PLEA BARGAINING – YET TO BE ADAPTED IN INDIAN CRIMINAL JUSTICE SYSTEM

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Abstract

There is a century old Baconian example of a sheep which ran for shelter to a bush to save itself from rain and hail and found itself deprived of its fleece when it came out. This is the condition of a litigant, not only in India but in almost all the countries of the world. Pathetic condition of judicial system in India which includes pending cases, shortage of judges, inadequate fund, inadequate infrastructure, the reality of today's overcrowded and expensive system of court and delay in justice made everyone to think of an alternative to resolve disputes. With these and for some other reasons alternative dispute resolution system is gradually and slowly stepping into the shoes of adversarial system of dispute resolution. As far as criminal matters are concerned, plea bargaining being a major ADR technique to resolve criminal matters, is rapidly occupying the field.

I. The Concept

Basically, the plea bargaining consists of an agreement (formal or informal) between the defendant and the prosecutor. The prosecutor typically agrees to a reduced prison sentence in return for the defendant's waiver of his constitutional right against self-incrimination and his right to trial. The dictionary meaning of Plea Bargaining is "[t] he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case, subject to approval of the court. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of multi-count indictment in return for a lighter

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sentence than that possible for the graver charge."[1]

According to Justice A. K. Sikri, "There is no perfect or simple definition of Plea Bargaining. Simply put, a plea bargain is a contractual agreement between the prosecution and the defendant concerning the disposition of a case of a criminal charge. However, unlike most contractual agreements, it is not enforceable until a judge approves it."[2] Under this technique, the criminal cases are resolved through a "plea bargain", usually well before the case reaches trial. In a plea bargain, the defendant agrees to plead guilty, usually to a lesser charge than one for which the defendant could stand trial, in exchange for a more lenient sentence, and/or so that certain related charges are dismissed. For both the government and the defendant, the decision to enter into (or not enter into) a plea bargain may be based on the seriousness of the alleged crime, the strength of the evidence in the case, and the prospects of a guilty verdict at trial. Plea bargains are generally encouraged by the court system, and have become something of a necessity due to overburdened criminal court calendars and overcrowded jails in the country like United State of America.

According to Justice M.Y. Eqbal, in plea bargaining also we have to follow the Manu's dictum i.e. to inflict just punishment on those who act unjustly by means of bargain between the parties. It is sum and substance of the philosophy of punishment in cases to be resolved through plea- bargaining.[3]

As a whole the guilty plea or no contest plea is the quid pro quo for the concession and there is no other reason. A plea bargain (also plea agreement, plea deal or copping a plea) is an agreement in a criminal case in which a prosecutor and a defendant arrange to settle the case against the defendant. The defendant agrees to plead guilty or no contest and in some cases to also provide testimony against another person in exchange for some agreement from the prosecutor as to the punishment. A plea bargain can also include the prosecutor agreeing to charge a lesser crime or reducing the charges or dismissing some of the charges against the defendant. In most cases, a plea bargain is used to reduce the number of cases and their aggregate impact on the criminal justice system as the number of cases which can be actually tried by a court

1. Black's Law Dictionary.
2. Justice A.K. Sikri 'Plea Bargaining' Nyaya Deep, Volume VII Issue 3 .July (2006).
3. 'Concept of Plea Bargaining' by Justice M.Y. Eqbal, Nyaya Deep, Volume IX Issue 1 .January, 2008.

system is a fraction of the number of cases filed. Plea Bargaining can be of three types:-

Charge Bargaining

It is a common and widely known form of plea. It involves a negotiation of the specific charges or crimes that the defendant will face at trial. Usually, in return for a plea of guilty to a lesser charge, a prosecutor will dismiss the higher or other charge(s). For example, subject to the approval court, .in return for dismissing charges for first-degree murder, a prosecutor may accept a guilty plea for Manslaughter

Sentence Bargaining

It involves the agreement to a plea of guilty in return for a lighter sentence. It saves the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence. For example, it may be used to reduced period of the sentence or amount of the fine associated with the crime being charged with. Again it is with the approval of the court.

Fact Bargaining

This is the least used form of plea bargaining. It involves the agreement to a plea of guilty and in return the Prosecutor agrees not to reveal any aggravating factual circumstances to the court because that would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines.

II. Application of Plea Bargaining

To illustrate how a "plea bargain" might be reached in a criminal case: suppose Mr. Ajay Pratap Singh is arrested and charged with two charges of aggravated assault/ battery, based on his alleged use of a baseball bat in a street fight. A "plea bargain" might be reached in his case in one of three ways:

- The prosecuting attorney handling the case approaches Mr. Ajay Pratap Singh and his attorney, and offers to allow him to plead guilty to a less serious charge, such as simple assault/battery or even disorderly conduct; or
- Mr. Ajay Pratap Singh agrees to plead guilty to one charge of aggravated assault/ battery, in exchange for dismissal of the second charge; or
- The government's evidence against Mr. Ajay Pratap Singh is so strong, and the

injuries suffered by the assault victim so serious, that Mr. Ajay Pratap Singh agrees to plead guilty to the original charge of aggravated assault/battery, in exchange for a less severe sentence than he would likely to receive if a jury found him guilty at trial.

III. Origin

The roots of plea bargaining may be seen long back in United State of America. It was a prosecutorial tool used only episodically before the 19th century. In America, Fisher says, "it can be traced almost to the very emergence of public prosecution although not exclusive to the U.S., developed earlier and more broadly here than most places." But because judges, not prosecutors, controlled most sentencing, plea bargaining was limited to those rare cases in which prosecutors could unilaterally dictate a defendant's sentence. ''Not until the crush of civil litigation brought on by the explosion of personal-injury cases in the industrial era did judges begin to appreciate the workload relief plea bargaining promised.'' In other words, plea bargaining is arguably another outgrowth of late-19th-century industrialization.[4] Plea Bargaining is today a very common practice in so many developed countries especially in the United State of America. Most of the criminal cases in America are settled through plea bargaining. The Federal Rules of Criminal Procedure recognize and codify the concept of plea bargaining or plea agreements.[5] The Supreme Court of United State has also approved this practice.[6] During 19th Century even in America this was not so popular and practiced in the rarest cases. But with the rapid growth in the population as well as increase in the court trials the courts became overcrowded and by the end of twentieth century's it became almost impossible for the trial in every criminal case. This made vast majority of criminal cases resolved with guilty pleas. Presently, since plea bargaining is expressly authorized in statutes and approved by the courts in America, it is conducted in almost every criminal case and roughly

4. Dirk Olin, 'Plea Bargain' The New York Times Magazine, September 29, 2002.
5. Rule 11(e) of the Federal Rules of Criminal Procedure (U.S.A.)- Under this rule, a prosecutor and defendant may enter into an agreement whereby the defendant pleads guilty and the prosecutor offer either to move for dismissal of charge or charges. Recommends to the court a particular sentence or agree not to oppose the defendant's request for a particular sentence, or agree that a specific sentence is the appropriate disposition of the case.
6. Santobello v. New York 404 U.S. 257 (1971).

ninety percent of the cases are converted into plea agreements, except in the Federal offences providing mandatory sentences and subject to United State Sentencing Guide Lines(USSG). According to Justice M.Y. Eqbal, in fact Plea Bargaining has over the years emerged as a prominent system of American Criminal Justice System. It has been immensely successful in USA and with the passage of time plea bargaining has become the norm rather than exception.[7] Non acceptance of this concept and even ban on the application of plea agreements may also be witness in so many countries of the world. According to Justice A.K. Sikri, "statutes codifying many federal Offences expressly prohibit the application of plea agreements."[8] Plea bargaining was introduced in Pakistan in 1999.[9] Under this, the accused accepts his guilt and offer to return the proceeds of corruption as determined by the investigators. If the plea is accepted by the court, the accused stands convicted, but will not be sentenced. However, the accused will be disqualified from taking part in election, holding public office, obtaining any bank loan and is dismissed from service if he is a government official. It is also used in England, Wales and Australia but to the limited extent of allowing the accused to plead guilty to some charges in return, for which the prosecutor will drop the remaining charges. But there is no bargaining over penalty and penalty is to be decided by the court. Irrespective of the facts that plea bargain has been criticized by the jurists as violation of fundamental rights such as right to trial, self- incrimination, double jeopardy and so on; gradually and slowly it is being adopted by the legislatures of series of countries including India.[10]

7. Concept of Plea Bargaining' by Justice M.Y. Eqbal, Nyaya Deep, Volume IX Issue 1 .January, 2008.
8. Justice A.K. Sikri 'Plea Bargaining' Nyaya Deep, Volume VII Issue 3 .July, 2006. –Federal Criminal Practice is governed by title 18 of the U.S. CODE, Part II (Criminal Procedure). Chapter 221of part II addresses arraignments, pleas, and trial. The U.S. Attorney's Manual (USAM) contains several provisions addressing plea agreements. For example, Chapter 9-16-300 (Plea Agreements) states that plea agreements should "honestly reflect the totality and seriousness of the defendant's conduct," and any departure must be consistent with sentencing guideline provisions. The Justice Department's official policy is to stipulate only to those facts that accurately represent the defendant's conduct. Plea agreements require the approval of the assistant attorney general if counts are being dismissed, if defendant companies are being promised no further prosecution, or if particular sentences are being recommended."
9. National Accountability Ordinance, 1999.
10. Criminal Law (Amendment) Act, 2005

IV. Plea Bargaining in India

The concept of Plea Bargaining was alien to the Indian judicial system till 5th July, 2006 that is the date from which Criminal Law (Amendment) Act, 2005 came into operation. Prior to this it was considered to be against the public policy even by the Supreme Court of India.[11] At the same time Law Commission of India had been advocating the introduction of the provisions as to plea bargaining in the criminal justice system for a long time.[12]It suggested to introduce plea bargaining as is in vogue in many states of US and considered the question of introduction of concept of concessional treatment for those who chose to plead guilty by way of plea bargaining. As a result, Criminal Law (Amendment) Act, 2005 passed by the Indian Parliament incorporated into Code of Criminal Procedure, 1973 as Chapter XXI-A and Concept of Plea Bargaining was thereby introduced to Indian criminal justice process.

The Act provides that the plea bargaining is applicable only in respect of the offences for which punishment of imprisonment is up to a period of seven years, offence does not affect the socio-economic condition of the country or has not been committed against a woman or child below the age of 14 years.[13] It lays down procedure to enable an accused to file an application for plea bargaining in the court where the trial is pending. On receipt of such application court must examine the accused in camera so as to ascertain whether the application has been filed voluntarily.[14] The Court then issues a notice to public prosecutors and the complainant, advancing them to workout, a mutually satisfactory disposition of the case.[15] Where the satisfactory disposition of the case is worked out the court shall prepare a report to that effect and the report shall be signed by the all participated in the meeting. If no satisfactory disposition of the case could be worked out, the court shall start the proceeding from the stage application was given for plea

11. State of U P v. Chandrika AIR 2000, SC, 164. Also refer Kripal Sing v. State of Haryana 2000(1) Crimes 53 (SC), "Neither Trial Court nor High Court has jurisdiction to bypass the minimum sentence prescribed by law on the premise that a plea bargain was adopted by the accused."
12. Law Commission of India, 142nd, 154th and 177th Reports on criminal law pertaining to Code of Criminal Procedure, 1973.
13. Section- 265-A of Code of Criminal Procedure, 1973.
14. Section- 265-B Ibid.
15. Section- 265-C Ibid.

bargaining.[16] In case the settlement is reached, the court can award compensation on the basis of settlement to the victim and then hear the parties on the issue of punishment. While disposing of the case so settled the court may release the accuse on probation, if minimum sentence is provided for the offence committed, the accused may be sentenced to half of such minimum punishment, otherwise, the accused may be sentenced to one- fourth of the punishment provided or extendable for such offence[17] The accused may also avail the benefit of setting off the period of detention undergone by the accused against the sentence of imprisonment in plea-bargained settlement.[18]The judgment delivered by the Court shall be final and no appeal shall lie in any court against such judgment except special leave petition under article136 or writ petition under article 226 and 227 of the constitution. Finally, the statements or facts stated by the accused in the application for plea bargaining shall not be used for any other purpose except for the purpose of this chapter.[19]

V. Pros and cons of Plea Bargaining

As far as Indian criminal justice system is concerned, it has very less experience in the application of plea bargaining. At the same time, it is deeply rooted in the United State of America. Over the years, it has emerged as a prominent feature of American criminal justice system so much that it has now become the norm rather than exception. The experience of USA shows that it has been helpful in the disposal of the accumulated cases and expedites delivery of criminal justice. In that country, many criminal cases are resolved out of court by having both sides come to an agreement. This process is known as negotiating a plea or plea bargaining. In most jurisdictions it resolves most of the criminal cases filed. Plea bargaining is prevalent for practical reasons.

- Defendants can avoid the time and cost of defending themselves at trial, the risk of harsher punishment, and the publicity a trial could involve.

16. Section-265-D Ibid
17. Section-265 E Ibid.
18. Section-265 I & 428 Ibid.
19. Section-265-K.

- The prosecution saves the time and expense of a lengthy trial. For prosecutors, a lightened caseload is equally attractive. More importantly, plea bargaining assures a conviction, even it is for lesser charge or crime. No matter how strong the evidence may be, no case is foregone conclusion. Prosecutor often wage long and expensive trials but lose.
- Both sides are spared the uncertainty of going to trial.
- The court system is saved the burden of conducting a trial on every crime charged.
- For judges, the key incentive for accepting the plea bargain is to alleviate the need to schedule and hold a trial on an already overcrowded docket.

Surprisingly, this researcher has come across writing of series of scholars from USA, criticizing plea bargaining bitterly. According to Timothy Lynch, "Impartial juries, one would think that the administration of criminal justice in America would be marked by adversarial trials — and yet, the opposite is true. Fewer than 10 percent of the criminal cases brought by the federal government each year are actually tried before juries with all of the accompanying procedural safeguards noted above. More than 90 percent of the criminal cases in America are never tried, much less proven, to juries. The overwhelming majorities of individuals who are accused of crime forgo their constitutional rights and plead guilty."[20] Plea bargaining has come to dominate the administration of justice in America. According to one legal scholar, "Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty plea or nolo contendere plea." Even though plea bargaining pervades the justice system, he argues that the practice should be abolished because it is unconstitutional. Legal scholars in America think that Plea bargaining

20. Timothy Lynch, Director of the Cato Institute's Project on Criminal Justice, 'The Case Against Plea Bargaining' published in REGULATION FALL 2003.- The rarity of jury trials is not the result of criminals who come into court to relieve a guilty conscience or save taxpayers the costs of a trial. The truth is that government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used and plea bargaining is the primary technique used by the government to bypass the institutional safeguards in trials. He concludes, 'as so many other areas of constitutional law, the Court must stop tinkering around the edges of the issue and return to first principles. It is true that plea bargaining speeds caseload disposition, but it does so in an unconstitutional manner. The Framers of the Constitution were aware of less time-consuming trial procedures when they wrote the Bill of Rights, but chose not to adopt them. The Framers believed the Bill of Rights, and the freedom it secured, was well worth any costs that resulted. If that vision is to endure, the Supreme Court must come to its defense.

unquestionably alleviates the workload of judges, prosecutors, and defense lawyers. But is it proper for a government that is constitutionally required to respect the right to trial by jury to use its charging and sentencing powers to pressure an individual to waive that right? As in America government officials deliberately use their power to pressure people who have been accused of crime, and who are presumed innocent, to confess their guilt and waive their right to a formal trial. We know this to be true because prosecutors freely admit that this is what they do. Any person who is accused of violating the criminal law can lose his liberty and perhaps even his life depending on the offence and prescribed penalty, the Framers of the Constitution took pains to put explicit limits on the awesome powers of government. The Bill of Rights explicitly guarantees several safeguards to the accused, including the right to be informed of the charges, the right not to be compelled to incriminate oneself, the right to a speedy and public trial, the right to an impartial jury trial in the state and district where the offense allegedly took place, the right to cross-examine the state's witnesses, the right to call witnesses on one's own behalf, and the right to the assistance of counsel. Justice Hugo Black once noted that, in America, the defendant "has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process, the defendant has a fundamental right to remain silent, in effect challenging the State at every point to 'Prove it!' By limiting the powers of the police and prosecutors, the Bill of Rights safeguards freedom.

No doubt the plea bargaining has bitterly been criticized in America stating it to be unconstitutional. But reality is that more than ninety percent of criminal convictions come from negotiated pleas and less than ten percent criminal cases go for trial. American Constitution provides, "The trial of all crimes, except in case of impeachment, shall be tried by the jury."[21] On the other hand, the judiciary has never determined that engaging in a plea bargaining process to avoid trial subvert the Constitution. In a leading case, the question before the Hon'ble Court was about the validity of plea bargaining process where in that case was a statute that imposed the death penalty only after a jury trial. Accordingly to avoid the death penalty, defendants were waiving trials and pleading guilty to lesser charges. Justice

21. Article III, Section 2[3] of U.S. Constitution.

Potter Stewart, writing for the majority, noted that problem with the statute was not that it coerced guilty pleas but that it needlessly encouraged them.[22] Even U.S. Supreme Court defended plea bargaining pointing out that the process actually benefited both side of the adversary system. The court noted that its earlier opinion in Jackson merely required that guilty pleas be intelligent and voluntary.[23] Even Supreme Court justifying the constitutionality of plea bargaining further stated that, "It [plea bargaining] is an essential component of administration of justice and as long as it is properly administered, is to be encouraged."[24] Going through the pros and cons and also criticism of plea bargaining by the American legal scholar one may think twice on the justification of adopting it into India. The answer is difference in Indian Criminal Justice process and United States in initiation of plea bargaining as in United States discretion to offer a plea bargaining vests with the prosecution agencies. Thus placing a great deal of responsibility and giving enormous power to the prosecution agencies. On the other hand in India, it is accused who can only initiate the plea bargaining. The fundamental difference between these two systems is that Indian Act allows for no negotiation between the accused and the state or the prosecutor or with the court itself. Besides these Act in India lays down so many duties over the court so as to ensure that the process is not misused. The differing provision in India may be taken as precautionary measures so as to run the wheel of justice smoothly.

As far as Indian criminal judicial system is concerned, the concept of plea bargaining is yet to be adapted. In our country, courts, and judges are placed very high and considered a place of dignity and foundation of justice. Under these circumstances, any concept incorporating bargaining is very difficult to be accepted by the people at large because it is likely to convert courts into markets. A section of lawyers, judges and scholars have always been against the introduction of this concept in India even before the enforcement of the Code of Criminal Procedure (Amendment) Act, 2005. Judiciary in India has adopted very strict approach towards the concept. It did not approve the procedure of plea bargaining with the open

22. United State v. Jackson,390 U.S. 570 (1968).
23. Brady v. United State, 397 U.S. 742 (1970).
24. Santobello v. New York, 404 U.S. (1971).

heart. The Supreme Court of India stated that such a procedure would be clearly unreasonable, unfair and unjust and opposed to public policy and would be violation of new activist dimension of Article 21 of the Constitution. Therefore, conviction of an accused as a result of plea bargaining must be held to be unconstitutional and illegal.[25] In **State of U.P. v. Chandrika**[26]the Supreme Court held that it is now a settled law that the concept of plea bargaining is not recognized and is against public policy under Indian criminal justice system. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. On the basis of plea bargaining, the court may not dispose of the criminal cases. The court has to decide it on merits. If accused confesses his guilt, appropriate sentence is required to be imposed. Mere acceptance or admission of the guilt must not be a ground for reduction of sentence. In ***Madanlal Ram Chandra Daga v. State of Maharashtra***[27] the Supreme Court 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. But the court should never be party to a bargain by which money is recovered for the complainant through their agency." In ***Meghraj Loya v. State of Maharashtra***, [28]the Supreme Court expressed that these arrangements please everyone except distant victim, the silent society. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the US but in our jurisdiction, especially in the area of dangerous economic crimes and food offences this practice intrudes on society's interests by opposing society's decisions expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The court subscribes the view that "State" can never compromise. It must "enforce the law". Also in **Ganeshmal Jashraj v. Government of Gujarat**[29]the Supreme Court observed that in the case of admission of guilt by the accused the evaluation of the evidence by the Court is

25. Kasambhai Abdulrehmanbbhai v. State of Gujarat AIR 1980 SC 854
26. AIR 2000 SC 164
27. AIR 1968 SC 1267
28. AIR 1976 SC 1929
29. AIR 1980 SC 264

likely to become a little superficial and perfunctory and the court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt.

In spite of above unanimous and strict mandate of Indian judiciary, we have plea bargaining in our country because of heavy burden of cases to be discharged and demand for speedier justice. It is this temptation, which has persuaded the legislature to incorporate this concept into Indian legal system.

VI. Conclusion

Today we are standing at a juncture where we have legislative provisions in the form of Chapter XXI-A of Code of Criminal Procedure, 1973 in one hand and on the other hand three champions that is Indian judiciary, a section of lawyers and Indian mindset. Objections have been raised from a section of lawyers stating that with the implementation of plea bargaining the deterrent effect of the law will leave way for the elite class of the society. The rich may get away very easily by paying any amount of compensation and serving a minimum sentence. There have been a strong mandate of Indian judiciary against the concept of plea bargaining as is evident from all the cases discussed above of course decided prior to 5th July, 2006 that is the date from which Criminal Law (Amendment) Act, 2005 came into force. Not only this but mind set of the Indians where Judges are considered at the top of the hierarchy of the justice delivery system and are kept at the place which is next to God. So any concept like plea bargaining where amount of sentence is reduced or compensation is paid and that too with the approval of court is very difficult to be accepted. In fact, these are the core reasons which made the task of adaptation very difficult for plea bargaining in India.

The aim of criminal justice is not only deterrent but is combination of prevention, expiation, retribution and of course reformation. Taking all these into consideration and also the exceptions of Chapter XXI-A of Code of Criminal Procedure, 1973, introducing plea bargaining i.e. application only in respect of the offences for which punishment of imprisonment is up to a period of seven years, offence does not affect the socio-economic condition of the country or has not been committed against a woman or child below the age of 14 years, one can appreciate

with open heart the provisions of plea bargaining in India. More over this concessional treatment to the offenders who on their own volition plead guilty has been introduced on the strong recommendations of Law Commission of India and Justice Malimath Committee Report. The Law Commission of India said, "We have examined the cases decided in USA as well as by the Indian Supreme Court and the 142nd Report (1991). We are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is properly administered. For that purpose, certain guidelines and procedure has to have to be incorporated in the Code of Criminal Procedure."[30]

Finally the concept of plea bargaining is not new to India. It is a technique of ADR and has been in practice since vedic period. It has been present in our country in the form of 'PANCH-NIRNAYA', which means decision of elder men of the locality in which parties to dispute reside or by the members of Panchayat whereas the origin of the present form of plea bargaining may be traced in USA. The requirement is to open the wrapper of potato chips and show to the Indians that the chips in beautiful pack before you are made of the same potatoes which you have been cultivating in your fields since time immemorial. So keeping into our mind, the peculiar social fabric and economic condition of our country if we implement the provisions of plea bargaining with letter and spirit, we will be able to maintain balance between efficiency and speed on the one hand and justice and dignity of court on the other hand. No doubt every technique has it pros and cons but seeing the success of plea bargaining in USA where more than ninety percent cases are being settle through this technique, we may conclude that all the limitation of plea bargaining may be overcome by proper education , awareness and will of all those making use of this technique.

30. Law Commission of India, 154th Reports on criminal law pertaining to Code of Criminal Procedure, 1973 (1996).