

# TRIAL PROCEDURE: CHALLENGES AND PROSPECT OF ENHANCING THE PROCEDURES IN ASIAN CRIMINAL JUSTICE SYSTEMS

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## I. GENERAL INTRODUCTION

As introduced in the presentation on investigation procedure, the criminal justice system as a coordinated system comprises a series of coherent actions of various agencies. Smooth and meaningful operation of these agencies' respective functions requires an entrenched coordination between them. The criminal justice system, in the adversarial setting in particular, operates in a paradigm of a ladder of multiple agencies, the judiciary at the top and the investigating agency at the bottom. In this ladder paradigm, the oversight by the agencies on top of the action of those in the lower-line is not only necessary but also indispensable in order to ensure utmost degree of fairness of the entire proceedings. The function of trial agency—the trial court—is a bottleneck. The verdict of the trial court comes out as a result of the totality of the functions of all agencies involved. The possibility of a fair and impartial verdict is almost none had the investigating and prosecuting agencies been unable to secure the same. It is thus a serious reason, the trial court in the adversarial setting plays crucial role of overseeing the fairness and impartiality in proceeding of the lower-line agencies, i.e., the investigating and prosecuting agencies. The oversight is generally maintained through (a) process of remand, in which the trial court exercises jurisdiction to place the suspect or accused in judicial custody or on bail; (b) entertaining the petition of the suspect and accused concerning treatment given to him/her by the investigators and prosecutors; and (c) hearing the claims of the suspect or accused concerning discovery of evidence.

The trial court's role in overseeing the investigation process comprises two basic functions: firstly, it closely monitors, by help of the remand hearing, the powers and functions of the investigators concerning process and methods applied in collating evidence; and secondly, it censors the unlawful and improper acts of the investigators in relation to the collection of evidence and treatment of the suspect. The purpose of such censor is to preserve and ensure fairness and impartiality of the criminal proceeding from start to the end. It shows that, as opposed to the traditional belief, the trial court's role in ensuring fair and impartial trial begins quite before the criminal charge is instituted by the prosecutor for trial. The trial court's failure to play this role will necessarily result in violation of suspects' procedural rights and inclusion of evidence obtained improperly and illegally. Section 15, through various sub-sections, of the State Cases Act, 1993, of Nepal, for example, provides for a system of remand, according to which the investigating officer has to approach the court for extension of the remand if he/she not been able to complete the investigation in the given time. The request for remand must be supported by reasonable grounds for the necessity of such extension. The remand motion enables the suspect and accused to bring any fouls being committed by the investigators to the attention of the court. In some countries, such as Hong Kong and Australia, the oversight power of the court is instrumental for rejecting the legality of evidence, which is known as the exclusionary rule. The process is called *voir dire*, in which the questionable evidence is excluded from the process of trial. In South Asia, the criminal justice system suffers from a serious set-back, as the practice of *voir dire* is not entertained, so that the questionable evidence exists in the process un-removed. The remand motion is however effectively used in Nepal and India in order to ensure proper treatment of suspects and accused by the investigators. Section 15(3) of the State Cases Act of Nepal enables the detained person to request the court for the privilege of medical examination by a doctor during the detention.<sup>1</sup> Section 15, including sub-section (3) in particular, of the State Cases Act of Nepal and the Indian Supreme Court verdict on *D.K. Basu v. State of Bengal* together establish an important jurisprudence

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with regard to 'oversight jurisdiction' of the trial court in South Asia, by which the trial courts are empowered to apply strict conditions for continuity of the detention of the suspects, to conduct enquiry about suspect's condition in detention, to censor the recalcitrant investigators for his/her improper or illegal indulgence in obtaining evidence, the extraction of confession in particular, and to prevent the investigators from engaging in abuse of power or corruption. Unfortunately, the trial courts are not seen as adequately prepared or conscious to use this benign jurisdiction effectively.<sup>2</sup> This newly developed jurisprudence emphasizes several important aspects of fairness and impartiality of justice. Some of these aspects can be highlighted as follows:

- a. Exercising this jurisdiction, the trial court may prevent investigators to prolong, without any reason or for an intention of making the detention itself a punishment, the timeframe of crime investigation and detention of suspects for that purpose. The court may require justification for the extension of remand and seek concrete grounds before agreeing to the request of extension. This jurisdiction is evidently important to ensure speedy trial.
- b. By this jurisdiction, the trial courts are able to consciously monitor the progress of investigation, and urge to expedite the same without letting unnecessary excuses prevail and contaminate the fairness and impartiality. An implicit sanction is built against the improper or illegal indulgence of investigators in matters of collecting evidence.
- c. Proper attention to the need of protecting human rights of suspects by detaining officials is ensured. The jurisdiction is able to make prompt and continuous enquiry of the situation of suspects in custody. The jurisdiction is thus important to enforce the right of presumed innocence, and, most importantly, to prevent the miscarriage of justice by condemning an innocent person.

Trial procedure is a fundamental constituent of the fairness and impartiality in criminal justice. However, the brief discourse herein before suggests that 'the fairness and impartiality of justice' begins quite before the actual trial process begins. The fairness and impartiality of trial is contingent upon several elements before the actual trial procedure starts. The oversight jurisdiction of the trial court over investigation process and treatment of suspects during detention is one important element like other elements such as the pre-trial conference, the specialized court, the application of diversion, plea bargaining and the continuous hearing of the case. Looking from this broader perspective, considering the utmost and undeniable necessity of fairness and impartiality, the effectiveness and efficiency of the trial procedure can be approached from different stages. The fair and impartial procedure in all stages, however, is marked by certain indispensable constituents,<sup>3</sup> such as (a) adequate and unrestricted access of the accused to his/her defense by representation of legal counsel, (b) concrete and explicit charges supported by a set of categorical evidence, (c) promptness on the part of the prosecutor to produce witnesses for testimony, (d) pro-active control of trial process by competent judges,<sup>4</sup> and (e) functioning of the court with notion of speedy trial, which enables the trial judge to effectively prevent unfounded and unreasonable adjournments by counsel, tampering with evidence and testimony of witnesses,

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<sup>1</sup>In India, in *D.K. Basu v. State of Bengal* (AIR 1997, SC 610), the Supreme Court of India has laid a charter to follow by the investigator during the detention, which includes the medical examination of the body of the detained person when he/she is in detention. This provision has been effective in many ways to protect the physical integrity of the detainee. The provision also helps in securing the right of detainee against forced, coercive and deceptive interrogation, which is generally used to obtain confession. Section 15(3) of the State Cases Act of Nepal and the Indian Supreme Court judgment in the *D.K. Basu v. State of Bengal* are considered important developments in attempts to reduce reliance of the investigators on confession as proof of conviction.

<sup>2</sup>For detailed discourse See; Mandeep Tiwan, *Human Rights and Policing*, Commonwealth Human Rights Initiative, 2005, New Delhi.

<sup>3</sup>V.S. Mani, et al. (eds.) *Handbook of Human Rights and Criminal Justice*, South Asian Human Rights Documentation Centre, Oxford University Press, 2007 (2<sup>nd</sup> Edition), pp.85-92.

<sup>4</sup>In accusatorial systems, the role of the judge is often defined as that of umpire. It implies that the presiding judge comes to the conclusion based on logical and evidence-based arguments of legal counsel. What it means is that the judge has to rely on evidence not on his/her knowledge or discretion. Nevertheless, as Lord Denning has said, "His (judge's) object above all is to find out the truth, and to do justice according to law; and in daily pursuit of it the judge plays an honorable and necessary role". *Jones v. National Coal Board* (1957).

improper and illegal assertion of rights by any party, and biased and improper influences by anyone, including the media.

## II. SIGNIFICANCE OF TRIAL PROCEDURE: FUNDAMENTALS OF FAIR AND IMPARTIAL TRIAL

The criminal justice system is an important instrument of safety of the society against violence and crimes—a way of holding offenders accountable for their criminal acts and protecting their fundamental rights. However, as argued by Moor, a professor of law, it is important to understand that the second idea could constitute a stand-alone justification for process of criminal justice system. This school of thought holds that the criminal justice system has not got to show that it produces any practical effect, such as reduction of crime; it is enough that it produces justice.<sup>5</sup> The component or attribute of justice is, therefore, the lifeline of the criminal justice system of any society. Minus the attribute, the criminal justice system is nothing but a repressive instrument of the State. The significance of the trial procedure is thus self-evident.<sup>6</sup> Trial is a process of discovering the truth by holding the balance between the contending parties. The parties' role in the trial is uninterrupted and they definitely exercise their freedoms. The misconduct of parties is however not acceptable to the trial process.

Simply speaking, a trial is the process by which a court decides on the innocence or guilt of an accused person. This process may be governed either by the adversarial system or the inquisitorial system. Historically, most Asian countries in the past followed the inquisitorial system, where the modern trends show most developing countries in the world have opted to go for the adversarial system. South Asia unexceptionally followed the adversarial system, like Japan, Hong Kong, Malaysia and many other countries. In the adversarial system, the prosecution, on behalf of the State, accuses the defendant, and must convince an independent judge (or maybe a panel of judges or a jury) of the person's guilt beyond reasonable doubt.<sup>7</sup> The accused is given a fair opportunity to defend himself/herself. In most Western countries, with adversarial systems, the trial is judged by a panel of jurors under procedural guidance of the presiding judge. In most Asian countries, the trial is independently presided over by the judge and the verdict too is passed by him/her. In most countries, the trial is presided over by a single judge. In countries where the single judge presides over the trial, his/her role is active<sup>8</sup>—as he/she takes part in examining the witness, refereeing motions, and deciding on the merit of the case by weighing the facts, evidence presented, and relevant laws. The trial process is also important for the reason of necessity of protecting the public interest and the human rights of the accused person. The court in this sense is considered the protector of the accused because the whole State is involved against him in the trial process. The role of the presiding judge in this context differs from country to country. In Nepal, for instance, the judge has nothing to do except to adjudge the case based on evidence furnished by the prosecutor. The charge is fully controlled by the prosecutor. Hence, the court accepts the charge without any change or suggestions to change in what the prosecutor has submitted to the court.<sup>9</sup> The practice in India is different. The trial court in India has power to frame the charge against the accused, taking into account all of the circumstances of the case.<sup>10</sup> Likewise certain offences cannot be compounded without the consent of the court.<sup>11</sup> The court also has the power to summon and examine any person as a witness, even if that person has not been called by either party as a witness,<sup>12</sup> and to examine the accused at any time to get an explanation from him/her.<sup>13</sup>

All these procedures applicable to trial in the adversarial system have evolved out of a belief that the truth will emerge from the disputed facts through effective and constant challenges. The adversar-

<sup>5</sup>Moore, 1997, p. 50.

<sup>6</sup>*Ibid.*

<sup>7</sup>V.S. Mani, et al. (eds.) *Handbook of human Rights and Criminal Justice*, South Asian Human Rights Documentation Centre, Oxford University Press, 2007 (2<sup>nd</sup> Edition), p. 85.

<sup>8</sup>This was stated by the Supreme Court of India in *Ram Chandra v. State of Haryana* (1981) 3 SCC 191.

<sup>9</sup>CeLRRd, *Comprehensive Analysis and Reforms of the Criminal Justice System of Nepal*, Kathmandu, 1999, pp. 1-10

<sup>10</sup>Section 228, 240 of the Code of Criminal Procedure, 1973.

<sup>11</sup>Section 320, *Ibid.*

<sup>12</sup>Section 311, *Ibid.*

<sup>13</sup>Section 313, *Ibid.*

ial trial is, to look from these perspectives, a contest between 'prosecution and the defense'—specifically speaking a contest between the prosecutor, on behalf of the State, and the defense counsel, on behalf of the defendant. This contest is, however, systematic, well framed and fully guided by pre-established rules of procedure. The contest is fought on the basis of admissible evidence and their construction and interpretation. The court functions as an umpire, though it controls the entire process of the trial. The judge's ruling in the following matter is final:

- Issue of admissibility of evidence presented by any party. The party objecting to the admissibility of the evidence must, however, give reasons.
- Issue of special motion demanded by a party. The trial process often requires need of a special motion to settle some legal issues. This is however a privilege of the trial judge to agree or disagree.
- Admissibility of a witness produced by a party. The judge may accept or reject such witness.
- Adjournments of trial process. Agree or disagree to the adjournment of trial process is the prerogative of the trial judge.

The discourse above amply sheds light on the nature of the trial process. The rules and values discussed above are important not only in view of the procedural formality, but also from the point of view of protecting the 'interests of public and human rights of accused'. Forsaking those rules and values will result in injustice. A trial procedure in this sense is a neatly developed system of fairness and impartiality of justice. A trial procedure cannot allow any such things to happen or behaviors to take place that will overshadow, forsake, or deny the possibility of fairness and impartiality of justice. The following discourse on fundamentals of the trial procedures will further elucidate the importance of fairness and impartiality in the trial process.

#### **A. Presumption of Innocence**

As pointed out herein before, the right to fair trial is a fundamental human right of accused persons. The ultimate objective of the 'criminal justice procedures and values' discussed above is to provide for an opportunity of fair trial, and consequently the concept of fair trial is pervasive throughout the criminal proceedings. The criminal procedure is thus devised in a way that the accused is considered and treated as innocent during the trial. He/she is presumed to be innocent until the prosecution has proven his/her guilt beyond reasonable doubt.<sup>14</sup> The burden of proving the guilt lies on prosecution; the defense must not make attempt to prove his/her innocence. The defense, however, can attempt to disprove the contentions made by the prosecution.<sup>15</sup> The presumption of innocence is the core principle of the fair trial, which the trial process must zealously protect. The principle of innocence underlies that the detention is a last resort. The accused's right to obtain bail must be considered liberally. In this context, the presumption of innocence provides the basis for a rule that the accused should not be detained until he/she is proven guilty by a court of law.<sup>16</sup>

#### **B. Right to Public Trial**

The right to public trial implies that the court should be open to the public during the trial. The importance of public trial lies on possibility of scrutiny of the trial by the general public, which contributes to the assurance of fair trial, the first imperative of the dispensation of justice. The principle of public trial has, however, several exceptions. Hence, a trial can be closed considering the public interest. Similarly, the trial can also be closed if open trial is likely to result in prejudice to the accused. Where the trial is of an offence involving crimes such as rape, the trial can be conducted behind closed doors.<sup>17</sup>

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<sup>14</sup> International Covenant on Civil and Political Rights, 1966 (ICCPR).

<sup>15</sup> This principle was established by the Indian Supreme Court in *Kali Ram v. State of Himachal Pradesh* (1973) 2 SCC 808.

<sup>16</sup> "Bail not jail" was the rule prescribed by the Supreme Court of India in *State of Rajasthan v. Balchanda*, AIR 1977 SC 2447.

<sup>17</sup> V.S. Mani, et al. (eds.) *Handbook of Human Rights and Criminal Justice*, South Asian Human Rights Documentation Centre, Oxford University Press, 2007 (2<sup>nd</sup> Edition), p. 90.

### C. Speedy Trial

The speedy trial is closely related with the principle of ‘innocence’. The speedy trial essentially vests when the accused is placed in detention, and thus waiting for the trial at the cost of his/her liberties. The delay in trial process is a serious problem in many Asian countries—the practice of staggering trial sessions over a long period being the most vicious reason. The speedy trial thus demands continuous hearing until the trial comes to an end. Obviously, the right to a speedy trial is particularly vital to the protection of the accused person’s human rights where they have not been granted bail and are waiting for trial in pre-trial detention. The trial court is thus always expected to consider the following factors when assessing the timeframe of the trial:

- Whether the accused is accountable for the delay; this situation generally occurs due to unnecessary adjournment motions of the defense counsel. In South Asia, the problem of delay in justice is a severe problem. Many detainees are in some cases awaiting trial over a decade.
- Whether the accused is prejudiced by such delay in any manner, recognizing that in some cases the delay may itself amount to prejudice;<sup>18</sup> and
- The nature of the offence with which the accused is charged.<sup>19</sup>

### D. Right of the Accused to Know the Accusation

The ICCPR guarantees each accused person the right to know about the accusation with promptness. The same is found reiterated in the constitutions of democratic countries. Like other rights, this right is equally important for conducting fair trial because unless the accused is aware of and understands the offence of which he/she has been accused, he/she will not have an adequate opportunity to formulate the defense. The right to know of the accusation includes the right to obtain documents from the prosecution.<sup>20</sup>

### E. Right of the Accused to Be Present at Trial

The right to be present at the trial is a fundamental element of fair trial. This right is important for the accused to allow him/her to adequately prepare for defense against the charge. This is because the presence of the accused throughout the trial enables him/her to understand the details of the prosecution’s case against them as it unfolds, and thus can effectively prepare rebuttals of the relevant evidence. This right also implies that evidence in the trial must be taken in the presence of the accused.<sup>21</sup>

### F. Right of the Accused to Cross-Examine Prosecution Witnesses

Cross-examination of prosecution witnesses by the accused is an important element of fair trial. This right of the accused is an absolute right which is generally done by the accused through his/her legal counsel. The trial which proceeds without giving opportunity to the accused to cross-examine the witness cannot be a fair trial.

### G. The Right to Remain Silent

The international human rights as well as the constitutions of democratic nations have unequivocally guaranteed the right to remain silent. Simply speaking, it would not be possible to prove innocence for any person. On the other hand, the responsibility of prosecutors to discharge the onus of proof is absolute. As a matter of fact, no accused person can be called as a witness, unless he/she chooses to do so. If the accused declines to give evidence, this cannot be held against him/her, and should not be commented on by parties to the trial.<sup>22</sup>

<sup>18</sup> *Ibid.*, p. 91.

<sup>19</sup> *Ibid.*

<sup>20</sup> ICCPR.

<sup>21</sup> V.S. Mani, et al. (eds.) *Handbook of Human Rights and Criminal Justice*, South Asian Human Rights Documentation Centre, Oxford University Press, 2007 (2<sup>nd</sup> Edition), p. 92.

<sup>22</sup> This rule has been absolutely protected by nations who have followed the Anglo-American adversarial system. In India, the rule has been provided for by Section 315 of the Code of Criminal Procedure, 1973. A number of Supreme Court judgments have upheld too. In Nepal, though Article 24 of the Interim Constitution of Nepal, 2007, has explicitly guaranteed the right to remain silent, so the practice is different. The prevailing trial procedure of Nepal begins by making the accused a deposition concerning the charge made upon him.

### III. EFFICIENT SPEEDY TRIAL AND THE PROSPECT OF BETTER PROTECTION OF FAIRNESS, IMPARTIALITY AND HUMAN RIGHTS

Faith in formalism often leads to dogmatic adherence to rules, which ultimately results in denial of fair trial. In most developing countries, the attitude that 'the system is designed for benefit or advantage of persons' is overlooked, and, rather with greater emphasis, an attempt to apply procedural rules is mechanically resorted to. In such a situation, a person becomes a victim of the rules and suffers from injustice from rules of justice. Efficient trial is thus secured by (a) ensuring promptness and continuous pursuit of trial proceeding, without breaking it into staggering sessions, (b) conducting pre-trial session among the representative counsels of the parties and agreeing on certain motions and procedures, which otherwise will take a long time in the courts, (c) developing diversion programs, which therefore will protect the court and the parties through a lengthy process, and (d) following fast track procedures, which relieves the court and parties from undergoing a lengthy, tedious process and also ensures justice objectively.

#### A. Prospect of Using Informal Means of Justice in Criminal Proceedings

Historically, the criminal justice system in most parts of the globe is found essentially retributive in character; it has been moved with a sense of putting the criminals into vengeance in the name of punishment as 'harsh as it could be'.<sup>23</sup> The atrocious nature of the criminal justice system 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 to the crime itself'. Until recently, the general perception of the people was that 'the criminals were genetically or mentally born felons'.<sup>24</sup> Hence, they deserved no 'leniency'.<sup>25</sup> The suppression of criminals was thus considered an 'unavoidable responsibility of the State to good citizens and thus the State could not stay back without satisfying an obligation of dealing crimes and criminals with all possible high-hands'.

After renaissance, in the wake of emergences of divergent socio-economic and political philosophies and the advent of science and technologies, the outlook of the society toward crimes and criminals have substantially been changed.<sup>26</sup> The biological theories of crimes have been superseded by sociological

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<sup>23</sup> *Ibid.*

<sup>24</sup> Victor Hugo's Novel '*Les Miserables*' (See, English Translation by Norman Denny, Penguin Books, reissued in 1982) is one of the classic documents in this regard. In a dialogue between Valjean, the main character of the novel, who is a convicted criminal turned virtuous man, and Javert, the police inspector, the latter suggests that 'the leniency towards criminals cannot be considered as 'the criminals are born as 'criminals'. In this novel, the writer has made hard efforts to 'demonstrate that the moral virtues continue even with hardened criminals and their transformation is possible by teaching reintegration within them the 'sense of moral good as a human being'. The State on the other hand has persistently resisted the 'ideas of reforms and transformation of criminals into good human beings'. The story has been repeated in Fyodor Dostoevsky's '*Crime and Punishment*' (See, English Translation, reissued in 2003, Penguin Classic). In both of these superb 'literary works', the crimes have been presented as outcomes of the 'ill-structure of the society and its failure to address the need of cohesion in interests of its members'. They are significantly capable of revealing the dynamics of the crime and criminality in an ill-structured society, which in our era is named as 'troubled society'.

<sup>25</sup> The notion of retribution has been pervasive in the criminal justice system since its very inception in all parts of the globe and in all centuries. Immanuel Kant in his '*Die Metaphysische Anfangsgrunde der Rechtslehre* (Metaphysical Elements of Justice) has argued that 'retribution was the only possible justification for punishing lawbreakers'. In his own words: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime. . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens". See Immanuel Kant, *Metaphysical Elements of Justice* (John Ladd trans., 2<sup>nd</sup> ed. 1999) at 138

<sup>26</sup> Again, '*Les Miserables*' and '*Crime and Punishment*' are two best classical representatives of the changed outlook of the society to crimes. Victor Hugo, for instance, in '*Les Miserable*' talks about the 'labyrinth of social earth', in which, at the lowest bottom of it, the human beings are left to live with all forms of miseries. They are exposed to absence, hatred and immoral conducts which drag them to the world of crimes. His description of France after revolution in this novel is heart-piercing. The similar depiction of the Russian society of the time is found in '*Crime and Punishment*'. The social wretch and its consequence is depicted in such a way that 'the main character of the novel with full of hallucination of utopia moves out to fix the societal wrongs by killing 'oppressor', a lady who pawns things to exploit poor and needy. A law student, the main character of the novel, who has undergone acute depression because of wants and ensuing frustration and darkness of future that causes harms to his vanity, commits a gruesome crime with a belief that

theories, and criminology, a psycho-social analysis of crimes and criminality, has emerged with more than one reason for crimes. In this changed context, the '*lex talionis*' notion of punishment has lost its gravity.<sup>27</sup> By the advent of new research findings, the criminal justice system, along with attitudes of societies towards criminals, has changed significantly. American society played a pioneering role in this change.<sup>28</sup>

In most developing countries, the criminal justice system evolved customarily. The moral aspect of the crime got emphatic attention of the system, which required stringent enforcement of law and strict penalty. Most countries in South Asia, for instance, before colonial regime was established practiced a kind of 'rudimentary inquisitorial system' which invariably required the 'accused' to prove their own innocence.<sup>29</sup> Japan and China also practiced the inquisitorial system in the past.

While most countries in Asia have ratified the 'international human rights bill', the standard of the criminal justice system is still far from meeting the threshold of fair trial. The prevailing criminal justice systems in Asian countries possess some common aspects:<sup>30</sup> (a) the procedures are staggeringly lengthy and time consuming thus protracting trial for a tediously long time,<sup>31</sup> (b) most accused persons

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'killing a person with loathsome qualities and characters, is simply a killing of principle that hinders society to flourish 'justice'. He thinks killing such a person can never be a crime because it is a revolution. In both of these great classical works, the socio-economic and moral wretchedness of the society are portrayed as the factors of heinous crimes and depravity of human individuals'. In the oriental societies, the *Gautam Budhha*, two millennia ago, described similar reasons of the wretchedness of the society.

<sup>27</sup> See, *supra* note 2.

<sup>28</sup> In the 1950s and 60s, the American society came to encounter social issues unprecedentedly. The *status quo* was challenged by the emerging tide of the civil rights movement. And, in this tide of change the 'crime rates also soared up which, in turn, pressed the US Government to ponder upon the rising trend of the breakdown of the 'status quo' and ensuing challenges. The US Government hence came out with added focus on the 'need of studies on causes of crimes followed by policies and laws on crime control'. The 'Warren Court's contribution is significant in this regard. The 'Warrant Court' issued a series of rulings which redefined citizens' rights and substantially altered the powers of police and courts. The 'Warren Court' (it refers to the US Supreme Court between 1953-69, when Earl Warren served as Chief Justice leading a liberal majority and used the judicial power in dramatic fashion) expanded civil rights, liberties, judicial power and federal jurisdiction. The Warren Court invalidated 'the school segregation (*Brown v. Board of Education*), protected freedom of speech (*Brandenburg v. Ohio*), struck down poll taxes (*Harper v. Board of Elections*), required one person one vote system (*Reynolds v. Sims*), and protected accused against police abuse (*Miranda v. Arizona*). These new developments made a sweeping change in the notion of governance and criminal justice system. The decision in *Miranda v. Arizona* ended the 'conventional stereotypical attitude of police and courts regarding 'integrity of suspects or accused'. The criminal justice system thus acquired 'new rails of sliding ahead'. For detail discourse See; Cass Sunstein, '*Breyer's Judicial Pragmatism*', University of Chicago Law School, 2005 at 3-4.

<sup>29</sup> Nepal for instance promulgated the 'ever first code of laws in 1336, named '*Manabnyaysastra*' (Code of Human Justice-refers to a system of law and justice to be carried out by human authorities). The code presented a notion of 'tougher penal system'. Similar to Western societies, it resorted to the model of '*lex taliones*'. Hence, the offender acquired the 'same harm he/she had committed to victim'. Most importantly, the accused had to prove his innocence. See, CeLRRd, *The Baseline Survey of the Criminal Justice System of Nepal*, 2002.

<sup>30</sup> These characters are outcome of several reasons. Painfully, most Asian countries still regard the justice system as an unproductive sector of expenditure. The reform and modernization is not yet a matter priority sector of good governance and development expenditure. The Government expenditure in justice sector is less than 1.5 percent of total GDP (See, CeLRRd '*The Trial Court System in Nepal*', 2002: This study shows that the justice sector in Nepal is fully pauperized and alienated). Further, the justice system is considered to be a strictly formal sector, hence the 'rules are considered sacrosanct'. These outlooks obviously push the sector of justice in the shadow of development endeavors. A UN study on crime trends reveals a 'very sorry state of affairs in the sector of justice in Asia'. The ratio of police personnel (in population of 100,000) in South and South East Asia, including China, is 202 and 299 respectively. The ratio of prosecutors and judges in both regions is 2.5 persons per one hundred thousand populations, whereas this ratio is 10 and 8.6 persons in one hundred thousand in the USA (See, UNODC, '*International Statistics on Crime and Justice*', HEUNI Publication series 64, 2009. The acute shortage of human resources is one of the causes of 'delay in proceedings' and 'obsessed formalism' in the sector of justice.

<sup>31</sup> The delay in criminal proceeding leaves 'accused languishing in prison for waiting date for trial'. On the other hand, the victims are deprived of justice as the trial is a never ending process. Waiting for judgment of the court, the victims of crimes have to spend years with nothing at hand. The reparation or complementation too becomes a matter of illusion. Eventually, the victims of crimes have nothing at hand but to forget the 'painful past' and the accused is simply locked up and forgotten. In Nepal, over 14,000 people are incarcerated in prisons having total capacity to accommodate 11,000 inmates. The dilapidated buildings with no basic facilities make lives of inmates a 'curse'. In India and Bangladesh, over

come from rural or shanty urban-poor youths, generally from those communities that are abjectly marginalized in terms of development opportunities,<sup>32</sup> (c) the overwhelmingly larger proportion of accused or offenders have poor literacy or educational backgrounds,<sup>33</sup> and (d) the poor and marginalized communities suffer most heinously from the prevailing crime patterns.

The relevance of the 'formal system of criminal justice' is, thus, widely suspected, at least in the context of developing countries of South Asia. It suffers from myriad problems. The lacking of trust of people about 'fairness and objectivity of the investigation, prosecution and adjudication' is incredibly deeper. The clever offenders never feel deterred by the system whereas innocents think their lives would be irreparably destroyed once they have fallen in the hands of the system. The prisons of South Asia are overcrowded by those waiting for trial. The prisons lack even the minimum facilities, and even those rare supplies are shared by an implausibly huge number of inmates.<sup>34</sup>

The failure of the prevailing modalities of criminal justice in some developing countries points out the urgent need of rethinking on its prevailing procedures and methods. The need of change shows that 'the viability or capability of the conventional approach' applied by criminal justice systems is neither effective to prevent crimes nor has it been able to redeem the harms sustained by victims of crimes. It is expensive and susceptible to be tainted by abuse of power and corruption. It is neither politically safe nor economically efficient and sustainable. In poor or developing countries, the criminal justice system has been a source of violation of human rights and its reforms or improvement demand 'huge amount of revenues'. In the developed countries, the growth of crimes has been a serious problem for maintaining the safety of the society and social cohesion. In the developing countries, the ill-functioning of the criminal justice system is posing a serious threat of 'impunity and breakdown of the society', whereas in developed countries the 'the criminal justice system has failed to address the sophistication of criminal phenomenology, an ever increasing growth of criminal activities and its dire impacts on economy and social equilibrium.

Building competencies to address the problems of impunity, the increasing threat of crimes to the security of social structure, the wider lacking of the accessibility of poor to the mechanisms of criminal procedures and the redemption of harms of crimes are on the agenda for its reform. The reasons for reforms are several:

- a. The criminal justice system is monopolized by the state as a means of 'redressing violence of individuals against the society'. When crime enters the purview of the system, it becomes the monopolized 'providence and duty' of the judicial authorities.<sup>35</sup> The operation of the criminal justice system is rendered confined to the 'public sector' as an agency of State to impose punishment.

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300,000 and 75,000 accused respectively, are waiting for trial for a long period of time. Many of them are simply forgotten. The pathetic situation appears when 'most of these accused are acquitted. . . . after a long wait for trial'. The ratio of prosecution success in Nepal, India, and Bangladesh is less than 50 percent. It means that 'either these 50 percent acquitted are able to tamper the course of justice or they are victims of human rights violation'. In any case, this is a miscarriage of justice. See, *'Locked up and Forgotten'? The Report of the 'Conference on Penal Reform in Developing Countries', 6-7 October, 2010, Dhaka Organized by GTZ.*

<sup>32</sup> A Survey of Prisoners conducted by CeLRRd 'On Accessibility to Legal Aid' in 2010 reveals that 'over 90 percent of prisoners [are] poor. The literacy rate is negligible. Most prisoners have committed crimes under pressure of desperate want. A considerable number of such prisoners were found involved in 'crime of human trafficking', logging and trafficking of drugs. Those who were found guilty of committing crimes of trafficking girls and women for prostitution had victimized 'another poor person' who too was poor and deprived. The poverty in developing society is thus 'criminalized'.

<sup>33</sup> *Ibid.*

<sup>34</sup> India in South Asia has the largest number of prison population. About 300,000 people are incarcerated in jails of India, and significantly large number of these inmates await trial. As reported by the Ministry of Law and Justice in 2010, over 92,000 prisoners waiting for trial are set free by end of April 2010. It was said that another 10,000 inmates were supposed to be freed by the end of July, 2010. The scenario is self-evident of the state of criminal justice system. See, I Government: Enabling the Governance (Online information Service) at <<http://www.igovernment.in>>.

<sup>35</sup> See, Zeng Ge, *'Which Kind of Party? Role of Role of Victim In Chinese Criminal Procedure'*; 38 Hong Kong Journal 493, Sweet and Maxwell Asia, at 1.



- b. Crime against a victim is considered an offence against society and eventually the State.<sup>36</sup> As a matter of fact, the victim's role in the system is restricted to assist as a classic type of witness to the prosecution upon request of the criminal justice agencies, such as courts and tribunals.
- c. The institutions of criminal justice have become expensive enterprises. Neither victim nor accused, having no adequate resources, can afford hiring lawyers for a 'sophisticated intellectual game of win and loss'.<sup>37</sup> The criminal trial in adversarial system is a 'competitive game between public prosecutor and defense lawyer' resulting in 'victory of one having capability convincing the judge in his/her arguments'.<sup>38</sup>
- d. The criminal justice systems of most developing countries suffer from a crisis of confidence of the people. The lack of credibility in police, prosecutors and judges as well as difficulties to reach police stations, lack of knowledge concerning the niceties of the justice system, lack of resources to pay for lawyers, lack of state attorneys to guarantee deprived people's rights and lengthy proceedings are some entrenched problems tainting the system. These problems appear to disregard that 'access to justice and due process of reparation of harms meted out of crimes' is indispensably basic human rights against the government.<sup>39</sup>
- e. Criminal laws assert to protect or preserve 'ethico-moral' values of humanity. The protection and preservation of some 'values of humanity' such as 'inviolability of life and dignity' are always cardinal in criminal justice systems. 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 made by the perpetrators and the participation of victims in the proceeding to the level of satisfaction besides adequate monetary compensation to the harms. The current structure of the criminal justice system, in developing countries in particular, does not guarantee such reparation against harms of crime. The community's participation in the criminal proceeding is therefore an important component of the reform of the system.
- f. In most developing traditional societies, the formal structure of the administration of justice has never had full control over the system of dispute or conflict resolution. In such societies, the system of local governance, security and means of dispute resolution are provided through non-state institutions.
- g. Overcrowding of State judicial institutions is a serious problem in most developing countries. The service provided by state judicial institutions is driven by an excess of formalism, which makes the system not only accessible but also lengthy and cumbersome to follow.

<sup>36</sup> See, Alline Pedra Jorge Birol and Arno Dal Ri Junior, *'The Role of Organized in Informal Justice Systems: Brazilian Case'*; International Journal of Security and Terrorism, Vol 2(1), 2011 at 59-80.

<sup>37</sup> See, Alline Pedra Jorge Birol and Arno Dal Ri Junior, *'The Role of Organized in Informal Justice Systems: Brazilian Case'*; International Journal of Security and Terrorism, Vol 2(1), 2011 at 59-80.

<sup>38</sup> See, Gabriel Hallevy, *'Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? Plea Bargains as Mediation Process between the Accused and the Prosecution'*; Original Law Review, Vol. 5 No. 1, 2009 at 4-5. Also available online at <<http://ssrn.com/abstract=1315984>>.

<sup>39</sup> According to Hofeld's theory of rights, claim-rights require duty bearers for enforcement. To consider victim's rights to justice—adequate reparation to the harms of crimes—in the light of claim-rights theory, the victim's position may stand in awkward position, because in the criminal justice system, as it is conventionally established, the prosecutor is the holder of the claim-right against the defendant. In such a situation, how can the victim, who is actually suffering from the violation of rights, get the restitution of the violated rights? While it seems somehow tricky to materialize the system can find out space for restitution or reparation of the violated rights of victims. Here, we need to identify the duty bearers against whom victims can make claims. As rightly pointed out by Prof. Laurence H. Tribe, the victims owe claims against the government. In his statement to Senate Judicial Committee, Laurence opined that victims' rights are indispensably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate. These rights do not entail claims against private citizens; rather it is the government authorities themselves, those who pursue (or release) the accused or convicted criminal with insufficient attention to the concerns of the victim, who are sometimes guilty of kinds of violation that properly drawn amendment would prohibit". See, *Statement of Laurence H. Tribe of Harvard University Law School in a "Proposed Constitutional Amendment to Protect Victims of Crimes: Hearings before the Senate Judiciary Committee, 105<sup>th</sup> Congress 1<sup>st</sup> Session, 1997.*

The problems discussed above call for 'fresh considerations' on norms, theories, principles and mechanisms of the criminal justice system. It is plain from the discussion above that the rate of crime is increasing both in developing and developed countries severely affecting the social structure as well as the political and economic institutions. The crimes have become costly in terms of governmental expenditure as well as harms sustained by victims. The remedy, however, is seen neither effective nor efficient. The confidence of people in the system has significantly eroded. Thus, modern criminal justice systems have to be able to seriously 'revisit' their theories, principles and mechanisms.

Is informal justice procedure relevant to criminal proceeding? The answer is positive, though the reluctance on the part of State institutions and a considerably larger part of the civil society is massive. Nonetheless, the scope of application of informal procedures or mechanisms in criminal justice is seen as not impossible, if not easier to invoke. The following norms or principles of criminal justice systems, the adversarial system in particular, possess a great scope for application of alternative dispute resolution philosophy in settlement of conflicts of a criminal nature:

- a. In the adversarial (Anglo-American model in specific) model of criminal justice, the trial of cases takes the form of a legal confrontation between parties involved in the case.<sup>40</sup> The court in this system is simply obliged to decide between their respective arguments. The court does not assume role of 'discovering evidences'. As a matter of fact, the parties in hearing have a pivotal role during the proceedings, while the court's role is relatively passive, and limited essentially to determining the conflict between them.<sup>41</sup> 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. The Government in civil cases is happily engaged in negotiation with the private party for out of court settlement. The practice of the Government or the State being involved in negotiation with a private party is not a new phenomenon in the system of adversarial justice. If it is so, why cannot prosecution engage in negotiation with the accused?
- b. Within the framework of this fundamental principle that 'parties of the case are crucial players in hearing at the court', the engagement of the informal mechanisms to settle the case seems always possible because the parties, under this principle, are allowed to reach 'some decisions' independent of court on some issues of claims and possible liabilities.<sup>42</sup> In such cases, the court takes the obligation to execute the decision reached by the parties. The legal sanction of such agreement is fully established by law. Within this same principle's framework, the law can allow the parties of criminal trial to reach 'some agreements' independent of the court on 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 reparation of the harms sustained by victims of crimes.
- c. In civil jurisdictions, the dispute is litigated between 'plaintiff and defendant or respondent', and the role of the court is to 'determine the truth or legitimacy of their arguments'. In criminal trials, the prosecution and the accused are the parties to the conflict. The court, on the other hand, hears the 'pleas of the prosecution' and determines the 'strengths of evidence supplied by him/her beyond reasonable doubt' while issuing the verdict. In this process, there are some important principles or rules to be followed. They are: (a) the trial should take place in the presence of both parties as a mandatory rule, (b) each party must pass information to the other regarding its motions, (c) the accuser must prove the allegation with the strength of evidence, and (d) each

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<sup>40</sup> Roscoe Pound delivered a speech to the American Bar Association on *The Causes of Popular Dissatisfaction with the Administration of Justice* in 1906 on judicial administration. See generally Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in HANDBOOK FOR JUDGES (Kathleen M. Sampson ed., 2004). He claimed that the Anglo-American legal system was plagued with an "individualist spirit," a focus on litigation as a "game".

<sup>41</sup> Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 5-6 (1993).

<sup>42</sup> See, Gabriel Hallevy, 'Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? Plea Bargains as Mediation Process between the Accused and the Prosecution'; Original Law Review, Vol. 5 No. 1, 2009 at 5. Also available online at <<http://ssrn.com/abstract=1315984>>.

party has to justify its argument or plea on the strength of evidence. The rules laid down by these principles plainly show that none of the parties singularly have any significance within the framework of the adversarial model. These principles or rules imply that ‘the parties in the criminal proceedings’ are treated on equal footing; 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.<sup>43</sup>

- d. In civil suits where the State may sue or be sued and the State cannot be treated differently than the private party. This is also true in criminal proceedings. The State in criminal proceedings, just as in civil suits, is a party to the case and as such contests the case against the private party. Both in civil and criminal matters, the hearing of the cases does not grant a legal ascendancy to one or other party. The equality of opportunity to hearing is thus based on the notion of ‘equal footing’. In civil matters the ‘the principle of equal footing in hearing’ grants privileges to the parties to engage in out of court negotiations for settlement of all or some issues within the framework of law. The out of court settlement mechanisms include arbitration, mediation, negotiation and conciliation. The use of these 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.<sup>44</sup> The similar practice can be developed in criminal jurisdiction by 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 a broader sense the idea of alternative dispute resolution. The application of the concept of plea bargaining is therefore a good example to show that an informal mechanism is possible to apply in the criminal jurisdiction.<sup>45</sup>

The discussion above plainly shows that the ‘incorporation of informal mechanisms of dispute resolution’ in criminal justice is widely possible. Principles of ‘formal justice’ systems both in civil and criminal aspects are founded on the same notions, i.e. the State in a judicial hearing is a party to the litigation and as such enjoys no more privileges than the private party. Since there is a widely established practice of ‘the State, as a party to the dispute, being engaged in negotiation with private party in a civil suit, the same can be comfortably replicated in criminal matters. In this light, it can be safely argued that the ‘credibility of, and confidence on’, criminal justice systems can significantly be enhanced by ensuring application of alternative dispute resolution mechanisms within its framework. To that object, the following arguments of justification can be extended:

- a. The informal justice system is a non-state dispute resolution mechanism falling outside the ambit of the formal system. In the backdrop of massive failure of criminal justice systems across the world, irrespective of the levels or degrees of 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 research 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 have no access to a formal system;<sup>46</sup> (b) the non-state or informal system is found to be an

<sup>43</sup> See generally; Gabriel Hallevy, ‘*Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? Plea Bargains as Mediation Process between the Accused and the Prosecution*’; *Original Law Review*, Vol. 5 No. 1, 2009. Also available online at <<http://ssrn.com/abstract=1315984>>.

<sup>44</sup> Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, at 6 (1993).

<sup>45</sup> See, Gabriel Hallevy, ‘*Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? Plea Bargains as Mediation Process between the Accused and the Prosecution*’; *Original Law Review*, Vol. 5 No. 1, 2009 at 6. Also available online at <<http://ssrn.com/abstract=1315984>>.

<sup>46</sup> For instance, *Raute* and many minority indigenous communities in Nepal find it embarrassing to approach the court. In Mustang, the community of Thakali people has court of their own, which is presided by a group of elderly. The trial takes place in public. The parties can present witnesses for testimony. The judgment is awarded after an elaborate hearing. The judgment is fully respected by the parties as there is a ‘strong social pressure behind the judgment’. The Government institutions often feel embarrassed to take cognizance of cases from such communities because the enforcement of judgment without approval of the elder leaders of the community is virtually impossible. Hence, the government institutions tacitly allow the community to settle disputes, except those which involve heinous crimes like murder, robbery

alternative in places or communities where the presence of formal institutions of the State is lacking, or state has failed to fulfill its obligations;<sup>47</sup> (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;<sup>48</sup> and (e) non-state or informal systems are simple, comprehensible, and speedy.<sup>49</sup>

- b. The formal system of criminal justice regards crime as a matter of State concern, and thus asserts exclusive power of prosecution. Within this framework, crime against the victim is considered an offence against society or the State. As a matter of fact, victims of crimes have very restricted roles in assisting the prosecution. Victims of crime are thus obliviously ignored. Victims have no 'say in prosecution at all'. This typical principle of formal criminal justice makes victims apathetic to the criminal procedure.
- c. The concept of non-state or informal systems of justice is an outcome of social demand for unrestricted and easy access to justice, as well as a result of the movement for alternative forms of justice and conflict resolution which promotes more restorative solutions.<sup>50</sup> 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.<sup>51</sup>
- d. The modern of trend of dispute resolution is that the 'the conventional formal systems are supplanted by the informal system. The formal system divides the society by 'making one to win and other to lose'. The informal system of justice believes on 'conciliation' and thus gives opportunity to the parties themselves.

Some risks are obvious in the non-state or informal justice system. These risks are mainly associated with abuse of power by 'people involved in non-state or informal mechanisms'. Undeniably, the non-state or informal criminal justice system does reduce the cost and provides readily available access to justice and it is comparatively friendly to poor and marginalized groups of population.

## **B. Fostering Culture of Pre-trial Conference**

Most Anglo-American countries have a practice of using pre-trial conference for sorting out issues of 'time-frame' to be taken up at trial, the number of witnesses to be called, the number of lawyers to be engaged in examination, cross-examination, and arguments and rebuttals. Pre-trial conference is especially useful for 'understanding of the gravity of the case' and the pleas of the parties. The culture of organizing pre-trial conference is significantly low in Asian countries, South Asia in particular. The same is the situation in most African countries. Without pre-trial conferences, the following problems are obvious in Asian trials:

- a. Uncertainty of trial is a serious problem in lack of understanding of the proceeding or motion required by the case. The appointed timeframe is thus forsaken, because the prospect of trial

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etc. For some years, some institutions have taken initiatives to provide skill training of mediation to leaders of the community. In the community of *Raute*, which is still a nomadic community, no interference of any type from the Government is acceptable. The community has its own chief who has jurisdiction to try all civil and criminal cases. Not a single case from this community has reached to the formal system as of now. The rate of crime, due to stronger social sanction and societal security system, is negligible in these communities. Occasional incidents of violence are also effectively dealt with by the 'societal mechanism'. See generally; Johan Reinhard, *The Raute: Notes on a Nomadic Hunting and Gathering Tribe of Nepal*, 1974.

Online, <[www.thlib.org/static/reprints/kailash/kailash\\_02\\_04\\_01.pdf](http://www.thlib.org/static/reprints/kailash/kailash_02_04_01.pdf)>. Visited on 20 October 2012.

<sup>47</sup> See, Alline Pedra Jorge Birol and Arno Dal Ri Junior, *The Role of Organized Crime in Informal Justice Systems: Brazilian Case*: International Journal of Security and Terrorism, Vol. 2 (1). 2011 ss 59-80.

<sup>48</sup> See, *Linkages between State and Non-state justice system in eastern Afghanistan*, (A Survey Report), The Liaison Office (TLO), October 2012. Online, at <[www.usip.org/files/ROL/state-and-non-state-justice-system](http://www.usip.org/files/ROL/state-and-non-state-justice-system)>. Visited on 18 October 2012.

<sup>49</sup> *Ibid.*

<sup>50</sup> See, Alline Pedra Jorge Birol and Arno Dal Ri Junior, *The Role of Organized Crime in Informal Justice Systems: Brazilian Case*: International Journal of Security and Terrorism, Vol. 2 (1). 2011 ss 59-80.

<sup>51</sup> See, Alline Pedra Jorge Birol and Arno Dal Ri Junior, *The Role of Organized Crime in Informal Justice Systems: Brazilian Case*: International Journal of Security and Terrorism, Vol. 2 (1). 2011 ss 59-80.

without completing certain formalities becomes unlikely. In such a situation, the trial is continued to another time and the time of judge is wasted. This uncertainty also hinders the adequate preparation of the case, as lawyers may not be seriously engaged in preparation due to uncertainty. The most serious impact is on the right of accused to have a speedy trial.

- b. Possibility of manipulating witnesses and tampering with evidence is a serious problem too. Without pre-trial session, the contest between the parties is unorganized; hence, the chance of manipulation of witnesses and evidence is greater. The pre-trial conference is important to maintain courtroom discipline, which in turn is important for maintaining the dignity of the parties, the court, as well as the ongoing proceeding.
- c. Without pre-trial conference, the prospect of developing strategy for defending the claims or pleas becomes an elusive act. Both parties prepare their part in speculation of the other's strategy. The pre-trial conference properly communicates the strategy of each other, thus helping lawyers to concentrate on their defense rather than indulging on designing pretensions, manipulations and skipping attitudes.

The prospect of using pre-trial conference is in abundance in Asian culture as it emphasizes dialogue or negotiation as a primary model of dispute settlement. Hence, promoting pre-trial conference between the parties, the trial process can be reduced in terms of time frame and also issues. Most issues which have no substantial importance for debate can be removed, thus saving the time of the court. The pre-trial conference is also an important platform for a 'developing diversion approach'. Especially, the pre-trial motion can be the most suitable platform for juvenile justice process for agreeing about a possible diversion, thus protecting the interests of the child in the best possible way.

### **C. Fast-Track Trial Process**

The fast-track trial process is an emerging alternative form of trial process. The fast-track trial is found most useful in cases where the urgency of hearing evidence and witnesses is urgent for several reasons such as security of witness or availability of witnesses. Offences such as rape, trafficking of human beings and drugs, counterfeiting of currency, violation of immigration rules and so on cannot wait for long to be tried through a tedious process. The procedures in fast track cases are simple, and, most importantly, there is an agreement between both parties to expedite the process. The fast-track trial is extremely important and meaningful for protecting the privacy of victims as well as suspects, rehabilitating the victims, and correcting the offenders. Nepal introduced the system a few years before, though the practice has not yet gained prominence mainly because of lack of knowledge of the parties.

## **IV. CONCLUSION**

Fair trial is a 'substance as well as process' of justice. The maxim that 'delayed justice [is] denied justice' warrants, among many other things, guarantees to parties the 'right of speedy trial'. The trial process is vital because 'it pronounces the outcome of the entire criminal proceeding'. The trial process in this sense is a product of fair investigation and prosecution. It scrutinizes the merit, properties and legitimacy of evidence. However, a protracted trial ends up with injustice, at least with having no impact of justice.

Most Asian developing countries have nurtured a culture of 'dogmatism', i.e., an unexceptional loyalty to the prevailing system and persistent denial to change. This attitude has been a serious challenge to the reform initiatives in the criminal justice system. 'Staggering trial sessions' is a main cause of protracted trial in Asian countries. Hence, the continuous process of trial is an urgent need for reformation of the criminal justice system.

Participation of victims in plea bargaining sessions in prosecution offices can be developed as a desired informal approach in expediting the trial process. Participation of victims in criminal proceedings through plea bargaining can ensure adequate compensation to the victims, and as such it will ease the process of trial. Once the negotiation is worked out between the accused and victim, there remains hardly anything to contest during trial.

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Pre-trial conferences and fast-track trials can also be effectively used to reduce the timeframe and complexity of trial.