

CRIME INVESTIGATION IN DEVELOPING COUNTRIES: COORDINATION AND COLLABORATION OF INVESTIGATORS AND PROSECUTORS

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1. GENERAL INTRODUCTION:

The safety of a society, by way of getting all necessary arrangements for unflinching protection and preservation of individual's liberty and rights relating to his/her person and property, is the fundamental goal of criminal justice, and for this reason it has been regarded as an indispensable system of peace and order. In achieving this goal, criminal justice system uses multi-pronged processes—investigation prosecution, and adjudication which exist as independent jurisdictions but function as one 'integrated system.' The final outcome appears in one of the two forms—i.e. either the suspect is declared 'guilty' or he/she is 'innocent'. Criminal justice system by application of this process, reaching to the state of conviction and making the offender subjected to a system of punishment, functions as an effective instrument of 'detering potential offenders' , thus guaranteeing an effective system of preventing transgression in person or property of one individual by other individual.²

Looking from this pragmatic point of view,³ the criminal justice system in a society, which generally holds the faith on democratic function of State and affirms a deeply rooted trust in principle of the inalienability of fundamental rights of individuals, resolutely and meticulously follows some principles as 'indispensable or inevitable' components for building a worthy criminal justice system.⁴ These principles are (a) the *corpus delicti*⁵ is the primary fact and evidence for driving the process of justice to a dependable conclusion, and the *corpus delicti* is identified by way of resorting to the process of scientific examination or inquest of the crime scene; (b) the relation between *corpus delicti* and the offender is established by the scientific examination or scrutiny of the objects, exhibits or traces found in the crime scene; (c) the analysis of evidences is carried out for generating reasoning for appropriate indictment leading to the prosecution; and (d) the relation between the *corpus delicti* and the law is established, thus the authenticity, reasonability and validity of reason is confirmed.

The criminal justice system follows a 'systematically designed course of action in its operation', and this course of action is guided by certain other inevitable principles. These principles⁶ are (a) the fairness in all aspects of procedure; (b) the impartiality in attitude of applying procedures; and (c) the use of judicial mind while adopting decisions or interpreting findings. Failure to consider these principles will necessarily result in violation of the fair trial. The principle of fairness and impartiality in criminal proceeding are taken as two important attributes of the criminal justice system of a democratic society. These two components represent 'the concept of rule of law' in the context of criminal justice. The fairness and impartiality, in turn, require due attention for application or operation of the several other principles relating the procedure, which not only

2. Robert Weisberg, "A Cannon of the Criminal Law, Stanford Public Law and Legal Theory Working Paper Series, Stanford Law School, California, 2000, No.10, p. 4. Electronically available at http://papers.ssrn.com/papers.taf?abstract_id=231952 .

3. Criminal justice system is considered more effective and functional if it is able to achieve its goal of bringing the offenders into the notice of justice, and make no mistake by punishing an innocent person. The punishment to the offender is considered essential viewing the peace and tranquility in the society. Hence, no society cans the criminal justice system merely as a 'institution of state to exercise power to discipline the people'. For more philosophical deliberation See; Ibid.

4. For critical observation in this regard See; Andrew Haplin, *Definition of in the Criminal Law*, Hart Publishing, Oxford and Portland Oregon, 2004, pp.52-54.

5. The phrase *corpus delicti* means the physical object upon which the crime was committed, such as dead body, or the charred remains of a house. The *corpus delicti* can also be used to describe the evidence that proves that a crime has been committed. See; West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.

6. There are allegations that Anglo-American adversarial system has adopted pro-defendant procedures, and occasionally it is claimed that this system has increased the crime rate (See; Paul G. Cassell, *The Guilty & The "Innocent": An Examination Of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 n.30 ,1999. However, a philosophical justification to this system is that 'the social cost of false or wrong conviction is far greater than the privileges given to the defendant facing the trial'. For additional discourse in this regard See; Keith N. Hylton and Vikramaditya S. Khanna, "Towards Economic Theory of Pro-defendant Criminal Procedure", Boston University School of Law, Working Paper Series Index, <http://www.bu.edu/law/faculty/papers>.

make the criminal justice system in that society properly functional but also makes its result duly credible and trustworthy. These principles are (a) that the burden of proof lies on the prosecutors and so that the charge must be proved beyond reasonable doubt;⁷ (b) that the right of suspect to acquire adequate and competent legal defense by professional representation is fully guaranteed,⁸ which includes right to get interpreter⁹ in the case if he/she does not understand the language in which the charge has been put forth; (c) no suspect can be pressed to confess that he/she has committed crime and thus use of coercion or deceptive interrogation for extraction of confession renders the same as inadmissible evidence;¹⁰ (d) a suspect must be presumed innocent until the concerned judicial authority has declared him/her guilty; and (e) no suspect can be charged twice in the same crime, so that an arrest and detention made under such circumstance will make such arrest and detention illegal and improper.

These principles plainly and adequately deny an argument, which is so common in most developing countries, that 'criminal justice is a State's instrument to justify the coercive actions'. This looming misconception that 'criminal justice system is an instrument of State for coercing citizens to abide by rules of law and order' is a central problem of the fairness and impartiality in the criminal proceeding in developing countries. The misconception gives rise to the following serious problems destroying the positive impression of the general public to the criminal justice system:

- a. The police machinery in the developing societies generally takes criminal justice system as a 'police power' of the State; hence, no rights can be claimed by suspects who have been booked for suspicion of committing crimes. This assumption of police machinery does give a false impression to the investigators that 'a suspect or accused' is an enemy to the State. Such a psychology with investigator not only destroys the prospect of the fairness and impartiality in the investigation process, but also maligns the prospect of suspect's human rights protection. This unwanted psychology is accountable to engendering host of problems within the criminal justice system of developing countries. Most problems of torture are associated with this feigned psychology.
- b. The investigator becomes psychologically obsessed to consider that 'the person who is a suspect or accused' is the matter of central importance in investigation. Explicably, the 'investigation of the fact and relevant evidence' does not make the centerpiece of investigation works. The total concentration of the investigator, therefore, is likely to be driven to extract confession, thus indiscreetly disorienting the investigator from culling forensic, toxicological, and serological and other material evidence.
- c. In most developing countries, another saddening psychology, which is based on the misconception too, is that the work of crime investigation is related to an inherent power of the police institution. This psychology brings a notion of thinking in police that police officers must be allowed to carry out investigation independently, i.e., without interference or guidance of any other institution. This notion of thinking and belief is a greater source of argument on the part of the police investigator that 'the act of arrest, detention and interrogation' are exclusive privileges of the police institution. The truth is that a police officer, when he/she is acting as an investigator, is not working in the capacity of 'the police officer', as a law enforcer, but as a 'researcher and scientist'. The power and function as a researcher is 'power and function' of the investigator under the law, so that his position as a patrolling or law enforcing officer has nothing to with the power and function he/she is supposed to

7. See; Emily Sherwin and Kevin M. Clermont, "A Comparative View Standards of Proof", University of San Diego School of Law, Public Law and Legal Theory Working Papers 32, Winter 2000-2001. Electronically available at <http://papers.ssrn.com/abstract=285832>

8. On critical importance of defense legal counsel in criminal trial, See; Margaret Etienne, "Declining Utility to Counsel in Federal Criminal Court": An Emperical Study on the Role of Defense Attorney Advocacy under the Sentencing Guidelines", Illinois Public Law and Legal Theory Paper Series, Research Paper No. 03-10, 2003. Available at <http://papers.ssrn.com/abstract=447600>.

9. Right to get interpreter is human rights under International Covenant on Civil and Political Rights, 1966.

10. Torture of any form has been prohibited by Convention against Torture as well as constitutions of the democratic countries. As such unacceptability of torture and similar practices has been emerged as an important principle of fair trial.

entertain as an investigating officer. The power and function of police officer as an investigator 'is a power and function' associated with the realm of justice but not with the realm of law enforcement.

- d. The responsibility of 'proving the guilt' unequivocally lies on the prosecutor, and the prosecutor, thus, has to discharge this responsibility beyond reasonable doubt. The responsibility is carried out with the strength of 'evidence' that determine the 'nature of *corpus delicti* and 'the objective or factual relation between the *corpus delicti* and the suspect'. Analogically speaking, the investigation of crime, to look from this context, is an empirical research purported to generate data for the prosecution of the offence. Explicably, an investigation is a part of the prosecution that generates evidence required for. Obviously, the need of investigator working under the guidance of prosecutor is inevitable. The notion of thinking that an act of investigation is 'independent from prosecutors and, rather, is an independent function of police institution' is thus a stumbling block in the success of prosecution in many developing countries.¹¹

2. EFFICIENT COLLECTION OF EVIDENCES AND CHALLENGES IN DEVELOPING COUNTRIES

The brief discourse, herein before, emphatically highlights on the significance of evidence for successful prosecution which conspicuously underlies its importance for the conviction of offenders and the protection of innocents. The importance of evidence in criminal proceeding is thus crucial not only because 'it helps the criminal justice machinery to achieve conviction of offenders with proper penal sanction but also because it prevents an innocent from being victimized'. Each of the aspect reinforces other resolutely and, consequently, engenders a wider public credulity to the system of administration of justice in that given society. Understandably, the efficiency in culling proper and concrete evidences enables the 'criminal justice system of a given society' to fulfill two major objectives as a civilized society. Firstly, it achieves a goal of preserving the safety of the given society by protecting innocents from being victimized. Secondly, it achieves goal of deterring potential offenders by punishing the wrong doers. These two goals fairly adequately indicate to the types of 'evidence' the prosecutors are supposed to explore. It is also evident from the goal of protecting an innocent that 'no evidence culled by the investigator' can be dubious, doubtful, or unreliable. The goal of convicting the offender also demands that the evidence the prosecutors have culled must be undubious, undoubtful and fully reliable. The efficiency relating to evidence collection is thus philosophically related with the ultimate goal of the safety of the society the criminal justice system is to achieve about.

- 2.1. ***Some devastating challenges to the efficient collection of evidence in developing countries:*** The criminal justice systems in developing countries are, however, facing serious challenges in order to smoothly achieve these goals, mainly due to the 'lack clarity about the concept of criminal justice system itself'. Some misconceptions discussed above do fairly adequately indicate to these challenges. More detail discourse on some of them, to follow herein after, will make the understanding further more tangible. The main challenge, however, is the looming insensitivity in the concerned stakeholders of the criminal justice system in developing countries towards the need of transforming the criminal justice system from a coercive apparatus of the State into 'human rights protection machinery'. The tendency of refuting the principle among the stakeholders of the criminal justice system in the developing countries is extensive. Owing to this insensitivity and the looming tendency of indifference to the modernization of the system among the stakeholders of the criminal justice the following problems are bound to arise, thus hindering the process of efficient collection of evidence:

¹¹ . Much in this regard has been discussed in the article entitled " Comparative Survey of Investigation Systems in China, India, Japan and Nepal: Some Challenges and Best Practices'.

- a. **Notional or theoretical misunderstanding about 'powers and privileges' concerning investigation of crime:** It is a general understanding among the investigators, the prosecutors and the larger section of legal intelligentsia in the developing countries that the power of 'crime investigation' is inherently associated with policing institution of the State, and as such the belief that crime investigation is a crime control mechanism rather than an instrument of fair and impartial justice is widespread. As a result, the tendency of using means of coercive and deceptive interrogation, as an inevitable instrument of crime investigation, for extracting confession is phenomenally practiced in the developing countries. The root cause of this tendency lies on the misconception of the police institution that the function of crime investigation is a function inherently associated with the police power of the State. The resistance of the police officers, who generally occupy the authority concerning crime investigation, to take the 'function of crime investigation, as a tool of collecting evidence for fair and impartial prosecution leading to adjudication of the offence', is implausibly stronger. Of course, the function of crime investigation does contribute, as an essential component of preventing crimes by locating the offenders, to the mission of crime control, but the core objective of the function of the crime investigation is to help in enhancing and fostering the course of fair trial by generating adequate and reliable evidence for the trustworthy and dependable prosecution of alleged offenders. However, the misconception looming large in the police institutions as well as the other stakeholders of the criminal justice system that 'the crime investigation is an inherent power and special privilege of the police institution' poses a serious hindrance in fostering a necessary cooperation between the prosecutors and the investigators, specially for the purpose of collecting adequate, objective and reliable evidence. Owing to this misconception, the tendency of the crime investigators in developing countries to work in isolation of prosecutors is a widespread problem.

Hence, what the tendency and claims generally found among the crime investigators is that they should be allowed to act, by all means and mechanisms, to investigate the criminal acts independently as a prerogative of the police officer or institution. With no doubt, the police investigators, for the meaningful enforcement of criminal justice system in any society, have a key role to play. The crime investigators are explicably placed in a key position to handle criminals, so that they have powers to arrest suspects, detain them and conduct interrogation. The investigator can use innumerable techniques, methods and equipments to reveal the thread of criminal act. The responsibility of the investigator to cull evidence for conviction of the accused is thus vital and indispensable. But in no sense, it can be established that his/her work will yield good result without coordination and cooperation of the prosecutor.

To realize this responsibility of the prime importance in criminal justice, the crime investigators are supposed to discharge the duties of (a) ascertaining facts and circumstances that are associated with, and relevant to, the act of crime, the *corpus delicti*, (b) apprehending suspects and obtain necessary information regarding the *corpus delicti*, (c) collating evidence, oral or documentary, or direct or circumstantial, that is so necessary or vital for the prosecutors to discharge the onus of proof, (d) exercising the police power of the state in order to conduct search and seizure for the purpose of collating evidence, and (e) preserving the witness and evidence to be used by the prosecutors to ensure conviction of the offender, and prevent an innocent from being penalized. It is here necessary to consciously gauge the nature of works the investigator is supposed to carry out. Undoubtedly, the certain power exercised by investigators is associated with the 'police power of the State', which enables them legally encroach upon some freedoms or liberty of alleged suspects or accused which in other circumstances is not allowed. Nevertheless, the power so used by investigators is neither a 'power nor authority' belonging to the police institution, nor can it be exercised by an investigator by simply being a police officer. The power essentially belongs to the 'officer who is designated by law as the investigator of the

crime'.¹² The misconception that 'crime investigation' is a power of police officer is a 'key problem' behind many faults and failures in achieving goal of collating effective and meaningful evidences.

This said misconception is a deadly cause for massive failure of prosecution in Nepal and other developing countries. This misconception emphasizes division of function between 'investigator as a police and prosecutor as an accusing lawyer of the State'. Hence, the investigation process is detached from prosecutorial supervision and monitoring. As an outcome of the 'misconception', the function of investigation is considered by the 'investigator' as a technical function of the police officers, so that the engagement or involvement of the prosecutor is considered not only unnecessary but also undesirable—the involvement of the prosecutor, in fact, is considered to be interference in the function of investigation. This misconception is thus a stumbling block in ways of effective investigation and efficient collection of evidence.

No need to explain that the investigation is a part of prosecution. To be precise, the necessity of investigation may have no place if there is no prosecution is required. A meaningful prosecution is undoubtedly 'contingent' upon the successful accomplishment of the investigation works. Accuracy of findings of the probe of *corpus delicti*, the examination of the pieces of evidence associated with and the legality thereof are certain important aspects of investigation. The accuracy of the findings of the probe of *corpus delicti* is, undeniably and without any exception, governed by the 'science, technology and technical skills of the investigator, whereas the legality of evidences is always protected and ensured by the unfailing supervision investigator prosecutors, instructions for obtaining credible evidence and oversight of the fairness and impartiality of the prosecutor. The functional coordination between investigator and prosecutor during the entire process of the investigation is thus vital and relentless process. Any failure in coordination between these two authorities or agencies is heavy for the society, as well as the liberty of individuals.¹³ The assertion here implies that 'the investigator during his/her performance is necessarily associated with the prosecutor, and is constantly guided by him/her'.¹⁴ This cooperation is however broken or not practiced in most of the developing countries, which constitutes one of the serious causes of miscarriage of justice.

What are the rationales behind such cooperation behind investigators and prosecutors? The justification is self evident. The administration of criminal justice brings up an offender to the

¹² . For instance, State Cases Act, 1992 (2049) of Nepal specifically requires a police officer to be duly designated as an investigating officer before he/she takes charge of investigating officer. His/her authority of investigation is generated by the 'State Cases Act, which underlies the procedure of criminal proceeding. The authority of the investigating officer is, in no way, a power of police officer entrusted by the Police Act of the country. As the State Cases Act plainly provides that an act of investigation is to be carried out by a 'designated' police officer as 'investigator', no other police officers or the institution can interfere in the process of conducting enquiry or the process of evidence collection. Being a police officer is, thus, not 'enough'. The prevailing law in Nepal explicitly requires that the officer is to be recognized as an "investigator" by law itself. The proceeding of investigation is thus valid only if such proceeding is carried out by the designated investigator. Similar provisions are found provided by the Criminal Procedure Code of India, 1973. According to Section 204 (1b), to be read together with Section 87, the magistrate, taking cognizance of the offence, can issue a warrant for arrest of the suspect. The warrant for arrest is a written order for arrest of the suspect. Such warrant is signed and issued by the magistrate, and addressed to the concerned police officer. Seemingly, the provision implies that the power of investigation carried out by the police officer is a 'power related to the delivery of justice'. It is in no way a police power of the State.

¹³ . See; George L. Kelling, "Broken Windows and Police Discretion": A Search Report, National Institute of Justice; USA, 1999, pp. 1-45. Online available at <http://www.ojp.usdoj.gov/nij>>

¹⁴ . Some researches in Nepal, such as Baseline Survey of Criminal Justice System, CeLRRd, 2002, the Comprehensive Analysis and Reforms of the Criminal Justice System of Nepal, CeLRRd, 1999, National Survey of Criminal Justice System, 2012 and dozens of research articles contributed by experts have established that the 'coordination between investigator and prosecutor in Nepal is feeble giving rise to massive failure of prosecution. See, for ratio of success and failure of prosecution, the Annual Reports of the Office of the Attorney General. For the Fiscal Year of 2067 (2011) and 2068(2012).

notice of appropriate justice, thereby rules out the prospect of random reprisal against people and an innocent is being penalized. As already discussed before, the administration of criminal justice functions within a bound of concrete 'principles and normative standards'. The suspect or accused is presumed to be innocent until he/she has been proved committing the offence beyond reasonable doubt. This principle requires the 'prosecutor' to discharge resolute and absolute onus of proofs. Now it is evident why an investigator is so desperately obliged to work in collaboration with prosecutor while collecting evidence. In other words, the main reason behind the collaboration is to ensure that the prosecution is ensured founded on 'undubious, undoubtful and reliable' evidence. Who is the investigator, a police officer generally, is then working for? Definitely not for his/her institution—the police department. He/she is working for the sake of the prosecutor, who has a legal duty to charge the alleged person. This framework of the administration of criminal justice, in the societies that have opted to operate with adversarial system, demands that 'the investigator has to collate such evidences which are mandatory to prove the guilt of the offender'. Nothing more or less than that is required from the investigator. However, there are serious problems in this regard. The following instances of Nepal will illustrate the viciousness of the problem:

- Section 6(2) of the State Cases Act, 1993, stipulates the Government Attorney, who is to handle the case, to provide required instructions to the investigators, upon he/she acquires the 'preliminary report on investigation'. The preliminary report, in practice, however, contains no objective information on *corpus delicti* and other associated facts, scene of crimes, and possible relevant evidences. This report is submitted just for the sake of formality, and hence asks for no kind of instruction from the prosecutor that is supposed to be carried out. The investigator instantaneously takes up his/her work without any consultation in advance with prosecutors, the government attorney. Obviously, the process of collecting evidences starts without prior knowledge of what the prosecutor is looking for.¹⁵
- Section 7(5) also stipulates the investigator to seek advice or instruction from the prosecutor in connection scene of crime, which includes preparation of document such as the crime scene report, and concerning document or exhibit found in the crime scene. This practice is totally non-existent too. It also shows that the investigation follows or progresses in total indifference of prosecutor's concern or need.¹⁶
- Section 9(1) requires the police to record deposition of the suspect in presence of the prosecutor, but this provision is hardly followed in accordance with its true spirit, which intends to prevent circumstances leading to misuse of the authority by the investigating officer. In almost cases, the prosecutor gives its signature in the deposition falsely stating the deposition was recorded in presence of him/her. Some improvements in this regard are seen after series of sensitization training activities, yet the situation is still unchanged.
- Section 15(1) has a clear prohibition on detention beyond 24 hours of arrest except remand from the judicial authority taking cognizance of the offence. However, the prosecutor is hardly informed of process of remand. The investigator alone approaches the trial court, without any information given to the prosecutor, for the remand.¹⁷
- Section 17(1) requires the investigating officer to submit the detailed case file, along with his/her opinion, to the prosecutor once the process of investigation is considered completed by the investigating officer. The timeframe left for the prosecutor for the critical appraisals or understanding of the evidences is limited. Hence, the role of

¹⁵ . CeLRRd, *Baseline Survey of the Criminal Justice System of Nepal, (a research report)* Kathmandu, 2002.

¹⁶ . Yubaraj Sangroula, et.al, *Jurisprudence in relation to DNA Analysis and Scientific Evidence*, CeLRRd, 2070 (2014), Kathmandu, pp. 1-32.

¹⁷ . CeLRRd, n. 15.

prosecutor concludes by preparing a charge-sheet and attaching the documents or evidences submitted by the investigating officer.¹⁸

- The existing success rate of prosecution, including those cases tried by Chief District Officer, an executive body, which has jurisdiction to try cases of gangsterism or vandalism, is around 70 percent.¹⁹ The chance of acquittal in such cases is very low. With this rate of failure in the court, we are forced to argue that either the criminal justice system is letting considerably larger number of offenders go scot free, or is falling in trap of miscarriage of justice by placing a considerably larger number of innocent persons in a state of unfounded prosecution.

What would result by absence of 'cooperation and coordination' between the crime investigators and prosecutors? The brief and candid answer would be 'miscarriage' of justice, and incessant rise of recidivism and rate of crime. Ultimate victim of this situation is 'human rights of people'. The situation generates vicious circumstance of human rights violation and deterioration of the social safety respectively. The change in the situation is therefore not only desirable but also mandatory, provided that the criminal justice system has to be able to address its benign goals. Building or fostering efficiency for the collection of evidence is thus a vital or key concern of reforms of criminal justice system in the developing countries, and this can be realized only by adopting the following strategic reform initiatives:

- The investigator must bring about changes in attitude by truly internalizing a principle that 'his/her role as an investigator' is unquestionably related to the societal need of delivering fair and impartial justice, but not the exercise of coercive police power. An investigator of crime is an agent of criminal justice system but not a crime control or patrolling police office. The crime investigator is an expert of exploring and culling evidences that determines the *corpus delicti*, '*modus operandi*' of crime as well as linkage between the *modus operandi* of the crime and the alleged offender'.
- The purpose or goal of the investigation is to procure evidence for sustainable prosecution. The sustainable prosecution is that which is supported by unquestionable, authentic and legitimate evidence. The responsibility of sustaining the prosecution definitely lies on the prosecutors through evidence collated by the investigators. The prosecutor is thus an expert of knowing the vitality of the evidence and their legality. He/she has thus right and responsibility to instruct the investigator on what kinds of evidence are required to sustain the claims put forth before the trial.
- It is now self evident that the 'investigator and prosecutor' must work as a team rather than two independent institutions or officials. Their cooperation is necessary from the time the offence has taken place. The investigator is to collect evidence in accordance with the need of prosecuting the offence and sustaining it in the trial. For instance, a person is found allegedly killed by poisoning, the prosecutor inevitably require contents of poison in the blood of the deceased as a proof that the death had occurred by poisoning. The post-mortem report may have concrete analysis of the cause of death if the autopsy-performer is requested to the same. The prosecutor has to instruct the investigator in this regard, and this would be possible if the prosecutor knows about details of the offence. The cooperation between investigator and prosecutor is thus the most fundamental *modus operandi* for exploring proofs for sustaining the charge.
- The evidences collected by the investigator need to be scientifically and logically analyzed by the prosecutor, and here, again, the cooperation between the investigator and

¹⁸ . CeLRRd, *Analysis and Reforms of the Criminal Justice System of Nepal (a research report)*, Kathmandu, 1999.

¹⁹ . Attorney General Office of Nepal and CeLRRd, *Baseline Survey of the Criminal Justice System of Nepal (a research report)*, Kathmandu, 2012.

prosecutor is mandatory. The prosecutor has to draw reasoning for confirming the charge from evidences collected by the investigator. The involvement of the prosecutor in investigation is thus not only advisable but inevitable.

It now follows that 'the workable modus operandi' of the efficient evidence collection can only be developed by ensuring the 'collaborative team work of the prosecutor and investigator'. The so-called institutional autonomy and independence between prosecutors and investigators is a serious problem facing the criminal justice system of the developing countries. The absence of collaboration and joint efforts in exploration of evidence destroys the prospect of culling dependable proofs for sustainable prosecution. This situation can be illustrated by the following examples:

- An investigator may not necessarily be a lawyer or person with legal expertise, and so he/she may not know the procedural requirements of collecting evidences, thereby committing a sever mistake concerning legality of the evidence. Hence, prosecutor's involvement in investigation is mandatory for ensuring the legitimacy of the evidence. In developing countries, one of serious reason for failure of the prosecution is the inadmissibility of the evidence caused by wrong procedure of applied for collecting evidence. For instance, the collection of blood, semen, saliva, and other fluids are collected without fulfilling the scientific procedures, thus rendering their legitimacy destroyed. This kind of mistake happens because investigator and his/her subordinates may not have knowledge about 'evidentiary value of the work they are doing'.
- Investigator may have been psychologically and obsessively influenced by the culpability or innocence of the suspect, and so the entire investigation process may be driven by his/her subjective belief. The evidences collected in such a situation may not have any relevance with the *corpus delicti*.
- The difference of 'evidence and proof' is vital. Evidence is a particular, associated with fact of crime or available in the crime scene, document or exhibit'. It is an object or property of phenomenon. A proof is an evidentiary value of the evidence. The proof is a reasoning on which the argument of prosecutor is to be founded on. The investigator may not be aware of such reasoning underlying the evidence. The prosecutor is an expert of drawing reasoning from evidence by 'comparing the property of evidence with law'. In most developing countries' the prosecutor is insensitive of drawing 'proof for sustaining prosecution from' evidence.
- To establish linkage between the *actus rea and mens rea* is a vital function of the evidence, and this responsibility has to be discharged by the prosecutor. The investigator may not be concerned with need of linking such relation. The investigator may be able to explore such evidences only by suggestion of the prosecutor.

Again, the instances discussed above abundantly shed light on the need of a joint work or collaboration of the prosecutor and investigator. This now lead us to conclude that 'the vital aspect of efficient evidence collection' process lies on the 'active, engaged and cooperative participation of the investigator and the prosecutor in the process of exploring and analyzing the evidences'.²⁰ The absence of such cooperation thus can be identified as a serious problem affecting the efficiency in collection of evidences.

- b. **Impact of exaggerated institutional autonomy versus individual professional accountability:** In most developing countries, the institutional accountability is overridingly emphasized by both the 'investigator and the prosecutor'. What it implies is that the 'investigator' and 'prosecutors' emphasize the pride and prejudice of their respective institutions. This attitude

²⁰ . Mark. A. Moor, "The legitimization of Criminal Justice Policies and Practices" in *Perspectives on Crime and Justice: 1996- 1997*; Vol. 1 Research Report 1997, National Institute of Justice USA, pp 49-50.

begets 'invisible but strong current of institutional competition for supremacy, if not rivalry, between the investigator and prosecutor. Both of them indulge in quest of 'institutional autonomy' rather than 'professional participation or coordination' in performance. An investigator considers him/her more a 'member of police force' and the 'prosecutor' a lawyer. The notion that prosecutor is an agency of overseeing the investigation is largely sidelined. On the other hand, the investigator feels more accountable to 'his institutional boss' rather than the prosecutor. The result is 'invisible tug of war' between two professionals. This attitudinal problem, which is crucially important in destroying the efficient *modus operandi* of the collection of evidence and thus resulting in failure of the prosecution, is largely caused by an misunderstanding about 'structure of the criminal justice system', because the most developing countries have transplanted the 'administration of criminal justice from the former colonial masters'.

In the adversarial model, each agency of criminal justice system is supposed to function within a framework of 'institutional independence and functional interdependence'. Nevertheless, the notion of institutional independence cannot be considered as a license to function in isolation or disintegration of other agencies and disregard of the fundamental principles of justice. The institutional independence of each agency is understood as a guarantee to 'its administrative autonomy'. This doctrine implies that the criminal justice system cannot stand as a disintegrated platform of various mutually unaccountable, scattered and disintegrated sub-systems. While each institution functions with its own designated authorities and responsibilities, the goal of all is to ensure fair and impartial dispensation of justice without jeopardizing the public safety. In developing countries, this doctrine is however largely upset by the attitude of overriding and exaggerated pride and prejudice of criminal justice actors.

The criminal justice system of an orderly and organized society is expected to function as 'a composite and fully integrated system'. Any attempt to exclude or undermine any one of the components is not only unimaginable but also disastrous to the credulity of the entire system. The failure of any agency in its mission of carrying out the designated responsibility is bound to generate a state of mal-functioning the entire system.²¹ The efficiency and effectiveness of the criminal justice system is thus necessarily determined by an 'active and coordinated performance of all agencies'. No desired result of the administration of criminal justice system can be achieved without an active and smooth functionality of all agencies.²²

A well devised synchronism of functions of these various agencies is a device to activate this multi-pronged system towards its designated goal, and also forms a prerequisite for systematic and smooth functioning of the system. Thus, a functional criminal justice system is conceptually marked by two essentialities that (a) the functional independence of every agency is undeniable, and (b) an active and meaningful oversight or monitoring of functions of that agency by others is also undeniable. Failure to ensure independence of, and coordination between, the agencies of criminal justice system is bound to give rise to a state of abuse of power and hence lead ultimately to the miscarriage of justice. Inefficiency and corruption will be resulted as an outcome of failure to abide by 'principle of professional coordination'. Nepal's criminal justice system is a unique example of such a situation. In such a situation, every agency is tantamount of endorsing the use of extra-legal method in its performance. The need of kicking ass to keep people in order becomes a 'general rule' of belief. The brutal policing would then be phenomenal feature. This situation will intensify the social disorder, injustice and ultimately appears with characters of 'the criminalization of politics and politicization of crimes'. Disorder, fear, and

21 . Haribansa Tripathi (Dr.) "The Adjudication Process in Criminal Justice System" (A Working Paper for National Workshop on Criminal Justice System of Nepal, 10-12 June 1997); ILRR, Kathmandu, Nepal.

22 . *Ibid*

crime undermine social and economic institutions to such an extent that families, schools, commerce and other institutions cannot function smoothly.²³

Some scholars have rightly argued that the criminal justice system is not a system in its 'structural framework'. For them, in a structural system in its true sense, the concerned actors are explicitly directed to towards a particular objective by some coherent centralized authority.²⁴ In the criminal justice system, however, none of the agencies or actors has authority to command others in their respective institutional administration and works. It can thus be argued that the criminal justice system is founded on a theoretical notion that rejects existence of a vertical control mechanism. Every agency of the criminal justice system is associated with other horizontally, and, hence, functions with a scheme of horizontal control mechanism. Every agency is independent in its assigned functions, but is guided by the indispensability of coordination between their respective functions which provides for a system of mutual control by each other.

Different agencies are linked together through a process of actions in which one agency's "**output**" becomes the next agency's "**input**".²⁵ The weapons seized and the reports of finger prints affixed on the weapon, for instance, are "**outputs**" of the investigator's act, which becomes "**input**" to the prosecutor, as the charge-sheet to be prepared by him/her should essentially be based on such evidences. The prosecutors cannot prosecute a person with evidence procured by themselves independently. The charge sheet, on the other hand, is the "output" of prosecutors, which constitutes an "**input**" for trial courts. This functional framework of the system presents a scheme of tightly knitted 'interdependence' between agencies and requires an unavoidable interrelationship among different agencies involved. This scheme is important benchmark of the successful criminal justice system. The interdependence constitutes a system in itself, and as such it is entirely guided by the need of objectively operationalizing the various aspects of work within the system; in any case it is not guided by motivation of control of one agency's function by other.²⁶

Of course, the framework for coordination between these institutions is fashioned and functionalized by pre-determined laws and overall system of governance adopted by the given society. In this context, various practical attributes such as the size and composition of the population, the historical contexts, the unique topography, the economic development pattern, the level of education, the functional capacity of agencies etc. do play crucial roles in shaping the institutional framework and psychology of the interagency coordination.

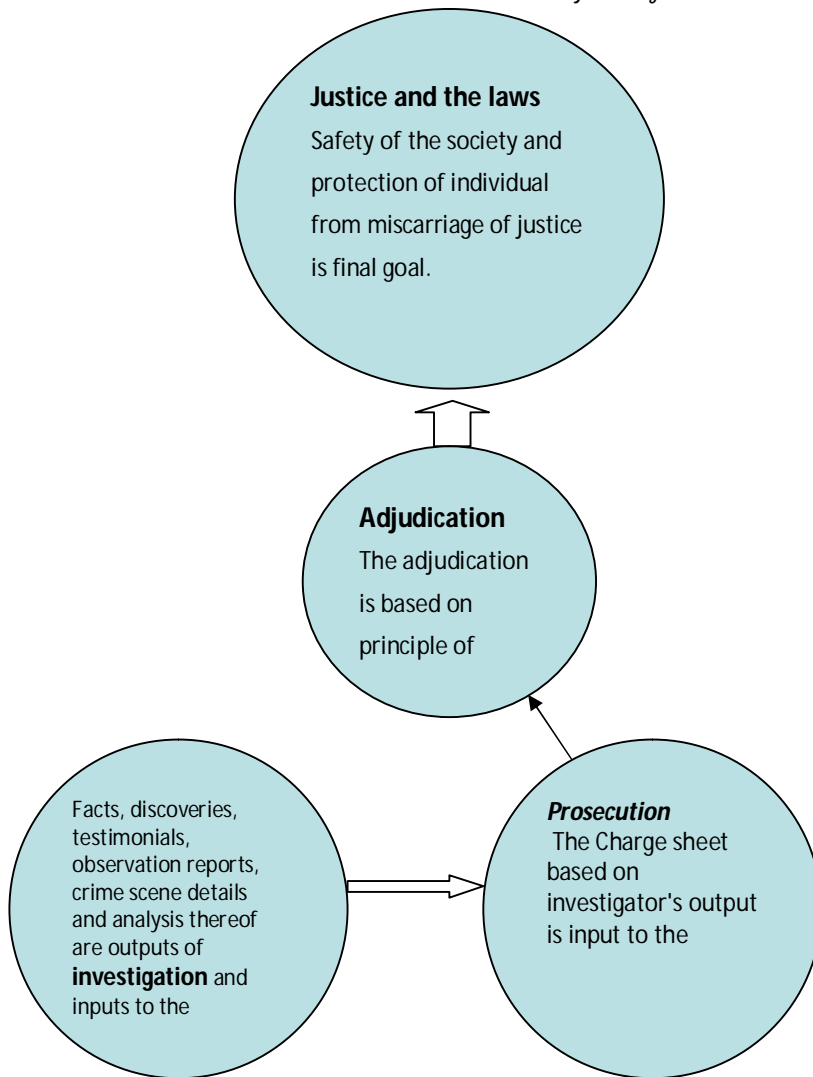
²³ . George L. Kelling, "Broken Windows and Police Dissection": A Research Report; National Institute of Justice: USA, 1999, pp1-45. Online available at <http://www.ojp.usdoj.gov/nij>

²⁴ . In countries that follow adversarial system, it is impossible to fashion the criminal justice system on vertical structure. In this system, each actor is accountable to its own central authority, and works independently. The police department in Nepal, for instance, is accountable to the Ministry of Home, and the prosecutors to the Attorney General. The system of courts is virtually independent of the executive control. Each of them is responsible to other only because no action of one becomes meaningful without other's existence.

²⁵ . Id,20

²⁶ . Ibid, p. 50.

Functional coordination of criminal justice agencies



These various factors shaping the structure and psychology of the system are defined as dynamics of the criminal justice system. The overriding and exaggerated institutional or organizational pride and prejudice generates serious obstacles in achieving goals of the criminal justice system.

The adopted typology of the criminal justice model also is an important factor for shaping the required framework of the coordination. It is why the model or framework of the coordination adopted by countries with adversarial system is different to that of countries adopting the inquisitorial one. When this framework is disregarded, the criminal justice system falls in a trap of chaos.

- c. ***Coherent function of the criminal justice system and the professional responsibilities of investigators and prosecutors:*** The fundamental objectives of the criminal justice system as discussed earlier makes it clear that the 'criminal justice system' is not a coercive instrument of State to inflict pains on people. It has specific goals to 'protect and preserve' human dignity and security. Criminal justice system in this sense is not a 'law and order' instrument of police department; rather it is an 'instrument of State to ensure' safety of the society by criminalizing unacceptable behaviors, penalizing the wrong-doers and deterring the potential offender'. These objectives have been fulfilled by the State by 'setting a fair and impartial system of trial'. The principle of 'fair and impartial trial' distributes powers to actors of criminal justice and rights to accused in a wisely defined 'scheme of operation'. The scheme can be outlined as follows:
- a. Actors of criminal justice can curtail liberty of suspects as provided by the law. The suspect can be arrested and detained subject to law. A lawfully carried out arrest and detention cannot be challenged in the court. However, the arrest and detention is to be based on objective evidences, but not on speculation or discretion of the arresting and detaining agencies. This value of the criminal justice system is found seriously suffering in developing countries mainly due to tendencies of violating or disregarding fundamental principles of criminal justice and laws established by the State. Arrest and detention without warrant, the manipulation of evidences by cooking them or failing to explore evidence, the excessive indulgence on interrogation to extract confession, the practice of torture to press the suspect to confess, and the use of evidence without analysis are some examples of disregarding the value of fair and impartial justice.
 - b. Investigators can indulge in using any legally possible means of obtaining evidence. State can use any amount of financial or human resources to procure evidence, and can use any type of expertise to sustain its findings. However, the State is expected to exercise this power by recognizing and protecting the due process or procedural rights of suspects. Unfortunately, the tendency of criminal justice actors in overlooking or violating the procedural rights of suspects or accused is phenomenal. Torture is commonly used on developing countries as a legitimate too of extracting confession.
 - c. Prosecutors can apply charges subject to laws that can be corroborated by evidence. They use resources as required by the need of sustaining the charge beyond reasonable doubt. However, the practice in developing countries is quite frustrating. Accused have been charged without adequate proofs and failure of such prosecution is bigger without any kind of accountability.

While using these authorities and powers, the investigators and prosecutors are supposed to pay respect to the following liberties or rights of accused:

- a. ***Presumption of innocence-*** These agencies are obliged by laws to treat suspects with full dignity of their physical integrity and security of persons. The suspects ought not or cannot be treated like convicts. Therefore, no arrest, detention, interrogation and process of collating proofs can deprive of suspects of their rights to physical integrity and security of persons.²⁷
- b. ***Right against self-incrimination is respected without exception.*** The most significant rationale behind right against self-incrimination is to prevent conviction of crime suspects based on confession as it is not only unreliable piece of evidence but also tantamount of torturous or deceptive interrogation.²⁸

²⁷ . See; Devlin Report to the Secretary of the State for Home Department (Departmental Committee on Evidence on Identification in Criminal Cases, 1996 H.C. 338, 1976.) UK.

²⁸ . See; Laurie Magid, "Deceptive Police Interrogation Practices: How far is Too Far": Villanova Public Law and Legal Theory Working Paper Series No. 2001-1, p.1168.

- c. **Right to representation by lawyers-** No suspect or accused can be denied of access to adequate legal defense.

The respect to suspects' rights does not automatically provide an opportunity for investigators and prosecutors to 'best coordination' between them. The respect to right to silence does limit scope of dependence on 'confession' as the basis of charge. Prosecutors have to lean back to investigators for more dependable proofs of guilt, and thus it ensures their watchful attitude over the investigators. Balance 'power of criminal justice actors and rights of suspect' theory is thus crucial for successful operation of the criminal justice system in any society. This theory is important to generate beliefs on prosecutors that:

- a. **Adequate and scientific investigation is a tool of 'effective prosecution:** Hence, the prosecutor has to legally guard the proceedings of collating evidence and assist investigators legally in matters of search and seizure and ensuring legal technicalities of the documents. Investigators are thus part of the prosecution work. The investigator's opinion about, and interpretation and construction of evidence, is a boon for prosecutors. The mutual collaboration between investigators and prosecutors is thus a 'keystone' of a successful prosecution.
- b. **The objective of investigation is to supply data for prosecutor on the given criminal act to prove the guilt of accused beyond reasonable doubt:** Prosecutor has to have a quality of a 'research analyst'. The evidence do not speak, they should be made to speak by the prosecutor. Prosecutors are not 'fax machine' to receive documents from police and submit to the court. They are professional actors with capacity to 'conduct methodological enquiry' of all evidences supplied by the investigators.
- c. **Investigators and prosecutors are individually accountable to 'success and failure' of their works. It is not their institution is accountable for success of investigation and prosecution:** Both these actors are responsible to 'collectively work for burden of proof against suspect on behalf of the state'. The punishment and reward is thus individual not institutional.
- d. **The prosecutor is a key agency in adversarial system.** Hence, he/she should acquire ability to represent the State. The investigator has to coordinate himself/herself with prosecutor for acquiring reliable evidence and their legal sustainability.

On top of all, the lack of appropriate forensic technology is equally important challenge in the developing countries. This technology is expensive and unaffordable generally. The rapid changes of the societal structure, the system of governance and political instability, and lack of adequate research facilities are also serious challenges. However, such challenges can be easily handled provided that the 'investigators and prosecutors' bring about changes in their stereotyped institutional pride and prejudice and begin working as a team.

3. INITIATIVES FOR ENHANCEMENT OF PRESERVATION, ANALYSIS AND USE OF EVIDENCES FOR WORTHY PROSECUTION AND FAIR AND IMPARTIAL TRIAL

The foregone discussion argues that 'the major problem of the criminal justice system in developing countries is associated with 'evidence collection and analysis method'. The method is generally archaic, the confession-oriented, and stricken by abuse of power and torture. Most charge-sheets brought by the prosecutors are based on 'confession' extracted by use of deceptive interrogation or physical force. The use of mental torture is also a common tool of extracting confession. The interest and inspiration of the investigator for exploring scientific evidence is not profoundly noticeable, hence the emphasis lies on 'extraction' of confession. The tendency that the confession is the conclusive evidence is random among the investigators and prosecutors of

the developing countries. The overriding emphasis and reliance on confession de-activates the investigators and prosecutors of the developing countries to explore scientific evidence. Equally true is the fact the 'the availability' of forensic facilities is scarcely limited. The evidences produced by forensic and other scientific means are also found tainted by several reasons. The protection of the scene of crime and preservation of evidences is a serious problems as well as challenge in the developing countries. Some studies show that the following problems are commonly encountered in this regard:

- a. **Protection of the scene of crime and preservation of the evidences:** It is said that evidence that is lying on the ground loosely can be collected and catalogued by using proper method of collection and preservation. Both the collection and preservation call for seriousness on the part of the investigators and the use of proper technology for collecting so that the properties of the evidence is not destroyed or tainted. The serious challenge in this regard in developing countries is associated with the level awareness of the public as well as the police personnel. The invasion of the scene of crime by the flocks of public and security personnel is a serious problem, which not only contaminates the scene of crime but also destroys the traces of evidences left by the offender; the evidences such finger prints, the foot prints, the bodily liquid substances, the traces of threads and hair and the other useful evidentiary marks to be found in the scene of crimes are either contaminated, tainted or destroyed.²⁹ In such a situation, the scope of using forensic technology and DNA analysis of the evidences to be found in the scene of crime is markedly low in developing countries.³⁰ Collection and preservation of evidences from the scene of the crime is a serious challenge in developing countries. In Nepal, for instance, numbers of samples collected are un-examinable for contamination during collection or delay in sending to the forensic laboratory.³¹ Considering the types of problems, the following remedies are to be adopted in order for making service of the forensic science enhance of the quality of criminal justice:
- Awareness training for grassroots police personnel importance of protecting the scene of crime and preservation of evidences and traces to be found there. It is found that the grassroots police personnel needs to be educated about the authenticity and reliability of the evidences to be produced by the use of forensic science. This initiative will prevent unwanted entry of the police personnel as well as the common people within the scene of crime. The equipments and materials can be used for making the scene of the crime preserved.³²
 - Making provision of adequate number of the scene of crime officers is essential, followed by an intensive training on skills of collecting samples from the crime scene. More number of the scene of crime officer makes it possible to reach the spot in time, so that many important traces can be collected before they are destroyed by natural phenomena such as rain, hot sun, or storms, fogs, dust and so on.³³

²⁹ . See; Jayabishnu Nepali, Praman ra bidhi bigyan: sankalan, samrakchan tatha parikchan ma aiparne samasya tatha chunautiharu (Evidences and Forensic Science: The Problems and Challenges to be Encountered while Collecting, Preserving and Examining) in Yubaraj Sangroula, et.al (eds.) *Jurisprudence About DNA Analysis and Scientific Evidences*, CeLRRd, 2070 B.S. (1913), Kathmandu, pp.64-65

³⁰ . See generally, Betty Layne Desportes, "Improving the Practices and Use of Forensic Science: A Policy Review; American Academy of Forensic Sciences, 2008. Available online www.thejusticeproject.org, visited 14th August, 2014.

³¹ . See; Jivan Prasad Rijal, "DNA and its Specific Property" in in Yubaraj Sangroula, et.al (eds) *Jurisprudence About DNA Analysis and Scientific Evidences*, CeLRRd, 2070 B.S. (2013), Kathmandu, pp.33-71.

³² . In a forensic training for the crime investigators in Nepal, from November 2013 to March 2014, it was learned that the preservation of the crime scene would be problematic due to lack of essential materials or mans such as ribbons, pillars and so on. The senior police officer engaged in the training as a resource person, however, suggested that the 'plastic role or locally made organic ropes' could be used for this purpose considering their lasting nature. He thus suggested to make a long plastic rope as part of the 'forensic kit-box' provided to the scene of crime officer'.

³³ . See; Jayabishnu Nepali, Praman ra bidhi bigyan: sankalan, samrakchan tatha parikchan ma aiparne samasya tatha chunautiharu (Evidences and Forensic Science: The Problems and Challenges to be Encountered while Collecting, Preserving and Examining) in Yubaraj Sangroula, et.al (eds.) *Jurisprudence About DNA Analysis and Scientific Evidences*, CeLRRd, 2070 B.S. (1913), Kathmandu, pp.56-65.

- Training is also necessary on enhancing the sensitivity of the scene of crime officer to deliver the collected samples in time. It has learned in Nepal that a large number of such samples are destroyed by delay in delivery of the samples to the laboratory.³⁴
- It is also necessary to clearly mark the 'types or categories' of sample collected from the scene of crime. It is also necessary to mark them who actually these samples belong to—the accused or the victim. It was learned that it was another important area of mistake to be made by the scene of crime officer.³⁵
- Each piece of evidence is to be given an individual identification mark or number so that it can be cross-matched against corresponding investigative report. It was reportedly another area of mistake to be committed by the scene of crime officer. Many samples were found collected in different bags or tube and put into a bigger bag with one identification number.³⁶
- Investigators in the developing countries also need an elaborative training for marinating 'custody chain' of the forensic evidences. The custody chain is a document to be filled out by the concerned officer who wishes to use or view the evidence. This is necessary to prevent loss of evidence and/or cross contamination by individuals who should not have contact with it.³⁷
- The area of the scene of the crime is to be photographed as rule. The detail signs of injury such blood stains are marked properly. These photographs are crucial evidence in the piecing together of an event so that investigators who are not able to visit the scene of crime can get detail information of the situation.

b. **Information of the scene of crime to the prosecutor.** As it has fairly been described the importance of 'evidence' as a source of 'reasoning' already before, the concentration of the investigating officer should be laid on procuring such a proof from the scene of crime that it will provide a strong reasoning to the prosecutor for making him/her able to determine the nature of *corpus delicti* and its meaningful relation with alleged offender. The prosecutor may be able to suggest the nature of proof required in that given crime. The communication between the investigating officer and the prosecutor is not only desirable but inevitable. From this point of view, the prosecutor must take the lead in coordinating with the investigating officer in the following matters as a necessary *modus operandi* for properly collecting and preserving evidence from the scene of crime:

- **Autopsy.** The prosecutor must be able to say what exactly he/she wants the performing doctor to mention in the autopsy report. The prosecutor therefore must clearly instruct the investigating officer, and who, in turn, must visit the performing doctor to advice on their requirement. It is advisable for the investigating officer to give a detail perspective of the scene of the crime to the doctor, and if possible, invite the doctor to visit the scene of the crime. In Nepal, for instance, the autopsy is found largely undependable evidence because it fails to mention the details which are necessary for generating reasoning for the prosecutor. The main reason is that 'the dead body is dumped' in the hospital by the junior personnel who has no knowledge of investigation.³⁸
- **DNA analysis:** The prosecutor must be able to suggest to the scientists carrying out the analysis on his/her requirement. Scientific language is not common or comprehensible for all. As a matter of fact, the prosecutor must require the scientists to make detail elaboration of their opinion by graphs, notation, narration, or elucidation. Only such reports can be sustainably used

³⁴ . Ibid.

³⁵ . Ibid.

³⁶ . Ibid.

³⁷ . Id, 31

³⁸ . For detail See; Yubaraj Sangroula, "Jurisprudential and Jurimetrics Analysis of Florence Evidence" in Yubaraj Sangroula, et.al (eds) *Jurisprudence About DNA Analysis and Scientific Evidences*, CeLRRd, 2070 B.S. (2013), Kathmandu, pp.1-22.

for generating the scientific reasoning. The importance of such elaboration is particularly important considering the absence of specialist expert prosecutors, judges and defense attorneys.

- **Custody Chain:** Legality or legitimacy of 'custody chain'—the document prepared by the scientist—must be obtained by the prosecutor for two main reasons: one, to prevent any manipulation in evidence; another, to prepare for examination of expert witness in the court. The custody chain will be thus an important source of legality of the evidence.

This *modus operandi* of collection, preservation and examination of forensic evidence will ensure the following:

- a. Circumvention in the possibility of contamination or destruction of evidence.
- b. Prevention of the possibility of manipulation of evidence, for ulterior motive by any person including the offender.
- c. Establishment of the unchallengeable legitimacy of the evidence.
- d. Establishing the accuracy and tangibility of the evidence.

Collectively, these elements will guarantee the success of prosecution, and thus avoid the miscarriage of justice.

4. CONCLUSIONS:

Considering from the wider perspective of the criminal justice system in the developing countries, the scenario seems not very encouraging. One of the major problems is generated, in most countries in Asia, by the 'unplanned transplantation' of the system of past colonial masters. India has been a glaring example.³⁹ The stereotyped attitude of the State and its criminal justice agencies that the criminal justice system is coercive apparatus of State for peace and order in the society is viciously responsible for blocking the desired change in the system. The tendency of sticking in conventional approach of investigation, which does not emphasize the cooperation and collaboration between the investigating officer and the prosecutor that overridingly focuses on confession-oriented investigation system, is another obstacle in reforms of the criminal justice system in developing countries. These problems and challenges can largely be addressed by popularizing the use of forensic science in investigation. Hence, the developing countries must emphasize use of science and forensic technology in dispensation of the criminal justice.

³⁹ . For detail information in this regard See; Malimath Committee Report.