

Compensation for the Wrongfully Convicted: A Pressing Need for Statutory Arrangements in Nepal

Jiwan Kumar Acharya*, Rasmi Regmi** & Sandhya Bista***

Abstract

Wrongful conviction appears as a form of a miscarriage of justice. Various factors might be responsible for the wrongful conviction of innocent individuals. However, irrespective of the cause, the aftermath of exoneration upon them is beyond imagination. Though they are released after acquittal, an absence of any compensatory provision for the wrongfully convicted appears to be similar to that of incarceration. Taking these concerns into account, the paper in its first part attempts to briefly overview the underlying causes behind wrongful convictions from an individualistic and systemic approach. Presenting some inherent impacts upon the innocent victims through this form of a miscarriage of justice, it justifies rationales for compensatory awards for the victims, emphasizing state obligation. In its second part, the paper attempts to overview the situation of wrongful conviction in Nepal, observing some landmark cases as well as orders made therein by the Supreme Court regarding the state liability upon the victims and orders for the statutory arrangements to address the compensatory claims. This paper justifies the urgency of enacting dedicated legislations for compensation in a wrongful conviction, observing the unavailability of other avenues to obtain compensatory damages at present. It also proposes some considerations to be taken into account while framing such legislation. In dealing with these considerations, this paper proposes a dedicated, independent, external and accessible mechanism to approach compensatory claims by the victims and assessment and award of amounts of damages for them. Examining possible avenues for fund arrangements to award such compensatory claims, the paper finally proposes a separate fund to arrange resources for such compensatory damages to the victims.

Key words: *Compensation, Compensatory Statute, Damages, ex-gratia payment, Innocence, Miscarriage of Justice, Wrongful Conviction*

* Jiwan Kumar Acharya is undergraduate student at Kathmandu School of Law. He can be reached at jiwan.ballb22@ksl.edu.np.

** Rashmi Regmi is undergraduate student at Kathmandu School of Law. She can be reached at rashmi.ballb22@ksl.edu.np.

*** Sandhya Bista is undergraduate student at Kathmandu School of Law. She can be reached at bistasandhya3@gmail.com.

Introduction

The court is considered as a strong system for the protection of rights and prescription of remedies upon the breach of individual liberties. It is seen as the guardian of justice by protecting victims and punishing the wrongdoers. The court pursues its adjudicatory function in a prudent and delicate manner since the fundamental rights such as the right to life, liberty, and property of the accused are concerned in the issues of adjudication. However, despite the prudence and delicate treatment in the issues, some errors might occur as exceptions. William Blackstone in his popular doctrine Black Stone Ratio has therefore suggested that “it is better that ten guilty persons escape than that one individual suffers”. It can be inferred that Blackstone through this adage has introspected the possibility of an innocent individual being trapped by the Criminal Justice Systems. Foreseeing such circumstances he has recommended the judicial decision-makers to be highly cautious while deciding criminal cases¹ even though the court tries to act in caution and certainty, there is the possibility that it may commit errors resulting in either conviction to an innocent individual or acquittal to the actual guilty one. Both of these conditions attract miscarriage of justice. These two possible errors are inversely proportional and are dependent on the level of certainty adopted by the court while deciding the case.² The higher the certainty and strict rules applied by the courts, the lesser is the false-positive (wrongful conviction) cases and the higher is false-negative (wrongful acquittal) cases. Similarly, the lower certainty of the court out-turns in high false-positive and low false-negative cases.³ As per this proportionality ratio, there cannot be any dispute in minimizing false positive/wrongful conviction through a high level of certainty and strict rules, but the problem arises while attempting to minimize wrongful conviction if there is the maximization of false-negative/wrongful acquittal cases. This problem can be addressed if the court applies high prudence in its judgment based on circumstantial and corroborative evidence which are beyond a reasonable doubt. However, it should be noted that there is no cent per cent accuracy in any system. Although both of these circumstances are a miscarriage of justice, this paper only has dealt with the issue of wrongful conviction.

Miscarriage of Justice

Generally, the terms miscarriage of justice and wrongful conviction are used interchangeably.⁴ But the term miscarriage of justice is much more border and inclusive because it also includes other errors of justice such as errors in law, procedure and, errors in fact.⁵ While discussing miscarriage of justice, the first thing that we need to consider is what the course of justice is. A course of justice comprises three stages – police intervention, court process and the penalty measures.⁶ Thus, miscarriage of

¹ Jan De Keijser, et al., ‘Wrongful Convictions and the Blackstone Ratio: An Empirical Analysis of Public Attitudes’, published on Punishment and Society, volume 16:1, 2014, p. 34.

² Ibid.

³ Ibid.

⁴ Kathryn M Campbell, ‘Exoneration and compensation for wrongly Convicted: Enhancing Procedural Justice?’ *Manitoba Law Journal*, volume 42:3, 2019, p.249.

⁵ Huff C Ronald and Martin Killians, ‘Cross-National Perspectives and issues-Introduction’, in Huff C Ronald and Martin Killians (eds.), *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, Temple University Press, Philadelphia, 2008, p.5.

⁶ Contemporary Comment ‘Miscarriages-What is the problem?’, *A Just Result: Extracurial Inquiries and Unsafe*

justice would mean any serious wrong in these stages⁷ involving wrongful accusation, wrongful treatment by the court including wrongful conviction and the wrongful penalty or abuse inside the prison.⁸ Miscarriage of justice indeed is the error in the justice⁹ or the failure of the justice that originates from different institutions and may occur in different forms. It occurs where individuals are detained without any charge, or although charged and detained but not presented to trial, or though presented to trial, the remanded individuals are denied bail even after acquittal from the trial court.¹⁰ It also includes those cases where the conviction is quashed by the appeal, or the convicted individual has already served the non-custodial sanction (fine, community work etc.) prior to acquittal from the appeal, or lastly, convicted and exhausted all the appeals but later the conviction gets quashed by extraordinary appeal or found non-guilty in a re-trial or have been pardoned.¹¹ In Nepal, the acquittal from the supreme court observing grave error, breach of substantive and procedural rights, malicious act from agents of criminal justice system etc. in the case, absence of those could alter the defendant's position otherwise is being regarded as the miscarriage of justice also. These last forms of erroneous court judgment can be strictly regarded as the wrongful

Verdicts, Institute of Criminology, the State Library of New South Wales, 28 October 1992, p. 74 available at <http://www.austlii.edu.au/au/journals/CICrimJust/1993/18.pdf?fbclid=IwAR32dnUYzAHsm4-EyqzThAmEy5r12pf29ISe93Gu8j3wSGOxfS50XjzhSeA>, accessed on 7 September, 2021.

⁷ Miscarriage of justice may arise from the misconduct, negligent or malicious actions of the state parties such as police, prosecutor, defense attorney, the court and non-state parties such as media, expert etc. If the police and/or the prosecution engage in some form of misconduct in investigating and/or prosecuting the person and if there is wrongful or malicious prosecution, it prima-facially attracts miscarriage of justice no matter whether or not it leads to a conviction by any court of law, and whether or not it leads to any incarceration. During the interview with the authors of this paper, criminal law expert senior advocate Lav Mainali argued that the moment when a police arrests an individual merely on the ground of information/Fir without investigating about the truthfulness about those information/FIR or without investigating relationship between such arrestee and the alleged information/FIR which ultimately leads to the wrongful conviction. The miscarriage of justice also can result from the error in interpretation of or execution of the laws by the courts violating due process, causing wrongful conviction to the innocent individual. The court also may cause the miscarriage of justice. The absence of judicial approach, non-application of judicial mind, non-consideration or improper consideration of material evidence and inconsistencies with faulty reasoning by the court may lead to the erroneous decision. See *Ayodhya Dube and Ors. vs Ram Sumer Singh*, AIR 1981 SC 1415.

Also, individuals are victimized of miscarriage of justice inside the prison. They might encounter the situation where they are locked behind the bar unjustifiably extended period of time than that of expected time in an offense or imprisoned sentence pronounced by the court.

See *Padammaya Gurung v. Office of PM and Council of Ministers and others*, Writ no. 071-WO-0512. 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 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.

See also *Thana Singh v. Central Bureau of Narcotics*, (2013) 2 SCC 590.

⁸ Contemporary Comment on paper 'Miscarriages-What is the problem?' A Just Result: Extra curial Inquiries and Unsafe Verdicts, the Institute of Criminology, the state Library of New South Wales, 28 October 1992, p. 74 available at <http://www.austlii.edu.au/au/journals/CICrimJust/1993/18.pdf?fbclid=IwAR32dnUYzAHsm4-EyqzThAmEy5r12pf29ISe93Gu8j3wSGOxfS50XjzhSeA>, accessed on 7 September 2021.

⁹ Law Commission of India, 2018, 'Wrongful Prosecution (Miscarriage of Justice): Legal Remedies', Report No. 277, p. 2 available at <https://lawcommissionofindia.nic.in/reports/Report277.pdf?fbclid=IwAR0qMbe8LCO2XuT6CyN3idfVcH2rhaWXrgKPJZpcIMNvvt0f2KX6x4jPj3o>, accessed on 8 September 2021.

¹⁰ Adrain, Hoel, 'Compensation for wrongful conviction', Trends and Issues in Crime and Criminal justice, *Australian Institute of Criminology*, no.356, May 2008, p.1.

¹¹ *Ibid*, p. 2.

conviction, which is a form of a miscarriage of justice. It is of no doubt that along with the wrongful conviction, the other forms of injustice also greatly impact the accused and they have unconditional rights of restitution or redress for the injustice. But this paper specifically deals with the issue of wrongful conviction and compensatory aspects to those innocent victims, since its gravity is higher compared to other forms of a miscarriage of justice.

Wrongful Conviction: A form of Miscarriage of Justice

Wrongful conviction is understood differently in different jurisdictions due to variations of practices and legislative arrangements.¹² In a strict sense, it is limited only to those cases where the individual who is factually innocent is convicted erroneously¹³ and in a broader sense, it includes any cases where the defendant who is previously convicted gets acquitted by showing any reasonable doubt in their guilt.¹⁴ These two conditions are termed factual innocence or material innocence¹⁵ and legal innocence or probatory innocence¹⁶.

Factual Innocence

Factual innocence implies the condition where the accused is convicted in the offense which they actually did not commit.¹⁷ They can be declared innocent in the offense after the discovery of new evidence. For example, if an actual person committing a crime confesses his/her guilt¹⁸ or the new DNA evidence is discovered¹⁹ clearly indicating

¹² Ibid, p.1.

¹³ Roach Kent and Sangha Bibi, 'Introduction to symposium on wrongful convictions', *Flinders Law Journal*, 2015, p.156, available at <http://classic.austlii.edu.au/au/journals/FlinLawJl/2015/5.pdf>, accessed on 3 October 2021.

¹⁴ Cassell Paul G, 'Overstating America's Wrongful Conviction Rate? Reassessing The Conventional Wisdom About The Prevalence Of Wrongful Convictions' *Arizona Law Review* Vol 60:815 p.819, available at <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1130&context=scholarship> , accessed on 29 September 2021.

¹⁵ Larry Laudan, 'The presumption of Innocence: Material or approbatory', *The X Annual Conference on Analytic Philosophy of Law*, 2005, p.8 available at <https://link.springer.com/content/pdf/10.1007/s10609-016-9281-8.pdf> , accessed on 29 September 2021.

¹⁶ Ibid.

¹⁷ Jennifer Gwynne Case, '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*, volume 50:2, 2008-09, p. -677-678.

¹⁸ *Khul Bahadur Kunwar v. Office of PM and Council of Ministers and others*, Writ no. 069-WO-1301. The applicant was Sargent (*bawoldar*) 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.

¹⁹ *State V. McCollum, 364 S.E.2d 112 (NC 1988)* In this case, two brothers Henry McCollum and Leon Brown were convicted of the rape and murder of an 11 year old girl, were coerced into confession and police

another person guilty in the alleged offence, exonerating the convicted individual. The factual innocence also includes the circumstance where the alleged crime in fact has not taken place, but such accused is charged and convicted on the false case²⁰. In some cases, an innocent individual may be convicted due to the misconduct of them council or ineffective lawyering. In all instances, such individual is found actually innocent suggesting wrongful conviction upon them.

Legal Innocence

In legal innocence, the individual is acquitted however; the court may not declare that such individual is innocent in the alleged offense explicitly. The defendant is acquitted on the basis of any reasonable doubt in an alleged charge or such individual is exempted from the charge due to insufficient evidence to secure a conviction. Such insufficiency may arise due to error in the collection of evidence or failure to maintain a chain of custody. Similarly, the evidence produced before the court may not be adequate to establish the guilt beyond a reasonable doubt. However, it is argued that these conditions do not suggest that such individuals did not commit the alleged crime but took advantage of the weak prosecution, reasonable doubt, procedural error, and statutory or substantive vacuum.²¹

But the authors in this paper believe that wrongful conviction should be dealt with broadly without differentiating factual and actual innocence or legal innocence and procedural error.

Factual v. Legal Innocence: An Important Discourse Within Wrongful Conviction to Compensate the Victims

With regards to defining innocence for ensuring the compensation, discussions were held with some Nepali experts. It was found that there are differing opinions among them on this issue. Supreme Court justice Hari Phuyal and Advocate Krishna Prasad Sapkota believed that the compensation must be provided to only factually innocent

fabricated evidence against them. Later, The North Carolina Actual Innocence Inquiry Commission an independent agency of USA investigated potential wrongful convictions in this case. The investigation tracked the evidence and conducted DNA test. DNA test then exonerated them reversing their conviction and implicated another man. It took thirty years for both of the brothers to set free.

²⁰ A person Chitra Bahadur Majhi from Okhaldhunga Nepal along with his two sons Kamal and Surendra were charged on the offense of Homicide against Gyan Bahadur Majhi. The police arrested them and filed case in Okhaldhunga District Court. The Court sent them to custody observing their involvement on the offense which was wrongly presented by the police. Surprisingly, the man who was thought to be dead returned back to the village after five months. Chitra Bahadur was tortured and forced to sign in the confession statement. Even it was later confirmed that the stick that police presented as an evidence as weapon in killing Gyan Bahadur Majhi had a chicken blood on it. The accused were wrongly convicted on false and fabricated case.

See: Central for Investigative Journalism, Nepal, 14 May 2016, available at <https://cijnepal.org.np/guilty-until-proven-innocent/?fbclid=IwAR0jzaJTxlMpJ9u707HU-PfEkeP-ynpMnD0bTarSXXL80j-3NeGGpQHrFs>, accessed on 29 September 2021.

²¹ Frederick McLellan Myles, Compensation for Wrongful Convictions and the Innocence Continuum, *Criminal Law Bulletin*, volume 52:2, 2016, p. 354.

individuals. They believed that the acquittal from the court does not indicate innocence because in many cases the evidence does not suffice to prove their guilt but there always remains a doubt of guilt. In such case, the defendants are released just on the basis of benefit of the doubt. Similarly, they argued that in the context of the Nepali judiciary, the acquittal rate is high. So it would be impractical to award compensation to everyone due to resource constraints. On the other hand, senior advocate Lav Mainali opined that the compensation must be provided to the acquitted individuals whether it is factual or legal innocence. The *prima facie* evidence of their innocence is the inability of the court to prove their guilt beyond a reasonable doubt. In such situation, the fact of their acquittal is more important than the reason for their acquittal. He also argued that it is the fundamental duty of the police and prosecutor not to file the charge haphazardly. Also, it is the duty of the lower courts to make a judgement with judicial mind and high prudence. If there is error, misconduct, negligence and malice on their part and the case cannot be established as per these grounds in the Supreme Court, its burden cannot be rested on the acquitted individuals showing impracticability and resource constraints as a reason. He emphasizes reforming the criminal justice system and enhancing the competency of the judiciary for minimizing the high rate of acquittal.

In discussing legal innocence, one major thing to be dealt with is about those cases where the defendant may have been acquitted on the basis of procedural injustice. Procedural injustice includes breaches in prevailing rules and procedures and violation of due process and human rights.²² For example, there can be a case where the evidence is enough to show the accused as guilty but the defendant gets exonerated due to serious error in procedures of a fair trial. The question about the compensation in such cases is very important. There is an argument that stating legal innocence would not suggest awarding compensatory damages in every legal gap. Rather compensation must be provided to only those cases where it can be proved that the legal error in the case is so grave that it could have altered the verdict of the case.²³ Discussing with authors of this paper in this particular issue, Senior Advocate Professor Rajit Bhakta Pradhananga argued that the compensation should not be awarded to the person who takes benefit from technical errors made by the prosecution and the court I.E. absence of jurisdiction, limitation, clear statutory arrangements, et cetera since it would not suggest accused's innocence. Senior advocate Professor Geeta Pathak and Advocate Madhav Basnet argued that the matter of procedural error must have a very critical discussion because some procedural aspects (for example: time-lapse, issues of jurisdiction and *locus standi*) may not make such big impact on the case but the fair trial rights like procedure of fair trial, right against torture, legal representation, et cetera can play a crucial role in the decision of the case. They argue that if the accused is tortured to get confession and generate evidence if s/he is not presented to the trial within 24 hours of arrest against Article 20 of the constitution of Nepal and if s/he is deprived of the council or legal representation, such accused must be compensated if these violations of fair trial rights result into conviction from the lower courts. Former Supreme Court Justice Pawan Kumar Ojha and senior advocate Lav Mainali on other hand maintained that the insurance of fair trial and procedural fairness is the duty of the court and the law professionals. If the law does not sentence in the charge which

²² Carrie Leonetti, 'The Innocence Checklist', *American Criminal Law Review*, volume 58:97, 2021, pp.107-108.

²³ *Ibid*, p.108.

is filed out of the court's jurisdiction, if the charge filed does not relate to the statute on the basis of which it was filed or the charge filed has out of the statutory limitation, and if the accused gets acquittal as per these grounds, s/he must be compensated even if it would suggest his/her involvement in the alleged charged. They argued that if the law does not criminalize and sentence in these offenses on the basis of said grounds, not providing compensation referring to these grounds cannot be regarded as rational because it is the duty of police, prosecutors, judges and defense attorney to observe these factors in the investigation, prosecution and preliminary and appellate hearings. Senior advocate Lav Mainali suggests that there can be some considerations in providing compensation to the accused whose involvement is seen in the acts from which the society suffers huge loss I.E. involving in mass killing by exploding bomb but not awarding compensation from the mistake of the investigating agencies and the courts in every case can become absurd.

The authors in this paper also believe that wrongful conviction should be dealt with broadly without differentiating factual/actual innocence or legal innocence/procedural error. Many countries have incorporated provisions stipulating factual innocence as the criteria to claim compensation after wrongful convictions²⁴. But compelling the wrongfully convicted individuals to prove their factual innocence even after acquittal from the court appears against the principle of presumption of innocence until proven guilty.²⁵ The core value of presumption of innocence is to protect the innocent and prevent wrongful conviction.²⁶ This principle applies from the moment of arrest till the end of the trial.²⁷ The European Court of Human Rights further supports this notion arguing that this principle excludes the expression of suspicion over the individuals after the acquittal from the court and declared guilty by the state agents prior to the trial.²⁸ Hence after the acquittal from the court though by the reason of legal innocence, the person so acquitted is clearly innocent as equivalent to the factually innocent. New York, Canada, and Scotland also have legal provisions to provide compensation to not only factually innocent persons but to the legal innocents also.

In almost every jurisdiction of the criminal justice system, either an individual is guilty or they are non-guilty.²⁹ But the requirement of factual innocence, however, demands proof of innocence even after acquittal from the charge suggesting not guilty to that individual. Nonetheless, whenever the defendant is acquitted in the charge on the basis that the evidence produced before the court is not beyond reasonable doubt which led to the termination of the charge against them, such defendant/accused should be

²⁴ See *Code of District of Columbia*, Chap-16, Sec.802, On sealing of Criminal records on grounds of actual innocence has a provision that mentions that 'a person arrested for a charge with the commission of a criminal offense pursuant to the District of Columbia Official Code or the District of Columbia Municipal Regulations whose prosecution has been terminated without conviction may file a motion with the Clerk at any time to seal all of the records of the arrest and related court proceedings on grounds of actual innocence/ factual innocence'.

²⁵ Myles (n 21); For the detail acquaintance about the presumption of innocence and material or probatory innocence, see pp. 357- 362.

²⁶ Elies Van Slidregt, 'A contemporary reflection on the presumption of innocence', *International Review of Penal Law*, volume 80, 2009.

²⁷ Myles (n 21).

²⁸ Ibid, p.359.

²⁹ Ibid, p.353.

presumed to have met the criteria of factual innocence.³⁰ In state party cases, the principle of burden to prove the charge beyond a reasonable doubt is rested on the prosecution. It has the greatest significance for ensuring fair trials in the criminal justice system. This burden is been rested upon prosecution since the prosecution represents the state party and the state is more powerful to collect evidence. But when this burden is shifted to a wrongfully convicted individual in the process of claiming compensation even after their acquittal, it would result in a high chance of power imbalance and unjust condition to their since if an individual may not be able to produce new evidence after the long lapse of the time of the crime as there might be the chance that the shreds of evidence could be depleted, lost, contaminated or fabricated. Hence creating a requirement of meeting the threshold of factual innocence places undue and normative burden upon the wrongfully convicted individual.³¹ Besides this, an important question that can be raised is, 'how many times should an individual be declared innocent even after being acquitted from the charge?' Similarly, mechanisms establishing such factual innocence are not built in the criminal justice system.³² So not recognizing his/her innocence even after they are being acquitted from the charge, (suggesting their innocence) is just an excuse to be exempted from the obligation to compensation and redressal and limiting their right to obtain compensation³³.

Factors leading to Wrongful Convictions

There can be one or multiple factors responsible for causing wrongful conviction. In a broad frame, those causes leading to wrongful Conviction can be categorized as individual and systemic.³⁴ Individual causes include those originating from the defendant's own attribution in whole or part i.e. voluntary false confession and plea bargaining. False confession is an admission to the crime in question by the accused who in fact did not commit the crime.³⁵ Such false confessions may be voluntary or involuntary in nature. People may confess to the crime involuntarily due to duress, coercion or false representation. However, some people confess to the crime without coercion by their own will, making a voluntary false confession.³⁶ Voluntary false confessions may be a result of mental illness³⁷ such as schizophrenia, desire to achieve of notoriety,³⁸ making a false description of the case to get compensated, an inability to distinguish between fantasy and reality on the pathologist need for acceptance on

³⁰ Ibid, p.346.

³¹ Ibid.

³² Ibid, p.346.

³³ Ibid.

³⁴ Hoel (n 10), p. 3.

³⁵ Leo Richard A., 'False Confessions: Causes, Consequences and Implication' Vol. 37, Number 3, 2009, p.333.

³⁶ Ibid, p.338 on Voluntary Confession as one of that is offered in the absence of police interrogation. It is explained by the internal psychological states of needs of the confessor or by external pressure brought to bear on the confessor by someone other than the police.

³⁷ Hoel (n 10), p. 4.

³⁸ Rachel Dioso-Villa et al, 'Investigation to Exoneration: A systemic Review of Wrongful Conviction in Australia', *Griffith University*, Queensland, Australia, volume 28:2, 2016, p.163.

self-punishment³⁹. Along with the voluntary false confession, another example of plea bargaining also can be taken as the individual cause to result in the wrongful conviction. In a process of plea bargaining, the state grants sentencing and other concessions for guilty pleas in criminal cases⁴⁰. But for an innocent person or the person who does not know the criminal justice system, s/he may find it best to accept other than to protest against the alleged charge in which s/he is not involved, to avoid distressing investigation and lengthy trial. The accused also can take such pleas if s/he sees no chance other than to confess under some specific circumstances. For example, s/he might do so due to fear of the death penalty or imprisonment till life in case of conviction if s/he does not make plea bargaining. So plea bargaining may create in defendants minds that it could be an escape route to get less punishment. Therefore, they accept to admit to what has not happened.⁴¹

The systemic cause on another hand are those causes that originates from misconduct or negligence of agents⁴² such as police, prosecution, defense attorney, experts etc. within the criminal justice system. The systemic cause includes eyewitness misidentification⁴³, false, misleading or improper forensic sciences⁴⁴, false confessions or admissions through torture, coercive interrogation, and psychological technique⁴⁵, informants or snitches, bad lawyering such as faulty legal representation and ineffective assistance of defense lawyer,⁴⁶ faulty circumstantial evidence⁴⁷, perjury or false accusation⁴⁸, official

³⁹ Richard A. Leo, 'False Confessions: Causes, Consequences and Implication' Vol. 37, Number 3, 2009, p.338.

⁴⁰ Rhodes, William M., 'Plea Bargaining: It's Effect on Sentencing and Convictions in the District of Columbia', *Journal of Criminal Law and Criminology*, vol. 70, Issue 3 Fall, art.5. p. 360.

⁴¹ Roberts, Paul Craig, 'The Causes of Wrongful Conviction?', *The Independent Review*, v. VII, n.4, spring 2003, ISSN 1086-1653, p. 572.

⁴² In the case of *Rajendra Maharjan and others v. Government of Nepal, NKP, 2063, DN. 7788* where Rajendra Maharjan was wrongfully convicted by District Court and High Court on the offense of homicide with life imprisonment sentence. Rajendra was believed but not confirmed to be Chaku Maharjan, against whom the case was register for the death of Prem Awale, on the grounds of FIR filed by the deceased's mother. Rajendra from the beginning had pleaded innocence and said that he was not Chaku Maharjan but the court did not take notice on it. The case went to the Supreme Court and the court acquitted Rajendra finding that he was falsely accused in the offense. The Supreme Court Establishing the precedent said that the courts must adjudicate any issue on the basis of factual and objective evidences presented on behalf of plaintiff and defendant. The Court cannot come forward and give its verdict going beyond the factual evidence. In an offense of homicide which is of heinous nature, the prosecution should file the charge only after completing all the required procedure to establish the charge.

⁴³ *Randall Dale ADAMS, v. The STATE of Texas*, No. 60037. Court of Criminal Appeals of Texas, En Banc, 31 January 1979.

⁴⁴ *State of Mont. v. Gilbam*, 932 F. Supp. 1215 (D. Mont. 1996).

⁴⁵ *Lowery v. County of Riley*, Case No. 04-3101-JTM (D. Kan. Sep. 15, 2006).

⁴⁶ Faridi, Mohammad et al., 'Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals' *Western New England Law Review*, Vol. 34, Issue 1, art.2, p. 4.

⁴⁷ Blum, Binyamin, 'Evidence Law: Convictions Based on Circumstantial Evidence', *The Judges' Book*, Article.11, vol.3 regarding false Circumstances for wrongful conviction, First See: Circumstances evidence proves other facts from which one may infer the existence of material elements. Example: When an eye witness provides testimony that s/he saw the person in the crime scene with the gun infer the person shoot the victim but circumstantial evidence witness testimony's says that the defendant was seen fleeing away from the crime scene shortly after she heard gunshot.

⁴⁸ Rachel Dioso- Villa et al, 'Investigation to Exoneration: A systemic Review of Wrongful Conviction in Australia', *Griffith University, Queensland, Australia*, Vol.28, Number 2, 2016, p.163. Also, See: Case of Chitra Bahadur Majhi of Okhaldhunga.

or government misconduct⁴⁹ overzealousness to secure a conviction by the prosecutor, non-compliance with the principle of Brady⁵⁰, generating and presenting false evidence by police and prosecutor respectively, failure to properly examine those evidence by the judges, the effects of the media tainting, tunnel vision⁵¹ towards the suspects, social group discrimination⁵² (racial prejudice and stereotypes influencing judges to wrongly convict minority defendants)⁵³, bias on the basis of a previous criminal record by the judges⁵⁴, plea bargaining (systemic)⁵⁵ and legislative arrangements to confer reward for the law enforcement agency such as police for investigation resulting in successful conviction in specific types of cases.⁵⁶ These one or multiple causes as observed above might result in wrongful convictions causing grave injustice and suffering to innocent individuals.⁵⁷

⁴⁹ Gross, Samuel R. 'Government Misconduct and Convicting the Innocent The Role of Prosecutor, Police and other Law Enforcement', *National Registry of Exoneration*, September 1, 2020, Official Misconduct is defined as perjury of law enforcement official or forensic fraud through prosecutor, police officer, forensic analyst or child welfare worker who violated an official duty in the investigation or prosecution and that violation contributed to the conviction of a defendant who was later exonerated.

⁵⁰ US Supreme Court in in Brady v. Maryland case 1963, realized that if there is the evidence that disproves the accusation made to the accused or that exonerates the innocent proving the innocence of the defendant should, it must be disclosed by the prosecutor. Wrongful conviction occurs sometimes when the prosecutor does not disclose the exculpatory evidence, causing conviction to the innocent person.

⁵¹ Hoel (n 10), p. 4; See also - Cutler Brian L., 'Conviction of the Innocent: Lessons from Psychological Research', *Wisconsin University of Law School*, Chapter-14, Findley Keith A., Tunnel Vision, 2014 p.1. Tunnel vision is understood as "compendium of common heuristics and logical fallacies which focus a suspect in building the case for conviction in such a way by selecting the lens of observing and evaluating the condition and filter it in a way that evidence that points away the guilt is ignored. Also. See: Steven Avery case where Avery was convicted of a brutal rape despite strong alibi evidence and even though the true perpetrator, who should have been a prime suspect was well known to police and prosecutors. The tunnel vision in this case prevented from considering alternative theories about the crime. Later on, through DNA exoneration Avery was acquitted in 2003 proving his innocence.

⁵² Clow Kimberley A. & Ricciardelli. Rose, 'Causes of Wrongful Conviction: Looking at Student Knowledge' *Criminal Justice Education*, March 2008 DOI: 10.1080/10511250801892979 p. 12.

⁵³ Hoston, William T., et al. "Wrongfully Convicted, Rightfully Exonerated: The Lives of Cornelius Dupree Jr. and Anthony Massingill." *Journal of Pan African Studies*, vol. 10, no. 5, July 2017, pp. 3, 15.

⁵⁴ Huff, Ronald C., 'Guilty Until Proved Innocent: Wrongful Conviction and Public Policy' *Crime and Delinquency*, 1 October 1986, DOI: 0.1177/0011128786032004007.

⁵⁵ Roberts, Paul Craig, 'The Causes of Wrongful Conviction', *The Independent Review*, v. VII, n.4, Spring 2003, ISSN 1086-1653p. 572. Prosecutor can force plea to elevate their conviction rate by raising the number and seriousness of the charges to the defendant. Also the defense counsel sometimes suggest the defendant to plea bargain at the conviction at trail that reduce the charges of punishment when it is taken.

⁵⁶ Reward as a causes of wrongful conviction. In Nepal, the Money Laundering Prevention Act, 2063 has a provision of reward to the person who may be given an amount equal to ten percent of the amount claimed or one million rupees whichever is lesser as reward if the person has made a complaint against an offence under the Act. Such provision can be sometimes abused in greed of obtaining money, as a result the innocent individuals might be investigated with mal intent resulting wrongful conviction.

⁵⁷ Davis, Deborah, 'From False Confession to Wrongful Conviction: Seven Psychological Processes', the *Journal of Psychiatry & Law*, Jan. 2009, DOI: 10.1177/009318531003800103. In this article the Author Deborah Davis has extensively dealt on the causes of wrongful conviction. Analyzing, false confession from the seven psychological processes which are (i) misleading specialized knowledge (2) tunnel vision and confirmation biases, (3) motivational biases, (4) emotional influences on thinking and behavior; (5) institutional influences on evidence production and decision making; and inadequate context for evaluation of claims of innocence, including (6) inadequate or incorrect relevant knowledge, and (7) progressively constricting relevant evidence. The Author has took reference from the Norfolk Four case indicating how multiple causes established in chain can result in false confession. This case has been compared with that of Salem Witch Trails 1692 Massachusetts in America.

What the Innocent Victims should encounter as a result of Wrongful Conviction

The individuals wrongfully convicted and punished have their liberty and rights snatched away without just cause. Their pain, suffering, humiliation, sense of betrayal, demotivation are beyond imagination. One cannot think about the catastrophe of wrongfully convicted and punished, who is locked and confined behind bars: losing his/her productive and energetic time and spending their time among the notorious criminals, defending their innocence. Most importantly, they are hunted by the fact each moment that they were victimized on the charge which they did not commit. So they endure psychological dysfunction, physical harm and social disengagement and stigmatization/hostility by the members of the society as a criminal. In the detention centers during the investigation, they might be inflicted to torture in the name of obtaining confession by the investigating authority, since they refuse the charge against them defending their innocence. Inside the prison, they, like the guilty prisoners might encounter prison violence and abuse.⁵⁸ Along with the physical sufferings, they are greatly impacted in their emotional status and are unable to reintegrate into society after their release from the prisons. Most of them show serious psychiatric morbidity and display symptoms of disorders including post-traumatic stress disorder. Mostly they encounter feelings of bitterness, loss, threat, paranoia, and hopelessness.⁵⁹ They might be compelled to develop aggressive behavior while attempting to suppress their pain, suffering, and humiliation and develop coping mechanisms for that situation. In prison, they remain with the notorious criminals. Since those criminals might have the nature to glorify their crime, they do not believe the stories of innocence of the wrongfully convicted innocent individuals and might treat them disrespectfully.⁶⁰ Consequently, the wrongfully convicted individuals find protest of innocence against their best interest because they feel isolated among the guilty criminals, which force them to convert into notoriety.⁶¹ They might develop aggressive behavior and negative thoughts for assimilation in the prison environment and earn respect there. They might develop an attitude of anger and revenge and act accordingly after the release from the prison against the state and society which victimized them. So there might

Also, during the interview The Deputy Attorney General Padam Prasad Pandey had stated that wrongful conviction also occurs in Nepal because of nature of the prosecutors not to avoid prosecuting each and every cases pressures groups and organization function as the catalyst in registering fake case. Similarly, media trial and confession in police custody is responsible to result wrongful conviction. Lack of scientific advancement in DNA and other materials to establish evidences also appears as the reason of having the higher rate of Wrongful Conviction in our country.

⁵⁸ Clow, K.A., Leach, A-M, & Ricciardelli, R. (2011). Life after wrongful conviction and In B.L. Cutler's (Ed.) Conviction of the Innocent: Lessons from Psychological Research (pp. 327-341). Washington: APA Books.

Case of Shiva Poudel: Poudel was detained on an accusation of murder of Sanjaya Lama was attacked on December 6, 2011. HE was kept in judicial custody at Chitwan Prison. He was critically injured in an attack by a group of UML-affiliated Youth Association Nepal Cadres, in custody of Bharatpur Jail who died while undergoing treatment at Neuro Hospital, Bansbari, and Kathmandu. See The Kathmandu Post: "Tarun dal leader murder: 14 convicted, 8 get life imprisonment" Publ. 4 April 2014 available at <https://kathmandupost.com/national/2014/04/04/tarun-dal-leader-murder-14-convicted-8-get-life-imprisonment> accessed on 13 December 2021.

⁵⁹ Hoel (n 10), p. 4, para. 3.

⁶⁰ Ibid, para. 5 .

⁶¹ Ibid.

be the chance of turning those individuals in recidivists after the release from the prisons.⁶² Similarly, release from the prison after the exoneration does not end their catastrophe there. The consequences for the innocent are life-lasting.⁶³ Even after they are released from prison, they might be unable to adapt to normal life and maintain the social relationship.⁶⁴ ‘Wrongful convictions can ruin lives, destroy careers, cause the separation of families, cause marriage breakups, and involve permanent and ongoing forms of stigma to victims and their families that can be felt long after wrongful convictions have been overturned.’⁶⁵ Conviction and punishment against wrongfully convicted individuals appear as the scarlet letter on their forehead. They lose their former identity; they are identified by the society such as the prisoner, rapist, and murderer.⁶⁶ Even though they have their conviction quashed, the members of society including the victims of crime are prejudicial and have the discriminatory attitudes against them.⁶⁷ They face reluctance in recruiting for employment, they might be deprived of the social services, and having their arrest record, they might be regarded as unqualified to perform the legal rights and obligations by the state and society.

Why should the Victim be compensated by the State?

When the wrongly convicted and sentenced individuals are released from prison, nothing remains in their hands. They have already lost opportunities of earnings, personal relationships, physical and mental health and confidence. They need to start their life from the emptiness in their hands. In such a situation, on the basis of moral obligations, obligation of human rights and principles of justice, there is no other alternative to provide compensation to assist for their rehabilitation and restoration of normal life. However, whenever the claim of compensation is raised by the victims, they are re-victimized by the state when they are observed as guilty even though their conviction is quashed on the basis of credible evidence. The state agents instead of redressing the wrongfully convicted innocent individuals for the grave injustice defend their wrongful actions ignoring their catastrophes.⁶⁸ The state rejects their claims for compensation taking the support of factual innocence. This unjustly compels the innocent victims to book long and unpredictable court proceedings to prove their innocence to obtain compensation.⁶⁹ They need to be worried for the fees incurred to hire an attorney for their court proceedings without anything in their hand. ‘But those victims want the government and its agents to take responsibility for the errors that led to their wrongful convictions. This responsibility includes both an apology and

⁶² Ibid.

⁶³ Wrongful Prosecution a Miscarriage of Justice: Need for procedural reforms in Pakistan

⁶⁴ Hoel (n 10), p. 4.

⁶⁵ Naughton, *Criminologizing Wrongful Convictions* 2003; 2007: Chap. 8.

⁶⁶ Hoel (n 10), p. 61.

⁶⁷ Kerry M. Karaffa, Jaimie, and Julie M. Koch, *Perceptions of Exonerees’ Compensating the Innocent, Deservingness to Receive Financial Compensation for Wrongful Convictions*, Criminal Justice Policy Review, SAGE Publications, published on 2015, p. 2., DOI: 10.1177/0887403415607049.

⁶⁸ Ricciardelli, Rose et.al, ‘Now I See it for What it really is: The Impact of Participation in an Innocence Project Practicum on Criminology Students’. pp. 2, 3.

⁶⁹ Myles (n 21), p. 348.

compensation for the myriad of losses that imprisonment caused.⁷⁰

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 entities⁷¹. Recognizing such state responsibility, the United Nations Human Rights Committee, a treaty body under the ICCPR, optional protocol I (which functions for the complaint mechanism) in its opinion in deciding the communication filed by Michel Dumont has prescribed the state to provide compensation for the wrongfully convicted victims pointing out the liability of the Canadian government.⁷² In every democratic society, the government is viewed as an accountable and responsible towards its citizens. Similarly, the social contract theory⁷³ also demands the state as the protector of individual rights. The state should also protect victims in case they are victimized by its actions or systemic failures. So, the victims of wrongful conviction have their legitimate requirement of compensation to restore their life status quo and recovery from the damages and sufferings. It is true that the harms/wrong caused against those individuals cannot be undone and a monetary award cannot restore lost years, lost livelihoods, lost opportunities, and lost relationships. However, there is symbolic importance attached to a societal acknowledgement of responsibility for the suffering caused by a wrongful conviction.⁷⁴ Indemnifying them with the compensation at least can assist to rebuild their life ahead along with acknowledgement from the part of the state and taking the responsibility in the error/systemic failures.⁷⁵ The

⁷⁰ Ibid, p. 349.

⁷¹ See *O'Neil v. State Case* where the Ohio Supreme Court provided the judgment that “the legislature and legal system have a responsibility to admit the mistake and diligently attempt to make the person as whole as is possible where the person has been deprived of his freedom and forced to live with criminals. Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime.”; Also, See Deborah M. Mostaghel, ‘Wrongfully Incarcerated, Randomly Compensated - How to Fund Wrongful-Conviction Compensation Statutes’, *Indiana Law Review*, vol. 44:503, 2011, p. 5,10.

⁷² UNHRC, Communication No 1467/2006, UN Doc CCPR/C/98/D/1467/2006
Dumont, a Canadian national was wrongly convicted in sexual offense in 1992 and served 34 months in prison before he was released. His conviction was quashed and he was acquitted from the charge in 2001 by the Canadian Québec Court of Appeal. Canadian Federal/Provincial/Territorial Guidelines had some compensatory provisions for the wrongfully convicted individuals. However, Dumont was not entitled for the compensation even though appealing in various Canadian authorities. In 2010, He brought a claim to the United Nations Human Rights Committee accusing Canada violating its obligation to compensate him under Article 14, 6 of the ICCPR. The respondent Canadian government argued that the applicant had never been proven innocent of the crime in question and was thus not eligible for compensation because the victim in the offense had the doubt as to whether or not the applicant was the perpetrator, therefore the court concluded that the victim’s statements gave rise to a reasonable doubt in regards to his guilt leading to his acquittal, but the court did not rule on his innocence. The human rights committee in its opinion prescribed the Canadian government to provide an effective remedy to Dumont in the form of adequate compensation – as well as ensuring that “similar violations do not occur in future.” See para 25. Similarly, the committee required that the State party provide evidence about the measures taken within 180 days. See para 26.

⁷³ Dushi, Desara, ‘Social Contract and the Government Legitimacy’, *Mediterranean Journal of Social Sciences*, Nov, 2015, p. 393.

⁷⁴ Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice? KATHRYN M. CAMPBELL, MANITOBA LAW JOURNAL | VOLUME 42 ISSUE 3, p. 267.

⁷⁵ Kerry M. Karaffa, Jaimie, and Julie M. Koch, Perceptions of Exonerees’ Compensating the Innocent, Deservingness to Receive Financial Compensation for Wrongful Convictions , *Criminal Justice Policy Review*, SAGE Publications, published on 2015, p. 2., DOI: 10.1177/0887403415607049.

concept of compensation basically relates to the principle of tortious liability. The aim of tort is to award damages to make the victim whole again restoring him/her in the position on prior to the wrong done making the effect that the wrong never occurred, or not leaving him/her in worse as the result of his/her injury to the person, property, economic interest, or rights than the plaintiff would have been in otherwise.⁷⁶ In case of wrongful conviction, the wrong is done by the state and injury is inflicted to the wrongfully convicted individual, thus the state has a tortious liability to pay damages to those individuals to their damage. The state must pay pecuniary and non-pecuniary damages for all the injury caused by it to the individual.⁷⁷

As per the corrective justice theory, the state has a moral obligation to restore and rebuilt the life of the wrongfully convicted individuals ensuring remedy, relief, and rehabilitation. If the victim loses his/her right, the state has a burden to restore his/her right. If the state injures its citizens by its misconduct, negligence, or malice, it must repair and recover their loss. The wrongfully convicted individuals have the right to obtain compensation from the state which victimized them and the state has the duty to satisfy them.⁷⁸ For the legitimate presence of the government among its citizens, it must be willing to rectify its errors. As the government wants its citizens to be responsible and law abiding people, if it is unwilling to take responsibility of its mistake, it cannot expect them to become responsible in their actions. If the government seeks excuses to correct error and misconduct, the citizens also have reasons to believe that their mistakes and misconduct can also be excused.⁷⁹ Any government to appear as the legitimate sovereignty should take responsibility of the systemic error and take measures to correct the damage. Compensating the wrongfully convicted individuals also enhances credibility in the justice system. If any individual is punished based on of wrongful conviction followed by subsequent imprisonment, it is natural that the public lose faith in the criminal justice system when the wrongfully convicted individual are released from the prison after exoneration and if the government is unwilling to restore their right and recover the damages⁸⁰ and they might turn hostile and non-cooperative towards the government due to fear of being entrapped in the ravaged system and doubt the performance of police, prosecutor, and court system ultimately having distrust in the credibility of the criminal justice system itself.⁸¹ When an innocent person is deprived of liberty from wrongful conviction, the government has a responsibility to do all to foster that person's re-entry in order to help restore some sense of justice- to which fair compensation is a part of it.⁸²

Compensating wrongfully convicted and punished individuals is also the obligation

⁷⁶ Alanna Trivelli, 'Compensating the wrongfully convicted: A proposal to make victims of wrongful incarceration whole again', *Richmond Journal of Law and the Public Interest*, 2016, volume 9:3, p. 267, published on 2016, available at <http://scholarship.richmond.edu/jolpi/vol19/iss3/7>, accessed on 29 September 2021.

⁷⁷ Ibid.

⁷⁸ Ibid, p.270-271.

⁷⁹ Ibid, p.281.

⁸⁰ Campbell, Kathryn M. 'Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice?' *Manitoba Law Journal*, Vol. 42, Issue 3, p. 255.

⁸¹ Ibid, p.254.

⁸² Scott Rodd, 'What Do States Owe People Who are Wrongfully Convicted?' *Justice & Business of Government*, Pew, Stateline, March 14, 2017.

under human rights instruments for a country like Nepal. Nepal is the signatory party of the International Covenant on Civil and Political Rights (ICCPR). Covering the broad issues of a miscarriage of justice, ICCPR Article 9 confers the victim of unlawful arrest or detention an enforceable right to compensation.⁸³ Particularly addressing the victims of wrongful conviction, Article 14 of ICCPR enshrines that if a person is convicted by a final decision and his/her conviction subsequently is reversed or s/he obtains pardon on the ground of new or newly discovered fact conclusively showing there is a miscarriage of justice, such person suffering punishment by the conviction shall be compensated according to law unless it is proved that the nondisclosure of unknown fact in that time is wholly or partly attributable to him/her.⁸⁴ Since Nepal has not made any reservations in provisions of ICCPR, it has binding obligation to comply with it.⁸⁵ Nepal has the obligation to protect, promote and respect the compensatory rights of the wrongfully convicted individuals. During the interview for this paper, Supreme Court justice Hari Phuyal stressed about state's responsibility in providing compensation to the victims of wrongful conviction. He stated that as Nepal has adopted the principle of justice with compensation in article 21, 2 of the constitution, the state's obligation to ensure justice with compensation can be taken as the basis of entitling compensatory damages, though this is related for the victims of crime. Similarly, Advocate Madhav Basnet in the interview stated that the state is responsible for providing compensation for two reasons: the first is since the state acts as a parent for every citizen of its country, so it has the duty to protect the victim. The second is as the wrongful conviction is the result of gross negligence and incapability of state actors, the state is liable to compensate the wrongfully convicted individuals to rectify its errors.

Overview of Nepalese Context on Wrongful Conviction and compensation:

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. Notably, the example of wrongful conviction followed by imprisonment of a police constable Madan Narayan Shrestha⁸⁶ in the offense of rape and murder of women drew large attention after his acquittal from the Supreme Court. The famous example of wrongful conviction in the Nepali legal arena is of a Nepali citizen Govinda Mainali working in Japan as an immigrant, who was wrongly convicted and acquitted from the Tokyo High Court sentencing 15 years in prison. The compensatory award to him is specially referred for the remedy to the wrongly

⁸³ International Covenant on Civil and Political Rights, art.9, para.5.

⁸⁴ Ibid, art.14, para. 6.

⁸⁵ *Treaty Act of Nepal 2047(1990)*, p. 9.

⁸⁶ *Madan Narayan v. Office of PM and Council of Ministers and others*, D. 10069, vol.8, 2075 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.

convicted individuals.⁸⁷ Similarly, recently, the case of Durga Prasad Subedi⁸⁸ gathered larger attention hugely questioning the Fair Hearing in the Indian criminal justice system.

The above discussion was in the part that studied the cases that have been wrongfully convicted which has gained popularity because they possess huge question on how the sacrifices, the wrongfully convicted individuals have been through can be sufficed. Also, the cases that have made the realization of an urgent requirement to make laws related to compensation where the Supreme Court has provided its decisions are studied above.

As there is no exact figure of wrongful conviction in the context of Nepal, the table below might help to understand cases of acquittals to indicate wrong conviction to the accused in the district and high (then appellate) courts and release from the supreme court. These cases have been taken as a sample referring for the time interval of ten years (2067-2077).

⁸⁷ Govinda Mainali was wrongfully convicted in December 2000 in the offense of rape and murder of Yasuko Watanabe in March 8, 1997. Watanabe used to work by night as a prostitute and used to work by day as a respected economist for the Tokyo Electric Power Company. The dead body of Yasuko Watanabe was found on March 19, 1997 with strangled condition in an apartment, which she had used for her sexual liaisons. Mainali was an immigrant in Japan. He had been arrested on March 23, 1997 for over-staying his work visa. He used to live with his Nepali friends in an apartment of the building, where Watanabe was murdered. Mainali admitted to police investigators that he had payed Watanabe twice to have sex with him. But in connection to the offense, he said that he had not seen her for days prior to her rape and murder, and there were no witnesses to claim his statement otherwise. Mainali was charged with murder of Yasuko Watanabe. He was acquitted in April 2000 by the Tokyo District Court based on the judge's finding there was no credible evidence of his guilt. In December 2000 the Tokyo High Court reversed acquittal and sentenced him to life in prison. Japan's Supreme Court rejected his appeal on October 22, 2003. In March 2005 Mainali filed a new appeal seeking a retrial. But it was denied. On July 21, 2011 the Japanese newspaper Yomiuri Shimbun reported that the prosecution had secretly conducted DNA testing of crime scene evidence. DNA testing of semen recovered from Watanabe's vagina excluded Mainali as the source. Along with not matching the semen's DNA, the report also noted that the DNA of a pubic hair recovered from the crime scene, DNA of a blood stain on the Burberry coat worn by Watanabe, and DNA of saliva found on the victim's chest also excluded Mainali as the source. Five days later, on July 26, Mainali filed a petition for a retrial with the Tokyo High Court based on the fact that the prosecution had never disclosed that semen had been recovered, and that the prosecution's secret tests conclusively excluded him as the man who raped and murdered her. After the petition, prosecutors disclosed in September 2011 that Mainali's trial lawyers had not been provided evidence that his blood type B did not match the type O blood of saliva found on Watanabe's breast. Based on the new DNA and blood evidence the High Court set-aside Mainali's conviction and ordered a new trial on June 7, 2012. The presiding High Court Judge Shoji Ogawa stated, "Suspicion has arisen that another person might have murdered the woman and it is assumed a guilty ruling would not have been handed down if the results of this analysis had been presented in the trial." Mainali was released from prison about 3p.m. that same day and transferred to a detention facility, since he had overstayed his visa and thus was in Japan illegally. On June 16, 2012 Mainali was flown to Kathmandu, Nepal after spending 15 years in prison and being away from home for 18 years. On October 30, 2012 the Tokyo High Court declared after a retrial that Mainali was not guilty. Exoneration of "Govinda Mainali was abnormal in Japan, which has a 99.8% conviction rate. After the acquittal, he sought for 68 million Japanese ¥ (\$790,000) for wrongly convicting and sentencing him. The Tokyo District Court endorsed paying about ¥68 million in compensation to him." See: <http://forejustice.org/db/Mainali-Govinda-Prasad-.html> also, see: <https://jiadep.org/Govinda.html>.

⁸⁸ Durga Prasad Subedi, a Nepali citizen from Illam spent 40 years of his life in prison without Fair Hearing who was wrongfully convicted for the case of murder. Chief Justice Prakash Srivastav and Rajashri Bhardwaj of West Bangal High Court has ordered West Bangal government to compensate IC 5 Lakh within 6 weeks of the order. See https://deshsanchar.com/2021/12/09/588131/?fbclid=IwAR3s5hV05ZvYPH5JXUaNesYyDu0WKI8C8BIITrgsitZjk5Pm49kP7_6Rhzg, accessed on 27 Mangsir.

NKP	Decision no.	About the case
2067	8525	<p>https://nkp.gov.np/full_detail/3379?fbclid=IwAR2dIAuSG_ViMKVlyj_vk--kjBipSCEsnmJEfQL7usnkW_DIYjG0F8YqXQs Case: Murder</p> <p>Reasons: An after-thought FIR or complaint does not seem to be considered as a high level of evidence in the spirit of evaluation of evidence and even the statements made to prove such a complaint should be viewed accordingly.</p>
2068	8568	<p>https://nkp.gov.np/full_detail/136?fbclid=IwAR3Emt_PETyJvDnNKVL23e_HdFFFITeKyY4n26fDrNgz_Y1cuiPODOmWt5HQ Case: Murder</p> <p>Reasons: Assumptions, suspicions and possibilities are uncertain elements, so such uncertain elements cannot take the place of evidence confirming death. (The guilt must be proven beyond reasonable doubt with enough evidence)</p>
2068	8723	<p>https://nkp.gov.np/full_detail/860?fbclid=IwAR0Qb39wuTDXxWXXmYggkQz0Orl_gaBEHN-EQLq8F1D5uq6UMkXn3BLMks8 Case: Attempt to murder</p> <p>Reason: The attempt to mass suicide cannot be considered as attempt to murder.</p>
2069	8760	<p>https://nkp.gov.np/full_detail/252?fbclid=IwAR0ZYEQ8CsJVUN0i01BrDRn5cu6RgoTpnfhkosETSLDwEYGMRU1bum8x01Y Case: Murder</p> <p>Reason: Weak police investigation. The court stated that “The sole purpose of the judge should be motivated by the idea that no one should be subjected to injustice, that the guilty should not be acquitted, and that the happy life of the innocent should not be spent in the confinement of the prison. Encouraging the practice of convicting of heinous crimes such as murder by giving rise to the evidence of empty imagination will, sacrifice justice on the altar of weak investigation instead of disrupting the judicial path.</p>
2070	8955	<p>https://nkp.gov.np/full_detail/395?fbclid=IwAR3gFdZAiETD28KTr4RHr3m6b7QOZg7Fj5FFBADtp24d4FDow8g4yNSnfYc Case: Murder</p> <p>Reason: The causes of death is not the acid attack rather it is due to some side effects of the medicines used in medical operation. In such case, it is irrational, unjustifiable and unlawful to connect the incident of acid attack to the death of the person.</p>
2071	9153	<p>https://nkp.gov.np/full_detail/54 Case: Murder</p> <p>Reason: Circumstantial evidence should also prove the guilt of the accused in a concrete and unambiguous manner and override the belief that the accused gets the benefit of the doubt. Conjecture and suspicion should not be termed as circumstantial evidence.</p>

2071	9268	<p>https://nkp.gov.np/full_detail/8070 Case: Weapons and ammunitions Reason: In serious crimes like criminal offenses, the culprit has to be retained only on the basis of factual and solid evidence. In the absence of factual and solid evidence, it would be contrary to the spirit and letter of the principle of criminal justice to accuse a person just because of the allegation made by the co-accused to conduct a on the ground that it has not been confirmed.</p>
2072	9385	<p>https://nkp.gov.np/full_detail/8428 Case: Murder Reasons: There is no direct evidence against the defendants. The reason for the killing has not come without any doubt. Accusations against defendants in criminal cases must be substantiated by solid, indisputable and unquestioning evidence.</p>
2073	N/A	N/A
2074	9844	<p>https://nkp.gov.np/full_detail/8895 Case: Murder , Attempt to murder Reasons: The accused is not criminally responsible if his unlawful act was the product or mental disease of mental defect</p>
2075	10051	<p>https://nkp.gov.np/full_detail/9103 (Madan Narayan Shrestha) Case: Rape and murder Reason: Torture and other cruel, inhuman or degrading treatment of any person is contrary to the accepted principles of criminal law and a violation of justice. The evidence given to the authorized officer during the investigation was not voluntary but was subjected to extreme torture under physical and mental pressure.</p>
2075	10118	<p>https://nkp.gov.np/full_detail/9170 (Nurbu né Yangchain Tamang) Case: Human Trafficking Reasons: This obligation of the plaintiff is not limited or terminated by the fact that the legislative law has shifted the burden of proving its innocence on the defendant. In this case, the plaintiffs, in their indictment based on their own investigation, state that the acts of the defendant are a criminal act which is prohibited by law, the existence of criminal elements as required by the legislative law to establish such offense and, if necessary, their concurrency must be shown.</p>
2075	9935	<p>https://nkp.gov.np/full_detail/8986 (Sanumaya Rai) Case: Human trafficking Reasons: In the present case, the defendant's claim that he was not guilty and his name was different was confirmed by the citizenship certificate he had submitted. The plaintiff's claim did not appear to be unquestionable when the victim himself appeared in the court and made a statement stating that the person who was going to sell himself in India was not the defendant but another person. Although Section 9 of the Human Trafficking and Smuggling (Control) Act, 2064 has shifted the burden of evidence on the defendant, the prosecution should conduct a thorough investigation into the allegations made by the plaintiff, what law was violated and how it went beyond the law. The prosecution can't avoid its responsibility only because the burden is shifted to defendant.</p>

2075	10149	<p>https://nkp.gov.np/full_detail/9201 (Bimal Kumar Yadav) Case: Robbery Reason: Since the burden of proof will be on the plaintiff to prove the claim without any doubt, and as the plaintiff has not been able to substantially prove the guilt of the defendant, it would not be justifiable to convict him on the basis of the statement made by the co-defendant before the authorized officer.</p>
2076	10189	<p>https://nkp.gov.np/full_detail/9241 (Om Narayan Thakur) Case: Murder (mother and child by burning) Reason: In order to take the death statement as evidence and to maintain its credibility, the person working in the hospital or other independent person should have the document and confirm it in the court.</p>
2076	10190	<p>https://nkp.gov.np/full_detail/9242 (Bed Bahadur Magar) Case: Human trafficking and Smuggling Reasons: Although the affidavit is an important piece of evidence in itself, it must be supported by other evidence. Therefore, in case the victim's statement is proved by the court, if the victim does not appear before the court in connection with the proceedings of the case, the court cannot accept it as irrefutable evidence or conclusive evidence even if it is important evidence for the purpose of maintaining guilt.</p>
2076	10197	<p>https://nkp.gov.np/full_detail/9249 (Ram Prabesh Kumar Loniya Magar) Case: Kidnapping and Hostage-taking Reasons: Accusations against defendants in serious criminal offenses such as abduction and hostage-taking must be substantiated without doubt, otherwise the accused will have the benefit of the doubt.</p>
2076	10312	<p>https://nkp.gov.np/full_detail/9378 (Jitendra Karki) Case: Murder Reasons: The death statement as mentioned in the statement could not be confirmed from any other documents, so it doesn't seem reasonable to accept it as an evidence.</p>
2076	10349	<p>https://nkp.gov.np/full_detail/9415 (Syam Kumar Ram) Case: human trafficking Reasons: Although Section 9 of the Human Trafficking and Smuggling (Control) Act, 2064 has shifted the burden of evidence on the defendant, the prosecution should conduct a thorough investigation into the allegations made by the plaintiff, what law was violated and how it went beyond the law. The prosecution can't avoid its responsibility only because the burden is shifted to defendant.</p>

2076	10274	https://nkp.gov.np/full_detail/9340 (Sobha Badi) Case: Human Trafficking Specialty of this case: Even in the case of no appeal from the defendant, if the non- reversal of the decision will cause a serious injustice, then the higher courts can reverse the decision of the lower court. Reasons: Criminal convictions on the grounds that the accused did not appear in court must be understood as a miscarriage of justice or gross injustice. It would be irrational, illegal, and irrational to consider the fact that the defendant did not appear in court to be conclusive evidence in itself and to make the accusation claim. Trial in absentia is against the principle of natural justice.
2077	10493	https://nkp.gov.np/full_detail/9559 Case: Murder Reason: The principle of criminal justice does not apply to convicting defendants solely on the basis of suspicion and conjecture. (4 defendants – all consumed alcohol- death of one)

The study of those cases gives a conclusion that Nepal has a practice of releasing the accused on the basis of legal innocence. In other words, the accused are released on the basis of the principle of innocent until proven guilty. Through this sample study, (taken only from the precedents published in the online version of *Nepal Kamm Patrika*) it can be inferred that in almost all of the cases the Supreme Court releases the accused on the ground of inadequate standard/insufficiency of evidence. This study also highlights the faults within the police and prosecution. To justify this conclusion, we can take the cases of human trafficking. The sample cases above show that mostly in cases of human trafficking, the prosecution neglect in presenting strong evidence against the offender arguing that the burden to prove its innocence is shifted to the defendant. But the court in such cases has clearly stated that though burden is shifted upon the defendant, the prosecutor cannot move away from its responsibility to properly file the case against the defendant with proper investigation and strong evidence. Another notable thing to be analyzed from above- mentioned data is that there are no cases of rape suggesting wrongful conviction in the table above. There can be two reasons for it. One that the court is so accurate in deciding the rape cases that there is no wrong conviction in such case. The second reason could be that the accused of rape is generally taken as the actual culprit and judges do not bother to see the cases in an assumption of wrongful accusation. This second presumption is supported by the law professionals such as senior advocate Lav Mainali and Krishna Prasad Sapkota and the deputy attorney general Padam Prasad Pande. During the interview for this paper, they argued that the police registers and the prosecutor file charges on the rape from the pressure groups, media trials, and large resentment of the public in sympathy to the victims. But there might be the chance of prejudice and tunnel vision towards the accused from the police, prosecutors and the judges, and also instances of fake cases. Finally, in the wrongful convictions suggesting legal innocence in these sample cases, the court has declared the accused as non-guilty. The authors argue that there bring no difference in legal and factual innocence after the court acquits the accused, the right to compensation should be insured for those victims without declaring guilty even after the final judgment.

The sample cases referred to above suggests that there are many instances in Nepal

where innocent individuals have suffered from wrongful conviction. But there are no compensatory measures for them. Few of them know their rights were violated have filed a writ in the Supreme Court with the hope of getting compensated for what they have lost while being imprisoned. The Supreme Court of Nepal has propounded precedent in the case of *Khul Bahadur Kunwor v. Police Special Court* regarding the compensation for the wrongly convicted individuals.⁸⁹ The court states that the state should compensate the victim who is being prisoned/ punished despite being innocent because of negligent actions of the state bodies. Similarly, in the writ petition filed by advocate Amrit Prasad Shrestha and others⁹⁰, where Supreme Court has importantly recognized the right to compensation of wrongfully convicted individuals stating that - in any malicious investigation and wrong accusation, the period of stay of the accused in jail cannot be considered as lawful detention and when the person is exonerated after the final verdict in such cases, compensation should be awarded to such individual. Issuing its verdict in the same writ petition, more significantly, the court also further directed the state to formulate the law relating to the compensation for victims who were wrongfully convicted as a result of malicious investigation and later exonerated in the cases enlisted in the Government Cases Act, 2049 Schedule 1 where the government is the plaintiff. Following the Amrit Shrestha's writ petition, the court in a subsequent petition filed by advocate Som Prasad Luitel,⁹¹ ordered to form the committee including the concerned stakeholders and experts within 3 months to formulate the laws to compensate the victims of wrongful conviction who are not engaged in crime in any way. Also regarding the execution of the decision, the court has explicitly ordered to the Supreme Court's judgment execution directorate to strictly monitor the implementation of the judgment.

The court in the writ petition filed by Padammaya Gurung⁹² who had spent 5 years 6 months and 7 days additional period in prison than her actual sentencing period pronounced by the court, has directed to the government of Nepal to compensate total of 6 lakh 3 thousand 6 hundred rupees (at the rate of 300 rupees per day). Also the court has directed the respondents to formulate the law relating to compensation

⁸⁹ *Khul Bahadur Kunwar v. Police Special Court*, NKP 2076, volume 4, DN 10250.

Khul Bahadur was imprisoned for 4 years without any crime commission, got out of jail and knew that another person Ghanshyam Adhikari was the main culprit. He after filed the case in the Supreme Court regarding his wrongful conviction.

⁹⁰ *Amrit Prasad Shrestha v. Office of PM and Council of Ministers*, Writ. 079-WS-0076, D. 0006, NKP 2075, Vol. 1 Constitutional Bench. The writ petitioned was filed in Supreme Court of Nepal by the legal practitioners realizing unavailability of compensatory arrangements for the wrongly convicted victims. The petitioners demanded the compensatory statute and pleaded before the court to observe critically by making different institutions responsible such as the concerned investigating officer for malicious investigation, prosecutor for wrong accusation etc. Because of such circumstances the innocent person suffers from the violation of personal liberty, along with violation of social, economic, employment opportunities.

⁹¹ *Som Prasad Luitel v. Office of PM and Council of Ministers and others*, Writ. 072-WO-0285 In this writ, the applicant was accused for the Homicide case in 2067-02-03 got release after 32 months, 2 days spending time in prison who was not guilty but innocent and was under punishment because of wrong accusation and malicious investigation of the state for which the applicant issued a writ in Supreme Court.

⁹² *Padammaya Gurung v. Office of PM and Council of Ministers and others*, Writ. 071-WO-0512 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 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.

for the violation of the liberty of an individual through such unjustified act of the stakeholders. Similarly, in the case of Madan Narayan Shrestha⁹³, the court has ordered the respondents stating that the state has a duty towards the wrongfully convicted and punished individual to reinstate him/her to the former employment position from which s/he was dismissed due to the accusation in crime. However, this decision has not complied yet.

These cases suggest some of the trends and practices in regarding the issues of wrongful conviction and compensatory arrangements. The Supreme court has directed the respondents in making legislation addressing cases of wrongful conviction and compensatory aspects. Regarding the execution of judgments provided by the Supreme Court, stakeholders who were as the respondents were consulted during the research but there are no legislative arrangements made to date in accordance with the orders comprised in the said judgments. Similarly, there are no any records available with regards to the actions being taken as per the orders given by the Supreme Court. So, those victims of wrongful convictions are deprived of their compensatory rights. Most importantly, due to the lack of any avenues for the compensatory claims, it seems impossible to obtain the compensation by the victims.

Possible Avenues for Compensatory Claims in Nepal

Observing international practices, it can be discovered that in countries which do not have any statutory arrangements for compensating wrongfully convicted individuals have other different avenues to provide compensation. Those avenues are assessed in the context of Nepal analyzing the possibility of its enforcement.

a. Tortious Liability

One of the avenues for compensation to the wrongfully convicted could be on the basis of tortious liability to the state. Tort basically deals with the issues where any harm is inflicted to the victim by the wrongdoer. Such wrongdoer is liable to pay damages either through compensation, service or kind.⁹⁴ The exonerees are the victims made by state's mistake, thus the state should take the responsibility for all the damages caused due to faulty/erroneous systems. The victim of wrongful conviction can bring lawsuit against the police or prosecution for maliciously prosecuting him/her.⁹⁵ S/he can also bring lawsuit against his/her own defense attorney for ineffective assistance of counsel.⁹⁶ The plaintiff can sue even to the government but it is only possible the state, as a private person, would be liable for such actions as per the law. It means the challenged government conduct must be

⁹³ *Madan Narayan v. Office of PM and Council of Ministers and others*, D. 10069, vol.8, 2075 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.

⁹⁴ Mijares Laura Patricia, *Compensation for Wrongful Convictions: A study towards an effective regime of tort liability*, thesis submitted to department of Law, University of Toronto, 2012.

⁹⁵ Mostaghel (n 71).

⁹⁶ *Ibid*, p.515.

parallel to the private sector.⁹⁷

In Nepal, the new provision relating to the liability of police and prosecutors for malicious investigation and accusation has been introduced in National Criminal Code 2018.⁹⁸ The legal provision provided is however incomplete and impossible to implement for wrongful conviction cases. The police or prosecution when found to accuse anyone maliciously, are liable for 6 months imprisonment and NPR5000 as fine.⁹⁹ In case of any harm as a result of such malicious accusation, the compensation must be paid by such individual.¹⁰⁰ While analyzing the provision minutely and its practical aspect, with respect to wrongful conviction, firstly it is incomplete because it does not cover all the possible cause of wrongful conviction. It only deals to the issue where there is a malicious practice by police or prosecution. The second thing here to analyze is; in the case of wrongful conviction the compensation is very high which is nearly impossible to indemnify from single offender. If the compensation for the wrongful conviction is indemnified from the police who conducted investigation or prosecutor of the case, there will be counter argument raised that the police and prosecutor will not be able to function as they will be in constant threat of suit of high compensation against them.¹⁰¹ The whole state is liable for such misconduct and thus the whole state must be liable for it. The provision is very hard to implement since it is very difficult to prove that the act of police or prosecution was malicious because of lack of evidence with the lapse of time and poor access of the plaintiff to the evidence.¹⁰² And the fact is that there is no case as such filed in the court with this regards till date. The third is the fine and imprisonment is very nominal in this issue the police or prosecutor might be sentenced as per the said legal provision. But the question here is what the victim obtain as a compensation and relief.

If the provision for compensation to wrongfully convict is kept under tort law, firstly, it is very difficult to prove that the misconduct of actors in the Criminal Justice System caused his/her wrongful conviction. Secondly, this procedure will further victimize the plaintiff because s/he again must go through a long legal procedure, hire a lawyer and again fight against the state. Thirdly, even if the claims of the plaintiff is approved, there will be a lack of uniformity in compensation i.e. someone might get high compensation and some may get very low) since the discretion lies completely to the judge. **The fact here also is that our recently introduced provisions regarding tort on National Civil Code have not spoken about the tortious liability of the state in the cases of wrongful conviction. Thus, the avenue of claims of tortious liability in obtaining compensation does not help the victims.**

b. Compensation Petition

The Supreme Court and the High Court of Nepal are provided with extraordinary

⁹⁷ Ibid, p.516.

⁹⁸ Muluki criminal Code 2018, s. 99.

⁹⁹ Ibid, s. 99(2).

¹⁰⁰ Ibid, s. 99(3).

¹⁰¹ Mostaghel (n 71).

¹⁰² Ibid, p. 514.

jurisdiction to give appropriate order for the enforcement of fundamental rights and ensure remedy in case of violation of those rights.¹⁰³ The Constitution of Nepal has provided right to get compensation as a fundamental right for the victims of crime.¹⁰⁴ But the definition of victims provided in the Crime Victim Protection Act does not include victims of wrongful conviction.¹⁰⁵ Thus, one way open for victims of wrongful conviction to ask for compensation through the petition raising the issue of violation of right to compensation is also barred. The next way for victims of wrongful conviction to ask for compensation is by raising the claim of violation of their right to freedom and infringement of liberty by the state by wrongfully convicting them, but this claim only is not sufficient because the wrongfully convicted individual has not only lost their right to freedom and liberty but they are also deprived of using their other rights. Though the constitution provides right to constitutional remedy for breach of the constitutional rights¹⁰⁶, the right to compensation for wrongfully convicted individuals is not yet addressed. At present, there is no provision in constitution or in any other law to claim compensation by the wrongfully convicted individuals through direct petition to court. Hence, the petition before the Supreme Court by the victims would not appear effective since there are no arrangements in awarding compensatory damages to them, on which the Supreme Court could issue its judgements.

c. **Private Bill**

Particularly in the United States of America, a wrongfully convicted individual can lobby to pass a private bill from the legislature to dispense money from treasury to the individual directly as compensation for wrongful conviction.¹⁰⁷ Even in the absence of a legal claim, it is assumed there the moral obligation of the state to pay for the injuries caused to individuals by its actions.¹⁰⁸ The private bill are regarded as moral obligation bills generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state.¹⁰⁹ The private compensation bill are taken as an obligation that arises from the sense of justice and equity instead of taken more than mere desire to charity.¹¹⁰ So, the Member of Parliament is believed to bring the bill in the parliament not only with the sense of charity. However, the Private bill for compensating an individual in every wrongfully convicted case is not so effective. Generally, highly publicized and politicized cases gets this type of compensation.¹¹¹ This process is lengthy, expensive because a state legislator must be lobbied for sponsoring the bill along with supporting it and passing the bill from

¹⁰³ *Constitution of Nepal* 2072(2015), art.133, art. 144.

¹⁰⁴ *Ibid*, art. 21.

¹⁰⁵ *The Crime Victim Protection Act*, 2075 (2018), s.2.

Clauses f, hand j of Section 2 of this act defines who are victims that are mainly the direct victims of crime as victim of first grade, the indirect victims (who are not involved in the offence but has to bear the damage) as victim of second grade and the family victims.

¹⁰⁶ *Constitution of Nepal* 2072(2015), art. 46.

¹⁰⁷ See *Supra*.75, p. 510.

¹⁰⁸ Adele Bernhard, 'When Justice Fails: Indemnification for Unjust Conviction' (1999), Pace Law Faculty Publications, p. 93.

¹⁰⁹ *Ibid*, p. 94.

¹¹⁰ *Ibid*.

¹¹¹ Heneage Meridith J, 'Rightful Compensation for a Wrongful Conviction: In Defense of a Compensation Statute in the State of Wyoming', *Wyoming Law Review*, vol19, number 2, January 2019, p. 310.

the house.¹¹² Next problem seen in this process is there is lack of uniformity while providing compensation. For a long period of imprisonment, there might be very less compensation and in some cases high compensation might be provided to the one who had spent very less time in the prison.¹¹³ Further, the bill so proposed may not be materialized as promised because ultimately the vote on the bill is based on the convincing ability of the parliamentarian who purposes the bill to the parliament.¹¹⁴

In Nepal, there is no practice of such kind of private bill. Hence the possibility of this process to claim compensation by the wrongfully convicted is very low. There is no private bill passed by the legislature yet. Another fact is that such private bills should be passed for each case of wrongful conviction in the individual basis. It is impractical to make laws for individual-to-individual cases. And it also does not address every victim of wrongful conviction universally and uniformly. In such a situation, compensation through a private bill is impossible in Nepal.

d. Ex-gratia Payment

Some countries such as New Zealand¹¹⁵, Australia¹¹⁶, and Canada¹¹⁷ have passed the guideline comprising ex- gratia payment. Governments in the absence of specific statutory arrangements adopt certain guidelines for the compensation with *ex- gratia* payment. These guidelines only function as the direction for the government having only persuasive force¹¹⁸ hence, these guidelines are non-binding in nature with respect to the provision adopted and award decided. *Ex- gratia* payments are voluntary and discretionary in nature and represent the

¹¹² Mostaghel (n 71).

¹¹³ Ibid. SEE: *O'Neil v. State Case*. In this case, O'Neil was convicted and sentenced by the Court for armed robbery. The actual perpetrator confessed after three and half years of O'Neil's conviction. He then, claimed for compensation for wrongfully conviction but was disregarded by the Court of claim and it was dismissed. Observing this, Ohio General Assembly enacted special legislation. The legislation authorizes him to file a claim for loss of education, employment and general damages that compensated him \$6,967. The amount compensated was not enough for the erroneous conviction so appeal was made on the fewer amounts where Ohio Court of Appeal made Court of claims to rethink on the judgment.

¹¹⁴ Adele Bernhard, 'When Justice Fails: Indemnification for Unjust Conviction' (1999), *Pace Law Faculty Publications*, p.95.

¹¹⁵ *Compensation Guidelines for Wrongful Conviction and Imprisonment*, New Zealand, August 2020 New Zealand has adopted Compensation under Ex Gratia Payments for Persons who are wrongfully convicted by adopting Compensation Guidelines for Wrongful Conviction and Imprisonment that is forwarded to the Ministry of Justice which aims to vindicate innocent defendants and compensate reasonably for losses arising from wrongful conviction. On Point 30 of the guideline losses are compensable to the extend people are attributable to the applicant's wrongful conviction and imprisonment and for the period following conviction. The compensation is provided on the losses that are recognized as pecuniary and non-pecuniary losses. On point 29, types of compensation are listed that in detail talks about how such exonerated people who suffered can be compensated in many circumstances.

¹¹⁶ Human Rights Act, 2004, Australian Capital Territory, Australia, sec-23 The Australian Capital Territory (ACT) has incorporated a rewarded version of Article 14(6) by adopting the ACT Legislation under the Human Rights Act 2004. Section 23 of Human Rights Act has a provision of Compensation for wrongful Conviction an individual has right to be compensated according to the law, when anyone is convicted by a final decision of a criminal offense and the person suffers punishment because of the conviction and the conviction is reversed or is pardoned on the ground that a newly discovered fact shows conclusively that there has been miscarriage of justice.

¹¹⁷ *Compensation for Wrongfully Convicted and Imprisoned Persons 1988*.

¹¹⁸ *Compensation for Guidelines for Wrongful Conviction and Imprisonment*. August 2020, Background and Purpose, pt.4. Nothing in the Guidelines requires the Government to agree to compensate a person in any particular case.

government's graciousness or benediction.¹¹⁹ These payments are payments of money given as a concession without legal compulsion by the government to the wrongfully convicted individuals¹²⁰. Those individuals may not be allowed a right to legal redress to claim or challenge for the payment¹²¹. In another word, there might not be any mechanism to appeal to the award¹²². The discretionary power handed over to the state sometimes may get misused as there is no transparency in the decision making¹²³. Such payments are somewhat based on the random choice that shows arbitrariness in terms of when compensation will be offered and how it will be quantified or compensated¹²⁴. *Ex-gratia* payment may not fully address the incalculable loss of the victim when released from prison¹²⁵. There is no effective result to the circumstances where the victim is compensated with satisfaction. Observing these lacunas, the Home Secretary of UK on April 19, 2006 announced ex- gratia scheme to be abolished and replace it with the Criminal Justice Act, 1988 in need of the statutory scheme that would rebalance criminal justice in favor of victim¹²⁶. Thus introducing the *ex-gratia* payment would not become an effective avenue for Nepal too for insuring the compensation to the victims.

Dedicated Legislation

From the analysis above, it is evident that those avenues cannot work for the victims. So, the separate, specific and dedicated legislation is widely proposed in a form of compensatory statute. Compensation statute is the codified statute that specifically comprises provisions regarding compensation to the people who are wrongly convicted.¹²⁷ Those statutes become uniform, practical, fair, rational, rapid and popular avenue in awarding damages.¹²⁸ The compensation statute provides an accessible, reliable and swift mechanism for such compensatory arrangements. However, there are different contentions raised with regards to compensation to the wrongfully convicted individual by enacting dedicated legislation. There are major 4 concerns: lack of justification for non-economic damages, incurring funding and resources constraints, cost of doing business argument and since victims of this type cannot be made whole again fully, the task of compensation to them is non-achievable only resulting waste

¹¹⁹ Nicola Southall, 'Looking Backwards and Forwards: A Critique of New Zealand's System for Compensating the Wrongly Convicted', A dissertation submitted in partial fulfillment of the degree of Bachelor of Laws (with Honours) at the University of Otago, October 2016, p. 6.

¹²⁰ Hoel (n 10), p.2.

¹²¹ Michael O'Keeffe on the Submission to the Australian Productivity Commission Inquiry into Access to Justice, 4th November, 2013, p.11.

¹²² Tom Percy QC, 'Despised Outsiders Compensation for Wrongful Convictions', p.1.

¹²³ Villa, Rachel Dioso, 'Out of Grace: Inequity in Post- Exoneration for Wrongful Conviction', p. 359.

¹²⁴ Hoel (n 10), p. 6.

¹²⁵ Villa (n 123).

¹²⁶ Myles (n 21).

¹²⁷ Lonergan Jessica R., 'Protecting the innocent: a model for comprehensive, individualized compensation of the exonerated', Legislation and Public Policy, Vol 11:405d.

¹²⁸ Bernhard Adele, 'Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated', *Darke Law Review*, vol.52,2004, p. 708-711.

of money.¹²⁹ The first argument of lack of justification for non-economic damages stating that there is no measure for non-economic damages does not stand adequately. Because there are measures that can relief these non-economic damages too, such as from service of counseling, medical treatment, educational services etc. Also the additional monetary compensation can be provided for pain and sufferings inflicted upon such individual.¹³⁰ Second argument against providing compensation is that cost of such compensation would be high for the state. But firstly the number of individuals exonerated from the court can be minimized by making reformation in the criminal justice system, by enhancing competency of agents of criminal justice system such as the police, prosecution, courts etc. making them capable and responsible. Because large numbers of compensatory claims as a result of wrongful conviction indicates error in the systems. Introducing advancement in the process of investigation and incorporating new technologies in the process of collecting and evaluating the evidences would be the best resort instead of being afraid of compensatory fund¹³¹. And secondly, the state cannot escape from its responsibility just by making an excuse of high cost argument. So the state could better prepare for the payment rather than denying recovery.¹³² The argument of wrongful conviction as just the matter of doing business is a very insensitive and irresponsible argument. This argument can be repudiated on the ground that it leads to unfair treatment, it creates incentives to continue such unfair treatment, it does not save the state money and it leads to violation of constitution.¹³³ The argument by the state lastly is that it is insuperable to make victim of wrongful compensation whole again. Though the compensation and services cannot give to wrongfully convicted individuals back their years spent in jail but the compensation plans are significantly helpful in recovering the victims and their integration to the society.¹³⁴ Thus, though there might be some doubts in drafting and implementing statute of compensation, there is still a greater cause and higher need for its formulation.

From the analysis above, it is evident that the alternative avenues other than the statutory arrangements are not accessible, available, affordable, and adequate to confer compensation to the victims of wrongful conviction in Nepal. As the government of Nepal and House of Representatives are ordered by the supreme court of Nepal in its judgments to frame legislative provisions for ensuring compensation to the wrongfully convicted victims, it is their obligation to comply this order in accordance with the Article 128 of the constitution of Nepal. While taking reference of the opinion made in its general comment 32 by the United Nations Committee on Civil and Political rights, the states are found to have been prescribed for the enactment of specific legislation to compensate the wrongfully convicted individuals. Thus, the government of Nepal can also proceed to enact dedicated specific legislation taking the observation made by the CCPR committee as the persuasive value. Similarly, Nepal can frame its compensatory legislations observing the international practices that are recommended by all the experts while interviewing regarding compensatory statutes. It can also take

¹²⁹ Trivelli (n 76), p. 274.

¹³⁰ Ibid.

¹³¹ Adele Bernhard, 'Justice Still F Justice Still Fails: A Review of Recent view of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated', *Darke Law Review*, vol.52, 2004, p.713.

¹³² Ibid.

¹³³ Trivelli (n 129).

¹³⁴ Ibid.

reference from the arrangements recommended by the Indian Law Commissions in its report number 277 while proposing amendments in the Indian Penal Code. Nepal also can take reference from the modal statute of innocence project and the legislative arrangements of the different countries which have compensatory arrangements to include the essential considerations within its legislation.

With regards to the legislative arrangements for ensuring compensatory damages to the wrongfully convicted victims, the amendment within the existing statutes is being regarded as one of the alternatives instead of introducing new legislation. Amendments in the Criminal Code, Civil Code or victim protection Act is being proposed to incorporate the compensatory arrangements. But with regards to it, criminologist and professor senior advocate Rajit Bhakta Pradhananga, senior advocate Lav Mainali and Krishna Prasad Sapkota and former Supreme Court Justice Pawan Ojha argued that Making an amendment in the criminal and civil code is not the suitable option since the compensatory legislation requires detailed provisions with specific definitions and criteria's of compensatory awards along with the amount of damages, avenues/mechanism to award such damages, sources for providing the damages, et cetera. Also, the though the compensatory claim mostly relates with the civil nature of claim, the criminal case also is associated in this issue. So it might not be appropriate to put into one of this nature of legislations. Similarly, they also argued that as the aims and objectives of these statutes are different, in addition of provisions relating to the compensation would make these statutes derailed, incoherent and unsystematic. Thus, it appears appropriate to enact a new legislation incorporating the require issues.

Issues to be Considered in Drafting the Compensation Statute

a. Who should be compensated?

Different countries have different eligibility criteria to determine who should be compensated under the compensation statute. Many countries have the practice providing the compensation only to those individuals exonerated through pardon. Other countries generally have criteria to entitle such compensation to those cases where the victims get exonerated through new or newly discovered facts, or by proving factual innocence. The International Covenant on Civil and Political Rights in its Art14 (6) has also listed criteria for compensation. The Covenant in its provision states the compensation should be provided to those individuals convicted in criminal offence whose final decision of conviction has been reversed or s/he who has been pardoned on the ground of a new or newly discovered fact where the individual is not wholly or partly liable for non-disclosure of such unknown fact.¹³⁵ But in many jurisdictions where pardon is the requirement for claiming compensation it is seen that pardons serves as a barrier to compensation because a person may be completely exonerated but unable to get pardon.¹³⁶ Also, it is very difficult to find new fact or new evidence in the case after the lapse of so much of time. Another condition to provide compensation to those who the individuals who do not attribute to their conviction neither wholly nor partly is

¹³⁵ *International Covenant on Civil and Political Rights 1966*, art.14(6).

¹³⁶ *Ibid*, p.102.

quite problematic, because there can be many situation where an individual may sometimes confess or plea bargain due to voluntary or involuntary reasons.¹³⁷

Thus, the criteria for wrongfully convicted individuals to claim compensation in Nepal must be broad. It should not be limited to pardons, disclosure of new evidence or just factual innocence. The compensation must be given to such victims even in case of legal innocence except in the condition where the reason of exoneration is a mere procedural technicality which means that such individual, in the absence of such procedural technicality, could have been convicted otherwise.

b. What can the State ensure for the victims?

Observing international practices, victims of wrongful conviction are indemnified with pecuniary/monetary and non-pecuniary¹³⁸/non-monetary forms¹³⁹ of compensation. Some countries have very broad range of compensatory schemes. These states along with reasonable pecuniary compensation also provide wide range of non-pecuniary compensation such as physical and mental health care, attorney fees, reintegration services, education assistance, and assistance for employment, family assistance, child care assistance, et cetera. Texas¹⁴⁰, Vermont¹⁴¹, Massachusetts¹⁴², Maryland¹⁴³ are some exemplary states in the United States of

¹³⁷ See 'Causes of Wrongful Conviction' discussed in this paper.

¹³⁸ Pecuniary losses cover mostly the tangible or objective monetary losses. The economic losses including other comprises loss of investments and the value thereof, loss of business, loss of profit, and loss due to delay; Trivelli (n 76).

¹³⁹ Non-pecuniary compensation attempts to recover the intangible or subjective losses. The non-pecuniary compensation comprises compensation from losses such as medical expenses and treatment, loss of earnings, impairment of earning capacity, loss of physical function, loss of services, education, aggravation of older mental or physical conditions, pain and suffering, emotional distress, loss of enjoyment of life, loss of consortium, grief, humiliation and loss of favorable reputation. It also attempts to compensate past and future losses too. See Trivelli (n 76).

¹⁴⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 103.001, 103.052–.054 (West 2015)

Texas provides one of the most exemplary statutes, providing \$80,000 per year of imprisonment with annuity, as well as additional of \$25,000 per year on death row and registered as a sex offender. Also, awarding compensation of child support, 120 hours of tuition, opportunity to be a part of Texas State Employee Health Plan and various other reintegration services is in this statute. SEE: Chunias, Jennifer L., Aufgang, Yael D. "Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted", Vol. 28, Issue 1(2008), p.- 108 and, Loneragan, Jessica R. "Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated"

¹⁴¹ VT. STAT. ANN. tit. 13, § 5574(b) (2) (Supp. 2007).

This state statute provides mental and physical health care by granting exonerate for upto 10 years of eligibility for the Vermont Health Access Plan. SEE: Chunias, Jennifer L., Aufgang, Yael D. "Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted", Vol. 28, Issue 1(2008), p. 108.

¹⁴² MASS. GEN. LAWS ANN. ch. 258D, § 5(A).

Massachusetts' statue encourages the court to grant orders entitling claiming to receive 50% discount on tuition fees at any of its state or community college, also in University of Massachusetts. Massachusetts' statute permits the claimant to request a separate hearing for the expungement of records. Also, it provides assistance in applying for health insurance within 60 days of their scheduled release through Department of Correction's Mass Health Initiative. See Chunias, Jennifer L., Aufgang, Yael D. "Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted", 2008, vol. 28:1, p. 108; Jessica R. Loneragan, "Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated", volume 11:2, 2008.

¹⁴³ MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis, 2015)

Maryland compensation scheme composes a reasonable monetary amount plus counseling services. Also, following benefits such as state identification card and other documents necessary for the individual's

America which has these kind of compensatory provision. Similarly, countries like New Zealand¹⁴⁴ and Canada¹⁴⁵ have also ensured a comprehensive compensatory guideline including both pecuniary and non-pecuniary compensation. However, few states like Montana¹⁴⁶, Alabama, and Wisconsin, etc. have a very narrow scheme of compensation.

The award of compensation in Nepal should also cover both pecuniary and non-pecuniary losses. Regarding pecuniary losses, provision fixing the upper limit and lower limit¹⁴⁷ for compensation can be adopted by analyzing the average per capita income of an individual or on the basis of the daily wage rate. The compensation so awarded must be in adjustable with the inflation rate and market price.¹⁴⁸ For non-pecuniary losses, various circumstances of such individuals must be analyzed separately in each case. The major issues to be considered for non-pecuniary compensation in the statute must include physical and mental health care, attorney fees, reintegration services, education assistance, assistance for employment, family assistance, child care assistance, vocational trainings, and any other relevant trainings etc. Along with the pecuniary and non-pecuniary compensation, one major provision should be made in the Act stating to provide a certificate of exoneration and expunge his/her criminal record. Also, the state must make a formal apology to such wrongfully convicted individuals publicly. The statute of compensation to be made in Nepal must adopt both right-based and need-based approach while rewarding compensation to those victims. All the experts interviewed also were agreed that both pecuniary and non-pecuniary loss should be provided but a very cautious investigation of the family background, profession, living standard, loss faced and loss to be faced by such individuals must be assessed before deciding the

health or welfare on the individuals release from confinement, health care and dental care for at least 5 years after the individuals release form confinement; Ibid Chunias, *Aufgang & Yael*.

¹⁴⁴ *Compensation Guidelines for Wrongful Conviction and Imprisonment, New Zealand, August 2020.*

In the guidelines, the point 32 has a base rate that provides compensation for, a. Non-pecuniary losses, being: 1. Loss of liberty, 2. loss of reputation, 3. Loss or interruption of family or other personal relations, 4. Loss of interruption of school or study opportunities, 5. Mental or emotional harm and b. Pecuniary losses.

¹⁴⁵ *Compensation for Wrongfully Convicted and Imprisoned Persons.*

The considerations for determining the quantum of compensation under the Guidelines include both non-pecuniary and pecuniary losses: (i) Non-pecuniary losses a) Loss of liberty and the physical and mental harshness and indignities of incarceration; b) loss of reputation which would take into account a consideration of any previous criminal record; c) loss or interruption of family or other personal relationships. (ii) Pecuniary Losses a) Loss of livelihood, including of earnings, with adjustments for income tax and for benefits received while incarcerated; b) loss of future earning abilities; c) loss of property or other consequential financial losses resulting from incarceration.

¹⁴⁶ MONT. CODE ANN. §53-1-214 (2015): Montana offers only educational aid to victims of wrongful conviction.

¹⁴⁷ The Vermont state of USA has provision for minimum 30,000USD to maximum 60,000 USD per year as compensation for each year of incarceration.)

¹⁴⁸ *Pora V. Attorney-General (Newzealand [2017] NZHC 2081;*

“The timing and size of Pora’s compensation award meant that impact of inflation was particularly acute, since 16 years had passed since the setting of the \$100,000 benchmarks. The fact that the Guidelines did not expressly refer to inflation adjustment was not decisive. The \$100,000 benchmark and the appropriate non-pecuniary loss figure should be interpreted as permitting adjustment where that was necessary to achieve the purpose of the Guidelines in a particular case.”

See also <https://www.justice.govt.nz/assets/Documents/Publications/pora-inflation-adjustment-20171106-cabinet-paper.pdf>.

compensating amount.

c. **Where can the victim obtain the damages from?**

In determining the admissibility of the claim of compensation and the amount of the compensatory awards, generally, three kinds of mechanisms are found to have existed internationally. The first is the department within the government or any specific ministry, where the wrongfully convicted individuals can apply for compensation after the exoneration; such as Provincial or Federal Ministry of Justice¹⁴⁹ in Canada, Ministry of Justice and Defense¹⁵⁰ in New Zealand and Secretary of State in the UK¹⁵¹. But there is the argument that the involvement of these government bodies lacks independence and externality. These government ministries are headed by political personnel/elected officials. Such lack of independence and externality may appear as the hindrance of obtaining compensation to the wrongfully convicted individuals since here the wrongful conviction is caused due to the mistake or misconduct by the state itself and psychologically the government officials may be reluctant to accept the state's errors and to spend a huge amount of compensation required to those victims arguing insufficiency of resources/funds. So, dealing in the compensatory awards by the government mechanism might not be effective since it has a conflict of interest in those claims. Similarly, the victims may not have adequate access to those mechanisms if such mechanisms follow lengthy procedures and protracted nature of assessment. In Nepal, to this date government is not even complying the court's decision of compensation and there are no records showing the government's actions for the compensatory measures to those victims.

The second mechanism could be the courts to award damages in the issues of wrongful conviction where the Supreme Court of Nepal is conferred the original jurisdiction to hear the award of compensation and determine the amount thereof. Because originating those cases from the trial/district or appellate/high court may cause undue burdens to the victims demanding lengthy period of time and complex appellate procedures. The Supreme Court can apply summary procedure in hearing and adjudication of damages. However, this kind of court mechanism also might not be feasible in the case of Nepal since the Supreme Court is filled with the

¹⁴⁹ *Guidelines Compensation for Wrongfully Convicted and Imprisoned Persons*, 'The procedure to the claim and implementation implies when an individual meets the eligibility criteria, the provincial and federal ministers responsible for criminal justice will undertake to have appoint either judicial or administrative inquiry that examines the matter of compensation. The provincial or federal governments would undertake to act on the report submitted by Commission of Inquiry. However the authors here believed that instead of appointing judicial and administrative inquiries separately in each cases, it would have far more certainty and uniformity if a dedicated mechanism is established to hear and adjudicate every claims of compensatory damages.

¹⁵⁰ *Compensation Guidelines for Wrongful Conviction and Imprisonment*, August 2020, paras.11, 12. Minister of Justice receives application regarding the claim of compensation, examines merits of those claims and determine the procedure to assess and decide the application. Similarly, in the application filed by the person who is convicted under military law, the Ministry of Defense takes the charge in application with consultation with Ministry of Justice and provides advice to the Government.

¹⁵¹ *Criminal Justice Act 1988*, Sec. 133 The Secretary of the State determines the right of compensation after the application of the compensation is lodged. The amount of it shall be assessed by assessor who is appointed by Secretary of State.

backlogs of undecided cases. Due to this reason, the court takes a lengthy period of time to issue its judgments on claims of compensation but these claims are with the nature of urgency since the victims are needed to be redressed/rehabilitated as immediately as possible. But Former Justice Pawan Ojha in another hand argued that it is the state's responsibility to give compensation to such individuals without making any excuses of workloads or long procedures. He opines that the high court can be the best court to award compensation in such cases because the court already has the details about the subject matter in the case better. But on the other hand, Rajit Bhakta Pradhananga stated that the same bench of a court delivering verdict of acquittal cannot award compensatory damages since it requires a detail and technical analyses/calculation by the experts in the compensatory claims and these natures of cases might affect also the other issues by demanding detail and technical hearings.

The third mechanism could be establishing specifically dedicated mechanism for hearing and adjudication of the claims concerning compensation of wrongful conviction and amount of damages. The issues of compensation can be adjudicated establishing a dedicated Tribunal. This mechanism fulfills the threshold of independence, externality and accessibility. As the Tribunals are formed comprising a person having expertise or working experience in the concerned issues in Nepal¹⁵², the hearing and adjudication on matters related to the compensation for the wrongful conviction can be done in effective manner with the help of experts from such dedicated Tribunal. This Tribunal should apply the summary procedure to hear the claims. It can result in promptness in the decision and encourage the victims to ask for the restoration/redress/remedy for the accusation and conviction to them. Indian Law Commission in its report number 277 has also recommended the government of India to form a special court to hear the claims of compensation for the wrongfully prosecuted individuals applying the summary procedure.¹⁵³

d. How could the resources be arranged for the compensatory damages?

There might arise confusions about the sources in awarding compensation to the victims. Regarding the arrangement of such resources, the states which have separate compensation statute are either silent or very vague with regards to source of funding. New Hampshire pays the award from any money in the treasury.¹⁵⁴ North Carolina provides award from its emergency and contingency fund or any other available state fund.¹⁵⁵

¹⁵² *Revenue Tribunal Act, 2031(1974)*, This Act entails the provision on the establishment and formation of tribunal in Section 3(2) that says "Each Tribunal shall consists of following members appointed by the Government of Nepal who are Law Member, Revenue Member, Accounts Member.." with the qualifications that are further discussed in Section 4 of this Act.

¹⁵³ Law Commission of India, 2018, 'Wrongful Prosecution (Miscarriage of Justice): Legal Remedies', Report No. 277, p. 85 available at <https://lawcommissionofindia.nic.in/reports/Report277.pdf?fbclid=IwAR0qMbe8LcO2XuT6CyN3idfVcH2rhaWXrgKPJZpcIMNvyt0f2KX6x4jPj3o>, accessed on 17 September 2021.

¹⁵⁴ *New Hampshire Revised Statute (2010)*, New Hampshire, United States of America, Chap.541-B: 13.

¹⁵⁵ *North Carolina General Statute*, New Hampshire, United States of America, ss. 148-84.

Thus there is uncertainty about the source of funding even in international practices. In Nepal, there could be also same confusions regarding it. So, with regards to our country, there are 3 solutions suggested below for funding these compensation schemes.

1. Use of the existing Victim Relief Fund

The National Penal Code¹⁵⁶, Criminal Offenses (Sentencing and Execution) Act¹⁵⁷ and the Crime Victim Protection Act¹⁵⁸ have provisions for newly introduced victim relief funds to provide interim relief for the victims of crime. The fund is originally credited by the government of Nepal. The victims of crime are provided interim compensation from the fund. Later after the offender of the crime is convicted, the amount is deposited to the fund by the offender.¹⁵⁹ The fund can be used to compensate the wrongfully convicted individuals too because they are also victimized by the state though are not defined as victims of crime. The police department and the office of attorney general should deposit certain percentage of such compensation to the fund.¹⁶⁰ This way the state will not require creating a separate fund rather it can be easily manage from this prevalent fund. During the interview, the Supreme Court Deputy Registrar Bimal Poudyal emphasized that creating many funds sometimes make it inefficient. So, primarily at the first stage, the compensation to those victims can be managed by available victim relief funds.

However, there also arise problems with if the victims are compensated from the prevalent relief fund. Firstly, the compensation asked in each case of wrongful conviction can be of high claims. In case of high claims of compensatory amount, the present victim relief fund may not be enough to award such damages. Secondly, the purpose of this relief fund is mainly to provide interim relief to the victims of crime. But the issue of compensation to wrongful conviction is completely different to the objective of this fund.

2. By allocating a separate budget for the compensation

The government can allocate a certain amount for compensating wrongfully individuals in its annual budget. But allocating a budget for this particular issue in the annual budget might not be a feasible option. Even if such a specific budget is allocated, it is difficult to assume the actual numbers of compensatory claims in the particular fiscal year. So it is difficult to determine how much amount to be allocated in the budget for the compensatory issues. Similarly, allocating funds to compensate wrongful convictions might not be certain because the allocation of budget depends on various factors like political agendas and economic situation of the country. These factors might

¹⁵⁶ *National Penal Code 2074(2017)*, s.48.

¹⁵⁷ *The Criminal Offence (Sentencing and Execution) Act, 2074 (2017)*, s.48.

¹⁵⁸ *The Victim Protection Act 2(d)*, s.29.

¹⁵⁹ *National Penal Code 2074(2017)*, s.48(3).

¹⁶⁰ Mostaghel (n 71).

result in budget cut-off.¹⁶¹

3. By creating a separate fund

Awarding compensation to the wrongfully convicted victims would be much more effective if a separate fund is created by the state. Rajit Bhakta Pradhananga, in his interview for the purpose of this research, stated that the compensatory legislation should speak about a separate fund. A dedicated separate fund should be established for providing these interim and long term reliefs since there can be instability in governmental priorities and the amount of budget in the compensatory issues.

While creating such kind of separate fund by the state, a question might arise about how money can be collected for this fund. With regard to this question, one of the solutions could be a large initial investment by the state so that the interest could be produced for the fund itself and the fund itself would replenish to compensate the victim.¹⁶² This way the state would not take a substantial hit every time to become worried for the compensatory amount. The states would be more prepared to provide more foreseeable and practicable damages if an individual becomes eligible for compensation.¹⁶³ Another way could be a fund established as such where the state initially keeps a certain amount and also amount from the budget allocated for the Police department, office of an attorney general, court, prison and ministry of law and justice can be deposited to the fund. Advocate Madhav Basnet, in his interview, noted that after any wrongful conviction the prosecutor and investigating person whose negligence or misconduct resulted in a wrongful conviction should be personally liable to a certain percent of the compensatory amount. The fund so created by the contribution of budget from these authorities will make the criminal justice process effective in whole because as per instrumental theory the threat of liability creates incentives to avoid behavior that triggers liability¹⁶⁴ which means if these bodies who are directly involved from investigation to the final judgment of cases, are made responsible in case of wrongful conviction then they try to minimize the cause of wrongful conviction as much as possible.

Conclusion

In case of a crime, the state might arrest and detain the individual as the suspect. The court, in the first instance in deciding the crime in question, may imprison such accused

¹⁶¹ Ibid. See also the fact that California mandated that all costs associated with representing inmates pursuant to Penal Code section 1405 to investigate and, if appropriate, file motions for DNA testing of biological evidence where such testing could prove innocence, be borne by the State. In that same year, California allocated \$1.6 million dollars over two years to provide counsel to assist inmates with innocence claims. For 2002 and 2003, the NCIP [Northern California Innocence Project] and CIP [California Innocence Project] received state funding. That funding was discontinued as a result of state budget cuts in 2003.

¹⁶² Ibid.

¹⁶³ Trivelli (n 76).

¹⁶⁴ Mostaghel (n 71).

finding guilty in the charge against them. But through the appellate process, the guilty might be exonerated in the crime in question on the basis of newly discovered or preexisted evidence and might be acquitted. Mistake, misconduct, negligence, malice: whatever may be the reasons behind their arrest and detention by the police or any investigating authority, prosecution by the prosecutor and wrongful conviction by the lower courts, pain, sufferings, loss, humiliation, stigmatizations are beyond imagination on the part of such exoneree. But the state and criminal justice system reacts as if nothing has happened to them. These grave injustices are being taken as exceptional errors in the process of pursuing its business by the state. It is beyond the doubt anyone who is victimized in any way has a valid claim to obtain remedy for this very reason. The wrongfully convicted innocent individuals, who are victimized by the state also unconditionally deserve the remedy through the compensation for the restoration of their life and recovery of their damage. However those victims, seeing and experiencing power imbalance, hardly put forward their claim against the state. They consider their acquittal as their great victory and real justice upon them. Among them, few of those victims, who understood this state made victimization as the injustice and breach of their rights if attempted to put forward their claim of compensation for the remedy, redress, restoration and recovery of their physical and mental health, liberty, property, and sociability, rather should prove their innocence time and again. The state instead of protecting such victims and attempting to ensure remedy and redress to them presents numerous arguments to seek exemption from those obligations.

Nepal though has the responsibility to provide compensation to wrongfully convicted individuals internationally under various human rights instruments and nationally as per the orders of the Supreme Court in different cases and writ petitions have not yet formulated any measures to provide such compensation. The possible avenues for providing compensation to the victims of wrongfully convicted in the context of Nepal could be by creating tortious liability, by compensatory petition, by private bill, through *ex-gratia* payment, or through separate dedicated legislation. Among these avenues, a dedicated separate compensation statute is the best avenue because it can cover all the possible issues in detail, and also it would be binding to the state. The major things that are to be included majorly are about who to be compensated and how to compensate. Every individual who is wrongfully convicted and later exonerated by the final authority to decide the case should get compensation except in cases of exoneration due to procedural technicality. Regarding the mechanism of compensation, a separate department within the government or any specific ministry can be given the responsibility to provide compensation. Other alternative mechanisms could be through petitions to the Supreme Court. To award damages, the Supreme Court of Nepal could be given original jurisdiction, or the creation of a separate tribunal can be explored. Any of the following mechanisms can be adopted for the compensation provided that the individuals have holistic compensatory measures including both pecuniary and non-pecuniary compensation. The major challenge for compensating the wrongfully convicted about how and from where the payments for compensation come from. In the paper, there are 3 possible ways prescribed in this regard. The state can use the prevalent fund of victim relief fund to compensate them or can separate budget each year for such compensation or the best way is to create a separate fund for it where the police department, court, Office of the Attorney General, prisons, and the Law Ministry would also contribute for such fund as per their responsibility and accountability.

Nepal should formulate a progressive act for compensating wrongfully convicted individuals after rigorously discussing all the possible issues relating to it.