

# Miscarriage of Justice: An Assessment from Human Rights Perspective

Baliram Kumar Chauhan<sup>1</sup>

Email: chauhanbaliramkumar55@gmail.com

## To cite this article:

Chauhan, B. K. (2025).  
Miscarriage of Justice: An  
Assessment from Human  
Rights Perspective.  
*Sambahak: Human Rights  
Journal*, 25(1), 18–47.  
<https://doi.org/10.3126/sambahak.v25i1.83916>

**Keywords:** Miscarriage,  
Justice, Pre-trial, Trial, Post-  
trial, Human Rights, Violation

## Abstract

*Miscarriage of justice is an outcome in a process of justice that is unjust. Justice may be miscarried if there is any serious violation of human rights in any stages of criminal proceedings. Factual innocent and legal innocent people fall into the trap of Miscarriage of justice. The paper aims to explore the situation of miscarriage of justice in pretrial, trial and post-trial stages of criminal proceedings in Nepal. The paper presents the issues related to the miscarriage of justice and sketches how human rights of the parties of the cases are being violated in Nepal. Similarly, this paper has incorporated the existing legal framework to prevent and protect people from miscarriage of justice in Nepal. Ultimately, this paper concludes by stating that the State must enforce the existing legal framework effectively to protect the rights of the people subjected to miscarriage of justice and make other necessary laws for the prevention of miscarriage of justice including effective remedies.*

## Background

Justice is the ultimate need of every human being. Every person should have equal access to justice when their dignity or rights are infringed. Human dignity and freedom are always at risk if a justice system is not able to ensure equal access to justice with proper procedure and standards, principles and decorum of Justice. The term justice suggests the quality of being just or right or reasonable (Lamichhane, 2019). The stability and peace of society, along with the state of good governance, are rooted in the successful delivery of justice and the positive human

---

<sup>1</sup> BALLB fifth year student at Kathmandu School of Law

experiences it fosters. Such sentiments among citizens are shaped by a clean, impartial, transparent, and swift judicial system. However, in Nepal, the 'justice system is in cold storage' if not on a ventilator. In other words, justice is currently in a comatose state (Sangroula, 2018) that has led to the miscarriage of justice. The meaning of the term 'miscarriage of justice' is widely debated, with definitions varying significantly based on individual's viewpoints, interpretations, and the specific situations in which the term is applied and being used. "The word 'miscarriage' may have derived from Plato, (whose mother was said to be a midwife) and certainly, one of the most comprehensive definitions, that of Walker suggests that the term refers to a failure to reach the end goal of 'justice' (Poyser and Grieve, 2018). Cambridge online Dictionary defines Miscarriage of Justice as, "a situation in which someone is punished by the law courts for a crime that they have not committed". Similarly, Merriam -Webster Dictionary has defined miscarriage of justice as, "an outcome in a judicial proceeding that is unjust". *Especially*, an error made in a court of law that results in an innocent person being punished or a guilty person being free". The definition of a miscarriage of justice would be a significant failure within the justice system that involves one or more of the following: (a) an unjust accusation or arrest by law enforcement, (b) improper handling by the courts, typically resulting in a wrongful conviction, and (c) an unfair punishment or severe mistreatment while in prison. (Anderson, 1993).

"A miscarriage of justice can be broadly defined as the conviction of an individual in circumstances where the conviction ought not to have occurred" (Birdling, 2008). "Human Rights" means rights related to life, liberty, equality and dignity of a person provided by the Constitution and other prevailing laws and this term also includes the rights contained in the international treaties regarding human rights to which Nepal is a party (The National Human Rights Commission Act, 2012, Section 2f). The Constitution of Nepal (2015, Art 17) states that no person shall be deprived of his or her liberty except by law. The "liberty" here means a freedom against all forms of physical restraints and coercion. This constitutional guarantee ensures a safe guard against illegal encroachment of any person and encroachment of any person in the personal liberty of individual (Sangroula, 2018). According to Dicey, 'Personal liberty' means a personal right not to be subject to imprisonment, arrest or other physical coercion in any manner that does not admit legal justification"(De, 2000). Blackstone's formulation states that "It is better that ten guilty persons escape than that one innocent suffers" (Teka & Devendorf, 2023) which is also an important concept of a justice system. Miscarriage of justice includes many errors of justice such as error in law, procedures and errors in fact (Haule, 2024). Many states of the world like UK, Germany, Italy, Spain, Canada has made legal provision for compensating the victims of miscarriage of justice. A criminal Justice system

comprises of three stages; pre- trial, trial and post- trial stages. Under the criminal justice system, course of justice comprises three stages – police intervention, court process and the penalty measures (Acharya et al., 2021). In context of Nepal there is numerous instances of Miscarriage of Justice in every stage of Criminal Justice System. The persons victimized as the result of miscarriage of justice are the victim of the biggest failures of the state and justice system to ensure proper justice and protect individual liberty and human rights (Chauhan, 2025).” Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (United Nations General Assembly, 1985), in present welfare state, miscarriage of justice has become one of the most important challenge for ensuring a proper justice system.

### **Research methodology**

In this paper Doctrinal research methodology such as systematic analysis of legal rules, principles, doctrines, case laws, journals, Books, newspaper opinions has been used. Similarly, Non- Doctrinal Research methodology such as real-world impact and operation of laws and <sup>2</sup>identification of gaps between law and practice has been used. Primary and Secondary both sources has been used in this paper.

### **Objective**

The paper aims to explore the situation of miscarriage of justice in pre- trial, trial and post-trial stages of criminal proceedings in state party criminal cases in Nepalese justice system. Further, it examines various issues contributing to miscarriage of justice and highlights how the human rights of the parties involved in the justice process are being violated. Furthermore, the paper analyzes the existing legal framework intended to prevent such injustices and identifies its limitations. Finally, it emphasizes the need for making proper laws and developing appropriate legal reforms to address these challenges more effectively.

### **Limitation**

This paper has focused on miscarriage of Justice in general Criminal cases only. Similarly, this paper has not mentioned the miscarriage of justice in case of Juvenile delinquency. This paper

has discussed about the miscarriage of justice regarding the violation of procedure mentioned in National criminal procedure code, 2074 only.

### **Defining innocence**

Innocence persons are those who has been factually or legally immune from the criminal charge filed against him. There are basically two types of Persons who can fall into trap of miscarriage of Justice. First type of innocence - factual innocence known as actual innocence means that the defendant did not actually commit the alleged offence (Case, 2008). Here, the accused has not participated at any aspect of commission of the crime for which he is prosecuted or convicted. Similarly, factual innocence also includes the situation when an individual has committed more serious crime than they have committed (Birdling, 2008). Factual innocence may fall into trap when there is wrong identification of suspect or offender, wrong and malicious investigation, malicious prosecution. This is also known as wrong man claim. Factual innocence could be claimed when there is substantial evidence against a defendant, but reasonable doubt is created by evidence, new or old, not presented to the jury. In such a case, due process of law would arguably be violated by maintaining a conviction on less than proof beyond a reasonable doubt (Wisotsky, 1997).

The second type of innocence, Legal innocence, are those persons where the prosecution fails to introduce sufficient proof at trial to demonstrate the defendant's guilt beyond a reasonable doubt (Case, 2008). Legal innocence occurs when there is insufficient evidence to convict, procedural errors, incomplete investigation, led to acquittal, failure of prosecution to prove guilt beyond a reasonable doubt. Further, legal innocence could be claimed if defendant does not deny committing the act in question, but claims an affirmative defense like insanity (Wisotsky, 1997). There is an ongoing debate among the scholars that only factual innocence must be granted the compensation.

### **International Legal provisions**

#### **International Covenant on Civil and Political Rights (ICCPR), 1966**

This covenant has incorporated the following procedural principles and fairness regarding the criminal cases (International Covenant on Civil and Political Rights, 1966, Art. 9(1)-9(5)):

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law as stated in. (International Covenant on Civil and Political Rights, 1966, Article 9(1)).

- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him (International Covenant on Civil and Political Rights, 1966, Article 9(2)).
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement (International Covenant on Civil and Political Rights, 1966, Article 9(3)).
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (International Covenant on Civil and Political Rights, 1966, Article 9(4)).
- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (International Covenant on Civil and Political Rights, 1966, Article 9(5)).
- In the determination of any criminal charge against him, everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (International Covenant on Civil and Political Rights, 1966, Article 14(3a))
- To be tried without undue delay (International Covenant on Civil and Political Rights, 1966, Article 14(3c))
- To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (International Covenant on Civil and Political Rights, 1966, Article 14(3d));
- To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (International Covenant on Civil and Political Rights, 1966, Article 14(3e));

- To have the free assistance of an interpreter if he cannot understand or speak the language used in court (International Covenant on Civil and Political Rights, 1966, Article 14(3f));
- Not to be compelled to testify against himself or to confess guilt (International Covenant on Civil and Political Rights, 1966, Article 14(3f)).
- Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law (International Covenant on Civil and Political Rights, 1966, Article 14(6)).
- When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him (International Covenant on Civil and Political Rights, 1966, Article 14(5)).

## **Nepalese Context**

### **Criminal Proceedings**

After the act and commission of the crime, the offender is punished by the court through criminal proceedings. The core objective of the criminal proceedings is to prevent the State from exercising arbitrary discretions encroaching to the liberty of individual (Sangroula, 2018, p.206). Police, investigation officers, Lawyers, government attorney, Judges, jailor are the major actors of criminal justice system in Nepal. Further, institutional structure of Nepal's criminal justice system consists of police organization, scene of crime officer, forensic laboratory, officer of the attorney general, district court, high court, Supreme Court and Prison department. In Nepalese criminal proceedings system, to provide for prompt disposal of small cases by following summary procedures, Summary Procedure Act of 2028 can be followed in order to adjudicate. However, Special Court Act 2059 has been made to make timely provision with regard to the constitution, power and procedure of Special Court in order to accomplish the trial and decision of the special types of cases in an expeditious, prompt and effective manner. Except these other cases are investigated, prosecuted and adjudicated by following the procedure set by National Criminal Procedural Code, 2074. Whole criminal proceedings can be divided into three stages; Pre- trial stage, Trial stage and post- Trial stage.

### **Pre- Trial Stage**

Under this stage first step is to filing the First Information Report (FIR), A person who knows that any offence set forth in Schedule-1 has been committed or is being committed or is likely to be committed shall, as soon as possible, make a first information report in writing or give information on such offence, verbally or through electronic means, along with whatever proof or evidence which is in his or her possession or which he or she has seen or known, to the nearby police office in the form referred to in Schedule-5 (The National Criminal Procedure Code 2017, Section 4(1)). The police or investigating authority may arrest any person related to an offence if such person is found or caught in the course of committing the offence (The National Criminal Procedure Code, 2017., Section 9(1)). Any person who is arrested shall be produced before the adjudicating authority within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to such authority; and any such person shall not be detained in custody except on the order of such authority (The National Criminal Procedure Code 2017, Section 20(3)) . The investigating authority or police employee designated to investigate into any of the offences set forth in Schedule-1 or Schedule-2 shall conduct preliminary investigation immediately after a first information report or information as to the commission of such offence has been registered pursuant to Section 4 within 3 days (The National Criminal Procedure Code 2017, Section 10).

Further, the investigating authority may take deposition from the accused in relation to any offence under Schedule-1 or Schedule-2 in the presence of the government attorney (The National Criminal Procedure Code 2017, Section 16(1)). The investigating authority shall interrogate, as necessary, any person, who is believed, based on a reasonable ground, to have knowledge of any important matter in connection with any offence under Schedule-1 or Schedule-2 (The National Criminal Procedure Code 2017, Section 16(3)). The concerned person shall assist in investigation by giving answer, to the best of his or her knowledge, to any question asked by the investigating authority in connection with any offence being investigated under this Chapter. Provided that no person shall be compelled to give any answer which might be of self-incriminatory nature (The National Criminal Procedure Code, 2017, Section 17).

If, in conducting investigation into any offence under Schedule-1 or Schedule-2, the investigating authority has a reasonable ground to suspect that any document, exhibit, evidence, accused or other person connected with such offence is in any place, the authority may search such person or place and seize such document, exhibit or evidence (The National Criminal Procedure Code, 2017, Section 18 (1)). If information is received that a person is dead due to culpable homicide or accident or suicide or in an unusual situation or in any other suspicious

circumstance, the investigating authority shall immediately go to the place where the corpse is located and examine the corpse (The National Criminal Procedure Code 2017, Section 20 (1)).

If the investigating authority thinks, in view of the nature of any offence, that evidence related to that offence can be obtained if the examination of the blood, semen, hair or any other part of body of the concerned person or arms, thing or object, DNA or any other matter is conducted in order to find out the offender, he or she may cause the examination of such blood, semen, hair or other part of body, arms, thing, object, DNA or any other physical evidence to be conducted by a government medical doctor or recognized laboratory (The National Criminal Procedure Code 2017, Section 21 (1)).

If it is necessary to identify any person in connection with any case, a police employee whose rank is at least assistant sub-inspector of police shall cause such identification to be made (The National Criminal Procedure Code 2017, Section 24 (1)). After completing an investigation into offences under Schedule-1 or Schedule-2, the investigating authority must prepare a report in the prescribed format, attach relevant documents and evidence, state whether there is sufficient evidence to indict the suspects or reasons for not doing so, and submit the report to the concerned government attorney's office (The National Criminal Procedure Code 2017, Section 31). If, on studying a case-file in the course of making decision to or not to institute a case pursuant to sub-section (3) of Section 31, and in view of the proof and evidence collected, the concerned government attorney considers that there is adequate evidence for instituting the case, the concerned government attorney shall, in relation to a case under Schedule-1 or 2, prepare a chargesheet, in the form referred to in Schedule-20 and shall submit the charge sheet to the concerned court within the time limit (The National Criminal Procedure Code 2017, Section 32).

### **Miscarriage of justice**

Under the pre- trial stages miscarriage of justice has been happened by following actions and in the process and procedure:

#### **Arbitrary Arrest and Detention**

The Constitution of Nepal (2015, Art 20(1)) states that no person shall be detained in custody without informing him or her of the ground for his or her arrest. In Nepal, there are numerous instances of illegal arrest and detention by state authorities. Sometimes there are clear ill intentions of these illegal arrest and detention especial in undue influenced politically motivated issues. Another reason is arresting and detaining without obtaining permission prior to the arrest even there are sufficient time and reasonable basis to take prior permission by the court. One of



the instance can be case of Lalbadhur B.C. where court has clearly mentioned the arbitrary arrest and detention of the accused by the state officials by stating that “since it appears that the petitioner has been kept in custody continuously without reason and basis, with a prejudiced intent towards the petitioner, such detention of the petitioner cannot be considered lawful (Suman Kumar B.C. on Behalf of Lalbahadur B.C. v Area Police office, 2079 B.S.).” This is only a sample of illegal arrest and detention.

Nepal’s courts have issued numerous orders of Habeaus Corpus against illegal detention of innocence persons by state authorities through abuse of powers. But there is no traditions to investigate or prosecutes these law enforcement officials in Nepal. Even to ask about the ground of these illegal actions. Despite of these illegal arrest and detention again and again by the state authorities that violates the right to life with dignity and personal liberty granted by constitution of Nepal, have not held liable for their illegal act. Further, in Nepal there is no proper law to provide the compensation to these types of victims this is one of serious type of Miscarriage of Justice.

### **Obstruction in Legal Counselling**

Further, The Constitution of Nepal (2015, Art. 20(2)) provides that any person who is arrested shall have the right to consult a legal practitioner of his or her choice from the time of such arrest and to be defended by such legal practitioner and any consultation made by such person with, and advice given by, his or her legal practitioner shall be confidential as fundamental right. Lawyer- client consultation is very fundamental and sensitive discussion in course of every stage of criminal procedure. But NHRC report shows that in most of prison and detention centers there is no separate private space or room for detainees and prisoners to consult with their legal practitioner (Human Rights Situation in Fiscal Year 2080-2081, 2081 B.S.; Human Rights Situation in Fiscal Year 2079-2080, , 2080 B.S.).Same situation is in police custody. This is the serious obstruction in legal counselling between Lawyer-client. This act is against the principle of procedural fairness.

### **Refusal of registering FIR and Delay in Investigation**

“It is a fundamental legal duty of the state to investigate every offence and ensure justice in accordance with the law. When an offence occurs but no investigation is conducted, or if an investigation is carried out but proves ineffective or fails to reach a conclusion, these are indicative examples of the failure of the rule of law. Conducting a successful, fair, and lawful investigation and ensuring that justice is ultimately served are core responsibilities of law

enforcement agencies” (Dhwaj Dhami v. District Police Office and others, 2072). A miscarriage of justice occurs when the criminal justice system fails to deliver fair outcomes, leading to the wrongful conviction of innocent people or allowing those who are guilty to avoid punishment (Miscarriage of Justice in India, 2025). Although the law requires that even if a FIR about an offense is made orally, the police office must prepare a written record, read it back, and register it but this is not followed in practice.

Due to undue influence of political and economic power many suspects are not investigated on reasonable time even after registration of FIR. One of the instances is not arresting Aftab Alam until 2076 B.S. even after the order of Supreme Court on 16 Jestha 2069 B.S (Mishra, 2019). Why those state authorities were not charged and prosecuted for their this illegal, malicious and prejudice act and violation of procedural fairness and making the obstruction in the justice process? What compensation was provided to the victim of this illegal, malicious and prejudice act and violation of procedural fairness and making the obstruction in the justice process by the law enforcement officials itself? In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure (United Nations, 1989).

Similarly, many times Police refuse to register FIR. Due to delay in registration of FIR investigation starts untimely that lads to many destructions of many important evidences. If the concerned police office refuses to register a FIR made or information given, the person making or giving such first information report or information may make a complaint setting out such matter, accompanied by the first information report or information, to the concerned district government attorney office or the police office higher in level than the police office required to register such first information report or information (The National Criminal Procedure Code, 2017, 5(1)). Undue influences of political power, economic power, in case of involvement of own relatives or friends, corruption, cases involving the police officials itself are some causes of not registering FIR in Nepal. One of the notorious instances can be the case of Bijay Mahara, a FIR against the local police Personnel allegedly involved in torture and subsequent death of Bijay Mahara (Ghimire, 2020). This is not only single incident of refusal of FIR by the police office.

Victims and their lawyers have indicated that police frequently refuse to file First Information Reports (FIRs) in sensitive cases involving human rights violations. FIRs that accuse authorities

of torture are particularly unlikely to be registered. Victims and their families often face heavy pressure to avoid pursuing legal action this pressure can be both overt and covert, and may come from various sources such as police officers, politicians, government officials, and even community members who fear possible backlash. In many cases, police dismiss such complaints outright (International Commission of Jurist, 2020). A notable 60% reported fearing for their safety due to anonymous threats. In this sense, survivors are afraid of reprisals and further abuse by police officers if they report torture (Advocay-Forum Nepal, 2020). Out of 152 cases filed with the help of AF, 6.58% torture survivors withdrew their complaints. Police refusal to register FIRs stymies the judicial process at its inception as without a registered FIR, the prosecution of a crime becomes impossible, as the Nepali legal system does not allow for private prosecutions<sup>1</sup>(Advocacy Forum-Nepal, Asian Human Rights Commission, The Redress Trust, & World Organization Against Torture, 2015, March 22).

### **False Charges and wrong investigation**

There are multiple instances of false charges on innocence person by the police due to their malicious intent or negligent investigation. There are multiple instances in Nepal where accused has been arrested due to one reason or charges but police or investigative authorities has maliciously charged in other offences by making false investigations report. Similarly, they have been prosecuted maliciously and negligently. Some notable instances are case of Hem Dorje Tamang, Indian citizens Ramesh Sah and Prakash Patel (Pokharel, 2022) , Ruby Khan (Human Rights Watch, 2021) and others. Similarly, in case of Shiva Pujan Mahato Chai V HMG (Shivpujan mahoto Chai v HMG, 2046 B.S. ) police arrested wrong person without proper identification and wrongly investigated due to which he was wrongly prosecuted in district court, Madhyamanchal Regional Court and Supreme court although he was innocence. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system (United Nations, 1990). In Nepal there is no effective laws to provide justice to the person victimize by the false charges, wrong investigation and false prosecution.

### **Delay in Legal Aid**

Legal aid refers to the provision of free legal services to individuals who are financially unable to afford a lawyer for representing them in a case or legal proceeding before any court, tribunal, or authority. It is a mechanism established to guarantee that no person is denied access to legal counsel and assistance due to lack of financial resources (Choudhury, 2024). Article 20(10) of

the constitution of Nepal states that any indigent party shall have the right to free legal aid in accordance with law. Legal aid is vital for promoting social equality and upholding justice in all aspects of life. But in Nepal many accused persons are denied of access to defense and a fair trial and they are unaware of legal aid provided by Court, Nepal Bar Association (NBA), Central and District Legal Aid Committees, Civil societies and NGOs or they don't get opportunity to consult with their lawyers on time. The Legal Aid Act (2054 B.S.) and Legal Aid Rules (2055 B.S.) seems inadequate and unrealistic to cover the overall aspect, reality and problem of legal aid in Nepal (Lamichhane, 2019).

### **Violation of due process in investigation**

In State party criminal cases, statements that are supposed to be recorded in the presence of the government attorney at the Office of the Government Attorney are, in some instances, already taken at the police office. Similarly, although statements generally mention, in line with legal principles, that the accused shall not be compelled to testify against themselves, that they have the right to consult and meet with a legal practitioner, the right to fair trial, and the right to free legal aid (Aryal, 2020). These rights have not been effectively implemented in practice. This act is violation of Substantive and procedural due process. Similarly, many investigations are conducted in confession based. The Suspect are compelled to confess the guilt forcefully rather than collecting the proper evidences. In these type of cases accused get acquitted due to absence of independent and objective evidence to support the confession. A research show that "Out of the 97 cases studied, government attorneys were present in 92 cases, which is 93% of the total. In 7 cases, i.e., 7%, government attorneys were found to be absent during the testimony" (Sabaika Lagi Naya, 2071).

### **Trial Stage**

The role of prosecution starts from the filling of charge sheet. In this stage, as officers of the court, prosecutors have professional legal responsibilities to ensure that a suspect receives a fair trial. Prosecutors need to be aware of how all stages of the pre-trial criminal process affect suspects (including arrest detention and investigation), since the actions of police officials determine whether a subsequent trial will be fair (Saul et. al, 2009). The trial stage of criminal proceedings begin after the filing of charge sheet. Further, the whole bail proceedings can be divided into four stages i.e. bail hearing, evidence examination along with witness testimony, final hearing and sentencing hearing. After a charge sheet has been made, the court shall, subject to this Chapter, issue a summons or warrant for arrest, as required, to enforce the appearance of any accused who is not present along with the charge sheet in a case related to an offence set forth in Schedule-1 and Schedule- 2 (The National Criminal Procedure Code 2017,

Section 57(1)). When the accused appears in court, they must be clearly informed of the details of the offence they are charged with, all related facts, the evidence presented by the complainant supporting the charge, and the potential punishment if the charge is proven. Additionally, the court must read the charge sheet to the accused (The National Criminal Procedure Code 2017, Section 121).

If the accused is present then the court must start the bailment proceedings after taking the statement of accused. If, based on the evidence available for the time being, any person accused of the any offence under Schedule-1 or Schedule-2 which is punishable by a sentence of imprisonment for a term exceeding three years, or an offence of attempt to, abetment of, or criminal conspiracy to, or being accomplice to, the offence appears to be guilty of the offence punishable by a sentence of imprisonment for a term exceeding three years or there is any reasonable ground, based on such evidence, to believe that such person is guilty of the offence, the court may remand such person in detention for trial, recording the reason for such detention (The National Criminal Procedure Code 2017, Section 67). Further, the court may take bail /bond, guarantee from the accused except the condition provided in section 67 (The National Criminal Procedure Code 2017, Section 68)). After the bail hearing, each party shall produce their evidences before the court. All of his or her witnesses, documents, exhibits and evidences shall be specified in the complaint by the plaintiff, in the deposition by the accused (The National Criminal Procedure Code 2017, Section 99(1)). If the accused, while giving a deposition, requests additional time to present any document, exhibit, or evidence that cannot be produced right away, the court may grant a new appearance date within a period of up to one month (The National Criminal Procedure Code 2017, Section 99(3a)).

Further, the concerned party shall cause the attendance of any witness of each case filed in the court on the day appointed by the court (The National Criminal Procedure Code 2017, Section 101(1)). The depositions of all witnesses present on the scheduled date for witness examination must be recorded; however, if time does not permit completing all depositions that day, the remaining depositions shall be taken on the next working day of the court (The National Criminal Procedure Code 2017, Section 106(1)). The deposition of a witness shall be taken before the bench of the judge (The National Criminal Procedure Code 2017, Section 108). Unless the court orders otherwise, the plaintiff's evidence shall be presented first, followed by the defendant's evidence, on the scheduled date for evidence examination, in accordance with the law of evidence (The National Criminal Procedure Code 2017, Section 127(1)). Upon completion of examination of evidences, the trial court sets a date for the final hearing. The judge shall make judgment in a case generally within one month after the termination of

examination of evidence in the case (The National Criminal Procedure Code 2017, Section 131(1)). If it is not possible to make judgment within the period one month, information thereof, accompanied by the reason for the same, shall be given to the appeal hearing court (The National Criminal Procedure Code 2017, Section 131(2)). Under the prevailing law there is provision of separate sentencing hearing after conviction (Dhungel, 2022). The Criminal Offences (Sentencing and Execution) Act (2017) is the governing law regarding sentencing in Nepal.

### **Miscarriage of Justice**

Under the trial stages miscarriage of justice has been happened by following actions, and in the process and procedure:

#### **Wrongful and Malicious Prosecution**

It is the primary responsibility of the prosecutor to ensure that individuals are not prosecuted for criminal offenses based on incorrect or flawed investigations. For this reason, the prosecutor is considered as the gatekeeper of the criminal justice system. After receiving the case file along with the investigation report, the relevant government attorney's office shall review the file, assess the evidence gathered during the investigation, and forward it to the Attorney General for a decision on whether or not to proceed with prosecution. However, if the Attorney General has delegated the authority to make this decision to a subordinate officer, the case file shall instead be sent to that designated officer (The National Criminal Procedure Code 2017, Section 31(3)). Black's Law Dictionary defines malicious prosecution as "One begun in malice without probable cause to believe the charges can be sustained. An action for damages brought by person, against whom civil suit or criminal prosecution has been instituted maliciously and without probable cause, after termination of prosecution of such suit in favor of person claiming damages."

Article 20(9) of The Constitution of Nepal states that every person shall have the right to a fair trial by an independent, impartial and competent court or judicial body. Prosecution is done in trial stage and appellate stage. "In criminal offenses, concrete and doubt-free evidence must be collected against an individual before the state can file charges and proceed with a case. If the state charges someone with a criminal offense without evidence and the accused is acquitted as a result, even then, the Attorney General should not appeal the case just to harass the accused (Nepal Government V Magre Kha and others. 2066 B.S)." In Nepal wrong prosecution has been done in both stages. In many cases of wrongful Prosecutions Accused are prosecuted only on the basis of confessional statement oriented prosecution although there are absence of

independent and objective evidences. Few instances can be the case of (Nepal Government V. Magare Khan, 2066 B.S.)<sup>3</sup>, (Ramesh Sah V Nepal Government, 2078 B.S.)<sup>4</sup>. In many cases these type of innocence persons have to face imprisonment life due to lack of access to appeal in higher courts because of their economic conditions. Further, out of the 123 cases studied, 12% charge sheet was found to have cited the legal provisions incorrectly.. Similarly, in out of 119 cases studied, 13 % charge sheet were filed with excessive claim. In out of 122 cases studied, in 33% cases were prosecuted without having sufficient evidence (Sabaika Lagi Nayaya, 2071, p.169-172).

### **Power of Government to decide adjudicating authority of the case**

The concept of fair trial states that the adjudicating authority to hear a case must be clearly defined in the law. However, various laws of Nepal, including the National Criminal Procedure Code, 2074 have granted the Government of Nepal the authority to designate the authority who will hear the case. Section 169(2) of the National Procedure Code, 2074 states that If there is a separate provision regarding the authority to hear a case in this Code, or if the Government of Nepal has designated a separate authority to hear any of the cases mentioned in that Code by

---

<sup>3</sup> In this case Supreme Court has stated that in the present case, the accused Om Prakash and Kausal Kandu (Gupta) appear to have been implicated solely based on statements made before the police. No narcotic substances were found in their possession. There are no eyewitnesses against them. There is no documentary evidence against them. There is no indication of any banking transactions that would suggest involvement in drug trafficking or engagement in the narcotics trade. There is no evidence such as a decoy agent or voice interception against them. Under such circumstances, the law does not grant the government attorney the authority to file charges. Similarly, Court has stated that in the present case, since it has not been established whether a crime was committed by these defendants, filing charges without evidence is not only erroneous but also appears to be a misuse of the prosecutorial power of the State of Nepal.

<sup>4</sup> In this case The Supreme Court has stated that “in the context of the present case, it is seen from the facts of the case that the appellant-defendant Ramesh Sah and the other defendant Prakash Patel were arrested on 2069/1/19 (Bikram Sambat calendar) while attempting to flee after cheating the complainant of that case by claiming they would clean and polish gold jewelry and other items. They were under police custody and being investigated at the time. During the same period, specifically on 2069/1/22, a report was prepared stating that individuals who appeared to be of Indian origin were receiving information about illegal goods being transported in bags for sale and distribution. Based on this, it was claimed that brown sugar (a narcotic drug) was recovered from the defendants, fabricating a false and imaginary seizure report and scenario to support this claim. The case was thus initiated alleging that narcotics were recovered from the defendants.

It appears that the investigating officer, with a premeditated plan, attempted to falsely link the defendants—who had already been arrested at the scene of the fraud—to a serious criminal offense involving heroin trafficking. Based on that flawed investigation, it is evident that a malicious prosecution was initiated against the defendants. Therefore, this bench is seriously concerned that the investigating officer was directly involved in such misconduct and that the concerned government attorney failed to exercise the necessary caution and sensitivity to prevent prosecution in a false case.”

publishing a notice in the Nepal Gazette, the initiation of proceedings, conduct of the case, hearing, and settlement of such cases by such authority shall not be hindered. Here, while designating the adjudicating authority there might not be use of fair, impartial and independent mind. That can led to the violation of article 20 (9) of the constitution of Nepal.

### **No translator at court**

Article 20 (8) of The Constitution of Nepal states that every person shall have the right to be informed of any proceedings taken against him or her. 124 Languages are spoken as mother tongue as per National Census 2078 in Nepal. Nepali Language is used as the official language in Nepal's courts. Many populations of Nepal don't understand Nepali language due to which they face many challenges regarding participation in investigation process and court proceedings. But in some courts of Nepal, there is no language translators. This is the violation of article 14 (3)(f) of the ICCPR, 1966.

### **Not taking deposition before Court**

The National Criminal Code (2074, Section 108) states that the deposition of a witness shall be taken before the bench of the judge. But, in some courts , the deposition of witness is taken before the employees of courts in division (*Phat*) of the court. Due to this, there have been obstruction in independent witness testimonies and examination. This is flagrant violation of criminal procedure and goes against the principle of fair trial and natural justice.

### **Delayed in verdict**

In some cases accused has been detained even longer time than the punishment prescribed by law only in investigation cases. There is a popular legal maxim with a deeper meaning "justice delayed is justice denied." In Case of Awadh Lal Shah v Kathmandu District Court and others, (2018) Supreme Court of Nepal has stated that:

*"Justice must not be delayed, for when justice is delayed, the parties to the case are deprived of justice; and even if justice is eventually obtained, it comes only through great expense and hardship. Failure to deliver a decision within a reasonable time is contrary to Article 20(9) of the Constitution, which guarantees a fair and proper hearing. Timely adjudication is also a vital fundamental right linked to the right to life. As the guardian of fundamental rights, the State must always act to prevent undue delays in any case. The consequence of such delays must be regarded as a serious deviation from justice."*



NHRC report shows that complaints have been received that prisoners have had to spend extended periods in custody due to the courts' inability to deliver timely verdicts (Human Rights Situation in Fiscal Year 2079–2080, 2080, p. 53). In Nepal, while waiting for the trial for an enduring long time frame, the personal liberty of the accused is suspended, thus endangering the situation of human right violation (Sangroula, 2018, p.118). As a prima facie factor of the delay in justice, with result of improper and illegal deprivation of the personal liberty is a serious problem of the fair trial in Nepal (Sangroula, 2018, p.118) that has led to the miscarriage of justice. In many cases accused has spent more time in imprisonment than the punishment delivered by the court. For instance, In case of Nepal Government V Changed Name P. Ji. A. 081/082 (ta) and others, defendant was convicted and punished for the imprisonment of 1 year and 3 months but he was held in detention for 3 years and 6 months and 13 days. Further, Victims also deprived from right to justice for long time.

### **Wrongful conviction**

State has right to punish the offender from the order of competent judicial bodies but state cannot punish the innocence person. Wrongful conviction can be occurred from District Court, High Court and even from Supreme Court . Similarly, Wrongful conviction occurs if offender get more punishment unlawfully. In Nepal, there is no systematic study on the cases of wrongful conviction and imprisonment. There is no data or record to indicate the exact figure of conviction and exoneration in our country. All the decision of conviction by lower court that get acquitted by the higher court are Wrongful conviction.

Few instances of wrongful conviction who get acquitted by the decision of Supreme Court of Nepal are case of madan Narayan Shrestha (Madan Narayan v. Office of Prime Minister and Council of Ministers, 2075)<sup>5</sup>, Ramesh Sah (Ramesh Sah v. Nepal Government, 2078),

---

<sup>5</sup> In this writ, the applicant reported that he was a serious victim of wrongful Conviction. On date 2060-07-08, when the applicant was on duty in District Police Office, he was accused on the murder of Rita Lama Moktan. The District Court and Patan High Court convicted the applicant with life imprisonment but Supreme Court made him release on date 2076-01-1 because of which he filed the writ petition claiming to get back the job he was dispatched from and compensate his salary while he was in prison. The Supreme court stated that “When a police personnel, accused in a case of homicide and rape, is acquitted by this court due to the charges not being established, and was suspended and dismissed from service because of the case, they retain the right to automatic reinstatement to their position after being acquitted.” Further the court ordered that Since the petitioner has already reached the age of 48, which is the retirement age, they are deemed to have automatically retired; therefore, there is no necessity to reinstate them to their former position. However, they must be provided with the salary, allowances, and other benefits from the date of suspension to the date of retirement.

Shivpujan Mahato Chai (Shivpujan Mahato Chai v. Nepal Government, 2080), Narendranath Yogi, Upendra Regmi, and Yuvraj Gautam (Narendranath Yogi v. Nepal Government, 2080), Dorik Prasad Yadav and Dewanand alias Shivanath Prasad Yadav (Nepal Government v. Devilal Yadav and others, 2080), Ram Pravesh Kumar Loniya Magar (Nepal Government v Ram Pravesh Kumar Loniya Magar, 2076), Shobha Wadi (Nepal Government V Shobha Wadi, 2076)<sup>6</sup>, Khul Bahadur Kunwar (Khul Bahadur Kunwar v. Office of PM and Council of Ministers and others, 2042 B.S) <sup>7</sup>. If an accused, who was in detention at trial phase or was imprisoned following a conviction by a lower court, is later acquitted by a higher court, then although their right to liberty cannot be fully restored, they must be provided compensation at least for the physical harm or loss they have suffered (Aryal, 2020). This injustice compels the innocent victims to book long and unpredictable court proceedings to prove their innocence to obtain compensation. They need to expend huge money for the fees incurred to hire lawyers for their court proceedings without anything in their hand. Wrongful convictions have profound and often irreversible consequences for individuals and their families, resulting in the loss of livelihoods, fractured relationships, marital dissolution, and long-lasting social stigma that frequently endures even after exoneration. Accordingly, the state bears a responsibility to offer fair and adequate compensation that accounts for the physical, mental, psychological, and reputational harm endured, as a means of facilitating the wrongfully convicted person's rehabilitation and reintegration into society (Chauhan, 2075). Observing these trauma and immense sufferings and additional burdens upon the wrongfully convicted individuals, the state must be responsible to the injustice caused by its agents or entities (Acharya et al., 2021).

### **Post-Trial Stage**

This stage of criminal proceedings includes implementation of judgement and appeal. If the court passes any judgment in any case, the concerned court shall establish a record of the

---

<sup>6</sup> Supreme Court Stated that "Convicting an accused solely on the ground of their absence in court must be understood as a miscarriage of justice or a gross injustice. Treating the accused's non-appearance in court as conclusive evidence in itself and using it as the sole basis for establishing guilt is illogical, unlawful, and unreasonable."

<sup>7</sup> In this case the applicant was Sargent (hawoldar) of police in Central Police Training center. On 2042-04-15, the applicant and his friend Yagya Bahadur K.C. were convicted by Regional Police Special Court, Patan for stealing two service revolver. Kunwar and his friend Yagya Bahadur were never informed about their accusation and never confessed for the crime. They were sent to Central Jail and Kunwar spent 4 years of imprisonment there. After the release from the Central Jail serving the punishment, the person named Ghanshyam Adhikari (one of the prisoner from central jail) confronted and confessed that he had stolen the two service revolver for what Kunwar was convicted of. Later, through writ procedure, Khul Bahadur Kunwar and Yagya Bahadur K.C, made claim for the expunge of conviction made against them.

sentence, fine or the established claimed amount or compensation pursuant to such judgment (The National Criminal Procedure Code 2017, Section 151(1)). Regardless of which level of court issued the judgment, the District Court where the charge sheet or complaint was registered shall be responsible for enforcing it (The National Criminal Procedure Code 2017, Section 152 (1)). Further, the concerned District Court shall also execute a judgment on a case proceeded and adjudicated originally by the appeal hearing court (The National Criminal Procedure Code 2017, Section 152(2)). A party who is not satisfied with a judgment or final order made by a court may make an appeal within thirty days from the date of knowledge of the judgment (The National Criminal Procedure Code 2017, Section 134(1)). However, if the appealing party submits a petition explaining valid reasons for failing to appeal within the prescribed time, and the appellate court finds the reasons justifiable, it may grant an extension of up to thirty days. A person wishing to make an appeal pursuant to subsection (1) shall file it with the court which hears appeals from the court making judgment (The National Criminal Procedure Code 2017, Section 134(2)).

### **Miscarriage of justice**

One of the major problems of miscarriage of justice in Nepal is the failure to implement court decisions. Out of 152 cases reviewed, compensation was awarded in 30.26% (46 cases), with 95.65% of those judgments issued by district courts and the remaining 4.35% by appellate courts. To date, out of the 46 victims who were awarded compensation only 7 (15.22%) actually received the money (Advocacy Forum-Nepal, 2020). Another problem regarding miscarriage of justice in Nepal is more sentencing than Court order. Few instances are the case of Muhammad Nur Ullah Sheikh and Padammaya Gurung. In case of Muhammad Nur Ullah Sheikh v Kathmandu District Court and others (2078)<sup>8</sup>, the convict Ullah Sheikh has to serve 7 years 1 month 16 days, but he served imprisonment of 8 years 5 month 8 days which was more than the prescribed punishment by the court. Another instance can be the case of Padammaya Gurung v. Office of PM and Council of Ministers and others (2071)<sup>9</sup>. In this case, the applicant

---

<sup>8</sup> In this case Supreme Court of Nepal has stated that calculating two-thirds of the imprisonment sentence imposed on the individual amounts to 6 years and 8 months. Adding 5 months and 16 days for the unpaid fine at a rate of NPR 300 per day, the total imprisonment should not exceed 7 years, 1 month, and 16 days. However, as of today, the petitioner has already served more time than legally stipulated. Therefore, any detention beyond this period must be deemed unlawful.

<sup>9</sup> In this case, Padammaya, the applicant was raped and got pregnant. She killed the baby subsequently after the birth and was convicted on the offense of Homicide and sentenced for 5 years of imprisonment by the Supreme Court of Nepal. The applicant was imprisoned from 2048-09-02 and was expected to get

spent more time on prison for extra 5 years 6 months and 7 days because of negligence of the prison authority. The prisoners might also get victimized, suffering abuse and prison violence whilst incarceration. Here prison authority are the major perpetrator of this negligence they must be punished. In the case of Padammaya Gurung v. Office of PM and Council of Ministers and others (2071) Supreme Court of Nepal has ordered to pay compensation of six lakh three thousand and six hundred. But this is not the reasonable compensation for curtailing the personal liberty of a person illegally.

### **Existing Legal Frame work to protect from Miscarriage of justice**

#### **The Constitution of Nepal**

The Constitution of Nepal has guaranteed following rights as fundamental rights:

#### **Right Relating to Justice**

Right relating to Justice that has incorporated principles and provisions of procedural fairness (The Constitution of Nepal, 2015, Art. 20).

#### **Right of victim of crime**

A victim of crime shall have the right to get information about the investigation and proceedings of a case in which he or she is the victim (The Constitution of Nepal, 2015, Art. 21(1)).

A victim of crime shall have the right to justice including social rehabilitation and compensation in accordance with law (The Constitution of Nepal, 2015, Art. 21(2)).

#### **Right against torture**

No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment (The Constitution of Nepal, 2015, Art. 22(1)). Any act of such act shall be punishable by law, and any person who is the victim of such treatment shall have the right to obtain compensation in accordance with law (The Constitution of Nepal, 2015, Art. 22(2)).

#### **Right against preventive detention**

---

released on 2053-09-01. But she spent more time on prison for extra 5 years 6 months and 10 days and got released on 2059-03-11 because of negligence of the prison authority. The prisoners might also get victimized, suffering abuse and prison violence whilst incarceration. The Supreme Court of Nepal has issued directive order in the name of the respondents to promptly enact such a law to safeguard personal liberty of the person.

---

No person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to the sovereignty, territorial integrity or public peace and order of Nepal (The Constitution of Nepal, 2015, Art. 23(1)). Information about the situation of a person who is held under preventive detention must be given immediately to his or her family members or relatives (The Constitution of Nepal, 2015, Art. 23(2)). If the authority making preventive detention holds any person under preventive detention contrary to law or in bad faith, the person held under preventive detention shall have the right to obtain compensation in accordance with law (The Constitution of Nepal, 2015, Art. 23(3)).

### **Police Act, 2012**

Section 15 of the police Act, 2012 states about the duties of police employee as follows:

- To obey the orders issued by the competent authority according to the law; and promptly execute and serve warrants issued by such authority
- To prevent crimes, and protect people from unnecessary harassments
- To trace out criminals and cause them to be punished according to the law
- To arrest persons who must be arrested according to the law, and for whose arrest there exist adequate grounds.
- Take prompt and appropriate action if any arrested or detained individual is injured or becomes ill, ensuring they receive proper care while being guarded or transported.

### **Compensation Relating to Torture Act, 2053 (1996)**

This act is expedient to make provisions on compensation for inflicting physical or mental torture upon any person in detention in the course of investigation, inquiry or trial or for any other reason or for giving cruel, inhuman or degrading treatment to such a person. This Act has prohibited the torture by stating that no person in detention in the course of investigation, inquiry or trial or for any other reason shall be subjected to torture (The Compensation Relating to Torture Act, 1996. Section 3(1)). If any employee of Government of Nepal is held to have inflicted torture upon any person, the victim shall be provided with compensation as referred to in this Act (The Compensation Relating to Torture Act, 1996. Section 4). Further, this act deals about the provision regarding filing of complaint, proceedings on complaint and compensation, action against the person involved in the commission of torture, fixation of amount of compensation and execution of the decision.

### **The Crime Victim Protection Act, 2075 (2018)**

Although this act has not explicitly addressed the victims of wrongful convictions and victims of miscarriage of justice but this act has addressed few aspects of miscarriage of justice. This major objective of this act is to make necessary provisions on the protection of the rights and interests of the victims, by making provisions on the protection of the rights and interests of the victims, by making provisions also for compensation to the victims for damage sustained as a result of an offence, and reducing adverse effects caused to the victims of crimes, for getting information related to the investigation and proceedings of the case in which they have been victimized, for getting justice along with social rehabilitation and compensation pursuant to law, while ensuring the right of crime victims to justice conferred by the constitution of Nepal, which remains as an integral part of the process of offender justice.

### **The National Penal Code, 2017**

The National Penal Code (2017) has incorporated several legal provisions to address and prevent miscarriage of justice although these provisions are not sufficient to prevent every aspect of miscarriage of justice. These provisions aim to safeguard individual rights, ensure fair trial procedures, and hold authorities accountable for wrongful acts, thereby reinforcing public trust in the justice system and upholding the rule of law. This Code has incorporated following provisions:

#### **Prohibition of making false complaint**

Section 98(1) of this code has Prohibited of making false complaint by stating that no person shall, with intent to injure or annoy any person, make a false claim or accusation or give false information against such person before or to an authority making judicial proceeding. A person who commits, or causes to be committed, the offence of making false complaint shall be liable half the maximum sentence imposable for the offence in respect of which such false accusation has been made. Provided that the provision of this Section shall not apply to any case in which the Government of Nepal is plaintiff (The National Penal Code, Section 98(2)). If this offence has resulted in any kind of harm or loss to a person who is a victim of such offence, compensation for such harm or loss shall be recovered from the offender to the victim (The National Penal Code, Section 98(3)).

#### **Prohibition of making investigation or prosecution maliciously**

The National Penal Code (2017, Section 99(1)) states that no authority responsible by law for making investigation or prosecution shall make investigation or prosecution maliciously, with intent to have an innocent person bear liability or to save the real offender. Such

offender shall be liable to a sentence of imprisonment for a term not exceeding six months or a fine not exceeding five thousand rupees or both the sentences (The National Penal Code, Section 99(2)). Where any person suffers any kind of harm or loss from such offence, he or she shall be entitled to get compensation from such offender (The National Penal Code, Section 99(3)).

Section 89: Prohibition of fabricating evidence

Section: 90. Prohibition of making or issuing false certificate

Section 93: Prohibition of concealing evidence of offence

Section 95: Prohibition of harboring offender

Section 96: Obligation to give information of commission of offence to person under a legal duty

Section 100. Prohibition of failure to appear in violation of terms and conditions of guarantee:

Section 102. Prohibition of obstructing apprehension or rescuing from custody:

### **The National Criminal Procedure Code, 2017**

This code has incorporated various procedural principles and provision regarding criminal proceedings in general cases in each stage of criminal cases. This code is expedient to make the procedural law simplified and timely, by amending and consolidating the laws in force relating to procedures on investigation, prosecution, filing, proceeding, hearing and adjudication of criminal cases and other procedures related thereto, and execution of judgments on such cases. Violation of general procedure mentioned in this case cause miscarriage of justice. Section 195 of the National Criminal procedure Code, 2017 states that a public servant who fails to do act or take any action required to be done or taken pursuant to this act within the period, if any, specified by this code shall be liable to departmental action in accordance with law.

### **Analysis**

Miscarriage of justice can occur if there is any serious violation of human rights in any of these stages. In criminal proceedings, a court's final verdict does not necessarily mean it has uncovered the absolute truth regarding the accused person's guilt. Various issues can arise during the trial that may deprive the defendant of fair legal procedures. For instance, a prosecutor might act improperly or negligently, a judge could make mistakes in handling

evidence, or investigators might behave unethically during the investigation. In fact, there are countless potential incidents, both before and during the trial, that could violate the defendant's right to due process. Miscarriage of justice has been happened in almost every legal system of the world. Various countries across the world have made laws regarding compensation and rehabilitation of victim of the miscarriage of Justice.

In context of Nepal, there are numerous cases of miscarriage of justice in every stage of criminal justice system from a long period of time that has violated the personal liberty and human rights laws. Under the pre- trial stage miscarriage of justice has been occurred due to arbitrary arrest and detention by the state authorities, obstructions in legal counselling by not providing separate private space or room for detainees and prisoners to consult with their legal practitioner, delayed investigation and refusal of registering FIR by state authorities, false Charges and wrongful investigation and delay in legal aid. Similarly, there has been the violation of substantive and procedural due process as many investigations are conducted in confession based. The Suspect are compelled to confess the guilt forcefully rather than collecting the proper evidences.

Further, under the trial stage there has been many wrongful and malicious prosecutions as out of the 123 cases examined, 12% of the charge sheets contained incorrect citations of legal provisions. Likewise, among 119 cases analyzed, 13% of the charge sheets included excessive claims. Furthermore, in the review of 122 cases, 33% were prosecuted despite lacking sufficient evidence (Sabaika Lagi Nyaya, 2071). Similarly, there has not been use of fair, impartial and independent to designate the authority who will hear the case by the government of Nepal due to politicization of justice process. This has led to miscarriage of justice in Nepal. Here, the adjudicating authority must be clearly defined and designated by the law. In addition to these, not providing translator by the court, taking deposition of witness before the employees of courts in division (*Phat*) of the court instead of taking before the bench of judge, improper and illegal deprivation of the personal liberty for long time and deprivation of victim's right to justice for long time due to delay in verdicts are other causes and situations of miscarriage of justice in Nepal. Similarly, wrongful convictions is another problem that has led to miscarriage of justice. If an accused person, who was either detainee during the trial or imprisoned following a lower court's conviction, is subsequently acquitted by a higher court, their right to liberty may not be entirely restored. However, they should be compensated, at minimum, for the physical harm or loss they have endured. In context of Nepal, miscarriage of justice has been happened due to failure of state authorities to implement the decisions of the court and serving more imprisonment than the prescribed period of sentencing after conviction by the court.



The existing legal frame work to protect from miscarriage of justice are not sufficient to address every aspect and problems of miscarriage of justice. The most disappointed thing is that the Crime Victim Protection Act (2075) does not recognize these types of victims. Similarly, although many times Supreme Court of Nepal has issued orders to make necessary laws for addressing miscarriage of justice but Nepalese law makers have not taken this matter seriously. In Nepal's legal system Miscarriage of justice has been occurred due to Corruption and improper conducts caused by law enforcement officials, prosecutor, judges, and prison authority. Further other causes include reliance on circumstantial evidence, fabrication of evidence, non-disclosure of evidence, unreliable cell confession resulting from prison informants or voluntary false confession, unreliable confessions resulting from police pressure or vulnerability of suspects. Similarly, unreliable victim and eyewitness identification and testimony, misleading or improper forensic sciences, undue political influences, incomplete investigation are other causes of miscarriage of justice in Nepal.

## **Conclusion**

A justice process includes pre- trial stage, trial stage and post- trial stage. In Nepal miscarriage of justice has happened in each stage of criminal proceedings. Abuse of power can be one of the fundamental causes of miscarriage of Justice. Arbitrary arrest and detention, obstruction in legal counselling, refusal of registering FIR and delay in investigation , false Charges and wrong investigation, delay in legal aid, violation of due process in investigation are miscarriage of justice in pre-trial stages. Further miscarriage of justice in Nepal has been due to wrong and malicious prosecution, power of government to decide adjudicating authority of the case, no facility of translator at court, not taking deposition before court, delay in verdict and wrongful convictions are the causes and situation of miscarriage of justice in trial stage where as non-implementation of judgements and more sentencing than the decision of judicial bodies are major causes of miscarriage of justice in post-trial stage that has violated the human rights in Nepal. There are no sufficient laws to protect from the miscarriage of justice. The State must be implementing the existing legal framework effectively. Similarly, *the* State must make other necessary laws for the prevention of miscarriage of justice, including effective remedies.

## **References**

- Acharya, J. K., Regmi, R. & Bista, S. (2021). "Compensation for the Wrongfully Convicted: A Pressing Need for Statutory Arrangements in Nepal." *Kathmandu School of Law Review*, vol. 9 & 10, no. 1, p. 91, 102.
- Advocacy Forum-Nepal.(2020).*Torture in Nepal in 2019: The need for legal policies and legal Reform*. Advocacy Forum-Nepal. Kathmandu. p. 43, 45.  
<http://advocacyforum.org/downloads/pdf/publications/torture/26-june-2020.pdf>
- Advocacy Forum-Nepal, Asian Human Rights Commission, The Redress Trust, & World Organization Against Torture. (2015, March 22). *Submission to the United Nations Universal Periodic Review: 23rd Session of the Working Group on the UPR – Human Rights Council*. p.6. [https://upr-info.org/sites/default/files/documents/2015-10/js2\\_upr23\\_npl\\_e\\_main.pdf](https://upr-info.org/sites/default/files/documents/2015-10/js2_upr23_npl_e_main.pdf)
- Anderson, T. (1993). Contemporary Comment: 'Miscarriages-What is the problem?'. *Current Issues in Criminal Justice*, p. 74.  
<https://classic.austlii.edu.au/au/journals/CICrimJust/1993/18.pdf>.
- Aryal, R.P. (2020). Principles and Practice of procedural Law. *Lex and Jurix Publication Private Ltd. Bhaktapur*. p. 469
- Aryal, R.P. (2020). Principles and Practice of procedural Law. *Lex and Jurix Publication Private Ltd. Bhaktapur*.p. 472
- Awadhilal Shah v Kathmandu District Court and others, Writ No. 079-WH- 0218
- Birdling, M. (2008). *Miscarriages of justice: a definition* (Doctoral dissertation, Oxford University, UK). <https://ora.ox.ac.uk/objects/uuid:f1687060-6638-41fa-83e1-4e310fdb048/files/mb939ce79cce43ffb681a80f3e29d3e90>.
- Case, J. G. (2008). How wide should the actual innocence gateway be? An attempt to clarify the miscarriage of justice exception for federal habeas corpus proceedings. *William & Mary Law Review*, 50(2). p.677-678.  
<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1062&context=wmlr>.
- Chauhan, B.K. (2025, March 14). "Compensate Victims of Miscarriage of Justice". The Rising Nepal. <https://risingnepaldaily.com/news/58609>

- Choudhury, D. (2024). Concept of Free legal aid-a comparative analysis free legal aid in India, United Kingdom and Australia. . *International Journal of Law and Legal Jurisprudence Studies*. ISSN:2348-8212 .Volume 3(3). P.104
- De, D.J. (2000). *Interpretation and Enforcement of Fundamental Rights (First)*. Eastern Law House. P. 610.
- Dhwaj Dhami v. District Police Office and others. *Nepal Kanoon Patrika* 2072, D. No. 9367
- Dhungel, L. (2022). Procedural Law: Principles, Provision and practices. *Sanrab Publication*. Kathmandu. P. 241
- Ghimire, B. (2020, September 7). *In attempts to protect their colleagues, police don't register first information reports against them*. The Kathmandu Post
- Haule, N. (2024). "Wrongful Conviction in Tanzania." *International Journal for Multidisciplinary Research*, vol. 6, No. 6, pp. 2–3, <https://doi.org/10.36948/ijfmr.2024.v06i06.32027>
- Human Rights Watch. (2021, October 18). *Nepal: Police allegedly use excessive force on protesters, target activists*. Human Rights Watch. <https://www.hrw.org/news/2021/10/18/nepal-police-allegedly-use-excessive-force-protesters-target-activists>
- International Commission of Jurist.(2020). Human Rights and the Rule of Law in a Federal Nepal: Recommendations from an ICJ High-Level Mission. *International Commission of Jurist*. P.29
- Khul Bahadur Kunwar v. Office of PM and Council of Ministers and others, Writ no. 069-WO-1301 (2042 B.S. )
- Lamichhane, B.P. (2019). Legal Aid: Existing law, policies and practices in Nepal.. *Journal Of Political Science*. Vol. 19, P. 21. <https://doi.org/10.3126/jps.v19i0.26697>.
- Lamichhane, B.P. (2019). Legal Aid: Existing law, policies and practices in Nepal.. *Journal Of Political Science*. Vol. 34, P. 38. <https://doi.org/10.3126/jps.v19i0.26697>
- Madan Narayan v. Office of PM and Council of Ministers and others, *Nepal Kanoon Patrika* 2075 B.S. Decision No. 10069, vol.8.

- Miscarriage of Justice in India. (2025, March 3). *Law Bhoomi*.  
<https://lawbhoomi.com/miscarriage-of-justice-in-india/>.
- Mishra, S. (2019, October 13). *Nepali Congress MP Mohammad Aftab Alam arrested*. Ratopati.  
<https://www.ratopati.com/story/102957/alam-arrested>
- Muhammad Nur Ullah Sheikh v Kathmandu District Court and others, *Nepal Kanoon Patrika* 2078, Decision No. 10670
- Narendranath Yogi V Nepal Government, *Nepal Kanoon Patrika* 2080. Decision No. 11190
- Nepal Government V Devilal Yadav and others, *Nepal Kanoon Patrika* 2080. Decision No. 11164
- Nepal Government V Magre Kha and others, *Nepal Kanoon Patrika* 2066. Decision No. 8243
- Nepal Government v Ram Pravesh Kumar Loniya Magar, *Nepal Kanoon Patrika* 2076. Decision No. 10197
- Nepal Government V Shobha Wadi, *Nepal Kanoon Patrika* 2076, Decision No.10274
- National Human Rights Commission of Nepal. (2012). *National Human Rights Commission Act*, Section 2(f).  
[https://www.nhrcnepal.org/uploads/law/National+Human+Rights+Commission+Act\\_\(1\).pdf](https://www.nhrcnepal.org/uploads/law/National+Human+Rights+Commission+Act_(1).pdf)
- National Human Right Commission of Nepal. (2080 B.S.) "Human Rights Situation in Fiscal Year 2079–2080". *National Human Right Commission*. p. 53
- National Human Right Commission of Nepal. (2081 B.S.) "Human Rights Situation in Fiscal Year 2080–2081". *National Human Right Commission*. p. 13
- Nepal Law Commission (2017). *The National Criminal Procedure Code*., Section 4(1), 5(1), 31, 32(1), 57(1), 108, 121, 127(1), 131(1), 131(2).  
<https://lawcommission.gov.np/content/13458/civil-criminal-procedure-code-2074/>
- Padammaya Gurung v. Office of PM and Council of Ministers and others, Writ no. 071-WO-0512

- Pokharel, G.(2022, April 6). Malicious prosecution: How Nepal police abuse their power at the cost of innocent people's dignity. Onlinekhabar. <https://english.onlinekhabar.com/malicious-prosecution-nepal-police.html>
- Poyser, S., & Grieve, J. D. (2018). Miscarriages of justice: What can we learn?. In In: Griffiths, Andy and Milne. Rebecca, (eds.) *The Psychology of Criminal Investigation* (pp. 5-30). <https://ray.yorks.ac.uk/id/eprint/3105/1/Chapter%201.pdf>
- Ramesh Sah v Nepal Government, *Nepal Kanoon Patrika* 2078. Decision No. 10762
- Sabaika Lagi Nayaya. (2071).The Status and Challenges of Government Cases in Nepal, 2070. *Sabaika Lagi Nayaya*. Kathmandu. p.169-172, 179. [https://www.undp.org/sites/g/files/zskgke326/files/migration/np/UNDP\\_NP\\_ROLHR\\_state-cases-in-nepal-status-and-challenges-a-study-report.pdf](https://www.undp.org/sites/g/files/zskgke326/files/migration/np/UNDP_NP_ROLHR_state-cases-in-nepal-status-and-challenges-a-study-report.pdf)
- Sangroula, y. (2018, July 10). *Miscarriage of justice*. Annapurna. <https://annapurnapost.com/story/102598/>
- Sangroula, Y. (2018). *Criminal Justice system: Comparative Study of the Criminal Justice System of Nepal With Reference to China, Japan, India, U.S.A. and U.K.* Sahayatra Nepal Publication Pvt. Ltd. P. 85, 206, 118.
- Saul, B., Kinley, D., Sangroula, Y., & Williams, S. (2009). *Human rights in the criminal justice system in Nepal: Law enforcement training manual (Police and Prosecutors)* (Revised ed.). Kathmandu School of Law. pp. 8-9. [https://ksl.edu.np/resource/assets/uploads/resource/b4ae5-nepal\\_manual\\_final\\_mahesh.pdf](https://ksl.edu.np/resource/assets/uploads/resource/b4ae5-nepal_manual_final_mahesh.pdf)
- Shivpujan mahoto Chai v HMG, *Nepal Kanoon Patrika* 2046, Decision No. 3965
- Suman Kumar B.C. on Behalf of Lalbahadur B.C. v Area Police office, Sunsari, *Nepal Kanoon Patrika* 2079. Decision No. 10998
- Teka , M., & Devendorf , J. (2023, November 13). "What Is Blackstone's Formulation in Criminal Law?". *Law Info*. <https://www.lawinfo.com/resources/criminal-defense/what-is-blackstone-s-formulation-in-criminal.html>.

- United Nations. (1966). *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.
- United Nations. (1989). *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Principle 11. Adopted by Economic and Social Council resolution 1989/65. <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-effective-prevention-and-investigation-extra-legal>
- United Nations General Assembly. (1985). *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34)*. <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse>
- United Nations. (1990). *Guidelines on the role of prosecutors adopted by the 8th UN Congress on the prosecution of crime and treatment of offenders, Havana, Cuba, 1990, Article 12*. UN.
- Wisotsky, S. (1997). Miscarriages of Justice: Their Causes and Curses. *St. Thomas Law Review*. 9(3). P. 550. <https://scholarship.stu.edu/cgi/viewcontent.cgi?article=1608&context=stlr>.