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Human Trafficking across borders: Human Rights Violations of women and children, challenges and remedies

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Proper Implementation of Laws and Policies: A Definitive Way for Providing Justice

- Roshi Bhandaree¹

The economic influence is the pushing and pulling factor for the commission of the crime of trafficking. The majority of the girls, women and children they have been trafficked in the recent days more in number because of the larger growing sex market. The easy money making, open border and criminalized and organized crime on one hand encourages the pimps and the perpetrators for the commission of the crime and to the other hand the search for the means of livelihood from the victim side contributes to larger extent for the crime. The effective implementation of the laws and plans and policies are the pre-requisites for the economic enhancement of the citizen which ultimately helps to controls the crime rate. The capability enhancement could be the ultimate way for the restoration of the economic standard of the victim to the society and administration of the justice.

Introduction

Trafficking is a complex development issue which pulls economic problem, health problem, gender problem, and a legal problem.² Human trafficking has now grabbed attention of global community. There are many national and international³ legal instruments to combat against this crime. The *State Cases Act* defines the crime of trafficking in women and girls as an

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² Trafficking is a complex development issue. It is an economic problem, as the vast majority of women seeking to escape poverty are lured into trafficking by the false promise of economic gain. Trafficking is a health problem, as trafficked women and children are most at risk for HIV infection. It is a gender problem, as unequal power relations reinforce women's secondary status in society. Lastly, it is a legal problem, as its victims are stripped of their human rights and lack any access to redress the crimes committed against them. (USAID 1999)

³ Convention for the Suppression of the Traffic Person and of the Exploitation of the Prostitution of Others, the Convention of the Rights of Child, the Convention on the Elimination of all Form of Discrimination against Women, and the SAARC Convention on Prevention and Combating Trafficking in Women and Children, signed 2002 provide the general legal framework for combating child trafficking. By ratifying various relevant international instruments including the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, and ILO Convention No. 182 on Elimination of Worst Forms of Child Labour and No. 29 on Forced Labour, Nepal has expressed its commitment towards elimination of worst forms of child labor, including sale and trafficking of children, debt bondage, serfdom and forced labor.

offence against the state of Nepal.⁴ It has been defined by ONRT-NHRC⁵ as which incorporates,

- a. illicit and clandestine movement of person/s within and across national borders,
- b. for buying, selling, recruitment, transportation, transfer, harboring or receipt,
- c. by means of threat or the use of violence or other forms of coercion, of abduction, of fraud or deception, of the abuse of authority, or of position of vulnerability, or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person,
- d. for the purpose of any kind of exploitation; and exploitation shall include, at a minimum, non-consensual sex work or exploitation of the prostitution of others or other forms of sexual exploitation, forced or bonded labor, fraud marriage, camel jockeys, slavery or practices similar to slavery, whether for pay or not, servitude or involuntary servitude (domestic, sexual, or reproductive), or the removal of organs, adoption, or other illegal.”⁶

Human Trafficking and Transportation (Control) Act 2064, Section 4 states that if anyone commits acts of selling or purchasing a person for any purpose or use someone into prostitution, with or without any benefit, extract human organ except otherwise determined by law, or go for in prostitution that shall be deemed to have been committed human trafficking.

⁴ State Case Act 1990 (*Sarkari Mudda Sambandhi Ain 2047*), schedule 1

⁵ It has broadened the definition of Palermo Protocol. Article 3 “*Trafficking in Persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*”

Nepal has yet to ratify the UN Trafficking Protocol although it has agreed in the UN trafficking Protocol in the national plan. UN trafficking protocol is problematic because they provide no guidance on how trafficked person and smuggled migrants are to be identified as belonging to either of these categories.” Meena Poudel, *Dealing with Hidden Issues Social Rejection Experienced by Trafficked Women In Nepal* (USA: Lambert Academic Publishing 2011), 23.

⁶ “...the illicit and clandestine movement of person/s within and across national borders for buying, selling, recruitment, transportation, transfer, harboring or receipt; by means of threat or the use of violence or other forms of coercion, of abduction, of fraud or deception, of the abuse of authority, or of position of vulnerability, or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any kind of exploitation; and exploitation shall include, at a minimum, non-consensual sex work or exploitation of the prostitution of others or other forms of sexual exploitation, forced or bonded labor, fraud marriage, camel jockeys, slavery or practices similar to slavery, whether for pay or not, servitude or involuntary servitude (domestic, sexual, or reproductive), or the removal of organs, adoption, or other illegal.”

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children states that:

a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs; c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

The *Interim Constitution of Nepal, 2063 (2007)* clearly prohibits human trafficking and forced labor under *Right against Exploitation*.⁷ *The Children's Act* has safeguarded the best interest of the child and punishes person who involve children in immoral profession.⁸

On 'Victims'

'Victims' are those persons who, individually or collectively, has suffer sustain harm which include physical and psychological harm, economic loss and substantial impairment of the fundamental rights⁹ either through commission or omissions of the activities which are considered as illegal in the criminal laws. Generally the direct harm is sustained by the victim of human trafficking however families and relatives are also victimized indirectly.

In the offence of human trafficking 'victim' means a person who is sold, transported or put into prostitution?¹⁰ The trafficked victim substantial deprivation of the fundamental rights gets associated with their right to live with a dignified life. Every human being has three basic rights to constitute the development of his/her personality, (1) the right to identity, (2)

⁷ Article 29(3) (1) Every person shall have the right against exploitation. (2) Exploitation on the basis of custom, tradition and convention or in any manner is prohibited. (3) Traffic in human beings, slavery or serfdom is prohibited. (4) Force labour in any form is prohibited."

⁸ Children's Act, 1992 (2048), section 16. Children not to be involved in immoral profession

⁹ *Regional Study, for the Harmonization of Anti Trafficking Legal Framework in India, Bangladesh and Nepal with International standards* (Kathmandu: Kathmandu School of Law 2007), 210.

¹⁰ Human Trafficking and Transportation (Control) Act 2007, section 2 (c).

the right to contract and (3) the right to own property,¹¹ which is destroyed in case of trafficking.

Women and children are one of the most vulnerable groups in the societies. Despite of numerous international and domestic instruments have able to provide *de jure* rights to them. But in *de facto* women and children are much prone to the violence and sexual exploitations. Statistics suggest that violence against women is astonishingly pervasive. Overall, it is estimated that one in three women worldwide will suffer some form of gender-based violence within the course of their lifetime where one of the forms of abuse include trafficking.¹² Similarly, “Obscure beliefs like ‘sex with virgin’ will cure STDs and sexual dysfunctions etc increases the vulnerability of children, especially the girl child.”¹³

Trafficking as an organized crime

Trafficking of women has become part of transnational organized crime and has been referred to as the “dark side of globalization.” Within the South Asian region, Nepal and Bangladesh have been designated as “sending” countries or countries of origin in the regional web of trafficking.¹⁴

If there is no client there would be no sex industry. The supply and demand¹⁵ of human trafficking has increasingly boasted the vicious circle for the continuous trafficking of the

¹¹ Yubaraj Sangraula, *Trafficking of Girls and Women in Nepal* (Kathmandu: Kathmandu School of Law 2001), 55.

¹² *United Nations Declaration on the Elimination of Violence against Women* (1993) article 1; *Ending Violence against Women and Girls – Protecting Human Rights* (Eschborn: Deutsche Gesellschaft für 2005), available at <http://baer.rewi.hu-berlin.de/w/files/lsbpdf/enendingviolenceagainstwomengirls.pdf> (accessed on 07 September 2012).

¹³ Children are trafficked for sexual exploitation because of the belief that they have lesser chances of being HIV/AIDS carriers. Studies point out that the age of the girls being trafficked to India is declining and the demand for virgin girls is increasing since clients seem to believe that children have fewer chances to contract this disease.” ‘Child Trafficking in Nepal’, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/90D747F199783971C1256D48005FAF36-tdh-nep-2jun.pdf> (accessed on 06 September 2012).

¹⁴ Jyoti Sanghera and Ratna Kapur, *Trafficking in Nepal: Policy Analysis: An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal*, available at <http://asiafoundation.org/resources/pdfs/nepaltraffickingassessment.pdf> (accessed on September 07, 2012).

¹⁵ Some commentators have identified the reasons for trafficking from the supply side (i.e from the point of view of the trafficking victim) which include poverty; inadequate opportunities (educational and economic); economic disparity globalization (relaxed controls); international migration; civil and military controls; erosion of traditional family values; lucrative business with low investment and high monetary gains; transnational crime; weak law enforcement mechanisms and lack of political will; export of labour; low status of women and girls in society; traditional and religious practices and social conventions such as child marriage, polygamy, social stigma against divorced and sexually abused women etc. , and demand side, which include male attitudes, expansion of the commercial sex industry; preferences for young women and virgin girls due to HIV infections; and demand for cheap labour by employers. *Regional Study* (n 7), 196;

women in the market as the commodities. Economical influences is one of the major reason for the cause of it which emphasizes the expectations factor¹⁶ and a search for means of livelihood plays vital role for the commission of the crime. However the traffickers are difficult to identify, as they are experts in avoiding detection and escaping arrest.¹⁷ It is further impossible to supply girls in market alone. It engages numerous people for its commission. It is carried out through well organized trafficking syndicates involving recruiting agencies, transport agencies, airlines, money changers, hotel owners, and law enforcing agencies.¹⁸

The increasing notion of the women and children being used in the sex market of the various countries including Thailand, Gulf countries, India, etc. involves the larger people for the commission of the crime. For this reason the transportation of women to the different parts of the world for the sex market hook the citizens of different states. For rescuing the victim and punishing offenders human trafficking i.e., enjoys extra territorial jurisdiction¹⁹ where 'the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events' is made.²⁰

- **Economy as the determinant factor of human trafficking**

The deep and severe poverty levels in Nepal create an environment, in which people “barely scratch out a living in fragile ecosystems; their vulnerability to natural and economic shocks is heightened by the fact that even the most basic infrastructure has so far failed to reach them.”²¹ The major reason for the trafficked person easily gets into trap is for better living standards. The pushing and pulling factor for the commission of the crime is economy.

The case of *Bajir Singh* of Dolakha where the accused was made liable on 6 counts selling women for conducting prostitution. He was punished with 170 years, 13 lakh fine and 9 lakh compensation. It was found that he had big racket for conducting prostitution. He was also owner of the Brothel in Agra. *Kantipur*, 2069-3-28.

¹⁶ Ibid, Promises of high incomes and upward social mobility; an escape from poverty; and the ability to support parents and families in villages.

¹⁷ Sanghera (n 12). Their networks have links with politicians, businesspersons, state officials, various institutions such as police, customs, border police, overseas recruiters, travel agents, transport agencies, religious institutions, hospitals, clinics, adoption agencies, etc.

¹⁸ *Regional Study* (n 7), 263.

¹⁹ *Ram Prasad situla v. Nepal Government*, NKP 2064, p. 1181; *Balbahadur v. HMG* 2045, p. 561 The victim was taken to Brothel of India where she denied to get engaged in prostitution. She was thrown out of the window. The local and Interpol India rescued the victim and helped for investigation. The testimony and the information provided by the interpol proved the accused guilty. Thus, the accused was punished in Nepal.

²⁰ Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in *Coizgo v. Belgium* referred to this situation rather as an 'obligatory territorial jurisdiction over persons' or 'the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events' rather than as true universal jurisdiction.' Malcolm n Shaw, *International Law*, 5th edition (Cambridge: Cambridge University Press 2004), 598.

²¹ *Child Trafficking in Nepal* (n 11), 10.

The pimps are active because they get paid after they find the victim. The brothel owners have large interest in it and the victims are expected to be their bonded labour.²² The possibility of the human trafficking is due to the constant demand and the buying and selling of the person as the commodities. Especially the women and children are more prone to get victimized.²³ Their access to assets and other productive and community resources is very limited. Their low status makes them vulnerable to trafficking and sexual exploitation.²⁴

The economic influence cannot be subtracted from the fact that the attempt or commission of the crime has been made in earning for their livelihood. It was found that around 32.43% have been trafficked because they were influenced for lucrative jobs, 24.32% for foreign employment, 13.51% marriage (by spouse or through marriage proposals and love affairs) and 8.10% trafficked after intoxication and 21.62% because of various reasons.²⁵ The majority of the trafficking has been carried out due to economic influences that can be made through job offers. Despite of conducting awareness program in the villages it has been ineffective to come under control due to joblessness and desire for better life standard.²⁶

- **Right to freedom of movement and trafficking**

Trafficking is a crime because of the elements of abuse and the violations that are committed against women not because of the movement or mobility per se.²⁷ The Right to

²² Active involvement of third parties (agents/pimps) is another reason for the commission of the crime and it is not a new issue. Two people were accused of sending women for lucrative jobs to Golf. Central Investigation Bureau raided hotel and caught them. It was found that they were teamed up with manpower companies to send the girls. The investigation had been started. The Kathmandu post 2069/03/28

²³ It was commonly believed that 5000-7000 Nepali girls were trafficked across the border to India each year, and that 150,000-200,000 women and girls are trapped and bonded in brothels in various Indian cities. These numbers were first disseminated in an article published in 1986 and remained unaltered over the past 15 years. Several authors who cite these figures admit that these numbers are only “intelligent speculations” due to the clandestine and underground nature of trafficking. Sanghera (n 12).

²⁴ *Report for UNDP Nepal of the outcome evaluation mission on Gender*, available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=44&cad=rja&ved=0CEMQFjADOCg&url=http%3A%2F%2Fwww.undp.org.np%2Fuploads%2Fpublication%2F2009010705544399.pdf&ei=VHJJUJWIIYsrAfWnICQAO&usq=AFQjCNGesmEuxqy0zGPq4I-t2OIFa4qDQQ> (accessed on September 07, 2012), 9.

²⁵ The researcher has conducted the research on various daily newspapers articles from *Kantipur*, *Gorkhapatra*, *Annapurna Post*, *The Kathmandu Post*, *Nagarik*, *The Himalayan Times*, *Nepal samacharpatra*, *Rajdhani*, *Naya patrika*, *Republica*, which were published in last eight months from 2068/09/01 to 2069/05/01. See the reason for the trafficking could be made for any purposes but in the majority of the condition it is witnessed that the economic influences is the major reason for the success of the trafficking.

²⁶ After the shut down of the tea factory in Jhapa even though awareness program was conducted to acknowledge them about the trafficking at 25 households but despite of it 5 girls disappeared from the village and the reason was unemployment. ‘*Bharat laijadai gareki yuvatiko udhar*’, *Kantipur*, 2068/09/03.

²⁷ Sanghera (n 12).

freedom of movement and association²⁸ cannot be denied. Everyone is entitled to move freely and without any restriction. If the movement involves force, violence, abuse then it is matter of criminal law. If migration is the basic human right, trafficking is the violation of that right.²⁹

The difference between the migration and trafficking is about the consent.³⁰ The ‘consent’ of the victim of trafficking shall be considered irrelevant. Trafficked persons are assumed not to have given their consent and are considered to be ‘victims’ and ‘slaves’, whereas people who are smuggled are considered to have willingly engaged in the criminal activities.³¹ Around 33% of registered Nepalese migrants across the border are women who have migrated for various purposes, including for the sexual purposes, however it is not clear whether or not these women are migrants for sex work or trafficked into prostitution.³² The open border to India is one of the major problems for the commission of the crime related to trafficking.

Generally women are sold to Indian Brothels from Nepal through different points with different means and with different techniques.³³ There are 36 official points between Nepal and India, but for traffickers there can be hundred of unofficial exit points.³⁴ Since India has an open border policy with Nepal, Nepali’s have free access to enter India, and therefore trafficking becomes difficult to identify. Every year 15,000 women and children are sold to India and other countries. Around 3,000 of them were rescued through reckless entries.³⁵ The concerns are largely that persons go to India without proper papers quite legitimately, and it is difficult to differentiate between a legitimate and non-legitimate reason.

Consequences of Human Trafficking

²⁸ Interim constitution of Nepal, Article 12 (3) (e) “Freedom to move and reside in any part of Nepal; and Article 12 (3) (f) Freedom to practice any profession, carry on any occupation, industry and trade.”

²⁹ *Consultation on Gender, Migration and the Law, Focus on Bangladesh, India and Nepal 18-20 January, 2007*, (New Delhi: Center for Feminist Legal Research 2007), 15.

³⁰ “At the core of any trafficking definition must be the recognition that trafficking is never consensual. It is the non-consensual nature of trafficking that distinguishes trafficking from other forms of migrations. The lack of informed consent must not be confused with the illegality of certain forms of migration. While all trafficking is, or should be, illegal, all illegal migration is not trafficking. It is important to refrain from collapsing the concepts of trafficking and illegal migration.” *Report on Trafficking submitted by the UN Special Rapporteur on Violence Against Women, to the Human Rights Commission* (Geneva April 2000).

³¹ Poudel (n 3), 23.

³² Poudel (n 3), 28. but see the majority of the women illegally migrated either by deception of the identity, false documents or by any reasons mostly the trafficked women are found to be forcefully engaged in the prostitution.

³³ The change in routes and the use of internet, mobile phones have subjected the victims to fall in trap of pimps and agents.

³⁴ *Status and Dimensions of Trafficking within Nepalese context* (Purano Baneshwor: Institute for integrated Development Studies (IIDS) 2004)

³⁵ ‘Pratyek Barsa 15,000 mahila tatha Balbalika Bechbikhanama’, *Gorkhapatra*, 2069/04/02.

The consequence of human trafficking shackles individual, society and state at large. Trafficking has severe implications on the psycho-social and economic well-being of the victim. Around 68% of women who had been rescued from the Gulf countries were found to be physically, psychologically and sexually exploited.³⁶ The sex workers' had a high proportion of cases with anxiety, depression, and PTSD. They tended to have more anxiety symptoms (97.7%), depression, all the constituents of the sex workers group scored over the cut-off point (100%), and the proportion of those who are above the cut-off for PTSD was higher in the sex workers group (29.6%) and higher rate of HIV infection in the sex workers group (29.6%).³⁷ The victims get affected with the sexual diseases and the condition worsens when they are further victimized with their non-acceptance back into the society. The non acceptance of the women who have been to abroad for employment has now created a serious problem.

Denial of basic standard of human rights to the victims such as right to health, nutrition, education and freedom, the country loses a large number of women and children as victims to this crime, who otherwise would have contributed productively to its growth.

Trafficking in person brings social breakdown, deprives countries of human capital, undermines public health and imposes enormous economic costs. As such, trafficking is incompatible with the dignity and honor of human beings.³⁸ It creates fear and disorder in the society and more importantly the decline of faith in the people towards the state mechanism transcends.

Victim Justice System

For the restoration and rehabilitation and reintegration to the society the different legislative measures has identified the rights of the victims. Especially The Human Trafficking Control Act has been introduced to combat against trafficking. The act has incorporated several provisions effective to victim.³⁹ In short, we can summarize it as:

³⁶ *Ibid.*

³⁷ Atsuro Tsutsumi, *Mental health of female survivors of human trafficking in Nepal*, available at <http://nivcmail.vicollaboratory.org/nivc/groups/inwomen/lists/inwomen/archive/2009/08/1235125950000/1250620105788.pdf> (accessed on 06 September 2012).

³⁸ *Trafficking in persons especially on Women and Children in Nepal*, (ONRT and NHRC 2006), 1.

³⁹ The earlier Human trafficking acts did not incorporate either the parents, relatives in the circle of doubt. Neither the provision of rehabilitation centers, in-camera proceedings existed in the act. It did not address the issue of Human organ transplantation either.

1. Compensation to the victim

The victims are compensated with the fine received from the offender. A court shall issue order to provide compensation to the victim which shall not be less than half of the fine levied as punishment to the offender.⁴⁰ But the consequences faced by the victims are irreparable. The victims are disintegrated from the society and its difficult to reintegrate them to the society. The destruction of the victim's dignity and prestige leaves their wound unhealed.

2. Confidential hearing

The issues of the children and women are considered to be more serious and delicate in nature. These are the reason that the court hearing should be done in closed camera. It has in-camera court proceedings.⁴¹ Further, the act has safeguarded the right to confidentiality of the person who puts written request to remain unnamed for reporting the offence committed or may be committed.⁴² And the prohibition against disseminating confidential information, without the consent of the victim, no one shall publish or broadcast the real name, photograph or any information which is detrimental to his/her character.⁴³ Further the problem is Nepalese laws lack witness protection which makes it more difficult to prosecute the case. SO this confidentiality provision to some extent increases the FIR but the seriousness is required for the prosecution.

3. Burden of proof

The burden of proof lies to the defendant.⁴⁴The motion maker do not have to collect the evidences to prove the guilt. This is one of the positive steps in this case where the trafficking victims do not have to burden to collect the evidences of the phenomena she had been into.

4. Rehabilitation center

The establishment of rehabilitation centers had been introduced in light of restorative justice to the victims for physical and mental treatment, social rehabilitation and family

⁴⁰ Human Trafficking and Transportation (Control) Act 2007, section 17 (1).

⁴¹ *Ibid*, section 27.

⁴² *Ibid*, section 5.

⁴³ *Ibid*, section 25.

⁴⁴ *Ibid*, section 9.

reconciliation of the victim.⁴⁵ Nepal government may provide economic support as well as other assistance to the center run.⁴⁶ Government of Nepal has been providing financial and technical support to eight rehabilitation centers established by different organizations.⁴⁷ Center manage for the social rehabilitation and family reconciliation of the person stationed at the Center⁴⁸ and medical treatment and consultation service and facility to the victims.⁴⁹

Services provided by the rehabilitation centers include health check up and treatment, awareness program on anti-trafficking, legal aid, psychological counseling, skill development training, and coordination for generating employment opportunities for the victims, and reintegrating victims to the community. The safe homes were established. The safe homes have provided space to those trafficked women who were suffering from slavery-like situations.

Different Approaches for access to justice for victims of human trafficking

The victims are those who are inflicted by the harm caused by the offenders. It may have harmed directly to the victim however, in felony the society gets threatened by the behavior of the offenders. For this reason when the trafficking victims are sidelined and the more concentration is made to the protection of the society then the victims get revictimized by the state policies which is miscarriage of the administration of the justice. Thus, the access to justice for the victims can be searched through two different dimensions, i.e. prevention and protection.

a) Prevention Dimension

⁴⁵ *Ibid*, section 13; About 7,073 of those person who were about to get trafficked were rescued and were consulted and returned to their home by Maiti Nepal Parsa. *Gorkhapatra*, 2068/10/07.

⁴⁶ *Ibid*, Section 13(3); According to MoWCSW, a total NRS. 38,660,000 has been collected in the central level rehabilitation fund.

⁴⁷ It has provided a grant of NRs. 18,0420492 to these rehabilitation centers during 2009-2011. Written replies to CRC from Nepal, CRC/O/OPSC/NPL/Q/1/Add.1 on 23 May 2012; These homes have received government funding from the rehabilitation fund established in December 2008, with a core fund of 14 million rupees, which was increased to 24 million rupees in FY 2009/10. So far the rehabilitation homes have received one million rupees each. For the rescue of victims of trafficking, a budget of 100 thousand rupees and that of 325 thousand rupees was provided to the Nepalese Embassy in India in FY 2008/09 and 2009/10, respectively.

⁴⁸ Human Trafficking and Transportation (Control) Act 2007, section 13(4).

⁴⁹ *Ibid*, section 13(5); By February 2012, these centers have provided services to a total 807 rescued women and girls in 2009 to 2011 and 54 women and girls still residing to the centers. (n 45).

The plans and policies should be directed towards preventing for the commission of the crime. Awareness raising campaign, social mobilization through rallies, peer education, organization of women's group discussions, etc. can be the better option for the prevention of the crime. Further the programs can be conducted so as to acquaint them with the paralegal training. Paralegal training is a process of empowering women to learn and assert their constitutional rights as well as educating both women and men about the negative implications of the defective value system.⁵⁰

Poverty is both the cause and effect for commission of the trafficking. Thus, the plans and policies of the Government should focus for the capability enhancement of the individuals. Improvement of livelihood opportunities through income generation, vocational training, micro-credit could be alternate way for addressing the problem. The targeted programs like micro credit and skill development,⁵¹ skill oriented vocational training programs,⁵² making policy for attracting foreign capital and technology providing modern technologies and equipments, district level programs focusing on commodity specific trainings, appropriate positive discrimination programs for productive employment these programs can formulate and implement for creating self-employment opportunities encouraging local knowledge, skills, and technology. That is to enlarge the employment and self-employment opportunities through these programs for their capability enhancement could be better choice to address the problem. But the problem is not in the policies or plans of the state rather the failure of the implementation mechanism has created the hurdle for its exercise.

Interception of suspected trafficking victims through community surveillance and border-based rescue, proper surveillance system, systematic repatriation of the victims, record keeping system the border points could be made effective for controlling the crime rate. The establishment of District Committees on Controlling Human Trafficking in all 75 districts in 2009/10 and National Committee on Controlling Human Trafficking (NCCHT) led by the MOWCSW is another important step that has been made for the prevention of trafficking.⁵³

⁵⁰ Sangroula (n 9), 93.

⁵¹ Three years interim plan

⁵² 3.4.2 Priority shall be given to the vocational training and skill development training programs by linking them with the need for lifelong learning and developing them as a means to bridge the gap between the existing and the required skills. Labor and employment Policy 2062.

⁵³ On 12 December 2010, the NCCHT decided to repatriate a Nepali victim from a rehabilitation home in Bangladesh. On 27 July 2009, it decided to establish an information desk at the district level to prevent trafficking resulting from illegal migration. *Thematic report of the Government of Nepal on measures taken to give effect to the international covenant on Economic, Social and Cultural Rights*, available at

However, Lack of strategic planning, NGO's concentration in few districts, issue of co-ordination, weak monitoring evaluation, no long term commitment to the programs lack of transparency, lack of the essence of empowerment, lack of programs to address demand side issue, etc. are the main reason for the increment of the trafficking issues.⁵⁴

ii) Protection Dimension

The state mechanism as Nepalese police along with NGO's and INGO's have been monitoring to control crime especially for the control of the laborers for the illegal migration is essential to protect women and children from the trafficking. The protection can be carried out in the time of attempt or after the commission of the crime. It cannot be denied the active involvement of the NGO's and INGO's in the field of anti trafficking.⁵⁵ There is no time limitation for legal remedies and the victims can file the case against traffickers at any time. Thus, the different approaches can be applied for the restoration of the victim to the society and for administering justice to them.

The Moral approach

Modesty and chastity are depicted as the basis of ethical existence in the social personality of girls and women.⁵⁶ Generally the trafficked persons are victimized in the sex trade. This approach views prostitution as "fallen" or "misguided", social evil, and maintain the social stigma on prostitution.⁵⁷ Women also spoke that these processes not only denied trafficked women's access to their families and certain services but also make them discredited and outsiders.⁵⁸

[http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/14F7CD14AE435A03C12579DB00379545/\\$file/ICESCR+Third+Periodic+Report+submitted+to+Geneva_20111104012057.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/14F7CD14AE435A03C12579DB00379545/$file/ICESCR+Third+Periodic+Report+submitted+to+Geneva_20111104012057.pdf) (accessed on 23 April 2012)

⁵⁴ *Status and Dimensions of Trafficking within Nepalese context* (n 32), 94-96.

⁵⁵ After the disappearance of the victims their relatives have been actively involved in search of them and given application for their search to the different NGO's and INGO's. On this Maiti Nepal Banke got 159 applications on 2010, 242 on 2011 and 249 on 2012 to search the disappeared. *The Himalayan Times*, 2068/01/12; Similarly, Maiti Nepal, Nepalgunj on F/Y 2067/2068 got application of 295 and on 2068/69 of 332. 'Yuvati tatha balbalika samet gari nabbe jaana ko uddhar', *Gorkhapatra*, 2069/02/27.

⁵⁶ Sangraula (n 9), 8.

⁵⁷ Elaine Pearson, *Human Rights and Trafficking in Persons: a handbook* (Bangkok: Global Alliance against Trafficking in women 2001), 78.

⁵⁸ *Samajik Bahiskar* is not allowing you to go home, to the temple, etc. For example, in my case samajik bahiskar was preventing me to live in the society I wanted or had to do survive, preventing me to go to the places I wanted to visit. These are some of the experiences have in my life when I got back from the brothel of Bombay. It is all about rules against you and your interests and your needs. Poudel (n 3), 89.

High levels of stigma and discrimination were associated with returned trafficked persons. Thus, the trafficking and prostitution gets intertwined and further victimizes the trafficking victims. However the legalization of the prostitution cannot be the solution. If the prostitution is legalized then the trafficking of the women to the legalized zones increases,⁵⁹ eventually the sex market which includes brothels, sex clubs, massage parlors and other site of the prostitution activities gets legalized. The supply and demand side gets actively engaged in the sex market as the legitimate sexual entrepreneurs. Secondly, the illegal sexual activities are considered as sin and taken negatively in the society. Thus, the act done by the offender though have traumatized the victim from its behavior the societal disregard further leaves them in vulnerable position.

Thus, rehabilitation centers could be the better option for addressing the problem of the trafficked women for enhancing their capability. For this, the active engagement of the state agencies, NGO's, INGO's are required for the rehabilitation of the trafficked women back into the society. The social awareness is the other option for addressing the problem.

The migration approach

In Nepal, the trend of leaving for India in search for a better life and in search for work to feed the children and to maintain a family back home is a very old cause of migration. They may become vulnerable to abuse and trafficking that can take place within the migratory process. This approach focuses on the problems created by "irregular" or "illegal" migration, either for works or other purposes. The concern is to regulate migration, in order to reduce the presence of undocumented migrants.⁶⁰

The strict checking of the passports⁶¹ and related documents should be priority for its control. Women are thus encouraged to go through recruiting agencies and not use individual agents. A provision has been adopted to reimburse the pre-departure orientation fee to women. Since the implementation of the provision, pre-departure orientation fee has been reimbursed to some 1018 women migrants.⁶² Overall, Nepalese migrant workers do not attend the required pre-departure orientation training course, with one 2009 survey findings indicating that 77

⁵⁹ *Social Reponsive Human rights Legal Education* (Kathmandu: Kathmandu School of Law 2004), 79.

⁶⁰ Pearson (n 55), 80.

⁶¹ Passports Act 1967, Section 3. Passport to be received: A Nepalese Citizen may make a journey abroad only upon receiving a valid Passport issued in his/her own name.

⁶² *Thematic report of the Government of Nepal on measures taken to give effect to the international covenant on Economic, Social and Cultural Rights* (n 52).

per cent of returnees had not attended training. The same survey found half of the returnees interviewed did not have their employment contract.⁶³

Similarly, the extradition treaties effective implementation is required for the control of the illegal migrants especially for foreign employments. For this, strengthening diplomatic relation could help for the control of trafficking. Nevertheless, diplomats and consuls do retain some useful functions in the collection of information and pursuit of friendly relations, as well as providing a permanent presence in foreign states, with all that that implies for commercial and economic activities.⁶⁴ Recently the Saudi Arab Embassy has listed with full information of 49 groups to Prime Minister, Foreign Ministry and Department of foreign employment to investigate for the illegal transportation of the women which is an imminent threat.⁶⁵

Government of Nepal is drafting a Policy on Safe Migration to address the issue of illegal migration and also to prevent trafficking resulted from illegal migration. It has adopted the Guidelines to Investigate and Prosecute Crimes Relating to Foreign Employment, 2010 and implemented the National Plan of Action on Women, Peace and Security adopted on 1 February 2011. It includes a plan for training of security personnel and the peacekeepers on Gender Based Violence including trafficking.

The labor approach

This approach is concerned about the labor market, and the problems that arise from domestic unemployment and policies regarding migrant workers. It is also concerned about the protection of workers' rights and working conditions, which raises the question of which categories of work should be recognized as such, and consequently the legal protections which should be accorded to the workers in these sectors.⁶⁶

The recruitment of migrant labor from Nepal is regulated by the *Foreign Employment Act* (the Act) 2064 (2007) and its accompanying *Foreign Employment Regulation* 2064 (2008).

⁶³ *Nepal Briefing to the UN Committee on the Elimination of Discrimination against Women*, available at <http://www.amnesty.org/en/library/asset/ASA31/006/2011/en/11fc32bc-52e7-49d8-b3d2-d9f8da6ecd42/asa310062011en.pdf> (accessed on 13 September 2012).

⁶⁴ Shaw (n 19), 669. The GON has continued activities to rescue victims, also in coordination with relevant NGOs. The embassies and missions of Nepal have also been engaged in rescue works. For instance, the Nepal Embassy in India rescued 11 girls in 2008, one girl in 2009 and two girls in 2010.

⁶⁵ 'Bombay bata farkeki cheli le logne lai parkaien', *Kantipur*, 2068/11/12.

⁶⁶ Pearson (n 55), 81.

To ensure safe migration, the Act specifies that migrant workers depart from the “native airport.”⁶⁷ They should receive an employment contract outlining the terms and conditions of employment and provisions of remuneration⁶⁸ and carry life insurance.⁶⁹ Finally, recruitment agencies in Nepal are required to ensure that all migrant workers attend orientation training.⁷⁰

For this, earlier the issuance of the passport by the foreign ministry had to some extent controlled trafficking. After changing the policy of getting passport from district has increased the involvement of the pimps around the villages.⁷¹ And the consequence can be seen that the crime of forgery of passport has increased rapidly.⁷² Also the corruption issue though is not dealt in the trafficking acts but the separate act deals with this regard it has been another problem. The involvement of some officials were found guilty in the past but denied involvement of police official.⁷³

The proper and effective laws and policies are thus required for the protection of the women who could be trapped to human trafficking. The court held that when women are having difficulties exercising their constitutionality enshrined rights, the special measures provision of the constitution should be used to facilitate measures that foster rights enjoyment rather than rights eradication. With respect to the facts before the Court in this case, for example, constitutionally sound special measures would include the development of legal channels of migration for women as well as pre-departure training for female migrants on how to safeguard their rights in their country of destination.⁷⁴

⁶⁷ Foreign Employment Act 2007 (*Baideshik Rojgar Ain 2064*), section 22.

⁶⁸ *Ibid.*, section 25.

⁶⁹ *Ibid.*, section 26.

⁷⁰ *Ibid.*, section 27.

⁷¹ The citizenship card, passport are made by the pimps themselves. They put visas on it and coerce the girls to go to abroad. The girls of age 15-16 years or of more than 40 are also found going abroad either lured or in force as the pimps force them to return money visa an ticket they approved for them. Around 150 women are in abroad now and those who return they do not give any negative reactions too. *Nagarik*, 2069/03/29.

⁷² ‘Human Trafficking rackets thriving’, *The Kathmandu Post*, 2068/12/26; From the Record of Immigration Department, 261 people were detained for forging passport. More than 200 have been held by the police in the charge of forgery in past two years, but see the reason for the forgery could be anything. The denial of the illegal migrants workers to the Gulf countries are basically made for the exploitation, domestic violence, for dance bars, prostitution, etc.

⁷³ Some workers yet claimed they paid in the range of Rs. 10,000 to 60,000 to TIA officials through well laid channels. *Ibid.*

⁷⁴ *Sabin shrestha v. HMG*, Supreme court bullentine, 2001, vol. 19, p1 cited at *Consultation on Gender, Migration and the Law* (n 27), 23.

The establishment of *Foreign Employment Tribunal*⁷⁵ is another landmark in controlling trafficking. The Tribunal has been an effective mechanism for addressing illegal migration and exploitation of workers. Similarly, a *Committee to Hear the Issues of Undocumented Workers*, including representation from the non-governmental sector, was established at the DOL. The functions of this committee are specified in the provision under the *Guidelines to Investigate and Prosecute Crimes relating to Foreign Employment*, 2010.

In pursuance of the *Foreign Employment Act 2007*, which also provides for a labor attaché in countries with more than 5,000 Nepali workers, and the directive order of the SC, the GON has sent labor attaches to four countries: Saudi Arabia, Malaysia, Qatar and United Arab Emirates. These labor attaches are responsible for assisting the respective embassies and missions in protecting the rights of migrant workers.

The crime control approach

This theory is more concerned to the deterrent theory of punishment. If any offence was committed then the offender are punished in such a way that it leaves threat and fear among the people so that they do not commit the same mistake again. The Nepalese legal provisions are more concentrated to the criminals rather than to the access to the victims. The principle concern of the repressive crime control strategy is to stop crime, not violation and exploitation of women, whose interests are secondary, or presumed to be generally served by stopping the criminals.⁷⁶ The Nepalese law has shifted from this dimension towards the victim perspective. However the strict laws to some extent discourages the offenders for committing crime.

Conclusion

It is the social and economic constraints more responsible for the trafficking of the women. The economy is the major pushing and pulling factor for the commission of the crime and the flourishing market of the sex trade has been uncontrollable to stop the trafficking market as the organized crime. The majority of the cases concerns that the economic being determinant factor the major focus of the Government as well as the concerned stakeholders should focus for the capability enhancement. The different approaches try to seek to address different

⁷⁵ It was established on 3 February 2010. In a period of one year, the Tribunal has considered 224 cases. (n 60).

⁷⁶ Pearson (n 55), 79.

problems for the cause of trafficking. However the inefficient laws and lack of implementation of the proper laws are the main reason for the further victimization of the trafficking victims. The restoration of the victim to the society is a big challenge so that they can enjoy their dignified life and live with respect. For this the massive awareness, the strong legislation and effective state mechanism are required for their reintegration to the society. The victim who had been distressed by the act of offender further gets victimized when they are not focused by the laws for the proper integration in the society. The victim should get the ultimate justice so that they can enjoy their dignified life.

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