

# SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS IN NEPAL

*Narayan Prasad Panthee\**

## I. INTRODUCTION

Disputes are inevitable and are often decided on the basis of evidence before a court of law. The principle of evidence law is that the burden of proof of proving the accused has committed the offence in a criminal case lies on the plaintiff. Likewise, in civil cases, the burden of proof lies on the plaintiff. The principle of the criminal law ensures that the prosecutor should prove the accused guilty beyond reasonable doubt. The testimony of witnesses is one of the main forms of evidence. They may be justice collaborators; victim-witnesses; other types of witness (innocent bystanders, expert witnesses, or others). As per Nepalese evidence law, all persons, including accomplices, may be competent to be a witness unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, physical or mental diseases or any other cause of the same kind.<sup>1</sup> Witness testimony is taken as evidence only if given before a court of law. Except for expert witnesses, witnesses are usually permitted only to testify to what they experienced first hand. Witnesses are not like other evidence; they are human beings and are often threatened by criminals with reprisals or other harm. This is why the protection of witnesses is imperative to the integrity and success of the judicial process. Witness protection in criminal cases begins with formal police or ad hoc protection. Ad hoc protection measures may continue during testimony in the form of judicial or court protection measures. If the threat is high, special protective measures such as relocation and identity change as a part of formal protection may be employed. The primary objective of witness protection is to protect the physical security of witnesses for the purpose of securing their testimony. Psychosocial health and socio-economic considerations have a prominent role in the protection of witnesses prior to, during and after testimony. Police protection and support are other measures in the investigation and prosecution stages which ensure expedient investigation, confidentiality, monitoring, and which mitigate security issues.

## II. CURRENT SITUATION OF WITNESS PROTECTION IN NEPAL

Nepal is in a transition stage. The old tyrannical monarchical reign has been changed to a Republican system through the proposal passed by the Constitutional Assembly on 29 May 2007 at its first meeting. Making the new constitution and bringing the peace process to a logical conclusion is the fundamental task of the Constitutional Assembly, government and political parties. The political situation is very volatile. The political situation is fragile and the absence of a comprehensive witness protection policy contributes to the general climate of impunity and prevailing human rights violations. Relevant provisions on witnesses in the Civil Code, 1963 and Evidence Act, 1974 are only related to the procedure on witness testimony but not directly related to witness protection. Non-government organizations (NGOs), and international non-governmental organizations (INGOs), including the United Nations and some government agencies, have regularly expressed their deep concerns regarding the witness protection policy and recommended numbers of measures to be taken by the government to ensure effective delivery of justice and accountability of both past and present human rights violations. A report presented before Human Rights Council at its Fifteenth session indicates the actual situation of witness protection in this country.

In July 2010, lawyers and human rights defenders working on the case of Arjun Bahadur Lama, a school teacher who was forcibly disappeared and killed by Maoists during the country's recent decade-long conflict,

---

\* Deputy Registrar, Litigation Department, Supreme Court of Nepal.

<sup>1</sup> Section 38 of Evidence Act, 1974.

were threatened by Maoist cadres after one of the main suspects in the case was refused a visa by the US embassy. The attitude of the chairman of the Maoist party, who publicly denounced the accusations as 'false' and accused the human rights organizations of having launched a campaign to 'defame' the Maoists potentially encouraged such threats. The same month, lawyers defending the case of Ghan Shyam Mahato, a 14-year old domestic helper who had been cruelly abused by his employers, were manhandled and threatened by relatives of the perpetrators who have close links with the Maoists and who threatened to burn down the lawyers' practice should the perpetrators be sent to jail.<sup>2</sup>

The efficacy and efficiency of the justice system depends upon state competence and its ability to prevent witnesses at all stages of the dispute resolution process from being harmed and threatened with harm. Witness protection generally depends on what the state can offer in this regard. Witnesses are often failed by the justice delivery mechanisms. Even the formal institutions of the country is not accountable for their criminal activities.<sup>3</sup> Allegations of threats and interference present in the course of criminal justice administration are common.

Explaining the current situation in Nepal, in a South Asian regional seminar and national consultation on witness and victim protection, the Office of the United Nations High Commissioner for Human Rights in Nepal (OHCHR-Nepal) called on the government to establish an effective mechanism to ensure protection of all victims and witnesses of human rights violations and abuse. According to an OHCHR statement, a major obstacle that prevents cases of human rights violation from being successfully prosecuted in courts is the absence of an effective witness protection mechanism. The government has already committed to safeguarding the rights of victims and witnesses, including their protection, through the ratification of a number of international human rights treaties, including the International Covenant on Civil and Political Rights. In the light of the future establishment of the transitional justice mechanisms, it is now time for Nepal to adopt specific measures to make such protection a practical reality.<sup>4</sup>

As per the interim constitutional mandate the constitution of the Truth and Reconciliation Commission is also yet to be constituted, which hampers the logical conclusion of the peace process and brings past allegations under the judicial process. Criminalization of politics and political criminalization is common, and interferes with witnesses' ability to deliver a real statement before a court of law.

### III. CURRENTLY AVAILABLE MEASURES AND LEGISLATION FOR WITNESS PROTECTION

Witness protection programmes play a prominent role in the administration of justice. At least the following five key elements determine the functioning of state and international criminal justice witness protection programmes:<sup>5</sup>

1. The financial security and political parameters within which a protection programme functions.
2. The structure and independence of the protection mechanism.
3. The extent to which a programme is able to procure cooperation from state and non-state institutions locally and internationally.
4. The efficacy and efficiency of the justice system as a whole.
5. The nature and scale of the threat to witnesses.

In Nepal there is no specific witness protection programme or policy. However, there are some legal provisions scattered through different acts, regulations, directives and practices which are close to the

<sup>2</sup> A written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization with general consultative status 23 August, 2010 on HUMAN RIGHTS COUNCIL Fifteenth session, Agenda Item 4, General Debate ALRC-CWS-15-01-2010.

<sup>3</sup> Army personnel involved in the Bardiya National Park killings, which led to the death of two women and a child under suspicious circumstances in March 2010, have reportedly threatened the victims' families and witnesses and managed to make them sign an agreement in which they have promised that they will withdraw the First Information Report they had filed against 17 army personnel. *Ibid.*

<sup>4</sup> The Kathmandu Post, 18 December, 2010.

<sup>5</sup> Mahony Chris, *The Justice Sector afterthought: Witness protection in Africa*; Institution for Security Studies, Tshwane (Pretoria), South Africa, 2010, PP 4.

European Model<sup>6</sup> that provides witness protection, plea bargaining, and immunity from prosecution. Generally, witness assistance and support programmes are conducted by the police and non-governmental organizations like Maiti Nepal,<sup>7</sup> Forum for Law and Development (FWLD), and the Legal Assistance Center (LAC). During the investigation, the investigating authorities are not bound to disclose the investigation and the witnesses involved in the case. If there is any threat to any witness during the investigation, it is the duty of the concerned police to protect the witness. As mentioned in the Rule Regarding Government Cases, 1999, it is the duty of the concerned police to present the government witness through a government attorney to the court of law for their testimony. Regarding police (physical) protection of witnesses, there is no specific police protection for witnesses; however, it is the duty of the government to protect its citizens from any physical risk and danger. If the police and public prosecutor think there is the necessity for physical protection of any witness then police surveillance and patrolling of the witnesses' area is common. As an ultimate resort, the police can keep the witness in a secure place. Some Procedural Protection measures are also practiced during the trial stage. Nepal respects the right of the accused to confront witnesses as fundamental right; however there is very limited provision to reduce fear through avoidance of face to face confrontation with the defendant. Section 6 of the Human Trafficking Act is an example in this regard. There is no special measure to make it difficult or impossible for the defendant or organized criminal group to trace the identity of witnesses. There are provisions to limit the witness's exposure to the public and psychological stress as the hearing is held in camera. Cases like rape and juvenile delinquency are heard *in camera* and records are also kept confidential as per the guidelines made by the Supreme Court decision of *FWLD v. Government of Nepal*.<sup>8</sup> After this decision some legislative provisions were made, such as section 7 of the Domestic Violence Act, 2009,<sup>9</sup> and section 27 of the Human Trafficking Act, 2007.<sup>10</sup> There is provision in the Domestic Violence Act to provide psychological counselling in the service centre but separate service centres are yet to be established and police and NGOs are supporting those who need psychological counselling. There is no specific financial assistance programme which covers all the requirements of a witness protection programme. However there are some provisions, like the Rehabilitation Fund and Rehabilitation Centres, in the Human Trafficking Act.<sup>11</sup> As per the Government Cases Regulation 1999, witnesses presented before a court of law shall get travel and daily allowances equal

---

<sup>6</sup> Basically there are two models in witness protection programmes. (1) The US model: Despite even the threat of death, US citizens have a legal obligation to provide testimony in civil and criminal proceedings. (2) The European model: provides for witness protection, plea bargaining and immunity from prosecution for those who assist.

As explained by Chris Mahony, differences between these models are: Variations in the criminal justice landscape as well as differences in legal systems result in different witness protection systems. Fyfe cites four main elements that differentiate European protection mechanisms from the US model.

The first is legislative, where protective mechanisms, like that of the UK, have only recently been enshrined in law despite protective measures and admission criteria being broadly congruent.

The second element is the variance in jurisdiction or location. The police are generally provided a greater role but in some cases the judiciary, government or special boards are empowered to admit and protect witnesses.

The third source of variance between European and US protection systems is the nature and scale of criminality that threatens witnesses. In Italy, where organized criminality is prevalent, thousands of participants enter the programme, while there are only around 650 per year in Germany.

Finally, an attempt to negate differences that impede cooperation among EU member states is evident in the creation of the European Liaison Network, which comprises the heads of protection programmes. Despite its establishment, the formulation of standardized admission agreements and other common areas of practice have proven difficult to conclude. *Ibid*.

<sup>7</sup> Because of the effort of this NGO is in human trafficking sector, its chairperson, Anurada Koirala, was selected as CNN Hero of the Year 2010.

<sup>8</sup> Writ No. 3561 of 2006 decided on 25 December, 2007. English version of this case is published in NJA Law Journal, Volume 2, 2008 pp 231.

<sup>9</sup> Proceedings to be held in camera: (1) If it is so requested by the Victim, the court shall conduct in camera proceedings and hearings of the complaint relating to this Act.

(2) During in camera proceedings and hearings pursuant to subsection (1), the claimant, defendant, their legal practitioners and those who are so permitted by the Court, shall be allowed to enter into the court room.

<sup>10</sup> In camera court proceedings:

(1) Court proceedings and hearings for an offence under this Act shall be conducted in In-Camera.

(2) Only parties to the proceeding, their attorneys or other non-parties permitted by the court may enter to the court during the proceeding and hearing under Sub-section (1).

<sup>11</sup> Section 13 and 14 of Human Trafficking Act, 2007.

to the non-gazetted first class civil servant from the concerned police office.<sup>12</sup>

During the testimony the court shall forbid the asking of any question which could unnecessarily insult or annoy the witness.<sup>13</sup> In the course of conducting examination-in-chief or re-examination, a party to the case shall not ask any leading question, which suggests the intended answer, if so objected to by the opposing party. If the court thinks that such questions are necessary to decide the dispute it can give permission for only those question to be asked.<sup>14</sup> Capacity building and training for officers involved in witness assistance and protection programmes is not common. During training they are trained in various human rights issues and to some extent the subject matter of witness protection is included. Due to the limitation of resources, separate waiting rooms for witnesses are not provided. This issue is being addressed on a case-to-case basis. A special Court disposes corruption cases, and this court follows the Special Court Act's procedure. This Court shall have to decide a case generally within six months from the date of filing. Likewise, in cases relating to domestic violence, the Summary Procedure Act, 2028 (1971) shall be followed. In our respective court regulations there is special provision for those cases in which anyone who is aged, a woman, a child or disabled gets priority in the proceeding. However, its execution is not so satisfactory. This Truth and Reconciliation Bill is under consideration by the Legislature-Parliament to provide justice to the victims who suffered gross human rights violation during the armed conflict in Nepal. The Witness Protection Bill and Perjury Bill<sup>15</sup> are drafted and kept on the Nepal Law Commission's website to collect stakeholders' suggestions and comments for further improvement. This witness protection bill defines offences, undue influence and other terminologies. This bill also makes the provision for the witness protection committee at the district level under the Chairmanship of the District Police Officer. Other members are the District Attorney and the Officer as designated by the Chief District Officer. This committee formulates and implements the witness protection programme in the district. The provision of non-disclosure of the witness, assessment of the threat, voluntary participation, relocation of the witness, post testimony assistance, psychological support, reintegration, access to records, security agreement, compensation, education and skill development training, confidentiality of the records, exemption from the proceeding and punishment etc., are mentioned in this draft bill. The perjury bill is concerned with the controlling of false statements of the witness.

#### **IV. CRIMINALIZATION AND PUNISHMENT OF OBSTRUCTION OF JUSTICE**

Obstruction of justice is the frustration of governmental purposes by violence, corruption, destruction of evidence, or deceit. The general obstruction of justice provisions are tampering witnesses, retaliating against witnesses, and obstruction of pending court proceedings, conspiracy, and contempt. Nepal has no specific law regarding the obstruction of justice. In some laws obstruction of justice is defined as crime. Some of the provisions regarding the obstruction and punishment thereof are mentioned in some legislation. Offence under the Human Trafficking and Transportation Act shall be fined up to Ten Thousand Rupees.<sup>16</sup> In addition, in course of collection of particulars of narcotic drugs, if any particular or document is not provided by any person, organization-institution or association, demanded by the Narcotic Drugs Control Officer or investigating authority such person, organization-institution or association shall be liable to such punishment which shall be half of the punishment to the actual offender.<sup>17</sup> Similarly, any one obstructing an investigation of an offence under Corruption case trying officer may punish up to six month imprisonment or fine up to five thousand or both on the recommendation of investigating officer.<sup>18</sup> The case of contempt of court is tried under the Interim Constitution of Nepal, 2007, Supreme Court Act, 1990 and Administration of Justice Act, 1991.<sup>19</sup> Except the above mentioned provisions most of the cases are prosecuted under the Some Public

<sup>12</sup> Rule 15 and 16 of the Rule Regarding Government Cases, 1999.

<sup>13</sup> Section 51 of Evidence Act, 1977.

<sup>14</sup> Section 50 of Evidence Act, 1977.

<sup>15</sup> <http://www.lawcommission.gov.np>

Last visited on May 25, 2011.

<sup>16</sup> Section 22 of Human Trafficking and Transportation (Control) Act, 2007.

<sup>17</sup> Section 17B of Narcotic Drugs (Control) Act 1976.

<sup>18</sup> Section 51 of Prevention of Corruption Act, 2002.

<sup>19</sup> The Supreme Court shall be a court of record. The Supreme Court may impose punishment of up to one year's imprisonment or fine of up to ten thousand rupees, or both, to the person convicted, in cases wherein the Supreme Court has initiated the proceeding of its own contempt or contempt of subordinate courts or judicial authorities if anyone obstructs the

(crime and punishment) Act, 1970.<sup>20</sup> Now a Penal Code is drafted and the following provisions of this code address the obstruction of justice.

1. No person shall create hurdles or obstruction while serving of summons, notice or arrest warrant or order issued lawfully or while carrying out search, seizure recovery or survey and measurement or conducting a public inquiry (Sarjamin) or while arresting a person as per au arrest warrant. Whoever creates hurdles or obstruction as referred shall be liable to a punishment with an imprisonment not exceeding six months or with a fine not exceeding five thousand rupees or with the both.
2. No person shall prevent or obstruct a public official by use of force or manhandling or by any other manner from discharging his/her official duty. Whoever commits an offence referred shall be liable to a punishment with an imprisonment not exceeding six months or with a fine not exceeding five thousand rupees or with the both.
3. No person shall prevent or obstruct in any other manner a person who, after having knowledge that an offence has been committed or is about to be committed, goes to provide information or notice about such an offence to the police or a competent authority. Whoever commits an offence referred shall be liable to a punishment with an imprisonment not exceeding two years and with a fine not exceeding twenty thousand rupees.

## V. MITIGATION OF PUNISHMENT AND/OR IMMUNITY GRANTS

### A. Mitigation of Punishment

Mitigation is that which tends to soften, temper or make less harsh or severe. Mitigating circumstances surrounding a criminal offence are those circumstances that tend to lessen the apparent badness of the particular crime or the apparent badness of the defendant. Mitigating circumstances are not limited by the law; they may be unlimited in number, as long as they are based upon evidence introduced by either the prosecution or the defense at trial or sentencing.

Mitigating factors are circumstances that do not constitute a defence, legal excuse or justification for the crime, but which decrease its guilt or enormity. A mitigating factor is one that can be considered as extenuating or reducing the degree or moral culpability of the defendant, and tends to support imposition of

---

justice delivery process. Similarly, the Appellate Court can punish up to six month of imprisonment or fine up to five thousand or both in the contempt of court to those who obstruct the justice. District Court can impose punishment up to one month imprisonment or fine up to one thousand or both.

<sup>20</sup> Article 2 of this Act prohibits the following acts:

- (a) To hinder or obstruct any public servant from discharging his/her official duty by committing battery or riot or by any other way;
- (b) To break public peace by committing battery or riot in any public place;
- (c) To break public peace or to make obscene show by using obscene speech, word or gesture in public place.
- (d) To print or publish any obscene materials by using obscene language or by any word or picture which denotes obscene meaning; or to exhibit or sell or distribute such obscene publication in public place other than the purpose of public health or health science;
- (e) To cause undue hindrance in the regular operation of postal service, communication, transportation, electricity supply or any other such essential social service;
- (f) To trespass on any governmental or non-governmental office or anyone's building or land by committing riot; or to stay or remain there in without any authority;
- (g) To damage any public or private property by committing riot or pelting stone or by any other way.
- (h) To insult women in public place by committing molestation (*Hatapata*);
- (i) To make undue behavior in public place.
- (j) To hinder or obstruct anyone or to stop his/her pathway or passage in a condition when he/she is staying anywhere or walking on the road or traveling by any vehicle; or to commit riot, molestation, battery, nuisance or misconduct; or to capture or damage any property or vehicle of such person having with him/her in the said condition with keeping intention to harass or cause trouble him/her;
- (k) To threat or scold or tease or to commit any undue act or to express any undue thing to anyone through telephone, letter or any other means or medium with keeping intention to intimidate, terrorize or cause trouble or to insult or defame or harass to him/her;
- (l) To commit any act or express anything, which causes intimidation or terror in general public and breaks public peace, by entering or not entering in any public gathering, assembly or demonstration; or to show weapon.

a lesser sentence. This is mainly a judicial function and its legal basis is the court's authority to determine appropriate sentence however it depends on the criminal law of the respective state whether there is special legislation may or may not be needed.

The Supreme Court of Nepal has recognized and incorporated the following mitigating circumstances as mitigating factors for reducing the punishment.<sup>21</sup>

1. Infanticide or killing of newly born child by his or her own mother;
2. Pursuance of suicide pact;
3. Excessive use of the right of private defence;
4. Exceeding the limitation determined by section 14 of the chapter 'Of Homicide' of Country Code (Prevocational Murder);
5. Intoxication;
6. Mistaken identity of victim or transferred malice;
7. Mistake of fact or duress;
8. Diminished responsibility; and
9. Battered women syndrome and syndromes arising from social tension.

In the case of *Shanti B. K. vs. His Majesty's Government*,<sup>22</sup> the Supreme Court has laid down some significant principles regarding the act of sentencing, which may serve as guidelines for the subordinate judges. In this case the Supreme Court has identified the following mitigating circumstances to reduce the punishment as per the 188 No. of the Chapter on Court Management of Country Code.<sup>23</sup>

1. Whether or not the murder has been committed in a premeditated manner and with a motive of killing;
2. Murder committed with cruelty and torture;
3. Nature and degree of crime;
4. The motive and social background of the offender;
5. Circumstances around commission of the crime;
6. Age of the offender;
7. Physical, mental, economic and family conditions of the offender;
8. Opinion or feelings of the victim;
9. Damage or loss caused to the victim or the society;
10. Past criminal record of the offender;
11. Whether or not the accused has assisted the judicial process by revealing the truth in the court;
12. Whether or not the offender has experienced the feelings of remorse or repentance following commission of the crime;
13. Whether or not the crime has been committed at the instigation or under the pressure caused by someone else; and
14. Other appropriate factors relating to the particular case.

## **B. Immunity Grants**

Law gives immunity to some people as per their relationship and nature of work. There are some

<sup>21</sup> Dr. R. B. Pradhananga, (2004), "Mitigated Homicide in Nepal: Theory and Judicial Practices", *Nepal Law Review*, Vol.17. p.12.

<sup>22</sup> *Shanti B. K. Vs. His Majesty's Government of Nepal*, *Nepal Law Journal (Nepal Kanoon Patrika)*, (2061), p.769.

<sup>23</sup> This provisions is as follow which is typical in criminal jurisprudence:

Despite confession by the accused in a case involving punishment of imprisonment for life with confiscation of entire property or of imprisonment for life pursuant to law, where the adjudging chief of office has a ground to suspect that it might be an accident, or in view of the circumstance of commission of the offense, the punishment as referred to in law will, in his or her view, be so severe if it is imposed on he accused and lesser punishment should be imposed on him or her, then the chief of office shall determine the punishment imposable by law, and explicitly set down in the reference memorandum such opinion as he or she has made, along with the reason for the same, and judgment shall be referred accordingly. Even the authority making final verdict may also determine punishment that is lesser than that specified by law if the authority also holds such opinion.

provisions in our evidence act which grants immunity from prosecution to certain people. Except those provisions Nepalese laws do not allow immunity to the witness. As per those provisions the parents, son, daughter, husband or wife of the party to the case shall not be compelled to be a witness against such party. Likewise any communication made during their marriage is also immunized. No judge shall, except otherwise order has been made by the Superior Court, be compelled to answer any question which came to his or her knowledge or regarding any act he or she performed in the court as such judge. Expert, public personnel police are not compelled to be a witness to the extent which jeopardizes their profession. Communication between the lawyer and client is also granted immunity. Except above mentioned provision witness shall have to answer.

Except the above mentioned provisions immunity is limited against self incrimination. Immunity from prosecution occurs when a prosecutor grants immunity, usually to a witness in exchange for testimony or production of other evidence which should be accurate, truthful and complete cooperation. It is immunity because the prosecutor essentially agrees to never prosecute the crime that the witness might have committed in exchange for said evidence.

The prosecution may grant immunity in one of two forms i.e. complete immunity (completely protects the witness from future prosecution for crimes related to his or her testimony) and Partial immunity (prevents the prosecution only from using the witness's own testimony or any evidence derived from the testimony against the witness).

In Nepalese context there is complete as well as partial immunity provision in some legislation that helps in investigation and prosecution. Human Trafficking and Transportation (Control) Act, 2007 prescribed the partial immunity by reducing the punishment 25 percentage who substantially cooperate the investigation and prosecution agencies.<sup>24</sup>

Similarly, section 18C of Narcotic Drugs (Control) Act, 1976 prescribed complete as well as partial immunity.<sup>25</sup> In addition to the above mentioned provisions section 55 of Prevention of Corruption Act 2002,<sup>26</sup> the investigating authority may give complete or partial remission in the claim of punishment with regard to the accused that assists in the process of investigation carried out under this Act having him presented as a witness on its behalf.

## VI. PROTECTION OF WHISTLE-BLOWERS

A whistle-blower is a person who tells the public or someone in authority about alleged dishonest or

---

<sup>24</sup> Provision of section 21 is as follows.

Exemption from penalty:

(1) If an accused charged of committing an offence under this Act accepts an offence and co-operates the police, public prosecutor or court to collect evidence and arrest other accused or abettor, and if he/she has committed the offence for the first time, court can reduce the punishment up to twenty five percent so prescribed for that offence.

Provided that, if the assistance is not proved by the evidence or he/she gives statement against the support provided to the police or prosecutor, a case may be registered notwithstanding anything in the prevailing laws.

(2) Notwithstanding anything contained in Sub-Section (1), there shall be no reduction in claimed punishment, pursuant to this section, in the following conditions:

(a) To provide exemption in punishment to the principal accused,

(b) If the case involved is trafficking or transportation of a child,

(c) If exemption in the punishment has already been provided 21 of this Act is as follows:

<sup>25</sup> 18C Punishment may be remitted: Notwithstanding anything contained in prevailing laws, any person who helps in finding the principal offender and assists by providing the information and clue about gang in which he/she, him/herself engaged or other gang involved in the transaction of narcotic drug punishable under this Act, if there is a demand for full or partial remission of punishment in the charge-sheet, the judicial authority also may remit in punishment accordingly.

<sup>26</sup> This provision is as follows:

The investigating authority may give complete or partial remission in the claim of punishment with regard to the accused who assists in the process of investigation carried out under this Act having him/herself presented as a witness on its behalf.

Provided that in case other evidences do not prove his assistance or in case he becomes hostile later on, the case may be filed against him again notwithstanding anything contained in this Act or in other prevailing laws.

illegal activities/misconduct that may be a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations, and corruption, occurring in a government department, a public or private organization, or a company. Whistle-blowers are commonly seen as selfless martyrs for the public interest and organizational accountability. Most whistle-blowers are internal, and believe in taking action with respect to unacceptable behavior within an organization. Some whistleblowers are external and report misconduct to lawyers, the media, law enforcement agencies or watchdog agencies or the state.

The concept of a whistle-blower is new for Nepalese context and not very often used. We do not have specific and comprehensive whistle-blower protection act includes definition of employee, protected disclosers, subject matters of disclosers, protected activities and so and so. An NGO called Pro-Public is advocating for whistleblower protection in Nepal. A Bill has been drafted for lobbying purpose. The proposed Bill speaks of rewarding the whistle-blower with up to 10000 rupees for accurate information, and punishing a whistleblower with up to 5000 rupees for fake reporting. Apart from the rewards and punishments, the Bill also contains a number of provisions related to the process of making complaints and providing due protection to whistle-blowers.

However, there are some legal provisions which are related to whistle-blower. Section 56 of Prevention of Corruption Act, 2002 has a provision for the protection of informers.<sup>27</sup> This provision, however, is largely confined only to the breach of secrecy. The existing Act makes some provision for information disclosure, but the provisions in the Act are meant more to discourage false reporting rather than encourage and protect accurate reporting. Section 49 of the Act makes provision for imposing a fine not exceeding 5,000 rupees for anyone filing false or wrong complaints with an intention to cause losses, damage or harassment. Section 58 makes provisions for distributing rewards but it is not specific in terms of amounts to be awarded to the whistle-blower.

The Right to Information Act, 2007 introduced this concept in Nepalese jurisprudence. This act defines "Public body" very widely<sup>28</sup> and section 29 of the same act provides the protection of whistle-blower.<sup>29</sup> The concept of "shoot the messenger" is widespread in Nepalese culture in this regard. If the employee discloses any illegal misconducts of the organization concerned, even if the law protects them from employer retaliation, they may be punished with suspension, demotion, termination, wage reduction and/or harsh misconduct by other employees.

<sup>27</sup> This provision is mentioned that Notwithstanding anything contained in the prevailing laws, no action shall be taken against a public servant for disclosing confidentiality under the law relating to the terms and condition of his/her service who gives information for taking legal action in case of corruption committed or going to be committed or for preventing to be committed.

<sup>28</sup> As per this act "Public Body" means the following body and institution list:

- (1) A body under the constitution,
- (2) A body established by an Act,
- (3) A body formed by the Government of Nepal,
- (4) Institution or foundation established by the law, public service.
- (5) Political Party or organization registered under the preventing law.
- (6) Body Corporate under the full or partial ownership or under control of the Government of Nepal or such body receiving grants from the Government of Nepal.
- (7) Body Corporate formed by a Body established by the Government of Nepal or the law upon entering into an agreement,
- (8) Non-Governmental Organization/Institutions operated by obtaining money directly or indirectly from the Government of Nepal or Foreign Government or International Organizations/Institutions,
- (9) Any other Body or Institution prescribed as Public Body by the Government of Nepal by publishing notice in the Gazette.

<sup>29</sup> Section 29 of this Act is as follows: Protection of Whistleblowers:

- (1) It shall be a responsibility of an employee of a Public Body to provide information on any ongoing or probable corruption or irregularities or any deed taken as offence under the prevailing laws.
- (2) It shall be the duty of the information receiver to make the identity of whistleblower in accordance with Sub-Section (1) confidential.
- (3) The whistleblower shall not be terminated from his/her post or punished with any legal responsibility or caused any loss or harm for giving information pursuant to Sub-section (1)
- (4) If any punishment or harm is done to the whistleblower against Sub-Section (3), the whistleblower may complaint, along with demand for compensation, before the commission for revoking such decision.
- (5) While investigating the complaint pursuant to Sub-Section (4), the Commission may order to revoke the decision of removal from the office if so removed from office and for the compensation if any damages caused to the whistleblower.

## VII. INTERNATIONAL OBLIGATIONS OF NEPAL

Nepal has ratified the UN Convention against Corruption of 2003<sup>30</sup> and UN Convention against Transnational Organized Crime, 2000.<sup>31</sup> Articles 24 and 25 of the United Nations Convention against Organized Crime (UNTOC) and Article 32 of the United Nations Convention against Corruption (UNCAC) require States Parties to take appropriate measures to provide effective protection for witnesses. These two conventions state two measures for witness protection: physical protection of witnesses, including relocation and non-disclosure or limiting the disclosure of information concerning the identity and whereabouts of witnesses, and an evidentiary rule to permit witnesses to testify in a manner that ensures their safety. As per the article 9 of the Treaty Act, 1990<sup>32</sup> as a party to these conventions Nepal is obliged to take necessary measures to protect witnesses, including legal provisions.

## VIII. RECENT PROBLEMS AND CHALLENGES

Participation in a trial as a witness can be a source of great anxiety for many people and may seriously affect the quality of their deposition. The absence of comprehensive witness protection policy and other measures leads to the following problems:

1. Police, prosecutors and justice authorities have not institutionalized regular, early meetings with prosecution witnesses to determine their physical as well as psychological well-being. Such meetings are particularly helpful in the case of child or juvenile witnesses and when witnesses suffer from significant impairment of intelligence, social functioning or a physical disability or disorder affecting the quality of the delivery of their evidence.
2. Witness protection mechanisms are facing the lack of proper training and equipment to provide adequate protection for individuals at risk and have often failed to do so, even when serious concerns regarding the safety of a particular person have arisen.
3. The absence of a witness protection mechanism has made victims and witnesses vulnerable to threats and intimidation and has also endangered the work of all those who speak out against abuses: notably human rights defenders, lawyers and journalists.
4. The absence of any security arrangements for victims during police investigations even results in allegations of torture being investigated by police officers belonging to the same police station as the alleged perpetrators. These perpetrators are also typically not transferred to another police station or suspended during investigations, making victims of torture extremely vulnerable to threats and reprisals.
6. State institutions are not friendly to the witness in terms of time and other physical facilities.
7. The government has remained passive concerning the witness protection programme, including the Witness Protection Act and Perjury Act. Nepal has accepted the obligation to protect witnesses by ratifying the UN Convention against Corruption and the UN Convention against Transnational Organized Crime.
8. Criminalization of politics and political criminalization is common and influences the witness' statement and ultimately hampers the criminal justice system.

---

<sup>30</sup> Nepal ratified this convention on 13 February, 2011.

<sup>31</sup> Nepal ratified this convention on 24 June 2011.

<sup>32</sup> Art.9 of the Treaty Act is as follows:

Treaty Provisions Enforceable as good as Laws: (1) In case of the provisions of a treaty, to which Nepal or the Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament.

Inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.

(2) Any treaty which has not been ratified, accede to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement.

9. The main dispute resolution mechanism for the transition period i.e. the Truth and Reconciliation Commission, is yet to be constituted.
10. In the absence of a comprehensive whistle-blower act, and the bad governance of the public sector as well as the private sector are not disclosed properly. The case of bad governance of the banking sector is very crucial in this regard.
11. Nepal is facing financial problems due to limited economic resources and may not be able to introduce witness friendly infrastructures.

### **IX. POSSIBLE WAYS FORWARD**

Nepal has no specific witness protection programme. The existing provisions are traditional and not sufficient to establish an effective, efficient, independent and impartial witness protection mechanism and policy. The following points are possible ways to address the issue.

1. The Witness Protection Bill should be passed by parliament immediately, with necessary amendments to establish an effective, independent and impartial witness protection system, capable of providing protection to victims and witnesses of crimes, including human rights violations attributable to state agents and members of other powerful and/or armed groups.
2. Ensure that the investigation and prosecution for alleged crimes during the insurgency are addressed in future by constituting a Commission on Enforced Disappearances and a Truth and Reconciliation Commission equipped with strong witness protection mechanisms.
3. Provide law enforcement agencies with appropriate training and resources to enable them to ensure the protection of vulnerable individuals. Such training should include interviewing techniques, discussion of court arrangements and familiarization with trial procedures.
4. Investigation should be prompt, impartial and independent and should address intimidation, threats and attacks against victims, witnesses, lawyers and human rights defenders who are engaged in working to ensure justice and dismantle Nepal's entrenched system of impunity.
5. A witness management plan in addition to the National Witness Protection Program should be made for those who do not qualify for the formal witness protection programme.
6. Political criminalization and criminalization of politics should be controlled so as to make the environment friendly for witnesses to deliver their real statement and produce evidence to the court.
7. A separate and comprehensive whistle-blower act should be enacted to secure protection of whistle-blowers.
8. Nepal should approach the international community to cooperate in matters like relocation of witness and financial support.

### **X. CONCLUSION**

The efficacy and effectiveness of any country's criminal justice system is dependent upon the cooperation of witnesses. Witnesses become reluctant if there are no witness protection measures to protect them from intimidation, threats and reprisal. No one wants to be in danger for helping others. Maintaining the law and order of the country is the prime responsibility of the government. Likewise, criminal territory is not limited by political borders; particularly organized crime. The need to protect witnesses and secure their cooperation is universal but it differs depending on the situation of each country. In this regard, Nepal should have to address the above mentioned problems by introducing a comprehensive witness protection programme and policy.

**REFERENCES**

1. Mahony Chris, *The Justice Sector Afterthought: Witness protection in Africa*; Institution for security studies, Tshwane (Pretoria), South Africa, 2010
2. *Nepal Law Review*, Faculty of Law, Tribhuvan University Kathmandu Nepal, Volume 14, Number 1-2, 2000-2001.
3. *Annual Survey of Nepalese Law*, Nepal Bar Council United Graphic Printer P. Ltd. New Plaza, Putalisadak, Kathmandu, Nepal, 2004.
4. *The Interim Constitution of Nepal, 2007*, Law Book Management Committee, Babarmahal Kathmandu, Nepal, 2007.
5. Nepal Law Commission website. [www.lawcommission.org.np](http://www.lawcommission.org.np) .
6. United Nations Convention against Transnational Organized Crime and the Protocols Thereto <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>
7. United Nations Convention against Corruption [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)
8. “Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime” <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>
9. Good Practice in Whistle blowing Protection Legislation (WPL), U4 <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=207>.
10. *Nepal Law Journal ( Nepal Kanoon Patrika )*, Volume 46, Supreme Court, Kathmandu, Nepal.
11. *NJA Law Journal*, Volume 2. No.1, 2008, National Judicial Academy of Nepal.