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**Witness Protection**  
**A Study Report**  
**2010**

# Witness Protection A Study Report



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# Witness Protection: A Study Report

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# PREFACE

In Nepal there is no concrete law in the area of witness protection except for the incomplete provision in the *Muluki Ain*. The latest provision provided by the International Criminal Court is considered more reliable and acceptable by this modern world. An eminent mechanism to complement the justice system, the notion of witness protection has not yet been introduced in the Nepali criminal justice system. Informal Sector Service Centre (INSEC) acknowledged the urgent need for a good research and study and appropriate suggestions to fulfill the same inadequacy thereby conducted this study in the area of witness protection.

Protection of the witness is one of the biggest challenges where traditional and cultural discriminations and malpractices are deep rooted in the society. To promulgate law, to build the organizational structure accordingly, and to develop a culture respecting the spirit of such structure are the three basic steps to modernize the present judicial system. Internalizing these matters, we organized consultations in all five developmental regions. This book is, thus, an outcome of those series of consultations.

I would like to express my gratitude to Advocate Govinda Sharma (Bandi) for his involvement in this important study. I would like to thank Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) for supporting us in translating this study into English and publishing this English version. I would like to express my special thanks to senior officer Advocate Bidhya Chapagain of INSEC for putting forward the proposal with regards to this study before INSEC and for the necessary co-ordination as per the requirements. Likewise, I would also like to thank senior officer Yogish Kharel of INSEC for editing this book and officer Gita Mali of INSEC for the cover design of this book.

I am convinced that this book will be of use and of significance to the policy makers, law makers, law professionals, and the authorities responsible for law execution and law dispensing as well as for those who are committed for the witness protection and establishment of legal regime. As in past, I expect your valuable comments and suggestions on this study.

**Subodh Raj Pyakurel**  
Chairperson, INSEC

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# Chapter 1

## Preliminary

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### 1.1 Introduction

A saying by famous jurist Jeremy Bentham that “*Witnesses are the eyes and ears of justice*” shows the significance of the role of a witness in justice dispensation. A statement from the witness can bring a huge change in the status of the case. Furthermore, success of a criminal case depends mainly upon the presence of the witness in the court and a statement consistent with the evidences gathered from the site. Therefore, the justice system must create an opportunity and environment where the witnesses and the victims are able to put forth their statements without any fear. But ironically, Nepal’s existing justice administration is not found to have been able to acknowledge this role of witnesses.

Similarly, Nepal’s provision regarding the questioning of witnesses is also not simple and swift. It takes a long time to take statement from a witness while in such situations, many cases fail due to such problems as witnesses forgetting the things he or she saw and knew, witnesses refusing to give a statement under the influence of the convict and witnesses having temporary addresses not being located to be summoned in the court later.

There is a perpetual lack of legal and institutional provision regarding witness protection in Nepal. Because of the fact



that the witnesses aren't being able to feel safe under the existing legal provisions regarding the witnesses, the trends such as, witnesses of mainly the criminal cases of serious nature not wishing to be present in the court, witnesses not wishing to give a statement even if they are present in the court due to lengthy questioning procedure and witnesses turning into hostile witnesses due to potential threat from the defendants, are generally observed. Reasons such as government failing to guarantee security for the witnesses and provision of facilities for the witnesses being limited to the papers seem to be mainly responsible for this. Nepal's criminal justice system seems to be incapable in terms of providing justice to the victims since it hasn't paid enough attention on the safety and security of the victims and witnesses for presenting them before the court at the time wanted by the court. There is no doubt that the absence of such role will strengthen the criminals in the long run.

On the other hand, the investigation and prosecution of cases of gross human rights violations and crimes that occurred in course of the armed conflict of the past is being stalled due to a lack of appropriate security for the witnesses and the victims. Even as the country is undergoing peace process after the end of conflict, the general public is reluctant to support the investigation of such cases due to fear. The experiences of other countries in post-conflict and different investigations that have been carried out on the matter show that support and participation of the witnesses and the victims is essential for the successful prosecution of serious crimes that took place in the past.

Therefore, it is the fundamental legal obligation of the State to provide security for the witnesses and the victims in order to carry out successful prosecution of the crimes of serious nature and serious human rights violations.<sup>1</sup> The witnesses and the victims need to be saved from fear, intimidation and revenge to also guarantee rule of law.<sup>2</sup>

## 1.2 Objective of the Study

Justice is a basic and fundamental right of each and every person. The Interim Constitution of Nepal 2007 and the different international agreements on human rights to which Nepal is a State party also guarantee this right. It has put the obligation on the State to provide justice for the victims of crimes as well as the victims of serious and gross human rights violation. However, the victims of existing justice system of Nepal is unable carry out its obligation due to the lack of law and structure regarding the protection of witnesses and the victims. This has seriously affected the right to justice. Therefore, it is important to establish an effective legal and institutional structure regarding the protection of witnesses and the victims in order to ensure the right to justice.

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1 Witness protection in Countries Emerging from Conflict, INPROL Consolidated Response (07-008), [www.inprol.org](http://www.inprol.org) accessed 2009/11/19

2 Good Practice for the protection of the witness in criminal proceedings involving organized crime, UN office Drugs and Crime, Vienna, <http://www.unodc.org/documents/organized-crime/witness-protection-manual-feb08.pdf> accessed 2009/11/19

Although the annual reports of the Office of the Attorney General, United Nations Human Rights Mechanisms and different Human Rights Organizations have been drawing the attention of the government for a long time to the need of formulation of a law regarding the protection of the victims and witnesses, the law-formulating agencies are not found to have conducted any discussion or debate on the issue formally so far.

The topic of witness protection, which remains as an important mechanism to fulfill the concept of justice, has not yet got an entry into the criminal justice system of Nepal. Adequate study and research about this is yet to be done. The Informal Sector Service Centre (INSEC) has brought forth this study on witness protection to present necessary suggestions to fill these gaps at least to some extent.

The main objective of this study is to identify some provisions that can be followed in Nepali context while evaluating the international standards on the matter and the good practices of other countries.

### 1.3 Methodology of Study

The study has undertaken desk review as well as conducted consultations with the legal practitioners working in the field, victims and their relatives and the stakeholder organizations. International standards on witness protection and the provision made by the laws of other countries as well as the practices adopted for effective implementation of the

law have also been reviewed in course of this study. The researcher had an opportunity to visit Hong Kong University in February 2010 on the occasion of the University's tenth annual program on human rights and was able to observe the witness protection program in Hong Kong directly and talk to the officials involved in the program. The experience gathered there has further helped this study.

Focused Group Discussion was also adopted as another methodology of the study. The study has taken as its basis the regional workshops of Focused Group Discussion, conducted with an objective to gather the opinions of the victims and other stakeholders on what mandate is needed with regards to witness protection and what should the witness protection law should be like in Nepali context. The main objective of the regional workshops was to identify the main contents that should be included in witness protection law and to gather necessary suggestions to prepare a draft of the law. This methodology undertaken by the investigator seeks to lay stress on the need of wider consultation for the formulation of legislations. In this way, the given study has started the process of consultations, though on behalf of the civil society. The study adopted the procedure of organizing regional workshops in order to incorporate the voices of the stakeholders and the victims in the process of formulation of law. Regional workshops were held in different places from mid November 2009 to mid May 2010 in this regard.

The regional workshops in the form of Focused Group Discussion gathered opinions of the victims, security agencies, experts of legal and justice sector and representatives of civil society while also at the same time identified the areas of witness protection on the basis of group interactions and discussions among the participating stakeholders.

Exploratory Research Design and Qualitative Method were adopted to gather the opinions of the victims and other stakeholders in this regard. Apart from this, discussions were held among the stakeholders on the following five themes on a group-wise basis:

1. Problems faced by witnesses and victims in present situation,
2. Subjects to be incorporated by the legislations regarding witness protection,
3. Form of structural mechanism regarding witness protection,
4. Measures for witness protection, and
5. Punishment.

The workshop had adopted the procedure of documenting the conclusions of each group after the group-wise thematic discussions concluded and the conclusions were presented. As per the plans of organizing workshops in five development regions for thematic discussions, the first workshop was organized in Nepalgunj on December 4, 2009 while other workshops were held in Pokhara on June 5, 2010, in Biratnagar on February 17, 2010 and in Dhangadhi

on February 2, 2010 respectively. The participants for the regional workshops were selected on random basis.

This study aims to prepare an analytical report on the witness protection law by maintaining consultations and coordination with the victims and stakeholders and present it at the National Workshop and prepare a final report based on suggestions received from that workshop. Since providing support to the formulation of draft of witness protection law is one of the main components of the investigation, consultations with the stakeholders were considered desirable.

#### 1.4 Scope and Limitations of Study

The scope of given study is to prepare a comprehensive report after conducting a theoretical analysis on witness protection. Although it was said that an study would be conducted on witness protection, overall study on witness protection program has, however, is not conducted here. It instead aims to prepare a draft of a bill by analyzing the measures of witness protection on the basis of the experiences of other countries on witness protection.

Although the study aims at addressing all concerns of the victims and the stakeholders, concerns of all stakeholders may not have been reflected adequately in the study due to some practical difficulties. For example, the study may not have been able to incorporate all stakeholders in its regional workshops held in different places under the Focused Group Discussions. Similarly, the stakeholders participating in the

workshops also may not have been able to put forth their concerns adequately regarding their interest due to the lack of proper knowledge on the issues. In this way, this study is limited to the available information only.

This report is divided into five chapters. The preliminary chapter is focused on the procedure, limitations and objective of the study. International standards on witness protection are discussed in the second chapter. How the concept of witness protection was developed has been discussed in this chapter. The standards developed by the United Nations and the International Judicial Mechanisms are also discussed under this chapter. Experiences of other countries have been discussed in the third chapter. Those countries mainly include South Africa, Hong Kong and Australia. Efforts to make a quick review of the existing Nepali laws and policies have been made in the fourth chapter. Efforts have been made also to review the provisions made in the legislations on witnesses such as Evidence Act, Civil Code and Government Cases Act as well as the provisions contained in the drafts of the proposed Truth and Reconciliation Bill and Disappearance Bill. In the fifth chapter, attempts have been made to draw conclusions on the need of formulating legislation on witness protection in Nepal and also to point out the subjects that need to be incorporated by such legislations. Discussions have been done on who requires protection, who provides such protection and for how long and how such protection will be provided.

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## *Chapter 2*

# International Standards

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### 2.1 Historical Concept

The concept of witness protection is found to have entered Criminal Justice System after the witnesses of criminal cases started being reluctant on giving the evidences due to the fear of organized criminal gangs in course of investigation and trial of the cases. It began specifically from the United States of America in 1970. The witness protection program was introduced mainly to bring the then mafia gangs, who were enjoying immunity due to the lack of evidences, to book. Until then, since the members of the criminal groups in USA used to kill or take physical action against anyone helping in the judicial process against them, prosecution against them was possible or successful. State would fail in getting statements from important witnesses in such crimes or offences while in many cases, the members of such organized criminal groups used to disappear the witnesses. Such a situation encouraged the American Justice Department to formulate and implement programs on witness protection.<sup>3</sup> As a result, the American government formulated the Organized Crime Control Act in 1970. The Act authorized the Attorney General of USA to provide protection to the witnesses of the organized crimes and

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3 Fred Montanino, "Unintended victims of organized crime witness protection", Criminal Justice Policy Review, vol. 2, No. 4 (1987), pp. 392-408.



other crimes of serious nature, supporting in judicial process by providing facts of the cases. In this way, the concept of witness protection took on a legal form and the protection of witnesses in course of the investigation and prosecution of organized crimes became a fundamental obligation of the State. Recently, a judicial norm was developed that this concept will also be implemented in human rights violations and will not only be limited to the criminal cases of serious nature. Therefore, looking at the provisions on witness protection in the laws of different countries formulated after the 1990s, we can see that this provision is mainly implemented in the crimes of serious nature<sup>4</sup> and human rights violations.

## 2.2 International Standards

Different standards on witness protection have been developed in international level and it is the obligation of the concerned State, according to the international law, to provide protection to the witnesses and victims as per those standards. The international law also requires the State, while make legislative, judicial and administrative provisions to fulfill those obligations. The standards regarding the security and protection of witnesses and victims developed in international level are as follows:

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<sup>4</sup> This report mentions that the organized crimes, crimes under the international law and any crime considered to be serious in the nature are the Crimes of Serious Nature.

### 2.2.1 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1895

This Declaration had for the first time defined the victims of crimes and had declared formally that they are entitled to protection. This Declaration has established that "victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, trauma, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power and, that such victims are entitled to protection and security.

Also, the Declaration has determined the obligation of the State regarding the protection and security of the victims of crimes and abuse of power. The principle 6(d) of the Declaration provides that the State is responsible for taking measures to minimize inconvenience to the victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation. Similarly, principle 4 of the Declaration provides that the victims should be treated with compassion and respect for their dignity. It provides that they are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. The Declaration also mentions that physical and psychological protection should also be provided while providing remedies under judicial and administrative processes.<sup>5</sup> The Declaration also

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5 Principle 5

provides for taking measures to minimize inconvenience to the victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.<sup>6</sup>

### **2.2.2 The UN Convention against Transnational Organized Crime, 2000**

The UN Convention against Transnational Organized Crime, 2000 and its three optional protocols have made provisions that the States parties should provide effective protection to the witnesses providing statement or testimonies or information in course of the criminal proceedings of the crimes mentioned in the Convention, their relatives or any person close to them in order to save them from possible threats and revenge. The crimes defined by the Convention include money-laundering, corruption, human trafficking and illegal trade of immigrants.<sup>7</sup>

### **2.2.3 The UN Convention against Corruption, 2003**

Similarly, the UN Convention against Corruption 2003 has provided that each State party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them. The crimes declared so by the Convention include money laundering,

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6 Principle 6 (d)

7 Article 7, UN Convention against Transnational Organized Crime, 2000

bribes taken by those holding public posts, embezzlement of public property, abuse of authority, financial property made through illegal means, etc.<sup>8</sup>

#### **2.2.4 The Economic and Social Council Resolution, 2005/20**

The Economic and Social Council has, in 2005, passed a resolution issuing the Guidelines on Justice for Child Victims and Witnesses of Crimes. The Guidelines states that every child facing criminal actions has the right to be treated fairly and witnesses should be provided security. The Guidelines have also defined child victims and witnesses. According to IV (9) of the Guidelines, child victims and witnesses denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or group of offenders. The Guidelines also state that every nation has to provide security and protection to child victims and those who have witnessed the commission of crimes.

#### **2.2.5 International Covenant on Civil and Political Rights, 1966**

Article 6 of the International Covenant on Civil and Political Rights states that every human being has the right to life, while Article 9 has provided for the security of person. Similarly, Article 2 of the Covenant states that a State party should make laws to guarantee rights to life and

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8 Articles 32, 37 (4) UN Convention against Corruption, 2003

security and provide effective remedies. Article 14 says that it is the duty of all nations to ensure a fair public hearing and provide justice as per domestic laws. In addition, the State party shall undertake to ensure that any person whose rights have been violated shall have an effective remedy (Covenant on Civil and Political Rights, Article 2 (3)). The remedy in violation of any case should entail, besides legal action and penalty, proper reparations to the victims. There should be no fear or intimidation to victims or witnesses in the course of seeking remedy. Other obligations provided for by the Covenant which is close to witness protection program include right to life (Article 6), right against torture or cruel, inhuman or degrading treatment or punishment (Article 7), right to security of person (Article 9) and right to liberty of movement (Article 12).

## **2.2.6 Statute of the International Criminal Court (Rome Statute), 1998**

Article 68(1) of the Rome Statute has granted the International Criminal Court the privileges to take appropriate measure to protect the safety, physical and psychological well-being of victims and witnesses. Other Rules and Guidelines concerning court administration are also found to have given responsibilities to make necessary arrangements for victims and witnesses. Similarly, the Statute has also provided for setting up of a Victims and Witnesses Unit as part of the Court. The Unit is also mandated to provide, in consultation with the prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on

account of testimony given by such witnesses.<sup>9</sup> The Court can also appoint staff with expertise in trauma, including trauma related to crimes of sexual violence.

### 2.2.7 International Practices

Different arrangements have been made for the security of victims and witnesses with regard to cases heard by the International Criminal Court, formed temporarily at the UN's initiative, based in former Yugoslavia and Rwanda. The Rules of Procedures and Evidence have, as compared to other international laws, made elaborate arrangements regarding the measures to be adopted regarding the security of victims and witnesses. These Courts have laid emphasis on the impartial public hearing in order to maintain a balance between the security of victims and witnesses, and the rights of prosecutors.<sup>10</sup> Similarly, these Courts are also found to have started the jurisprudential practice that not only victims and witnesses but also defendants would receive security.<sup>11</sup>

The former Yugoslavia-based ICC, regarding the security of witnesses and victims in a case, is found to have specified the following duties of Court under the Special Procedural

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9 Article 68 (4) Rome Statute of the International Criminal court

10 Briefing Paper on Legal Issues and Witness Protection in Criminal Cases, Mark Mackarel, Fiona Raitta and Susan Moody, Department of Law, University of Dundee, The Scottish Executive Central Research Unit 2001.

11 Prosecutor vs Delalic, Mucic, Delic and Landzo, ICTY

## Security Strategy.<sup>12</sup>

- ▶ Not to disclose the identity of victims and witnesses and to put ban on media,
- ▶ To avoid the accused from being subjected to trauma again,
- ▶ Not to disclose the identity of victims and witnesses before the accused and defense counselor,
- ▶ To belatedly disclose the identity of witnesses under the hearing program,
- ▶ To take general measures within the Court precinct and in the vicinity for the security of victims and witnesses.

The features of security-related programs of the International Criminal Court (ICC), the Yugoslavia-based Provisional ICC and the Rwanda-based ICC can be summarized as below:

- ▶ Assistance and security-related services are in place by establishing the Witness Protection Special Unit under the Registrar.
- ▶ These Units are mandated to provide physical security and other counseling, medical and psychological care and services to anyone – victim or witnesses – who faces the risk of vulnerability for having provided information presenting himself or herself before the Court.
- ▶ These Units are independent and autonomous to undertake proper measures as may be necessary to provide for the security of witnesses and implement

<sup>12</sup> Prosecutor vs Tadic, Case No. IT-94-I-T

them effectively. There is a provision that the Bureau of Witness Protection under the International Criminal Court, in consultation with the Prosecutor's office, can provide services.

- ▶ Arrangements have been made to equally provide security to witnesses both for prosecution and defense. With a view to executing works impartially, separate Units have been set up in the ICC of Rwanda for the security of witnesses of both parties to a case.

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### *Chapter Three*

## **Experiences of Other Countries**

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Different countries have their own experiences regarding witness protection. Usually these programs are found to have been conducted for the purpose of providing security to witnesses, victims or their relatives in cases involving organized crimes, terrorism and other criminal offences of serious nature. And, such programs are in place in all countries regardless of their legal system and regions. In Asia also, such programs have been in operation and of them, programs of Hong Kong, the Philippines and Thailand are exemplary. Due to limitation of this study, it is not possible here to discuss them and only a few representative programs have been discussed.

### **3.1 Hong Kong (Special Administrative Region, China)**

In Hong Kong, the Special Administrative Region of



China, the HK Police Force had initiated a witness protection program in 1998 of temporary nature in line with a recommendation made under the police reform project and an Independent Commission against Corruption (ICAC) of similar nature was also established. In 2000, Hong Kong Witness Protection Ordinance was also promulgated for the purpose of providing criteria for witness security and other assistance. This law brought about uniformity in the Hong Kong Police Force and the witness protection program set up by the ICAC. The Ordinance has made the following arrangements in terms of protection of witnesses:

The Ordinance provides authority to conduct the Witness Protection Program to arrange for or provide protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses. In Police Force, such protection and assistance program is run by the Witness Protection Bureau, while in ICAC, this is run by the Department of Witness Protection and Weapons. Other law enforcement agencies are also planning to run such program.

The Witness Protection Program has also made provisions for what kinds of witnesses can be provided with protection and how it could be provided. According to which, a Commissioner in the Police Force will take care of the management of the program and the responsibility of keeping or removing witnesses. In ICAC also, these responsibilities are taken care of by a Commissioner.

The Ordinance also provides for the Rules that apply when an individual is included in or separated from the protection program, grounds for termination, and definition and interpretation of standards. The concerned authority is also legally empowered to adopt necessary and proper measures required to ensure safety and well-being of the participants included in this program. Under this, non-disclosure of the identity of witnesses or power to alter their identity have been provided for. The Ordinance also provides for penalty to those who disclose information regarding identity, place, etc of witnesses included in the program and information regarding their security.

### 3.2 South Africa

Before the South Africa's National Crime Prevention Strategy prepared in 1996 came into force, the Criminal Procedure Code 1977 would unilaterally oblige witnesses to provide testimony. After the Crime Prevention Strategy pointed out the need of a strategy related to protection of witnesses, the Witness Protection Act was issued in 2000. This new law has made the following arrangements regarding the protection of victims and witnesses:

- ▶ This law set up a Witness Protection Program under the Ministry for Law and Constitution Building for the purpose of protecting witnesses who are at risk. The branch offices of the program led by a director appointed at the center have been established in all nine Provinces of South Africa. This program has been identified as Protection Unit which was established in 2001 as an integral part of

the National Prosecution Agency.

- ▶ This law has also provided for functions and duties of chiefs of the Witness Protection Units. Right with regard to taking decisions on such issues as whom to provide protection, how long protection should be provided and in what kind of circumstances such protection could be withdrawn rests with the chief of the concerned program. However, decisions of these chiefs will primarily depend on the recommendations of section chiefs, employees of law enforcement agencies and the National Prosecution Agency.
- ▶ The decisions to be taken by the chiefs such as denying applications lodged demanding protection or withdrawing protection being provided to certain individuals will be subject to the review of the Ministry of Law and Constitutional Development.
- ▶ The law defines the crimes to which witness protection program could be attracted and it also provides for requirements and procedures which the persons wishing to make use of such schemes have to follow. That's why, as the chief can exercise his or her discretion in accepting or rejecting protection, a comprehensive list of crimes has not been prepared.
- ▶ The law has made punishable the act of disclosing any information or publishing such information by persons taking part in the Witness Protection Program or by government personnel. However, an arrangement has been made for the chief to make public any information upon consultation with the

stakeholders concerned if it is necessary to make public.

- ▶ In the event of any foreigner citizen to be included in the Witness Protection Program or any foreigner witness to be transferred to South Africa, the Minister for Constitutional Development and Justice can reach an agreement with the international organizations or the concerned country to this effect. But, prior approval of the Ministry is indispensable for such deal.

### 3.3 Australia

As a result of a report on witness protection prepared by the Joint Parliamentary Committee of Australia, the Witness Protection Act was issued in 1994.<sup>13</sup> This Act was formulated for Commonwealth. In order to implement this on a provincial level, separate law was enacted in States. This law had following arrangements:

- ▶ This law provides for the setting up of a National Witness Protection Program and sets out the standards necessary for anyone to be included in the program. The witnesses fulfilling these criteria may be included in the program once they accept the conditions attached thereto.
- ▶ The Act has granted authority to the Australian

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13 Australia Parliamentary Joint Committee on the National Crime Authority, Witness Protection: Report by the Parliamentary Joint Committee on the National Crime Authority, Parliamentary paper No. 193/88 (Canberra, Australian Government Publishing Service, 1988).

Federal police to include witnesses in the National Witness Protection Program (NWPP). This includes the signing of the Memorandum of Understanding with witnesses, issuing new identity cards and requiring them to return old identity cards.

- ▶ The authority has also been granted to ensure that those who have been included in the NWPP do not abuse their new identity obtained under the protection program to escape civil and criminal responsibilities and to set up an appropriate machinery to monitor and regulate them.
- ▶ The law declares as crime any act of disclosing information or breaking the secrecy regarding the protection program and the persons included in the program and anyone who is found to be involved in such acts will be punished under the law.

### 3.4 India

No witness protection Act has been enacted in our neighboring country India also. In 1958, though the Indian Law Commission had in its Report talked about the concept of witness protection, it was taken in a very narrow sense. But later in 1996, the Law Commission pointed out the need of ensuring protection of witnesses.<sup>14</sup> Similarly, the Indian Supreme Court has been laying stress, in different cases, on the enactment of witness protection-related law. In

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14 Law Commission Reports no. 154 on the Code of Criminal Procedure 1973, Volume I, 1996

an ethnic riot that took place in Vadodara of Gujarat on March 1, 2002, 14 people including 12 Muslims were burnt alive which is best known as Best Bakery Case. In a well-known case about this (*including Zahira Habibullah Vs State Government and Others*), the Law Commission has recommended the Government to draft a new law without delay on witness protection with a view to addressing the concerns raised in the Supreme Court order. But no such law has been enacted so far.

Like in Nepal, the Indian Evidence Act has made some provisions regarding witness protection. Sections 151 and 152 of this 1872 Act provides that while questioning witnesses, no such questions which will likely to hurt their dignity or prestige or harass them should be asked. However, this has failed to make any other provisions necessary to ensure protection of witnesses.

Effective laws and competent body are required to implement rights guaranteed by the international laws. However, there are very few countries in Asia that have made effective provisions for the protection of victims and witnesses. In many countries including India, Sri Lanka and Bangladesh, there is no specific arrangement in this regard, while the provisions made in such countries as the Philippines and Thailand are not considered to be enough.

### 3.5 Features of the Witness Protection Program

The objective of almost all Acts, laws and programs related to witness protection mentioned above is to ensure the

presence of witnesses before the investigating agency or courts of law by providing them security and facilities. Under such programs, witnesses in particular of serious crimes are provided security. Sometimes, protection is provided also to those who have taken part in a crime but who want to become witnesses for the State. Prior to providing protection to any individual under the program, almost all Witness Protection Programs have a tradition of getting a Memorandum of Understanding signed by witnesses in which their duties and responsibilities are mentioned, which are given below. But these conditions differ depending on the situation.

- ▶ Every witness wishing to get included in the Witness Protection Program should inform the designated body or official regarding the offences, crimes or allegations involved,
- ▶ Commitment not to get engaged in criminal activities,
- ▶ All precautionary measures should be pursued so that facts relating to the protection provided to witnesses will not get disclosed,
- ▶ To fulfill other responsibilities as prescribed by law,
- ▶ Cooperation should be extended to all employees and officers providing security and the lawful and reasonable requests made by them should be responded with respect.

Similarly, once a witness is included in the Witness Protection Program, he or she is entitled to enjoy the following rights and facilities:

- ▶ Witnesses participating under this Program will be entitled to means of subsistence and financial aid for themselves and for their families.
- ▶ If any individual included in this program is holding a government position or other service before they joined the program, they will not be removed from those positions or services nor will they have the facilities being enjoyed by them by virtue of being on those positions or services reduced just because of having participated in the program.
- ▶ Such witnesses are normally found to have been provided transport and subsistence allowances.
- ▶ Witnesses included in this program are also provided with free medical care.
- ▶ If a witness dies by reason of being in the witness protection program, their family will be provided with expenses for obsequies and other facilities the deceased is entitled to.
- ▶ In case a witness included in the program dies or becomes incapable permanently, arrangements are found to have been made for free education of the children of such witnesses in a government or private school, campus or university. However, they will be made accountable for their actions if they are found to be not providing testimony or abiding by oath.



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## *Chapter 4*

# **Review of Prevailing Laws and Policies**

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There is no provision under the prevailing Nepali laws in relation to the protection of victims and witnesses. Because Nepali criminal justice system is based on adversarial investigative method, the provisions of the prevailing constitution and law are more concerned with rights of the accused while they are indifferent, insensitive and impractical to the protection of the victims and witnesses. Hence, the prevailing criminal justice system is found to be silent on the physical, mental and psychological damages suffered by the victims of crime. However, the Supreme Court, through its judicial activism, has expressed concerns over the protection and dignity of the witnesses and victims and has drawn attention of the concerned agencies towards taking necessary steps in this regard.<sup>15</sup>

Though the matter of formulation of laws for the protection of witnesses has been in discussion in Nepal since long, it has not materialized so far. Though different organizations including the United Nations have, at different times, provided the Government of Nepal (GoN) with technical assistance of different kinds in drafting laws for the

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15 The Supreme Court, on November 4, 2009, had issued an order in the government's name to formulate legislation regarding witness protection in the mandamus case of Women, Law and Development Forum vs Government of Nepal. However, the complete text of the verdict could not be ready till the time this study was carried out.

protection of witnesses, no draft law of such kind has been made public and brought into discussion by the GoN as of yet. Different non-governmental organizations (NGOs), mainly the human rights organizations, have, on their own way, prepared some draft laws. However, due to lack of necessary coordination in these attempts, these drafts have also remained limited within these organizations only. Hence, there have not been necessary discussions and debates on what provisions should be included in this law. With a view to bridging this very gap, this study undertakes a study on the attempts made so far in this regard.

Though the Nepal Law Commission is said to have prepared a draft bill on Protection and Safety of Witnesses in 2062 BS, it has not been yet brought to public discussion. Though a study conducted by Conflict Mitigation Program<sup>16</sup> which is run with the European Union assistance has stated that the GoN has brought an Act for the safety and protection of the witnesses, it is yet to be verified. The reason for this might be the tendency to continue with the tradition of avoiding public participation in law framing.

The bills on Truth and Reconciliation Commission and Enforced Disappearance of People (Offence and Punishment), recently tabled in the Legislature-Parliament and under consideration, have for the first time included some provisions for the protection of the witnesses.

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16 A study carried out by CMP for NHRC.

However, these provisions, on the one hand, are not sufficient themselves, and on the other hand, as these provisions are attracted only in terms of the Commission, it cannot fulfill the need of new legislation.

Some provisions contained in the prevailing Nepali Laws and Policies for the protection of victims and witnesses are discussed as below.

#### 4.1 Evidence Act, 2031

The Evidence Act 1974 has provisions regarding what should be considered as evidences during the course of a case and how these evidences should be gathered. In this context, Section 51 of the Evidence Act 1974 has a provision where a court can prohibit asking unnecessary questions to the witnesses thereby preventing a witness from being subject to humiliating or taunting questions. Thus, some attention seems to have been given to the protection of the witnesses. Besides, this, this Act has no further provisions for the protection of the witnesses. Neither has it provided definition of a witness. Rather, the provision of taking statement from the witness in the presence of the accused has further risked the protection of the witnesses.<sup>17</sup> Because of this, there are cases in which witnesses have not come to give their statement in serious crimes as they have to give the statement in front of the accused. Likewise, Section 47 of the Evidence Act 1974 has a provision that a witness

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<sup>17</sup> Section 48 (2) of Evidence Act, 2031

cannot refuse to answer questions if he or she feels that the answers of those questions may land him or her receiving punishment. This provision directly contradicts with Article 24 (7) of the Interim Constitution which states that an individual accused of any offence shall not be forced to be a witness against himself.

## **4.2 State Cases Regulation, 2055**

Rule 15(3) of the State Cases Regulation, 2055 provides that the concerned police office should provide the witnesses with necessary travel costs while summoning them to be present in the court. The regulation further provides that every witness, while being made present in the court in this way, should be provided with travel allowance at par with what the non-gazetted first class officers receive in a day. But, in practice no one seems to have received this facility. Upon inquiring the concerned agencies why the provision of the regulation has not come into the implementation, the reason cited was that the government has not allocated budget for this.

## **4.3 Civil Code, 2020**

Like the Evidence Act 1974, No. 143 and 156 of Chapter on Court Management of Civil Code also have the provision that inquiry with the witnesses and the people involved in documenting the crime scene should be done in the presence of the feuding parties. This provision has also put the witness at risk. Likewise, No. 144 of the chapter on Court Management states that the parties themselves have

to make the witnesses present in the court. Likewise, No. 169 of the same chapter provides that if a feuding party has not explicitly named a witness and that if the witness has given statement with sufficient evidence but if such witness is found to have given false statements, they will be sentenced to a maximum of two years depending upon the seriousness of the offence. Though this provision is said to have been put with a view that the evidences be gathered in an appropriate manner and that nobody would give false witness account, there is no such standard to distinguish false and true, the witness gets terrified and hesitates to come to the court.

#### **4.4 Draft of the Criminal Code, Criminal Procedure Code and Criminal Offences (Offence and Implementation) Act 2067**

The Criminal Law Reforms and Revision Taskforce formed by the Government of Nepal as per the decision of December 3, 2008 to improve the Nepali criminal legislations by making timely reforms, to revise the drafts of criminal code and criminal procedure code and submit a report to the government along with recommendations regarding the penal policy by revising the Nepali legislations has submitted a report along with the draft of the Criminal Code, Criminal Procedure Code and Criminal Offences (Offence and Implementation) Act to the government. Section 109 of the Criminal Code has provided for securing information from witnesses through video conference if they are physically incapable or minor or cannot be presented before a court of law for security reasons.

Similarly, in cases under Schedule-1 or Schedule-2 of the draft, the police office will have to make available daily and travel allowances to witnesses who are present in courts on behalf of the government equal to those of the non-gazetted first class officers and the government will have to make necessary arrangements for the security of such witnesses. Likewise, for cases under Schedule-1 or Schedule-2, Section 114 of the draft code has provided that a court may direct the concerned authority to make necessary arrangements for security of witnesses who believe they cannot make themselves present in court or their security is under threat after providing testimonies and submit an application to the court asking for necessary security. In that case, the concerned authority will have to make such arrangements as directed. Any responses taken as ordered by the court in terms of providing security to witnesses cannot be challenged in court.

However, the draft code has not been able to fully acknowledge the concept of witness protection. No subject regarding witness protection-related programs, its processes and plans of actions have been included here. As witness protection-related arrangement is by nature both substantive and procedural, it will be desirable to make arrangement to this effect in a separate law rather than codifying it. It may be difficult to include all those things into it. Since without establishing the institutional structure and program related to witness protection, legal provision alone will not ensure effective protection of witnesses, this should be provided for in a separate law. As this Code is problematic in other aspects also, it should be reviewed on a wide scale.

## 4.5 Truth and Reconciliation Commission Bill, 2066

The Comprehensive Peace Agreement (CPA) and the Interim Constitution have provided for the setting up of a high-level Truth and Reconciliation Commission to investigate violations of human rights that took place in the past and crimes against humanity. A bill to this effect which was registered with the Legislature-Parliament on February 17, 2010 has acknowledged the concept of witness protection. Section 19 of the bill has made the following arrangements on witness protection. If any individual, victim or his or her family member who is to be present to provide statement, testimony or information before the Commission makes a request to it for security and if it is deemed, upon necessary inquiry in this regard, necessary to provide security to such person, the Commission will have to make necessary arrangements for the security of such persons.

- ▶ For the security of such person, the Commission may, as per necessity, seek help of the Government of Nepal.
- ▶ No legal case or action will be taken against any person only because of recording testimonies or statements or providing any information to the Commission.
- ▶ If any person appearing in the Commission demands reimbursement of the actual costs incurred in travelling to and from the Commission, and for lodging and food to provide testimonies, statements or information, the Commission may provide reasonable expenses to such person.

## 4.6 Disappearance Bill (Crimes and Punishment), 2066

Similarly, as per the political agreements reached in the past, the Disappearance Bill (Crimes and Punishment) designed to search for individuals who have been disappeared and to bring persons involved in those acts within the net of law is now with the Legislation Committee of the Legislature-Parliament. Section 19 of the Bill has made the following provisions regarding the protection of witnesses:

- ▶ If a person, victim or his or her family member appearing before the Commission to provide testimony, statement or information asks the Commission for his or her security, the Commission will, upon necessary inquiry regarding such request, make appropriate arrangements for the security of such person if it seems necessary to provide security to them.
- ▶ The Commission may, if necessary, seek the help of the Government of Nepal for the security of such person.
- ▶ No legal case or action will be taken against any person only because of making testimonies or statements or providing any information to the Commission.
- ▶ If any person appearing in the Commission demands reimbursement of the actual costs incurred for travelling to and from the Commission and for lodging and food to provide testimonies, statements or information to the Commission, the Commission may provide reasonable expenses to such person.



- ▶ If anyone, who provides any notice, information or evidence to the Commission, wishes to keep his or her name confidential, the Commission will have to keep their names confidential.
- ▶ If women or children required to be present before the Commission to acquire information or record statement, the Commission will have to make special arrangements for their honor and security.

The provisions in both of these bills are positive but not without shortcomings. Even in the Legislature-Parliament many amendment proposals have been registered. Given the provisions of these bills concerning witness protection, responsibilities of protection are apparently given to the Commissions. However, as Commissions are by nature temporary and will cease to exist once their stipulated mandate is over, the bills are silent on what would be the situation of protection after that. Secondly, though the bills say that witnesses would be protected, it fails to provide for what would be the constituents of such witness protection programs as a result of which there would be a greater possibility of the program being ineffective. Thirdly, the Disappearance Bill has also limited the responsibility of protecting witnesses to the Commission only. As the Bill defines an act of disappearance as an offence, this provision will stay in place even after the Commission ceases to exist and it will be proper to continue protection program accordingly. Therefore, these provisions will apparently fail to fulfill the objectives of witness protection program.

## 4.7 Intimidation and Threats to be Considered as Crime

Unlike in other countries, prevailing Nepali laws do not define as crimes the acts of intimidation and threats. In several countries, such acts are considered as crimes against justice administration. In England, the Criminal Justice and Public Administration Act of 1994 considers as crime acts of intimidating or threatening or discouraging witnesses in any way and persons intimidating or threatening the witnesses in such way would be punished with an imprisonment of up to five years.

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### *Chapter Five*

## **Subjects to be Covered by Nepali Laws Relating to Protection of Witnesses and Victims**

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Based on the suggestions received from regional workshops and seminars conducted in different parts of the country, and studies made in the previous chapters, it seems that the law related to the protection of witnesses and victims should include the following subjects.

### **5.1 Definition of Witness**

The prevailing Nepali laws do not define “witness”. But Section 10 of the Evidence Act, 1974 provides that if any of the following persons express any fact immediately or immediate before or after, regarding any act, incident or situation, such fact may be taken as evidence:

1. The person who had done that or who had directly seen or known the act, incident or situation
2. The victim of the act, incident or situation.

This provision envisions three kinds of witnesses – one who is involved in the act or incident, one who has witnessed or directly seen the act or incident and a person who has been a victim of the incident. Similarly, Section 9 of the Evidence Act 1974 provides that any fact expressed by the party to a case may be taken as evidence. On the basis of these provisions, court may take as evidence confessions or a tip-off in certain situations. So, this makes it clear that Nepali laws accept the principle that any person involved in criminal activities will be considered as witnesses.

But, even if a person has been involved in criminal activities and wants to cooperate with the government by being a witness by proving true information regarding a gang or organization involved in criminal activities and the persons associated with such activities, there is no tradition or system of regarding such persons as witness and providing them security. Given the practices in other countries, arrangements have been made there to treat as witnesses those who have been involved in criminal activities, in certain situations. Such witnesses are involved in criminal activities in one way or the other and they help the government during its investigations in bringing the main culprit or other accomplices within the net of laws by providing factual information to that effect. Such persons are given different names in different countries – assistant witnesses, government witness or a witness participating in a judicial act.

While defining witnesses who may participate in witness protection program, there should be a provision for providing security not only to the witnesses who cooperate with the government but also to those who are with the accused. Therefore, it will be desirable to provide security and protect witnesses who are at risk for having presented themselves as witnesses rather than on the basis of whose side they actually stood for in a case. Thus, basically, for the purpose of witness protection, witnesses can, based on the consultations to this effect, be grouped in categories as below:

1. Who has direct knowledge about criminal acts
2. Who is involved in criminal acts
3. Victim witnesses
4. Other witnesses

## 5.2 Nature of Offence or Crime

Vis-à-vis resources at disposal and need, it is simply not possible to implement the witness protection program in all criminal cases. The standards developed regarding this at the international level and practices in other countries are found to have been applied to only certain such cases.

The Rome Statute of the International Criminal Court has provided that only witnesses of the crime of genocide, crimes against humanity, war crimes and the crime of aggression will be entitled to protection. Similarly, the UN Convention against Transnational Organized Crime 2000 states that it is the duty of a State to provide protection to witnesses in organized crimes, money laundering,

corruption, obstruction of justice, human trafficking, illegal manufacturing and smuggling of arms and ammunition, terrorism and other crimes of serious nature.

The security-related law of Thailand has provided for the protection of witnesses in cases involving smuggling of narcotic drugs, crimes against national security, organized crimes, money laundering, human trafficking, corruption and cases which attract a minimum of 10-year imprisonment. Likewise, protection of witnesses has been provided for in the law of Guatemala on violence against women and in the law of South Africa on violence against women and children.

In Nepal also, regional workshops were conducted to discuss in what kind of cases witnesses need protection. From the discussion, basically two kinds of suggestions were deduced in this regard: criminal cases of serious nature and cases involving violation of human rights.

### 5.3 Security Structure

Agencies tasked with the responsibility of protecting witnesses differ from country to country. In some countries, this authority has been granted to police, while in others to the Office of the Attorney General (Prosecutors Office). This right is also found to have been enjoyed by the Ministry of Law and Justice, the court itself and an independent and autonomous body in several places. However, whoever coordinates the program, this is almost in all countries found to have been run by police or

investigating authority. For example, the Independent Commission against Corruption runs the Witness Protection Program in Hong Kong in cases associated with corruption, while in other serious crimes a special unit will be set up under police to look into those cases.

Regarding the question which agency is proper and practical to be given the responsibility of running the program, participants taking part in the workshops and police, government attorneys, defense lawyers and judges involved in investigation, prosecution and dispensation of justice had conflicting opinions. Most of the participants were of the opinion that the Office of the Attorney General should be primarily responsible for running the program and other investigating agencies should have separate witness protection units set up subject to the direction and control of the Office of the Attorney General, while other participants, victims of human rights violations in particular, suggested that as police themselves are found to have been involved in such violations, this right should be given to the National Human Rights Commission or a separate or independent body should be set up to look into the issues of witness protection.

Thus, basically, three things should be taken into account while deciding the structure of witness protection: firstly, kind of cases needing witness protection; secondly, the lessons learnt from the experiences of other countries; and thirdly, ability/competency of the existing structures.

In the context of Nepal, the witness protection program is

needed in crimes of serious nature and serious violations of human rights. Since it is the investigating officer who has to first deal with a witness in the course of their inquiry and investigation, the investigating agency in one way or another should be involved in this process. This is why, whoever investigates a certain crime it is appropriate to give them the responsibility of protecting witnesses also. Also, vis-à-vis the suggestion received from the workshop that victims and witnesses may feel further insecure if cases of serious human rights violations are given to the police, granting responsibility to the National Human Rights Commission or any other independent agency would be relevant. Though witness protection units may be set up in different agencies, commissions or machineries for logistical and other support, the main responsibility about this will remain with the Office of the Attorney General, the Ministry of Law or a Special Department for Witness Protection.

## **5.4 Security Plans**

Different measures could be adopted for the protection of witnesses, which has been discussed as below.

### **5.4.1 Secret Investigation System**

If evidences are collected in a confidential way during the investigation, identity of witnesses could be protected. For the security of witnesses under this, the policies such as officials engaged in investigation not publicizing or broadcasting the facts obtained from the investigations in media, not making inquiries with potential witnesses in crime scenes or making inquiries with the witnesses or the

persons concerned in places beyond their houses or police posts.

#### **5.4.2 Secret Investigation System**

Once a witness is known to be at risk, he should be kept under close protection. Security agency provides such protection to the witness and his or her family round the clock. Under this, before or during the hearing, measures will be taken to keep witnesses in a safe place or to relocate them to another place or country or to rehabilitate them. For the sake of close protection, there is actually no need of new laws but what requires for it is the effective procedure for appropriate management.

#### **5.4.3 Procedural Protection**

This security measure can be implemented by making amendments to procedural laws. Such measures include in particular discontinuation of contacts with witnesses or victims if a court thinks it necessary to do so, to keep perpetrators in judicial custody, to maintain confidentiality of witness up to appropriate time prior to hearing, to give a fake name to witness, to examine the witness through video conferencing or to keep the witness behind a curtain during the hearing, to remove the sensitive information from dossiers of the court and not to disclose the true identity of the witness.

### **5.5 Risk Assessment**

Criteria to determine risk differ from place to place and situation to situation. Therefore, in every case, the following



points should be taken into account and risk assessed appropriately.

- ▶ Nature of the alleged crime (whether this is a serious crime meriting protection?)
- ▶ Nature of the threat (whether the victim or witness has received any threat before openly and whether he has any evidence of it?)
- ▶ Relationship between the witness and perpetrator (whether the alleged perpetrator knows the victim or has any relation with him to be near or whether there is any possibility of it? whether the associates of the alleged perpetrator have been arrested yet? Do they have access to them?)
- ▶ Condition of the accused or perpetrator (whether the alleged perpetrator has been released on bail?)
- ▶ Criminal records of the alleged perpetrator (whether he was involved in any terrorist act or crimes or violence?)
- ▶ Importance of the testimony provided by the witness (does the testimony affect any individual or a well-organized group? How important is the evidence of witnesses for the success of the hearing? Can the same evidences be presented through other means or by other witnesses? Is the witness prepared to have his or her testimony recorded?)
- ▶ Psychological state of the witness (is there any possibility of the witness rejecting the statement or getting afraid? Has he ever been a victim? Has he ever been a victim of narcotic drug, alcohol and mental imbalance?)

By analyzing the points in question, decisions could be made on whether particular witnesses should be protected and what kind of protection should be given, if at all.

## 5.6 Immunity from criminal obligation or provision regarding facilities

As discussed above, provisions are found to have been made for giving complete immunity or mitigating the punishment keeping in view the seriousness of witnesses' involvement in the crimes for the purpose of controlling organized crime in different countries. Such types of provisions are found to have attracted the persons of such nature to be ready to become a government witness. On the other hand, arguments have been made that such a practice of giving immunity or waiving off the punishment in the cases of serious nature will institutionalize impunity.<sup>18</sup>

Therefore, many of the nations have made provisions for giving some kind of punishment to such types of witnesses. Such punishments are different in different countries. The amendment to Italian law made in 2001 implemented the provision that such witnesses may be given the facility of house arrest while Hong Kong and the Netherlands are found to have made provisions for keeping such witnesses in a place set up by the security agencies and not in general jails for the period of their imprisonment.

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18 Nicholas Fyfe and James Sheptycki, "International trends in the facilitation of witness co-operation in organized crime cases", *European Journal of Criminology*

No concrete suggestions could be gathered from the regional workshops regarding what kind of provision needs to be made in Nepal. Looking at the practices and experiences of other countries, it can be managed after dividing it into different levels.

Firstly, the case hearing authority can be authorized not to initiate a case against the witness involved in the criminal act after keeping in mind his or her participation in the act and his or her situation. Provisions of giving such witness immunity in case of his or her role in the crime being that of an accomplice and if the reasons for his or her involvement in the crime were beyond his or her control can be kept.

Secondly, punishment for the witness, who is involved in the criminal act but is ready to become a witness for the government, can be deducted. While doing so, a provision can be kept that Court may take a decision on reducing such punishment by keeping in view the participation and situation of such witnesses in the criminal act.

Thirdly, for the person, who played an important role in making a criminal incident happen but who has agreed to become a witness for the government and thus has played an important role in crime control by giving important information related to his or her criminal gang and the crime, provisions can be made to keep him or her in a reform center or under house arrest.

## 5.7 Punishment for those who Violate Confidentiality

Another important provision that needs to be included in the law regarding witness protection is prescribing an agency that shall after concluding an act of breaking the facts or confidentiality of the witness under witness protection program as a crime, award punishment to the persons involved in such acts. In the consultations held at the regional level also, it was suggested that laws should be formulated in such a way that provides for stern punishment to those breaching confidentiality. However, the suggestions didn't include the duration or extent of punishment.

There is no uniformity in the practices of other countries as well. The Witness Protection Act of South Africa has made provisions of penalty and imprisonment not exceeding three years for such offence, while the proposed amendment bill of Kenya has made provisions that imprisonment of up to 10 years can be given for such offence. Similarly, the Ordinance of Hong Kong has made provisions of imprisonment of up to 10 years for such offence.

If the situation of crimes and punishment for the same in existing Nepali law is to be considered, it may be desirable to formulate law that makes provisions of imprisonment for three to 10 years on the basis of seriousness of the crime.

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## *Chapter 6*

# Conclusion and Suggestions

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### 6.1 Conclusion

The roles of witnesses and victims are very important in criminal justice administration. Different studies and researches carried out into this topic show that prosecution without the support from witness and victims cannot be effective. This subject is more important in post-conflict situation because most of the witnesses don't want to help the justice system due to fear and intimidation from the perpetrator and in some situations, they get involved in bringing unfavorable results in the cases by giving statements against their own party because of the threats and pressure from the accused or perpetrator. Therefore, without making appropriate arrangements for the safety of the witnesses, the perpetrators of the crimes of serious nature and human rights violations cannot be brought to book.

There is no law on witness protection in Nepal. That's why most of the criminal cases are failed. On the other hand, situation is such that the persons involved in serious human rights violations are enjoying immunity from punishment due to lack of appropriate protection for the witnesses and the victims. Since the victims and witnesses of such cases have to face threats and abuses, they do not wish to cooperate during the investigation or trial of the cases.

Although the Chapter on Court Management of the Civil Code, and the Evidence Act, 1974 have made provisions regarding the examination of witnesses, they are silent on the issue of safety of the witnesses. On the contrary, the binding provision of taking statements from the witnesses in the presence of defendants puts the witnesses into further risk. The report of the Office of the Attorney General shows that because of this reason, the witnesses or the victims do not wish to give statement and if they give at all they tend to give flexible statements keeping in view the potential risk from the convict and in many situations, they turn into hostile witnesses because of which the prosecution of most of the government cases fail. Therefore, formulation of law regarding the protection and safety of witnesses and victims seems to be essential in order to fill that gap.

## 6.2 Suggestions

The government needs to formulate a law regarding the protection and safety of the witnesses and victim immediately in order to address the aforementioned problems effectively. Since the process of formulation of law is not transparent in Nepal, the legislations whose drafts are ready haven't been effective in recent days. Although the government agencies have formulated drafts of such laws time and again with support from the donor agencies, the work of making such drafts public and collecting suggestions from the stakeholders is not carried out widely, while on the other hand, although the non-governmental sector, especially the organizations working in the field of

human rights, have prepared drafts of the laws regarding the protection and safety of the witnesses in their own way, there is no coordination among such organizations for such process and situation is such that those drafts couldn't also be developed into a Bill. Therefore, it seems necessary to encourage the Nepal Law Commission, which has the responsibility to prepare the draft of the law after assimilating all the efforts made in this issue so far at once place, to take a lead in this matter. The Law Commission also needs to assimilate all such efforts, hold wide consultations with the concerned stakeholders and prepare and submit the draft of the law on witness protection and safety before the government as soon as possible. The following subjects need to be incorporated by the law on the protection of witnesses and victims.

### **6.2.1 Establishment of witness protection program**

It is recommended to initiate a witness protection program at national level without further delay to provide witnesses of organized crimes or crimes of serious nature as well as serious human rights violations with security, protection and other necessary support in case their personal interest or security is in jeopardy because of being a witness of such crimes or incidents in order to effectively address such incidents.

### **6.2.2 Establishment of Witness Protection Mechanism**

A provision to initiate national witness protection program under the Attorney General of Nepal can be made for the purpose of safety and protection of the witnesses at risk. It

could be appropriate to make arrangements of providing safety and protection to the witnesses at risk by setting up a witness protection unit in Nepal Police, the Commission for Investigation of Abuse of Authority, the National Human Rights Commission and other agencies investigating crimes and human rights violations. Since it is a given that Nepal is going to have a federal system in the future, such security mechanism will also be required in federal units. Therefore, it is desirable to make provisions in the Act itself for mechanisms and units that run state-level witness protection programs in the federal units.

### **6.2.3 Witness Protection Scheme**

The witness protection-related laws need to define security program and its strategic measures or this law may also remain ambiguous just as the proposed bills relating to criminal code, the Truth and Reconciliation Commission (TRC) and the Disappearance Commission. Therefore, without criteria and grounds to answer such questions as whom, how and up to when relating to providing protection, there will be a risk of concerned officers taking decisions on their discretion.

Therefore, the law, defining the crimes that merit protection, should determine protection-related strategic measures, prerequisites of the person wanting protection and procedures they have to follow, appointment of an officer who will decide what kinds of witnesses should be provided such protection and in what condition, rules which apply while participating in or separating from the program and



grounds of termination of such protection, rights and duties of the person included in the protection program, provisions for a machinery to be set up after reviewing a decision to reject applications or remove persons from the program and to punish an act of breaking confidentiality related to protection by defining it as a crime. All these things should be clearly spelled out.



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