

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE TO TACKLE TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS: SITUATION AND SOLUTIONS IN THE CONTEXT OF NEPAL

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I. INTRODUCTION

As we are going to discuss The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants, in the Nepalese context, it would be better to divide the subject into two divisions:

- i. The effective administration of criminal justice to tackle trafficking in human beings, and
- ii. The effective administration of criminal justice to tackle smuggling of migrants.

Though a lot of people are going outside the country for foreign employment, they do not intend to migrate to that country. Here, it is necessary to say that each and every person going outside to seek employment does not find himself in the same position as he had thought. Some of them are told that a very charming job is awaiting and they go there anyway. But getting there they find that the job is hazardous. A lot of agencies established for the purpose of exporting skilled and unskilled labour are cheating the person whom they provide the service to.

On the other hand, there are a lot of people in different countries who are living illegally. They reach at the destination as a tourist or some other status, which is accepted, and are lost. The intention of such people is not to be a migrant in that country. They only want to stay there to earn a lot of money and fly back, if they are not caught. These people are doing this by their own efforts.

Here I am mentioning these things because the number of people of the second category is increasing gradually. It may be possible that a group of offenders may start to commit this offence in an organized way. And in the meantime the people seeking foreign employment, changing their mind, may come under the influence of such group. In the same way, the agency that is cheating its client may change its role and start the smuggling of migrants. And, we are discussing here how such a situation can be controlled.

While talking about the effective administration of criminal justice to tackle trafficking in human beings we are mainly concerned with the trafficking in women and girls. It is because male trafficking is very rare in Nepal. That's why this paper mainly concentrates on the present situation and the solution of trafficking in women and girls. The main objective of trafficking is to sell them at the places where prostitution is carried on in an organized way.

Thinking that it would be very interesting to know how we have been trying to tackle the problem and are not achieving the goal, I will give a very short historical glimpse of both sides here.

II. HISTORICAL BACKGROUND

In the modern history of Nepal, the sale of human beings was restricted for the first time in 1808 A. D. by declaring a 'Rukka' (a declaration by the King having legal status). But before the Declaration of Eradication of Slavery in mid-April, 1925 A. D. (On the 1st day of Sambat 1982) the trade of human beings was alive as slavery. After this Declaration laws were also made according to the new situation. In part three of the 'Ain', the only law at that time, there were also provisions in regard to murder and

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the sale of humans (Jiu Masne Bechane ko). Those provisions not only declared trafficking in human beings illegal but also made it punishable. According to the provisions the buying and selling of humans in the name of slavery was prohibited. No one was allowed to buy slaves even from outside the Kingdom. Sending or taking human beings to foreign countries for the purpose of selling or forced and hazardous labour was restricted.

On the contrary, at the same time a lot of girls were entering inside the huge gates as maids. Most of the girls came from certain races living in certain parts of the country. One of their duties was to entertain their master. In addition some religious and social customs stipulated that the duty of the women of certain groups was to entertain the elite by any means.

After democratization of the country in 1950, people started to think about themselves in new ways. Individuals became conscious about their rights. New acts were enacted giving more rights to women. The Act of Country (Muluki Ain) was promulgated in 1963. In the eleventh chapter of the fourth part of this Act it stipulates that no one can sell any human being and can not take any human being outside the Kingdom with the intention of selling. But the problem of trafficking became worse. To tackle the problem more efficiently a new special act was enacted and promulgated in 1986.

More detail, concerning existing laws is given later.

III. CAUSES OF THE CRIME

Causes of the crime can generally be divided into three groups:

A. Social Causes

B. Economic Causes

C. Other Causes

A. Social Causes

Because of illiteracy and lack of awareness, the women and girls in remote areas and villages believe any stranger in a very short time's interaction. Offenders have identified the races and tribes where making physical relations with consent is not a big thing. But, the girls of such societies are not in the position to differentiate between sexual exploitation and physical relations with consent. And this helps the offenders to influence these innocents.

Family destruction is another cause that makes women want to leave their native place but at the same time they do not realize the person who is being their friend is going to ruin their life. The root cause of family destruction is polygamy. Sometimes it may happen by natural disaster.

This does not mean that our laws allow these practices. The people of such societies do not know about these laws. And even today they do not know that the laws of the country can manage their social behavior. Some people, who know, do not want to go that way.

According to the statistics published by the Police Headquarters of Kathmandu 90% of those trafficked are uneducated.

B. Economic Causes

Most of the women do not have access to economic activities. They are dependent on their guardians. The woman who wants to earn money herself can easily be misled by offenders.

Poverty and unemployment force the people to seek jobs in new places. Most victims of trafficking believed the person who told them that they would get a very nice job.

According to the statistics published by the Police Headquarters of Kathmandu, 60% are trafficked in temptation of work

On the other hand, unemployment with poverty is making people do anything for their livelihood. These days this offence is being committed in an organized way. Such organizations are using the unemployed people from poor families for this purpose.

C. Other Causes

There are two very wrong beliefs in some parts of society, even these days.

- (1) The first wrong belief is a religious one. In the Far Western part of the Kingdom people offer their daughter to the God. These children have to live in the temple. There is also another wrong thinking about these children that they cannot marry. Even educated and so-called modern young boys do not want to be married with such a girl. (I am not talking about the living Goddess, 'Kumari' and about Buddha she monks.) The society has accepted them as a prostitute. The organizations involved in trafficking easily convene their agent that by trafficking them they are not doing wrong.
- (2) In the same way there is a tribe that has been considered for centuries, that their job is to entertain people. In the name of entertainment they are also being used as prostitutes. In other words, it is not wrong to say that they are prostitutes made by culture. Except prostitution, they do not have another occupation. And the organizations apply the same theory to convince their agent for trafficking of these people. Because male prostitution is not in existence in the society the females are only the victims of this mal-culture.

(It is necessary to say that these two types of people are struggling to get rid of their religious and cultural malpractices.)

IV. ACCESS OF THE OFFENDER

The problem of trafficking is being more complicated day by day. Some years ago the crime was committed in a personal way. But these days it has developed as an organized crime. About three or four years ago it was reported in the news that one of the chiefs of such criminal organizations had come to a village chartering a helicopter. It is very shameful for me to mention here that the fellow was a Nepalese national and a female.

Investigations have revealed that these days offenders are completing their offence partially. Some of them go to villages, and look for persons whom they can influence. They use the appropriate means to influence. For example a person who is suffering from family destruction they offer to marry. For the person seeking their fortune they say that they can arrange an appropriate job. They assure the victim that they can help them and they really want to help them. They come back to the town with the victim where another group is waiting for them. They hand over the victim to this second group. The victim is told that these men are friends of the previous group and now this second group will take him/her to the said place. The second group takes the victim up to the border and hands him/her over to the third group, which takes them to the destination.

A few years ago, the destinations of offenders were only Indian cities. But these days they are also taking the victims to other countries.

For centuries, the border of Nepal with India has been open. That's why the victims are easily trafficked outside the country. Because of the open border sometimes victims are send to a third country using Indian airports. As mentioned above, the victims are totally influenced by the offender, while crossing the border with India; they pretend to be close relatives. The victims themselves don't disclose the reality of the situation and don't give true information. They tell the guards at the checkpoint only the information they are taught to say. And very simply and by the very easiest way, offenders cross the international border between Nepal and India.

V. METHODS USED TO INFLUENCE THE VICTIMS

The offenders use different types of methods to influence the victim before committing the crime.

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A. In the Name of Employment

It is found that most of the victims trafficked are told they would be given a nice job. Very few of them were aware that they were going to India. Some were told that they were going to work in a circus. But others didn't know that they were being taken to India.

According to the statistics published by the Police Headquarters in Kathmandu, 60% are trafficked using this method.

B. Pseudo-Marriage

In this method the agent of the trafficker wins the victims affections first. Then he makes a marriage proposal that is very easily accepted. After marriage a husband has the right to take his spouse anywhere.

The statistics published by the Police Headquarters in Kathmandu shows that 25% of victims have been trafficked using this method.

C. Other Methods

Some victims have been trafficked by making them unconscious with drugs. Some have been taken for trade, and some for medical care. Some of them have gone with an agent who has told them he would take them to their relatives.

The statistics show that 15% have been trafficking using these methods.

VI. GOVERNMENT POLICIES TO CONTROL TRAFFICKING

The government has formulated policies to control trafficking.

Some of them are as follows:

1. A program for public awareness is to be launched.
2. Co-operation with NGOs and INGOs.
3. Efforts to control the problem will be made by bilateral and multilateral co-ordination with the international sector.
4. Appropriate steps will be taken to eliminate poverty and to promote employment for women.
5. A national co-ordination committee is to be established. Under this committee a district co-ordination committee will be established at the district level, which will work as a center for contact.
6. Trafficking will be controlled by conducting an employment program through informal and vocational education.

VII. REGIONAL EFFORTS TO CONTROL TRAFFICKING

The South Asian Association for Regional co-operation (SAARC), recognizing the seriousness of this subject, has drafted a treaty on this subject and opened it for ratification.

The provisions made by the treaty are as follows:

- i. The objective of the treaty is to release SAARC countries from being countries of origin, transit and destination of trafficking.
- ii. According to the treaty its member states are obliged to:

- (a) Define trafficking as a crime under their criminal law;
 - (b) Punish persons, who provide a place, or rent their building for buying and selling persons and invest knowingly in it; and
 - (c) Make punishable the act of provoking such crime.
- iii. After ratification the treaty member states shall:
- (a) Co-operate with each other in the investigation, prosecution, hearing and other matters of the crime under this treaty;
 - (b) Extradite the offender (or otherwise prosecute him);
 - (c) Make appropriate arrangements for the victims care and treatment before sending them back to their country of origin; and
 - (d) Establish a residential house and a protection house for the rehabilitation of the victims.

VIII. NATIONAL EFFORTS TO CONTROL THE PROBLEM

The Constitution of the Kingdom of Nepal 1990 in its Article 11 ascertains equal rights to Nepalese citizens without any discrimination on gender basis.

In the same way, Laws discriminating women are being amended. An amendment is under process in parliament to give equal economic rights to daughters. (During the period of training on 26th September, HM The King gave his royal assent to this Bill.) Just a few months ago the Supreme Court of Nepal gave its verdict in one case that women have the sole right over their body and even a husband cannot make physical relations with his wife without her consent.

Although, these efforts point towards the equal rights of women, it is clear that nearly all the victims of trafficking are females. And one of the causes of this problem, as mentioned above, is woman's inaccessibility to property. That is why more economic and social freedoms are being secured for females.

IX. THE ROLE OF NGOs AND INGOs

About ten organizations are active in this field. They have been focusing, mainly on two sectors: (a) Awareness and (b) Rehabilitation.

To make people aware they are using different means. Posters are very much being used for this purpose. Beyond this they go to the villages, consult with people and manage cultural shows. By all these means they teach the people the activities of the offenders and make them aware.

Under rehabilitation they have established hostels to house the rescued victims. Here they are trained in various vocational subjects, which help them to survive independently in the future.

One of these organizations is 'Maitee Nepal'. Not mentioning its contribution would be an injustice to it. Including the above-mentioned activities it has also established its branch offices on the transit points, which are mostly used to traffic, at the international border. They watch suspected people. They take information from the people whom they suspect. And they have been able to recognize the offenders various times.

X. THE EXISTING LAWS

While giving a short historical background I have mentioned a series of laws concerning the subject. There are currently two laws in existence in parallel on this subject: (a) General law, and (b) The Special Act

A. General Law

There are some provisions on this matter in the Act of Country, 1963. The eleventh chapter of the fourth part of this Act deals with our subject. Number 1 of the chapter restricts the taking of human beings outside the country for the purpose of selling or trading in human beings. The buyer is also punished if found inside the country. The punishment is twenty years imprisonment. If the offender is arrested before he has made a sale the punishment is ten-years imprisonment.

Number 2 of the chapter does not allow anyone to deprive the guardianship of a minor or a lunatic without the consent of a guardian.

Number 3 of the chapter restricts servitude. Punishment is imprisonment from three to ten years. And the court can order the offender to give appropriate compensation to the victim.

B. The Special Act

While retaining the above legal provisions, but realizing that these provisions are unable to control trafficking in human beings, a special act was also promulgated on the same subject in 1986. This act is mainly concerned with three things:

- (a) Trading in human beings
- (b) Taking human beings to a foreign country with the intention of selling them
- (c) Forced prostitution

(It is necessary to mention here that all forms of prostitution are illegal in Nepal.)

The first two things are almost the same in both laws. But there are some special features in the Act.

1. Special Features of the Act

- (i) The first special feature of this Act is the extraterritorial jurisdiction of the Act. Any person who commits a crime under this act who is living outside of the country can also be prosecuted and sentenced according to this act.
- (ii) The second special feature of this Act is the affiliation of the court of origin from the beginning of investigation. According to this provision before starting the investigation the police, producing a complaint to the court, has to get an order for investigation from the nearest court of first instance. The person who wants to complain can make the complaint at any police station.
- (iii) The third special feature of this Act is the provision for the verification of the statement of the victim. If the person complaining is the victim of any offence according to this act, a written statement of that person must be taken in the presence of a public prosecutor by the investigative officer. And that statement must be verified from the nearest court of first instance within twenty-four hours. A judge of the court has an obligation to verify the statement.
- (iv) The last special feature of this act is the burden of proof is on the defendant. Generally the burden of proof is on the plaintiff. Section 25 of the Evidence Act, 1974 is very clear on this point. But this Act is an exception to the general provision.

These provisions oblige the offenders to prove the followings things:

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- (a) If a complaint is registered with the police against them they have to prove the complaint is wrong.
- (b) If there is a written statement of a victim verified by the court they have to prove the statement is not correct.

All of these provisions are made to give strong protection to the victim and to punish the offender. But the effect on the cases has not been satisfactory.

2. Results

Here are the comparative statistics of the disposed cases of trafficking in human beings for the last three years, published in the latest Annual Report of the Attorney General of the Kingdom of Nepal.

Here are the statistics of the cases decided by the original court:

Fiscal year	Cases Registered			Cases Decided				Remaining cases	% Won
	Carried over	Of this year	Total	Won	Partial win	Lost	Total		
1998/99	173	118	291	38	30	31	99	192	38.38
1999/00	192	129	321	66	49	51	166	155	39.76
2000/01	155	89	244	55	36	43	134	110	41.04

The statistics of the cases decided by the Court of Appeal are as follows:

Fiscal year	Cases Registered			Cases Decided				Remaining cases	% Won
	Carried over	Of this year	Total	Won	Partial win	Lost	Total		
1998/99	85	41	126	6	4	20	30	96	20.00
1999/00	96	138	234	26	59	69	155	79	17.42
2000/01	79	73	152	20	10	46	76	76	26.32

Here are the statistics of the cases decided by the Supreme Court:

Fiscal year	Cases Registered			Cases Decided				Remaining cases	% Won
	Carried over	Of this year	Total	Won	Partial win	Lost	Total		
1998/99	36	17	53	2	3	2	7	46	28.57
1999/00	46	13	59	3	2	4	9	50	33.33
2000/01	50	17	67	9	2	6	17	50	52.94

A special court has been hearing the cases under this special act since last year. (During the period of the training, jurisdiction over these cases was given to the District Court, as it was in the past.)

The punishments under the special act are as follows:

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- (a) On completion of the crime - ten to twenty years imprisonment.
- (b) Taking any person to another country with the intention of selling - five to ten years imprisonment.
- (c) Attempt of the offence / provoking or providing assistance to the offender - imprisonment up to five years.

Being fully conscious of the weakness of this act, a new act is being prepared. These days it is open for discussion in general. This new act gives the investigative officer the right to arrest offenders and search related places without a warrant. There are other new provisions in the forthcoming act. Some of them are as follows:

- (a) Compensation to victims,
- (b) Establishment of a rehabilitation centre,
- (c) Establishment of a co-ordination committee.

XI. PROBLEMS OF CONTROLLING THE OFFENCE

A lot of effort has been made to control the offence, but the problem has become more serious. There are many hurdles with every step towards controlling the problem. To describe the problems of each step clearly they are given under separate topics.

A. Problems in Detection

It is clear that without the help of people the problem cannot be solved. In the case of trafficking, the victims have not been able to recognize the offenders at first sight. After a few days the offender influences the victim and they believe him blindly. As mentioned earlier, in most of the cases victims cannot imagine what is going to happen. Therefore the offenders are able to cross the border with their victims without any difficulty.

B. Problems in the Investigation

Many offences are not reported. The victims who are rescued after a few years of victimization cannot recognize the offender. Many times they cannot give a clear picture of the offence. Sometimes they exaggerate the truth. When the victim fails to identify the offender the situation becomes worse. After hearing the news that the victim has been rescued the offender puts himself out of reach of the investigator. And most of the time the main offender is out of the country.

C. Problems in the Prosecution

At this stage there is always the problem of evidence/witness. Most witnesses do not feel safe from the offenders. Sometimes witnesses are under the influence of the offender.

As already mentioned, a written statement of the victims is verified by the judge at the very early stage of the investigation. The courts summon the victim as a witness. The defendant's lawyer pleads the right to cross-examine the witness of the opponent.

D. Problems in the Execution of the Judgement

It is very clear that if the offender is not caught the judgement cannot be executed.

XII. PROBABLE SOLUTIONS TO CONTROL THE PROBLEM

A. Awareness

The most important thing in this context is awareness. First, it is necessary to teach the people how the offenders are exploiting them. Second, they should be taught not to believe strangers until they have complete information about them. Third, females should be told about their economic as well as their legal rights. There is also a need to teach them to fight for their rights.

The work of NGOs and INGOs in this area is very enthusiastic. But still there are a lot of things to be done.

B. Opportunity for Work

It is clear that most of the persons are victimized in the name of employment. Most of them only want to earn enough money to survive. To introduce opportunities in the villages is necessary. If work is available in their village they will not need or be tempted to go elsewhere.

C. Clear Laws

The laws of each country should declare trafficking and smuggling a criminal offence. There should be a clear law of extradition. Amongst other things there must be a very clear provision in the domestic laws on the situation where a country does not want to extradite its national.

D. Border Control

The number of these offences can be minimized through good border administration. In regards to the problem of an open border like that between India and Nepal, a systematic recording system of travelers, with their complete information must be introduced.

E. International Co-operation

The nature of these crimes is clearly transnational. To control such offences mutual co-operation between the country of origin and the country of destination is necessary. And in the same way the country en route also has to be co-operative.

To obtain the goal, bilateral and multilateral efforts also need to be made on a regional basis.