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Access to Justice to Victims of Human Trafficking: Nepalese Perspective

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## Government's Initiatives for the Rehabilitation and Reintegration of Trafficking Survivor in Nepal: Victim Justice System Perspective

- Sushila Karki<sup>1</sup>

*Trafficking, established as commercial sexual exploitation, forced labor or services, servitude, slavery or practices similar has reached alarming proportions in the present day world most effective within the South-Asian Region. Women and girls are the measure victim of trafficking. There are various reasons where women and girls prey for trafficking. Some of them primarily search out work in the wealthier countries are promised jobs and are subsequently forced into sexually exploitative situations upon arrival in the country of destination. The social stigmatization associated with trafficking due to lack of awareness in society necessarily associates all the trafficking with sexual exploitation. The key issues and challenges faced by the survivors of trafficking are social rejection, lack of ownership of citizenship which does not allow these survivors to successfully reintegrate back into the society. Some of the laws of Nepal namely Human Trafficking and Transportation Control Act 2007, Human Trafficking and Transportation Regulation 2008 provide rehabilitation measures to the survivor. In line with these legal provisions this article has made efforts to analyze role of government of Nepal in nexus with rehabilitation and reintegration principle.*

### Conceptual framework of human trafficking

The notion of human trafficking has been defined and discussed from various aspects. Some of the literatures define it as the illegal transfer of the human being for the purpose of trafficking more specifically commercial exploitation. Human trafficking is also taken as transfer and harboring of the person for labor exploitation. However, human trafficking has been defined in various ways by laws as per context. Some countries have considered trafficking as immoral offence and some have focused trafficking linked with sexual exploitation. Some modern laws have linked trafficking also with illegal transfer of human organs. Below are some important definitions that may provide basic idea and concept of human trafficking.

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**The UN General Assembly, 1994:**

It defined trafficking as the

“illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labor, false marriages, clandestine employment and false adoption”.<sup>2</sup>

This definition includes the border aspect of human trafficking incorporating exploitative and oppressive work situations apart from prostitution, including forced labor of any form, false marriage and adoption.

**The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000** defines trafficking as;

“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 position of vulnerability or of the giving or of receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of other forms of sexual exploitation, forced labor services, slavery or practices similar to slavery, servitude or the removal of organ.”<sup>3</sup>

This is the first internationally recognized definition of the trafficking. The definition besides giving the definition of the trafficking has provided the guiding principle for a macro

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<sup>2</sup> 84th Plenary meeting of United Nation General Assembly (1994), available at <http://www.un.org/documents/ga/res/49/a49r060.htm> (accessed on 9th November 2011).

<sup>3</sup> See Article 3 of United Nations Office on Drugs and Crime, "Toolkit to Combat 16 Trafficking in Persons," 16 December 2008, (accessed on 20 October 2011), available at [http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_1-1.pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_1-1.pdf).

conceptual understanding of trafficking. As per the definition the trafficking not only incorporate the illegal transfer, transport or harboring of the persons but also expanded the definition to the exploitative conditions that may result from trafficking, which were earlier confined to prostitution. Concern has been expressed that the ‘first modern definition of trafficking is being elaborated in the context of crime control, rather than with a focus on human rights.’<sup>4</sup>

The protocol further incorporates the number of measures to support trafficked victim including housing, counseling, medical and psychological assistance, and training and employment opportunities.<sup>5</sup> However those provisions were not mandatory in assisting the trafficked victim.<sup>6</sup>

**SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Trafficking Convention)** defines trafficking as:

“Moving, selling or buying of women and children for prostitution within or outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.”<sup>7</sup>

The *SAARC Convention on Trafficking*, a first sub-regional treaty addressing trafficking in persons has significantly developed the concept of trafficking. The Convention define consent as irrelevant element for purpose of the trafficking, a woman who travels voluntarily to engage in commercial sexual work could be deemed to have been trafficked by any third party who assists her. Similarly the Convention requires state parties to make suitable arrangements for the care and maintenance of trafficked persons, including the provision of legal advice and health care facilities, pending the completion of arrangements for their repatriation in the case of cross-border trafficking.<sup>8</sup>

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<sup>4</sup> Radhika Commaraswamy, *Integration of the Human Rights of Women and the Gender Perspective-Violence Against Women* (2000), 7.

<sup>5</sup> See Article 6.3 of Protocol.

<sup>6</sup> Jyoti Sangera, *Towards the Construction of an Empowered Subject: A Human Rights Analysis of Anti Trafficking Legal Interventions and Trends in South Asia* (2001). Paper presented at the Technical Consultative Meeting on Anti Trafficking Programs in South Asia.

<sup>7</sup> See Article 1.3.

<sup>8</sup> Article 10.2.

From the above definition the term trafficking can be clearly defined having following elements;

- Trafficking is an act to move, sale or purchase women or children both within and outside the country that comprises both internal and international trafficking;
- Trafficking is an act to gain monetary or other consideration with or without the consent of the trafficked victim;
- Trafficking is an act carried out with threat or force or deception or fraudulent marriage or any other unlawful means.

Nepal enacted new trafficking law in 2007. Being comparatively new law in the region, it has also incorporated illegal transfer of organ as human trafficking. The Act further prohibits most forms of trafficking in persons, including the selling of human beings and forced prostitution.

### **Meaning of rehabilitation**

The Oxford Dictionary provides a standard but limited definition of rehabilitation. According to the dictionary, rehabilitation is “a course of treatment, largely physical therapy, designed to reverse the debilitating effects of an injury.”<sup>9</sup> This definition reflects one of the most common but narrowed concepts of rehabilitation, one that is focused on physical care. A second understanding of rehabilitation, also narrowed and predominant in law, is the one connected to helping “a person who [...] has been released from prison [or is still in prison] to readapt to society.”<sup>10</sup> Both of these concepts have had an impact on the way rehabilitation is understood under international law.

The World Health Organization, in the *Second Report* of its *Expert Committee on Medical Rehabilitation* (1968) provided three different species of rehabilitation; medical rehabilitation, referring to “the process of medical care aiming at developing the functional and psychological abilities of the individual, and, if necessary, his compensatory mechanisms, so as to enable him to attain self-dependence and lead an active life;”<sup>11</sup> social

<sup>9</sup> Oxford Pocket Dictionary, available at <http://www.encyclopedia.com/doc/1O999-rehab.html>. (accessed on 10th March 2011).

<sup>10</sup> *Collins English Dictionary* (United Kingdom: HarperCollins Publishers 2000), 1299.

<sup>11</sup> WHO Expert Committee on Medical Rehabilitation, *Second Report, Technical Report Series* 419 (Geneva, 1969), 6.

rehabilitation, meaning “the part of the rehabilitation process aimed at the integration or reintegration of a disabled person into society by helping him to adjust to the demands of family, community, and occupation, while reducing any economic and social burdens that may impede the total rehabilitation process;” and vocational rehabilitation, that refers to “the provision of those vocational services, e.g. vocational guidance, vocational training and selective placement, designed to enable a disabled person to secure and retain suitable employment.”<sup>12</sup>

International law does not delineate a working definition of rehabilitation as a form of reparation under international law. The closest expression of such a definition is found in the Basic Principles<sup>13</sup> that indicate that in certain situations persons who have suffered certain types of serious human rights or humanitarian law violations should be redressed by way of, among others, rehabilitation, meaning physical and psychological care as well as social and legal services. So, although the concept of rehabilitation set out in the Basic Principles spells out some other forms of rehabilitation beyond health, it mentions these other aspects without fully indicating what each one of them means or includes.

### **Right to rehabilitation and reintegration under international law**

International law, treaties are also sources of law. According to Article 38 of the *Statute of the International Court of Justice*, the traditional sources of international law are treaty, custom and the general principles of law.<sup>14</sup> There are various international law and human rights treaties, both at the UN level and at the regional level, which widely define rehabilitation and also taken reintegration as inevitable measure for victim justice system. Most of these law and treaties have defined rehabilitation as a form of reparation and as a right.

The *Universal Declaration on Human Rights* (1948) does not mention the word rehabilitation or any similar wording but it contains the right to an effective remedy in Article 8 and the right to an adequate standard of living for the health of the person and his family, including access to medical care and the required social services in Article 25. The *International*

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<sup>12</sup> *Ibid.*

<sup>13</sup> General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Res. 40/34 (29 November 1985).

<sup>14</sup> Statute of the International Court of Justice, available at [www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0) (accessed on 10<sup>th</sup> November 2010).



*Covenant on Civil and Political Rights* (1966) (hereinafter ICCPR) mentions the word rehabilitation in Articles 10 and 14 to indicate that the aim of a prison system is to promote the social rehabilitation of prisoners. The ICCPR also incorporates the right to an effective remedy in Article 2(3). The *International Covenant on Economic, Social and Cultural Rights* (1966) (hereinafter ICESCR) does not mention the word rehabilitation.

The *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* under Article 6, 7 and 8 provides special measures for the assistance and protection of victims of trafficking including reparation. Article 6, sub-article 3 mentions that the state party is required to implement measures to provide for the physical, psychological and social recovery of victims of trafficking. Such measures shall be implemented in cooperation with non-governmental organizations and other elements of civil society<sup>15</sup>. The appropriate measures as per the Article are;

- Appropriate housing;
- Counseling and providing information in relation to their legal rights in the language understandable to the victim;
- Medical, psychological and material assistance;
- Employment, educational and training opportunities.

Additionally, Article 8 provides the immediate return of the victim, without undue or unreasonable delay. While doing so the urgency shall also be done in terms of providing travel documents or other authorization in case if victim of trafficking is without proper documentation. The Protocol in this regard also ensures the immediate response in the procedure while repatriating the victim to the nation state.

### **Other UN instruments incorporating concept of rehabilitation**

Among all these UN treaties, conventions there are two specific instruments that are related to the victim justice system namely; The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Basic Principles of Justice) and the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Human Rights Violations and Serious Violations of International Humanitarian Law* (Basic Principles).

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<sup>15</sup> See Article 6 of the Protocol.

These two developments were basically related with the recognition, protection and promotion of the right to a remedy of victims of human rights violations.

### **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles of Justice)**

This Declaration adopted by the UN General Assembly almost a year after CAT (1985), is the first concrete manifestation at the international level to consider carefully the needs of victims of crime and abuse of power. It clearly incorporates the right to reparation in relation to both regular crimes and abuse of power but considers diverse reparations measures and different subjects as responsible for paying them.<sup>16</sup> Paragraphs 8 to 11 of the Declaration deal with ‘restitution’, meaning that the offender or a third party involved in the crime and not always and only the state, should, among others, “return [...] property or payment for the harm or loss suffered, reimburse[...] expenses incurred as a result of the victimization, [and provide] services and the restoration of rights.”<sup>17</sup> Then, the Declaration deals with ‘compensation’ to refer to the obligation of the State to pay a sum of money to victims “who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;” and to “the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization,” and if the offender cannot pay compensation or it cannot be obtained through other sources.<sup>18</sup> Subsequently, the Declaration deals with ‘assistance’, meaning the services that should be available to victims to deal with their harm regardless of whether state agents or others operating with their acquiescence committed the crime. As Clark puts it “the provisions of the Victims Declaration on assistance start from the rather obvious premise that some victims need more than money to make them whole. A support system must be in place.”<sup>19</sup>

Therefore, although the *Basic Principles of Justice* do not use the word rehabilitation as a particular reparation measure, it incorporates what could be called ‘the right of assistance,’ meaning that such victims “should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous

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<sup>16</sup> R. Clark, *The United Nations Crime Prevention and Criminal Justice Program, Formulation of Standards and Efforts at Their Implementation* (Philadelphia: University of Pennsylvania Press 1994), 193.

<sup>17</sup> General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, RES 40/34 (29 November 1985), para. 8.

<sup>18</sup> *Ibid.*, para. 12-13.

<sup>19</sup> Clark (n 16), 195.



means.”<sup>20</sup> Equally important, in 1996 the *UN Commission on Crime Prevention and Criminal Justice* called for the drafting of a Manual on the use and application of the *Basic Principles of Justice*. The central objective of the manual was to outline “the basic steps in developing comprehensive assistance services for victims of crime”, which go beyond reparations measures and are not limited to health services but incorporate others such as physical safety, compensation, counseling and legal services.<sup>21</sup> The manual uses the word rehabilitation mainly to refer to the need to provide social rehabilitation to offenders, a terminology already used in the ICCPR, for example, but also to indicate that rehabilitation is a way to provide restitution to victims. In this context, restitution is not only seen as a reparation measure but also as a sanction and/or a criminal penalty.<sup>22</sup>

### **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**

The *Declaration of Basic Principles of Justice* paved the way in international arena for careful thinking about victims’ rights *vis à vis* those of the alleged offender. As such, the then *UN Sub-commission on Prevention of Discrimination and Protection of Minorities*, adopted a resolution in 1988, where it established that “all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims, either individually or collectively,”<sup>23</sup> and that it would consider the possibility of elaborating principles and guidelines on the matter.<sup>24</sup> The sub commission mentioned ‘rehabilitation’ as an express form of reparation for gross human rights violations. Subsequently, in a resolution the following year, the sub commission entrusted Theo van Boven with the task of studying

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<sup>20</sup> *Ibid*, para. 14-19.

<sup>21</sup> UNODCCP and the Centre for International Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: UNODCCP 1999), 122.

<sup>22</sup> *Ibid*, 47.

<sup>23</sup> UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/Res/1988/11 (1 September 1988), para. 1.

<sup>24</sup> *Ibid*, para 2.

current international law on the right to restitution, compensation and rehabilitation for victims of gross human rights violations.<sup>25</sup>

Professor van Boven presented his final report to the Sub-commission in 1993<sup>26</sup> that proposed basic principles and guidelines in that report indicated that “reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.” As such, reparation “[...] shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition [...],” and the report established that “rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims.” Further, when defining ‘compensation’ as a reparation measure, the report makes it clear that a sum of money might also be a way to produce rehabilitation when it aims to pay a) “reasonable medical and other expenses of rehabilitation;” b) “harm to reputation or dignity;” and c) “reasonable costs and fees of legal or expert assistance to obtain a remedy”.<sup>27</sup>

A year later, in 2000, Bassiouni submitted his revised principles to the *Commission on Human Rights*.<sup>28</sup> This version goes back to some of the drafting of the 1993 van Boven version, although the principles are also applicable to humanitarian law violations, as it indicates that in certain circumstances “states should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.”

The revised principles define rehabilitation as including “medical and psychological care as well as legal and social services.” Equally, when defining compensation, the new set of principles indicates that a sum of money could also be paid to cover “cost[s] required for legal or expert assistance, medicines and medical services, and psychological and social

<sup>25</sup> UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.4/Res/1989/13 (31 August 1989), para. 1.

<sup>26</sup> UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/1993/8 (2 July 1993).

<sup>27</sup> UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/1993/8 (2 July 1993), principles 3-4, 9-10, 56-57.

<sup>28</sup> M.C., Bassiouni, Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms E/CN.4/2000/62 (18 January 2000), para. 33.

services” in the same part of the principle rather than in separate principles as was the case under the van Boven principles.<sup>29</sup> So, Bassiouni’s 2000 revised principles provide more precision on the kind of services that are included in rehabilitation rather than the more open statement included in van Boven’s earlier drafts. Nevertheless, as was evident at the open consultations held in Geneva in 2002, the inclusion of legal and social services within rehabilitation was not that obvious due to the connector ‘as well as’, while the meaning of a social service was far from clear.<sup>30</sup> The *International Rehabilitation Council for Torture Victims* (IRCT) responded to some of these views indicating that “victims often come from the least well resourced groups in society, and thus need assistance to avail them of the system.”

The revised versions of the principles between 2002 and 2004 did not incorporate important changes to the meaning of rehabilitation or to rehabilitation through compensation. Nevertheless, delegations continued to indicate that the meaning of legal and social services was not clear and some others questioned the reference to them.<sup>31</sup> The final version of the *Basic Principles* establishes the principle of adequate, effective and prompt reparations in principle 15, but also indicates that “in accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.” This means, that although rehabilitation is a form of reparation, it should be provided by states depending on the particular circumstances of each case if it is “appropriate” and “proportional” to the gravity of the situation. Principle 21 equally establishes that ‘rehabilitation should include medical and psychological care as well as legal and social services’.

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<sup>29</sup> UN Subcommission (n 27), para 23-24.

<sup>30</sup> *Ibid.*, para 132.

<sup>31</sup> M. Zwanenburg, *The Van Boven/Bassiouni Principles, An Appraisal*, in 24(4) *The Netherlands Human Rights Quarterly* (2006), 641-668.

## Nepalese Legal Framework on Human Trafficking

Among many legal provisions the constitutional framework is the basic legal foundation that talks about the equality and safeguarding the interest of women. Currently Interim Constitution 2007 (2063 B.S.) prevails in Nepal that provisioned equality framework, prohibits from exploitation.

### i) Interim Constitution 2007

The Interim Constitution Article 13, 20 and 29 guarantees the equality principle and prohibits any form of exploitation. According to Article 13 all citizens shall be equal before law and no one shall be denied the equal protection of law. Similarly, Article 20 mentioned that no woman shall be discriminated against any way on the basis of gender. The article further mentioned the right of the women including physical or mental violence against women. Article 29 explicitly mentioned right against exploitation saying, “no person shall be exploited in the name of custom, culture neither subjected to human trafficking, slavery nor bonded labour neither subjected to forced labour”.<sup>32</sup> Pursuant to these constitutional provisions any act contravenes to these provisions amounts to be criminal offense.

Similarly, the provision of article 35 (9) of the *Interim Constitution* highlights one of the policies of State "...of making special provisions of social security for the protection and welfare of single women, orphans, children, helpless, the aged, the disabled, incapacitated persons and the tribes in the verge of disappearance". In the same manner, according to the provision of article 35 (14) "[t]he State shall pursue a policy of making special provision based on positive discrimination" for empowering and uplifting the status of specific groups of people including women. In the same manner, the provision of the article 33 (m) of the Interim Constitution explicitly states that one of the responsibilities of the State is "[t]o implement international treaties and agreements effectively, to which the State is a party".

Prior to the *Interim Constitution*, the *Constitution of Kingdom of Nepal* 1990 (2047 B.S.) existed that never explain trafficking as offense from human rights perspective. However, the present Constitution explicitly prohibits any form of exploitation including human trafficking. The equality framework places the equal status of women in terms of her physical

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<sup>32</sup> See generally Article 29.

capacity and her control over sexuality. These guarantees together with right to equality of sexes and freedoms to inviolability of personal liberty provide the Constitutional framework against the ‘exploitation of persons for any purpose’, and as such it can be said that the said article provides a guarantee against trafficking of persons.

## ii) Legal framework under *Muluki Ain* ( Country Code) 1964

*Muluki Ain* under *Chapter on Human Trafficking* provides general framework of trafficking in Nepal. Clause 1 of the Chapter prohibits,<sup>33</sup> any act of taking any person or persons, by fraud or enticement, out of the territory of the country with an intention of selling. The clause further made the act punishable by 10-20 years of imprisonment, and has also made punishable to those who are involved in purchasing the person or persons.

This general law has been found inadequate to tackle the problem of trafficking and a special act *The Trafficking of Human Beings (Control) Act, 1980* has been enacted which has brought some fundamental changes in the legal regime against trafficking. The important feature is the shifting of the onus of proof to the accused person from the prosecution side. When a person is accused of trafficking a person or a person is found taking a woman outside the country the person has to prove that s/he is innocent. The Act has recognized the international nature of trafficking of human beings and given the Act extra-territorial effect. The other characteristic of the Act is that when a victim claims that someone has sold her, her statement is to be registered immediately and authenticated by the District Court. It has made stringent provisions for punishment too. This Act unfortunately has been found to not sufficiently address the problems of trafficking most importantly the rehabilitation and reintegration of victim and a new *Human Trafficking and Transportation (Control) Act 2007* was enacted.

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<sup>33</sup> “No person shall entice and take any human being out of the territory of Nepal with the intention of selling him/her, or take him/her outside of the territory of Nepal and sale him/her. In case any person has taken somebody for sale in foreign countries, and is arrested before he can do so, he/she shall be punished by an imprisonment for a term of ten years. In case the sale has been completed, he/she shall be punished by an imprisonment for a term of twenty years. In case the purchaser is traced out within the territory of Nepal, he/she shall be sentenced to the same punishment as seller.”

### **iii) National policy to eliminate and prevent trafficking of women and children on trafficking adopted in 2000**

In 2000, in pursuance with commitment made at international, regional and national levels, the Government (the Ministry of Women, Children and Social Welfare MoWCSW as focal ministry) had adopted thirteen focus areas for its national policy to eliminate and prevent trafficking of women and children on trafficking can be summarized as follows;

- a. Public awareness campaigns on trafficking will be carried out at a large scale.
- b. Action will be taken to remove laws that discriminate against women.
- c. Various institutions of the Government, I/NGOs, and private sector will be mobilized to combat the problem of trafficking in women and children.
- d. The MoWCSW will act as the 'focal point' for carrying out programs against trafficking.
- e. The Government will open its door for cooperation with the bilateral and multilateral donors to combat the problem of trafficking.
- f. The Government will protect the human rights of women and children.
- g. Heavy fines will be imposed on the traffickers and exploiters of women and children. The fines collected will be utilized to provide financial assistance to the victims.
- h. Steps will be taken to control and prevent the spread of sexually transmitted diseases and HIV/AIDS.
- i. The Government will take necessary steps to alleviate poverty and provide employment opportunities to women of high-risk communities.
- j. District level co-ordination committees will be formed to function as information centers and for collecting data, coordinating local level activities and raising awareness to combat trafficking.
- k. The Government will establish co-ordination committees at the national, district and village/municipality levels to control trafficking.
- l. Provisions will be made for carrying out formal and vocational education.
- m. Rehabilitation programs for the rescued women and children will be organized in collaboration with NGOs.
- n. Step will be taken to seek the commitment of Political parties to combat against trafficking of women and children.



#### iv) Human Trafficking and Transportation (Control) Act 2007

After *Trafficking of Persons (Control and Punishment) Act* 1986, the Act of 2007, i.e. *Human Trafficking and Transportation (Control) Act* was promulgated. The present Act is believed to be more proactive as compare to earlier in terms of victim protection system. The Act defines trafficking and transportation separately and also distinguishes between internal and international trafficking.

The most significant provision of this Act is it provides the measures for rescue, rehabilitation and reconciliation of victim of trafficking. According to Section 12 Nepal government holds the responsibility to rescue of any Nepali citizen in foreign land. The further section, Section 13 specifically stipulates establishment of rehabilitation centre for physical and mental treatment, social rehabilitation and family reconciliation of the victim. In furtherance to provide the services as stipulated in the above section, Section 13 sub-section 2 mentioned any organization can obtain permission to establish and run rehabilitation centre. Such centre however, should be under the constant monitoring of Nepal government.<sup>34</sup>

In order to operate this centre government should establish rehabilitation fund under the contribution of following sectors;<sup>35</sup>

- Funding received from the government of Nepal;
- Funding received from national and international organizations and individuals;
- Half of the amount received as fine from offender.

Nepal government may provide such economic support as well as other assistance to run the centre. With providing services to the victim of trafficking, the centre also requires to manage family reconciliation. Along with this, the Act also has compensation provision to the victim.<sup>36</sup>

#### v. Human Trafficking and Transportation (Control) Regulation 2008

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<sup>34</sup> See generally Section 13(2).

<sup>35</sup> See Section 14. *Ibid.*

<sup>36</sup> Section 17 of the Act, a court shall issue order to provide compensation to the victim which is from the amount levied a fine in form of punishment from the offender. The compensation amount shall not be less than half of the fine levied.

Under Section 29 of *Human Trafficking and Transportation (Control) Act*, this regulation was enacted to implement the objective of Act. The regulation in a broad framework provide the various measures for functioning of rehabilitating centre, establishment of National Committee (NC), District Committee (DC). Following description provides the clear idea on the regulations;

- **Establishment of National Committee<sup>37</sup>**: The National Committee is formed consisting member from Ministry of Women, Children and Social Welfare (MoWCSW), Ministry of Labour and Transport Management (MoLTM), Ministry of Home Affairs (MoHA), Ministry of Foreign Affairs (MoFA), Attorney General Office, Nepal Police, Institution or person working in the field of human trafficking and transportation (nominated by MoWCSW), victim/survivor of trafficking (nominated by MoWCSW). The secretariat of the Committee will be under MoWCSW.

The Committee hence established under the representation of the member from the above sectors holds and perform following duties and responsibilities;

- Prepare and submit necessary policy, programme against human trafficking and transportation to MoWCSW;
- Implement and monitor the approved policy, programme;
- Rescue victim/survivor from the foreign land. While rescuing the committee can assist and coordinate the organizations working in this field;
- Monitor and direct the rehabilitation centre to work as per the guidance given by Nepal government;
- Monitor and coordinate the district committee;
- Record information relating to human trafficking and transportation;
- Monitor the implementation of international, regional laws, conventions that Nepal is party to;
- Develop minimum standard to provide seed money for the victim/survivor who have taken training;
- Prepare and implement rehabilitation centre guidelines.

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<sup>37</sup> Human Trafficking and Transportation (Control) Regulation 2008, rule 3.

- **Establishment of District Committee:**<sup>38</sup> The Nepal government as mentioned in Section 23 of the Act can established District committee comprising following member to coordinate the activities of government and non-governmental organizations. The District Committee comprises of Chief District Officer (CDO); Government Attorney, District Government Attorney Office; District Police Officer; Institution or person working for human trafficking and transportation in district (nominated by CDO); Representative from Nepal Journalist Federation and Women Development Officer.

The Committee holds following roles and responsibilities;

- Recommend concern agency to prepare identity documents of the rescued victim/survivor in case the identity is unclear;
  - Establish and operates human trafficking and transportation control committee at local level;
  - Monitor district level rehabilitation centre as per the guidance of National Committee;
  - Public awareness against human trafficking and transportation;
  - Implement programmes as per the guidelines prepared by National Committee
  - Rescue vulnerable person of human trafficking and transportation within district;
  - Coordinate with the organizations working for human trafficking and transportation;
  - Keep record of all the activities relating to human trafficking and transportation and submit report to National Committee every three months.
- **Establishment and functioning of rehabilitation centre:**<sup>39</sup>

District Committee can establish rehabilitation centre to provide physical and mental assistance, rehabilitate and reintegrate victim/survivor in society. The committee additionally provide responsibility to manage the centre to non-governmental organizations. Such responsibility is given considering the financial and technical

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<sup>38</sup> Human Trafficking and Transportation (Control) Regulation 2008, rule 5.

<sup>39</sup> Human Trafficking and Transportation (Control) Regulation 2008, rule 11.

capacity of the organizations. The organizations hence, responsible or established to rehabilitate and reintegrate victim/survivor must apply following minimum standards;

- Minimum physical and infrastructural standard to rehabilitate victim/survivor;
- Capable to provide psychosocial counselling and health service;
- Capacity to arrange and provide necessary medical assistance;
- Capacity to arrange and provide legal assistance;
- Capacity to provide educational facilities.

The Centre established with all these facilities need to be monitor by district committee by every six months.

- **Reintegration and family reconciliation:**<sup>40</sup> The rescued victim/survivor need to be reintegrated in society and with their family member. The rescued victim/survivor should be kept in rehabilitation centre at least for six months from the date of rescue. However, if the victim/survivor is children then alternative measures to settle them in child protection centre need to be applied.

While reintegrating victim/survivor with family centre need to apply measures like searching and finding out the family, counselling the family members and coordinating overall process.

#### **vi. National Minimum Standards for Protection and Care of victim/survivor of Human Trafficking 2068 B.S.**

Recently Nepal Government has developed the Minimum standards for the protection and care of the survivor of trafficking. The minimum standards was developed under the notion of *Human Trafficking and transportation (Control) Act* and Regulations to effectively established, maintained and operate the activities of the rehabilitation centre established under this Act. The standard also provides overall activities of National Committee, District Committee. The major highlights of the standards are;

- **Concept of protection and care:** The victim/survivor of trafficking should be provided with all forms of protection and care. The protection and care should be

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<sup>40</sup> *Ibid*, rule 16.

provided by the organizations working in the field of rehabilitating, reintegrating the survivor. The standard has specifically mentioned the government of Nepal works in close connection with the organizations more specifically, those organizations who work in the field of rehabilitating and reintegrating of survivor<sup>41</sup>.

- **Process of protection and care:** While providing care and protection to the survivor following steps should be maintain<sup>42</sup>;
  - Initial Care: The Initial Care here refers to all the care provided immediate after the survivor arrives in the service provider organizations (this means various NGOs working in this field). Those services includes primary health care, legal support, psychosocial counselling, shelter, diagnosis of the diseases like HIV, tuberculosis etc.
  - Secondary Care: Secondary care or facilities refers to all the facilities provided to the survivor after initial care like education facilities, training, income generation activities, providing seed money etc.
- **Jurisdiction:** This minimum standard has its scope to prevent crime of human trafficking, protect survivor and prosecute the cases of survivor of trafficking<sup>43</sup>.
- **Rescue:** Nepal government holds the immediate responsibility to rescue the survivor of trafficking. According to Chapter 3, Section 8, 9 and 10 rescue of the survivor from the foreign nation need to be done by the National Committee. And district committee holds the responsibility to rescue the internal trafficking survivor. However, rescue of the survivor from the foreign country specifically India shall be done in coordination with the organizations working in trafficking issues residing in India. Additionally, rescue from the foreign land other than India shall be conducted by Ministry of Labour and Transport Management. While performing all these activities the Nepal Government shall coordinate with NGOs.
- **Developing planning and policies:** The minimum standards explicitly mentioned the concrete plan and policy shall be developed while rescuing the survivor. Section 11 of

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<sup>41</sup> Section 3 of National Minimum Standards for Protection and Care of Victim/Survivor of Trafficking specifically defines meaning of service provider institution or organization.

<sup>42</sup> *Ibid*, section 6.

<sup>43</sup> *Ibid*, section 5.

the standards mentioned that committees responsible shall prepare clear plan of rescuing considering the expenditure done in earlier rescue.

- **Rehabilitation:** Along with providing basic minimum care to the survivor the organization also need to ensure the rehabilitation of the survivor. The rehabilitation concept is based on the establishment of rehabilitation centre. The concept of rehabilitation centre is exactly as the concept mentioned in Human Trafficking Act<sup>44</sup>.The centre shall be established as the temporary residence or care centre where the survivor are kept at least for one to six months.<sup>45</sup> The centre along with providing initial facilities and care shall also reintegrate them with their family. The centre shall ensure following minimum facilities;<sup>46</sup>

- Common hall with various objectives
- Working room
- Bedroom and kitchen
- Sanitation and personal care facilities
- Security

Special measures shall be applied in case of children. Such special measures include separate rooms for them, entertainment facilities and all facilities shall be in strictly child friendly environment. Additionally, centre shall have following human recourses;<sup>47</sup>

- Management Officer
- Account and Administrative Officer
- Psychosocial Counsellor
- Physician
- Social Worker
- Warden
- Security Guard

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<sup>44</sup> Human Trafficking and Transportation (Control) Act 2007, section 13.

<sup>45</sup> National Minimum Standards, chapter 6, section 41.

<sup>46</sup> *Ibid*, section 43.

<sup>47</sup> *Ibid*, section 44.



- **Reconciliation and reintegration:** The rehabilitation centre shall also ensure the reconciliation and reintegration of survivor with their family and in the society. The centre need to fulfil certain process while moving towards reintegration process<sup>48</sup>;
  - Initial inquiry about the family members
  - Locating the address of the family members
  - Preparing the initial report regarding prospective challenges of reintegration
  - Provide counselling to family members
  - Create environment for the regular meeting and communication between survivor and family members.
  - All the process, information relating to the survivor, reintegration shall be kept confidential.

#### **Status of Trafficking Survivors with analysis of measure to rehabilitate and reintegrate survivors in society**

The rehabilitation and reintegration measure is not the sole responsibility of the government. Almost all the rehabilitation centres are run by non-governmental NGOs. *ABC Nepal, Shakti Samuha, WOREC, Maiti Nepal* are named few that directly work under the rehabilitation measure. These organizations perform following activities upon the rehabilitation and reintegration measure. All the NGOs worked to provide psycho social counselling, medical treatment, shelter support, legal assistance, training, search job placement and provide micro credit to start own business by survivors/victims.

- **Psycho social counselling:** Each NGO has at least one psycho social counsellor who provides counselling to the survivor. They are mainly from management and social science background however, received training to provide psycho social counselling. In all the organizations psycho social counselling is carried out continuously to the survivor. The counselling is provided into three phases; pre, post and career counselling. Under pre method the counselling is given as soon as survivor arrives in the centre. At the last stage i.e. career counselling the survivor are provided with the options where they can pursue

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<sup>48</sup> National Minimum Standards, chapter 7, section 48.

their career. This phase is totally based upon the post stage where the survivor chooses between their skill development activities.

- **Providing food and shelter to the residents:** The survivor usually kept in the centre for 1-6 months however; this varies as per the nature of the case. They are provided with three times meal, a well facilitated bedroom, separate study room and other basic facilities. After their recovery and once it is confirmed that they can work live independently NGOs facilitated them in finding rented room.
- **Facilitating medical check-ups, hospital visits, and treatments:** The survivors are provided with medical check-ups twice in a month. In *Maiti Nepal* survivor are also given yoga classes.
- **Providing Formal Education:** In all NGOs survivor are given education facilities. Those who want to continue their education they are enrolled in school or colleges. However, for those who don't, they are given training knitting woollen caps, stringing beads of various designs, sewing, stitching, weaving Dhaka (a traditional Nepali cloth used for making caps, blouses), and knitting sweaters, socks, and skirts.
- **Identifying criminals, filing cases against them:** The survivors are also provided with legal assistance. The cases to the legal aid organization namely CeLRRd (Centre for Legal Research and Resource Development), FWLD (Forum for Women, Law and Development).
- **Encouraging girls to set up their own enterprises and self –sustainable:** During the staying of the survivor in rehabilitation centre they are provided with various vocational training. All of them are encouraged to set up their own enterprises. The organizations also provided seed money for them.

#### **i. Problems faced by the survivor**

The survivor face following specific problems; physical, mental and social. Under physical problems they are found to be affected by communicable disease like tuberculosis, most of them are infected by sexually transmitted disease. Among every two out of five survivor are also found to be infected by HIV/ AIDS.

The survivor mostly faced social problems. Social problems found in terms of refusal from families and communities to accept individuals upon their return. Also, often they were viewed previously engaged in the trade as spoiled and refuse to marry them. Moreover, the survivors have difficulty formulating their identity apart from being a sexual object. Nor can they perceive a life away from their occupations. Often, women and children develop distorted images of themselves and their futures.

## **ii. Challenges during reintegration:**

Reintegration process is very challenging job for the organization. They need to ensure the family of the survivor accept them together with social acceptance. Following are the specific challenges faced by the organizations;

- Due to social stigma family of the survivor rarely accept the survivor. In almost one out of five cases family member feel happy to see their daughter.
- Stigma towards organization. The people have impression that the organization working in this particular field are trying to generate dollars out of it.
- Survivor themselves are not ready to meet their family.
- Threat to organization or survivor by offender.
- The organizations are run completely under the support of donor so they need to depend until the support is provided.

## **Analysis of Law**

Nepal has Human Trafficking and Transportation (Control) Act, Regulation and also recently drafted Minimum Standards for the rehabilitation and reintegration of survivor. The laws to some extent incorporate the notion of victim justice system with following basic features;

- **Provision of rehabilitation centre:** The Trafficking Act for the first time under Section 13 provisioned rehabilitation centre whose details procedure has been mentioned in regulation Rule 11. The rehabilitation centre as per the law shall be established under the government of Nepal where National Committee directly monitors and works in coordination with such organization who runs rehabilitation centre. Section 13 of the said Act provides that the Government of Nepal shall establish necessary rehabilitation centers for physical and psychological treatment, social rehabilitation and family reintegration of

the survivor of sale and trafficking and commercial sexual exploitation. The other provisions in this regards are:

- i. Any organization can obtain permission as to establish and run rehabilitation center. And the Government shall regularly and effectively monitor such organization and rehabilitation centre established by such organization.
- ii. The Government may provide financial and other support to the Centre operated by other organization.
- iii. The Centre shall make arrangement for social rehabilitation and family reintegration of the person stationed at the Centre.
- iv. The center shall make arrangement of medical treatment and consultation service and facility to the victim as per necessary.
- v. No one shall require the victim staying in the center engage in any work against his or her wish.
- vi. The management, operation standard and monitoring of the rehabilitation centre, arrangement of skills training and employment, rehabilitation and family reintegration of the victim shall be carried out as prescribed.

However, the intervention of government is not satisfactory. The role of the government is found only in the time while giving approval to the organization whereas the intervention of the government after the establishment of the organization is very less. The law has clearly mentioned that the government of Nepal works under National Committee and District Committee which is responsible to rescue survivor from foreign land also rescue within district. The National Committee is only establishing as the monitoring body which monitor the activities of District committee.

- **National Minimum Standards on rehabilitation and reintegration measure:** The current National Minimum standards found to be very ambitious in relation to the rehabilitation, reintegration and rescue of the survivor. The Minimum Standards led down long procedures while rescuing the survivor. According to the Minimum Standards No. 10,11,12 and 13 the National Committee or District Committee or Ministry of Labour and Transport Management need to formulate plans along with the estimate cost while rescuing survivor considering the cost applied while rescuing the survivor earlier. It is

very impractical in the sense that the rescue needs to have immediate intervention. Developing plans and estimating cost is require long time.

- **Analysis of measure from victim's perspective:** The concept of rehabilitating and reintegration in context to Nepal is not as per victim justice friendly. The organizations are working under their own way and the communication between the government and organization is not satisfactory. The law also guarantees the protection of the survivor in theoretical sense. Section 14 of the Trafficking Act has explicitly mentioned that rehabilitation fund shall be established for the survivor that includes fund from the government of Nepal, funding from national and international organizations and half of the amount received as fine from the offender. In practical sense the funding from the government is lacking. Only in one organization i.e. ABC Nepal 10-15 of the survivor are supported by the Ministry of Women, Child and Social Welfare which is also very less. The laws of Nepal is also not victim justice friendly because it does not incorporate the notion of justice system as embodied in Basic Principles of Justice.

## Conclusion

Nepal stands in a historic transition- transition from conflict to peace and from authoritarian and feudal system to a more democratic and egalitarian order. She has now pushed the decade long conflict back and has entered an era where it plans to create firm constitutional and legal foundations and move on. She has already made many remarkable achievements in terms of recognition, guarantee and realization of rights. The notable among them is the framing of the Interim Constitution which inscribes the rights of the children women and guarantees them. The enacted of the legislation like Human Trafficking and transportation (Control) Act 2007 is also remarkable in the line of enactment of law. The efforts are also made to improve legal framework to protect children, women from exploitation and violence of all forms including sexual exploitation, abuse and violence. Hence, the study in this sector specifically commercial sexual exploitation has been made to find out the effectiveness of the government for the protection of children and women.

The rehabilitation and reintegration process of survivor of trafficking is yet in fragile position. The process is completely NGO centric which are directly working under the

framework provided by the government of Nepal. As the NGOs are found to be totally depended on the support of the donor agencies the sustainability of the role of the centre is in stake. The laws clearly guarantee that government of Nepal has sole responsibility to rescue the survivor however the role of the government is found mainly on following sectors;

- Giving approval to the NGOs;
- Rescuing in coordination with these NGOs;
- Monitoring the activities of the NGOs;

However, the complete process of rehabilitation, reintegrating and rescuing is found to be NGO's responsibility. As has been already mentioned, NGOs have to be totally depend upon the funding of the donor agencies the sustainability of the NGOs itself is in question. At this outset the status of survivor will be same as earlier. They have been stigmatizing by the society and also family is not yet willing to accept the victims as there are high chances of them being re-victimized. The law has guaranteed the government of Nepal is also responsible in providing financial assistance in the form of rehabilitation fund to the survivor but none of the organizations have knowledge about those funding. As a result, the legal representations of survivor are also dependable towards legal aid institutions.

There are laws, provisions and also standards led by the government however, the study depicts that the activities of the government is moving towards it own way and the NGOs on the other hand. There is serious lack in the coordination between government and NGOs and monitoring mechanism of the government also fails.

Additionally, in light of the large numbers of survivors and the grave violations of fundamental human rights and freedoms associated with this crime, it is critical to ensure that both international and domestic legal frameworks provide sufficient protection measures to these individuals.

Existing methods of identifying survivor of trafficking and referring them to protection procedures are severely deficient. The facilities providing by the NGOs are not sustainable in nature due to lack of funding. The failure to have regular monitoring mechanism of the government has led to the various organizations working applying their own methodology and also uncertain about the sustainability of the institution. In this situation the ultimate



repercussion goes to the survivor of the trafficking. Additionally, there is no comprehensive regional framework and domestic laws are often conflicting and contradictory.

Additionally, the reintegrating process of the survivor is still challenging in Nepal survivors are in high risk of re-victimization. It also leads to re-trafficking due to lack of reintegration as the society considers them as pollutant to other girls and therefore they are not welcomed back. They suffer humiliation, sadness, depression, anger, and fear. The impact of trafficking is visible in the form of psycho-social consequences wherein the survivor faces high level of stigma, no courage to face family and society. The political instability, lack of human rights culture, good governance, widespread gender, and caste discrimination has made regional cooperation difficult.

Hence, based on aforementioned discussion and inferences following measures should be taken into consideration for the protection of the survivor of trafficking.

- Government of Nepal should take immediate measures to identify the survivor of trafficking;
- Government of Nepal should seriously formulate and implement survivor friendly measures to rehabilitate and reintegrate the survivor of trafficking;
- The monitoring measures of government of Nepal should be made effective to regularly monitor the activities of the NGOs providing rehabilitation services;
- Government of Nepal should establish an office or employ at least one representative to monitor the activities of the government;
- The fund that government separated for the support of the centre rehabilitation fund as provisioned in Trafficking Act should be provided to organizations that are working rehabilitation of trafficking victims on proportional basis;
- The government needs to provide continuous surveillance to the NGOs working in the rehabilitation and reintegration of the survivor;
- A clear and consistence guidelines should be prepared and implemented for the unanimous operation of the NGOs working to provide rehabilitation services;
- The NGOs working in rehabilitation and reintegration of survivor should work under the complete supervision of the government;

- The NGOs need to be cooperative and transparent while providing the status of the survivor, facilities given to the survivor;
- All NGOs need to work on aims, values of the guidelines so as to maintain consistency on the facilities provided to the survivor.

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