

Use of Informal Justice Mechanisms in Criminal Justice System: Critical Observation of Principles, Theories and Prospects

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Abstract

This article purports to facilitate a discussion on the relevance of informal justice mechanism as an apt component of modern criminal justice system. Based on the observation that the formal criminal justice system in south Asian countries suffers from myriad of problems including failure to uphold fairness and objectivity in investigation, prosecution and adjudication, as well as blatant disregard towards human rights and interests of the victims and the accused alike, in a criminal case, the article proposes that the norms, theories, principles and mechanisms of criminal justice system still plagued by the vestiges of colonial rule could be reinvigorated by integrating some components of informal justice mechanisms within the formal justice system while recognizing others as autonomous and complementary. It elucidates on mechanisms such as community mediation and plea bargaining and reflects on some of the successful institutions such as paralegal committee in Nepal, Lok Adalat in India and Salish Kendra in Bangladesh. The precise conclusion of the article is that modern criminal justice system should look beyond the narrow sphere of vengeance and should be able to hold the state responsible for providing restitution to the victim, to hold the accused socially responsible towards the victim and to assure long-term conflict resolution, to which end informal justice mechanisms such as mediation and plea bargaining must be thoroughly institutionalized in south Asia.

Keywords: South Asia; Criminal justice system; Informal justice mechanism; Restorative justice; Mediation; Plea bargaining

Introduction

The need to review the concept of crime and punishment

The system of justice which punishes offenders and protects the safety of the society, and is generally called criminal justice system, has constantly been under the trial of people throughout the history of human civilization. As it is widely portrayed in history books, dramas, poems and great philosophical works, the criminal justice system has either been used by the State as a tool for 'exercising the power of governance to quell the dissident or recalcitrant citizens' or suppressing the 'so-called wrongs' defined as crimes and thus so it as perceivably acquired an image of 'coercive means of the State' [1]. In all societies, irrespective of the diversity of religious and moral beliefs and socio-political structures, the State's role and indulgence in criminal justice system is characterised by 'infliction of proportional violence for acts of offenders [2].

Historically, the criminal justice system in most part of the globe is found to be essentially retributive in character; it has been moved with a sense of exacting vengeance on criminals in the name of punishment as 'harsh as it could be'. The atrocious nature of the criminal justice system has continued without mitigation during the medieval era and even during the advent of the modern era. One of the fundamental reasons behind such callousness and atrocity in the criminal justice system can be traced out 'in the underlying general perception of the people towards the crime itself'. Not long ago, the general perception of the people was that criminals were genetically or mentally born felons [3], hence, they deserved no leniency [4]. The suppression of criminals was thus considered an 'unavoidable responsibility of the State towards good citizens and thus it could not stay back without satisfying an obligation of dealing crimes and criminals with all possible high-hands'.

Emergence of divergent socio-economic and political philosophies and advent of science and technologies in the wake of renaissance substantially changed the outlook of the society towards crimes and

criminals. The biological theories of crimes have been superseded by sociological theories, and criminology, a psycho-social analysis of crimes and criminality, has postulated multiple reasons behind crimes. In this changed context, the *lex talionis* notion of punishment has lost its gravity. Factors that push persons towards the world of crimes or entice them to indulge in criminal activities have been explored copiously by many criminologists and new research have found array of such possible factors. Biological theories of crimes are being dispelled and deviation of person from established values or norms is recognized as a result of combination of objective factors in the society. The grounds include including prevailing cultures (family values), systems (such as educational, political, law-enforcement) and economy. Emotions of persons such as greed, anger, jealousy, revenge or pride aggravate susceptibility of a person to fall in the sphere of crime. The feasibility and frequency of crimes teach persons the skills and arts of committing crimes, hence some people decide to commit crime and carefully plan everything in advance to increase gain and decrease risk. Over the decades, many studies have quite distinctly shown that people are making choices about their behaviour; some consider a life of crime better than a regular job, believing that crime brings in greater fortune, both in terms of wealth and power, some get an adrenaline rush when they successfully execute a dangerous crime and some commit crimes on impulse, out of rage or fear. These findings and development have significantly transformed the attitude of criminal justice systems and societies towards criminals and the American society has played a pioneer role to bring about such change [5].

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In most of the developing countries, the criminal justice system evolved customarily. The moral aspect of the crime got emphatic attention of the system that required stringent enforcement of law and strict penalty. In most of the countries in South Asia, for instance, a kind of rudimentary inquisitorial system was in practice before the colonial regime, which invariably required the accused to prove his/her innocence [6]. Such inquisitorial system was in practiced in China as well [7]. The early Chinese criminal justice practiced *lex taliones* in most severe fashion. Some references show that early Zhou dynasty practiced a penal system of death for death and the criminal liability encompassed the entire family of the offender.

Most Asian countries have witnessed an unprecedented economic and social upsurge over the last few decades. However, the system of criminal justice, sad to say, lurks in a less improved and less modernized fashion. While most of the countries in Asia have ratified international human rights bill, the standard of the criminal justice system largely trails the threshold of fair trial [8]. The prevailing criminal justice systems of Asia possess some common aspects: (a) the procedures are staggeringly lengthy and time consuming thus protracting the trials [9], (b) most of those accused of crimes come from rural areas or are shanty urban poor youths, generally from those communities that are abjectly marginalized in terms of development opportunities [10], (c) the overwhelmingly large proportion of accused or offenders has poor literacy or educational background, and (d) the poor and marginalized communities suffer most heinously from the prevailing crime patterns.

Crimes and Criminal Justice System in Developing Countries: The Question of Human Dignity and Security

The relevance of the formal system of criminal justice is widely questionable, at least in the context of developing countries of South Asia. It suffers from myriads of problems. The lack of trust of people in 'fairness and objectivity of the investigation, prosecution and adjudication' is incredibly deeper. Tactful offenders rarely feel deterred by the system whereas innocent people deem their lives would be irreparably harmed once they fall into the hands of the system. The prisons in South Asia are overcrowded by those waiting for trial. The prisons lack the minimum facilities, and even those rare supplies are shared by implausibly huge number of inmates [11].

The investigation of crimes is inefficient and ineffective and marred by subjective and coercive elements. The practice of arrest is random. The arrest often involves use of force and interrogation is torturous, such as extended for incredibly longer period of time, and is humiliating. The practice of intimidation and torture of accused during detention in varying degree is common and the police officers often defend such practice as a necessary tool for revealing truth about crime. Prosecution is less attentive to facts and less sensitive to rights of accused as well as interests of victims. The practice of applying extreme form of sentencing is customary, unsparing even to children and elderly. Prosecution is hardly critical to evidences procured by the investigators; hence generally every case moves towards prosecution, a major factor for clogging of courts. It would not be erroneous to say, the system is cancerously defiled by corruption [12]. This also notoriously renders prisons overcrowded and uninhabitable. The quality of 'defence' is severely questionable. It is unaffordable by poor and unreliable in quality. The lawyers' ethical standard in South Asian nation is extremely poor. The public view lawyers as 'professionals' who are skilful in manipulation of facts or reality. The underrepresentation in terms of quality is thus a widely felt lacuna of

the defence professionalism in South Asian nations. Corruption, in terms of bribe for manipulation of facts or truth, defiles the system cancerously, and the abuse of power by criminal justice actors, often an outcome of insensitivity towards human dignity and rights of people, turns the values and norms of justice into a mockery.

Colonial legacy and impacts:

Many problems of criminal justice system in South Asian countries are handed down by the colonial culture of coercive enforcement of criminal laws and hierarchical bureaucratic notion of actors [13] which overlooked the 'human element' and stressed on 'power element' of the system. This is the root cause for (a) the continuity of the psychology among criminal justice actors that the 'the criminal justice system not backed by hard laws and special prerogatives in matter of investigation, prosecution and adjudication would be undependable for maintaining law and order in the society, and (b) that the criminal justice system, which relies on human rights standards and believes on protection of human dignity and security as cardinal source of its legitimacy, fetters the hands of governments [14]. This erroneous perception about criminal justice system implies that the governments of South Asia have 'less trust on the judiciary'. While South Asian nations have recognized 'fair trial and a number of associated rights' in their constitutions, enacted a set of laws and have distinctly established a framework of the modern criminal justice system with necessary institutions, the constancy of practicing the special security laws has effectively impeded the induction of the modern pro-human rights notion into criminal justice system.

The practice of indulgence in special security laws predates the independence of India. The British colonial regime introduced this practice as a common strategy to quell voices of oppositions. This has now grown as a culture in South Asia. The practice of 'departing from regular criminal laws' by introducing special security laws to address violence or pressing security threats is a legacy inherited from the British colonial rule. The culture of using special security laws devised by British regime includes three different categories: (a) constitutional provisions and statutes authorizing declaration of states of emergency and the use of special powers during such emergency, (b) constitutional provisions and statutes authorizing preventive detention during the periods of emergency, and (c) substantive criminal laws such as TADA, POTA USPA which define special crimes perceivably threatening the national or societal security and establish special rules to investigate, prosecute and adjudicate such offences during emergency or non-emergency periods. The use of such laws has been fully institutionalized as a character of the South Asian criminal justice system.

The said culture has seriously obstructed the process of institutionalization and enforcement of human rights into criminal justice system which has not been able to (a) connect itself with the change and human development endeavours of the society, (b) be friendly to the need of safeguarding the interests of the poor, marginalized and vulnerable section of the population, and (c) maximize the public interest of the society by preventing socio-economic and environmental hazards.

Use of criminal justice for punitive purpose

South Asia has traditionally been ruled by a system of criminal laws devised to protect the interests of colonial or autocratic regimes. The Ranas in Nepal and the British in Sri-Lanka and India, including Pakistan and Bangladesh, used criminal law only as tool for 'crime control and safeguard of 'regressive status quo'. Criminal law and

institutions of criminal justice were meticulously employed to restrain peoples' expectations of freedom and liberty. The policing system and institutions were conspicuously designed to realize this special goal. The framework of the criminal justice system was structured in a way to give special role to the police. Hence, in all South Asian countries, the patrolling police were also entrusted with the responsibility of crime investigation. The criminal justice system thus essentially held a punitive character.

This aspect of the system is congenial and provides justification for the enactment and use of special security laws, phenomenally contrary to the human rights principles and norms. The culture of torture or use of force in criminal justice is thus structurally embedded in the system [15]. Arrest, detention and interrogation are meticulously enforced to be torturous because the objective of the entire investigation cannot be materialized without confession having been extracted. Implicitly, investigation is considered to be a part of the punishment itself. The interests of victims of crime in such a system rarely concern the agencies of the criminal justice, neither are the rights of suspects to fair trial considered important. This autocratic colonial form of system has played crucial role in legitimizing the following practices of the 'law enforcement agencies' in South Asia:

a. The suspect is systematically condemned right from the time of arrest. He/she is conspicuously subjected to a state in which he/she is unable to enjoy the dignity and other rights which are normally available to all human beings. He/she is psychologically intimidated and the risk of physically violently treatment looms large.

b. Participation of the victim in criminal justice is almost non-existent often narrowed to stand for the responsibility to appear in the court for testimony. Both the investigators and prosecutors become unconcerned for the safety and security of the victims. The following practices imply that 'the victims of crimes do not find 'a minimum space' in the system: (i) the prosecutors do not realize it is necessary to give due space to the victims in the process of prosecution, (ii) the presence of victims along with the charge sheet in the court is not considered essential, hence the victims of crimes are not even aware of the charge imposed on the accused before and during the trial, (iii) if the charge imposed by the prosecution fails to sustain in the court, the prosecutor enjoys exclusive authority to seek or abstain from seeking remedy from higher authority of the court, and (iv) the government is not obliged to seek approval of the victim to remove the case or withdraw the charge.

c. Investigators and prosecutors are immune from accountability for failure of the prosecution [16]. This dire lack of accountability has the irreparable consequence of miscarriage of justice which in turn promotes corruption. These adversities are attributable for the growing lack of confidence of the people on the system.

d. The colonial formalist approach to the operation of the system is pervasive and deeply rooted. The rules of procedures associated with criminal proceedings are mechanically enforced, disregard of their impacts on persons seeking justice. Candidly speaking, the notion that 'rules of procedures are meant for justice and hence are for the benefit of people' is lacking among the actors of the justice. Absence of meaningful pragmatic construction of rules of procedure is a serious problem in effective and efficient enforcement of the system.

e. Bureaucratization, often marked by the red-tapism, under-table kick-backs, favouritism and nepotism, is a well-entrenched character of the criminal justice system in South Asia. The huge backlog of the cases in South Asian courts is attributable to this factor [17].

Hereinbefore, an indication about the problem of 'in-wait for trial' had been made. In India and Bangladesh, the problem of backlog and waiting for trial is incredibly huge, which is self-evidence of violation of human rights. The delay caused by the jamming of the judicial procedures exacerbates the probability of a person being wrongly prosecuted and losing liberty. In India, for instance, in the given number of prison population, even a smaller percentage of wrongful prosecution translates into a lot of people.

f. The perception that the criminal justice system is a prerogative of the Government, hence it possesses unrestricted privilege to prosecute or refrain from prosecuting the crime has engendered a devastating culture of impunity in South Asia. In Nepal, for instance, the Government has withdrawn hundreds of cases from prosecution over the last few years claiming that 'those cases were of political nature' [18]. In India, thousands of accused and convicted persons are freed under the pretence of 'addressing the problem of congestion in the prison' [17].

g. The erroneous perception that the crime investigation is a privilege of the police department is another devastating factor of ineffectiveness of the criminal justice system. The British colonial culture in India attached crime investigation with police power. It was strategically necessary for the colonial authorities to maintain law and order and make the ordinary people posit that the criminal justice system is an instrument of deterrence. Hence, arrest, detention and interrogation are considered as a 'power devoid of responsibility' [19] of the police authorities. Torture and inhuman treatment sprouted out of such perception. The police use sweeping powers during investigation of the crime. Consequentially, following notions germinated: (a) investigation of crime is an independent function or authority of the police officer, (b) the prosecutor has no role in the process and quality of evidence, (c) the prosecutor must depend on police officer and their analysis on the matters of evidences and (d) the prosecutor must be guided by the authority of the police in matters of prosecution.

The above discourse plainly shows that the 'prevailing criminal justice system in South Asia is not capable of imparting sense of human dignity and security both to the victims of crimes as well as accused, as it is ritualistic and relies on the relics of the past colonial and feudal structure of the society. It inspires very less confidence of the people.

Grounds for scepticism towards the capability of the criminal justice system in the developed societies

The proportion of criminals is bigger in developed countries despite well-defined laws, rules of procedure, institutions of criminal justice, well-developed mechanisms of accountability and system reinforcing accountability and human rights, availability of the modern science and technology to prevent and investigate crimes, and most importantly, prevention of corruption. Does development foster crimes? This is an unanswered question yet. However, one can argue that, on account of the given scenarios of the crimes in the developed nations, the prevailing structure of the criminal justice system has failed to be a desired mechanism to discourage crimes in any part of the globe. Moreover, the adversarial principles of the contemporary criminal justice system have failed to satisfy the concerns of the victims of crimes.

Let us observe the statement of Mariano Florentino Cuellar, professor and dean of the Stanford Law School:

Etched into the public mindset is a familiar bundle of ideas about criminal law. At its core is the premise that criminal sanctions are

exceptional punishments, categorically distinguishable in application from civil penalties, and used primarily against people harming society by causing violence or severe injury to identifiable victims. Although this model is astonishingly persistent, nearly every aspect of it is open to question. Casting aside distinctions that pivot on the presence of identifiable victims or harms rather than risks, the American regulatory state is heavily dependent on—if not addicted to—criminal enforcement. As its economy, population, and bureaucratic capacity have grown over two centuries, the United States has achieved the largest prison population in human history, with its imprisonment rate the highest in the industrialized world [20].

The statement distinctly articulated the following: (a) the perception that the criminal justice system of exceptional punishment system has not discarded even by the citizens of the developed nations; (b) the attitude that the criminal justice system is concerned with prevention of violence is still pervasive in the developed nations; (c) the effectiveness of the criminal justice system in dealing with crimes is open to criticism; and (d) the criminal justice system's counter-productivity can be seen in the largest prison population in USA.

The crime ratio in developed countries has unprecedentedly increased in the past along with growth of economy and progress of industries and infrastructure, the US leading among most industrialized nations [21]. What is spectacular about the high prison population growth rate is the parallel growth of crimes as well as life and property insecurity. Along with the unprecedented rise of crimes and prison population, the empire of the criminal justice system becomes as broad as it has been exceedingly harsh in its effects. As rightly observed by Mariano, 'every year over a million people face arrest for drug possession and hundreds of thousands them are prosecuted for drug, weapons and immigration violations [20]. The criminal justice system attracts purview of all sectors and the criminal legislations are enforced in all walks of lives, ranging from political dealings between leaders to environmental issues. The discretion of prosecutor may bring any issue into a purview of criminal justice. As a matter of fact, the developed countries seemingly tend to become a system of 'governance through crimes' [22].

Harms of Crimes and Redress Provided by the Criminal Justice System

Harms of crimes are not easy to access [23]. While every crime imposes some kind of harms in the society in several distinct ways, the analysis of the costs, particularly in quantified way proves to be difficult. The cost arising out of damage of the property, destruction, or theft can be measured as loss in the market values. Similarly, other costs such as loss of the future income as a result of physical disability or the destruction of business assets or manufacturing equipment can be assessed, though subjectively. However, there are several costs of crimes that prove difficult to quantify. Many of such costs cannot, or should not be, quantified if the damage or loss is to be meaningfully or objectively assessed and they are directly associated with the value system or norms of the society that are the pre-conditions for peace, stability and progress of the society. The cost of crimes in society and for individuals hence needs to be assessed 'against its implications in the society at large'. It is evident that the prevailing criminal justice system has globally failed to repair the costs of crimes.

What harms CJS is expected to redress?

The discourse in this regard is very scant. The general perception is that the main agenda of the criminal justice system is to insure safety

of the society by (a) deterring the potential offenders by punishing the present offenders, and (b) building a trust among the people that they would be redressed through rehabilitation or reparation of the costs of crimes. While punishment to the offender may serve the mental satisfaction of the victims, it will not redress the losses sustained by the victims. The insensitivity of the system to the latter aspect is phenomenal and has been a serious cause for declining trust of the people.

Crimes impose several costs on the society. In violent crimes such as murder, the harms of crime are not confined to economic loss to the victim and threat of insecurity to the society; rather, includes injury to the value placed by the society on life itself [24]. The impact of some other violent crimes such as rape may be far more intensive and destructive to the entire psyche of the society. They not only violate human dignity of the victim but also pose a threat to the cohesion and harmony in relationship between sexes. On the other hand, the impact of crimes on economic growth and other development endeavours is quite obvious. Crimes encourage illegal market and its proliferation attracts investment in non-productive and non-social redevelopment activities. It creates a vicious cycle of increasing criminal affairs and growth of illegal markets and eventually causes collapse of the entire 'regime of governance and development' [25]. The economic analysis of crimes shows that growth of crimes is an intrusion in legitimate rights of people to participate in fair economic entrepreneurship. It means that the impact of crimes is not solely limited to the victims of crimes. The growth of crimes and resultant costs demand additional police personnel to monitor criminal behaviours, crime investigation and more criminal cases are required to be adjudicated by the Judiciary. Also, correction and prison systems need to be enlarged. Together, all these institutions and their activities consume a huge amount of public revenues and there is a tremendous burden on the national exchequer.

Necessity of Rethinking the Conventional Model of Criminal Justice System

The foregone discussion presents some insights about the necessity of rethinking about the prevailing model of the criminal justice system. The discussion has made attempt to reflect on problems of the conventional criminal justice system and attitudes of the people and government attached thereto. It was discussed that the conventional approach of the criminal justice system is not effective in preventing crimes and has not been able to redeem the harms sustained by victims of crimes. It is expensive and susceptible to being tainted by abuse of power and corruption by actors engaged in the system. It is neither politically safe nor economically and sustainable. In developing countries, the criminal justice system has been a source of violation of human rights and impunity and its reforms or improvement demand a huge amount of revenue. In the developed countries, the growth of crimes has posed a serious problem in maintaining social cohesion and has failed to address the sophistication of criminal phenomenology, intensive growth criminal activities and its dire impacts on economy and social equilibrium.

Reorientation on values of priorities and functions of criminal justice system

Human society's priority in the modern era is to ensure distribution of advantages or benefits equitably and thereby set up a system that fosters development endeavours in order to preserve dignity and security of all members of the society. Politically, the system must ensure a condition in which equal protection of laws is

fully institutionalised and economically, the development of every individual to 'threshold condition' is guaranteed. A justice system, be it civil or criminal, is thus inseparably linked with the governance system and development objectives. The 'threshold condition' of development demands guarantees of the five basic rights to every individual. They are (a) non-violability of the physical integrity of person, irrespective of socio-economic and gender diversities, (b) non-violability of personhood of individual, irrespective of age, physical condition and professional engagement or capacity, (c) non-intrusion in basic liberties and freedom of choice, (d) access to basic supplies, with minimum education as the fundamental component, and (e) access to participation in economic entrepreneurship. Effectiveness and efficiency of any justice system is tested against the realization of these elements of the threshold condition of development.

Material conditions such as the level of economic development, political consciousness and social coherence that compose the foundations of justice system cannot be ignored in a study of the concept of justice. They undeniably, and perceivably, have bearings on justice system and this theory implicitly rejects the idea of a universal standard for its application. Its mechanisms and methods need to be examined in the light of 'existing socio-economic realities of the society and its schemes of reform and improvement are to be orchestrated. With this hypothesis in the mind, the following principles should be given due attention while considering the elements of effectiveness of criminal justice system: (a) it must protect and safeguard the fundamental socio-economic and political interests of the society together with fundamental rights of individuals, (b) in a developing society, it must consciously safeguard individuals' physical as well as personal integrity and access to development opportunities. The acts of socio-economic injustice perpetrated by common individuals or state's authorities should be criminalized and penalized.

Development paradigm of criminal justice system

In developing countries, the term 'development' of society refers to a state of realization of the minimum threshold condition of progress by members of the society, which transforms their lives from the existing vector of deprived and vulnerable conditions into a better state of human dignity and security along with freedoms choice where people gain capabilities to address difficulties or inconveniences of life and become able to rescue themselves from a state of insecurity. Economically, the term refers to a state of 'adequacy of resources and opportunities necessary for achieving the projected goals of life'. Politically, it connotes a state in which people are able to freely and fairly participate in decision making process of the State. The indispensability of connection or roughly speaking the nexus, between system of justice and development is thus obvious.

In this paradigm, human security is a primary thrust of the criminal justice system, which defines criminal law as an instrument of protecting human dignity and welfare. In this paradigm, the jurisprudence of criminal justice system holds law as an instrument of protecting human dignity, and thus rejects significance of theories that define justice as an abstract or meta-realist concept [26]. The term justice in this sense means a mechanism of fostering human security through, inter alia, equitable distribution materialistic welfare. The objective of justice is to ensure a system of rules of law which, in turn, secures a state of good governance or a sound socio-economic and political regime necessary for preserving human security and dignity. The regime of law and justice is thus not a 'sacrosanct mechanism' in itself; it is indeed an instrument of development and security. Law and justice cannot have any significance if they lack an underlying mission

of 'distributing opportunities or advantages equitably' and protecting human dignity irrespective of whatsoever perceived differences existing around.

Unlike the classical jurisprudence, the human security and dignity-focused jurisprudence does not define law as a means of State to subordinate people. The tension between law and morality ends here. By contrast, the human security-centred jurisprudence takes law and justice as mutually reinforcing instrument of regulating affairs of Stat'. It believes that the State is the worst violator of the rights of people. Poverty and deprivation are outcomes of ill- governance. Law can be an ideal institution for serving human needs if it is able to regulate State's affairs by prescribing rules for its actions and proper behaviours. Human development and security together form the yardstick for legitimacy of law and justice system.

The concept of justice as a representative of moral aspect of human rights legitimizes the system of law. In a literal sense, however, the concept of justice distributes benefits or advantages of development by providing each individual with 'equity in resources to fulfil basic needs and opportunities for fair competition in participation of decision making process' [27]. A legal system is considered to be valid or legitimate if it has these indicators of justice immersed within it. Human rights as moral values recognizes that every human being is inherently dignified by virtue of his/her birth as a human being and thus he/she is entitled to enjoy the dignity irrespective of differences he/she has in origin, status or circumstance.

Economic and social needs or benefits and advantages constitute the primary sources of values or norms for 'meaningful operation of the system of justice'. The outputs (capabilities for fair competition and development) generated in forms of norms by operation of the system of justice are carried out by law in forms of actual rights in practice. The positive rules of law are thus instrumental in recognizing, protecting and enforcing 'the values and norms recognized by the principles of justice'. This notion of justice provides normative grounds for the application of the concept of 'rule of law'.

This thesis underscores that the equity-based distribution of advantages, the economic and social development programs and progressive legal culture are coherently interacting components of the concept of modern and pro-human rights criminal justice system. The progressive legal culture embodies human rights laws and values as cardinal principles of human security and dignity. The relationship between human rights and criminal justice system is thus indispensable. However, the enforcement of human rights through a criminal justice system requires political stability, economic development and good governance. Great many economists, legal scholars and development agencies from Max Weber to Douglas North to the World Bank have argued that rule of law based justice system is necessary for sustained economic growth and well-functioning of democracy [28].

Notional and Structural Reforms in Criminal Justice System

Building competency of criminal justice system to address impunity, increasing threat of crimes to the security social structure, wider inaccessibility of the criminal procedure mechanisms for the poor and redemption of the harms of crimes sustained by victims should be considered as the primary thrust for the reform agenda as regards criminal justice system. Earlier theoretical discourse amply sheds light on the dimensions and the causes of failure of criminal justice system in the modern era. Nonetheless, it would be appropriate

to summarize some of them in order to properly reflect on the agenda of reform or improvement required:

When crime enters purview of the system, it becomes monopolized providence and duty of the judicial authorities. Traditionally, crime is considered a public matter and only the State has right to prosecute and punish the offender. Such profoundly punitive approach towards the criminal justice system has proved to be a serious constraint in its effective enforcement. Consequently, the participation of victims and community in the process has ceased to be meaningful and objective.

Crime against victim is considered an offence against society and eventually the State [29]. However, the victim's role is narrowed to that of a classic witness to the prosecution upon request of the courts and tribunal. The State's concern for the individual harms sustained by the victim is minimal. Justice has become synonymous to punishment to the offender and the victim has to oblige to the decision of the State. Reparation of the harms suffered by the victim is forgotten.

a. The institution of criminal justice has become an expensive enterprise. Generally, neither the victim nor the accused have adequate resources to afford lawyers for 'sophisticated intellectual game of win and loss'. The criminal trial in adversarial system is a 'competitive game between public prosecutor and defence lawyer' resulting in 'victory of one having capability of convincing the judge in his/her arguments' [30]. The confidence of the victim of crime over the system has thus seriously eroded. The victim is neither properly represented nor has he/she the requisite space or mechanism available to defend himself/herself.

b. Confidence of the people in criminal justice systems is faltering. The challenges and difficulties therein appear to disregard that access to justice and due process of reparation of harms meted out of crimes is indispensably basic human rights to be secured by the government [31].

c. A victim's role in the criminal procedure can only be effectively guaranteed if: (i) the current institutional structure of the criminal justice system accommodates the interests of victims systematically; (b) the role is consistent with the restorative policy goals of the criminal justice system, realistic and affordable; (c) the role is judicially enforceable with full assurance of the State responsibility to compensate the victims in case the prosecution fails to sustain claim against the offender.

d. The protection and preservation of some values of humanity such as inviolability of life and dignity are always cardinal in criminal justice system. Some harm or damage of crimes cannot be monetarily or materialistically repaired. The psychological trauma or loss of personal dignity caused by crimes such as rape, trafficking and torture cannot be properly addressed without adequate compunction by the perpetrators and the satisfactory participation of victims in the proceeding besides adequate monetary compensation to the harms. The current structure of the criminal justice system, particularly in developing countries, does not guarantee such reparation against harms of crime. The community's participation in the criminal proceeding is therefore important component of the reform of the system.

e. In most of the developing traditional societies, the formal structure of the administration of justice has never had full control over the system dispute or conflict resolution. In such societies, the system of local governance, security and means of dispute resolution are provided through non-state institutions and the relation between formal and non-state institutions is sometimes characterized by degrees

of tension and resistance and other times by recognition, coordination and cooperation. Mostly in societies comprising of diverse tribal or ethnic communities, the formal system of criminal justice is neither fully accepted nor confided with. In such societies, the importance of informal or non-state institutions in resolving disputes is always paramount. In Afghanistan, for instance, 80-90 percent civil disputes and criminal offences are dealt with through informal institutions [32].

f. Overcrowding of State judicial institutions is a serious problem in most developing countries. The service provided by state judicial institutions is driven by excess of formalism, which makes the system not only inaccessible but also lengthy and cumbersome. The common people are often not aware of the formal procedures, which are expensive to a great extent. Owing to their transitional nature, the developing societies are bound to confront with rising trend of criminal activities. Factors such as ignorance of laws, dissatisfaction towards social structure, apparent discrimination in economic advantages and prolonged political instability and conflicts proliferate crimes. However, the prevailing laws are not able to cater to the need of speedy and reliable process of the justice. These problems drive people to seek justice informally. The developing societies are thus supposed to understand these exigencies of the dispute resolution.

Accommodating informal procedures and mechanisms of conflict resolution in criminal justice system

The problems discussed above call for a rejuvenated outlook on norms, theories, principles and mechanisms of criminal justice system.

Is alternative dispute resolution philosophy relevant to criminal justice?

The answer is positive, though the reluctance on the part of State institutions and considerably larger part of the civil society is massive. The scope for application of informal procedures or mechanisms in criminal justice is not untenable, although not easy to invoke. The following norms or principles of criminal justice system, the adversarial system in particular, possess a great scope for application of alternative dispute resolution philosophy in settlement of conflicts of criminal nature:

a. In adversarial (Anglo-American model in specific) model of criminal justice, the hearing of cases takes the form of legal confrontation between parties involved in the case [33]. The court in this system is simply obliged to decide between their respective arguments. The court does not assume role of discovering evidences. The parties are obliged to discharge the burden of proof for their pleas or claims. As a matter of fact, the parties have a pivotal role during the proceedings, while the court's role is relatively passive, and limited essentially to determining the conflict between them [34]. This adversarial approach applies to both civil and criminal hearings. The principle of parties' control of litigation proceedings is being widely used in civil litigation, even if one of the parties is the Government or the State. In civil cases, the Government contentedly engages in negotiation with the private party for out of court settlement, which is not a new phenomenon in the system of adversarial justice. There are no reasonable explanations why the prosecution cannot engage in negotiation with the accused in a criminal case.

b. Within the framework of the fundamental principle that parties of the case are crucial players in hearing at the court, the role of informal mechanisms in settling the case seems plausible because the parties are allowed to reach at decisions independent of court on some issues of claims and possible liabilities. In such case, the court

takes obligation to execute the decision reached by the parties. The legal sanction of such agreement is fully established by laws guided by the same principle and can allow the parties of criminal trial to agree on, independent of the court, some issues of criminal charge and punishment. Such autonomy granted to the parties will definitely contribute to the speedy trial, the success of prosecution and the timely meaningful and reparation of the harms sustained by victims of crimes.

c. In civil jurisdiction, the disputed is litigated between plaintiff and defendant or respondent, and the role of court is to determine the truth or legitimacy of their arguments. In a criminal trial, the prosecution and the accused are the parties to the dispute. The court hears the pleas of the prosecution and determines the strengths of evidence it supplies beyond reasonable doubt. There are some important principles or rules to be followed in this process: (a) the hearing must take place in presence of both the parties, (b) each party must supply information to the other regarding its motions, (c) the prosecution must prove the allegation with the strength of evidence, and (d) each party has to justify its argument or plea on the strength of evidence. The rules laid down by these principles plainly show the parties in the criminal proceedings are treated on equal footing within the framework of the adversarial model, hence the State cannot claim a special privilege against the accused. The prospect of negotiation between the parties in criminal proceedings is thus not ruled out.

d. In civil suits, the State may sue or be sued and the State cannot be treated differently than the private party. This is also true in criminal proceeding, since the state is a party to the case and as such contests the case against private party. Both in civil and criminal matters, the hearing of the cases do not grant legal ascendancy to one or the other party. Equality of opportunity to hearing is thus based on the notion of equal footing. In civil matters, it grants privileges to the parties to engage in out of court negotiations for settlement of all or some issues within the framework of law, whose mechanisms include arbitration, mediation, negotiation and conciliation. Using such alternative methods of conflict resolution in many instances has the effect of transferring the burden of finding a resolution to the impasse to the parties themselves. Similar practice can be developed in criminal jurisdiction by the application of the concept of plea bargains. The concept of plea bargaining is an alternative to conducting a full criminal trial by offering a solution to the conflict in court, which is in broader sense the idea of alternative dispute resolution. The application of the concept of plea bargaining is therefore a good example to demonstrate that application of the informal mechanism is possible in the criminal jurisdiction.

Justifications for incorporating informal mechanisms of dispute resolutions in criminal proceeding In the light of the earlier discussion, it can be safely argued that the credibility of, and confidence on criminal justice system can significantly be enhanced by ensuring application of alternative dispute resolutions mechanisms within its framework. To that object, the following arguments of justification can be extended:

a. Informal justice system is a non-state dispute resolution mechanism falling outside the ambit of formal system. In the backdrop of massive failure of criminal justice system across the world, irrespective of the levels or degrees economic, scientific and technological development of nations, the relevance of the non-state or informal system is obviously established. Informal or non-state systems are already in common practice among communities in developing countries and countries in transition. Empirical researches in many countries in this regard show that (a) the non-state or informal system

provides easier access to justice and security to people who otherwise have no access to formal system [35]; (b) the non-state or informal system is found to be an alternative in places or communities where the presence of formal institutions of the State is lacking, or has failed to fulfil its obligations; (c) the non-state or informal system is accessible easily to poor people and the decisions of the such systems are more acceptable to the community; and (e) non-state or informal systems are simple, comprehensible and speedy.

b. As elucidated in the earlier discussion, formal criminal justice has made victims apathetic to the criminal procedure. In developing countries, the indifferent attitude of victims is one of the causes of failed prosecution. Owing to defective notion of the system, victims and other members of community have faltering trust on police and prosecutors.

c. In developing countries, especially with diverse ethnicities, the minority and marginalized groups generally tend to reject the legitimacy of the formal system of criminal justice as it has been regarded as an instrument of suppression of the dominant group since they live with phenomenal poverty. Among such communities, there is a greater urge to have a system they can control themselves as it instils a sense of security when State does not fulfil its obligations.

d. The concept of non-state or informal system of justice is an outcome of social demand for unrestricted and easy access to justice, as well as the movement for alternative forms of justice and conflict resolution which promote more restorative solutions. The demand for informal criminal justice has its roots in the penal law abolitionist movement according to which the parties of disputes must resolve conflicts through mediation, conciliation and substitute prison and other forms of social control.

e. The conventional formal systems are supplanted by the informal system in the modern era, where the civil society, as a true representative of the people, plays a crucial role in the resolution of disputes in a way that the causes of conflict are eliminated. The overtly punitive formal system divides the society into winner and loser while the informal system of justice believes in conciliation and thus gives an opportunity to the parties themselves to resolve the conflict and foster social cohesion [36]. The popularity of the informal justice system has been growing over the years mainly due to (a) the rise of conflict science which regards 'conflict between two people' as conflict of all and therefore the resolution of conflict is a collective interest of the society, (b) the emergence of an informal process of conflict resolution in which it is not formal logic but the collective consultation of the members of the community and agreement of the parties that counts, (c) the emphasis for conflict resolution is placed on reconciliation and social harmony, (d) the practice of selecting mediators remains with the community, which is accountable for enforcing the agreement between the parties and (e) the guarantee of execution of decision is based on the informal social pressure.

Most legal systems in their primitive stage used non-state practices of dispute resolution: Many developed criminal justice system, the community enjoyed wider jurisdiction over trial of offences and allocated punishment for offender according to the exigencies, gravity of the crime, conditions of the accused and the objectives of the justice, before new theories of State's prerogative in such matters were developed. The formal system of criminal justice was introduced when the State gained power, and subsequently was used as an important instrument of enforcing laws. The western formal systems of criminal justice were coercively introduced in colonized nations [37,38]. These

systems were unknown to the local people and the natives are still not aware of the underlying philosophy of many institutions and concepts enforced on them. South Asia is a typical example in this scenario. The principles and concepts of English common law based adversarial system imported to India were not familiar to native population who spoke different language and practiced different culture since they developed in a unique context of English civilization and envisaged to address typical problems of that English society. The transplantation of the common law system as a tool of sustaining colonialism not only destroyed the local formal system of criminal justice that existed for over some millennia, but also engendered a sense of resistance among them towards the rules and concepts of common law as an instrument of sustaining colonial rule. This may be one of the reasons why people's trust in 'formal criminal justice system in South Asia is extremely low. Moreover, the phenomenal problem of corruption [39] has its roots in the attitude and patterns of the 'enforcement of criminal justice system by colonial rulers' [40].

Minimization of risks of abuse of power, exploitation and discrimination: Some risks are obvious in non-state or informal justice system. These risks are mainly associated with abuse of power by people involved in non-state or informal mechanisms. The following challenges need to be addressed so that the scheme of informal mechanisms can safely and meaningfully be applied to criminal justice:

- a. The informal justice system may encourage abuse of powers; the elites of the society may exploit its mechanisms to enhance their power structure and use as an oppressive tools. It may equally be used by someone as a tool for seeking revenge against other [41]. Adequate and proper safeguards must be installed to avoid such abuses.
- b. The informal or non-state mechanisms may encourage non-compliance of international human rights standards or instruments. The actors of the system may resort to torture and inhuman treatment as a means of quick and appropriate sanction for violation of laws.
- c. The potential offenders may not be deterred by simplicity of the informal or non-state mechanism of dispute resolution. This may induce impunity.
- d. The risk of such mechanism being controlled and violence being used by clandestine criminal groups to have their awards executed is not ruled out. In South Africa, vigilantes arrest suspects and summarily try them on streets, punishing them by flogging, stoning, beating and even burning [42].
- e. Religious, communal and social discrimination may be institutionalized. The informal systems may be ill-exploited by the local religious and ethnic leaders, or by local landlords. Women, religious and ethnic minorities and immigrants might be subjects of discrimination [43].

f. The obsession for retribution may perpetuate conflicts and the entire society may be divided between contesters. Historically, most non-state or informal systems are found using retribution as a guiding philosophy for punishment. In traditional developing societies, immediate revenge may be perceived as most effective and reliable form of justice.

Possible Models of Informal Mechanisms in Criminal Justice

The problems and risks mentioned above are not formidable and non-addressable. Conscious, informed and systematically planned schemes can control or remove those risks and make informal

mechanism works efficiently and effectively in criminal justice systems. Hence, societies have to be prepared to depart from conventionality of the system of criminal justice. To this end, Governments and civil societies should be prepared to give up beliefs that: (a) criminal justice system is the State's monopolized punitive instrument, (b) its philosophy is founded on healing of offence only by legitimized revenge, (c) punishment is a justice for the victim, and (d) punishment will end the conflict engendered by the crime. The following modality of the informal criminal justice system mechanisms is therefore suggested:

Figure 1 provides a holistic picture concerning the possibility of interposing informal justice mechanism in criminal justice framework. A fundamental principle which should be consideration is that total substitution of formal system, except some petty criminal cases, by informal mechanisms seems unfeasible. One should therefore plainly understand that informal criminal justice system means nothing more than an idea of interposing possible mechanisms within the available framework of the criminal justice system for resolving a series of problems that are hindering the course of access to fair, impartial and speedy justice to the bulk of people in a given society.

The different mechanisms may be relevant and thus organized more appropriately and efficiently in different stages of the criminal proceeding. Before proceeding to discuss on the proposed framework, it is relevant to ponder upon some important guiding principles.

- a. Informal mechanism should not be allowed to be initiated before the crime is duly brought to the notice of the formal authority, i.e., the police, prosecutor or magistrate as required by the law of the given society. This requirement is considered important to reduce the abuse of mechanism by actors involved in the process.
- b. The victim ought to be given autonomy to make a selection between the formal or informal mechanism. To enable a victim to make a reasonable or appropriately informed decision, the authority of formal system must ensure a system of properly briefing about the available mechanisms' [44].
- c. The State, by law itself, must clearly enlist some cases, such as high felonies, as not applicable, except some plea bargaining and case management models under strict guidance of the trial court, for settlement by informal mechanisms. This guideline is important for countries in transition and newly emerged democracies where susceptibility of decriminalization of human rights violation cases,

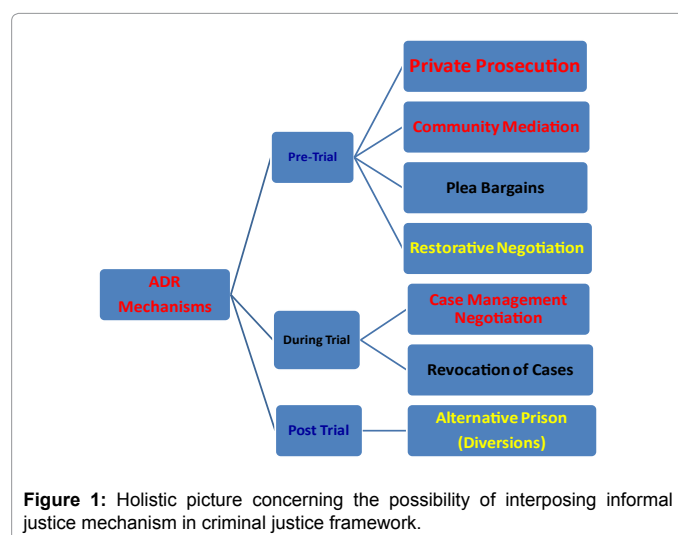


Figure 1: Holistic picture concerning the possibility of interposing informal justice mechanism in criminal justice framework.

such as forced disappearance, torture, murder for political revenge, kidnapping and criminalization of politics are grave problem.

d. The State must, by law itself, must enlist the categories of cases that are open for resolution by means of one or other informal mechanism.

e. Institutions or individuals purporting to engage in informal criminal justice system, as facilitator or mediator, must have fairly good knowledge of criminology, penology and international human rights instruments or standards. The safeguard of human rights in criminal justice, unlike in civil disputes, is always a sensitive issue. No system of justice can compromise on internationally accepted rules of human rights.

f. The State should also make provision by law of review of the award achieved by informal justice mechanism. The appellate court can review such awards by employing less formal proceeding, such as conference instead of formal regulated hearing.

These safeguards are purported to avoid risks attached to the informal or non-state mechanism of criminal justice system. With these safeguard properly installed in operation, any society can embark upon the course of providing the above-mentioned mechanisms. The basic legal ground work and philosophy for informal criminal justice system is readily available in constitutions of countries, at least those having democratic structure of governance. The preamble of the Constitution of the Republic of India, for instance, guarantees speedy justice to all people, that are not only important from economic, social and political dimensions, but also mandatory. Implicitly, the right to speedy, fair and impartial trial is fundamental human right of people. Most countries in the world today have unequivocally accepted that the rights to unrestricted and unhindered access to justice, the speedy trial and the duty of the State to effectively abolish the causes of delay in justice are cherished principles of good governance [45]. Moreover, there is significant volume of international human rights laws which fervently call for speedy trial as a fundamental right of individual. In many countries, nonetheless, the number of judges in proportion to the population size is small, the revenues is scarce but the case-log is implausibly huge which seemingly deprives people of their right to speedy trial, thus subjecting them to a cruel reality of miscarriage of justice [46].

Most traditions in world have used informal justice mechanisms since time immemorial. In all societies, such mechanisms did suffer from abuse and tampering, but it continued to improve. The *modes operandi* of criminal justice system has constantly undergone changes to adapt the new contexts and new problems. The world has come to a point of time where demarcation between nations, faith and traditions are crumbling and criminal justice system is part of this change.

Private prosecution

Private prosecution may be an effective alternative mechanism for public prosecution as it helps provide recourse other than criminal proceeding. It may be a suitable alternative to the criminal prosecution as it involves satisfaction of victims of crimes. Nepal has been traditionally practicing this modality successfully. The principle involved in this modality is that party or victim has autonomy or freedom to determine if the act of crime is a breach of peace against the entire society or he/she alone. If the victim considers the violation to be a serious breach of peace, he/she approaches State's mechanism with information of crime. But if he/she considers that the wrongful act has nothing to do with society other than he/she, then resort to

private prosecution. In Nepal this practice is categorised as private crimes. Such convictions involve imprisonment as well as pecuniary penalty. Most importantly, a crime prosecuted by the State in absence of evidence may be diverted to private prosecution. The State then comes out of the criminal proceeding. This is one of the reasons why petty criminal acts do not undergo criminal proceedings in Nepal, due to which Nepal has fewer accused waiting for trial in comparison to other South Asia countries. Criminal cases do not exceed three years of trial in Nepal. Private prosecution is a good solution to congestion as well as protection of autonomy of decisions for victims of crimes.

Community mediation as a first step of the informal criminal justice system

Community mediation is not a structure, it is rather a principle. It implies that a group of community members can take cognizance of crime subject to provisions of law and can engage victim and offender in negotiation. The group of community members engaged in mediation process can resort to structured framework and some of such structures being used in different parts of the world are enumerated below.

Paralegal committee in Nepal: Paralegal committees are successfully functioning in Nepal. They are trained on mediation process and psychology of the dispute. The committee has a larger membership but only few, generally three peoples, are involved in the mediation process. It maintains a close observation of the process and provides significant strength to ensure enforcement of the agreement reached between the two parties. The committee maintains a list of mediators and publishes the list at local governance office and district court that often refer cases to such mediators or invite them to help in conducting mediation. Paralegal committees' role is found successful in petty criminal cases and domestic violence. The skills of counselling they apply to prepare parties to mediate are found to be the strongest factor behind their success. There are currently 450 paralegal committees across Nepal, whose role in protection of children and women against all forms of violence is prominent [47].

Salish Kendra: *Salish Kendra* is a mediation or arbitration board in Bangladesh that is organized by a group of people from village who comprise of village elders, leaders such as religious priests, retired civil and military officers, social workers and school teachers. The board conducts two activities-one a platform of mediating disputes and other village court. In the mediation panel, there is a group of people elected by parties and also nominated by *Salish Kendra Board*. In the village court, there are paralegals or lawyers. The village courts adopt a summary trial of cases exactly in line of the formal courts. The fundamental objective of the *Salish Kendra* is to promote justice at grass root level by strengthening and activating Village court and Arbitration Council within the *Union Parishad* (a village governance committee). The group of stakeholders includes communities, community organisations, traditional leaders, religious leaders, local and national government authorities, organizations and institutions, local NGOs. These groups have very different roles and responsibilities regarding creating access for the disadvantaged women at rural areas to the formal and informal judiciary systems. Stakeholders are categorized as Primary Stakeholders comprising of village people, especially women, children, minority group, union *paraishad* Chairman, Secretary, Members and CBO Members and Secondary Stakeholders comprising of women leaders, village leaders and social workers, religious leaders, Household women leaders, *Choukider & Davader*, retired government officers, Journalists and NGO Workers. Both the mediation board and village court take cognizance of petty criminal and civil cases. *Salish*

Kendra has been a tremendously successful system in Bangladesh, for instance, there are 56 *Salish Kendra* function only under Madaripur Legal Aid Association. Satisfaction of people in dispute resolution is a remarkable feature of this model. However, the awards of these mechanisms are persuasive [48,49].

Lok Adalat (people's court): *Lok Adalat* is a popular forum for access to justice in India. It is organized regularly with the help of university law schools in which professors and lawyers work as judges and students as volunteers. The venue of the court is generally fixed at place like university law school's premises. This court is modelled in line with the private tribunals in middle age in India. Currently, however, the *lok adalat* is perfectly legalized with a given jurisdiction. India has a long practice of settling disputes through media of elder people. The *Lok Adalat* is developed in the light of historical experiences, being highly inspired by principles of Mahatma Gandhi. In nature, it is non-adversarial system whereby mock courts are organized by State Authority, District Authority, Supreme Court Legal Service Committee, High Court Legal Service Committee and *Taluk* Legal Service Committee. The *Lok Adalat* deals with civil cases of all types, matrimonial disputes, land disputes, labour disputes, and most importantly compoundable criminal cases. It has been a widely successful alternative dispute resolution venture in India.

Community mediation and its role in criminal justice system: Various systems as described above can be installed to deal with petty criminal cases at grassroots level, which otherwise cause a serious backlog at courts of first instance. Such mechanisms can more successfully handle conflicts or violence at family level. Matrimonial violence, scuffles between people in neighbourhood, violence associated with utilization public amenities, alcoholism related disturbances and public nuisances such as eve teasing, dislocation or destruction of public information and notice system and loitering of public places could be disputes effectively handled by mechanism founded on principles of community mediation.

Negotiation in criminal charges and punishment through plea bargains: Plea bargaining has traditionally been a system of negotiation' between the prosecution and the accused, and, in the recent past, it has increasingly been a part of *modus operandi* in easier and successful disposal of the criminal cases [50]. Plea bargains involve extensive negotiation between the prosecutor and the accused in various stages of criminal proceeding'. Such negotiation generally includes (a) bargaining for charges, (b) intensity of charges, and (c) number of prosecutions. The prosecutors, however, have authority to determine all these matters independently. However, they may lack the evidences to confirm charges or be confined by time limitations to do so. Through bargaining with the accused, the prosecutor may agree to limit its demand in relation to the sentence to be imposed, thereby levying more lenient punishment than the maximum one as required by laws in question. In lieu of this concession offered by the prosecutor, the accused may agree to cooperate by accepting the conviction motion by admitting the charge. The mechanism of plea bargains can serve the objective of relieving the prosecutor's 'burden of proof' which is always a difficult job in adversarial framework of criminal justice.

Plea bargains, through its appropriate extension and effective use, can serve as a mechanism of out of court resolution of conflict in criminal justice system. Within its extended framework, the mechanism can be used by parties 'to privatize the criminal proceeding by removing it to their own private domain'. Implicitly, the mechanism of plea bargains is already an alternative to conducting a full criminal

trial in court. In view of its visible elasticity, it seems fairly possible to develop it as a mechanism of negotiation between two parties of the criminal case. Hence,

a. The prevailing criminal justice system frameworks can suitably transform the mechanism of plea bargains from exclusive privilege of the prosecutor into out of court negotiation mechanism between the prosecutor and the accused with a view to accommodate victims' concerns of reparation or rehabilitation. The accused may agree to the reparation claims of the victim and the prosecutor may, for that consideration, agree to grant concession to the accused by limiting its demands in relation to the sentence to be imposed, thereby levying more lenient punishment than the maximum one as required by laws in question [51].

b. The defence counsel may be a responsible person for brokering the system of interaction or negotiation between the parties', i.e., the prosecution along with victims and crimes and the accused. The general structure of the mediation in plea bargaining is a negotiation between the accused and prosecution however to make it meaningful and serve the interest of the victim, the involvement of defence lawyer as a mediator, for all intents and purposes, is crucial for the success of negotiation. The plea bargains thus can be transformed into a form of mediation through agreement of the parties to negotiate and preparedness of the defence lawyer to mediate [52].

c. The major character of mediation is freedom of the parties to negotiate. By virtue of their right to self-determination, the parties are free to make their informed consent with due respect to the fairness and impartiality of the criminal proceeding. Due to freedom to consent for contract and right to self-determination, the agreement entered into by parties obtains legal recognition, which is a general principle of justice. The agreement reached between the parties by the virtue of informed consent assumes the character of the contract thereby obtaining recognition of the law.

The prospect of remodelling the criminal justice system by modification of the mechanism of plea bargains into a system of engaged negotiation between prosecutors and the accused with the medium of defence lawyer is plainly established. This approach is comfortably applicable even without wider change in the system of criminal procedure and would be highly acceptable to the community because it would give a space to the victims to bargain and settle their restorative claims through their involvement in the pre-trial stage.

Restorative negotiation: Generally speaking, restorative negotiation mechanism is reconciliatory or 'healing-driven model. It focuses on reinstatement or restitution of the broken and destroyed relationship between the victim of crimes and the accused, which indeed is a basis for removal of the conflict. The restorative negotiation model provides reparation to the victim of crime and solace from vengeance and criminal stigma to the accused. This is why the model is often defined as a healing mechanism [53]. In this model, the community play a crucial role in brokering the negotiations between the victims of crime and the accused. The role of the prosecutor and the defence lawyers is also important to create an environment conducive to negotiations that are theoretically guided by three principal guidelines: repairing harms of crimes, reinstating or reconciling broken relationship and reassuring peace or social harmony. In this manner, the conflict is fully transformed into an equal justice for both the parties who are immediately and directly affected, also with the objective of greater good of the community which is indirectly affected. Restorative mechanism is the most legitimate response to crime

as it is an instrument devised to correct the weaknesses or lapses in formal criminal justice system. System of administration of justice in a democratic society, as an instrument of peace and stability in society, is regarded as one of the major functions as well as obligations of the State. This notion of justice underscores two intertwined principles: punishment to the offender and reparation to the victim or his/her dependants. State's involvement in the criminal justice as a main stakeholder is thus primary and quintessential. Referring to State's unavoidable role, Pascal has rightly said that justice without authority is ineffective and power without justice is anarchy. Criminal justice system without restorative character is nothing but mockery.

Hence, the concept of restorative justice assures a role to the victim in the dispute settlement and offenders are encouraged to assume responsibility for their criminal acts—to repair the harms they have committed—by apologizing, returning the stolen property, or paying compensation or doing community service [54]. Hence, upliftment of victim's role in criminal justice is not optional but inevitable. This claim is based on a theory of justice that focuses on crime and wrong doing as an act against individual or community rather than the State [55]. This theory, in turn, receives ground in another theory which holds that in criminal justice system the State merely represents the victim's interests. As rightly pointed out by Glaser, restorative justice can be an instrument to foster dialogue between the victim and offender, and by making it an instrument of victim backed by community, it might bring the highest satisfaction to the victim, and thus can be a tool for bringing self-realized accountability of the offender thereby helping in minimizing the menace of recidivism' [56].

Additional underlying possibility of the restorative justice is the change in attitudes of defence lawyers practicing criminal law. The image of criminal law practitioners, especially with reference to, and in the context of, the organized crimes, typically the one involving terrorist acts causing harms to innocent persons, is increasingly gloomy. They are increasingly becoming subject of hatred in the society. The restorative mechanism is a solution to this problem, because it requires the criminal law practitioners to move with a scheme of pursuing their clients to agree to the idea of paying compensation and thereby indirectly serving to good cause of justice and command respect from the entire community.

Having these theoretical justifications laid down, it is urged that criminal justice system should redeem itself by incorporating these notions of restorative justice:

- a. Accept and give due place to the participation of victims of crimes in all affairs of pre-trial stage, including dialogue through representative of the community in the scheme of compensation for the harms inflicted.
- b. Engage in mediation between the accused and prosecutor, for the better interest of victim's reparation, within framework of plea bargains.
- c. Make State accountable for the harms of crimes sustained by victims with the idea that it is the consequence of failure of the State to ensure security in the society. Victims of crimes should be engaged in negotiate with the State authorities in order to make it liable for 'contingent or transitional reparation'. This mechanism would promote sincerity and efficiency of the State to the security requirement and, in the meantime, prevents escalation of conflict for the sake of revenge.
- d. Restorative justice scheme could be used as a synonym for mediation during the pre-trial stage.

Case management mechanism

Case management mechanism is a means of removing backlog and expediting the flow of case disposal. This mechanism is important to ensure speedy, fair and impartial trial. The removal of backlog will reduce the cost borne by parties as well as the State while also generating an atmosphere conducive for compliance of human rights standards. Implementation of the fast-track' model involves negotiations between the court and the parties as well as negotiations between the prosecution and the accused.

Revocation of cases: Revocation of cases is a mechanism of getting rid of criminal cases of less importance from the point of view of seriousness of harms and public interests. Basically, prosecution may revoke cases involving crimes without immediate harms to individuals. The opinion of civil society may be a good guide in this respect. Payment of monetary penalty is emphatically focused in such cases. The charge of corruption is typical example, in which the offender is liable to pay the sum of corrupted amount and the penalty equivalent to. Payment of such fines and dues may be made a ground for revocation of the case or reduction of the sentence. It can be handled exactly like plea bargains. In Nepal, for example, court may reduce the sentence of a person convicted of corruption, who surrenders after the judgement of the conviction in the court, by 20% in imprisonment and monetary penalty. The accused has right to negotiate with the court and agree to the offer provided by the law. The scheme of revocation of cases could also apply in respect of those offenders who have been serving trial for traditional crimes such as cow-slaughter, infanticide and crimes committed in a provocative state.

Alternative prison: The Penal Reform International has suggested the following approach in this regard:

Pre-trial diversion measures such as alternative dispute resolution and mediation should be fully exhausted before consideration of formal court proceedings. Moreover, diversion measures at all stages of the criminal justice process are vital. Since, police across the region are prone to over-arrest, arrest without substantial grounds must be avoided and alternatives such as a caution or fine fully utilised. Safeguards to limit the over-use of police and judicial custody require strengthening. Furthermore, revitalising and reinvigorating non-custodial measures including community service and other applicable methods is essential to prevent exposure of persons not considered a threat to society to hardened criminal behaviour in prison and the perpetual cycle of crime and re-offence [57].

Conclusion

Countries across the world have inherited the criminal justice system as a legacy of the past. Most of the principles, theories and normative standards inherent in it emphasize the public nature of the crime and underestimate the harms sustained by individuals. The criminal justice systems being practiced by both developed and developing countries are obsessively preoccupied with punitive aspects and bespelled by powers of arrest, detention, interrogation, prosecution and conviction. These principles and theories have lost their legitimacy in the advent of incredibly higher rate of crime growth in developed countries and cancerous growth of corruption and in efficiency of justice machineries in the developing countries.

The transplantation of the system of criminal justice from colonizing countries has been a debilitating element in the criminal

justice machinery in the developing countries. Massive corruption and power abuse creeping inside the system have their roots in the colonial legacy. The notions and insights of the system are hardly comprehended by the colonized people who have historically suffered from chronic ignorance and illiteracy. Unfortunately, the institutions of criminal justice systems in most of the developing countries function in a way that is non-conducive and incomprehensible to the indigenous population. In this backdrop, one can legitimately argue that the criminal justice system in most developing countries is a dogmatic institution devised not for the benefit or access of people but for the decoration of the State.

Informal system has been in place in many developing societies, since time immemorial. While excessive traditionalism and static attributes make them vulnerable to abuse such as to institutionalise discrimination, the possibility of them being refined and modernized is certainly not ruled out. Reformed and modernised versions of various models of informal systems could thus compliment the formal counterpart in many ways. Together, they could contribute to remove clogging of the courts by petty cases, reduce the cost of administration of justice, provide easy and affordable access to justice, and most importantly simplify the process of formal justice system. Hence, the use of informal system is not only desirable but inevitable in order to (a) institutionalize the enforcement of human rights standards and (b) prevent the miscarriage of justice.

The informal justice system can complement the formal system in two ways; (a) by functioning side by side as an autonomous independent system, and (b) by being imbibed into the formal system. The community mediation is an autonomous institution which has the potential to reduce burden of the formal system and provide access to justice in affordable cost, whereas mediation within the framework plea bargains, restorative model and revocation of cases are instruments to modify and modernize the formal system. The latter modalities could simplify the process of formal criminal justice and make them significantly yielding. The stake of victims of crimes would be fully ascertained and the normative standards would be changes. It is therefore necessary to generate a movement to promote informal mechanisms for the dispensation of the criminal justice system. To receive justice is a right of people, to refuse buying justice is also a right of the people.

Justice defends dignity and security of human being, which are acquired at a huge cost of development endeavours of human society. Hence, no justice can be perceived in oblivion of development. Informal justice mechanisms are instruments to connect justice with development endeavours.

References

1. Aristotle (1999) *The Nichomachean Ethics*.
2. Murphy JG, Hampton Jean (2010) *The Retributive Idea in Forgiveness and Mercy*. Cambridge University Press pp: 111-141.
3. Dostoevsky F (2003) *Crime and Punishment*. Penguin Classics.
4. Immanuel K, Ladd J (1999) *Metaphysical Elements of Justice*. Hackett Publishing.
5. Sunstien RC (2006) Justice Breyer's Democratic Pragmatism. *Yale law journal* 115: 1719.
6. CeLRRd (2003) *The Baseline Survey of the Criminal Justice System of Nepal*.
7. Zheng GG (2003) What Kind of Party? The Role of Crime Victims in Chinese Criminal Procedure. *Hong Kong Law Journal* 38: 493.
8. Harrendorf S, Heiskanen M, Malby S (2010) *International Statistics on Crime and Justice*. HEUNI Publication series 64: 114-115.
9. Ministry of Home Affairs (2010) *Locked up and Forgotten? Conference Report. Conference on Penal Reform in Developing Countries, Dhaka*.
10. CeLRRd (2010) *On Accessibility to Legal Aid*. CeLRRd, Kathmandu.
11. <http://www.igovernment.in/>
12. <http://indianexpress.com/>
13. Pierce Steven (2006) *Discipline and the Other Body: Humanitarianism, Violence and Colonial Exception*. Duke University Press.
14. Kalhan A (2007) *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India* *Columbia Journal of Asian Law* 20: 93.
15. Amnesty International India (2001) *Words into Actions—Recommendations for the Prevention of Torture*.
16. Lane SV (1978) *The Exclusionary Rule: A Requirement of Constitutional Principle*. *Journal of Criminal Law and Criminology* 69: 141.
17. Narrain S (2003) *Rights and Criminal Justice*. Malimath Committee Report.
18. UNHRC (2011) *Remedies and Rights Revoked*.
19. Sangroula Y (2012) *Professional Relationship between Crime Investigators and Prosecutors in the Human Trafficking Crimes*. *Kathmandu School of Law Review* 1: 12-33.
20. Cuéllar MF (2008) *The Political Economics of Criminal Justice*. *University of Chicago Law Review*.
21. Vicini J (2007) *Number of US Prisoners Has Biggest Rise in Six Years*.
22. UNODC (2012) *United Nations Survey of Crime Trend and Operations of Criminal Justice System*.
23. Noveck SM (2008) *Testing the Theory of Rational Crimes with United States Data 1994-2002*. *Inter University Consortium for Political and Social Research Bulletin*. Institute for Social Research, University of Michigan.
24. Becker Gray (1974) *Crimes and Punishment: An Economic Approach*. In: Becker Gary S, Landes William M (eds.) (1974) *Essays in the Economics of Crime and Punishment*. National Bureau of Economic Research.
25. Ehrlich I (1973) *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*. *Journal of Political Economy* 81: 521-565.
26. Bix Brian H (2005) *Raz, Authority, and Conceptual Analysis*. *American Journal of Jurisprudence*.
27. Galit AS (2009) *Measuring Justice: Internal Conflict over World Bank's Emperical Approach to Human Rights*.
28. Peerenboom R (2005) *Human Rights and Rule of Law: What is the Relationship?*.
29. Arno DR (2011) *The Role of Organized in Informal Justice Systems: Brazilian Case*. *International Journal of Security and Terrorism* 2: 59-80.
30. Hallevy G (2009) *Is ADR Alternative Dispute Resolution Philosophy Relevant to Criminal Justice? Plea Bargains as Mediation Process between the Accused and the Prosecution*. *Original Law Review* 5: 4-5.
31. (1997) *Proposed Constitutional Amendment to Protect Victims of Crimes*.
32. Wardak A (2009) *State and Non-State Justice System in Eastern Afghanistan*.
33. Roscoe P (1964) *The Causes of Popular Dissatisfaction with the Administration of Justice*. *Crime and Delinquency* 10: 355-371.
34. Laura N (1993) *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*. *Ohio St J on Disp Resol* 9: 5-6.
35. Johan R (1974) *The Raute: Notes on a Nomadic Hunting and Gathering Tribe of Nepal*.
36. Wojkowska E (2006) *Doing Justice: How Informal Justice Systems can Contribute? United Nations Development programme and Oslo Governance Centre*.
37. Sutherland J (2002) *Colonialism, Crime and Dispute Resolution. A Critical Analysis of Canada's Aboriginal Justice Strategy*.
38. Cuneen C (1999) *Criminology, Genocide and Forced Removal of Indigenous Children from Their Families*. *The Australian and New Zealand Journal of Criminology* 32: 124-138.

39. Mangalwadi V (1998) Corruption and the Culture of the Cross.
40. Gould W (2012) A brief History of Corruption in India. The India Site.
41. CeLRRd (2011) Community Mediation Report. CeLRRd, Kathmandu.
42. Scharf W (1998) Non-State Justice Systems in Southern Africa: How should Governments Respond?
43. UN (2009) Informal Justice Mechanisms.
44. (2012) Success Story: Revitalizing the relationship distorted since 20 years.
45. Sayantan G (2010) Alternative Criminal Dispute Resolution System: An Evolving Interface in India.
46. Asian Human Rights Commission (2004) Fifty Four Years in Jail without Trial: The Plight Prison Inmates in India.
47. UNICEF (2010) UNICEF-Real- Lives-Paralegal Committees.
48. (2009) Enhancing Opportunity to Justice at Rural Level. Madaripur Legal Aid Association.
49. Husain JB (2011) Court of Conscience-A Bangladesh Model of Mediation Mechanism.
50. Gross SR (1996) The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases. Buff L Rev 44: 469-500.
51. Heinz AM, Kerstetter WA (1979) Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining. Law & Soc'Y Rev 13: 349-366.
52. Brandon LJ (2005) System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining. Ohio St J on Disp Resol 20: 563.
53. Bakker MW (1994) Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System. N C L Rev 72: 1486.
54. Walgrave L (1999) Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?. Harv L Rev 34: 228-249.
55. Marty P (2001) Personalizing Crime Dispute Resolution Magazine.
56. Glaser D (1997) Profitable Penalties: How to Cut Both Crime Rates and Costs.
57. (2003) Penal Reform Strategies in Asia and Pacific: The Experiences of Penal Reform International and Partners on Prison. Penal Reform International.

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