission in 2006 had *suo moto* released its 200th Report on Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1976[57].

The fact being media and judiciary play a complementary role of discovering the truth and upholding the democratic values of a state but when it comes to the question of biasness, we have increasingly seen how different media houses can be extremely biased in its reporting and taking stance with respect to different cases. The Bar may be influenced by the 'popular opinion' portrayed by the media and could decline to defend the accused if he is depicted as a despicably wicked character by the media. As a result, the accused loses his fundamental right to self-

[57] Law Commission of India, 200th Report, available at: https://lawcommissionofindia.nic.in/reports/rep200.pdf.

defense. This kind of exposure also persuades witnesses to adjust their testimony to the prosecution's case. Most crucially, the public's and the judiciary's perceptions of the evidence may disagree. While the people believe the accused is guilty, the court may acquit him after a thorough analysis of the facts and evidence. Such disparities in perception erode the public's faith in the criminal justice system. Pre-trial publicity or media trial as it results in has the potential to undermine the criminal justice system and the rule of law[58].

Free Speech v. Fair Trial

The accused have rights to a fair and speedy trial which can be said to be in danger due to the influence wielded by the media. Most importantly, the legal principles in favour of an accused such as 'innocent until proven guilty' and 'guilty beyond reasonable doubt' goes down the drain due to such media trial that sometimes persists in branding an accused as guilty even before the court of law has given its judgment. Whereas as stated before, the freedom of speech and expression as provided by the Constitution of India is extended to the media also and it is up to the courts to decide to what extent any reasonable restrictions need to be imposed to achieve a certain objective. Hence, the courts across jurisdictions have a major duty to balance this right to freedom of speech and expression of the media against the right to fair trial of the accused.

On an international level, the right to fair trial has been enshrined in Article 10 of the Universal Declaration of Human Rights, 1948 ('UDHR'). It deals with the rights of an accused stating that "in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."[59] Article 11 of UDHR refers to the right of presumed innocence which states that "Everyone charged with a

[58] Justice R.S. Chauhan, Trial by Media: An International Perspective, available at: https://www.scconline.com/blog/?p=235735.
[59] https://www.un.org/en/about-us/universal-declaration-of-human-rights.

penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[60] Regarding freedom of expression, Article 19 of UDHR states that everyone has the right to form and hold opinions and to seek or receive information and ideas from media. The International Covenant on Civil and Political Rights, 1966 lays down similar provisions as to presumed innocence of the accused in Article 14(2).

The Indian Constitution does not separately refer to the freedom of the press or of the electronic media in Part III but these rights are treated by the law as part of the 'Freedom of speech and expression' guaranteed by Article 19(1)(a) of the Constitution of India. The guarantee is subject to 'reasonable restrictions' which can be made by legislation to the extent permitted by Article 19(2) that mentions 'contempt of court' as a reasonable restriction alongside sovereignty, security of state etc. Contempt of Court which is governed by the Contempt of Court Act, 1971 is the law that deals with tackling any situation such as media trial that could interfere with 'administration of justice' and therefore uphold due process of law[61]. Hence, contempt of court law is one of the important balancing acts in the tussle between fair speech and fair trial.

Whereas, the right to fair trial flows from Article 21 read with Article 14 of the Constitution of India. It is at the heart of the criminal justice delivery system which is coupled with other principles that form part of 'due process of law' such as presumption of innocence, right not to be a witness against oneself, right to legal representation etc[62]. In the case of *Zahira Habibullah Sheikh* v. *State of Gujarat*[63], the Supreme Court explained the meaning of 'fair trial' to

[60] *Id*.
[61] *Supra* note 57 at p. 36.
[62] S. Devesh Tripathi, Trial by Media, Prejudicing the Sub-judice, available at: http://www.rmlnlu.ac.in/webj/devesh_article.pdf.
[63] Supra Note 19.

essentially mean a trial where bias or prejudice for or against the accused, the witnesses or the cause which is being tried does not exist.

International Perspective

Jurisdictions such as US and UK also have had their fair share of struggle balancing these rights as stated above. The American courts had initially given importance to the rights of the accused but later slowly shifted focus to the rights of the media. Unlike in India and UK wherein the right to freedom of speech and expression can have reasonable restrictions, in US it is more absolute in nature. Neverthless, both jurisdictions agreed with the need for balancing of both rights and did attempt for the same. Lord Scarman in the House of Lords in *Attorney-General* v. *British Broadcasting Corporation*[64] stated that there is a need for balance between the two interests of great public importance, freedom of speech and administration of justice. Whereas, Justice Black in *Harry Bridges* v. *State of California*[65], stated that a balance has to be struck between the requirements of free Press and fair trial.

The test of "presumed prejudice" was one of the early tests laid down by the American Supreme Court in *Rideau* v. *Louisiana*[66]. In this case an interview with the accused was telecasted wherein he was seen to be confessing his actions to the Sheriff. The trial court had rejected the counsel's request to change venue of trial on the argument that the telecast had adversely affected his rights to have a fair trial. The Supreme Court iterated the mandate of the Constitution to guarantee due process and other minimal rights to accused such as right to counsel, the right to plead not guilty,

[64] [1981] A.C. 303.
[65] 86 L. Ed. 252.
[66] 10 L Ed 2d 663 : 373 US 723 (1962).

and the right to be tried in a courtroom presided over by a Judge. Therefore, the Supreme Court held that there was a prejudice caused due to the telecasting of the interview.[67]

The test of "reasonable likelihood" was later applied in the case of *Sheppard* v. *Maxwell*[68], wherein the Supreme Court of US checked if there is a reasonable likelihood of prejudicial news prior to the trial could affect the outcome of a fair trial then conviction ought to be overturned. In this case the court also laid down certain methods to control this situation such as to control the presence of media in judicial proceedings, insulating of witness, transferring the case to another country affected by less publicity or even ordering a new trial are some of the suggestions[69]. Later the scope was widened with another test of "totality of circumstances" wherein the Supreme Court in the case of *Murphy* v. *Florida*[70], the court stated that the pre-trial publicity and exposure of information must be viewed in the totality of circumstances to determine whether it has affected an outcome of a fair trial. In *Moyola* v. *Alabama*[71], a circuit court stated that the accused needs to show an "actual, identifiable prejudice" on the part of jury or court attributable due to adverse media trial.

As stated before, unlike American courts that have preferred to give the right to freedom of speech and expression a precedence over right to fair trial, the courts in UK have taken a different path to hold right to fair trial as an absolute right as in case of *R.* v. *Lord Chancellor, ex p Witham*[72]. In the case of *R.* v. *Evening Standard Co. Ltd.*[73], it can be seen that any publication providing information on previous convictions of the accused or any confession of the accused would be considered to have created a prejudice. The courts do apply the test of "presumed

[67] *Supra* Note 58.
[68] 16 L Ed 2d 600 : 384 US 333 (1965).
[69] Supra Note 58.
[70] 44 L Ed 2d 589 : 421 US 794 (1974).
[71] 623 F 2d 992 (5th Cir 1980).
[72] 1998 QB 575 : (1998) 2 WLR 849.
[73] (1954) 1 All ER 1026 (DC).

prejudice" to decide whether to stop such trials if such right to fair trial have been violated by detrimental publicity[74].

Similar to India, the UK courts take action to postpone or prohibit any publication from the media as per sections 4(2), 11 of the Contempt of Courts Act, 1981. Section 1 lays down the "Strict liability rule" which is against publication of any matter which creates a substantial risk of serious prejudice or impediment to the course of justice in legal proceedings, irrespective of the intention behind the publication[75]. In the case of *HM Attorney General* v. *MGN Limited and News Group Newspapers Limited*[76], it was stated that it could be said to interfere with administration of justice if any adverse publicity causes enough prejudice to deter witnesses from giving information that would affect the preparation of defence for trial etc. Such strict liability on publications would be applicable to any 'active' legal proceedings which are when summons has been issued or defendant arrested without warrant[77]. The media is also mandated to follow the Reporting Guidelines as to reporting restrictions in the criminal courts which would otherwise lead to criminal offence and contempt of court[78].

Indian Jurisdiction

In one of the initial cases *P.C. Sen, In re*[79], the Chief Minister of West Bengal was found to be in contempt of court and fined therein for making a speech on a case that was sub-judice before the courts. The court held that the speech was ex-facie calculated to interfere with administration of

[74] *Supra* Note 58.
[75] Contempt of Court, Reporting Restrictions and Restrictions on Public Access to Hearings, available at: https://www.cps.gov.uk/legal-guidance/contempt-court-reporting-restrictions-and-restrictions-public-access-hearings.
[76] [2011] EWHC 2074.
[77] Supra note 73.
[78] https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf.
[79] AIR 1970 SC 1821.

justice. The court clarified that the question is not so much of the intention of the contemnor as whether it is calculated to interfere with the administration of justice[80].

One of the first cases in India addressing this issue was in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers, Bombay (P) Ltd*[81], wherein the Supreme Court of India dealt with a contempt of court case against a press journal that published an article. The appellants were seeking injunction restraining the press from publishing any articles that commented on a prejudging a sub-judice issue before the courts that would ultimately lead to interference with due administration of justice. The SC of India relied on American and English judgements to decide on the issue. The court noted that the freedom of speech and expression under Article 19(1) when juxtaposed with Amendment 1 of the US Constitution is different as such a right is conditional in India and absolute in US[82].

The court concluded that a balance of convenience test needs to be followed in such situations. It was stated that

> "The process of due course of administration of justice must remain unimpaired. Public interest demands that there should be no interference with judicial process and the effect of the judicial decision should not be pre-empted or circumvented by public agitation or publications."

The court finally weighed the balance of convenience between the risk of such a publication creating any prejudice and freedom of knowledge of people and obligation of press, it was held in favour of the press[83].

The Supreme Court while considering the issue of sentencing in the case of *State of Maharashtra* v. *Rajendra Jawanmal Gandhi*[84] stated that trial by press or electronic media resulting in public

[80] https://indiankanoon.org/doc/1351834/.
[81] (1988) 4 SCC 592.
[82] Supra Note 78.
[83] *Id*.

agitation is against the rule of law. The court also cautioned the judges to guard themselves against such pressure and bias created by media. The Supreme Court of India in the case of *Anukul Chandra Pradhan* v. *Union of India*[85], connected the aspect of presumption of innocence in criminal cases to rule of law stating that anything contrary to this legal nature will jeopardise the same along with dignity of courts and protection of accused under Article 21. The court stated that reporting or criticism in sub-judice matters must be subjected to checks and balances so as not to interfere with the administration of justice[86].

In the case of *M.P. Lohia* v. *State of W.B*[87], the court remarked on the publication of a certain article which was very one-sided in its coverage. The court observed that such publication when the matter is sub-judice is interference with administration of justice and will amount to 'trial by media'.

A very important case in the Indian jurisprudence regrading trial by media is the case of *R.K. Anand* v. *Delhi High Court*[88], that specifically dealt with the role of sting operation in media trial and any interference in administration of justice. During the pendency of the sensational BMW case, NDTV had broadcasted a sting operation showing collusion between the defence counsel and the public prosecutor. The court in this case went on to define 'trial by media' as

> "...the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial impossible but means that

[84] (1997) 8 SCC 386.
[85] (1996) 6 SCC 354.
[86] Supreme Court Of India On Trial By Media, available at: https://www.mondaq.com/india/trials-appeals-compensation/1006762/supreme-court-of-india-on-trial-by-media.
[87] (2005) 2 SCC 686.
[88] (2009) 8 SCC 106.

> regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny"[89].

Here the court clarified that sting operation cannot be considered as a trial by media. Also, regarding the question whether such a sting operation warrants criminal contempt if it interferes with administration of justice, the court held in the negative. The court applied the public interest aspect of such sting operation and also the aspect of 'substantial truth' that comes with it to hold it not liable to criminal contempt[90]. Nevertheless, the court observed that the media should perform acts of journalism and not be a special agency to the court.

The next important case was that of *Manu Sharma* v. *State (NCT of Delhi)*[91] also dealt with another case of sting operation and its impact on the trial. Popularly known as the Jessica Lal murder case created a media frenzy which was later aggravated by a sting operation conducted by Tehlka exposing the accused to have bribed the witnesses. The court stated that:

> "There is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the Court. Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.[92]"

The court clarified stating that even though the trial by media that occurred did confuse the mind of the public and it did affect the accused but only to a certain extent and was not adverse enough to create a prejudice that would force the court to rule otherwise. The court observed that the

[89] https://indiankanoon.org/doc/58440/.
[90] R.K. Anand v. Registrar, Delhi High Court: An examination of the law on media trials, available at: https://nslr.in/wp-content/uploads/2019/04/NSLR-Vol-5-No-8.pdf.
[91] (2010) 6 SCC 1.
[92] https://indiankanoon.org/doc/1515299/.

freedom of speech and expression under Article 19(1)(a) has to be carefully used so as not to create any interference in administration of justice on matters sub-judice before courts. The court finally called on to the media cautioning them to extend their cooperation to ensure a fair trial. The court concluded stating that:

> "Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible."[93]

This was also a case wherein the advocate, Mr. Ram Jeth Malani representing Manu Sharma, the accused had faced a lot of criticism and malignment for representing the accused.

In other sensational cases such as the Arushi Talwar murder case, wherein the Supreme Court had first simply cautioned the press to restrain from publishing maligning articles that could interfere with the investigative process. When the media continued disparaging the Talwar family, the court replied to another application filed by the father requesting judicial intervention, the court sent out notices to certain journals to explain the assertions made and as to why action should not be taken against them. The court also directed the Information and Broadcasting Ministry and the National Broadcasters' Association which is a regulatory body for electronic media, to produce on record rules framed for self-regulation of content[94].

Another such sensational case that occurred recently was the *Sushant Singh Rajput death* case. The Bombay High Court rejecting the argument of media claiming they were only engaging in "investigative journalism", came down heavily on Republic TV and Times now for its disparaging form of reporting the case saying "These TV channels took upon themselves the role

[93] *Id*.
[94] Aarushi murder case: SC slams 'sensationalist' media, available at: https://indianexpress.com/article/india/crime/aarushi-murder-case-sc-slams-sensationalist-media/lite/.

of the investigator, the prosecutor as well as the Judge and delivered the verdict as if, during the pandemic, except they, all organs of the State were in slumber". The court stated that such trial by media interferes with criminal investigation by the police and is against the Programme Code under the Cable TV Act and Rules. The court observed that the programmes aired by the TCV channels are prima facie contemptuous and there were multiple PILs filed requesting to lay down guidelines regarding the same. The court went ahead to give a landmark judgment laying down guidelines and new norms for media to follow with respect to reporting on high-profile criminal cases. The court directed the media to restrain and refrain from certain actions which are listed as guidelines:

1. To not refer to the character of accused/victim creating any prejudice against them nor printing their photographs
2. To not hold interviews with witnesses or victim or any other their family members and analysing any versions of these witnesses that are vital for trial
3. To not publish any confession by accused made to police officer
4. To not criticise the investigative agency and the police based on half-baked information and also predicting or proposing course of action to be taken by investigative agency
5. To not pronounce merits of the case including pre-judging the guilt of the parties when it is yet to be concluded by court
6. To not recreate crime scene and any further depiction of the crime
7. To not leak sensitive information collected by investigative agency
8. To not act in any manner that would violate the provisions of the Programme Code as prescribed under section 5 of the CTVN Act read with rule 6 of the CTVN Rules, the norms of journalistic standards and the Code of Ethics and Broadcasting Regulations and

thereby inviting contempt of court proceedings within section 2(c) of the Contempt of Court Act

9. To not indulge in any character assassination and mar reputation of parties
10. To not depict deceased as one of weak character especially in cases of death by suicide
11. To not report/debate/discuss that would harm the interests of the accused being investigated or witness or anyone connected to investigation of case[95]

Unfortunately, the court again restrained from initiating criminal contempt proceedings which was disappointing just like in *Arushi Talwar* case, but merely reposed faith that media would be more responsible in future. Nevertheless, the laying down of such indicative guidelines laid down would immensely help persons in filing criminal contempt proceedings in case any media violated any of the guidelines listed.

The stakeholders of a criminal trial are sometimes relentlessly battered by the menace of media trials, affecting their rights and the guarantee of a fair trial. We have seen that a bias is formed in the mind of judges and it creates a veil restricting them from getting an impartial trial.

The next chapter, deals with the concept of Plea Bargaining and its effect on the criminal justice system in India presently in light of the chapters discussed supra.

[95] *Nilesh Navalakha & Ors.* v *UOI,* available at: https://www.livelaw.in/pdf_upload/bombay-high-court-judgement-in-ssr-media-trial-387625.pdf

Chapter V

Plea Bargaining

The concept of Plea Bargaining is fairly contemporary in the Indian context. The Criminal Law (Amendment) Act, 2005[96] incorporated the Chapter on plea-bargaining as Chapter XXIA into the Code of Criminal Procedure, 1973. Plea bargaining was not generally used in our criminal justice system prior to the change to the Code of Criminal Procedure. The concept of plea bargaining was not recognised in Indian criminal law, and it was even regarded against public policy. However, Sections 206(1) and (3) of the Code of Criminal Procedure, as well as Section 208(1) of the Motor Vehicle Act 1988, allowed the accused to plead guilty to minor offences without the possibility of a plea bargain with the prosecution.

Plea-bargaining is a legal agreement in which the prosecution offers the accused the chance to plead guilty to a reduced charge or the original criminal charge with a recommendation of a sentence that is less than the maximum punishment. Only those offences that carry a maximum sentence of seven years in prison are eligible for plea negotiation. Offenses affecting the country's socioeconomic condition, as well as those committed against a woman or a child (a person under the age of 14), are excluded.[97] As a result, all serious offences fall outside of its purview. In the instance of plea bargaining, once the court issues an order, there is no right of appeal to any court.[98]

[96] Criminal Law (Amendment) Act, 2005 (2 of 2006) with effect from 5th July, 2006.
[97] Section 265A(1)(b), Code of Criminal Procedure, 1973.
[98] Section 265G of CrPC.

As the defender of its citizens' fundamental rights, the state has a responsibility to provide a timely trial and avoid unnecessarily protracted delays in criminal cases that could result in a grave miscarriage of justice. It is in the best interests of everyone involved if the accused's guilt or innocence be determined as soon as possible. There can be no dispute that a speedy trial is an integral and necessary component of Article 21's fundamental right to life and liberty. As a result, the problem of case backlog has plagued Indian courts for a long time. To reduce delay in disposing off criminal cases the Law Commission recommended in its 142nd[99], 154th[100] , 177th[101] Report, introduction of "plea-bargaining" as an alternative method to deal with huge arrears of criminal cases. In its report, the Malimath Committee backed this idea. The Code of Criminal Procedure has been amended to include Chapter XXI-A, which contains 12 sections.

Evolution and reference to the United States

The rise of plea bargaining is commonly attributed to the nineteenth century, but it actually stretches back hundreds of years to the introduction of confession law and has most likely existed for over eight centuries.[102]. Shortly after the Civil War, there was an inflow of plea bargaining cases at the appellate level in the United States. Various courts summarily rejected these deals and allowed the defendants to withdraw their confessions, citing previous confession precedent banning the providing of incentives in exchange for admissions of guilt. However, even these early American appellate decisions could not really stop plea bargains from reaching the American courts. While corruption kept plea bargaining alive in the late 19th and early 20th

[99] Law Commission of India, 142th Report on "Concessional Treatment for Offenders who on their own initiative chose to plead guilty without any bargaining" (1991).
[100] Law Commission of India, 154th Report on Code of Civil Procedure, 1973 (1996).
[101] Law Commission of India, 177th Report on Law Relating To Arrest of law (2001).
[102] John H. Langbein (1979) : Understanding the Short History of Plea Bargaining, Faculty Scholarship Series, Paper 544. http://digitalcommons.law.yale.edu/fss_papers/544.

centuries, overcriminalization forced plea bargaining into the mainstream of criminal process and led to its supremacy. Between 1908 and 1916, the number of federal convictions resulting from pleas of guilty rose from 50% to 72%[103]. Though plea-bargaining rates rose significantly in the early 20th century, appellate courts were still reluctant to entertain such deals when appealed.[104]

In the United States, plea bargains or negotiated pleas account for around 95 percent of all criminal convictions. Plea bargains account for over 92 percent of convictions in England and Wales. Only 14.3 percent of cases in British crown courts go to trial, with the rest opting for a plea deal[105]**.** The Supreme Court concluded in *Brady* v. *United States*[106], the first American decision in this area, that simply because the agreement was made out of concern that the trial might end in a death sentence did not invalidate a bargained guilty plea. When properly handled and managed, the United States Supreme Court has recognised techniques such as plea bargaining.[107] The United States of America was a pioneer in incorporating plea bargaining into its judicial system, and it encompasses a wide range of offences. As a result, over 90% of cases are resolved using this practical and efficient legal technique.[108] Interestingly, in individual states or at the federal level, almost anything goes in matters related to plea bargaining. The United States thus does not limit the kind of case that can be plea bargained, allowing it for the minimum violation or offence up to the most serious crimes, including those which could have a potential for the death penalty.

[103] U.S. sentencing commission (2014) : sourcebook of federal sentencing statistics, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf.
[104] Mohd. Ashraf and Absar Aftab Absar, *Plea Bargaining in India - An Appraisal*, 23 ALJ (2015-16) 104.
[105] Supra note US Sentencing Commission
[106] 397 U.S. 742 (1970).
[107] Supra note Mohd. Ashraf.
[108] Supra note US Sentencing Commission.

Plea Bargaining and the Criminal Procedure Code

The process of plea bargaining can be initiated only by the accused voluntarily, before the court in which such offence is pending for trial. An application may be made at anytime after filing of the charge sheet in a case instituted by the police by lodging an F.I.R. In respect of complaints, initiated by a person, the application may be moved at any time after the magistrate has taken the cognizance of the offence and issues a process under section 204 of Cr. P.C. Plea bargaining cannot be availed of in respect of offences punishable with death or imprisonment for life or imprisonment for a term exceeding seven years. Apart from these, offences affecting socio economic conditions of the country also stand excluded from its purview. The benefit of plea bargaining will not be available in case of offences committed against women and children below the age of fourteen years.[109] The application for plea bargaining has to be filed by the accused in the court in which the offence is pending for trial[110]. The application shall be accompanied by an affidavit duly sworn by the accused stating therein that he has filed the application for plea bargaining voluntarily after understanding the nature and extent of punishment provided under the law for the offence and that he has not been previously convicted by a court for the same offence. If the accused has been previously convicted for the same offence, he is barred from making the application for plea bargaining.

On receiving the application for plea bargaining the court shall issue notice to the public prosecutor or the complainant of the case depending upon the case instituted upon police report of private complainant under section 200 Cr. P.C. and to the accused to appear on a day fixed for

[109] Section 256A of CrPC.
[110] Section 265B of CrPC.

the case.[111] On the appearance of the accused on the date fixed, the court shall examine him in camera to satisfy itself that the accused has filed the application voluntarily. The court shall then provide time to the public prosecutor or the complainant of the case, as the case may be and the accused to work out a mutually satisfactory disposition. If the court finds that the application has been filed involuntarily by the accused or that he had been previously convicted for the same offence the court shall reject the application and proceed further in accordance with the provision of the Code.[112]

Section 265C provides the guidelines for working out a mutually satisfactory disposition that the court dealing with the application of plea bargaining has a continuing duty to ensure that the entire process is completed voluntary by the parties participating in the meeting. The victim or the accused, if so desires, may participate in such meeting with their pleaders engaged in the case. On being informed that a satisfactory disposition has been worked out, the court shall prepare a report of a such disposition which shall be signed by the presiding officer of the court and all other persons who participated in the meeting.[113] In case no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of the Code. Where a satisfactory disposition of the case has been worked out, the court shall award compensation to the victim in accordance with the disposition and shall hear the parties on quantum of punishment[114] . The court may release the accused on probation of good conduct or after admonition under Section 360, or deal with the accused under the provisions of the Probation of Offenders Act, 1958, if the law allows it for the offence charged.

[111] Section 265B(3) of CrPC.
[112] Section 265B(4)(b) of CrPC.
[113] Section 265D of CrPC.
[114] Section 265E of CrPC.

After hearing the parties, if the court finds that the minimum sentence is provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment[115]. In case the minimum punishment is not prescribed for the offence charged, the accused may be sentenced to one fourth of punishment provided for the offence[116].

The court shall deliver its judgment in the open court and shall be signed by the presiding officer of the court.[117] The judgment shall be final and no appeal shall lie in any court against such judgment, (except a special leave petition to the Supreme Court under Article 136 or a writ petition under Articles 226 and 227 of the constitution)[118]. The benefit under Section 428 of the Code, for setting off the period of detention undergone by the accused against the sentence of imprisonment is also permissible in the plea bargained settlement[119]. Section 265K of the code provides that the statements of facts stated by an accused in an application for plea bargaining shall not be used for any other purpose.

Judicial Response

Prior to the 2005 amendment, the Indian judiciary was hesitant to implement this concept, and the concept of plea bargaining was repeatedly rejected by the Indian judiciary, despite multiple recommendations from the Law Commission of India. Even after such suggestions, the courts continued to make rulings that were unfavourable to plea bargaining. The earliest cases in which

[115] Section 265E(c) of CrPC.
[116] Section 265E(d) of CrPC.
[117] Section 265F of CrPC.
[118] Section 265G of CrPC.
[119] Section 265I of CrPC.

the concept of plea bargaining was considered by the Hon'ble Court was *Madanlal Ramachander Daga* v. *State of Maharashtra*[120] in which it observed:

> "In our opinion, it is very wrong for a court to enter into a bargain of this character offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence."

In *Thippaswamy* v. *State of Karnataka*[121], J. Bhagwati observed "It would be clearly violative of Article 21, of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly".

In *Kasambhai Abdul Rehmanbhai Sheikh* v. *State of Gujarat*[122] and *Kachhia Patel Shantilal Koderlal* v. *State of Gujarat*[123] the Supreme Court ruled that the practice of plea bargaining was unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. The court, observed

> "…such conviction based on the plea of guilty entered by the appellant as a result of plea bargaining 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 Article 21 of the Constitution, unfolded in *Maneka Gandhi's case*. It would have the effect of polluting the pure fount of justice, because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and ardous criminal trial which having regard to our cumbrous and unsatisfactory system of administration of justice is not only long drawn out and ruinous in terms of time and money, but also uncertain and unpredictable in its result and the judge also might be likely to be deflected from the path of duty to do justice and he might either convict an innocent accused by accepting the

[120] AIR 1968 SC 1267 p. 1270.
[121] (1983) 1 SCC 194.
[122] (1980) 3 SCC 120.
[123] (1980) 3 SCC 120.

> 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"[124]

After the amendment, the concept of plea bargaining has found recognition in the Indian Courts since the court is left with no option but to interpret the law and not make laws. The courts have held that criminals who admit their guilt and repent, a lenient view should be taken, while awarding punishment. While commenting on this aspect, the division bench of the Gujarat High Court observed in *State of Gujrat* v. *Narwar Harchanji Thakor*[125] that

> "…the very object of law is to provide easy cheap and expeditions justice by resolutions of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administrations of law and justice, fundamental reform are inevitable. There should not be anything static".

It is critical that the judiciary and the legal profession support the law relating to plea bargaining; otherwise, a specific law will not become a widespread remedy. Plea bargaining law should be given serious consideration and practised on a regular basis. To address the terrible status of the courts in terms of case pending, plea bargaining appears to be the only near-term remedy that can successfully address the problem if it is given serious consideration. The courts may decide at the outset which cases can be handled effectively and efficiently under Section 265A's provisions. The success of the notion of plea bargaining in its current form, as well as its diversification in the future, is contingent on altering people's minds, which can only be accomplished with the involvement of the judiciary.[126]

[124] Supra note *Abdul Sheik* p. 855. See also, *State of Uttar Pradesh* v. *Chandrika* (1999) 8 SCC 638*; Kirpal Singh* v. *State of Haryana* 1999 Cri LJ 5031 (SC).
[125] 2005 Cri LJ 2957
[126] Supra Note Mohd. Ashraf.

Thus we see the impact that this concept has on criminal justice in India today. Now let us try to identify the practical applications of the elements discussed above by discussing the survey in the forthcoming chapters.

PART B

Chapter VI

Empirical Study and its Findings

The community that is in close interaction with the processes of the Criminal Justice System are lawyers. They see both sides of an issue, most often on the defence side and perspective can be gathered by understanding and analysing the various experiences that lawyers practicing in criminal courts have gone through in the system that is in place currently. Since this research paper pertains to the reforms required in the Criminal Justice System in India, various lawyers, both defence lawyers as well as prosecutors, who are members of the Trivandrum Bar Association, Thiruvananthapuram District, Kerala were identified to be part of the survey. A questionnaire was circulated amongst the members of the Bar and a total of 106 responses were obtained from the various members out of which approximately 15 participants are, or were State Prosecutors. The rest, except for 3 participants, frequently practice in criminal law on the defence side and have given their perspective on the questions relating to the Criminal Justice System in India, specially focusing on the three main aspects discussed above. The questionnaire given out is attached along with this paper as Annexure-I.

The questionnaire is divided into three sections. The first section being various questions relating to the rights of the victim, accused and witnesses in the criminal justice system. The second section pertains to media trials and its effect on criminal trials. Third, is the questions relating to plea bargaining, and its effective use in criminal courts that the participants practice in. The questions and answers are designed in a manner which are close-ended, and most questions have options ranging from 'Highly Disagree' to 'Neutral' to 'Highly Agree'. Some questions are direct 'Yes or No' questions. Out of the participants, 52.8% of them appear in criminal matters before the Trial Courts as well as the High Court. This gives us an additional perspective into the nature of the issues mentioned in the chapters above at the appellate stage also.

The following charts can be used to analyse the answers given by the participants for various important questions in the survey.

Section I

Rights of accused, victim and witnesses in the Criminal Justice System in India.

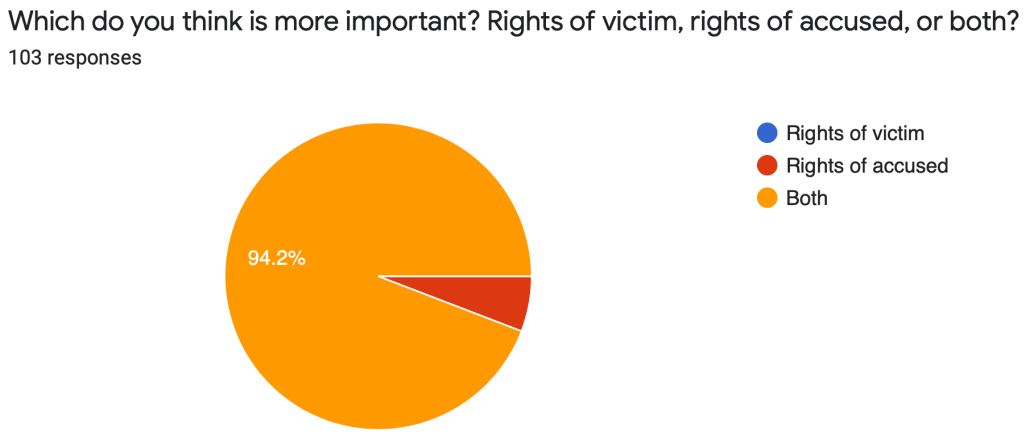

Figure 1

94.2% of the participants consider that there has to be a balance of rights between the accused and the victim, and the Criminal Justice System needs to secure both sets of rights in an equal and equitable fashion.

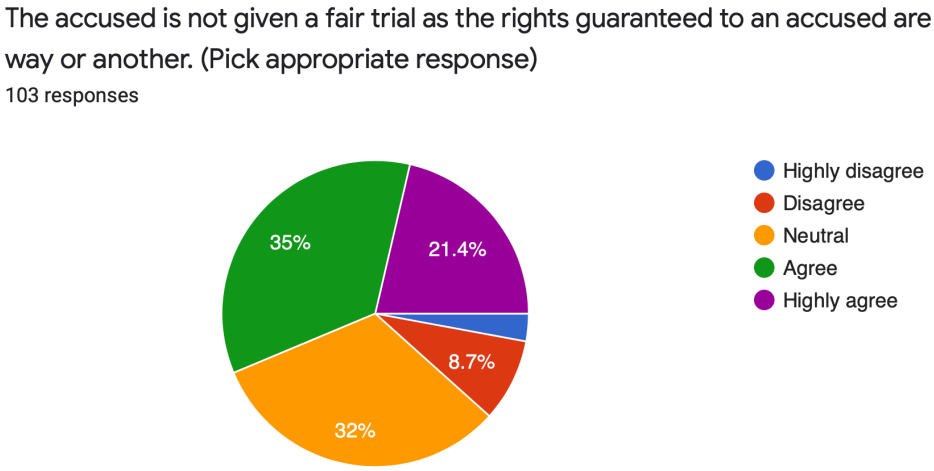

Figure 2

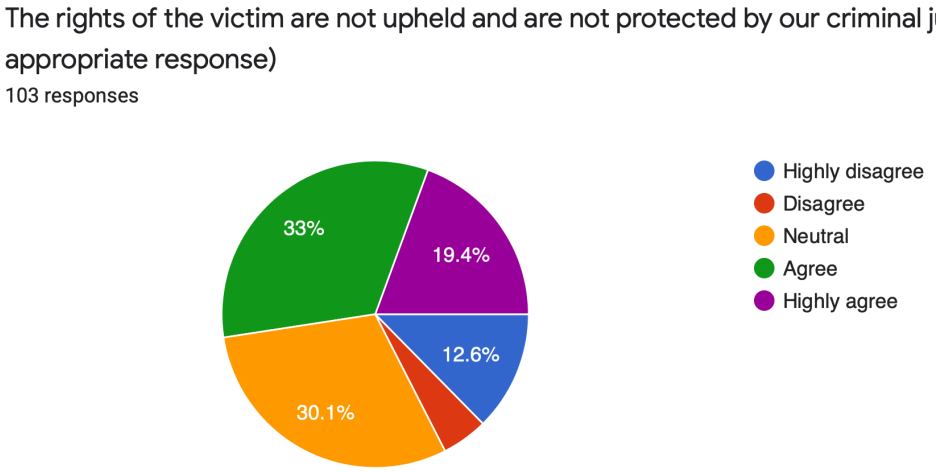

Figure 3

Figures 2 and 3 paint the picture of the current workings of the system. About 56.4% of the participants either agree or highly agree that the rights of the accused are not adequately protected by the current system and adding to that, 52.4% agree that the rights of the victim are presently not being upheld or protected.

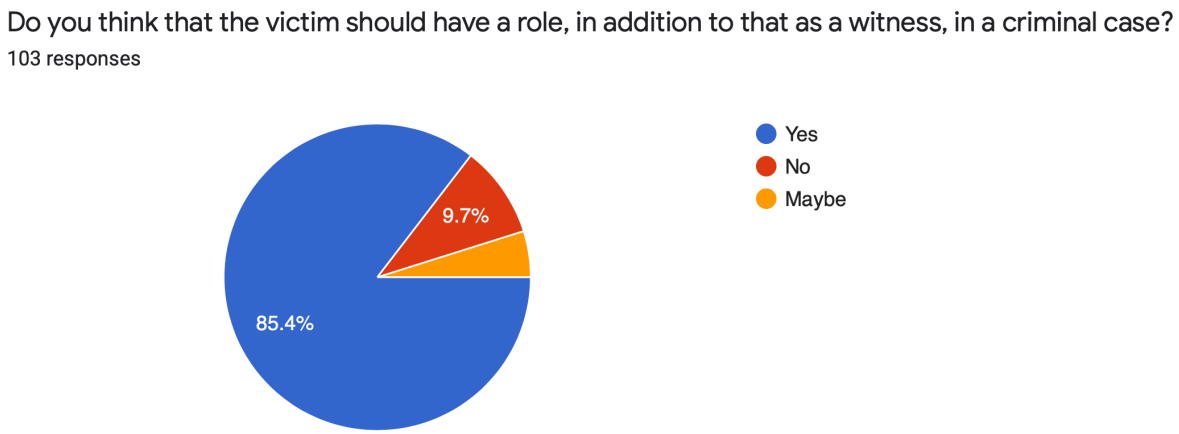

Figure 4

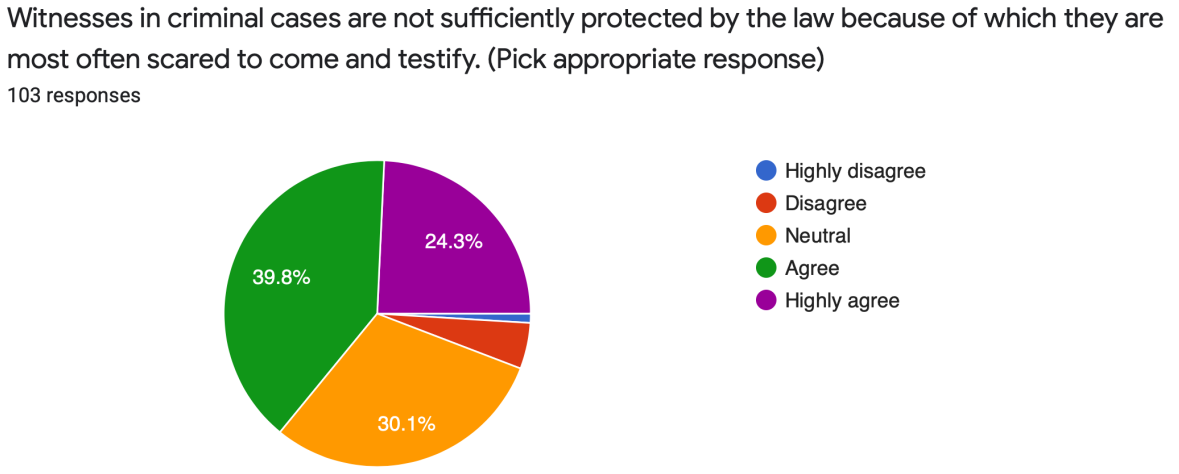

Figure 5

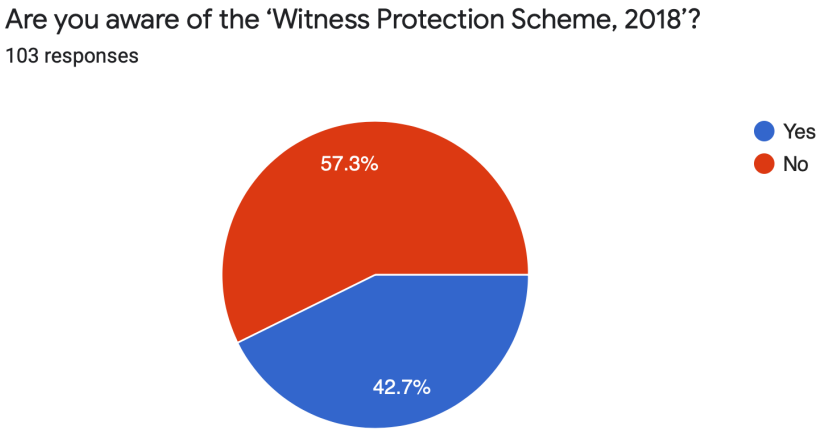

Figure 6

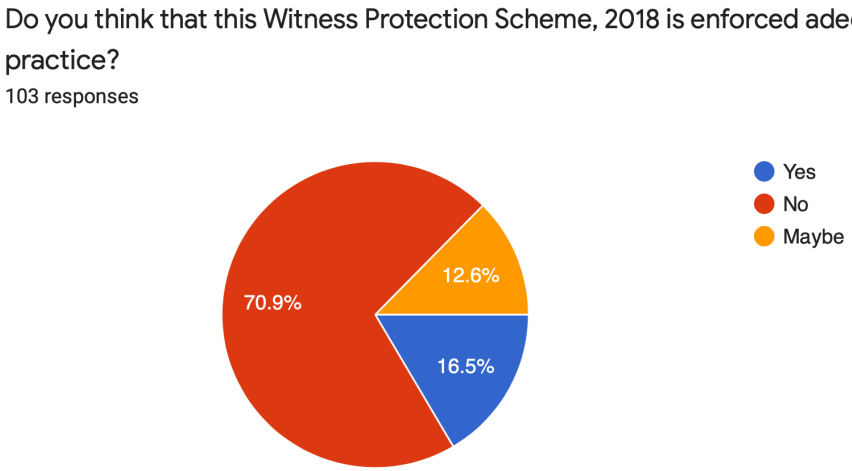

Figure 7

Figures 5, 6 and 7 show us that 64.1% of the participants think that witnesses are not protected either in criminal trials so as to ensure free and safe testimony. Moreover, 57.3% are not aware of the Witness Protection Scheme, 2018 discussed above, and only a meger 16.5% think that this Scheme is enforced in the courts of practice today.

Section II

Media Trials

71.9% of the participants agree that the media plays an important role in the criminal justice delivery of our country.

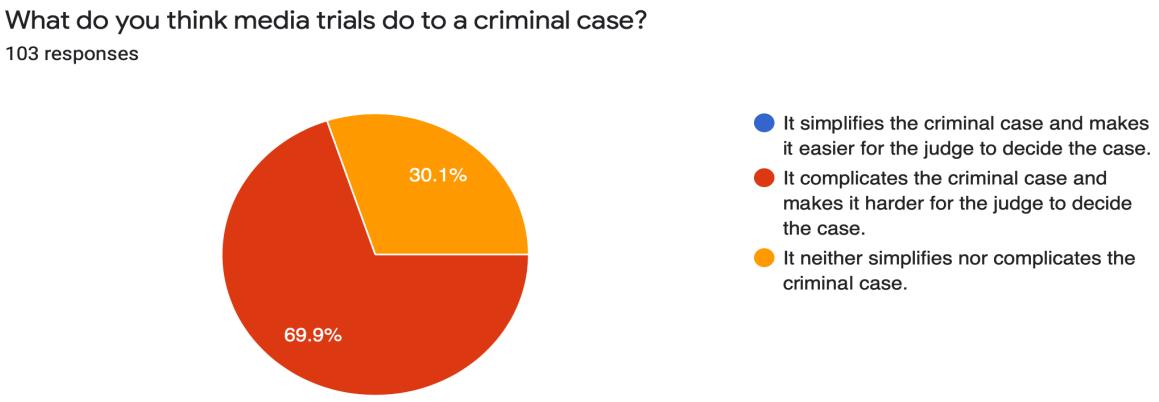

Figure 8

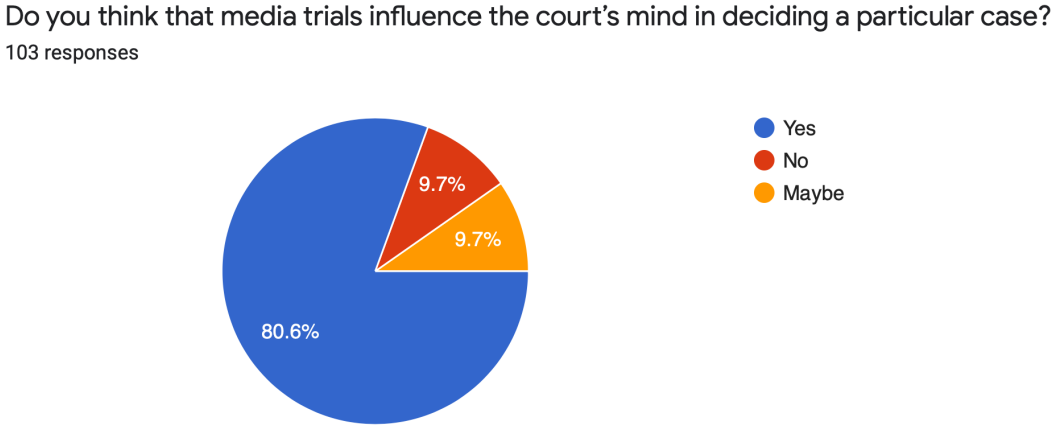

Figure 9

Figure 8 depicts 69.9% of participants having concern over media trials complicating criminal cases and thereby making it harder for the judges to decide the matters effectively. In addition to that Figure 9 suggests that 80.6% of the participants think that the mind of the judge is influenced in cases which have obtained media attention.

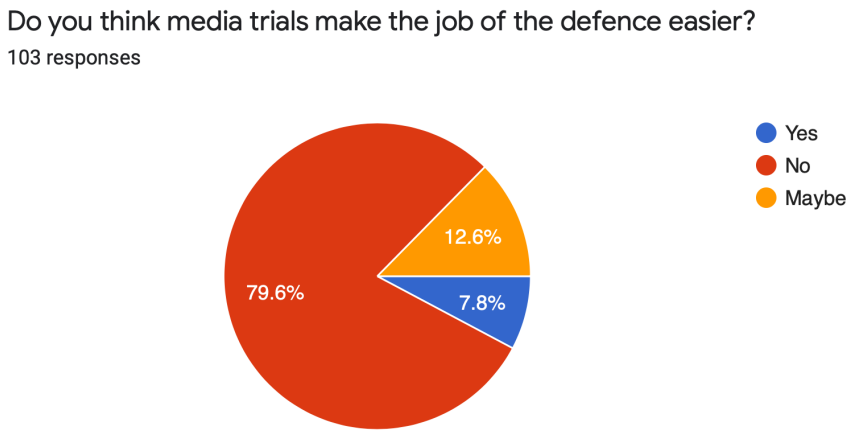

Figure 10

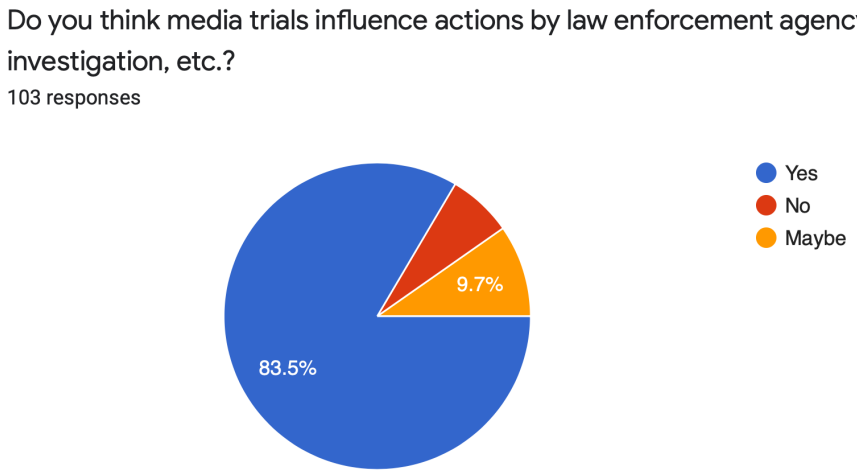

Figure 11

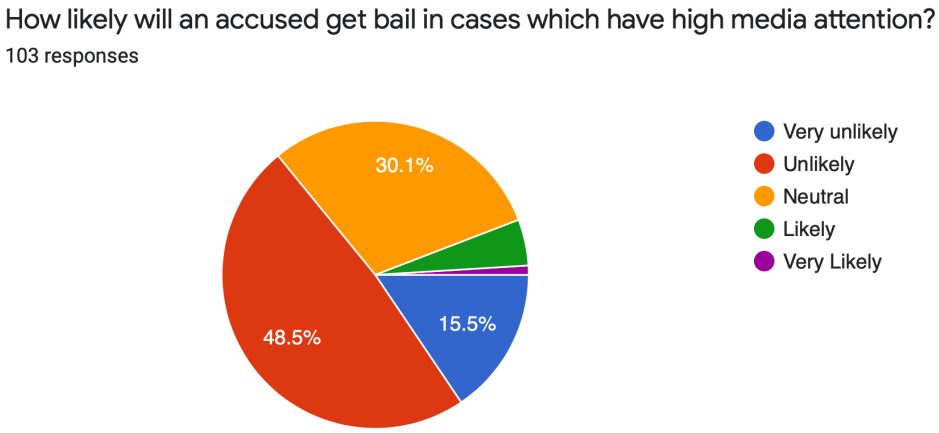

Figure 12

Figures 10, 11 and 12 show that the participants by a big majority think that media trials influence the course of investigation, and the trial making the job of the defence very hard.

69.9% of the participants have had experiences conducting cases which have had media attention, out of which 72% of them have felt that the accused in such cases were denied justice solely because of their media portrayal.

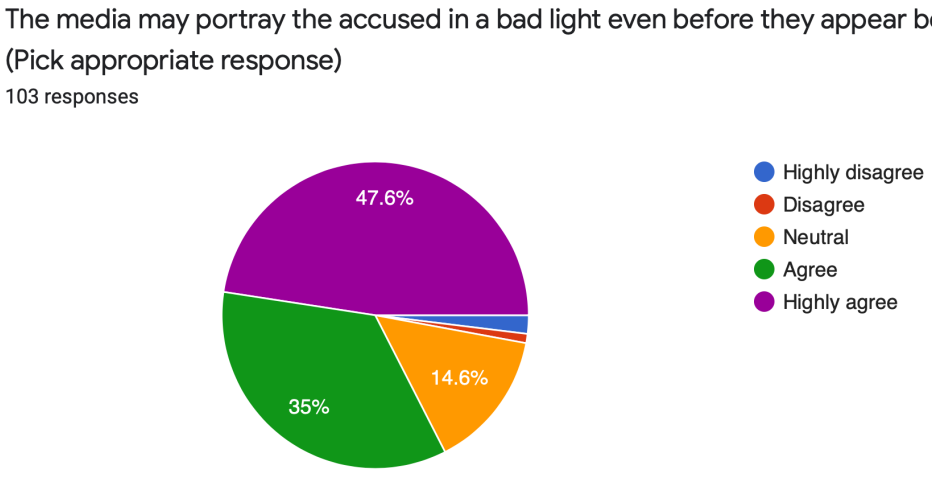

Figure 13

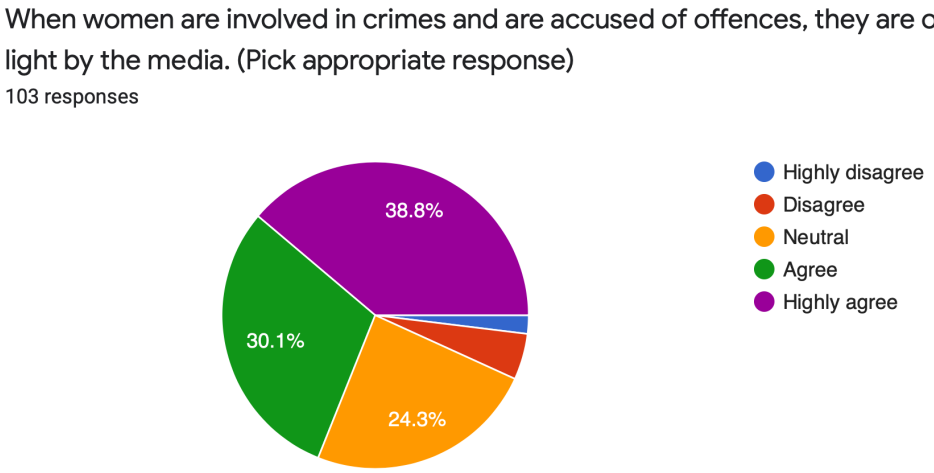

Figure 14

82.6% believe that there is prejudice associated with an accused who has attained media attention, even before they appear before a court of law and this is even stronger in the case of women where 69.9% of the participants agree that in case of women, the media is swift to portray them in bad light.

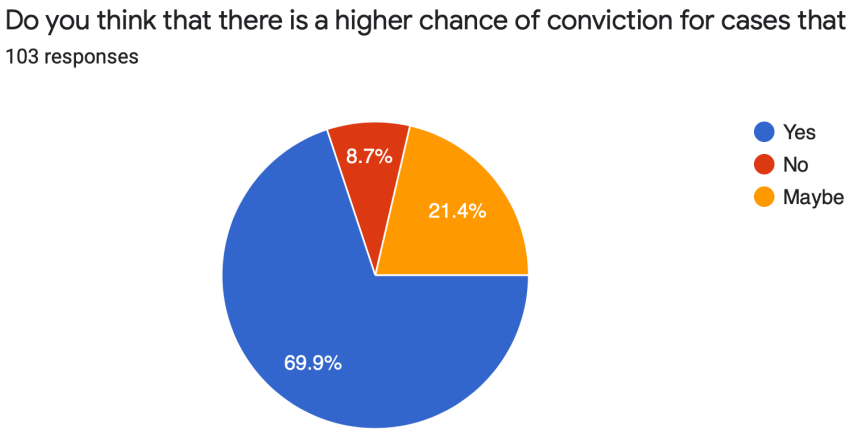

Figure 15

Figure 15 shows that almost 70% of the participants believe that there is a higher chance for conviction in cases which have had media attention.

Section III

Plea Bargaining

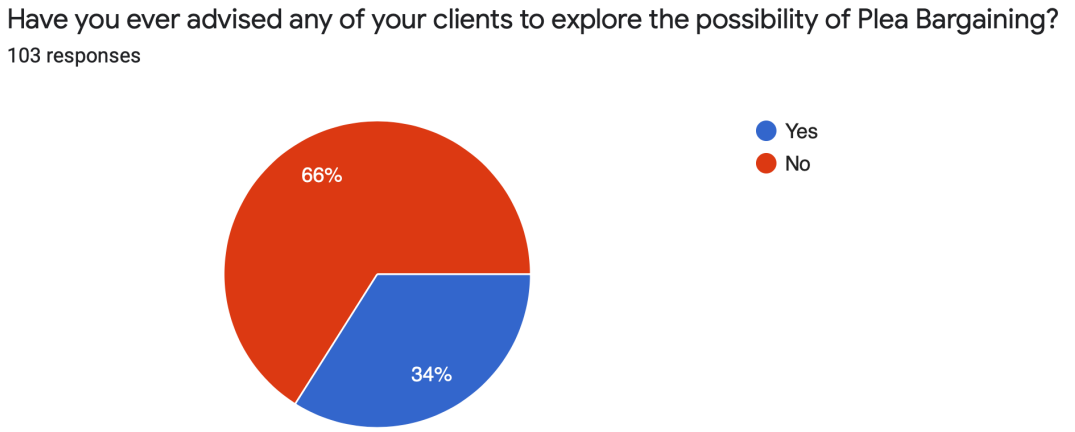

Figure 16

Only 34% of the sample group has even advised an accused to explore the possibility of Plea Bargaining.

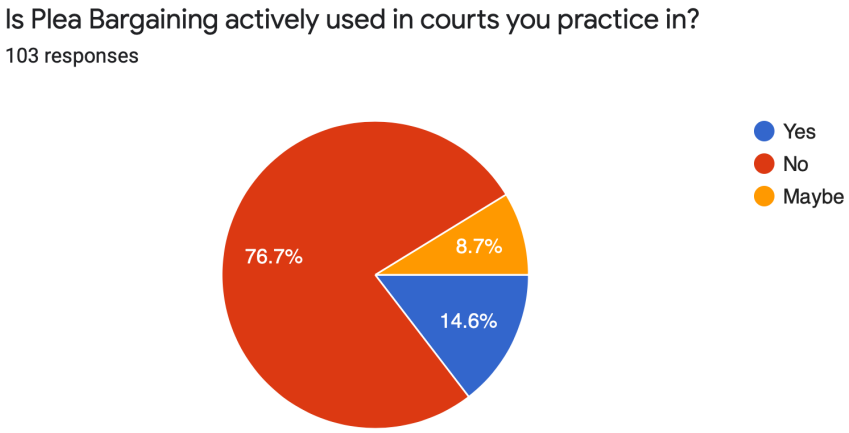

Figure 17

Plea Bargaining is not actively used in Courts according to 76.7% of the participants and that only 25.2% of the participants think that the Courts actively support and advocate Plea Bargaining.

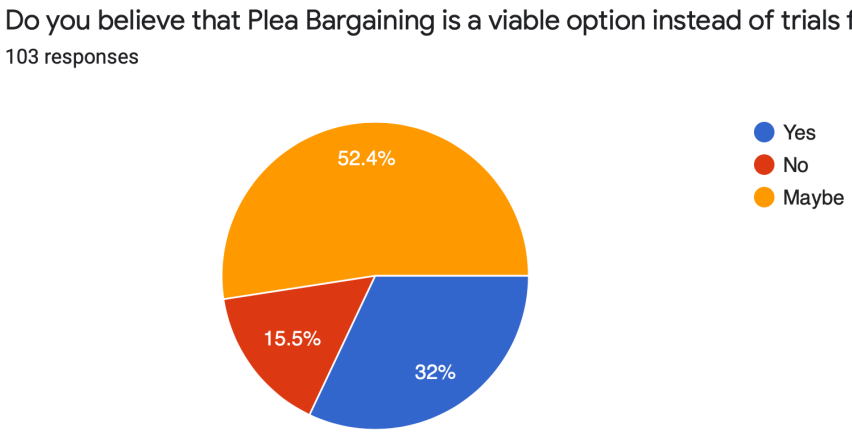

Figure 18

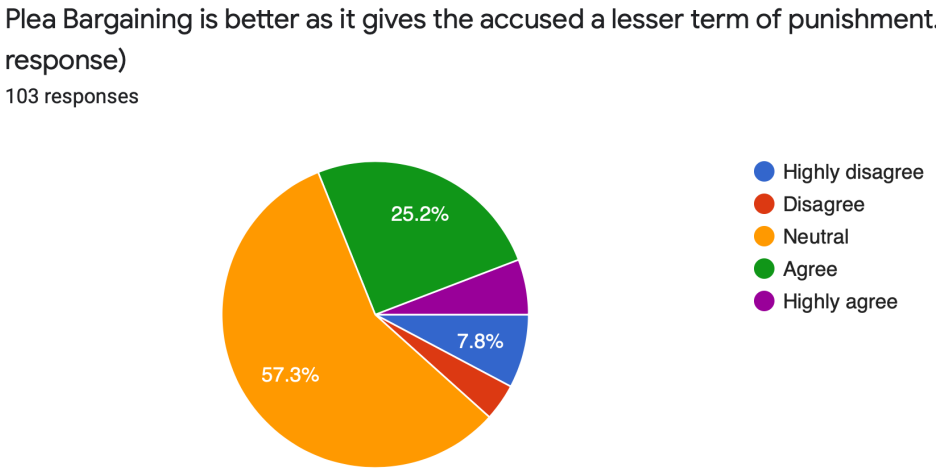

Figure 19

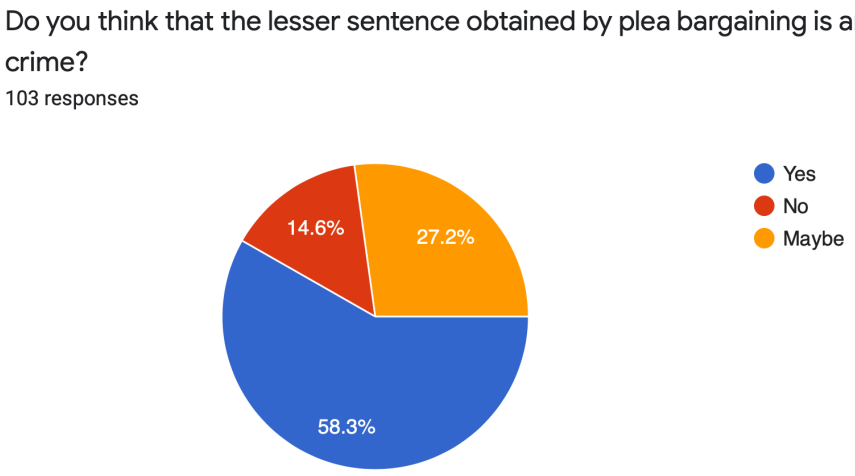

Figure 20

Figures 18, 19 and 20 show that the participants are seemingly unsure about the possibilities of Plea Bargaining where only 32% of them think that Plea Bargaining is an effective alternative to going for full fledge trials. Only 31% agree that Plea Bargaining is better as it gives a lesser

punishment to an offence, whereas 58.3% agree that the lesser punishment given by way of plea bargaining is an effective sentence for a crime.

Figure 21 shown below reflects the adoptability of the system of PLea bargaining in the current justice system where only 16.5% of the participants think that the existing system enables the effective adoption of the concept of Plea Bargaining.

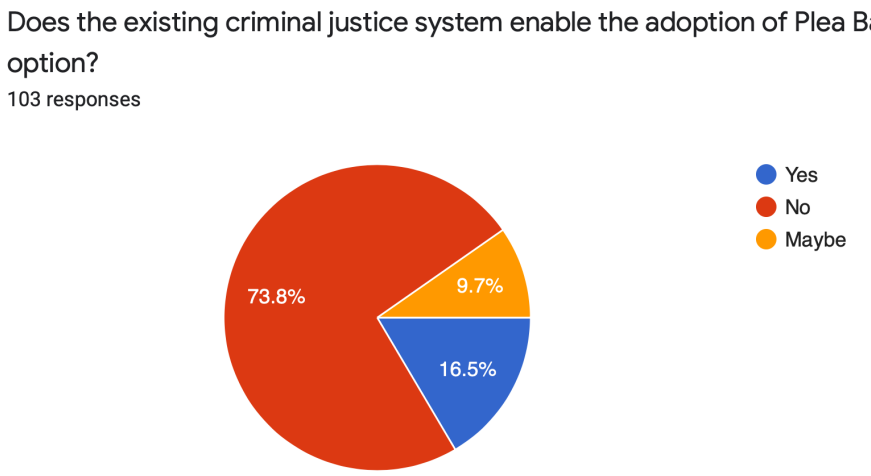

Figure 21

Analysing the above data, we can clearly see that the practical enforcement of aspects pertaining to ensuring a fair trial is often not utilised to the full extent by the criminal justice system. A clear understanding can be derived from the answers given by the participating lawyers who are well experienced in this subject, and who understands the day-to-day practicability of the various laws and procedures of the system. They point to the fact that although there exists such laws, the actual usage and utility of them are often diminished and forgotten, and they remain primarily unused. The answers given by the participants give force to the research questions posed in this paper and point towards the lack of enforcement of the various provisions of our

criminal justice system meant for the protection of various stakeholders as well as upholding the concept of fair trial.

Chapter VII

Analysis and Conclusion

The analysis, like the survey, can be divided into three sections.

Section I: *Rights of accused, victim and witnesses in the Criminal Justice System in India.*

Almost all the participants think that the rights of the accused and the victims are to be equally protected, and that both rights are of equal importance. No right of either a victim nor the accused can take predominance over the other and the courts need to find an equitable model in which both rights can be adequately protected without giving prejudice or bias to the other side. The majority of the participants eel that the rights guaranteed for these main players of the criminal trial are not adequately protected in the current scenario. The rights of the accused are not protected in one way or the other and thereby the accused is missing out on the constitutional guarantee of a fair trail in most cases, according to the majority of the participants. Same is the case with respect to the victims in a case, wherein they are most often ignored, and their plight is forgotten in the course of procedure.

In this regard, more than 85% of the participants think that the victim should have a more substantial role in the criminal trial and subsequent process than that of a mere witness. This is important as it gives a great opportunity for the victims of offences to aid and help the prosecution in a better manner, and ensure that the trial is conducted in a way which is not detrimental to the interests of the victim and thereby ensuring conviction.

It is pertinent to note that the majority of the participants feel that the witnesses that they have encountered are most often reluctant to come before courts to give their testimony under oath because they are either scared or apprehensive about harassments that they may face due to their testimony. The majority of the participants think that witnesses in crimes need adequate protection by the criminal justice system to ensure that all the witnesses identified by the investigating agency actually come before the courts and testify the veracity of their statements. It is surprising to note that a majority of the participants are not aware of the Witness Protection Scheme, 2018 which was a step in the right direction regarding this problem. It is pertinent to note that according to the participants, the said Scheme of 2018 is not being implemented in the courts on a practical level even now. This shows that although there is a scheme of witness protection in place, it is neither utilised, nor given any kind of publicity so that laymen who are most often the witnesses, can come to the courts with confidence in the system.

Although such laws, schemes and procedures exist today, it does not always penetrate to the lowest levels in which they are most needed, and they unfortunately remain as mere letters in print.

Section II: *Media Trials*

The survey shows that media trials are a proven menace to the fair delivery of justice in case of criminal trials. The media, although an important part of our society, drags its nose into a lot of unwanted areas to increase their TRP or Television Rating Point. 70% of the participants think that media trials of a particular case complicates the case and makes it harder for the judge to decide the case in an unbiased and neutral manner. A staggering 80% of them believe that the judge is influenced by these media trials and their mind is swayed by the media's portrayal of a

particular case before them. Nowadays we see that a lot of criminal cases recieve media attention, and rightly so. But a media trial happens when the media dissects each and every detail of the story, conducts their own investigation and trial, and portrays the accused as guilty of the offence. These are often seen by the actual judges themselves who try and hear these matters and a majority of the participants feel that the media portrayal of an accused influences the judge's mind. They suggest that media trials make the job of the defence much tougher and a veil of guilt is already put on the accused thanks to the media attention surrounding a particular case.

The majority also agree that media trials hamper the investigation process and it has the potential to alter the course of investigation, and the arrest of persons who are shown to be involved with a particular offence by the media. It is also seen from the survey that the majority of the lawyers believe that an accused who has media attention or has been subjected to media trials is more unlikely to be granted bail than other accused persons (also subject to facts of the case). The judge hearing a bail application might be under pressure to 'meet the ends of justice' in the eyes of the press and the public, and might deny bail to an accused who might, in normal circumstances, be granted bail.

Moreover, it can be understood from the survey that the media portray of persons accused of offences are often derogatory and borderline defamatory especially when women are arrayed as accused of an offence. The media goes to great lengths to find out information regarding such accused which may show them in bad light even if it does not relate to the case at hand. This is highly detrimental to the whole establish process of law in upholds the principle of 'innocent until proven guilty'. It can also be understood from the survey that the majority of the participants believe that the chances of conviction in cases which have had high media attention is relatively higher than those cases which do not have media attention. This may be because of

the pressure on the judge to act according to what the press and the public (through the press) believe to be true. It may often be far from actuality.

Section III: *Plea Bargaining.*

It can be seen from the survey conducted that only 34% of the participants have even considered advising a client about the possibility of Plea Bargaining in a particular case. The greatest threat for Plea Bargaining in normal circumstances in India, is the considerably low rate of conviction of India courts. This may be the reason why most lawyers, including the participants, are passive towards the concept of Plea Bargaining. 76% of them state that Plea Bargaining is not actively used in the courts that they practice in, and only 25% think that the courts advocate and support this concept. We can therefore see that it is not only the lawyers who are passive about this concept, but the courts also do not actively support and pave the way to optimally utilize this concept and increase the conviction rate. Majority of the participants are neutral regarding the effectiveness of Plea Bargaining and this concept as a viable alternative to trial for each and every case. The majority is neutral in opinion with respect to the quantum of sentence also. They do not feel that Plea bargaining is necessarily a better option because it gives a lesser term of sentence to an accused who pleads guilty through this process. However, the majority think that the lesser sentence which is given in cases of plea bargaining is still an effective sentence in criminal cases, and therefore in line with the sentencing policy of our criminal justice system.

It is noteworthy to mention that only 16.5% of the participants think that the criminal justice system in place enables the effective adoption of the system of Plea Bargaining. This shows that the existing system is not flexible enough to accommodate this foregin concept, and it needs more leverage to actually have an effect on the sentence and thereby make the accused consider

pleading guilty. Due to the lack of bargaining power of the accused, and the low rate of conviction prevalent in the country, only a handful of lawyers would even suggest the idea of Plea Bargaining, that too at the expense of being called a bad lawyer who does not have the confidence to obtain an acquittal after trial.

Conclusion

The above chapters discuss in detail, the three key elements of the criminal justice jurisprudence in systemic detail, and based on such study the researcher had conducted the above empirical study to understand the practical application of the above discussed elements. From both the detailed research and the empirical study, it can be stated that regular stringent reforms are required to be made in our criminal justice system with respect to the three aspects discussed in this paper.

It is worthwhile to reproduce the research questions posed by the researcher at the start of the paper.

1. Whether the rights of accused, victims and witnesses are adequately protected in a balanced manner by the criminal justice system in the country?
2. Whether media trials affect the course of a criminal case and influence the mind of the court in deciding that particular case?
3. Whether Plea Bargaining is understood and effectively used by the criminal justice system?
4. How important is the need for constant reforms in the criminal justice system?

Question 1:

The answer found by the researcher to question 1 is in the negative. The rights of the accused, victims and witnesses are not balanced out and often ignored in a great manner by the present system. This is evidenced by the fact that the rights of the accused under the Constitution and laid down by the Supreme Court in, *Joginder Kumar* v. *State of Uttar Pradesh*[127] and *D.K. Basu* v. *State of West Bengal*[128] are only acknowledged by the system and not actively enforced in a religious manner. Moreover, the majority of the participants of the survey were of the view that the rights of each of these stakeholders were not adequately protected by the system at any given time in a balanced manner. Either the accused is given more weightage, or it is the victim. The concept of fair trials are not strictly enforced, and the rights are often ignored by the system for ease of trial, or for other conveniences. Additionally, the victim needs to be given a greater role in criminal trials than merely that of a witness. The prosecution should be actively aided by the victim or their representative in conducting criminal trials.

With regard to the witnesses in a criminal trial, it has been found that there is a constant apprehension for coming out and testifying in criminal cases. They are often threatened and made to falsely testify for their own well-being. Practical application of the Witness Protection Scheme of 2018 is not being enforced by the system and that aggravates the situation even further, and the reluctance of witnesses to come and testify can be understood when their rights are held to be on a weaker footing.

Question 2:

Based on the above research, it is found that the answer to question 2 is in the positive. Media trials are a bane to criminal trials before actual courts of law. It is found in the research as well

[127] Supra Note 22.
[128] Supra Note 2.

as the survey conducted that media trials do in fact influence the mind of the court while deciding that particular matter, and that most often, the accused is faced with unwarranted prejudice and bias when there is media attention involved in a particular case. Moreover, the accused are often shown in derogatory and defamatory light by the media adding to the menace that they cause to the concept of fair trial and the various rights available to the accused which are discussed above.

Question 3:

The answer to question 3 is found to be in the negative. Still considered a western concept by many, plea bargaining has failed to pick pace in the Indian criminal justice system which believes in completing trials for every case. As evidenced in the tables given in the introductory chapter, the conviction rate in India is very low and this aspect is not helpful for the success of this concept. Additionally, the survey shows us that the concept is not adequately advocated in the courts and the lawyers are reluctant to advise their clients regarding the scope of plea bargaining. It is to be seen that the concept is not effectively utilised in our criminal system and majority of the participants of the survey are of the opinion that the present legal system is insufficient for the adoption of this system.

Question 4:

The importance of reforms in the criminal justice system is very high. The above conclusions derived in the 3 main questions posed by the researcher point to the direction that reforms are the need of the hour in the criminal justice system, especially with respect to the three elements of it discussed in detail in this paper. The researcher is of the opinion that the reforms should be of

two ways. One, it should be regular. Since the criminal justice system is having close interaction with the people at large, and the rights and liberty of different people are often questioned, there needs to be regular appraisals of the workings of the current system and reforms need to be brought out at frequent and regular intervals of time, as and when required. The second type is that the reforms brought out should be stringent and should be authoritative enough to penetrative to all levels of the system and ensure strict compliance. Therefore, from the research we can willfully conclude that stringent and regular reforms are required in the criminal justice system with specific reference to the three key aspects discussed in this paper.

Chapter VIII

Suggestions and Recommendations

Criminal Justice System

- A combination of Adversarial System and Inquisitorial System need to be formulated for the functioning of the Criminal Justice System. Retaining the present aspects of the Adversarial System, some of the good features of the Inquisitorial System can be adopted to strengthen the Adversarial System and to make it more effective. This includes the duty of the Court to search for truth, to assign a pro-active role to the Judges, to give directions to the investigating officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth and focusing on justice to victims.
- The recommendations made in the Malimath Committee Report, 2003 and the development strategies for freedom from crime suggested by the Madhava Menon Committee on Draft National Policy on Criminal Justice, 2007 must be reconsidered and implemented in the system at the earliest.

Rights of Accused, Victim and Witnesses

- The rights of each of the stakeholders should be collated based on the various laws and judicial decisions, and be put in a schedule to the criminal code or published separately, subject to frequent and regular amendments.

- The standard of proof in criminal cases should be between ‘proof beyond reasonable doubt’ and ‘preponderance of possibilities’. Excessively strict standards of proof might be detrimental to the criminal trial and may cause high rates of acquittal.
- Needless to mention, there should be speedy and fair trial which need to be further strengthened and practised in the present system. The position now indicates that speedy trial is not often guaranteed to the accused and the accused is forced to spend long years as an under trial prisoner or have to wait for the disposal of their case. The system should bring out necessary changes to enforce the speedy disposal of criminal cases.
- The accused must have a right to claim compensation for illegal arrest and detention and for under trial imprisonment in cases where the trial or appeal leads to acquittal.
- The victim or his representative should have the right to be a party in every criminal proceeding and should be in a position to aid the prosecution.
- The role of the victim in a criminal trial must include right to adduce evidence, right of examination and cross-examination, right to assist the investigating agency, right to be heard in respect of grant or cancellation of bail, to participate in negotiations leading to settlement of cases and in plea bargaining.
- The victim of a crime or their legal heir must have the right to get compensation for the harm caused to them either as a state obligation or recoverable from the convict. Victim compensation law must be enacted to provide for the creation of a fund for the adequate disbursement of compensation to the victim of crimes.
- The courts should make every endeavour to protect the rights of witnesses and to ensure the protection and safety of witnesses who come to testify in criminal cases.

- The Witness Protection Scheme, 2018 should be enforced in all courts all over the country and wide publicity of the Scheme should be given in all media so that people are aware of the protection granted to witnesses.
- Workshops and seminars regarding witness protection should be conducted for judges and lawyers in all courts and a compliance register has to be maintained at the district court level which can monitor and keep track of any complaints or proceedings initiated under the 2018 Scheme.
- Express penal provisions need to be added to the Indian Penal Code to provide for offences relating to intimidation and threatening of witnesses. Specific provisions need to be introduced which clearly provide for the punishment for intimidation and threatening of witnesses to either give false evidence or not to give evidence at all. The offence should be made cognizable and non-bailable with a minimum sentence of seven years of imprisonment and fine, triable by a court of sessions.
- Offences relating to threatening of witnesses should be tried in a speedy manner and should be disposed within a period of six months without affecting the trial of the original case.
- A central Act should be promulgated which provides for witness assistance and protection, and this Act should provide for all aspects regarding witness assistance, rehabilitation and protection if necessary. Modes to determine the priority of witnesses needing protection can also be provided under the act thereby giving authority to local agencies to determine the priority list of witnesses who may have an apprehension of threat or intimidation, or are actually facing such threats.

- Such an enactment can also provide the various rights available to witnesses such as anonymity, right to privacy, right to witness assistance and rehabilitation, right to seek protection from harassment by law enforcement agencies, right to compensation for testimony and programmes which provide counselling, treatment and other support.
- There is a present over reliance of the criminal justice system on testimony of witnesses to prove the guilt of the accused. This may complicate the situation and the system may need to explore other possibilities like advancements in forensic applications, technological facilitation in investigation and trial process, artificial intelligence, etc. so that excessive dependence of the system on witnesses can be reduced.

Media Trials

- There need to be guidelines which are either developed by the Supreme Court in a judgement, or brought out by the legislature that speak about the manner in which media may report matters that are before the courts. These guidelines may have methods or ways in which the media can portray a criminal case and report the proceedings of the same. Matters that are sub-judice can be avoided from being actively discussed and deliberated by the media, and can be left to mere reporting of factual events.
- Great deference needs to be shown by the media when reporting criminal cases which have public attention. Sensitisation of media personnel should be done by the justice system in order for them to understand the repercussions of their media trials. There can be codes of conduct that the legislature or the courts can set for the media in broadcasting matters that are sub-judice.

- Without affecting the right to free speech, the courts can utilise contempt jurisdiction towards punishing media houses, individuals, and journalists who breach such code of conduct for potentially scandalising, prejudicing, or hindering trial because of the media portrayal of such cases.
- The guidelines or the code of conduct should specify circumstances that will warrant particular courts to ban media reporting on matters before them, and clarify the scope and limitation of such bans.
- There should be a remedial mechanism for persons especially the victim or the accused who feel that they did not get justice from the courts owing to how the media reported the case and the possible influence on the mind of the court.
- Adequate training especially with respect to the psychological effect of media trials on the mind of the judges should be given in judicial academies, and the judges should be well trained to ignore any bias or prejudice that they may feel due to the media portrayal of a criminal case before them, and should be in a position to deliver justice in an efficient, impartial, and fair manner.
- Stakeholders of the criminal justice system such as the accused, victim, witnesses, law enforcement agency, lawyers, and any other person related to a criminal case should abstain themselves from appearing on the media to discuss that particular case (matters that are sub-judice), or even divulge any information regarding the case at hand. After a final order has been passed by a court of law, that case can be free for discussion by the media and the stakeholders may be allowed to participate.

Plea Bargaining

- For the concept of plea bargaining to be effectively used in India, it has to be completely overhauled. The Criminal Procedure Code needs to be amended further to widen the scope of plea bargaining as the current concept is rendered quite ineffective by the rigidity of the system.
- A system where equal leverage is given to the accused should be formulated, as the present system is not very attractive to the accused as there is a sure shot chance of serving some amount of jail time in plea bargaining. It may seem better for the accused to claim trial due to the significantly low rates of conviction in courts today. The concept should be amended in such a manner that the bargaining or negotiation should yield any result agreeable to both sides, and not just the minimum sentence prescribed for an offence.
- The bargaining, which should be done by the prosecutor aided by the victim and the accused aided by his lawyer, must be without court interference, should depend on factors like gravity of the offence, criminal antecedents of the accused, attributes of victim, socio-economic factors of victim and accused, etc.
- The American system of plea-bargaining can be entirely borrowed with the required amendments to suit the Indian system. Wide powers for reducing the sentence, commuting the sentence, changing the sentence to social service, changing from rigorous imprisonment to simple imprisonment, etc. when the accused is willing to plead guilty, should be given to the prosecutor and the court may order according to such agreement reached by the prosecutor and the accused. Borrowing the American concept can help a great deal in reducing docket explosion in our courts.

- Sensitisation programmes for prosecutors and lawyers, as well as training for the judges should be conducted frequently to explain and educate the various aspects and benefits of plea bargaining. The defence lawyers must be educated in such a manner that they should not opt for trial as the first course but should explore the possibility of a plea bargaining in order to obtain a favourable decision in a criminal case. There needs to be a shift in mentality to accept the new concept of plea bargaining as the system has slowly come to adopt new tools like Lok Adalat, arbitration, mediation, fast track courts, etc.
- With a view to curb corrupt practices and to oversee the right implementation of the concept, the local court having jurisdiction can oversee the plea bargaining, and verify whether no corruption, coercion, threat or other illegal modes are used to arrive at an agreement. So also, the courts can look into the genuinity of the bargain of the accused, and the genuinity of the agreement of the prosecutor.
- The courts must commit all eligible cases for plea bargaining to the mediation centre or the office of the prosecutor to explore the possibility that a plea can be given by the accused in exchange for a lesser sentence. Only after this is done, the courts need to continue with the framing of charge. A specific time period should also be mandated by the courts for the agreement to be reached by the parties.

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ANNEXURE-I

Survey

As part of research into the Criminal Justice System in India, three main aspects, ie. media trials, rights of various stakeholders and plea bargaining are focused. The following survey is integral in understanding the practical aspects of these elements and their functioning in day to day practice. Thank you for your kind participation in this research.

* Required

1. Which court establishment do you practice in? *

Check all that apply.

- [ ] Trial Courts
- [ ] District Court
- [ ] High Court
- [ ] Supreme Court
- [ ] Other Courts and Tribunals

2. Do you practice in the field of criminal laws? *

Mark only one oval.

- ◯ Yes
- ◯ No

Rights of accused, victim and witnesses in Indian Criminal Justice System

3. Which do you think is more important? Rights of victim, rights of accused, or both? *

Mark only one oval.

- ◯ Rights of victim
- ◯ Rights of accused
- ◯ Both

4. The accused is not given a fair trial as the rights guaranteed to an accused are not enforce in one way or another. (Pick appropriate response) *

Mark only one oval.

- ◯ Highly disagree
- ◯ Disagree
- ◯ Neutral
- ◯ Agree
- ◯ Highly agree

5. Do you think the rights of a victim need to be considered in a criminal case? *

Mark only one oval.

- ◯ Yes
- ◯ No
- ◯ Maybe

6. The rights of the victim are not upheld and are not protected by our criminal justice system (Pick appropriate response) *

Mark only one oval.

- ◯ Highly disagree
- ◯ Disagree
- ◯ Neutral
- ◯ Agree
- ◯ Highly agree

7. Do you think that the victim should have a role, in addition to that as a witness, in a crimina case? *

Mark only one oval.

- Yes
- No
- Maybe

8. Witnesses in criminal cases are not sufficiently protected by the law because of which they are most often scared to come and testify. (Pick appropriate response) *

Mark only one oval.

- Highly disagree
- Disagree
- Neutral
- Agree
- Highly agree

9. Do you think a witness needs protection before and after their testimony in a criminal case

Mark only one oval.

- Yes
- No
- Maybe

10. Have you had any experience where the life or well-being of a witness, that you knew, car under threat because of their testimony? *

Mark only one oval.

- Yes
- No

11. Are you aware of the 'Witness Protection Scheme, 2018'? *

Mark only one oval.

- Yes
- No

12. Do you think that this Witness Protection Scheme, 2018 is enforced adequately in the plac of your practice? *

Mark only one oval.

- Yes
- No
- Maybe

Media Trials

13. The media plays an important role in the criminal justice delivery in our country. (Pick appropriate response) *

Mark only one oval.

- Strongly disagree
- Disagree
- Neutral
- Agree
- Strongly agree

14. What do you think media trials do to a criminal case? *

Mark only one oval.

- It simplifies the criminal case and makes it easier for the judge to decide the case.
- It complicates the criminal case and makes it harder for the judge to decide the case.
- It neither simplifies nor complicates the criminal case.

15. Do you think that media trials influence the court's mind in deciding a particular case? *

Mark only one oval.

- Yes
- No
- Maybe

16. Do you think media trials make the job of the prosecution easier? *

Mark only one oval.

- Yes
- No
- Maybe

17. Do you think media trials make the job of the defence easier? *

Mark only one oval.

- Yes
- No
- Maybe

18. Do you think media trials influence actions by law enforcement agency like arrest, course investigation, etc.? *

Mark only one oval.

- Yes
- No
- Maybe

19. How likely will an accused get bail in cases which have high media attention? *

Mark only one oval.

- Very unlikely
- Unlikely
- Neutral
- Likely
- Very Likely

20. Have you had an experience in dealing with a criminal case that had been discussed in the media? *

Mark only one oval.

- Yes
- No

21. If yes, have you felt that the accused are denied justice solely because of the media portrayal about them?

Mark only one oval.

- Yes
- No
- Maybe

22. The media may portray the accused in a bad light even before they appear before a court law. (Pick appropriate response) *

Mark only one oval.

- Highly disagree
- Disagree
- Neutral
- Agree
- Highly agree

23. When women are involved in crimes and are accused of offences, they are often shown in bad light by the media. (Pick appropriate response) *

Mark only one oval.

- Highly disagree
- Disagree
- Neutral
- Agree
- Highly agree

24. Do you think the victim of a crime is haunted by the media and the rights of the victim are disregarded? *

Mark only one oval.

- Yes
- No
- Maybe

25. Do you think that there is a higher chance of conviction for cases that have had media attention? *

Mark only one oval.

- Yes
- No
- Maybe

Plea Bargaining

26. Have you ever advised any of your clients to explore the possibility of Plea Bargaining? *

Mark only one oval.

- Yes
- No

27. Do the courts usually in practice support and actively advocate Plea Bargaining? *

Mark only one oval.

- Yes
- No
- Maybe

28. Is Plea Bargaining actively used in courts you practice in? *

Mark only one oval.

- Yes
- No
- Maybe

29. Do you believe that Plea Bargaining is a viable option instead of trials for each and every case? *

Mark only one oval.

- Yes
- No
- Maybe

30. Plea Bargaining is better as it gives the accused a lesser term of punishment. (Pick appropriate response) *

Mark only one oval.

- Highly disagree
- Disagree
- Neutral
- Agree
- Highly agree

31. Do you think that the lesser sentence obtained by plea bargaining is an effective sentence for a crime? *

Mark only one oval.

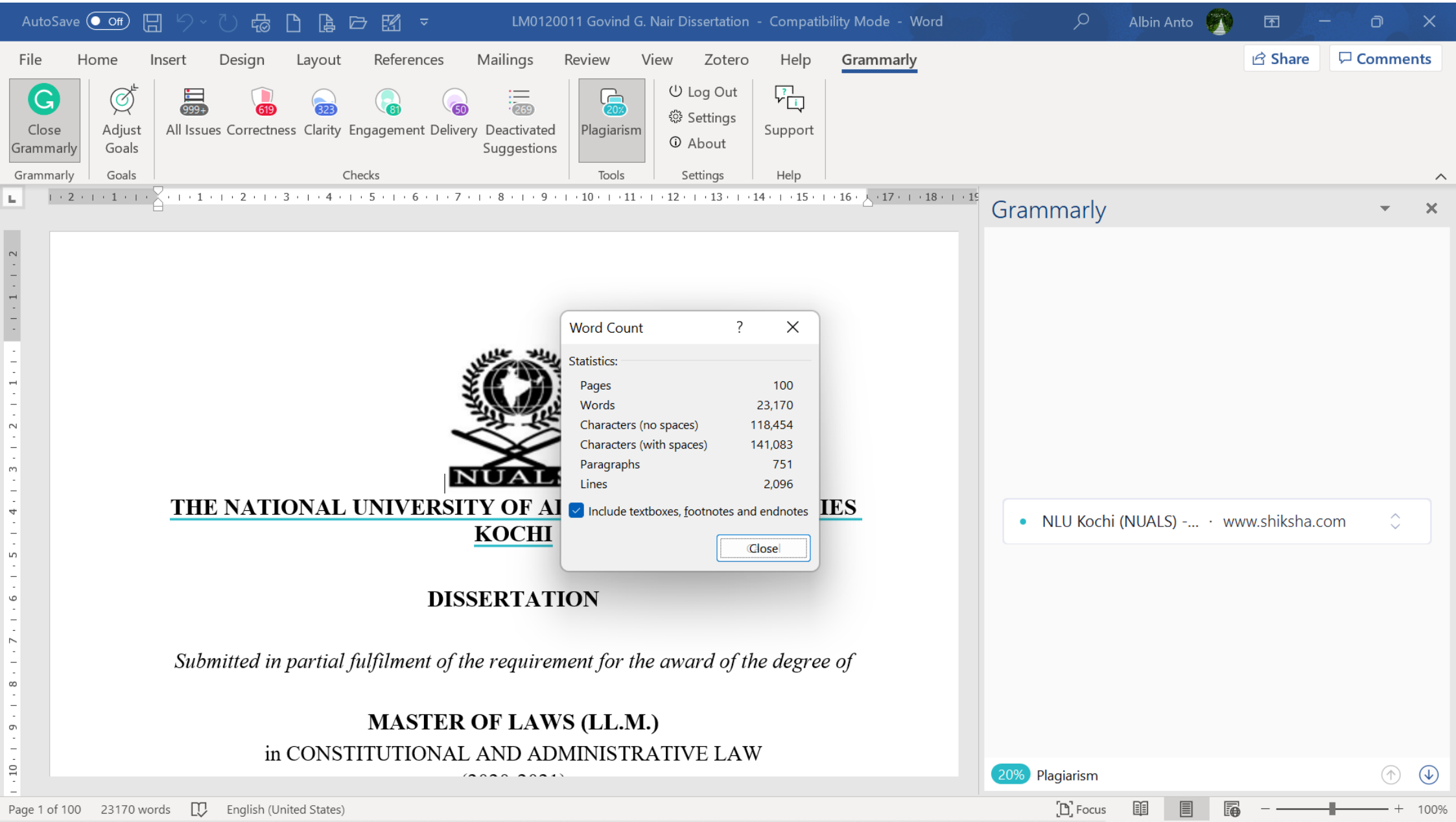
- Yes
- No
- Maybe

32. Does the existing criminal justice system enable the adoption of Plea Bargaining as an effective option? *

Mark only one oval.

- Yes
- No
- Maybe

33. Remarks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