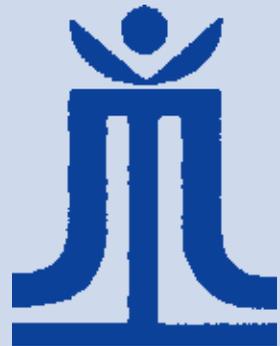
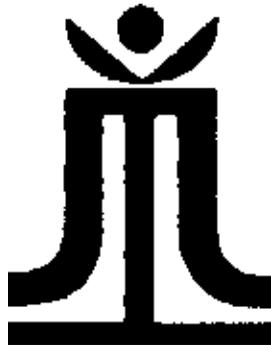


**Judges' Workshop on
COMBATING
TRAFFICKING
IN WOMEN AND
CHILDREN**



National Judicial Academy, Nepal
Ramshah Path, Kathmandu

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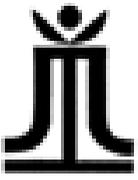
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राष्ट्रिय न्यायिक प्रतिष्ठान

NATIONAL JUDICIAL ACADEMY

FOREWORD

On behalf of National Judicial Academy I am pleased to bring this publication entitled "**Judges' Workshop on Combating Trafficking in Women and Children**". Primarily this is a record of the events and proceedings of two workshops organized in the auspices of the National Judicial Academy in collaboration with the United Nations Development Fund for Women (UNIFEM) South Asia Office.

The NJA is primarily responsible to provide training to the judges, judicial officers, government attorneys, lawyers and quasi judicial officials. As a newly established agency passing through evolving stages NJA has carried out several training programs for judicial manpower with the financial and technical support of its partners. Since the inception of NJA the UNIFEM has been an active and credible partner.

This publication contains exhaustive description of the activities of regional and national workshops held in Kathmandu and Dhulikhel respectively. It brings live picture of the program and sheds lights on the issues raised by the participants and resource persons.

In the recent years women's trafficking has become a serious human rights violation issue and shameful reality in the Nepal. The government and the civil society as well have taken various anti-trafficking initiatives such as making and updating laws, prosecuting the offenders and setting administrative measures. However, those efforts have yielded limited effectiveness. Given the fact that merely adopting and ratifying international treaties, formulating national plans and policies, as well as enacting and enforcing laws to mitigate the issues of trafficking in human person may not bring about desired results in the absence of sensitization and realization on the gravity of issue among the law enforcing agencies. Guided by this very premise, the NJA took initiative to organize the national workshops with a view to sensitize the judges who are particularly working in trafficking-prone areas. Similarly, a regional workshop was held to provide ample opportunities to share and exchange common problems and ideas related to trafficking issues facing among the judiciaries of South Asian Region. I believe that this kind of programs would help each other to learn on the issues and seek for solutions through the exchange of ideas and good practices of other countries. The primary purpose of this publication is to disseminate information and resources to the judicial manpower.

Among others, I was impressed by the interaction and lively participation of the participants also by adopting pedagogical approach of learning. On behalf of the NJA I would like to express my gratitude to the UNIFEM South Asia Office and commend for the support of the Supreme Court of Nepal, various superior courts of the Region, honorable participants and learned facilitators from home and abroad, and our staff members for their every support that were invaluable for the success of the program. As a credible partner the NJA will be happy to work with the UNIFEM in various capacity building endeavors in the future.

May 2, 2006

Justice (Rtd) Tope Bahadur Singh
Executive Director
National Judicial Academy

EDITORIAL NOTE

The National Judicial Academy (NJA) is the leading judicial training institute in Nepal to serve the training and research needs of the judges, government attorneys, judicial officers and member of private Bar and others who are directly involved in the justice system. The main objectives of the NJA is to conduct training, workshop and undertake research and others activities for enhancing the professional efficiency of judges, government attorneys, judicial officers and the member of private Bar. The NJA has been involved to promote an equitable, just and efficient justice system in Nepal through training, research, publication and other capacity building programs for judicial personnel.

From its establishment NJA has been extensively working in collaboration with government as well as non-governmental organizations. In a very short time NJA has gained experience of organizing various regional and national workshops jointly with our partners. This publication is one example of joint venture with UNIFEM South Asia Regional Office.

The Trafficking in women and girl child is a gross violation of human rights and a serious crime against humanity. It has become an issue of national regional and global concern. It is believed that thousands of women and children are trafficked across borders and within countries. The women and children are trafficked for various purposes such as for commercial sex, domestic servant, organ removal and other forms of exploitative works. According to one estimate, annually 5000-7000 women are being trafficked from Nepal to Indian sex market alone which is a matter of national concern. However, the filing and reporting against this crime is very low. The Law enforcement mechanism including the court is yet to be adequately sensitive in dealing with the women trafficking issues. The judges, judicial officers, government attorneys and lawyers do not have easy access to modern library and internet facilities that help them to gather information and resources. Against this backdrop, the publication at a hand is expected to provide resources on the subject to judges and other judicial personnel.

This publication is the outcome of the Judge's Workshop on Combating Trafficking in Women and Children at the national and regional level, which was organized by the NJA with the support of UNIFEM, South Asia Regional Office and presents the details of the events and proceedings. Our purpose in bringing out this work is to further disseminate the information and build up the knowledge base on the subject among all our stakeholders.

We place on record our gratitude to Hon'ble Kalyan Shrestha, Justice, Supreme Court of Nepal and Ms. Chandni Joshi, Regional Program Director, South Asia Regional Office, UNIFEM, who constantly inspired and guided us in the conceptualization and implementation of the workshop. We would like to acknowledge the assistance of Ms. Sangeeta Thapa, Ms. Aruna Rana Thapa, Ms. Archana Tamang and Ms. Salina Joshi.

We highly appreciate the financial contribution made by UNIFEM which had made it possible for us to publish this work. UNIFEM's contribution is not only commendable but also substantive in the promotion of Gender Justice and capacity building of the Nepalese Judiciary.

The editorial team would like to extend its thanks to the members of the publication management team for their guidance and support provided to us. Last, but not least, we would like to thank the entire NJA staff who have made a valuable contribution in bringing this publication out.

Editorial Team

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PART ONE

**Workshop on Effective Implementation
of the Laws and the Institutional
Mechanism to Combat Trafficking
of Women in Nepal**

1. Preliminaries

1.1 Background

According to estimates 5,000 to 7,000 women and girls are trafficked every year, ending up mostly into forced prostitution. Approximately 200,000 Nepalese women and girls, reportedly sold for 25,000 to 50,000 rupees, are employed as sex workers in different countries. However, the census data 2001 on female population absent from households have raised questions about the validity of the traditional data on trafficked women. The census data shows altogether 87,712 absentee women and among them 40.6 percent are absent without known reasons. The proportion of population absent from household without a known reason is higher for women than for men (which is a mere 9.2 percent of the total 679,469). This phenomenon of female absentees with unknown reasons indicates the possibility of their being trafficked.¹

Trafficking in persons in any form of exploitative work violates number of human rights of the victims, guaranteed by various international human rights instruments. Most women in sex work suffer abusive working conditions. In many cases, the victims of trafficking return home with HIV/AIDS and other diseases. Though trafficking is a national issue, the number of cases reported in the law enforcement agencies compared to the estimated number of women and girls trafficked is extremely low. The cause for minimal number of reporting is due to intimidation and harassment during the case proceedings, lack of victim protection mechanism, lack of confidence in prosecuting and investigating agencies, etc. The role of enforcement mechanism is not adequate to response to the trafficking problem. According to the research conducted by FWLD and UNIFEM² in 70 percent of trafficking cases, the police submit the investigation report to the government attorney on the 25th day (the last day of the submission of the investigation report in court). This gives very less time for government attorneys to prepare a charge sheet. And further leads to

¹ Source: Status and Dimensions of Trafficking Within Nepalese Context, IIDS and UNIFEM, March 2004.

² The effectiveness of the existing laws and institutional mechanism to combat trafficking in women in Nepal, FWLD and UNIFEM, 2001, unpublished report.

ineffective argument resulting to high unsuccessful ratio of the cases. The study identified that in 23 percent of reported trafficking cases, the government attorneys did not appear during the hearing. Similarly, it is found that only in 5 percent of trafficking cases, the government attorney has given direction to the investigation officer. This resulted in the acquittal of the accused. The study identified several problems with the adjudication system. At the trial level, cases are plagued by insufficient evidence, excessive delay in the court process and non-execution of judgments. The study also highlighted that 84.7 percentage of cases are pending in the Supreme Court whereas, in Appellate Court ratio is 33.8 percentage and in District Court it is 48.3 percentage. Among the many issues, the study identified lack of awareness on gender issues, lack of conceptual clarity on trafficking issues, lack of skilled human resources, corruption, political pressure, lack of coordination among police, government attorney etc. were some of them. These problems have lead to insensitive treatment towards the victim as well as inefficient and ineffective role of the enforcement mechanism to punish the traffickers and provide justice to the victims.

It is clear that, skilled and sensitised human resources are imperative towards effectively addressing the crime of trafficking. Though there have been some landmark decisions on gender justice, it is important that judges are allowed a space to learn and unlearn on several aspects of gender justice as well as violence against women. The National Judicial Academy³ has already initiated the process of providing that space for judges and UNIFEM since a long time has been involved for gender justice. Therefore, to give continuity to this process specifically focused to combat the crime of trafficking and ensuring the justice to victims three days workshop training was conducted.

1.2 Introduction

National Judicial Academy (NJA) organized a three days Workshop on Effective Implementation of Laws and Institutional Mechanism to Combat Trafficking of Women in Nepal. The organization of the workshop was from August 14 to 16 2005 at Himalayan Horizon, Dhulikhel, Kavre, Nepal with the support from UNIFEM. Upon NJA's request Supreme Court nominated the District Court Judges as

³ The National Judicial Academy (NJA) is an autonomous body established under the NJA Ordinance 2004. It works under the broad policy guidelines of the 13 members Governing Council headed by the Chief Justice. Its broad objectives are to enhance the competence and professional efficiency of judges, employee of Nepal Judicial Service and lawyers and to undertake studies and research in the field of law and justice. Some of the strategies to meet the objectives of NJA are training, research, consultancy and coordination with the Supreme Court, Attorney General's Office, Ministry of Law, Justice and Parliamentary Affairs, Judicial Council, Judicial Service Commission, and the Bar Council.

participants. Similarly, Attorney General Office nominated the Government Attorneys as observes and also a Police Officer was attended the workshop. In total, the workshop was consisting of 25 participants in which twenty participants were representing from District Court Judges, three were from Government Attorneys and one was from Police Official. The workshop was divided into inaugural session, field visit, paper presentation with discussion sessions, closing session etc. The workshop was interactive and participatory in nature. One and half hour was allotted for each session Tea/coffee and lunch break was arranged during session's intervals. At the end of the program a questionnaire consisting of 15 questions were distributed to the participants with a view to evaluating the workshop. Overall responses from the participants were quite satisfactory.

1.3 Objectives:

- To understand the crime of trafficking as a issue of violence against women and as a gender concern.
- To understand and discuss on the conceptual framework of trafficking with other concepts for effective judicial response.
- To share information on the international human rights instruments, declaration as well as the national laws and policies in relation to trafficking.
- To understand the mental health impact of trafficking and encourage sensitive judicial response.
- To share national best practices from different development region in Nepal
- To initiate national judicial response against trafficking.

2. Inaugural Ceremonies

The inaugural ceremony was commenced with registration of participants. Justice Mr. Kedar Prasad Giri, Supreme Court presided over the inaugural ceremony. The Chief Guest Right Honorable Chief Justice Mr. Dileep Kumar Poudel inaugurated the program. In inaugural ceremony, Right Honorable Chief Justice Dileep Kumar Poudel, Justice Kalyan Shrestha, Ms. Chandni Joshi from UNIFEM and Honorable Justice Kedar Prasad Giri from the Chair also had delivered their remarks on the organization of the program.

The inaugural session was followed by a play on experiences of a trafficked woman. A playgroup led by Ms. Mausami Sen presented a play reflecting complex problems a trafficked woman faces. The play highlighted the problems in justice system from a victim's perspective. The issue of stigma and discrimination, the issue of double victimization during legal proceedings and absence of some fundamental rights of the victims were raised through the play. The play came to a close after the victim screamed out questions for those who are responsible for ensuring their rights? "Where is justice? How can I get it? Who would give me the justice? Supreme Court justices and Attorney General along with other higher figure of the Nepalese judiciary had attended the inaugural ceremony of the workshop.

3. Remarks

3.1 Remarks by Right Honorable Chief Justice Dileep Kumar Poudel

Chairperson and respected ladies and gentlemen,

Firstly, I would like to thank the organisers for providing me an opportunity to inaugurate this three days workshop of district judges.

Trafficking of women and children is a heinous crime against humanity. In today's 21st century where we are talking about the rights of animals it is indeed shameful to talk about such crime against women and children. Today men exercise their right to freedom, right to life and right to security whereas women are in the hands of criminals who use and sell them as animals. After which women's life becomes dangers and hell. Also, a child who would be a future of the nation becomes a child labourer or a child slave and is forced into dangerous work. The contribution he could make for the society and for the nation gets shadowed by slavery like practices.

On one hand we are talking about human rights but on the other we are not ensuring the rights of the survivors who have fallen victims of this heinous crime. This is an organised crime and indeed need lots of efforts to curb it. Human Trafficking is a global problem and it needs to be curbed by international effort. Nepal has signed some of the relevant international human rights instruments and is committed to combat the crime. Also, we have our national laws which came into force in 1986. However, law alone is not enough, until and unless that law is effectively implemented. A court is responsible for providing compensation to victims and to control the crime. Our constitution and our law provides district court to hear the initial phase of the trafficking cases and therefore the district courts have tremendous responsibility as court of first instance to hear the cases against trafficking. Today's programme has similar objective of effectively implementing the laws.

Also we need to give attention towards ensuring the rights of the victims during rescue and rehabilitation. Reintegration is equally important part. A victim expects justice from all of us, more than just a legal remedy a victim expects social remedy. In this respect district court judges has bigger responsibility. Along with your role, the role of the intellectuals, academic, government and non-government agencies are as important. I am also highly impressed with the play on trafficking which was effective and I would like to congratulate the actors of the play. As a chief of the judiciary I hope that such programmes contribute towards effectively curbing the crime of trafficking and ensuring the rights of the victims. I wish all the best for the success of the programme.

3.2 Welcome and Objectives highlight by Hon'ble Kalyan Shrestha, Chief Judge, Appellate Court, Executive Director, NJA

Firstly, I would like to welcome the Hon'ble Chief Justice, all the justices, resource persons and the entire guest who are present here. I feel that we have taken an important step towards addressing the crime of trafficking as we stand here as a testimony of recognizing this violence. Such programme provides us space and an opportunity to revisit our work and the mechanism within which we work. It's important to understand why many forms of violence against women including trafficking continues despite efforts at national as well as international levels. Why have our efforts failed, where do we need to correct ourselves, how do we need to do things differently, when will we really start to make an impact, when can we see a society that will not tolerate violence. Equality is the foundation upon which all other rights are built. Without equality, other rights can only be symbolic, without any true

meaning. Seen from this parlance, trafficking is the most blatant form of violence against women, which stem from inequality, discrimination, disempowerment, and the crime continues to exist nurtured by culture of patriarchy and conspiracy of silence to which judges must have serious concerns.

Society expects a great deal from its judges, the expectations exist because judges have such an important and crucial role in people's lives and can affect their livelihood, their safety, their freedom and their humanity. We must respond to this large expectation. People have placed us in honourable positions but should not we remember that the honour attached with our positions stem from the honour and dignity of our people for the honourable services that are expected from us to the people to whom our sources have to be consecrated. When we as conscience keepers of the society stand as silent spectators and do succumb to our narrow personal interest or biases based on our personal traits like sex, colour, creed or group, and trivialize the services and concerns of the huge group like women, then we risk, we forfeit our honour. Laws and legal authorities are not simply the legal instruments but they are the service documents which could be judged from performance indicators in terms of how much services are practically delivered to protect, defend and promote the causes of our people. Then obviously this is an accountability issue. Whose accountability is it to explain why trafficking could not be combated successfully. The state will have to explain why they could not create situations of equality and uphold sense of security and justice amongst women and children. Obviously the government and society which do not ensure equality and justice have no reason to expect allegiance from their people. The accountability of upholding equality and justice can be discharged only through a collaboration of all the key players of the state mechanism, of which judiciary is apart.

When we do not take the issues of violence against women seriously or trivialize their suffering and fail to redress them then we have to accept blame for our failures. At this juncture, the problems faced by women require a careful and realistic understanding by judges. Often I am afraid, whether we fully comprehend the issue, from the perspectives of those who are subjected to suffer. Unless we try to see things objectively we can never ensure fairness, but the fact is, although we try to see the things as objectively as we can. To my mind justice is not just what I personally believe in, but what the people need. Unless we see the problem as our own, and internalize the problem to solve from the perspective of those who need our services most, there will be a big difference between what we deliver and what the victims

receive. Equality is the bridge between our knowledge of different realities and our actions that integrate those realities.

Ensuring gender justice, to my mind, is not limited to regular disposal of cases but they should include the effective implementation of the constitutional framework of equality through legal instruments and definite action plans, with immediate applications, which cannot be waited for any time in the name of progressive realization strategy. I consider this is partly our social accountability to ensure justice.

Though many discriminatory legislations are annulled, new legislations have substituted them at the instances of judicial interventions, yet many are yet to be modified to tune with the need for equality. I believe, discriminations persist more in our mindset than in our laws, so committing ourselves towards equality and justice is more important than the equality legislation. When other actors are not sufficiently sensitive to respond to equality issues, judges can serve as equalizers. The workshop has been organized to provide avenues to discuss the problems and prospects of the issues commonly shared by us and to embark on a strategic measure to combat this problem.

I must extend my sincere thanks to Ms. Chandni Joshi and the entire team of UNIFEM for their support. I specially pay tribute to her and the UNIFEM for their constant support for the judicial education on equality issues since long. I am sure that we will have a fruitful discussion among ourselves and get to learn and unlearn in this process. I know all of us will be enriched with the experiences that would be shared by the judges from the districts as well as the resource persons.

3.3 Remarks by Ms. Chandni Joshi, Regional Programme Director, UNIFEM, South Asia Regional Office, New Delhi

Chairperson, Hon'ble Justice Kedar Prasad Giri, Supreme Court, Chief Guest, Hon'ble Chief Justice Of Nepal Rt. Hon'ble Dileep Kumar Poudel, Hon'ble Justice Kalyan Shrestha, Hon'ble Justice Keshari Pandit, Distinguished Hon'ble Judge from Bangladesh, India, Nepal and Sri Lanka, Respected members of the audience and friends.

At the onset I would like to express my happiness to be a part of the programme that the Pro Public in Partnership with UNIFEM has organized for Civil society members on the issue of trafficking. UNIFEM is the women's fund in the United Nations

System. Its work is rights –based, grounded on the premise that whatever we do must enhance women's rights. Having grown out of the women's movements across the world, UNIFEM's work is informed by the work of the women themselves. Serving as bridge between policy-makers and grassroots women in the developing world, it is a key institution for giving women's voices, visibility and space, using a rights-based framework and an empowerment strategy. To promote women's human rights, UNIFEM focuses on strengthening the capacity of rights holders as well as the capacity of the rights upholders and UNIFEM is happy to be able to extend support for such initiatives. UNIFEM's partnership with the civil society in the past have led to many positive changes and I am sure our efforts would culminate into bring many more changes in making differences in the lives of exploited, abused and disadvantaged.

Trafficking in women and children has been a long-standing tragedy since more than a decade in Nepal. Despite several initiatives trafficking remains a serious concern. Trafficking is yet to be perceived as a glaring abuse of human rights and an assault on human dignity. Trafficking is a form of violence against women and it is one of the major factors that impede the realization of human rights and fundamental freedom by women and girls in South Asia. Available statistics on violence against women reveal that the majority of women can expect to be the victims of some form of violence at sometime in their lives. Over 74 million women are simply missing from the South Asia's demography, 3 to 4 million women are battered each year and the overwhelming number of women and children are trafficked to exploitative and abusive conditions. Women are largely excluded from government structure, and from processes of economic, social and political decision-making. Gender based violence is perhaps the largest deterrent to empowerment of any kind. Not only does it disable lives, it also incapacitates communities and obstructs development. There are many factors perpetuating the violence, which include the recognition of violence as a woman's issue, rather than as a social issue. Accountability of such responsibility needs to lie not only with governments but also with civil society, non-governmental organizations, United Nations and private sector.

Some of the major challenge to address trafficking in South Asia has been to get a holistic conceptual framework and definitional understanding of the issue, which so far was guided by the concept that equated trafficking to prostitution. It had therefore, limited the scope of addressing different forms of trafficking. This results in failing to address the vulnerability of the victims and the process that put them in a situation of abuse of sex workers. Placing the onus of abuse on the victim themselves

and detracts from addressing the abuser/ perpetrator. The existing laws on trafficking is focused on punishing the perpetrator and fails to provide any relief such as compensation and other victim friendly provisions. Trafficking has not yet been prioritised as a serious crime. The criminal intent and conduct employed by the perpetrators during the process of trafficking is yet to be understood and addressed from the legal perspective.

A regional assessment that UNIFEM undertook to examine the national laws and institutional mechanism to combat trafficking in women and children in Bangladesh, India, Nepal and Pakistan has revealed that the laws in these countries need to be improved to make it inclusive of provisions that protect the human rights of the victims and survivors. Also, until women have access to easy and prompt delivery of justice, effective legislation will be useless. Sensitized and informed judiciary needs to compliment effective legislation to ensure justice for victims. One of the key instruments for promoting equality and addressing gender based violence is a justice delivery system with a gender lens. With the current surge of gender based violence, and the impunity with which it occurs, the role of the justice delivery system in containing, combating and deterring such violence becomes even more potent.

Recent trends in judicial pronouncements in the region have been very encouraging and progressive. This is reflected in the marital rape case where the Supreme Court in a landmark judgement cited CEDAW as a guideline. It is noteworthy that there is considerable judicial activism towards gender equality, which is also evident through many positive reformations in the 'eleventh amendment to the country code,' which importantly ensure women's right to property and right to reproductive health. However, there is a need to further accelerate and replicate such initiatives, and shift the focus from 'formal equality' to 'substantive equality,' which has been promoted in the international instrument such as the CEDAW Convention.

The use of international human rights instruments by key stakeholders is indeed a positive step towards addressing the crime. Among the instruments, the SAARC Convention on Trafficking lays down opportunities for bilateral cooperation between country of origin and destination to address the crime of trafficking. However, this convention is yet to be ratified by Nepal. Though the progress has been slow, Nepal's effort to combat trafficking has yielded some positive results. The United States State-Department have acknowledged Nepal's efforts to combat the crime of trafficking and have positioned Nepal among the Tier 1 countries that have been able to take effective strategies to minimise the problem of trafficking. The work of civil society is noteworthy especially in improvising the bill on trafficking to make it

inclusive of human rights perspectives and victim friendly provisions. Also care needs to be taken so that the anti trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum- seekers.

I wish this Workshop a success and I am sure with such a distinguished group to debate and think through we will be able to develop strategies to fight the crime of trafficking to ensure due justice to victims.

3.4 Play on Experiences of a Trafficked Woman by Ms. Mausami Sen and her group

Ms. Mausami Sen and her group presented a play reflecting complex problems a trafficked woman faces when she is trafficked, rescued, rehabilitated and repatriated. The play highlighted the problems in justice system from a victim's perspective. The issue of stigma and discrimination, the issue of double victimization during legal proceedings and absence of some fundamental rights of the victims were raised through the play.

3.5 Address and Adjournment by the Chairperson Hon'ble Kedar Prasad Giri, Justice, Supreme Court

I would like to thank the organizers for providing me this opportunity to chair this programme. I am happy to be part of this process. Trafficking is a serious problems and it needs collective efforts to eradicate such crime. I must congratulate the NJA and UNIFEM for taking this initiative. I think the workshop would be a fruitful experience for all the judges who have come to participate. I wish the workshop all the success. Thank you.

4. Proceedings of the Workshop

Women's Human Rights, Violence against Women and Gender Justice

Hon'ble Kalyan Shrestha, Chief Judge, Appellate Court, Executive Director, the National Judicial Academy

Are rights equal? Is equality possible in reality? Will there be equality if there are equal laws? Are women not equal because they are weaker sex or they are not capable of carrying out dangerous work? Such several questions come attached with the word equality. Therefore, it is very important to understand what equality means. Different people perceive equality differently, each in accordance with forms and circumstances they are exposed to. The right to equality is fundamental. It not only encompasses equality in opportunity but also includes strategies to create opportunities for equal enjoyment of rights. Equality can be achieved by making special provision for the advancement of specific groups, including women, who are in a disadvantaged position. Equal enjoyment of rights is important that only having equal laws. With equality it is important to understand what discrimination is and what constitutes discrimination. Discrimination means distinction, exclusion or restriction made on the basis of sex or other conditions. And it has the affect or purpose of nullifying the recognition, enjoyment or exercise by women or any other group. Though equality encompasses different facets of our life, such as caste, creed, colour, culture etc., the demand for equality between men and women has been more conspicuous, wider and effective than others. The most fundamental structure of oppression is gender domination and subordination.

There are two types of equality model, formal and substantive. The formal model of equality principle is based on classical liberalism. This model is based on a sameness approach and it is more applicable to civil and political rights. It is more focused on procedural equality as it believes in neutral legislation. According to this approach, in a just society, the sex of a person would carry no expectation with it, it would be as irrelevant as the colour of one's eye. It takes the view that women and men are equally able to take advantage of opportunities. Therefore, if a woman has been expected to satisfy the same conditions of men, no discrimination has occurred. Thus once specific instances of differential treatment based on sex are prevented or addressed, women no longer are considered disadvantaged. This approach simply speaks about equal treatment in the application of equality as a right. It believes in treating men and women equally without taking into account the stark reality of

difference of socioeconomic positions. While formal equality judges the form of the rule to determine if it treats men and women the same way without creating barriers or favours on account of sex, substantive equality looks to the rule's results and effects. The substantive model of equality takes a pluralist approach. It is not one theory of equality but, in fact, reflects many theories that take many types and sources of differences into account and seeks to achieve several substantive ideals. The model focuses on equality in the result and rejects the principle of sameness as a goal. According to this model, since there are different groups of different status, they cannot be treated in the same manner. The principle of equal treatment may be demonstratively right but it covers up inequalities. This model believes that treating everybody in the same manner when they are in fact in unequal situations perpetuates inequality.

The substantive model of equality considers special measures as the most effective means to ensure de-jure as well as de-facto equality. There must be clarity about the goals of special treatment. One goal of substantive equality is to remedy of past discrimination. Examples of special measures that are designed to meet this goal might be identifying those posts previously occupied only by men and ensuring that women are given those posts. Remedying past discrimination may require restructuring wage scales to eliminate the past effects of gender-based job segregation that has not allowed women to have comparable worth as men. Article 4 of the CEDAW Convention provides for temporary special measures and also Article 11 of our Constitution provides for special measures. Substantive equality also recognizes biological differences between men and women. Because only women become pregnant, for example, pregnancy may disadvantage women with respect to job opportunity, seniority and job security. Special measures are needed to ensure that women's child-bearing capacity does not result in systematic disadvantage. As presently configured, paid labour uses a male model in its expectations and assumes that no workers will ever be pregnant. Substantive equality analysis requires that male model be challenged so that women and men are on equal footing in a paid work environment. In this context, Justice Clair L. Heareux Dub's words are relevant: It is important to walk mile in another's shoe, as it is possible to grow in the same family, neighborhood, school... yet we have totally different experiences depending on whether you are a man or a woman. The way to resolve differences therefore is not to suppress those who are different but to notice them and try to see our reflection in them.

Whose responsibility is it to ensure human rights and what is it? Human rights and fundamental freedoms are inalienable, non-negotiable and universal in character. Though the significance of national and regional conditions, as well as historical, socio-economic, cultural and religious backgrounds cannot be ignored, human rights and fundamental freedoms are the birthright of all human beings and their protections and promotion is the first duty of every State. Human rights of women are an integral part of the universal human rights framework. The full and equal participation of women in every walk of life at national, regional and international levels and the elimination of all forms of discrimination on the basis of sex are the basic objectives of women's human rights.

I felt that as judges we can contribute to ensuring such equality and the measures may be:

1. Judges should try and include the changing pretext of the society in their legal interpretation and not merely wait for law to address that need. Judges can fill the vacuum in absence of law.
2. Judges not only recognizes law but also makes a meaningful interpretation.
3. Decision makers need to be sensitive toward the consequences while using law and justice.
4. Legal interpretation should have objectives to fill the holes, and to promote justice.
5. Law should also acknowledge different interpersonal relation between human beings.
6. Need for a hierarchy is not important in interpreting laws, it should be objective, suitable theories and resources could be used.
7. To be unbiased decision maker, one should not limit oneself to the boundaries of the laws but should keep open to the facts around.
8. Justice is not a isolated procedure but is a social procedure, therefore, reality of people who would be affected by the decision needs to be understood unlearning whatever biases one may have. If one decides under the influence of biases and prejudice that results to unrealistic decision.
9. Court needs to create a facilitating environment for women to encourage their access to justice. Politeness, empathy and sensitivity are some qualities that are necessary to generate trust in the justice delivery system.

10. Justices need to play a major role as a catalyst for equality. They need to respect the differences in our society and ensure rights of all irrespective of their differences.

Conceptual understanding of Trafficking, Migration, and Prostitution: Causes & Impact of Trafficking on Women

Mr. Pratap Kumar Pathak, Chief District Officer, Dang

According to the UN Protocol Trafficking means 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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of the others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

According to the SAARC Convention, Trafficking consists of all acts involved in the recruitment, transportation, forced movement, and/or selling and buying of women and children within and/or indirect threats, abuse of authority. For the purpose of placing a woman and/or child against her will with or without her consent in exploitative and abusive situations such as forced prostitution, false marriages bonded labour clandestine employment and false adoption, begging, organ trade etc."

According to Ms Radhika Coormarswamy, UN special Repproteur on Violence against Women, Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harboring and receipt of persons by threat or use of violence, abduction, force, fraud, deception or coercion including the abuse of (authority) or debt bondage for the purpose of placing or holding such person, whether pay or not, in forced labour (slavery) like practice in a community other than the one in which such person lived at a time of the original act described.

Some of the key elements of trafficking are threats or use of threats, violence or other forms of coercion, abduction, fraud, deception or abuse of power, long term exploitation of humans for profits, transportation, sale, purchase, transfer, harboring and receipt of person within or across national boundaries for the purpose of forced labour or slavery like purposes.

Trafficking takes place for various reasons - child soldiers, prostitution for brothels, for sex tourism, as concubines, as gifts etc. (forced sex work), domestic labor, bonded labor, agricultural labor, camel jockeying, entertainment industry, including bars, massage parlors, circus, illegal adoption, organ removal/transplant, drug smuggling, begging, pedophilia, child marriage, forced marriage, mail order brides.

The potential victims of trafficking are: People from low-income households in rural and urban areas, ethnic minorities, people with low level of education, adolescent, young girls from broken homes, women who have been subjected to sexual abuse, rape and violence in marriage and stigmatized by society, low income families with many children, single women, abandoned, widowed or unmarried. Reasons for trafficking mainly of supply side: poverty, dreams for a better future, loss of family income, illiteracy and lack of awareness, economic disparity, civil and military conflicts, consumerism, lucrative nature of the business of trafficking that attract the crime syndicates, weak law enforcement mechanism, marital problem - polygamy, divorce, family violence, desertion, etc., domestic violence - rape, incest and abuse etc. Demand side reasons- globalization opens up the avenues for mobility, demand for cheap labour and entertainment personnel, rising male migration to urban areas and expanding sex industry, sex tourism, demand for younger girls who are presumed to be free of sexual diseases and HIV AIDS.

Although trafficking and prostitution are closely interlinked but they are different from each other. Though trafficking takes place for various purposes such as bonded labour, domestic servitude etc but most of the time women and children are trafficked for the purpose of prostitution. Trafficking is a coercive and exploitation process. Prostitution is seen from two different perspectives. The first perspective believes prostitution is the main purpose of trafficking and hence international movement to abolish prostitution is underway. CATW (Coalition Against Trafficking in Women) is taking the initiative in this regard. The 1949 convention is also focused on abolishing prostitution. But the second perspective argues for choice. They would like to call prostitution as sex work and prostitutes as sex workers especially as the case of adult prostitutes. They consider it is the right of the women to decide on their choice of profession - as a means of livelihood. Global Alliance Against Trafficking in Women (GAATW) argue against abolition and criminalization of prostitution. However, both these perceptions recognize the need to address the exploitative conditions inherent in the sex trade and to protect the rights of women involved in sex work. Prostitution is usually the objective of trafficking, yet trafficking is not prostitution. Trafficking takes place for reasons other than prostitution, such as

bonded labour, domestic servitude, organ trade. Prostitution is viewed by two different perspectives. CATW (Coalition against trafficking in Women & Children) believes that it is a violation of women's human rights. GAATW (Global Alliance Against Trafficking in Women, argue against abolition and criminalization of prostitution. According to them, adult women have the right to choose to engage in sex work. Prostitution may be a source of livelihood hence could be a conscious choice of many sex workers.

There are several impacts of trafficking. The psycho-social impacts -Trafficked persons face high level of stigma, impairing their entire prospects of respect. Victims would not have the courage to face the family and the society due to this situation of self-denial. Re trafficked due to lack of reintegration. Society considers them as pollutant to other girls in the village. Hence, even after their come back they will not be welcomed back in their families and the society. They suffer humiliation, sadness, depression, worry, anger, fear etc.

The physical impact of victims or survivors subjected to trafficking undergo different serious forms of tortures, such as rape not only in brothels, but also on the way to destination, hitting and burning of private parts with cigarette, faltering of the feet, beating and gang raping, wage exploitation, forced to serve many clients every night etc. Some of them have also become victims of several life threatening diseases such as tuberculosis, STD, HIV Positive and AIDS. Unofficial estimate is that between 60 percent to 70 percent of sex workers contract HIV/AIDS.

Most of the trafficked women and children are forced to live in slavery like situations. They are physically and mentally tortured and forced into prostitution, are held in bondage in brothels, are raped, beaten, burnt with cigarette butts, abused and subjected to inhuman and degrading treatment. They face frequent threats from their agents, employers, police and others. They are subjected to serious diseases such as HIV, STD etc. Unwanted pregnancies and frequent abortions. Exposed to hazardous work (circus). Earnings are often unknown to them and are withheld by the traffickers or employers.

Threat to emotional well being in terms of constant fear of arrest, isolation, deprivation of family life and social support systems, humiliation and abuse result in serious emotional scars. They are driven into drug and other addictions. They have little chances to leave brothels for want of rescue operations. They are not aware of their rights to be free from torture and to enjoy their freedom of movement. Long delays in repatriation, forced repatriation, lack of exhaustion of legal remedies where

they were rescued against the perpetrators, chain of revictimization all put them in fragile situation.

Rights that would be affected by trafficking- right to personal liberty, privacy to choose a profession, right to movement, right to earn livelihood, right to have control over one's own body, right to safety from health, heard & confusions disease, right to family life.

Migration is a movement of a person from one country to another and from rural to rural at urban place, usually voluntarily. Trafficking is a movement by deception or coercion.

The difference lies only in the element of choice. All acts of trafficking involve migration but not all acts of trafficking are migration. If migration is not accompanied by coercion or deception and does not result in forced labour or slavery like conditions, it is not trafficking, although many people migrate voluntarily but end up being trafficked. Migration with consent does not mean trafficked with consent. Traffickers fish in the stream of migration.

In many circumstances, large disparities in income and wealth entice individuals to migrate, rather than absolute poverty. There are other push factors also such as to better one's life and the break down of the family structure. External migration is meant for employment opportunities abroad but many women who migrate for these reasons are exploited in the country of destination by their employers and others. Those runaway from such employment who are unable to withstand the verbal and physical abuse then fall prey to brothel owners and pimps and face untold misery in these foreign lands. Women face exploitation when they turn to be irregular migrants due to lack of proper documentation or as a result of fake travel agents. They would be compelled to endure silence and remain in employment even when exploitation would be rampant, because victims of rape and abuse would be stigmatized in our society. Those who would officially migrate will have better prospects for their safety because they will have official documents. The concerned government will also be responsible to repatriate migrant/compensate them in situations, where they are unjustly treated at the receiving country. Internal migration - It is a process where women and children from the rural areas migrate to urban areas in search of green pastures. Migration often allows humans to be deceived and trafficked generally by organized crime groups and even by other community members.

In response to instances of employers, sexual exploitation of women, who have migrated voluntarily, some countries have restricted women from leaving the country as migrant worker. This is clearly a protectionist approach. Most victims are trafficked through deception and false promise these by abduction and kidnapping, therefore, they are the active participants in their own trafficking. Difficult to eradicate trafficking, without understanding the causes and patterns of migration, the victims migration, initially are legal but later they would be subjected to any form of trafficking.

Different approaches: Moralistic approach- trafficking is equated with prostitution; and is therefore socially immoral; which should be abolished by all means. Prostitution is considered as a social evil. The approach maintains that women are forced into prostitution because of poverty or other factors, with less focus on trafficking agents and their networks. This is clearly a case of feminization of poverty and culture of silence. The strategy under this approach has been mainly repressive to suppress prostitution, deny the right to self determination to women, criminalize all those who are involved, including men visiting prostitute, carry out raids in brothels, formulate strict anti-trafficking laws, and unilaterally carry out rescue and rehabilitation programmes. The results have been marginalization of women and greater dependence of them on third party protectors. On the other hand, empowering strategy would recognize the sex work as an occupation and education about the right.

The Crime Control Approach- criminalizes the women victim. It believes that with strong legislation and inflicting heavy punishment, trafficking can be curbed. The prime motive here is stopping the crime than stopping the violation and exploitation of the victim's human rights. It considers the victims interest as secondary, re-victimizing them and creating fear of detecting among them, forcing them to live underground.

The Migration Approach- focuses on the problem created by illegal migration and aims to regulate migration by criminalizing trafficked persons as illegal workers. It controls women and girls mobility with strict border controls, have sticker visa regulation and punish and deport illegal migrants. Those activities put women in more vulnerable situation resulting in more susceptibility being exploited by traffickers and brokers, corrupt officials.

The Labor Approach- focuses on labor market and protects workers rights, but it does not recognize informal sector labor and provide legal protection for it. It would suggest restriction on some work sectors to migrant women, application of strict recruitment of regulation even in permitted work areas. Non-recognition of informal sector work such as domestic work, sex work, criminalization of undocumented migrants workers constitute additional problems in this area. Seen from the empowerment strategy - the rights of migrant women and their contribution for the economy must be recognized. They must be ensured with legal protection and with safe and just working conditions in all sectors.

Right Based Approaches- This approach has been the most prominent feature for addressing the problem. The criminal sanction paradigm has moreover suppressed and adversely affected the victims of trafficking than the traffickers. The focus here is on the protection of the rights of the trafficked victims in all forms of anti-trafficking activities such as prevention of deception, coercion or violence against trafficked person and violation of their human rights. However, they must not be prevented from leaving their places or migrating from their villages or towns or countries for job or other opportunities. Therefore, the activities of rescue, rehabilitation or deportation of victims need to be so designed that nowhere in the process all victims lose their human rights in the countries of origin or destination⁴ The right based approach demand that the rights of the victim from all prospective are respected and protected will not being subjected to trafficking retaliation and revictimization by agencies in the process of rehabilitation and also from the judicial system itself.

Field Visit at ABC Nepal

Ms. Durga Ghimire, President, ABC Nepal

We are very happy that we have such eminent judges from all over Nepal to ABC and I would like to take this opportunity to thank the National Judicial Academy and UNIFEM for taking such initiatives. We always felt that we needed such cooperation. As a rehabilitation center, we represent survivor girls and women and face problems in terms legal processes. It is indeed a great opportunity that we are face to face and that we will be able to discuss several problems with you.

ABC has been providing rehabilitation home since 1996. We have so far rehabilitated about 600 women and girls. We would like to take you for a tour later on the services

⁴ Status and Dimensions of Trafficking within Nepalese context, IIDS & UNIFEM, 2004, p. 9.

that we are providing to girls and women. We provide them educational support, income generating skills. When they finish their skill training we provide them some money so that they can start something on their own. We do not give skill training for training sake, but we try to find out what kind of product have market or what kind of skill would be used and we provide them the training accordingly. We have been providing them training on hotel mentors, Community Health Worker, Tampo Driving.

Briefing on the Observation of the Field Visit

Facilitator: Hon'ble Kalyan Shrestha, Chief Judge, Appellate Court, Executive Director, NJA,

Ms. Sangeeta Thapa, UNIFEM, Programme Coordinator Nepal, UNIFEM Office Nepal

Hon'ble Shrestha opened the session for discussion and the judges shared their experiences.

"This was a fruitful experience, especially to actually see the kind of rehabilitation homes that exists in Nepal. We most of the time only get to hear about the existence but never the opportunity to visit it and understand the kind of atmosphere that it has. I think that ABC is doing a great job, the environment was clean and the girls and women looked happy, I think we need more organizations like that to ensure that rescued girls are properly taken care of."

"I think this exposure visit helped us to be more sensitive towards the issue because now since we have seen it we can relate it when we actually have to think of such places, I think it will help us in our legal proceedings, such exposure visit should be a continuous process, I am really thankful to NJA for this initiative."

"I liked the sector wise problems that they indicated, they indicated the problem in police station, the problem in court etc. I think, the police and the government attorney really needs to be sensitive and cooperative to one another to provide quality service to the survivors."

"I think the important thing for me is that after this visit, I know what ABC kind of origination do and its effectiveness, many times I need to refer the victim to a rehabilitation and now I can refer the victim to ABC Nepal."

"ABC needs to work as a pressure group for more effectiveness from the law enforcers."

"ABC though is a legal representative to the survivors they need to be updated about some of the legal proceedings for their own effectiveness. Unless you understand that yourself, how can you be effective? Also I feel that ABC has not reached to the prone areas where they really need to focus their initiatives against trafficking."

'Court is accused of being late, and court really needs to take this seriously, the reasons for late decisions needs to be disseminated so that such blames are justified, otherwise it's a failure of an institution."

'Sometimes we get problem due to fake cases, its really difficult to filter false cases."

Psychological Impact of Violence on Women

Dr. Achal Bhagat, Psychiatrist, Director, Saarthak

A exercise was conducted asking the participants to make a pair and one of the pair would make a fist and the other would try to open it, vis a vis. We can easily open the fist if we ask the other to do so. The exercise reflected attitude of a human being.

If our judgment blames the victim, the victim can never establish herself as a normal person. Role of judge is significant as a change agent and not just as people who decide the cases. The sound of silence is dangerous and the survivors often go through that. I would like to share a story of Anjali. Anjali was about three when I met her in Hyderabad she was sitting in my lap she was in a home run by Sunita Krishna. She tickled my hand Anjali said my uncle used to like it, she was sold by her father and she was sold into prostitution and she was thinking that every old man would like it. It is a mental health impact once who go through the experience would feel the same way. Victims have learned not to trust people who are supposed to protect them. Many policepersons are good in their job but some have also asked sexual favors from these victims and that have totally destroyed them. The children would find themselves in Nepal. Often in organizations like ABC Nepal or Maiti Nepal but trafficker are most of the time never been caught. The crime of trafficking is shifting in its dimension Nepali girls are less found in cities like Delhi and more in small town like Chandigarh. Also trafficking has not only taken place from Nepal to Indian but Manali to Kathmandu. Trafficking knows only one story money, people do not sent their children because they are poor but because they want money. Thirty

one percent of the population are under the poverty not all the persons are trafficked what leads to trafficking is greed for money. Women's status in the country makes women vulnerable and they are used as tools of men or for men's purpose. Trafficking is a reality and the abuses are the reality. When we are born we are helpless. We all feel helpless on time to time. One of the first words that the child speaks "afai" (by myself) try to take away the spoon, the control is lost. What happens in trafficking is that the control is taken away by the strangers. You can image how it feels to be taken the control out of your life. Anyone who have not experienced abuse? I am abused many times and abuse is maltreatment. About dignity: I was in Halidiya one of the judge from the High Court said that if a woman gets slapped it does not matter. I asked him how does he feel if I slap him? He got very angry. He said he felt humiliated and his dignity was threatened. If just a word can do so much harm, imagine what does actual slapping do, it destroys the dignity and the self respect is lost.

Post traumatic disorder calculation is like this- 2 yrs back 2000 girls were trafficked. 2000 girls would earn Rest. 3000.00, their productive time 40 years. NRs. 3000 X 40 years X 12 months is the lost GDP in the country. In the court some of the things that need attention are:

1. Don't let the victim be in direct line of vision from the perpetrator
2. Talk to the child softly.
3. Loose the hierarchy in the court and be subtle.
4. Do not let the lawyers ask the question about detail sex trauma.
5. Validation is important. If a chair broke down and if you fell on the ground you expect to be helped and talk to the people: that's validation. If you are told why did you sit on the chair, blame would be on you for something that is not your fault. Trafficking is not their fault. And it's the responsibility of the court to that the child should feel at ease.

Questions and Responses:

- **Why aren't the red light area demolished?**

That would not be a strategic move because it will only lead to clandestine methods of exploitation. At least they are visible and police raids are possible.

- **What are the main impacts of psychological trauma?**

The major impacts are loss of self-esteem, loss of control, loss of trust, loss of interest etc. The important thing is that the survivor needs to have control back to her life, be in charge of her life herself and not to be told what to do. Most rehabilitation center keep survivors and treat them as child, they are told what to do and the control is taken away. One of the important thing a rehab center need to do is provide livelihood programme. Shakti Samuha in Nepal is a great example of how the survivors have themselves taken charge of their lives and this has lead to a road of steady recovery.

- **We often have debate about using the words victim vs. survivor, what is appropriate?**

We should use the word survivors with victimized persons because they have the right to survive. By using the word victim we are making them helpless, these words can reflect the trauma that they experienced.

- **What kind of psychological caution one needs to take in response to a child offender? A victim cannot say what the victim goes through. To make her open up in the court may be a person of her own age or any other help?**

The response has to be therapeutic and healing. No instrument is better than a sensitive judge. You have talked to a child, I am sure all of you have your own children and you have talked to them, all you need to require is sensitivity towards the child who has been victimized. Do not only rely on the evidence of the victim but also rely on the evidence of psychologist. Counseling survivors need skilled resource. Random counseling can do more harm than good. People with no professional skill come to the court to talk to the child and it becomes a disaster. When we adequately

response against violence, good to the society is much larger than what we are expecting.

National Laws, International & Regional Legal framework against trafficking

Ms. Sapana Pradhan Malla, President, Forum for Women, Law and Development

At the onset, I would like to share the study on law and law enforcement agencies conducted with the support from UNIFEM. The study shows that there is concerning low reporting of trafficking cases, not more than 150 cases are registered though thousands are trafficked every year. This reality shows that either victim's have no trust towards law enforcement mechanisms or the mechanisms are ineffective to bring victims to report. Also, the coordination between government attorney and police is weak. The police needs to seek government attorney's guidance in the investigation but that hardly happens and charge sheet prepared by the government attorney itself is vague and does not help much. Also the Supreme Court have large number of pending cases and decision takes long time to come. The law is ineffective in ensuring rights to the victims; there is no compensation for the victim and no victim witness protection.

International human rights frame work:

1. Slavery Convention 1926
2. ILO Forced Labour Convention No 29, 1930
3. Convention for Suppression of The Trafficked In Persons and of the Exploitation of the Prostitution of the others 1949
4. ILO Abolition of Forced Labour Convention No 105, 1959
5. ILO Convention No 182
6. International Covenant on Civil and Political Rights 1966
7. International Covenant on Social, Cultural And Economic Rights 1966
8. Convention on the Elimination of All Forms of Discrimination against Women 1979
9. Convention Childs Right 1989

10. Protocol to Prevent, Suppress And Punish Trafficking in Person, Specially Women And Child Supplementing the UN Convention against Transnational Organized Crime 2000
11. Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography 2000

1.2 Regional Instruments

12. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002

1.3 Declarations

13. Declaration on Elimination of Violence Against Women 1993
14. Beijing Platform for Action 1995
15. Further Action and Initiatives To Implement The Beijing Declaration and Platform for Action 2000
16. Stockholm World Congress on Commercial Sexual Exploitation of Children
17. Yakohama World Congress on Commercial Sexual Exploitation of Children 2000 (Address Demand Side)
18. Recommended Principles and Guidelines on Human Rights and Human Trafficking.

ILO Convention:

- Discourages All Forms of Forced Labour
- Prohibits Worst Forms of Child Labor
- Prohibits All Forms of Slavery

Slavery Convention:

- Slavery and Practices similar to slavery are prohibited

International Covenant on Economic Social and Civil Rights

- Right to enjoyment of just and favorable condition of work
- Right to adequate standard of living
- Protection from forced marriage

CEDAW Convention:

All appropriate measures to suppress all forms of trafficking of women and exploitation of the prostitution of women

Childs Right Convention:

- Take measures to prevent all forms of abduction, sell or trafficked of children
- Punishes sell of children, child prostitution and child pornography with or without consent

OP to CRC on Child pornography:

Prohibition of children, child prostitution and child pornography

2.2 Trafficking Related Specific Instruments

2.1 Convention For Suppression Of The Trafficked In Persons

2.2 Protocol To Prevent, Suppress And Punish Trafficking

Definition: Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring 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.

Broad Definition

- Right against Exploitation
- Right to Non-discrimination
- Right to Privacy and Confidentiality
- Right to the Represented and Heard
- Right to Information
- Right to Health and Other Services
- Right to Safety

- Right to Compensation
- Right to Voluntary Repatriation
- Right to Residence
- Right to Mobility
- Right to Access to Justice

Measures to be taken to implement the Protocol

a. Legislative Measures

- Criminalise the offences of trafficking in persons
- Protect the rights of the victims

b. Administrative Measures

- Address Underlying causes of trafficking in persons
- Establish cooperation among the governments
- Provide appropriate training
- Ensure effective information exchange among law enforcement
- Establish cooperation with NGOs and Civil Society
- Ensure voluntary repatriation of the victims
- Research and mass media campaign
- Ensure security and control of documents
- Prevent re-victimization of the victims
- Enables victim to participate in the criminal proceedings
- Provide compensation to the victim
- Provide assistance to victim
 - Housing
 - Legal and social counseling
 - Temporary or permanent residency
 - Confidentiality during legal proceedings

- Voluntary repatriation of the victim
- Right to information in own language (legal rights/proceedings)
- Right to non discrimination
- Material assistance/employment, educational and training opportunities
- Border measures
- Security and control of document
- Right to information
- Capacity building of law enforcement agencies
- Cooperation among law enforcers, immigration or other relevant authorities for information for checking travel document
- Means and methods used by criminal groups including recruitment and transportation of the victims
- Repatriation of victim of trafficking
- Training for the law enforcement, immigration and other relevant officials
- Dispute settlement mechanism (incase of dispute between two state)

2.3 SAARC Convention on Trafficking:

- Extraditable offences
- Enhancing Penalties in aggravated circumstances
- Proper judicial procedures
- Confidential hearing
- Capacity Building of Law Enforcement Agencies
- Cooperation During Investigation, Judicial Action, Rescue and Repatriation
- Formation of Task Force

Declaration on VAW:

- VAW includes trafficking in women and forced prostitution

- Protection of human rights of the victims
- Effective suppression of trafficking for the sex trade and tourism
- As matter of priority introduce effective legislation to combat trafficking(BPFA As well)

BOTTLENECKS:

Convention for suppression of the trafficked in persons and of the exploitation of the prostitution of the others 1949

- For the purpose of the prostitution
- Lacks rights perspective
- No reporting mechanism

Protocol to Prevent, Suppress and Punish Trafficking

- Only supplementing convention, not independent
- Jurisdiction only if organized crime
- No reporting mechanism

SAARC Convention on Trafficking

- Lack of treaty monitoring mechanisms
- The definition of trafficking for the purpose of the prostitution only
- Not being able to protect victims from criminal liability under immigration laws
- Not being able to make appropriate distinctions between women and children
- Not respecting a woman's choice not to repatriate
- Non Ratification of the main conventions
- No bilateral Agreements
- No extradition treaty
- Lack of information exchange/data
- Lacks conceptual understanding on migration/trafficking and prostitution

Recommendation:

International Level

- Comprehensive standard that includes all the aspects of trafficking
- Instruments focusing different aspects for example for prostitution, transnational in nature and organized crime, sell of children, forced labour/ Need to be bring consistency in all the framework and approach
- Politics of different position needs to bring in the common understanding

Regional Level

- Conduct Regional Surveys on statistics /laws and polices and infrastructure available
- Create Regional Information Center
- Enter into bilateral agreements for the necessary cooperation for prevention/ investigation/legal assistance/rescue/cooperation/border monitoring/extradition
- Amend the SAARC Convention
- Formation of regional task force
- Regional rapporteur
- Identification of root cause /SAARC program to address the root causes

National Level

- Ratification Of Human Rights Framework
- Enactment of New Legislation in accordance with international frame creating:
- Extraterritorial jurisdiction,
- Comprehensive definition,
- Strong punishment keeping aggravated circumstances,
- Compensation to the victim,
- Victim protection,
- In Camera hearing,
- Special procedure

- Enter into bilateral agreements for the necessary cooperation and extradition treaty
- Awareness program on changing value system and rights
- Economic development in the prone area of trafficking
- Education for all
- Border monitoring
- Reporting periodicals as well as alternate reports
- Gender friendly institutional mechanism
- Create enabling environment for reporting the cases
- Capacity Building of Law enforcement
- Support system for affected persons
- Strong mechanism to handle the corruption

National Laws

Trafficking in Persons Act, 1986

- First special Act.
- Burden of proof lies with the culprits.
- Extra-territorial jurisdiction is applicable.
- Government case.
- Provision of stringent punishment system.
- Victims can file complaints anytime (no time limit)
- Limited burden of proof.

Weaknesses of the Trafficking Act

- Not rights based.
- Need to take courts' permission to conduct investigation on the issue.
- Victims are required to keep reaffirming their statements.
- Lack of protection of the victims and witnesses.

- Lack of implementation of extra-territorial jurisdiction.

Governments proposed Human Trafficking Control Bill's positive and negative aspects

- The government only limited trafficking to sex.
- Human Trafficking is very limited which has failed to encompass all aspects of the issue.
- The word child has been presented from a gender perspective while only those under 16 are considered as children.
- There are no provisions protecting those who file the cases including the victims and witnesses.
- Punishment is minimal compared to the degree of crime and there is a huge gap in punishment procedures concerning the implementation of the justice ethics.
- Not enough punishment system for those who are answerable to the public.
- Suspected crime is proven wrong from the procedural side and the criminals can present other proofs and get away scot-free.
- Lack of adequate provisions for compensation.
- Human Trafficking Control working committee in limbo.
- Since provisions for rehabilitation are not mandatory, it has failed to encompass all parties for the rehabilitation process.
- Promotion and publicity banned but punishments (incase of violating the rules) have not been ascertained.
- It has failed to manage the right to confidentiality.
- It had failed to address the victim's minimal human rights.

The changes that need to be made in the governments proposed Bill:

1. The Bill should revised from rights perspective
2. The Bill should be renamed as Human trafficking Control Act.
3. The Bill should be defined as per the international human trafficking conventions.

4. Those below 18 should be considered as children.
5. The definition of sex work should be removed.
6. Criminalisation of prostitution (when practiced with one's wish) should be scrapped.
8. Child sex-exploitation should be addressed under a separate system.
9. There should be a special provision to deal with children or those who are not mentally fit.

Making Road to Justice Accessible: Victim Protection, Appearance and Examination In Camera Hearing

Hon'ble Min Bahadur Rayamajhee, Justice, Supreme Court

Trafficking has become a global problem. Millions of women are sold and bought globally and are sold from hills to Terai from rich country to poor country. Data shows that 200,000 women are in Indian brothels and are forced into prostitution. The reasons of trafficking are gender discrimination, poverty, illiteracy, early marriage and violence in the home. Article 11 of the Constitution provides rights against exploitation. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and more specifically the Convention on the Elimination of All forms of Discrimination against Women all provide various measures to ensure equality and rights of women. Our national law also provides remedy.

When we see the court system we see lot of acquittal cases and we need to question why that happens. Is it because we are not victim centric, may be we need to apply victim centric approach. Victim Centric Approach includes right to information to victim, right to confidentiality, not asking insensitive questions etc. Judges need to be proactive and apply victim centric approach. If the accused side have a strong lawyer or strong other influence we need to be careful as what kind of affect it will have on the victim and on the case. May times we ask for specific details of proof but a statement can be a strong proof. Also, we debate a lot about consent but how relevant is the consent when one buys or sells your body? We say she consented to it, but is that relevant? Is it allowed to buy or sell someone else's body? Also, the police investigation, how are victims questioned, are they sensitive to victim's needs. In camera needs to be brought into practice, It takes time to implement these measures so we have to work out through what we can do with our current infrastructure.

Question: A victim says that she is raped later she becomes hostile and says that she is not raped. Such cases create lot of difficulty in coming to a decision and understanding what could be the reality.

Response: We need to understand why the victim was hostile. Its easy to think that the victim is hostile therefore the case is clear, however, its we need to know the socio-cultural context, the background of the survivor etc before deciding only on the basis of her being hostile.

A group work was facilitated among two groups of judges. Group 1 working on the Protection, Appearance and Examination and Group Two worked on In camera hearing.

The findings of the group works are as below:

Group 1 on Protection, Appearance and Investigation: No economic support for victims no compensation. Mental impact needs to be understood. Fair behavior, politeness would provide relief to a victim. Lack of security, low awareness, disappointment over justice system, organization sensitivity and activism, maintain confidentiality. Lack of investigating expert, favorable information and lack of sensitivity.

Group 2 on In Camera Hearing: Lack of infrastructure and Lack of sensitivity to right to privacy among law enforcers. Victim do not appear or become hostile, lack of detail guidelines on camera hearing, lack of money to stay in the central during the case, no provision for TADA.

Conclusion: Hon'ble Min Bahadur Rayamajhee

You have identified the most significant areas around these issues. There are problems resource wise etc and we need to correct it but it does not take much to bring changes if our will is strong. We need to be empathetic and be active. In your leadership you can be a role model. Provisions for in camera may need resources but we can work with whatever we have.

Judicial Responses to Equality

Hon'ble KN Upadhaya, Former Chief Justice, Supreme Court

Globally within this thirty years, there have been important changes in women's status. Among them there have been significant improvement in the areas of reproductive rights, health and education. However, in economic, social and political areas women's status is concerningly fragile. There is need for investment of resources and to bridge this gap between men and women. If we see minutely, we see that men and women spend their lives in their own world. These world are different in standards socially, economically, educationally, and religiously. In a Human Rights Conference in Vienna in 1993 for the first time women's rights was established as women's rights. As a result of democracy and human rights progress women's issues have received substantial attention. It has been a global challenge to address the historical discrimination against women and move forward for their empowerment. Today women are themselves not only organized but are enlightened, logical and committed towards their own progress. The same traditional and cultural norms that discriminated women were acceptable fifteen, twenty years back but now these norms have become acceptable. The attitudes towards women are in so many ways inhuman and degrading. The culture of Muslims in African national where small girl's private parts are stitched to save her from adultery, the culture of stoning women for falling in love in Arab countries, and our own culture of sending women to cowshed when she needs safe environment after her delivery and forcing widows to live a sedentary life. These are all examples of how women are forced into discriminatory situations.

Eliminating violence against women also includes providing in camera hearing, privacy of legal proceedings such as prohibition of providing women's name, picture or identity in video. We have a strong Women's Convention generally known as CEDAW Convention on the Elimination of All forms of Discrimination against Women.

The efforts of NGOs and INGOs to educate judiciary despite no resource allocation from government has lead to some achievements. The recently established National Judicial Academy and the Judicial Council have also taken initiatives towards this direction. Today we don't' only need policy and programme but also monitoring mechanism in investigation mechanism, government mechanism and in public institutions. We need to ensure attitudinal change that respects human's human rights that does not see women as objects for discrimination and torture. Judiciary has

to play an important role for this kind of change, it itself needs to be role model. However, judiciary is just a part and cooperation from all sectors is necessary.

Effectiveness of Institutional Mechanism: Panel of Stakeholders

Judge's Perspective: Hon'ble IP Khatiwada, Judge, District Court, Chitwan

We need to create a conducive environment in the court. Victims and witness have great expectations from court and we need to meet that expectation. We want witness willing to come to court, if we create an intimidating environment we will fail to bring them into the court. It is important for the court to make strategic move for the favor of justice. It was indeed a pleasant experience to visit rehabilitation center I think we need to visit such centers and keep ourselves aware of what is happening around us. Why can't we go to these places, we need to be proactive and from a judge's point of view I think we all are committed to combat violence and ensure gender justice.

Government Attorney's Perspective: Mr. D.R. Regmi, Deputy Attorney General, Kathmandu

There is no definition of 'litigation' in our existing laws. Litigation is divided between criminal and civil. In criminal cases there is question of crime and in civil cases there is question of rights. Criminal and civil cases are divided into government and individual cases.

In government cases, police and other institution (government attorney) will investigate, collect evidence, defend in the court and appeal. Government has primary responsibility to ensure peace and order in the society. Also the government have a role to investigate, prosecute in the serious cases that are affecting social peace and harmony. In these cases an individual is not capable of investigating or prosecuting the cases which creates problem to punish the criminal as well as ensuring justice to victims. Therefore, such cases are looked upon by government and is a global trend.

Challenges in Prosecution and Defense

1. Investigation not based on evidences
2. Statement based investigation not in practice
3. Inadequate provision for time limitation

4. Lack of education, training, technical knowledge among investigators
5. Lack of unbiased evaluation of the evidence collected during prosecution.
6. No system for not initiating cases
7. Lack of skill, knowledge and training among prosecutors
8. Prosecutors uninformed about keeping offenders in custody.
9. Strict rules not applied in collecting additional evidences
10. No relevancy between the demand for punishment and offence.

Police's Perspective: Dr. Chuda Bahadur Shrestha, SSP, Police Academy

It is found that million of women and girls have been trafficked across national borders and within countries. The global trafficking industry generates an estimated five to billion US dollars each year. Which is highest that surpasses profits generated by the arms and narcotics (Widgren 1994). In Nepal, the underlying causes for the increasing incidences of trafficking is mainly the law status of women due to interplay of socio-economic, cultural, political factors and less awareness related to psychological factors.

At present, the insurgencies and Bhutanese refugee have further aggravated the situation. Nepal beings to the supply side of the trafficking chain wherein human are trafficked for both labour as well as sexual exploitation to other countries in Asia, Gulf countries and Europe. It has been often quoted time and again that the figure ranges from 5,00 to 7,000 to 20,000 Nepalese children being trafficked every year and from estimates to 70,000 to 375,480 Nepalese women working in India brothels, with record estimate of 417,200 Nepalese engaged in prostitution in India (Acharya, 1998:15). Internal trafficking also takes place with the country, which do not receive as much attention as external trafficking. (Source: Anti-Trafficking National IEC Strategy; 202, Ministry of Women, Children and Social Welfare, Singha Darbar, Kathmandu, Nepal).

Some Prone areas for violence against women- Problems areas: Already identified districts such as Jhapa, Morang, Sunsari, Udayapur, Dhanusa, Sindhuli, Mahottari, Sarlahi, Ramechhap, Parsa, Makwanpur, Chitwan, Dhadhing, Kathmandu, Lalitpur, Nuwakot, Rasuwa, Kavrepalanchowk, Sindhupalchowk, Gorkha, Kaski, Nawalparasi, Rupandehi, Dang, Banke, and Kailali. District headquarters and other city area where internally displaced person are living. Hotel, restaurant, high-way restaurant, bus

stops, factories, cinema hall, refugees camp. Street children, bonded labour, domestic worker

Age Group: Mainly teenager up to 40 years (threat of sexual abuse and trafficking). Widow and elderly women are probable victims of harassment, torture in the name of witchcraft and others

Some examples of Violence against Women in Nepal

Crime against Women/Discrimination	Stakeholders	Procedure	Remarks
Right to equality, privacy, property and others	HMG, Court, Civil society	Amendment and implementation of laws and regulation	Right based issues
Social custom and women	"	"	"
Other forms of discriminations (legally, politically socially, economically etc)	HMG, Court, Civil society, Law Enforcement Agencies	"	"
Eve-teasing/sexual harassment in work and public places	Victims, family member, community, VDC and municipality civil society, police, defense lawyer, court, government attorney, local administration	Create awareness, identify the problems and joint operational plan and action	No specific law, community mediation
Molestation	"	"	"
Housewives and torture	" and the hospital	Investigation and prosecution	Civil and criminal cases on the nature and intensity of the

			situation of the victims
Widow and torture	" and the hospital	"	"
Witchcraft	" and the hospital	"	"
Polygamy/Fraudulent marriage	" and the hospital	"	"
Sexual abuses/rape	" Hospital and forensic lab	"	Criminal offense
Forceful prostitution	"	"	"
Burning death/murder	"	"	"
Trafficking	Victims, family member, community, VDC and municipality civil society, Police, defense lawyer, court, government attorney, local administration	Create awareness, joint operational and action plan, investigation and prosecution	"

Crime against Children/Discrimination: Gender based discrimination between a boy and a girl, a son and a daughter in relation to education, property employment, participation, development etc at home, society and nation.

Infanticide: child labour and exploitation (domestic, industry and transport), sexual abuse/rape (home, school and other places), child marriage, trafficking, children recruitment in conflict, kidnapping, Pedophilia, other forms of violence against children

Stakeholders of criminal offences:

- Victims/Family/Relatives/Witnesses/Suspects
- Family/Relatives
- Society/Community/Legal Community/NGO/Civil Society/Media
- District Development Committee (DDC), Village Development Committee (VDC) and Municipality
- Women Development Office
- Social Organizations/Social Worker/Psychologist/Special Juvenile Police
- Forensic Science/Hospital
- Advisory Board (Central/Regional/District/Local)
- Juvenile Justice Board (Judiciary)
- Home/Rehabilitation Centre/Community

Supervision of Institutions

- Local Advisory Board/Inspection Committee/Social Auditing
- Juvenile Justice Cycle
- Community-Apprehension-Production-Institution-Adjudication-Disposal-Rehabilitation

Stakeholders of Victim Support Schemes: Starting from relatives, peer group, community social workers, police, local bodies/administrations, government prosecution, court, hospital, educational institution, volunteer organization, psycho-social counseling, legal aid, financial and medical support, rehabilitation center/home, government institution, victim support organization, media etc.

Role of Police in anti-trafficking: Police is to prevent, detect crime, maintain law and order, peace-security and provide service in community, with fairly, finally, with integrity, common sense and sound judgment. The organization structure of Nepal police in Central Level, police Headquarter (PHQ) headed by inspector General of Police IGP and other departments, Administration, Operation, Criminal Investigation Department (CID) and National Police Academy are headed by Additional Inspector General of Police (AIGPs). Criminal Investigation Department

(CID) and its subordinate divisions/units are responsible for crime investigation, detection, community policing, women and child service (Women Police Cell). Similarly it also looks after crime prevention and community safety, INTERPOLE and Forensic Science Lab. Deputy Inspector General of Police (DIGP) heads five regional and one Valley Police Office and Senior Superintendent of Police (SSP) head fourteen Regional Police Units (ZONAL) offices. These Offices are responsible for Supervising, Monitoring and evaluating the works of the District Police Office. Superintendent of Police/Deputy Superintendent of Police (SPs/DSPs) heads 75 districts. One of the Major responsibilities of District Level Police Offices and other units including Border Police Units is Preventive and Investigative of Crime against Women and Children. Investigation division or sections are established separately in every district and other units. These units are facilitated by trained human resources.

Nepal Police with providing special training to the police personnel have established number of women and child service center and community police service centers in many parts of the country. According to the demand of the people/situation, such kinds of service centers are always in the process of further extension. UNICEF Nepal, UK DFID, DANIDA, Planted Infants, American and British Embassy and JICA Nepal have provided training for the police personnel and contributed through various means of support for the establishment and strengthening of women and child centers and community police service centers. Similarly National NGOs and other community-based organizations have supported Nepal Police in various aspects. The issues related to violence against women could be categorized according to the gravity of the cases. The police role is vital in criminal offenses whereas in the right-based and civil issues, it may not be so but even then Nepali Police has been performing varieties of services hand in hand along with INGOs, NGOs, CBOs, related to the violence against women and children.

For example:

- Creating awareness for anti-trafficking activities, rescuing, rehabilitating, investigating cases related to anti-trafficking.
- Searching, rescuing and rehabilitating the missing abandoned and orphan children
- Rescuing and providing varieties of support services to the victims of domestic violence, other abuses and victims of crime.
- Rescuing, providing varieties of support services to the senior citizen, disable

- Construction of rehabilitation centers for children, senior citizen and disable
- Provided scholarship to the victims of conflict, internally displaced people
- Initiate to raise fund for the victims of sexual abuse and prevention of child labour
- And others

The specific role of Nepal Police:

- Creating awareness for the prevention and detection of crime against women and children tuning with the demand of the society.
- Information collection regarding the probable threat of the crime, criminals
- Registration of the cases
- In the minor cases problem is resolved through community mediation
- Provide services to the victims/witnesses
- Search, arrest and prosecution of the suspects
- Liaison with the stakeholders of criminal justice
- Social Mobilization for investigation of all sort of crimes
- Networking and coordinating with government attorney, GOs, INGOs and NGOs.

Legal Mechanism: Some international and national legal instruments related to the protection and rights for the women and children.

- UN Convention for the Suppression of the Traffic in Person and other Exploitation of the Prostitution of 1944 and Final Protocol 1966
- The Universal Declaration on Human Rights (UDHR), (30 Articles) 1948
- Conventions on Civil and Political Rights 1954
- UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1991 Convention of Rights of the Children (CRC) 1989.
- ILO Convention on the Prohibition and Immediate Action for the Forced or Compulsory Labour, 1990

- UN Declaration on Victim of Crime and Abuse of Power, 1985
- Slavery Convention 1956 (Slavery Convention 1926 and amended by the protocol 1953, supplementary convention on the abolition of slavery, the slave trade and institutional practices similar to slavery 1956)
- Convention against Torture and Other Cruelty in Human or Degrading Treatment or Punishment 1984
- Declaration of Elimination of Violence against Women 1983
- SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002
- The Constitution of the Kingdom of Nepal, 1990
- Civil Code (Muluki Ain)
- Police Offence Act
- Anti-trafficking Control and Prevention Act
- Children's Act/Regulation
- Prison Act and Regulation
- The State Cases Act/Regulation
- Nepal Treaty Act

Implementation aspect in policy and local level:

- The new Anti-trafficking Bill or the Trafficking in Human Beings (Offences and Penalties) Act 1999 needs to be revised and issue ordinance.
- Much more emphasis has been given to the awareness and drafting the new legislation.
- As stated in statistics regarding the trafficking of women and girls, very less number of victims/family/civil societies have approached for lodging the First Information Report to concerned agencies/stakeholders.
- Team investigation system yet to be developed for the protection of victims and witness.
- Less initiation for the investigation of pending cases.

- Strengthening and utilization the INTERPOL system and Trans-national cross border relation.

Recommendation:

- Holistic Victim support schemes and networking
- Creating awareness to the general people and concerned agencies through media and other means
- Further extension of collaborative women, child and community police service centers
- Development of community surveillance centers in probable prone areas
- Initiation/consolidation of victims welfare fund/rehabilitation programme
- Formation of coordination committees between all relevant stakeholders
- Strengthening the networking collaboration between state agencies in the process of investigation, detection and prevention of violence against women and anti-trafficking cases
- Periodic review and evaluation

Crime against Women and Children

S.N	Fiscal year	Rape	Trafficking	Abortion	Polygamy	Child Marriage	Attention to Rape	Domestic Violence
1.	057/058(00/01)	122	92	55	75	1	35	449
2.	058/059 (01/02)	130	40	14	51	-	19	410
3.	059/060 (02/03)	157	55	15	69	2	18	569
4.	060/061 (03/04)	155	56	8	44	3	18	922
5.	061/062 (04/05)	155	63	11	57	1	20	630

Central Police Scientific Lab (CPSL) have examined 61 of Rape Cases

Statistic of Juvenile Delinquency

Fiscal Year	Type of Crime									Age		Sex		Judicial Decision				Total
	Thief	Rape	Public Offence	Possession of illegal weapons	Killed Cow	Drugs	Burglar	Murder	Trafficking	10-13	13-16	M	F	Jail	Deposit	Out in Bali	Absconding	
058/059	3	5	4	2	1		2	1		2	16	18		9	8	1		18
059/060	3	10	19	1		3		6		2	40	40	2	18	5	17	1	42
060/061	9	12	14	1		2	2	7	1	2	46	42	6	9	26	5	4	48

Conclusion: The role of present day policing has become multi dimensional that requires multi agencies (INGOs, GOs and NGOs) collaboration, cooperation and coordination to combat and prevent violence against women and children. It requires partnership to deal various issues against women and children.

The number in violence against women and trafficking further elevated in the 12 years of internal conflict of Nepal.

Civil Society's Perspective: Adv. Sapana Pradhan Malla, President, Forum for Women, Law and Development

We have been fighting against the crime of human trafficking since many years. Trafficking is a serious problems since a long time and this problem is further increasing due to conflict. Though most of the time we are saddened by the increasing violence against women there are few achievements as well which is seen due to our continuous effort against the crime. America's anti-trafficking legislation has fixed minimum standards for various countries in the world on the trafficking front. It has divided countries with trafficking problems in various tiers. Tier one is the lowest indicator of trafficking problems while tier three indicates countries with extensive problems. American state department has included Nepal in tier one category for a number of reasons such as – formulating the trafficking Bill and being involved in law enforcement actions. India, on the other hand, falls in tier two category. Chalking out SAARC regional laws on trafficking is the need of the hour.

We should also look at the Swedish model on trafficking law and discuss on addressing the demands of trafficking as well as criminalization and decriminalization of trafficking. As long as demands of trafficking are not taken into consideration, trafficking problems cannot be addressed. Punish the pimps but not the victims. State laws, policies and strategies designed to combat trafficking lack focus and conceptual clarity. The tendency to treat trafficking as a moral issue rather than a human rights violation blames the victim and does not control trafficking. Any government policy designed to combat and control trafficking must recognize this. Although migration and trafficking both involve the movement of people, migration is a voluntary activity involving the fundamental right of freedom of movement. While both prostitution and trafficking often involve sexual slavery, prostitution may involve the right of self-determination whereas trafficking necessarily involves coercion.

Shadow or alternative reports prepared by civil society organizations should be used to document and monitor the implementation of human rights instruments. Based on

these reports, concerned international bodies can require government agencies to act and recommend improvements to anti-trafficking measures. The State should implement these recommendations seriously. However, NGO should prepare shadow report giving special focus to the trafficking.

Controlling and combating trafficking in human beings in Nepal poses many challenges. Whatever challenges be, human rights of the trafficked person should be at the center of all efforts to prevent and combat trafficking and to protect, assist and provide redress to the victims. The following recommendations are based on findings made during the course of the study. These recommendations focus on: Addressing the underlying problems that allow trafficking to flourish; reforming anti-trafficking laws, creating the effective institutional mechanism; developing and refining monitoring mechanisms and creating effective rescue, support and reintegration programs for affected person.

When compared to the estimated number of women trafficked, the number of registered cases is quite low. Inadequate budgets and expertise create major challenges. Moreover, the efficiency and credibility of law enforcement agencies are questionable. Police and government attorneys fail to cooperate with one another. Poor investigation and inadequate charge sheets result in a high number of acquittals. Widespread complaints of rampant corruption in all three components of the criminal justice system are another major challenge. Even judicial decisions do not provide a consistent approach to the definition of trafficking. There are no uniform rules of evidence to establish guilt in trafficking cases. Courts have interpreted the limited shift of the burden of proof on the accused as requiring additional independent evidence to corroborate the victims' statements before the burden shifts. As such evidence is usually not available; victims are deprived of the benefit of this powerful tool. The effectiveness of law enforcement agencies needs to be improved. In how many cases have been police initiated cases? Though the existing law came for effectively combating the crime, the burden of shift does not shift if the person is a relative. But as you know relatives sell many women and children.

Article 12 of the Foreign Employment Act, prohibits a woman from going to foreign country without a guardian's or government's approval. The state is still welfarish towards women, it has still not incorporated rights based approach. It is said that it is to protect women from exploitation but women are going through illegal challenge and that is even more dangerous therefore, the safe migration strategies needs to be adopted rather than stopping women. We need to ensure right to choice and

encourage people to exercise that right. Violence is hindering peace, security and development, how can we effectively use the existing laws.

Responses:

"Nuwakot is also one of the most prone districts. The citizenship rights of trafficked women and children and Badi women and children need to be ensured. "

"If community and police can come together against traffickers we could get lot of success in combating the crime. Victims are still scared of police, how can we free them from the fear of police."

"We say that police investigation is outdated but resources are some of the problems, but we are working towards addressing these problems. We also need to bring humanly transformations so that we can build a rapport with survivors and develop a safety net."

"How to look at so many cases that are pending, what strategies needs to be taken we need to have separate discussion for these issues."

"We are also providing language training in our police trainings and attitude change training."

"Court room should be designed to facilitate the children's access as well, children's statement recording can be done differently, and we need to think of the strategies though".

"Private sector can also be a strong stakeholder against trafficking. Right to privacy needs to be ensured. Court should also ensure this right, instead of names Mr. X and Ms Y can be used."

"Victim's right to appeal needs to be ensured as well."

"Most of the government attorney are sensitive towards this issue and provide victim's the information that they can appeal."

"When the victim is absconded, sending summons is difficult, the provision of providing address has not been used and it should needs to be reactivated."

Hon'ble Kalyan Shrestha: We had an enlightening presentations form the different institutions that are working against trafficking. We had representative from some of the key institutions and it has been very enriching to hear from them.

Critical Assessment of the Judicial Responses on Trafficking Related Cases

Hon'ble K.R. Pandit, Judge, Court of Appeal & Faculty, National Judicial Academy

We are responsible to ensure justice and to ensure rights of the survivors. When someone comes to us saying that we have not been effective we need to pay attention to that kind of criticism sensitively. We as a respectable institution need to be an example and make ways for evaluation of our own work and amend it if necessary. There is no harm in doing so we will only make ourselves accessible.

In this session I would like to discuss some of the cases to understand the judicial trend of deciding cases and I would like to know form you what could be the other ways of looking into those cases.

In HMG vs. Raju Tamang, Sita Magarni reported against Raju accusing him of trafficking her and selling her in Rest. 10,000 after Sita was rescued and returned by Indian Police. Raju's statement said that he sold Sita along with his friend Prakash. Accused denied this in the court, and no statement was recorded of the victim. The court decided that the accused cannot be convicted only on the basis of police confirmation. Therefore the question arises: Why was there no argument on the fact that the India police had rescued the victim. These are the issues that needs to be argued because when we do not question such facts we are unable to provide adequate remedy.

In Kamal Prasad Sherstha vs. Mathuri Sharma/HMGN, Mathuri Sharma reported that she with her friend was sold in Bombay. Punishment under Article 4 of the existing Act was demanded. Accused denied the accusation. The Bagmati Special Court said that it was only help therefore provided 10 years of prison. Appellate Court prescribed 11 years of prison. But in Supreme Court, it was argued that victim's statement was inconsistent, on one hand she said she was taken promising of a job during the FIR however, during the reconfirmation of the statement, she said that she was made unconscious and sold. Also, the victim's friend denied of being sold though it was in the FIR. No eyewitness of the incident is present. Also the family members did not come looking for her. The burden of proof lies on the victim and she failed to

prove the crime. Therefore, the accused was acquitted. We need to ask probing questions here to understand the loopholes, why was the accused acquitted?

In *Geeta Danuwar vs. Rangeet Lama and Shimla Tamang*, Geeta Danuwar reported against Balkrishna Danuwar sold Simla Tamang in Rest. 25,000 in Bombay, after 4/5 months Simla Tamang sold Ranjeet Lama in Rest. 30,000.00 after being sold in many places, after 8 years Geeta returned infected with HIV and AIDS. Simla and Ranjeet confessed in Police. District court gave verdict of 11 years of prison for both and Rest. 43, 500 and 50, 750 Rest. find respectively. But after 8 months Appellate Court gave verdict to acquit the accused.

The reasons for Acquittal:

- The crime conducted before the endowment of the existing law.
- The burden of proof was on the victim, however, was unable to give statement in the court therefore the FIR could not be taken as a proof.
- Cannot rely on the 3 years late FIR.
- According to the government attorney, no need to appeal on the decision of the appellate court

Relevant Questions:

1. No comparisons between the Article 11 of the Traffic in Persons Act 1986 and the Chapter on Trafficking of the Country Code.
2. Office of Attorney General did not appeal in the Supreme Court in this case.

In *Ganga Bahadur Tamang vs. on behalf of Indra Bahadur Damai/HMGN, Pampha Devi* reported against Ganga Bahadur for selling her in Bombay after promising her to get her married. Victim reconfirmed her statement in the court. The FIR was filed very later almost after seven years. Also, evidence of selling her couldn't be proved. Therefore the accused was acquitted from the Supreme Court.

Relevant Question:

- Even when there was a strong evidence of victim's reconfirmation of her statement it was not considered as proof against the accused.

In *Ajay Shrestha vs. HMG/N*, the victim reported against Ajay Shrestha and his friends accusing them of selling her to a brothel after promising her to marry. She ran

away from brothel and reported to the police she was kept in a Ashram she was brought to Maiti Nepal. Punishment under Section 8 (1) and (5) was demanded. The District Court gave verdict of 10 years of punishment to Ajay and the Appellate Court approved the decision. No involvement of Ajay after returning from Sunauli, also no claim against the friends of Ajay who were involved in the crime. Therefore the Supreme Court acquitted the accused.

Relevant Questions:

- Ajay has involvement in the group that took her to Sunauli
- After returning to Kathmandu from Sunauli the victim was in the control of the same group
- Ajay could not prove that he was not into the criminal gang after the incident.

HMG vs. Hasta Bahadur Tamang, Krishna Bahadur reported against Hasta Bahadur for selling three girls after consultation with the other accused. Hasta Bahadur said that the co-accused bought him a watch and gave Rest. 1000 but do not know how much the girls were sold of. The victim gave statement that she was sold by the accused. The District Court gave verdict of 10 years of imprisonment to the accused. However, the Appellate Court stating that it was only help gave less punishment to the accused. The accused is not actively participated and also he did not know about the crime specifically and was not involved in the selling.

Relevant Questions:

1. Went along with the accused.
2. The accused gave him a watch and cash
3. How was he a helper is he did not know of the crime from the beginning
4. If he knew of the crime from the beginning and only helped than why only a helper and not the main accused?

Making Minimum Standards Work: International Minimum Standard and Implementation of Strategies adopted by HMG/N

Mr. Shyam Sundar Sharma, Joint Secretary, Ministry of Women, Children and Social Welfare

Background of International Minimum Standard

Minimum standard was first prepared in 2000 (2058) by joint initiative against Trafficking Programme (JIT), now it is being updated by the same programme. However, it is yet to be approved by the government, this is based on the standards set by UN. It is obligation of state for combating trafficking and rescue, rehabilitate, reintegrate and provide compensation to survivals of trafficking

Obligation of the State

- Principle of Non-discrimination
- Safety and fair treatment
- Access to justice
- Access to private action and reparation
- Residential status
- Health and other services
- Repatriation and Reintegration
- State Cooperation
- Human Rights Based Approach – which is universal, indivisible and inseparable

Underlying principles

- Human Rights and Dignity
- Obligation of the State
- Trafficking denotes not only sexual exploitation, but also labour exploitation and organ transplantation
- Heavy fine and prison and compensation
- Trafficked persons are not criminals
- Obligation of receiving or transit countries
- Legal aid
- Security warranty in movement and while returning home country
- Protection of children in their specialty

- Avoid Discrimination and Inequality

Areas of NPA of Trafficking

- Policy, Research and Institutional Development
- Increase awareness among stakeholders
- Maintain national database
- Strengthen coordinating role of MWCSW
- Legislation and enforcement
- Promote and assert legal rights
- Enhance legal enforcement to ensure justice for the victims
- Legal awareness among stakeholders and vulnerable groups
- Awareness Creation Advocacy, networking and social mobilization
- Implement awareness programmes
- Increase awareness through media
- Improve anti-trafficking networks
- Priorities the issues of trafficking
- Create sense of responsibility
- Health and Education
- Promote preventive and curative health education
- Provide preventive and curative health services
- Increase school enrolment and create educational awareness
- Income and employment generation
- Increase the economic status
- Rescue and reintegration
- Intercept and rescue
- Rehabilitate and International level
- Monitoring and Evaluation

- Measure the progress of NPA
- Measure the progress of anti-trafficking initiatives
- Ensure a gender sensitive approach to implement NPA

National Policy on Trafficking

- Public awareness campaign in large scale
- Remove laws that discriminate against women
- Mobilize GO, NGO, INGOS and Pvt.
- Cooperation with bilateral and multilateral donors
- Protect human rights of women and children and culprits will be made to pay heavy fines
- The traffickers and exploiter of women and children will be made to pay heavy fines
- Control HIV/AIDS
- Alleviate poverty and provide employment opportunities to women
- National Coordination taskforce and DTF will be formed Provisions for vocational education
- Rehabilitation programme for rescued girls and women

National Committee and Task Forces

National Coordination Committee

- 16 member committee comprising GO, NGO representatives
- Chaired by MWCSW Minister
- Policy guidance and overall coordination is the main TOR

National Task Forces

National Taskforce

- 16 members taskforce comprising GO, NGO and representatives

- Chaired by MWCSW secretary
- Joint secretariat of MWCSW, foreign affairs, home affairs, law justice and parliamentary affairs, labors and transport management, health, education and sports, national planning commission, representative of police HQS, NGO, ILO, UNICEF, and Undersecretary of MWCSW is the member secretary.

Terms of Reference of the NTF

- Organize orientation and seminars
- Provide guidelines and directive to C/DCWB and taskforces
- Short and long term action plans
- Coordinate governmental and nongovernmental activities
- Make necessary arrangements for realizing commitment made at international and regional level
- Effective enforcement of relevant laws and regulations
- Publication and coordination relevant data and information

District Task Forces

Districts:

- | | |
|-------------------|------------------|
| ▪ Nuwakot | ▪ Jhapa |
| ▪ Kailali | ▪ Mahottari |
| ▪ Dang | ▪ Lalitpur |
| ▪ Sindhuli | ▪ Sunsari |
| ▪ Nawalparasi | ▪ Kathmandu |
| ▪ Sarlahi | ▪ Sindhupalchowk |
| ▪ Chitwan | ▪ Makawanpur |
| ▪ Morang | ▪ Banke |
| ▪ Parsa | ▪ Rasuwa |
| ▪ Dhading | ▪ Ramechhpa |
| ▪ Kavrepalanchowk | ▪ Dhanusha |
| ▪ Gorkha | ▪ Kaski |
| ▪ Udaypur | ▪ Rupandehi |

Nineteen members Task Force Comprising Chaired by DDC Chair, CDO (VC), LDO, DEO, DHO, DADO, D Land Revenue, Cottage and Small Industry, Government Advocate, Chief District Police, Mayor/Chair of Municipality/VDC, Chamber of Commerce and Indus, Women's Association, Girl High School Principle, NGO Representation, TU Campus Chief, DCWB, Ad Bank, and WDO.

Terms of Reference of DTF

- Identify trafficking affected VDC and constitute task force
- Maintain records of over 10 yrs children under the risk of trafficking
- Implement programmes, run awareness campaign, coordinate programmes of NGO and local bodies
- Monitor, supervise, and evaluate activities in the district
- Set up emergency fund by local resources
- Send information under threat of trafficking
- DTF bordering district are required to discuss with counterpart
- National NGO required to consult with DTF for launching programme

VDC/Municipality TF

- 12/13 member taskforce chaired by chief/mayor of VDC/municipality, secretary (VDC), women member of VDC, representatives from red cross, chief of health center, local police chief, local bank, women health workers, chief family planning prog. local chamber of commerce and industry
- Programme initiation, formulation, implementation, coordination and monitoring within the VDC/Municipality

WDO as anti-trafficking focal agency

- District focal point for trafficking, gender, children and local agency of MWCSW
- Member secretary of district task force
- Member secretary of DCWB and child welfare officer
- Programmer, coordinators, facilitator, resource person, monitor, evaluator, financier, in the district

Expected Role of DTF

- Programme coordinator, formulator, implementation, evaluator, monitor, reporter
- Social, mobilizer through civil society
- Reporter to Ministry and National Taskforce
- Resource Net worker, financier, borrower
- Coordinator and facilitator to district lien agencies, local bodies, and civil society
- Collaborator with judicial and legal procedure closely working with lawyer, police and other legal authorities for providing justice to the victims

Changing Role of DTF

- All DTF must be activated through programme, project and other activities
- Composition of DTF can be reviewed to make more effective
- TOR of DTF should make more wider and intensive
- Probably DTF should expanded in anti-trafficking must be increased in all probable district

Constraints of DTF:

- It is a representative committee without fulltime member except WDO
- Transfer system is also disturbing the effectiveness of DTF
- Inadequate awareness and willingness to work in trafficking among the members
- Team building process is not yet matured
- Less programmes to DTF
- Weak linkages between and other district level programmes and agencies
- Trafficking issues is less discussed among district office chiefs during staff meeting, programme consultation, formal meetings and gathering and informal discussions
- Less involvement of DTF in judicial or legal investigation process

Conclusion: Combating trafficking is very much time consuming and complex activities. It should be address through effective mechanism such as gender mainstreaming, gender management system, gender responsive governance, institutional arrangement and TOR should be reviewed

Relevance of victim/witness Protection Scheme in Criminal Justice system particularly in Trafficking Related Case

Mr. A.F. Hassain Ariff, Former Attorney General, Republic of Bangladesh

Rights of the citizen are protected through justice system. In criminal justice system the offenders are brought into justice to face the consequences. Amendment in laws is brought to update the criminal justice system to address the present problem. Violence has increased in society; in Bangladesh there are laws to protect victims from abuse. Present situation has taught us that the laws need to be amended to meet the situation or redress the situation. Firstly, FIR is lodged to complain, after lodging a complain police starts investigation and makes a visit to relevant places record statements; he may submit the charge sheet. Prosecution starts the victim's remain at the corridor when the name is called she inters the court trembling, and gives information 2/3 years old and may not be able to furnish exact information. This is a general scenario of our persecution fluctuation. Witnesses are important element for justice and conviction. In Bangladesh, many cases are lodged in police station but how many offenders are traced out, how many charge sheets come to the court or result in conviction. In 100 percent registration, the convicted cases may be of 6 percent. This situation needs change in attitude of law enforcement agencies.

There is a tendency that a judge has to act on the material evidences. They can't act on their whims. The role of the law enforcement agencies is important to correct several flaws in our system. As a result of the discussion and consultation with law enforcers it was raised that witness requires protection, including education, legal counseling etc. Other side of the prosecution is the offender. The offenders are usually organized and systematic. These are dangerous people and standing against them to report about them needs lot of guts. It calls from a supporting environment. In a murder case the accused was a son of a powerful man, and he used to bring intimidating people in the court to harass the victim's side. Witness was consistently threatened; the witness was brought by the victim. When it was realized that the witness and the victim were scared, these people were sent out of the court, however, even after the case, the witness was hounded and he was confined to fear of those people.

A system needs to be developed that a witness is ensured safety in judicial system. A victim's evidence comes first, except in murder where the witness is the important evidence. The offender tries to locate or dissociate the witness. During Investigation- so and so is witness; name of the witness becomes known to the offender, law enforcement agencies gets their name who have witnessed the evidence. The investigation officers go to the houses around it, their names are forwarded to the prosecutor in the charge sheet. It is for the prosecutor to further the matter; prosecution needs to see that a offender is not unfairly brought to the court. A witness should feel that he is important and he is vital to criminal justice system to ensure fair trail, interaction with the witness of the lawyers and GA is important. Psychological boost up is important, the trust that the offenders will not assault me or that I will be provided support needs to be there. Whereas the offender needs to feel that I have contributed to violence in the society. In Bangladesh women are threatened not to complain or not to be a witness not to say the truth. When the offender goes scot free, they are free to commit the offence again and again. Since this is a trans border problem a common mechanism acceptable to all the country is needed. Even if a offence takes place in Dhaka and the offender is in Delhi we need to build mechanism to punish the offender in Dhaka. This calls for regional cooperation from the SAARC countries.

There are two opinions, focusing on trafficking- providing protection to witness with a regional framework and/or bilateral framework. A regional forum is an important solution; bilateral cooperation may not address the regional issue. If there is only a bilateral approach it creates difficulty in approaching the law enforcers the, but if there is a common approach under the SAARC convention a mechanism could be built. With vision to provide regional remedy against the crime, a Victim/Witness Protocol has been drafted nationally in most of the SAARC Countries and this has taken a shape of regional Protocol. This protocol needs to be adopted to provide relief to the victims no matter where the crime is committed. Thank you.

Concluding Sessions

Evaluation and Concluding Remarks from District Judge

Hon'ble Prabha Basnet, District Judge, Patan District Court

This programme has been excellent, I felt that I have benefited from this process. The time is fast and world has become global and has become fast, with this legal field is also progressing. We have been affected by culture, norms and religion, however we

need to be guided by rights. Now I think the need of such training is even more to keep up with time and its development. Women's participation in such training is equally important. I feel that as judges we also need to learn and we also need to be updated and this kind of training fills that knowledge vacuum and it also provides a platform for us judges to discuss on the problems that we face in the court or discuss on some of the pressing challenges. Many times we cannot share either because of the time constraint or because of the lack of environment that such discussion demands. I am really happy that the National Judicial Academy and UNIFEM has initiated such process and I feel that it needs to be continuous.

Hon'ble Shambhu Bahadur Karki, District Judge

Its important to understand why this programme was organized. The objective of the training was to support and enhance what we have been doing. Its also to learn how are we doing, what are we doing, is this the way that we should do it or do we need to change the ways and what needs to be done. How can we provide due justice? And I feel that this training have been very successful in stirring a emotion among us. I think all of us also felt enriched by the experiences shared by the Bangladeshi, Indian and Nepali resource persons. We got an opportunity to visit ABC Nepal, it touched us, we felt that we need to do more than what we are doing. We are also asking ourselves are we really only focusing on punishing criminals and not looking at the need of the survivors, why aren't we attentive towards due justice for survivors ensuring their right? Justice is practically and sensitively interpreting laws. Law is a stick, how to use that stick is a prerogative of a judge. Also training or workshop should not be tedious, it needs to be interactive. And I feel that this programme was very successful. I believe that we were sensitive but we have become more sensitive after this training and we have benefited hugely. I would like to thank NJA and UNIFEM for creating this space for us. I would like to urge the organizers to repeat such trainings and reach the unreached judges.

Concluding Remarks from NJA

Hon'ble Kalyan Shrestha, Executive Director, NJA

Firstly, I cannot stop myself from thanking all of you who have made this programme a successful event in terms of the quality of discussions that we had and in terms of the maximum use of what was delivered in the sessions from the resource persons and in terms of your commitment for gender justice. I would like to thank all the district judges for their active participation and contribution. I would like to thank the

resource persons who have come from the region and the resource persons from Nepal. I would like to thank UNIFEM and Aruna ji and Archanan ji who have been with us through out the training. I would rally like to thank UNIFEM not only for the financial support without which we would not have been able to conduct this training but also their moral support and guidance. I would like to acknowledge the support that FWLD has made and especially Salina ji who have contributed in every step. I would also like to thank my NJA team, Rajendra ji, Gyanendra ji and everyone without whom this event would not have been as successful. Lastly, I hope that UNIFEM would extend us their support in replicating such programme and that we can reach more judges for gender justice.

PART TWO

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PART TWO

**South Asian Judges Workshop on
Combating Trafficking of Women
and Children**

1. Preliminaries

1.1 Background

Trafficking in persons, especially women and children has been a serious problem in Nepal. Transnational as well as internal trafficking takes place in Nepal for forced prostitution, circus, forced labor, and child-soldiers among many. Poverty, gender discrimination, illiteracy, and lack of employment and educational opportunities are some of the primary factors associated with trafficking. According to current estimates, 5000 to 7000 women and girls are trafficked every year, ending up as sex workers or domestic servants, primarily in India and Middle East. Approximately 200,000 Nepalese women and girls, reportedly sold for 25,000 to 50,000 rupees, are employed as sex workers in these countries. Trafficking in persons in any form of exploitative work violates number of human rights of the victims, guaranteed by various international human rights instruments. Most women in sex work suffer abusive working conditions. In many cases, the victims of trafficking return home with HIV/AIDS and other diseases. Even if they are not infected with HIV/AIDS or other sexually transmitted diseases others presume they are infected and consequently their families and the rest of the society neglect them. Trafficking is clearly a significant national issue, but the number of cases reported in the courts compared to the estimated number of women and girls trafficked is extremely low. Rehabilitation programs and transit homes for the victims of trafficking are woefully inadequate. Although, government, NGOs, INGOs, and other stakeholders have taken several initiatives to address the crime, trafficking still remains a serious concern in Nepal. Apart from the root causes that aggravate trafficking, ineffectiveness of law and enforcement mechanism are some of the reasons that trafficking persist. FWLD and UNIFEM SARO conducted a study on "the effectiveness of the existing laws and institutional mechanism to combat trafficking in women in Nepal." The study indicates that even though it is estimated that between 5000 to 7000 girls are trafficked from Nepal to India each year, the crime report registered at the police department shows that over the last eight years the number of trafficking cases filed has not exceeded 150 a year. Clearly these numbers reflect a failure of the system.

The cause for minimal number of reporting is due to intimidation and harassment during the case proceedings, lack of victim protection mechanism, lack of confidence in prosecuting agencies, lack of an effective law, etc. In addition coordination between government attorneys and police needs to be strengthened. In 70 percent of trafficking cases, the police submit the investigation report to the government attorney on the 25th day (the last day of the submission of the investigation report in court). This gives very less time for government attorneys to prepare a charge sheet. And further leads to ineffective argument resulting to high unsuccessful ratio of the cases. The study identified that in 23 percent of reported trafficking cases, the government attorneys did not appear during the hearing. Similarly, it is found that only in 5 percent of trafficking cases, the government attorney has given direction to the investigation officer. This resulted in the acquittal of the accused. The study identified several problems with the adjudication system. At the trial level, cases are plagued by insufficient evidence, excessive delay in the court process and non-execution of judgments. Among the many issues, the study identified lack of awareness on gender issues, lack of conceptual clarity on trafficking issues, lack of skilled human resources, corruption, political pressure, lack of coordination among police, government attorney etc. were some of them. These problems have lead to insensitive treatment towards the victim as well as inefficient and ineffective role of the enforcement mechanism to punish the traffickers and provide justice to the victims. It is clear that, skilled and sensitized human resources are imperative towards effectively addressing the crime of trafficking.

In this context, the National Judicial Academy which is already involved in training judges on gender justice conducted a three days training from Sept 23 to 25, 2005 for South Asian Judges on Trafficking. High court judges from Bangladesh, India, Nepal and Sri Lanka participated in the workshop. The report includes the major areas that were discussed in the workshop.

1.2 Introduction

National Judicial Academy (NJA) organized a three days South Asian Judges Workshop on Combating Trafficking in Women and Children. The organization of the workshop was from 23rd – 25th September 2005 at Dwarika's Hotel, Kathmandu, Nepal with the support from UNIFEM. Upon NJA's request Supreme Court nominated the Judges of Court of Appeal as participants. The total participants were consisting of 20 judges in which five participants were representing from Higher Court of India, Bangladesh and Sri Lanka. The workshop was divided into inaugural

session, paper presentation with discussion sessions, countries perspectives presentation, penal discussions and closing session. The workshop was interactive and participatory in nature. The workshop consisted four sessions a day. One and half hour was allotted for each session, starting at 09.00 am and ending at 04.30 pm. Tea/coffee and lunch break was arranged during session's intervals. At the end of the program a questionnaire consisting of 15 questions were distributed to the participants with a view to evaluating the workshop. Overall responses from the participants were quite satisfactory.

1.3 Objectives

- To understand the crime of trafficking as a gender issues and as a issue of violence against women.
- To share information on the international human rights instruments, declaration as well as the national laws and policies in relation to trafficking.
- To understand the mental health impact of trafficking and encourage sensitive judicial response.
- To discuss on the conceptual framework of trafficking for effective judicial response.
- To share national and international best practices addressing the crime of trafficking and to share country perspective on trafficking.
- To initiate regional judicial response against trafficking.

2. Inaugural Ceremonies

The inaugural ceremony was commenced with registration of participants. Justice Mr. Kedar Prasad Giri, Supreme Court presided over the inaugural ceremony. The Chief Guest Right Honorable Chief Justice Mr. Dileep Kumar Poudel inaugurated the program. In inaugural ceremony, Right Honorable Chief Justice Poudel, Justice Kalyan Shrestha, Justice Kehsari Raj Pandit, Court of Appeal from the NJA and Ms. Chandni Joshi from UNIFEM had delivered their remarks on the organization of the program.

The inaugural session was followed by a play on experiences of a trafficked woman. A playgroup led by Ms. Mausami Sen presented a play reflecting complex problems a trafficked woman faces. The play highlighted the problems in justice system from a victim's perspective. The issue of stigma and discrimination, the issue of double victimization during legal proceedings and absence of some fundamental rights of the victims were raised through the play. The play came to a close after the victim screamed out questions for those who are responsible for ensuring their rights? "Where is justice? How can I get it? Who would give me the justice? Supreme Court justices and Attorney General along with other higher figure of the Nepalese judiciary had attended the inaugural ceremony of the workshop.

3. Remarks

3.1 Remark by Right Honorable Chief Justice Dileep Kumar Poudel

Honorable Chairperson,
My Colleague Justices,
Honorable Justices from SAARC Countries,
Distinguished participants, Ladies and Gentlemen

It is a matter of great honor and pleasure to me to have such an opportunity to be the chief guest and address you at this inaugural session of a three-day regional workshop on "Strengthening Law and Law Enforcement Mechanism in South Asia to Combat Trafficking of Women and Children". At this auspicious moment, I would like to extend my sincere thanks to the UNIFEM South-Asia Regional Office for supporting

this workshop and particularly to the National Judicial Academy (NJA) for organizing this regional workshop in Kathmandu.

Today, Justice from India, Bangladesh, Sri Lanka and Nepal have been assembled here for exchanging mutual experiences and sharing ideas through extensive, discussion on this pertinent topic. This is undoubtedly a great event for the judicial community in the SAARC region. I consider this event as an important one because it will be instrumental to bring justices and legal luminaries together in one platform to discuss and exchange ideas and sharing experiences on wide range of issues related to human trafficking.

In my opinion, trafficking in human being is a dreadful crime that violates the basic human rights of the victim. It is also a crime against humanity. Over the past decades, trafficking in human beings has been increasing enormously. No country is immune from this malady. Due to economic disparity, illiteracy and unemployment, children and women are being trafficked day by day. The tendency shows that victims are moved from poor economic environments to search brighter opportunity. This pattern starts at the domestic ground and expands from regional to global levels. According to the statement of the United Nations Office on Drugs and Crime, the trafficking in human beings is not confined to the sex industry. Children are trafficked to work in sweetshops as bonded labor and men work illegally in “three-D” jobs-dirty, difficult and dangerous. A recent CIA report estimated that between 45,000 to 50,000 women and children are brought to the United States every year under false pretences and are forced to work as prostitutes, abused laborers or servants. It is also pertinent to cite the UNICEF report that estimates more than two hundred thousand children are enslaved by cross-border smuggling in the West and Central Africa. In my opinion, it is a stigma to whole human kind. It is said that in the world, there are about seven hundred thousand to two million people mainly women and children who are being trafficked every year. About ten million trafficked people, predominantly women and children, are living in subhuman conditions. As reported, human trafficking is the third largest illegal trade in the world that makes annual profit up to five billion to seven billion US dollar after drugs smuggling and gun running. The joint effort in international as well as national level needs to combat such types of inhuman act.

The Constitution of the Kingdom of Nepal, 1990 has guaranteed the “Right against exploitation” under Article 20. “Traffic in human beings, slavery or force labor in any form is prohibited and any contravention of this provision shall be punishable by law” –the constitutional provision guarantees. To combat against human trafficking and raise socio-economic status of the victim, the policy should be focused on the

prevention of crime and their protection. The rehabilitation of the victims is also vital for socialization to them in the community. Considering it as a serious crime, many legal provisions have been set in Nepal to prevent such type of crime. The Civil Code, 1963 makes it as a serious offence. The Children Act, 1992 has also prohibited employment of minor children and any form of exploitation and trade of them. The Human Trafficking Control Act, 1986 prescribes severe sentence for the offence of trafficking, which implies extra-territorial jurisdiction. From the very inception, Nepali courts are delivering decisions in favor of human rights of victims especially, the women and children. As judges, we have to be pretty much aware on these types of problems.

On this occasion, I would like to state that Nepal has ratified more than sixteen international conventions relating to human rights and against the trafficking in women and children, such as the Universal Declaration of Human Rights, 1948 (UDHR), the Convention on Elimination of All Kinds of Discrimination Against Women, 1979 (CEDAW), the Convention on Right of Child, 1989 (CRC), the UN Convention for Suppression of the Trafficking in Persons and of the Exploration of the Prostitutions of Others, 1949 etc. Besides, Nepal has shown its serious concern on women and children involving declarations like, Beijing Declaration and Platform for Action-adopted by the Beijing Conference, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons etc. I am of the opinion, it is the suitable time for making multilateral efforts to combat trafficking in women and children. The legal provisions should be formulated and strengthen as a regional action plan for combating collectively. I believe the adoption of SAARC Convention on Preventing and Combating Trafficking in Women and for Prostitution on January 5, 2002 at the Eleventh SAARC Summit held in Kathmandu is a timely initiative in combating and preventing trafficking in human being.

As an organized crime, human trafficking has transnational impact. It does affect the whole global governance system. From the judicial perspective, it creates a number of human rights related problems. Judges of the 21st century have to be more serious in deciding cases concerning human trafficking and particularly women and children trafficking. Bringing the perpetrators within the ambit of criminal law is the main concern of the legal system. Law enforcement officials need more efforts to tackle with this heinous crime. Furthermore, we have to join hand in hand for developing tools against the atrocious crime against humankind and establish regional mechanism to combat the menace. The strong determination of the government, the judiciary and the civil society is essential to stop these crimes. I feel it is necessary to the SAARC countries to have to amend national laws within their respective

countries in line with international human rights instruments. It is probably, the right time to work on this issue so as to promote positive action in favour of social victims. Enactment of laws alone is not the ultimate action to combat the problem, the strong judicial awareness should also be generated.

At last but not the least, I hope this workshop would serve the purpose of mutual cooperation in the area of preventing human trafficking in the South Asian region. The wrongdoer must be punished and the victims must be protected and rehabilitated in the respective jurisdictions. For this, we need to improve our traditional legal regime so as to ensure justice to the society. I wish every success of this workshop.

Thank you.

3.2 Key Note Speech by Justice Kalyan Shrestha

“First of all, I would like to welcome all the justices of the Superior Courts of the region who have come to participate in this workshop.

Probably this is the first time that judges from the region are holding discussion on combating trafficking in women and children. Though the issue is pervasive since a long time, however, it still has not get the space in our discussion as a serious issue.

Recognizing trafficking as an issue and pursuing for ways to combat it as a part of violence against woman is in itself an important step forward for us. For judges, this is also an opportunity to throw light on their work in order to understand what is doable and what is not. In order to see the relevance of the issue for the Judges, let me refer to an old story from the Upanishads in which a night man was hired by the villagers to protect them from crimes. He would walk through the lanes with his metal lantern open only at the front so he could see whatever the lantern casts its light on. No rays of light fell on the person who carried the lantern. To see the watchman, he had to be asked to turn up the lamp back onto his own face. We too are like the watchman. Our eyes, ears, tongue, etc. are all facing outwards, looking at and comprehending the world around us. Yet, if we wish to seek the eternal truth, the cosmic wisdom, it is necessary to turn the lamp back on ourselves, look and find the source of the light within us.

Most of the time, we ask others to change, seldom revisiting ourselves for change. And such a workshop could serve as an opportunity to revisit our work and the mechanism within which we work in the light of the mounting problem of violence against women including trafficking.

Regarding the nature and magnitude of the trafficking crime. A heartening news item appeared a couple of days back in one of the dailies in Kathmandu which carried a saddening story about a gang of ten traffickers who engaged in trafficking as many as hundred and fifty (150) women and children over ten years from Nepal to India for their profit. Shockingly interesting was when they said that they were the ones who also participated in rescuing and repatriating the victims. They traded in human beings and ironically brought shame to those who with bonafide mission involved in rescue operations.

Why many forms of violence against women including trafficking permeate throughout all ages and all over the world despite efforts at national as well as international levels? Is it because men partake in all such exploitative activities, hold mostly the positions of influence, and hence trivialize the experiences of victim women? Is it because trafficking is understood as equivalent to prostitution, and the latter is considered as one of the oldest professions? Is it because trafficking takes place in a significant area of economic activity, which is annually around ten billion dollars trade. Which is also the third after arms and drug trade? Can it be taken as a natural outgrowth of the globalization process creating more chances for migration from one place to another? Such questions can be added to a long list. To my mind, central to all these issues is the issue of equality and non-discrimination.

Equality is the foundation upon which all other rights are built. Without equality, other rights can only be symbolic, devoid of any true meaning. Seen from this parlance, trafficking is the most blatant form of violence against women, which stem from inequality, discrimination, disempowerment, and the crime continues to exist nurtured by culture of patriarchy and conspiracy of silence to which judges must have serious concerns.

I believe, women are exploited not because they are weak but because they are disempowered, which is the result of inequality. Often people have argued that the state of disempowerment is the result of underdevelopment, hence the concerns of women would be better handled when development will advance. But for me, they cannot be asked to wait any longer in order to be equal. Even development and growth does not help in a situation of disempowerment because the benefits of growth will not trickle down to the benefits of disadvantaged women in the absence of empowerment to enjoy them. Should there be a choice between empowerment of women and development, I would definitely prefer empowerment agenda to development opportunity though they are inter-related.

Society expects a great deal from its judges, the expectations exist because judges have such an important and crucial role in people's lives and can affect their livelihood, their safety, their freedom and their humanity. We must respond to this large expectation.

People have placed us in honourable positions but should not we remember that the honour attached with our positions stem from the honour and dignity of our people for the honourable services that are expected from us to the people to whom our sources have to be consecrated. When we as conscience keepers of the society stand as silent spectators and do succumb to our narrow personal interest or biases based on our personal traits like sex, colour, creed or group, and trivialize the services and concerns of the huge group like women, then we risk, we forfeit our honour.

I understand, laws and legal authorities are not simply the legal instruments but they are the service documents which could be judged from performance indicators in terms of how much services are practically delivered to protect, defend and promote the causes of our people. Then obviously this is an accountability issue. Whose accountability is it to explain why trafficking could not be combated successfully. The state will have to explain why they could not create situations of equality and uphold sense of security and justice amongst women and children. Obviously the government and society which do not ensure equality and justice have no reason to expect allegiance from their people. The accountability of upholding equality and justice can be discharged only through a collaboration of all the key players of the state mechanism, of which judiciary is a part.

When we do not take the issues of violence against women seriously or trivialize their suffering and fail to redress them then we have to accept blame for our failures. At this juncture, the problems faced by women require a careful and realistic understanding by judges. Often I am afraid, whether we fully comprehend the issue, from the perspectives of those who are subjected to suffer. Unless we try to see things objectively we can never ensure fairness, but the fact is, although we try to see the things as objectively as we can. Nevertheless, we can never see things with eyes except our own as Justice Cardozo once said. Then to be able to see, it is important to walk a mile in another person's shoes. As it is possible to grow up in the same family, neighborhood, school and yet have totally different experiences depending on whether you are a man or a woman. The way to resolve differences therefore is not to suppress those who are different but to notice them and not try to see our reflection in them (Justice Claire L'Heureux Dube). To my mind justice is not just what I personally believe in, but what the people need. Unless we see the problem as our own, and internalize the problem to solve from the perspective of those who need our

services most, there will be a big difference between what we deliver and what the victims receive. Equality is the bridge between our knowledge of different realities and our actions that integrate those realities.

From this perspective, I can see the relevance of the issue combating trafficking in women and children for judges because we live in South Asia, which still continues to be a hot spot for many instances of violence against women. South Asia as a whole is conflict prone and the impacts of conflict have been more intensive on women and children resulting in displacement (80% of the refugees are women and children), rape, genocide etc. Young girls are particularly at risk. 60 percent of the trafficked in South Asia are minor girls. The region is most hard hit by poverty. We must understand the relationship between poverty and gender. More than the economic state of affairs, feminization of poverty has affected women subjecting them to victimization of violence. It is often said poverty is like the heat, you cannot see it, you can only feel it. So to know poverty, you have to go through it. Perhaps women can better understand this. Behind this is the backdrop of disempowerment which is equally an issue for Judges.

In retrospect, South Asian Judiciaries in the recent years have made significant initiatives through progressive judgments in upholding gender justice in their respective jurisdictions, learning through each other's experiences and creating more congenial environment for gender justice. The Supreme Court judgments in the case of Vishal Jeet v. Union of India (1990) and Gaurav Jain v. Union of India (1997) in which Supreme Court of India issued directives to the Union and state governments to study trafficking in depth and prepare a national plan to address the problem are the testimony how seriously the courts are willing to respond to the call of the problem. Such initiatives are welcome steps, which could be reflected in other jurisdictions also. The Supreme Court of Nepal also has given many directives to uphold gender equality, be in the case relating to marital rape, or property right. The court whittled down discriminatory legal provision, which allowed lesser or nominal punishment for a rape of a prostitute, which was in itself the legacy of outrageous practices that continued from the distant past. Recently, the Supreme Court has instructed the government to make provision for the citizenship of the children of Badi community who are traditionally sex workers, whose father is unlikely to be traced. Such initiatives are taken in other jurisdictions also. Even so, I would humbly submit, they are far below than what are needed, they may be only a storm in a teapot. Not much benefit is really reaching out to our women and children through our services.

I am particularly haunted when I hear thousands are trafficked each year from one country to another, yet not many reports are made. I have never heard that a mission is constituted to rescue and repatriate the missing women and children from other jurisdiction through a diplomatic channel. Countries of destinations or transit are also not doing their due in terms of their responsibility according to the international legal instruments. Rescue operations are made casually rather in an unsystematic manner. Repatriation is made either forcibly or without looking into the need for their contribution to bring the perpetrators to justice. Such activities have been a deceptive way of relieving the perpetrators from their criminal liability. The number of disappeared women and children from the region is mounting but our sensitivity is not matching the problem. We would have decided many cases relating to trafficking, rape and other forms of violence, but seldom we might have inquired into what would have gone in the reintegration process of the victims in their families or in the society. We wish we rehabilitate them as if they are the past criminals as other members look at them. The punishment we inflict on the perpetrators are seldom adequate to address the impacts of crime on the victims which continue even after decisions are made. Whether we would have requested our governments to set up a commission for the region which would facilitate rescue, repatriation, rehabilitation and reintegration. The SAARC Convention on the issue of trafficking could have made important contribution in combating this problem, once that would be put in place but ironically that is yet awaiting for the completion of ratification process in order to be operative. I feel sad when I have to say the remaining ratification is only from Nepal. I hope this part will be completed very soon. In order to address the problems relating to violence against women and trafficking, more holistic approaches need to be taken, to which, I believe, Judiciary can make a search for its potential role. We must see this issue as a human rights issue. Human rights are important because they are universal in character which means they are not limited to any particular sex or sect, neither limited to any national. This dimension of right should generate hope for destitute, marginalized and victimized women to live a dignified life as any respected human being, to name even as a judge. Their sense of equal worth has to be honoured by all, and the reason that they were subjected to trafficking should not constitute any ground for discriminatory behaviour. Similarly, globalisation was meant for enhancing the capability of the people to enjoy their freedom in wider context, but instead of universalisation of human rights, with proliferation of trafficking, violations of rights are universalized more than the rights, and instead of globalisation of opportunities, exploitations are globalised. These situations must be reversed.

Ensuring gender justice, to my mind, is not limited to regular disposal of cases but they should include the effective implementation of the constitutional framework of equality through legal instruments and definite action plans, with immediate applications, which cannot be waited for any time in the name of progressive realization strategy. I consider this is partly our social accountability to ensure justice. Though many discriminatory legislations are annulled, new legislations have substituted them at the instances of judicial interventions, yet many are yet to be modified to tune with the need for equality. I believe, discriminations persist more in our mindset than in our laws, so committing ourselves towards equality and justice is more important than the equality legislation. When other actors are not sufficiently sensitive to respond to equality issues, judges can serve as equalizers. Our people have never resisted the judges with this role. I agree with Justice AS Anand of India, when he says a socially sensitized judge is better statutory armour in cases of crimes against women than long clauses of penal provisions containing complex exceptions and provisos (Justice AS Anand).

With this in mind, the workshop has been organized to enhance the understanding among the judges of the region about trafficking. This workshop will give avenues to discuss the problems and prospects of the issues commonly shared by us in our respective jurisdictions, and to embark on a strategic measure to combat this problem. This can pave way to constructive co-operation between the judicial and law enforcement bodies at the bilateral as well as regional level for the effective implementation of SAARC Convention as soon as it would be put in place. I hope this workshop can help us harmonize our viewpoints and methodology to address this problem.

Before I conclude, I must extend my sincere thanks to Ms. Chandni Joshi and the entire team of UNIFEM for their creative and constant support to have this workshop without which it would not have been possible. I specially pay tribute to her and the UNIFEM for their constant support for the judicial education on equality issues since long. For me, trafficking and violence against women is not merely a legal issue, but also an education issue, which frees from our inherent biases and helps in building our capability to understand the issue and implement them, which is ultimately not limited to the Judges themselves but ultimately the benefits of which will have to reach out to the people. I am waiting for a time when laws will not be made understood and implemented in male perspective, but in human perspectives where laws will carry better reasons for universal compliance than class defiance or reluctance. I consider this workshop will take us to that direction.

Lastly, we must be reminded that the burden we would like to lighten must not be like the one who sits on other's back and yet assures that he is sorry for her and try to lighten the load by all possible means – except by getting off the back.

3.3 Welcome and Objectives Highlights by Justice Kesari Raj Pandit, Court of Appeal, Deputy Executive Director, NJA

Hon'ble Chairperson

Rt. Hon'ble Chief Justice, Dileep Kumar Poudel

Hon'ble Minister of Law, Justice and Parliamentary Affairs

Hon'ble Justices of the Supreme Court of Nepal

Hon'ble Justices from Bangladesh, India, Sri Lanka and Nepal

Ms. Chandni Joshi, Regional Programme Director, UNIFEM SARO

Distinguished guests, Ladies and Gentlemen

It gives me immense pleasure to be here and welcome the members of higher judiciaries of the SAARC Region. The presence of Rt. Hon'ble Chief Justice has inspired us for meaningful deliberation in the conference entitled "South Asian Judges' Workshop on Combating Trafficking of Women and Children". The National Judicial Academy (NJA) feels honored and privileged to welcome the Rt. Hon'ble Chief Justice and Hon'ble Justices of the Supreme Court of Nepal. Also, I would like to extend my warmest welcome to the Hon'ble Justices from different parts of the country and from outside the country. The presence of all other distinguished guest and luminaries has significant importance to make this conference a grand success. Your presences itself is a testimony of common concern for the protection and promotion of human rights and strengthening gender justice in this part of the globe.

We are initiating an important process of conducting consultations with justices' from India, Bangladesh, Nepal and Sri Lanka in addressing the crime of trafficking in partnership with UNIFEM. I would like to extend sincere thanks to UNIFEM and Ms. Chandni Joshi, Regional Programme Director of UNIFEM on behalf of NJA for her support, co-operation and valuable initiative. UNIFEM's partnership with the NJA in the past has proved to be fruitful to sensitize Judges on gender justice. I believe, we are heading towards ensuring dignified life of the people, in particular, of exploited, abused and disadvantaged women and girls in the South Asian Region.

I would like to take this opportunity to mention a few words on the National Judicial Academy. Established under the provision of the National Judicial Academy Ordinance, 2004, NJA aims at providing continuous legal and judicial education to

the judges and judicial personnel including prosecutors and lawyers. Realizing that the judicial education is an indispensable means for enhancing fair and efficient administration of justice, the NJA has focused its programmes to enhance knowledge and professionally enrich judges and other actors in the justice system. The Rt. Hon'ble Chief Justice is the Chairperson of the Governing Council of NJA. The Council is the policy making body of the NJA. The representation of all the stakeholders of the justice system has been ensured in the Council. The membership of the Council also includes academicians from the Universities. Executive Board of the NJA is responsible to monitor the functioning of the NJA. NJA is, of course, a newly established institution and we have to learn a lot on the techniques and methods of capacity building programmes. We are looking forward for the meaningful partnership with other academic institutions including national and international agencies working in the field of law and justice. I take this opportunity to thank all partners who have extended their valuable support.

Millions of women and girls have been trafficked across national boarder and within the same boundaries. It has been estimated that the global trafficking industry generates eight billion U.S Dollars each year. This situation has threatened to the civilization and humanity of 21st century. Trafficking in women and children has been a long-standing tragedy in Nepal. Various reports and information suggest that this 'trade in human misery' is prevalent in other countries in the SAARC region and in other parts of the world. Contemporary humanity has shown unprecedented concern for the protection and promotion of human rights. Despite several initiatives taken at the national and international level, the tragedy of trafficking has remained as a serious problem. Violence against women has impeded the realization of human rights, thereby multiplying the trafficking problem making it more complex.

Crime like trafficking in women and children is transnational and organized, and requires joint and collaborative efforts among the nations in the region to prevent and combat practices against humanity. As you know, we all have made many attempts in the past at national and international level as well. Recent trends in judicial pronouncements in the SAARC Region have been very encouraging and progressive. Judicial activities towards gender equality have brought many positive reformatations in law and practices. Our system suffers from many deficiencies. We have to strengthen legal regime, we need distinct policy and programmes to protect victim and witnesses of trafficking not only on punishing the perpetrator, but also providing relief to the victim by providing compensation and by ensuring victim friendly justice systems. Co-operation and partnership among the judiciaries, civil societies in the region would facilitate to further our humanitarian concern and make

visible differences. Exchange of judicial information and maintaining co-operation among judiciaries in the SAARC Region is a long awaited strategy and we believe it would be a very useful instrument to combat the grave crime of trafficking in women and children in land and across the boarder. I hope this conference would pave the way step further to combat trafficking and strengthen our desired ties for co-operation at the practical level. South Asia is the centre of ancient civilization and we can pay tribute to our rich heritage ensuring a society free of human trafficking.

We believe that our deliberation would be helpful in developing an empathic and supportive justice system. It would be an instrumental effort to nudge all the concerned stakeholders to understand the impact of crime of trafficking and its consequences. Our recommendations, I hope, would be helpful to the policy makers to understand the urgency in addressing the humanitarian needs and protect the human rights of the survivors. In the same vein, we believe that our findings would be instrumental in the process of reforming national and regional anti-trafficking laws, improving court procedures, providing assistance to victims and witnesses.

Once again, I would like to welcome Rt. Hon'ble Chief Justice, Hon'ble Justices and all dignitaries present here. I am sure this distinguished group of luminaries in the region would pave the way to translate our dreams into a living reality.

3.4 Remarks by Ms. Chandni Joshi, Regional Programme Director, UNIFEM SARO

Chairperson, Hon'ble Justice Kedar Prasad Giri, Supreme Court

Chief Guest, Hon'ble Chief Justice Rt. Hon'ble Dileep Kumar Poudel

Hon'ble Justice Kalyan Shrestha

Honorable Justice Keshari Pandit

Distinguished Hon'ble judges from Bangladesh, India, Nepal and Sri Lanka

Respected members of the audience and friends

It is truly an honour and a privilege to be here at this South Asian Judges Workshop on Combating Trafficking in Women and Children. The fact that you are all here is a testament in itself. It reflect, among other things, your commitment and your will be improving law enforcement mechanisms to combat trafficking. It also shows an acknowledgment that there are gaps, which is perhaps the first step forward in finding solutions. Aware that it was not easy to create this window in your time, please accept my sincere appreciation for being here – a very warm welcome to you all !

UNIFEM's partnership with the NJA is a very valued one. It is, as you may know, an autonomous body set up by the NJA Ordinance 2004, and presided over by the Chief Justice of Nepal, who heads the thirteen-member Governing Council. It provides a critical and ready resource with regard to meeting the training and research needs of judges, government attorneys, government legal officers, judicial officers, private law practitioners and other who are directly involved in the administration of justice in Nepal. This conference is a joint venture of NJA and UNIFEM, and may I say that it is a great pleasure to be associated with the Academy.

I would also like to express my appreciation to Forum for Women, Law and Development. This is another partnership that has been enriching in our work to promote women's rights and human security. I thank FWLD for their support in organizing this meeting!

Undeniably, partnerships are the key to successful strategies and sustainable solutions. Our partnership with the judiciary goes back many years, and it is today, one of our most rewarding alliances. Though the women's movement has long been involved in efforts to end violence's against women (VAW), this acquired additional momentum through its association with the judiciary. I truly believe that with the coming together of the highest levels of the judiciary and the women's movement, to collectively understand women's human rights and explore avenues by which the system can respond to the pandemic of violence against women – change is inevitable since these are the tow most powerful forces of transformation. And transformation is what we need. Particularly heinous in crimes against women (and I'm looking upon VAW as a crime here) is the trafficking of human beings, especially women and children. A transnational business, yielding huge returns, it is a sad and telling commentary on our times – the causes of trafficking, the factors that propel it and the features that sustain it – render it one of the greatest challenges that we face. At all national, regional and international fora, it has been singled out as a significant threat. As recently as the UN World Summit, which has just concluded in New York, some of the global challenges that were noted by world leaders, included, the pandemic of trafficking.

As Dr. Radhika Coomaraswamy, the former UN Special Rapporteur on Violence against Women noted ... “traffickers fish in the sea of migration”. The linkages between globalization, feminized poverty, unsafe migration, trafficking and HIV/AIDS are not hard to find. It is also no surprise, that all of them increasingly have a feminine face. Spawning new forms of violence, globalization has contributed to accenting gender disparities thus enhancing inequalities between women and men. It has increased the wage gap between low and high-skilled workers and created new

risks for the poor and marginalized. Due to feminized poverty – the gender-based discrimination that continues to deny women equal access to rights, opportunities and resources, women are increasingly clustered in informal and low-wage employment. They are under-represented in decision-making, and denied equal access to resources such as property and inheritance rights. Too often this results in loss of livelihood and greater susceptibility to violence, unsafe migration and trafficking, leading to increased vulnerabilities to HIV/AIDS.

Human trafficking scars South Asia, creating exploitations, which violate a gamut of human rights guaranteed by various international human rights instruments. The trafficked enter a cycle so vicious that it is next to impossible to come out of it. An easy target for HIV/AIDS and other diseases, even repatriation brings no relief. They become the target of further human rights abuses. This is primarily because there are no victim friendly laws or law enforcement mechanisms. Bilateral/regional cooperation, in terms of treaties, laws and mechanisms, are of the essence, to prevent the victim from acquiring the status of an illegal immigrant, who is buffeted endlessly between the country of origin and the country of destination, only to fall into the hands of traffickers, once again. Grey areas such as these foster human rights abuses.

Effective justice calls for a gender lens – in the domain of laws and law enforcement mechanisms as well as in terms of sensitivity towards the trafficked survivors. The realities facing them need to be recognized and responded to. Systems need to be in place: laws promoting their rights, as well as laws and processes to book and penalize traffickers; trafficked survivors need access to justice and officers of the judiciary need to have the tools and perspective to respond' there needs to be synergy in the efforts of diverse stakeholders to stop trafficking; and the issue needs to be dealt with, both as a social and legal one. Being an international issue, it needs to be addressed in cooperation with other affected countries.

Though several measures have been initiated, much as yet remains to be done. The workshop is designed to respond to this need, if not wholly, at least in part. We hope to be able to catalyze greater clarity with regard to a conceptual understanding of trafficking and its different dimensions; examine the international and regional legal framework against trafficking, as well as the psychological impact on the survivors of violence. We hope, as well, to focus on violence against women as a human rights and gender justice issue, and discuss challenges and strategies in the context of the SAARC Convention.

UNIFEM's experience in working with the judiciary, through the Gender and Judges initiative, has been one of immense leaning. Of the many winning ingredients, the

most strategic has been the involvement of the judiciary, not as a target group but a major stakeholder. It has made it possible for the actions and decisions of the more informed and sensitized judges to reverberate throughout the legal system, encouraging police and prosecutors to followed by the region's criminal and civil justice structures, and has sought to sharpen the focus from 'formal equality' to 'substantive equality'. The Asia Pacific Advisory Forum on Judicial Education on Equality Issues, born through the process, has proven to be an extremely effective vehicle for Judges, several members of which have delivered gender sensitive judgments. The commitment of the apex court judges to the process has let to a growing judicial leadership in imparting gender equality education for the judiciary. In a sense, this has laid a foundation for gender sensitivity in the justice delivery system, which can further be built upon.

As I said in the beginning, partnerships are supremely important. No one group, organization or country can alone make an effective response. The dimensions are too vast. We need to work together, if we are to make any impact at all. The presence of a gender-equal law/policy needs to be buttressed by effective implementation, so that systemic gender discrimination and deeply ingrained attitudes are eroded. To achieve gender justice there is a need to integrate gender perspectives within every dimension of justice, and to promote women's participation in shaping justice frameworks and rule of law institutions in ways that promote their human rights, legal equality and inclusion. The role of the judiciary is thus central to the solution and partnerships with the judicial system, key to effectively ending VAW, particularly trafficking.

Thank you.

3.5 Remark by Justice Kedar Prasad Giri, Supreme Court

I am honoured to be part of this process. I am happy that such initiatives are taken against the problem of trafficking. Since trafficking is a regional problem we need to have regional strategies to address the problem and this workshop would indeed is imperative. I wish all the participants a fruitful workshop. Thank you.

4. Proceedings of the Workshop

Mental Health Impact of Trafficking: Need for a Personal Response

Dr. Achal Bhagat, Director, Saarthak

I spent most of the time helping traumatized people. Its important to understand that violence against women contribute to crimes like trafficking. When a woman is slapped it will contribute to her learned helplessness and vulnerability which is used against her often culminating to violence like trafficking. A survive cannot answer what is your goal in the life, that is all taken away from the survivor. It takes time to enable her to answer her goals and it often takes 18 months to 2 years. Assurance of safety and security are greatest needs of a survivor. Its important to generate that kind of trust from a survivor. The sensitive judiciary can teach victims to trust again and that decreases trauma. Victim easily accept that they are not good, they are not capable of trust, they are not capable of doing anything etc. because they do not have any option. When a victim develops negative identity, she develops to become a trafficker or a rights abuser. Though not many victims have turned to trafficking but if they are not rescued in a sensitive manner this may result.

I hope my experiences would be instrumental in understanding the needs of a survivor and that it would be useful in addressing victim's needs in the courts. Many times we deny that trafficking happens in our country and then we deny the kind of pain that a trafficked survivor goes through. There is a cost to a trafficked person and therefore cost to a society because of the crime. Judiciary can play an important role to minimize the cost and prevent the crime through effective decisions especially ensuring the rights of the survivors.

Journey of a trafficked person

The Day and days thereafter, a trafficked victim usually goes through fantasy of rescue, anger and fear, depression, acceptance and development of an identity.

Thoughts of a survivor often accounts to I could not save myself, I asked for it, If you trust, you will be hurt, Nothing is in your control, give up, What is future?, Why me? and If this has happened anything can happen.

Feelings of a survivor are numb, indifferent, angry, impulsive, sensation seeking and no consequences.

Post Traumatic Stress Disorder can be generalized anxiety, numbing, reliving of experiences, foreshortened view of future, avoidance and restriction of repertoires, demolition of identity and helplessness.

Mental Health Audit Therapeutic Vs Custodial

- Care and Protection processes
- Infrastructure
- Human Resources
- Opportunities
- Organizational Systems

Why see mental health as a right?

- Downstream Impact of infringement of any right is on mental health
- This leads to loss of self determination
- Best Interest Principle
- Mental Health is also a key need of any human being

Mental Health Impact beyond need for treatment

- Documentation of Impact as collateral evidence
- Mental Health Impact as an advocacy tool
- Mental Health Impact as a mainstreaming tool
- Mental Health Intervention as an empowerment tool
- Mental Health Intervention as a participatory tool

An Aware Response

- Encourage to talk by creating safe boundaries
- Listen Non Judgmentally
- Validate

- Assess danger of further abuse
- Document
- Provide Support, Treatment and Referral

Avoid

- Taking charge and not giving survivor time
- Flooding

Must Do

- Make the process predictable
- Avoid Possible Triggers for Reliving Experiences, use technology and sensitize the judicial process
- Change to supportive techniques if too stressful
- Non judgmental
- Being Positive
- Not challenging initial statements

How can an NGO help in a trial situation?

- Partnership and Facilitation
- Crisis Intervention
- Informing the Process
- Problem of Homelessness

In order to live in the world we must name it. Reality without names is difficult to accept.

What name does the survivor give to her reality?

Violence against Women as a Human Rights & Gender Justice Issue

Ms. Chandni Joshi, Regional Programme Director, UNIFEM SARO

While we celebrate progress, we know that it has been too slow. Thirty years after the beginning of the Decade on Women, and ten years after Beijing, it is still a woman's face we see when we speak of poverty, of HIV/AIDS, of violent conflict and social upheaval, of trafficking in human beings. We must now urgently move forward on implementation, accountability and adequate resources to bring about a world in which people live lives that are free of want and free of fear. We owe this to the next generation. - *Noeleen Heyzer, UNIFEM Executive Director*

Linkages between VAW & Equality

- Equality and non-violence are two sides of the same coin
- Unless women attain full equality with men, violence against women will remain a constant threat
- Gender-based violence has an enduring negative impact on all aspects of women's lives & on society

Reality

- Gender-based violence knows no colour, age, nationality, class, caste.
- It devastates lives and fractures communities, impeding development in every nation.
- All over the world the well-being, promise and hope of millions of women and girls are destroyed by violence.

Definition

- “any act of gender based violence that results in, or is likely to result in physical, sexual or psychological harm, suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life” — *Declaration on the Elimination of violence against women (Article 1)*

- “violence against women is both a consequence of systematic discrimination against women in public and private life, and a means by which constraints on women are reinforced” — *General Recommendation 19 CEDAW*
- “is a manifestation of the historically unequal power relations between men and women, which have led to the domination over and discrimination against women by men and to the prevention of women’s full advancement” — *Beijing Platform for Action, paragraph 118*

Common Features of Gender-based Violence

Statistics

“One in three” is the stark figure that sums up the crisis confronting women throughout the world...globally, one in three women will be raped, beaten, coerced into sex or otherwise abused in her lifetime.” There are an estimated 79 million “missing girls and women” in South Asia who would have been alive if the sex ratio followed the global biological norm.

- Every sixth death of a female infant in some countries of South Asia is due to neglect and discrimination.
- The prevalence of domestic violence in South Asia is high, ranging from 50% to 80%
- Each year two million girls between 5 and 15 are introduced into the commercial sex market (UNFPA 2000)
- An estimated 80 per cent of 50 million refugees and displaced people around the world, due to increased fragmentation and insecurity, are women and children. (UNIFEM – Women War & Peace)
- Suicide is 12 times as likely to have been attempted by a woman who is subject to abuse than by one who is not.
- In every country where reliable, large scale studies have been conducted, results indicate that between 16% and 52% of women have been assaulted by an intimate partner.
- Research consistently demonstrates that a woman is more likely to be injured, raped or killed by a current or former partner than by any other person.
- From 40% to 60% of known sexual assaults have been found to be committed against girls 15 years and younger, regardless of region or culture.

Source: Facts & Figures on VAW- Division for the Advancement of Women and

Why do gender disparities persist

- Gender discriminatory socio cultural practices,
- Impact of globalisation on women – feminization of poverty/casualization of labour
- Shrinking state accountability and diminishing social protection
- Human rights violations based on gender
- Most policies have gender differentiated outcomes and are unfavourable to women

Why do gender disparities persist

- Lack of gendered statistics and sex disaggregated data collection, monitoring and tracking systems
- Gender sensitive and rights based approaches & mechanisms to address issues of accountability and justice not institutionalized
- Slow compliance with human rights standards
- Glass ceiling on women's representation and participation in public and political spaces

Enabling Instruments to Promote Women's Rights

- Convention on the Elimination of All Forms of Violence against Women (CEDAW) (1979)
- Declaration on the Elimination of violence against women (1993)
- Beijing Platform for Action (1995)
- Security Council Resolution 1325 on Women, Peace and Security (2000)
- Beijing + 10 Resolution – 49th Session of the CSW (2005)
- Islamabad Declaration: Review and Future Action
- Outcome Document of the World Summit (2005)

Some challenges

- Feminization of poverty – dynamic process (internal & external environments), deprivation, discrimination & denial of rights
- From needs to rights – equality of treatment; meaningful participation; inter-dependence of rights; obligation of state and non state stakeholders
- Recognition of men as supportive partners in addressing gender equality and gender based violence

Gender Equality

- involves equality between women and men at all levels
- Equal material welfare
- Equal access to information, resources and opportunities
- A value system based on belief in equality
- Equal participation in decision making
- Equal control over resources and benefits

Evolution of the Principle of Equality

Natural Equality – under which everyone is equal before the law

- This model does little to alleviate the social, economic and legal disadvantages suffered by women

Formal equality (identical treatment or gender neutral treatment) – men and women are to be treated exactly the same in all circumstances. This approach does not take into account that women are not physically or socially like men

The Protectionist (Differences) Approach – variant of the formal equality approach since it also uses men as a benchmark, though stressing on the differences from men.

Progress made in “ending violence against women”

Challenges

- International human rights standards still DO NOT inform all Government policies and programs.
- Limited understanding of how to use CEDAW - capacity building of NGOs & women's groups needed
- “Our biggest obstacle is not a lack of ideas. It is a lack of resources.” – whiles legislation and plans have been created there are inadequate resources (financial and human) to underpin more effective practice
- Mechanism of accountability of states, communities, perpetrators is inadequate – ineffective implementation of legislation and policies.

Data & Statistics – we know far too little about prevalence, costs and changes in the different and complex forms of VAW – what works what doesn't; difficult to make comparisons across countries and within regions.

- Sensitizing of the lower courts/ bar councils/ law colleges to understand the principle of substantive equality.
- Inadequate quality support services for women laws stress protection without necessary support services
- Insufficient focus on mental health aspects - lack of spaces for healing, re-building the self
- The language of rights not fully understood by those who need to exercise the right as well as those who need to respect and promote it
- Inadequate linkages & partnerships between agencies working on different forms of VAW/conflict resolution / HIV / AIDS / health / education
- Need to break socialization patterns that perpetuate stereotypes and the intergenerational cycle of discrimination & subordination

The way forward

- Documenting reality from women's perspective
- Creating a safe space for women to take action
- State's responsibility in creating women's human rights

- Making violence everyone's problem
- Securing a commitment to change

Conceptual Framework, Dimension of Trafficking, and Differences among Trafficking, Prostitution and Migration

Hon'ble Kalyan Shrestha, Justice, Supreme Court

Black's Law Dictionary

- "Traffic means commerce; trade; sale or exchange of merchandise, bills, money, and the like; the passing or exchange of goods or commodities from one person to another for an equivalent in goods or money; the subjects of transportation on a route, as persons or goods; ...
- The passing to and for of persons, animals, vehicles, along a route of transportation, as along a street, highway, etc. Trafficking means trading or dealing in certain goods and commonly used in connection with illegal narcotics sales."

GAATW on Trafficking

- "The term 'traffic' was first used to refer to the so-called 'white slave trade' in women around 1900. At this time 'traffic' meant the movement of women for an immoral purpose such as prostitution".

David Ould on Trafficking

- "It is perhaps interesting to note that the main concerns behind this Convention were the traffic of British women to brothels in continental cities and of girls from Europe and Asia into the United States."

1949 Convention on Trafficking

- "To procure, entice or lead away, for the purpose of prostitution, another person, even with the consent of that person; and to exploit the prostitution of another person, even with the consent of that person." Trafficking also

connotes “management and financing brothels; and knowingly renting a building or any other place for the purpose of prostitution of others.”

SAARC Convention

- “Trafficking means the moving, selling or buying of women and children (for prostitution) within and outside a country for monetary or other considerations with or without the consent of the person being trafficked.”

Radhika Coomaraswamy

- “Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons:
 - (i) by threat or use of violence, abduction, force, fraud, deception, or coercion (including the abuse of authority), or debt bondage, for the purpose of:
 - (ii) placing or holding such person, whether for pay or not, in forced labor or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).

UN Protocol

- (a) 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.
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (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.
- (d) “Child” shall mean any person below eighteen years of age.”

GAATW

- “All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harboring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority)
- or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labor, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.”

Features of trafficking

- Motives
- Demand and Supply
- Lucrative and clandestine
- Modus Operandi-Deception and Coercion
 - Deception
 - Coercion

Deception

- Entry into the country is legal. The deception lies in the fact that the women are not destined for work as dancers, but sold to brothel owners to work as prostitutes. They have genuine visas, but these have been obtained by traffickers through subterfuge or *mala fide* means.

Deception and coercion

- Many women go voluntarily with traffickers in the belief that legitimate jobs await them abroad. However, once she is out of the country she is stripped of her passport and travel documents—held as prisoner, often beaten and raped—until she agrees to prostitute herself.
- Dimension-Trans-border Nature
- Organized in nature
- The complexity

Trafficking and Prostitution

- Trafficking can not be consensual-Deception is key element
- The victim does not have right to her body and earning
- She does not know the consequences
- Prostitution can be consensual
- She has right to her body and earning
- She knows the consequences in advance

Migration and Trafficking

- Migration is a voluntary activity
- Migration is legal
- Migration is not crime
- Violence is not present
- No exploitation
- Outsider may not be involved
- No multinational problem
- No criminal procedures required
- May not be forced and coerced

Trafficking

- Trafficking is deceptive in nature
- Trafficking is illegal
- Trafficking is crime
- Torture and violence are present
- Exploitation of labor
- Outsider involved
- Multinational cooperation and coordination required

- Criminal justice administration required
- Forced and coercion

Smuggling-Black's law

- The offense of importing or exporting prohibited articles without paying the duties chargeable upon them. The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited.

IOM

- “A migrant is illicitly engaged (recruited, kidnapped, sold, etc) and moved, either within national or across international borders, or when intermediaries (traffickers) obtain economic or other profit by means of deception, coercion and other forms of exploitation under conditions that violate the fundamental rights of the migrants.

US law

- “All acts involved in the transport, harboring, or sale of persons within national or across international borders through coercion, force, kidnapping, deception or fraud; for purposes of placing persons in situations of forced labor or services, such as forced prostitution, domestic servitude, debt bondage or other slavery-like practices.”

Nepal Law 1986

- “A person is liable to have committed human trafficking if he is involved in any of the following acts: (a) Sale of human being for any purpose; (b) Trafficking people to foreign countries with the purpose/intention of selling;

International Human Rights Instruments relating to Human Trafficking

Hon'ble Kalyan Shrestha, Justice, Supreme Court, Nepal

1. Justice Shrestha listed out some of the available relevant international human rights framework as below:

1. Slavery Convention 1926
2. ILO Forced Labour Convention No 29, 1930
3. Convention for Suppression of The Trafficked In Persons and of the Exploitation of the Prostitution of the others 1949
4. ILO Abolition of Forced Labour Convention No 105, 1959
5. ILO Convention No 182
6. International Covenant on Civil and Political Rights 1966
7. International Covenant on Social, Cultural And Economic Rights 1966
8. Convention on the Elimination of All Forms of Discrimination against Women 1979
9. Convention Child Right 1989
10. Protocol to Prevent, Suppress And Punish Trafficking in Person, Specially Women And Child Supplementing the UN Convention against Transnational Organized Crime 2000
11. Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography 2000

1.1 Regional Instruments

1. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002

1.2 Declarations

1. Declaration on Elimination of Violence Against Women 1993
2. Beijing Platform for Action 1995
3. Further Action and Initiatives To Implement The Beijing Declaration and Platform for Action 2000
4. Stockholm World Congress on Commercial Sexual Exploitation of Children
5. Yakohama World Congress on Commercial Sexual Exploitation of Children 2000 (Address Demand Side)

6. Recommended Principles and Guidelines On Human Rights and Human Trafficking

2. OPPORTUNITIES

2.1 HUMAN RIGHTS INSTRUMENTS

ILO CONVENTIONS

- Discourages All Forms of Forced Labour
- Prohibits Worst Forms of Child Labor
- Prohibits All Forms of Slavery

SLAVERY CONVENTION

- Slavery and Practices similar to slavery are prohibited

ICESCR

- Right to enjoyment of just and favorable condition of work
- Right to adequate standard of living
- Protection from forced marriage

CEDAW CONVENTION

- All appropriate measures to suppress all forms of trafficking of women and exploitation of the prostitution of women

GENERAL RECOMMENDATION 19

CHILDS RIGHT CONVENTION

- Take measures to prevent all forms of abduction, sell or trafficked of children
- Punishes sell of children, child prostitution and child pornography with or without consent

OP TO CRC ON CHILD PORNOGRAPHY

- Prohibition of children, child prostitution and child pornography

2.2 TRAFFICKING RELATED SPECIFIC INSTRUMENTS

- CONVENTION FOR SUPPRESSION OF THE TRAFFICKED IN PERSONS
- PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING

Definition

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring 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.

- Broad Definition
- Right against Exploitation
- Right to Non-discrimination
- Right to Privacy and Confidentiality
- Right to the Represented and Heard
- Right to Information
- Right to Health and Other Services
- Right to Safety
- Right to Compensation
- Right to Voluntary Repatriation
- Right to Residence
- Right to Mobility
- Right to Access to Justice

Measures to be Taken to Implement the Protocol

- a. Legislative Measures
 - Criminalise the offences of trafficking in persons

- Protect the rights of the victims
- b. Administrative Measures
 - Address Underlying causes of trafficking in persons
 - Establish cooperation among the governments
 - Provide appropriate training
 - Ensure effective information exchange among law enforcement
 - Establish cooperation with NGOs and Civil Society
 - Ensure voluntary repatriation of the victims
 - Research and mass media campaign
 - Ensure security and control of documents
 - Prevent re-victimization of the victims
 - Enables victim to participate in the criminal proceedings
 - Provide compensation to the victim
 - Provide assistance to victim
 - Housing
 - Legal and social counseling
 - Temporary or permanent residency
 - Confidentiality during legal proceedings
 - Voluntary repatriation of the victim
 - Right to information in own language (legal rights/proceedings)
 - Right to non discrimination
 - Material assistance/employment, educational and training opportunities
 - Border measures
 - Security and control of document
 - Right to information
 - Capacity building of law enforcement agencies

- Cooperation among law enforcers, immigration or other relevant authorities for information for checking travel document
- Means and methods used by criminal groups including recruitment and transportation of the victims
- Repatriation of victim of trafficking
- Training for the law enforcement, immigration and other relevant officials
- Dispute settlement mechanism (incase of dispute between two state)

2.3 SAARC CONVENTION ON TRAFFICKING

- Extraditable offences
- Enhancing Penalties in aggravated circumstances
- Proper judicial procedures
- Confidential hearing
- Capacity Building of Law Enforcement Agencies
- Cooperation During Investigation, Judicial Action, Rescue and Repatriation
- Formation of Task Force

DECLARATION ON VIOLENCE AGAINST WOMEN (VAW)

- VAW includes trafficking in women and forced prostitution
- Protection of human rights of the victims
- Effective suppression of trafficking for the sex trade and tourism
- As matter of priority introduce effective legislation to combat trafficking (BPFA As well)

Recommended Principles and guidelines on Human Rights and Human Trafficking

Yakoholma- Address demand side

Rapporteur on VAW to make linkage of issue internationally and in un human rights committee

Reporting mechanism under some human rights instruments

3. BOTTLENECKS

Convention for suppression of the trafficked in persons and of the exploitation of the prostitution of the others 1949

- For the purpose of the prostitution
- Lacks rights perspective
- No reporting mechanism

Protocol to Prevent, Suppress and Punish Trafficking

- Only supplementing convention, not independent
- Jurisdiction only if organized crime
- No reporting mechanism

SAARC Convention on Trafficking

- Lack of treaty monitoring mechanisms
- The definition of trafficking for the purpose of the prostitution only
- Not being able to protect victims from criminal liability under immigration laws
- Not being able to make appropriate distinctions between women and children
- Not respecting a woman's choice not to repatriate
- Non Ratification of the main conventions
- No bilateral Agreements
- No extradition treaty
- Lack of information exchange/data
- Lacks conceptual understanding on migration/trafficking and prostitution

SOUTH ASIAN NATIONAL LEGISLATION

Constitution Of The Region Protects:

- Right against exploitation,
- Right to equality and non discrimination,

- Right against sexual exploitation and sell of human beings,
- Right against Forced labor and slavery.

LAWS

- No laws yet to be enacted in Maldives and Bhutan (non recognition of trafficking problem)
- The immoral traffic (prevention) act 1956 in India
- The suppression of immoral traffic act 1933 in Bangladesh
- The suppression of violence against women and children act, 2000
- Suppression of prostitution ordinance in Pakistan
- Penal code act no 29 of 1998 in Sri Lanka and
- Human trafficking control act 1986 in Nepal

Draft Legislation

- Immoral trafficking control act 1999 in Bhutan
- Human trafficking control act in 2001 in Nepal (proposing to criminalize women in voluntary prostitution)

Gaps In The National Legislation and system

- Attempted to combat trafficking without comprehensive definition of trafficking
- Moralistic approach/ Suppression of prostitution
- Criminalization of trafficked person under the immigration laws
- No confidentiality in the legal proceedings
- Lacks victim protection and support
- Focuses on combating crime, no compensation to the victim

6. RECOMMENDATIONS

6.1 International Level

- Comprehensive standard that includes all the aspects of trafficking

- Instruments focusing different aspects for example for prostitution, transnational in nature and organized crime, sell of children, forced labour/Need to be bring consistency in all the framework and approach
- Politics of different position needs to bring in the common understanding (gatw/catw)

6.2 Regional Level

- Conduct Regional Surveys on statistics /laws and polices and infrastructure available
- Create Regional Information Center
- Enter into bilateral agreements for the necessary cooperation for prevention/ investigation/ legal assistance/ rescue / cooperation/ border monitoring/extradition
- Amend the SAARC Convention
- Formation of regional task force
- Regional rapporteur
- Identification of root cause /SAARC program to address the root causes

6.3 National Level

- Ratification Of Human Rights Framework
- Enactment Of New Legislation in accordance with international frame creating:
- Extraterritorial jurisdiction,
- Comprehensive definition,
- Strong punishment keeping aggravated circumstances,
- Compensation to the victim,
- Victim protection,
- In Camera hearing,
- Special procedure
- Enter into bilateral agreements for the necessary cooperation and extradition treaty

- Awareness program on changing value system and rights
- Economic development in the prone area of trafficking
- Education for all
- Border monitoring
- Reporting periodicals as well as alternate reports
- Gender friendly institutional mechanism
- Create enabling environment for reporting the cases
- Capacity Building of Law enforcement
- Support system for affected persons
- Strong mechanism to handle the corruption

7. BENCHMARK

In Nepal under the Human Trafficking

Control Act

- Burden of proof lies with the accused unless it is near relatives
- Provides provision for extraterritorial jurisdiction

FWLD Vs. HMG NEPAL 2002

- Court declaring ultravires discriminatory punishment laws on raping to prostitute women.

NEW LABOUR POLICY IN NEPAL

- Lifting the ban on women's employment to gulf countries specially in organized sector.

Role of Judiciary to Combat Trafficking

Hon'ble Usha Mehra, Former Judge, High Court, India

At the outset I express my sincere gratitude for extending me the invitation to participate in the Regional Workshop on strengthening Law and Law Enforcement Mechanism in South Asia to combat Trafficking of Women and Children and make presentation on "Role of Judiciary and the Need for Judicial cooperation in combating trafficking".

On 9th day of May 1950, an International Convention was signed at New York for the prevention of immoral traffic, pursuant whereof, majority of countries in South Asia have enacted measures to combat trafficking of women and children. The issue of trafficking in women and children has been the subject of debates at the national, international and regional levels, for the last several years; yet the wide range of trafficking and prostitution and the legal status of prostitution has not received the due attention which it warrants.

The UN Special Rapporteur on Violence Against Women, Ms. Radhika Coomaraswamy, acknowledged in a Report prepared in 2000 the lack of an internationally accepted definition of trafficking. In the report, trafficking is described as including activities ranging from voluntary, facilitated migration to the movement of persons through threat of the use of force, coercion, violence etc., for certain exploitative purposes.

Trafficking is related to economic, social and political conditions. While the reasons may change, the core elements of trafficking remain constant. The raison d'être of trafficking is exploitation in one form or the other without the consent of the victims. It includes bonded labour, force marriage and other forms of slavery.

Countries of South Asia, because of their peculiar problems, allow traffickers to operate with relative ease. The socio-economic & socio-religious conditions, absence of enforcement systems, limited awareness, faulty procedures and accommodative police administration are factors, which aid and abet trafficking and prostitution. There are no official records of age or place of birth. This makes the children more vulnerable to being sold and trafficked and difficult to determine the age of victims.

Trafficking from Nepal to India is said to have begun in the 19th Century when Tamang girl were recruited as concubines and trafficked to India. The citizens of two countries, because of 1950 Treaty between the two countries, do not require visas to cross over. This has led to an increase in trafficking. In the year 1999, I came across a

news item concerning police raid on a prostitution den in Delhi when the police had recovered about 50 girls from G.B. Road. I was at that time Judge of Delhi High Court. I felt concern about the rehabilitation of the girls recovered and, therefore, on the basis of news item I suo-moto issued notice to the police authorities. The report by the police revealed that there were quite a good number of girls belonging to different part of India and Nepal, who had been forced into prostitution by the gangs, pimps etc. by luring them for better prospects/jobs. In spite of efforts and enquiry by the police it was not possible to ascertain the age of the girls. There is lack of data on trafficking due to clandestine nature of the crime. Accordingly to rough estimate prepared for the South Asian Region by the International Organization for Migration, approximately 5000-7000 women and girls entered the Indian sex industry per year from Nepal. Also of the 5,00,000 prostitutes in India, 13,500 are estimated to be Bangladeshi. An estimated 3,397 children were trafficked from Bangladesh into West Asia over 10 years. The trafficking is mainly due to socio-economic considerations coupled with illiteracy and entrenched position of agents, touts and other vested interests.

Trafficking and prostitution based on socio-religious sanctions is practiced in certain parts of India. This type of prostitution includes the Jogin, Devadasi and Basai systems. Under these systems young girls usually belonging to lower castes and economically weaker sections of society are dedicated and married to local deities and then exploited. A girl is made a Jogin (derived from the Sanskrit word, Yogin) i.e. a nun. Men belonging to higher castes persuade those of lower caste that dedicating their daughters to the Village goddess would protect them from natural calamities. A belief is caused that dedication is an honour bestowed on a selected few. The girl usually between the age of five and nine, is married in to the village deity.

It is commonly said prostitution is the oldest profession. I wonder whether it can even be considered as a legitimate work much less a profession. It is incompatible with human dignity and unmistakably reflects the lack of alternatives. It is rather one of the most serious violations of human rights. United Nations Report goes on to say that States need to ensure that their policies and law do not legitimize prostitution, and entreats States to take effective measures to punish those who purchase the sexual services of others. Articles 6,7 and 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplement the United National Convention against Transnational Organized Crime, 2000, contain these recommendations to the States.

There role of judiciary in combating trafficking is a two pronged attack consisting of preventing and punitive measure and to be implemented effectively the Legislative

Provisions alone are not sufficient until they are backed by the active participation and cooperation of the judiciary and people at large. People have faith in the rule of law. Common man knows that Court can guarantee their right to life and dignity. Judiciary by its directions help in regaining social order and can provide pragmatic stability, peace and order.

Judiciary plays an active role by both direct as well as indirect level. At legislative level it directs implementation of the Constitution pledges. It gives direction for the implementation of the fundamental rights and has made directive principles pertaining to welfare of women and children, as enshrined in the Constitution of India justiciable. Constitution of India pledges socio-economic justice to all sections. Swear and speedy legal action against erring persons such as pimps, brokers and brothel keepers can only be taken by the judiciary. The deterrent punishment to the offenders who forces the children in trafficking has the desired effect in the society.

The judiciary play indirect role in the eradication of trafficking in children and women by asking voluntary non-government organizations and public-spirited person to come forward and lend a helping hand in giving these victims a life with dignity. Because of Judicial activism, State has been forced to acknowledge the importance of directive principles, enshrined in the Constitution by providing education to children of victims of trafficking and help them in self-employment through the provision of education. The courts can also encourage the NGOs and other public-spirited persons to find suitable match for marriage of such victims. The object is to give them real status in society. Directions have also been given by the Judiciary asking the State and the Social Welfare Departments of the State as well as of Centre to implement all social welfare legislations for these unfortunate women and children by providing them housing, legal aid and free counseling. Because of judicial intervention many unfortunate women and girls victims of sexual exploitation have been re-integrated with their families. In this process, District Magistrate and District Authorities can render valuable services. Judicial directions given by the judiciary has created conditions by which these children have regained their lost respect. Minor girls integration with their family became possible and even their families were not informed about their activities in the cities. This could only be possible because of the supervision given by the judiciary.

The Supreme Court of India through various judgments two of which are entitled, “Vishal Jeet Vs. Union of India” and “Gaurav Jain Vs. Union of India”, are shining examples of the constructive role played by the judiciary aimed at not only prevention of the crime and curbing the menace of trafficking but also rehabilitation of the victims. While speaking of the role of judiciary the Supreme Court of India has laid

down that courts are part of the State steering by way of judicial review, that judicial statesmanship required to regaining social order and stability that interpretation is an effective armory in its bow to steer clear the social melody, economic re-organisation as effective instruments remove disunity and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law and pragmatic direction paved way for social stability, peace and order. This is necessary to sustain faith of the people in rule of law. The subordinate courts in India have also been mandated that women found in the flesh trade should be viewed more as victims of socio-economic circumstances rather than offenders in our society.

To my mind, steps should be evolved by the judiciary to make the courts easily accessible to the victims both during the period of their victimization by the pimps, agents brothel people as also during their rehabilitation undertaken by Government agencies or NGOs. It is a fact of common knowledge that in South Asia Region, women generally avoid going to the courts for various reasons. To overcome their hesitation and mindset one of the measures that has been adopted in Delhi by the judiciary is creation of Mahila Courts, i.e. courts which are presided over by women and manned by women staff. It has been experienced that this measure has brought about a perceptible change in attitude of the women.

The victims of trafficking and prostitution are apprehended quite frequently. They are brought before the Court. The victims are sent to homes set up by the Government for their rehabilitation where some facilities for imparting them skill are available. However, studies have revealed that the State's Homes have not succeeded much in changing the way of life or pattern of these victims. There had been instances of exploitation. In order that these rehabilitation centers gain confidence of the victims, to my mind, one of the roles that judiciary can play is that it should effectively supervise the remand homes set up by the Government or run by the NGOs. The court should supervise and monitor the activities and the rehabilitation programmes. The court should also nominate a committee to monitor the activities of victims who are discharged/released from the State's Homes so as to ensure that they do not again fall in the hands of pimps, agents etc. In fact, the victims after suitable training in remand homes may be deployed by the committee in the prone areas/villages like para-medical workers employed by Government on nominal payment, to keep the committee of the area informed of the activities of any individual or group intended to cause or promote trafficking. Similarly, one of the tasks of the committee should be to ensure that the children of these victims are provided education. These children should be provided adequate safety, protection and imparted skills/vocational education to make them better citizens.

The subject you have chosen for deliberations has wide ramifications, the melody is very deep rooted, the vested interests are highly powerful and influential yet efforts are necessary to overcome these odds. I commend you for making efforts towards correct direction. I wish you all success in your deliberations and endeavors

Country Perspective on Trafficking of Women

Hon'ble Rohini Perera, Justice, High Court of Colombo

The Penal Code of Sri Lanka came into force in 1885. However the first ordinance relating to the General Penal Code was passed in 1883. But that did not provide the Island with a composite array of penal provisions. The drafting of the Indian Penal Code (1837) and the drafting of the Ceylon Penal Code (1885) was by Lord Macaulay who was commissioned by the British Government to draft the two Penal Codes. Until 1995 there was no substantive law which dealt with Trafficking. The Penal Code (Amendment) Act No: 22 of 1995 in Section 360(c) defined Trafficking narrowly. In that definition it was stated that “whoever engages in the act of buying or selling or bartering of any person for money or for any other consideration” will be Trafficking if the “purpose for these activities was found to be for promoting, facilitating or inducing the buying or selling or bartering or the placement in adoption of any person for money or for any other consideration”. Therefore the definition of Trafficking was focused at controlling and eliminating adoption of persons illegally. This provided a narrow construction for the offence of Trafficking, which involves a number of other insidious acts, which provided pain, and suffering of oppression or suppression of women the word over. Having realized this limitation in the focused area of the offence the Sri Lanka legislature, on the 5th of August 2005, has presented a Bill to parliament in which it proposes to broaden the scope of the offence of Trafficking to include a number of other areas. In the proposed amendment Section 7 purports to expand the application of Section 360(c) of the aforementioned 1995 amendment. This proposed amendment deals with the following matters:

- (1) In the basic definition of Trafficking it prohibits, buying or selling or bartering or instigating another person to buy or sell or barter any person or does anything to promote, facilitate, or induce the buying or selling or bartering of such person for money or other consideration. In the way this new paragraph 7A is framed, in a way that, each of these acts including promoting, facilitating or inducing have been constituted to be offences which are committed in the first degree rather than as abettors in the second degree or

as accessories after the fact. The latter category of offenders normally carried a lesser penalty. This benefit has been denied to the accused persons in the way the offence is stated in the proposed legislation. The important issue here is that defenses if any must now be chosen as defenses which are suitable to defend a charge where the offence charged with is an offence in the first degree, and not as an accessories before the fact, after the fact or as co-conspirators. Further in paragraph B of the proposed section - a person is guilty of an offence of the first degree if he or she were to “recruit, transport, transfer, harbors or receives any person or does any act by the use of threat, force, fraud, deception or inducement for the purpose of securing forced or compulsory labor or servitude, slavery, the removal of organs, prostitution or other forms of sexual exploitation”. The form in which this particular paragraph (7B) is phrased excludes the defense of consent. By excluding the defense of consent the proposed amendment makes these offences mala in se’ and therefore no amount of payment by way of consideration would provide a defense in law. Further the prohibited purposes are sufficiently wide to include every aspect of social wrongs which trafficking is likely to commit. It includes as mentioned earlier forced or compulsory labor or services. This without any limitation of age would encompass the protection of persons who are both of tender age or of an older age. It also includes slavery and servitude whether or not this falls under what has been traditionally mentioned as indented labor. It includes removal of organs again whether of tender age or older age. It also includes prostitution and other forms of sexual exploitation. In paragraph C the emphasis is on the child. Unlike in the previous amendment of 1995 Section 360(c), this proposed amendment goes beyond adoption. This paragraph C of Section 7 of the proposed amendment deals with the protection of children from forced or compulsory labor or services, slavery, servitude, or removal of organs, prostitution or other forms of sexual exploitation.

The punishment is also amended so that trafficking will carry a term of imprisonment between 2 and 20 years and also a fine and if the offence is in respect of a child the minimum sentence will be three years imprisonment.

Note: The bill seeks to repeal and replace the existing section 360C and removes adoption related offences under a new section 360D.

Whereas earlier section 360C (1) (a) covered buying, selling and bartering a person for money and other consideration the new section 360(1)(b) is expanded to include recruiting transporting harboring or receiving any person for the purpose of forced or

compulsory labor, slavery, servitude the removal of organs prostitution or other forms of sexual exploitation. S 360C (1)(c) applies to the same acts by the use of threat force fraud deception and inducement are also included.

In both subsections (b) and (c) the consent of the victim concerned is immaterial.

Thus the new S 360C (1)(c) greatly strengthens the law relating to trafficking covering a whole gamut of purposes for which human trafficking is done.

Section 360D creates offences relating to adoption carrying with it a sentence up to 20 years imprisonment or fine or both. The offence includes arranging or assisting a child to travel to a foreign country without parental consent, obtaining the concept of a pregnant woman for money or other consideration for the adoption of an unborn child, recruiting a woman or couple to bear children, falsification of registers, procuring of children for adoption for money or other consideration and impersonation of the mother. The new section is essentially what was earlier section 360(1) (b) under the act No. 22 of 1995. However the earlier mandatory minimum sentence has been removed, giving court a greater discretion.

In all these matters contained in paragraph A, B and C of Section 7 of the proposed amendment the criminal liability extends not only to those who actively engages in solicitation of persons for Trafficking directly with the victim , but also to those who “recruits, transports, transfers harbors or receives persons for these purposes”.

In each of these cases the accused are charged as principals in the first degree and not as abettors or accessories after the fact or before the fact. By such means the scope of defenses available to them become limited. And an acquittal of any principal in the first degree does not relieve those other persons from their liability. Because each category of offences are defined as first degree offences.

Some proposals for reform:

First, the problem experienced in Sri Lanka according to the available statistics arises out of the law of evidence. In the Evidence (Special Provisions) Act No: 14 of 1995 Sri Lanka had introduced the possibility of leading evidence of recordings in courts of law. Under Section 4(1) it is said that in “any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording or reproduction thereof, tending to establish that fact shall be admissible as evidence of that fact”. This certainly allows a child or any other person who is traumatized through the activities of the traffickers to make a statement which may be recorded and the recording led as evidence in a court of law. This at first blush appears to be most

favorable to the victim of Trafficking. However once the evidence is so led there is no available law which would prevent the person who made that statement - namely the victim of Trafficking being subject to cross examination. This leaves the victim of Trafficking open to the additional trauma of being cross examined in the presence of the accused either in open court or in camera. The fact of one being subject to cross examination is a matter that needs additional consideration. It may therefore be proposed that Sri Lanka Legislature should seriously consider adopting the exception to the Hearsay Rule adopted in U.S Courts. In which it is stated "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" was considered as an exception to the rule against Hearsay. In an exception to the rule against hearsay such a statement may be made admissible by recording that statement and the person(s) who recorded such a statement being the only person(s) who might be subjected to cross-examination. This protects the victim of trafficking from that trauma. Such an approach is available in the U.S. under Rule 803 sub rule 2 of the Federal Rules of Evidence to which reference has been made earlier.

Second - In some countries evidence is taken by placing the victim and accused in two different rooms, and the victim gives the entire evidence not seeing the face of the accused. This evidence is given through a system similar to video conferencing. This protects the victim of trafficking from being traumatized yet again by seeing the face of the accused, while the accused and his counsel are in a position to see the demeanor of the victim who is giving evidence and facing cross-examination. By such means the integrity of the trial is preserved and the interest of the accused is protected and the victim of Trafficking is saved from reliving the trauma he has experienced at the hands of the accused. Additionally if this process were to be adopted it is less likely that the witness would go back on the evidence given earlier. The problem the courts are now facing is that witnesses who made statements after the commission of the offence have the tendency to deny their statements when they are faced with the prospect of giving evidence later in court. This danger is either minimized or may be completely eradicated if evidence was to be given in the aforesaid manner.

Third - most of these offences have a dual application. Some aspects of these offences such as recruiting, transporting, transferring, harboring or receiving may be committed wholly in Sri Lanka. But the forced or compulsory labor or services, slavery, servitude, the removal of organs, prostitution or forms of sexual exploitation might take place in another country. However the Sri Lankan courts have no jurisdiction over offences committed outside Sri Lanka, which may have a

relationship with the anti Trafficking laws of Sri Lanka. Therefore some provisions might be made so as to make such laws as these to have a extraterritorial application. This is done in most Western countries in matters concerning human Trafficking and pedophilia. Sri Lanka should follow these examples.

Conclusions

Trafficking by itself constitutes a damaging social phenomena. Any attempt to eradicate Trafficking must be approached from two stand points.

First, there is the law with which we have presently dealt with. That is the use of the penal laws in combating Trafficking. And then there is also a second aspect to this. This is the socio economic component of the society in which Trafficking takes place. This is a more complex and a difficult remedy to articulate. It is my belief that the mere tightening of the Penal laws might not be sufficient to eradicate or at least lessen the extent to which trafficking takes place. Therefore it is important that the socio economic element in the equation should also be carefully explored in order to eradicate trafficking in a total sense. This requires the active participation of the State, which must show an abiding interest in remedying the socio-economic ills of the State.

Hon'ble Baidya Nath Upadhyay, Judge, Appellate Court

Poor people are neglected by all, but who else in the world could be neglected by the poorest man? The answer is *women*. Even a person neglected by all, is usually seen neglecting his wife, daughter and mother, they are women of course. Even in the poor family women are more exploited and neglected than others. Not only that, a man having weakest background may dare to attempt offence against women of whatever standard she may be. The types of violence range from physical injury to mental or psychological torture; from within a home or family to out side like School, College and any where; and from baby to very old aged women. Battering, sexual harassment, rape and trafficking are very common offences in Nepal as in elsewhere.

Besides lack of education, poverty, unemployment, the attitude of the society is also one of the important factor for the cause and control of violence. Judges and people belonging to legal fraternity being the member of the society, they reflect the attitude of the society on the bench and in the bar as well. It doesn't mean that all the judges have same and identical attitude. Ideas and opinions may vary from person to person which depend on their background and experience. The Supreme Court decision in the case of *Meera Dhungana v. Ministry of Law, Justice and Parliament* (B.S. 2058, Writ

No. 55) was in great controversy among the Judges and members of the bar. In this case, offence of marital rape was defined. It was declared that a husband having sexual intercourse with his wife without her consent commits rape and becomes liable to punishment. The Court issued directives to provide punishment for such crime by amending some of the Sections of the Chapter on Rape of National Code (*Muluki Ain*). Still there are quite a number of people including judges, advocates; journalists etc. who do not consider that sexual violence in the conjugal relation come within the offence of rape.

The life in of village is very hard. Young girls and widows fall in trap of false promises made by traffickers. Usually they pretend to marry them and provide a comfortable marriage life abroad. Some times, they attract them and give false assurances for good jobs and better life in big cities. Innocent victims and some times even their parents too have no source to find out the truth, and easily prey to the traffickers. There are even some communities where parents feel happy on the birth of a daughter, as she will be a source of generating income when she grows up. Because, they are illiterate and are very poor, so they don't have any other choice. Such society is predominant in Melamchi, Helumbu (of Sindhupalchok district), Padampur (of Makawanpur District) and Kavre Palanchok, Nuwakot and Rasuwa Districts, people are sending their daughter, daughter-in-law, sister, wife to Mumbai, Delhi and else where for the prostitution. Even victims are not aware of danger and they go happily. All these come under the moral value for them. However, in recent times, they are gradually made to realize it immoral and perform it secretly. It fact during the Rana regime, beautiful girls were selected and brought to palaces of the then rulers and in the masons of their relatives especially from Helumbu, Melamchi and also sometimes from other districts. Such profession gave them multiple benefits, earning money, to be attached with the power, high social status, high living standard etc. Now, the Rana regime is gone long ago but women of those communities have simply changed their destination from palace to bigger cities like Mumbai, Delhi, Kanpur etc.

The response of the court in cases related to the violence against women is not very encouraging barring a few exceptions. As we don't have laws for sexual harassment, one cannot expect very much from the court in this regard. Even though, the Supreme Court has took up this issue in a great length but ultimately settled down by issuing directives to the Government for drafting legislation against sexual harassments (*Pramod Shah v. State Writ No. 3434/2060*, decision date 2060-11-29). Battering is considered as a household common phenomenon, so the society and the court do not seem to be very serious on battering cases. If a woman comes to the court against her husband or in laws, she will have to summon her great courage and

undertake high risk. A domestic quarrel resulting in to a simple battering case may lead her to dire consequences such as; eviction and starvation, reducing her to begging status. The response of judiciary is very frustrating in rape cases. So far Trafficking cases are concerned before the commencement of the Trafficking (Control) Act 1986, the response of the court was all the same. After the enforcement of the Trafficking (Control) Act, the offences were dealt firmly than before but consistency in the decision was lacking.

The *Muluki Ain* (National Code), 1963 has a very limited area to combat against trafficking in the chapter of Sale or Exploitation of Human being. The burden of proof was on the shoulder of the victim while the presumption of innocence or the benefit of doubt shields the offender, which defy the purpose of the Law. The section 12 of the Foreign Employment Act, 1985 prohibits to provide foreign employment to children and women without the consent of their guardians. Nepalese women require approval from their guardian and the government as well while going for a foreign job. But this restriction has been lifted while going to Gulf countries in organized sector. After the restoration of democracy Nepal got democratic constitution. At that time Convention on the Elimination of all Forms at Discrimination Against women, 1979 was already there. The impact of the Convention on the Constitution of Kingdom of Nepal, 1990 can be observed in the Art. 20, which prohibits trafficking in human beings, slavery, bonded labour or forced labour in any form. Then after, Nepal introduced the Trafficking (Control) Act, 1986 from 10th Nov. 1986, though the ratification of the convention was done on latter date, 22nd April 1991. Article 6 of the Convention, states, "State parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women." The publication of real story of some women who were victims of trafficking along with the pressure of civil society, resulted the commencement of Human Trafficking (control) Act, 1986. This instrument is relatively stronger than the previous one. The burden of Proof has been shifted on offender by the testimony of the victim. The major characteristics of this enactment are:

1. If an accused, other than relatives, preparing to take a woman abroad with him and if there is F.I.R. against him accusing as his intention is to sell the woman or to involve her in to prostitution abroad, in that case the burden to refute the charge lies on him (Sec.7).
2. The testimony given by the victim according to Sec. 6(2) is presumed to be true unless rebutted by evidence.

The Convention on the Right of Child, 1989 is ratified by Nepal on 14th Sept. 1990. Article 35 of this Convention that is “protection from abduction, sale and trafficking in children for any purpose or form” is a provision of great importance for reforming the Children Act. The sec. 16 (1) and (2) of the Children Act, 1991, stipulates that no one shall engage or use a child in an immoral profession or take photographs of a child for an immoral purpose. Similarly, Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child prostitution and Child pornography, 2000 has also been ratified on 8th Sept. 2000.

The evolutionary steps, which provided impetus for positive responses of the court, can be divided into three phases. Since, responses of the court depend on the legislation it has to apply, the existing legal instrument of the time matter much. The Chapter on Sale or Exploitation of Human being of the *Muluki Ain*, can be considered the starting point or the first phase. As we have already discussed above that the *Muluki Ain* has a little space to combat against trafficking. The victim had to prove the crime; accused is favored by the presence of very little doubtful situation. So the response of the court was not very good. Since, the crime is of trans boarder in nature, it was very difficult to prove the crime. Some times, the victim is not there, she might be abroad or died. Sometimes the victim complains and appears in the court but the offender is absconding across the boarder. Victim has to appear before the court twice or thrice to testify her complain and also identify the offender, which is very difficult. Sometimes they (victims) get married, so they want to keep such facts secret. If she has to make appearances to the court again, this may hamper her married life. So, in most of the cases victim does not come to testify her statement. Without testifying the victim’s statement the court cannot establish the crime. So, there was defect evident in the legal system so the response of court was not keeping with public ethos of those days.

The second phase is the transitional phase. That is the crime committed before the commencement of Trafficking (Control) Act 1986, but the case was instituted in the court after its commencement. During this period we can find mixed response from the court i.e. positive as well as negative decisions on trafficking cases. I would like to refer two leading cases in this regard.

In the case of *Kamal Prasad Shrestha v. State* (Ne. Ka P. 2051, pp.240), the full bench of the Supreme Court has decided that the burden of proof lies first on the accuser side, that is the victim, the confession of the accused in the police is not acceptable as an evidence unless supported or corroborated by other independent evidences. In this case the victim, Mathuri Shrama alleged the accused that he had trafficked her and her friend Kopila Khadka, some how escape from the brothel, and come back to

Nepal, Kopila is still in brothel of Mumbai. Kamal Pd Shrestha confess the offence accordingly and further added that he had trafficked four girls and sold to brothel of Mumbai, his objective is to have fun to intercourse different girls and getting money by selling them. Appellate Court used the Trafficking (Control) Act 1986 in this case and convicted the accused. But in the division bench of the Supreme Court, the opinion of the judges were different. One of the opinion supported the decision of the Appellate Court on the ground that a girl would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, so the statement given by a victim alleging someone about the offence which may effect her chastity should not thrown out on the ground of minor contradictions, there minor contradiction in fact but not in the crime. Finally from the full bench of the Supreme Court, though the victim alleged the accused both in F.I.R. and in the court but the testimony of victim was not considered seriously and on the ground of some minor contradictions the court concluded that it would be against the principle of criminal justice to convict and punish the defended in the lack of evidence. I refer this case, because it is decided by full bench, this decision was done in 24th March 1994, That is after the arrival of CEDAW and Convention on the Right of the Child, 1989; by that time Nepal had already ratified the former convention on 22nd April 1991 and the latter, on 14th Sept. 1990. Those conventions and their ratifications by the state could not change the attitude of some of the judges that can be easily demonstrated in the above case. Notwithstanding the existence of the Trafficking (Control) Act, 1986, the court may have faced some technical difficulty because the crime was committed before the commencement of this Act, and the former law on Sale or Exploitation of Human being (*Muluki Ain*) has not been repealed. This might have created problem for the positive decision. Here, I must refer to the Treaty Act, 1990, particularly sec 9 of which clearly expresses that the law, which is inconsistent with the bilateral or multilateral treaty in which Nepal is a party or has ratified to that extent of inconsistency, will not exist. So, there was a chance for development in this regard by applying the Convention with the help of this statute.

Ten years latter there was a landmark decision in the case of *Uttam Lama v. State* (BS 2061,G. Full Bench No.17). The incident of trafficking happened little earlier than the commencement of Human Trafficking (control) Act 1986 and the case was filed after the commencement. As the both statutes existed side-by-side, uncertainty remained in respects of their application, whether the former law is applicable or the latter one in a particular case. The Full bench of the Supreme Court applied the new law and concluded that defended has to refute the testimony of victim if it is false. Thus the burden to refute the testimony of victim was said to be on the accused side though the Trafficking (Control) Act was not commenced at the time of crime

committed. This positive decision paved the way for other cases too. By this time, Nepal had already ratified the Optional Protocol to the Convention on the Right of Child on Sale of Children, Child Prostitution and Child Pornography on 8th Sept.2000.

The third phase is the period after the commencement of the Trafficking (Control) Act, 1986. In cases filed under the Trafficking (Control) Act, 1986, the Court has played a positive role with a few exceptions. The full bench of supreme court in the case of *State v. Gopal Pd Dahal* (2051 Cr. App. no. 1610) has decided that even if the accused has not cross the boarder and caught within the territory of this Kingdom during the process of trafficking he liable to be convicted. Similar precedent was followed in the case of *State v. Raj Kumar Moktan* (2055 Cr. App. no 1966), though in this case the victim had not alleged and indicated the accused clearly, but the accused had confessed his offence before the Police. In the case, *State v. Mohan Nath Sharma and others* (2058 Cr. App. no 2815) positive decision was made. The fact of the case was, Kamala Rai (victim) had gone Arab for job. She was told to be involved in child caring job, but when she reached there, she was forced to prostitution. When she became sick, they send her back to Nepal. So, she submitted F.I.R. against those who send her there, Om Prakash Bista and others. In this case all of the accused denied the commission of crime. But the court convicted them. The case of the *State v. Ghurane Damai* (B.S. 2055, Cr. App. No. 2073) could be another example of positive decision. In this case' Ghurane was accused that he had sold a married woman in India. The victim was not there. But he accepted some fact that he had taken her to India. But he had pleaded that he was in love with her, so he eloped her to India, where she became sick, he had also cared, provided medical treatment too, yet she died, he had also informed to her relatives too. Since, the victim had already died so she could not present in the court, but the Court convicted him on the ground that the accused could not produce evidence of treatment and providing information to relatives. There are still many other examples of progressive decisions during this phase.

Besides those decisions of the court mentioned above, the procedural laws of trial courts have been changed suitably to meet the problems, which may arise in the court process. The fourth amendment on 17th Nov. 2003, of District Court Rules, 1995 is of great importance. Previously, both criminal and civil cases were assigned to same bench. But the amendment provided for bifurcation, e.g. Criminal Bench and Civil Bench. This has lead to the formation of a specialized bench. This amendment had added a new clause 46(B)., by which a judge can conduct camera trial in the cases relating violence against women including trafficking cases. The document of such

case can be available to the victim and defendant only. The news of the trial court proceedings could not be published in any newspaper without the permission of the Judge. The news, if published with the permission, should be without the identification of the victim. Similar provisions are there in the Appellate Court Rules (Clause 60Ka) and also in Supreme Court Rules (clause 67ka).

The National Judicial Academy has conducted several programmes on the topics relating to offences against women including trafficking for judges and lawyers. These help to sensitize judges and lawyers in the field of offences against women and improve their attitude towards this area. The Courts also provides legal aid to the victims if she wants to have additional lawyer other than government prosecutor. The access to the court is also made easy to the victims by the court it selves.

Though the changes in the laws brought about remarkable impact and the urban civil society has become very conscious and many N.G.O. have come forward to stop trafficking, but still women trafficking is going on alarmingly. There is no exact data of victims, there is diversity in the data of different NGO and INGO. The average accepted data is 5,000 to 7,000 women and children are victimized annually. According to ILO report 12000 women and children are trafficked annually from Nepal. This data is very much embracing and forces to address the vulnerability of the victim. The major obstacle for combating against trafficking is that this offence is of trans-boarder nature. Nepal's boarder is open in all directions except on the north, the barrio with China has no significance in this regard. Because of this situation and nature of the crime the country of origin becomes weak to cross the boarder so as to deal with the crime. The SAARC Convention on Preventing and Combating Trafficking in women and children for prostitution has mentioned opportunities for bilateral cooperation between country of origin and destination. But Nepal has not ratified it. The country of destination is mainly India. There are some instances of trafficking to other SAARC country and some other countries including Arab. Because of the increasing number of manpower agencies the ranges of the destination countries have been increased and may spread all over the world in near future. In this gathering of distinguished participants of SAARC country, if we can manage and establish court to court relation for collecting, accepting and refusing evidences in trafficking cases among the courts of SAARC region, that will be a significant achievement in this field. So, I would like to propose to discuss on this aspect too.

Hon'ble Tariq UL Hakim, Justice, Bangladesh High Court

Bangladesh is primarily a source country from where thousands of women and girls are trafficked annually to India, Pakistan, Bahrain, Kuwait and the United Arab Emirates (U.A.E.) for exploitation in voluntary domestic servitude and debt bondage. Some women and girls are trafficked through Bangladesh from Burma to India also. Bangladeshi boys are also trafficked into U.A.E. and Qattar and forced to work as camel jockey's women and children from rural areas in Bangladesh are trafficked in urban areas for commercial and sexual exploitation. Inefficient Police personnel are also believed to have been facilitating trafficking of women and children; poverty, illiteracy, low levels of income, river erosion, the withdrawal of water from the upper stream of the rivers all contribute to the rise of human trafficking. Organized gangs of traffickers lure their poor victims away with prospects of job opportunity.

No confirmed statistics are available about the numbers of women and children trafficked out of Bangladesh each year. Studies reveal however that about 22% of the female children belong to the 13-16 age group; 69% of the victims are female and 51% belong to the 11-18 age group; 52 are either illiterate or can only sign their names, and 81% are from the poorest class of the population.

The U.S. Government in June 2004 placed Bangladesh amongst ten countries who have made no efforts to cut international trafficking in persons and warned that unless they improve their record within three months, they could face non trade sanctions, such as cut off in non humanitarian and non trade related aid. Until June 2004 Bangladesh used to be treated as a tier 2 nation but alleged increase in trafficking of persons pushed the country further down to Tier 3. Although it is argued that the tiring of countries by the U.S. is often prompted by political and arbitrary consideration nevertheless since June 2004 the Bangladesh government has taken a number of steps for anti-trafficking in recognition of which the country has again gone to Tier 2 since June 2005.

Apart from the several statutory and legal provision for the protection of women's and children's rights the "Nari O Shishu Nirjatan Daman Ain 2000" (Suppression of Oppression of Women and Children Act 2000) provides for a maximum sentence of death penalty and a minimum sentence of ten years imprisonment for bringing into or taking out of Bangladesh, or keeping in custody any women with intent to use her for any illegal or immoral purpose. Similarly if the victim is a child then the minimum sentence is life imprisonment and a fine.

Judicial response to any social evil including trafficking of women and children is however dependant upon government action: unless the government officers

apprehend culprits and traffickers and prosecutes them the Courts cannot play any role in passing sentences.

Fortunately to combat this problem of trafficking the Government of Bangladesh since June 2004 has taken several steps which fall under the following three categories:

1. Administrative Measures
2. Monitoring Departures
3. Quick Disposal of Trafficking Cases

Administrative Measures

A thirty-three member Inter Ministerial Committee under the Home Ministry has been formed to take steps and co-ordinate measures between the different government agencies for the prevention of trafficking, trafficking interception and prosecution of persons connected with trafficking.

An anti-trafficking Police Cell has also been set up to compile statistics and data on trafficking cases and victims and to produce witnesses for trial.

Monitoring Departures Closely

The Government of Bangladesh has introduced anti-trafficking measures at Dhaka, Chittagong and Sylhet Airports. Trafficking interception procedures have been put in place at Airport checking counters, formal immigration or passport control desks and at Airline passport checking desks which passengers must cross before boarding the aircraft. Airline and Immigration Control staff have been given special training to identify false papers and inconsistent travel plan stories. The training of immigration officials is being carried out in collaboration with the International Organization for Migration (IOM), with funding from the United Arab Emirates government. From April, 2004 to September 2005 this programme provided training to 200 Bangladeshi immigration official as. IOM and British High Commission conducted a Training of Trainers (TOT) course for 20 immigration officials who in turn are serving as trainers for the rest of this target. The training course is for one months duration and is given to all new immigration officials as part of their induction. Immigration officials already in their jobs also receive ante-trafficking training.

The immigration officials are members of Special Branch of Police who re initially trained at the Police Academy as regular police officers and then receive special training at the school run by the CID at Detective Branch.

Thirty days orientation course and fifteen days refresher course is provided to the concerned airline personnel of Bangladesh Biman as they are the people responsible at the passport checking desk. 30 days Training for the Trainers (TOT) is provided for selected personnel at the Biman Association Training Center (BATC) with support from the British High Commission on ante-trafficking matters.

Apart from this, immigration officials are required to participate in periodical orientation programs for ante-trafficking.

The immigration officials are supported by the National Security Intelligence (NSI) and Rapid Action Battalion (RAB). A Special Superintendent of Police (Immigration) is responsible for monitoring the implementation of ante trafficking guidelines and support the Civil Aviation Authority at the Airports in this respect.

Monitoring departures has also been started at other land ports including Benapole land port through which thousands of persons go out of or come into Bangladesh by bus and other form of road communication.

The Bangladesh Rifles the security force which guards and patrols the borders of Bangladesh have also been given special training to check trafficking of persons.

Results

Training provided to immigration officials has shown change in knowledge and ability to recognize trafficking victims. The record shows that between 15th June, 2004 and 15th March, 2005 the Government intercepted 777 individuals trying to go abroad without proper documentation from the above mentioned airports. Of this 206 (27% were women and children) rescued from trafficking. Monitoring at Zia International Airport shows that it is the most common Airport through which undocumented travelers attempt to leave Bangladesh, with 624 of 777 cases of interception occurring there. Of these 562 were detected during the second step of the process, the formal immigration control step in the process.

Quick disposal of trafficking cases

Rapid disposal of trafficking cases has been recognized as an important deterrent and a policy consistent with that understanding has been adopted since June, 2004. As part of the Government's ante trafficking initiatives, a Deputy Attorney General has been designated at the national level to ensure quick disposal of trafficking cases. In addition Public Prosecutors and Special Public Prosecutors (SPPs) have been activated in 44 Special Tribunals in 35 districts. 5 of these special Tribunals are in

Dhaka, 3 in Chittagong and two each in Bogra, Rangpur and Rajshahi. In other District Public Prosecutors and Special Public Prosecutors have been designated in existing District and Sessions Courts to conduct the trafficking cases. The Inter Ministerial Committee of the Ministry of Home Affairs requires monthly report from the District level that provides data on the status of the prosecution of trafficking cases.

A committee established in June 29, 2004 monitors trafficking cases which initially selected 17 cases for quick disposal through continuous trial and constant monitoring and also took a decision to dispose of all the cases within 45 days. This policy of close monitoring and quick disposal without long adjournments has been adopted for all the case monitored by the committee. The Suppression of Oppression and Repression of Women and Children Act, 2000 provides that a case should be disposed of or completed within 180 days of its commencement.

This policy of quick disposal of cases has been implemented with prosecutorial existing resources. 44 Special Tribunals have been set up to hear trafficking cases. At the district level rapid disposal of trafficking cases are done at existing District Sessions Court by the Judges already designated for those Courts indicating that the program can be implemented using existing recourses through constant monitoring and logistic support.

This policy of quick disposal of trafficking cases is being implemented in 35 districts of the country. In the remaining districts efforts are also underway for quick disposal of trafficking cases with the help of Public Prosecutors.

Results

Between 15th June, 2004 and 15th March, 2005 a total of 86 cases were identified for rapid disposal under the Government's Special Prosecutor program for fast track action on trafficking. During this period 72 cases were completed though some of this may have been initiate prior to the start of this program. Of the 72 cases disposed of during this 9 month period 47 (65%) resulted in conviction involving multiple defendants, as a result of which 85 individuals were convicted. The Government is also keeping track of the nature of sentences being given for trafficking convictions. In most of the cases disposed of during this period life sentences were handed down affecting a total of 60 individuals found guilty of trafficking.

Conclusion

Although the aforesaid steps by the government during the last year shows that the government machinery has been geared up to combat trafficking of women and children resulting in apprehending several traffickers and rescuing their victims the gang leaders and main culprits behind the crime appear to be untouched and undeterred: unless they are roped in and the dens of trafficking destroyed the problem will persist. For this purpose the law enforcing agencies of the regional countries have to work in close co-operation and follow up leads on criminals involved in trafficking in each other countries. A Special Tribunal comprising judges from different countries of the SAARC region with jurisdiction to convene and sit in different regional countries from time to time should hear trafficking cases and hold trials of apprehended criminals and gang leaders and pass sentences which will be mandatory on the regional countries to implement and carry out.

Hon'ble Soumitra Sen, Justice, High Court, Calcutta

The word 'Trafficking' in common parlance means vehicular traffic but immediately upon use of the expression "trafficking' it assumes a different connotation. The word 'trafficking' has been defined in the Oxford Dictionary as to deal or trade in something illegal. Therefore, trafficking by itself is not only restricted to human beings but also dealing in anything illegal would mean trafficking.

Human trafficking theoretically can involve both men and women but what we are concerned with trafficking in women and children.

In recent years we have seen that there has been a spate of trafficking in women and in particularly minor girls from Asian countries. It is needless to go into the statistics. The facts, which are revealed, and that we read everyday in newspapers and other magazines is staggering.

Apart from being a social evil of the most serious kind, it is an offence in law of a most heinous nature.

To understand the magnitude of the problem a little insight to our social background is necessary. It is well known and is no secret that prostitution is supposed to be one of the oldest professions in human civilization. To what extent a sex worker had social recognition in the olden days or subsequent thereto is of no concern to us. The involvement of sex workers and their growth in the society was primarily a result of patronage by the rich and powerful of special class of women. In fact it would not be out of place to mention that it was fashionable in the early days for the rich and the

wealthy and the powerful to have a woman in their keeping other than their married wives.

While dealing with the problem of trafficking in women and children by way of legal provisions the entire issue must also be tackled from a social point of view. The rich and the wealthy and the powerful no longer flaunt the women in their keeping, and is no longer considered fashionable to do so. But, however, the problem of trafficking in women and children still continues to exist and in fact is growing at an alarming proportion. There may be various reasons, which compel a woman to take up the profession of a sex worker. It could be for survival, biological, economical, social, sociological. The list of such example is endless.

The International Community as well as our county had recognize and had identified this social malady and had from time to time tried to frame laws. If we trace the history we will find that there are several international instruments in force with regard to suppression of trafficking in women and children.

The international agreement dated 18th of May, 1904 was entered into for the suppression of White Slave Traffic as amended by the Protocol approved by the General Assembly of the United Nations on 3rd of December 1948.

There was an International Convention on the 4th of May, 1910 for suppression of White Slave Traffic.

On 30th September, 1921, there was an International Convention for suppression of Traffic in Women and Children which Protocol was approved by the General Assembly of the United Nations on 20th of October, 1947.

There was another International Convention on 11th October, 1933 for suppression of traffic in women of full age. This was also amended and approved by the said Protocol of the United Nations.

In 1937, the League of Nations prepared a Draft Convention extending the scope of the instruments mentioned above. In 1950, at a Convention in New York a draft was signed by several nations including India for suppression of traffic in persons and the exploitation of the prostitution of others. The resolutions adopted at the said International Convention were later on ratified by the Government of India.

In fact even prior thereto in 1939, the Government of India had ratified an International Convention for the suppression of Immoral Traffic in persons and the exploitation of the prostitution of others. Under Article 23 of the Constitution of India, Traffic in Human Beings is prohibited and any contravention of the prohibition is an offence punishable by law. Under Article 35 of the Constitution of India, such a

law has to be passed by Parliament, as soon as it may be, after the commencement of the Constitution. Article 23 of the Constitution of India prohibits Trafficking in human beings and other similar form of forced labour. It is significant to note that the language of Article 23 of the Constitution is not restricted to Trafficking in women and girls. The language is trafficking in human beings, which include both sexes. Initially the Act which was known as suppression of Immoral Traffic in Women and Girls Act has been changes to Immoral Traffic (Prevention Act) and the words 'Women and Girls' or Women or Girls wherever appearing has been substituted by the word person or persons.

Therefore, the Act, which is known as the Immoral Traffic (Prevention Act), 1956, has come about by way of amendment by the Act 44 of 1986.

If we go through the various provisions of the Act we will find that the Act is not aimed at abolition of prostitution or making or branding a sex worker as a criminal per se. The object and purpose of the act appears to me to marginalize or abolish commercializes, trafficking in women and girls for the purpose of prostitution as an organized means of living. There are, however, certain exceptions, which prohibit the Act of Prostitution in certain places. Reference may be made to Sections 7 and 8 of the Act, which has prohibited certain actions within certain area.

It further appears that the Act is aimed at protecting people from being forced into prostitution against their will. It has already been indicated that Article 23 of the Constitution of India prohibits trafficking in human beings. Article 35 of the Constitution a law for prohibition of human trafficking has to be passed by the Parliament.

From time to time various suggestions have come from voluntary organizations working for the cause of oppression of women for making the penal provisions in the statute more stringent and to provide for certain minimum standards for correctional treatment and rehabilitation of the victims. Keeping in view of the suggestions certain amendment to the Act has been made to cover all persons whether male or female who are exploited sexually for commercial purposes.

If we examine the various provisions of the Act we will find that as a fist step in recognizing the problem, the name of the Act has been changed from suppression of "Immoral Trafficking in Women and Girls Act" to "Immoral Traffic (Prevention Act)".

Offences involving the children and minors have been made slightly most stringent by enhancing the period of punishment.

Trafficking Police Officers have been empowered to investigate even across different states.

Licensing authorities have been empowered to suspend licenses of hotels and other like places where children and minors are found to be used for the purpose of prostitution and used for sexual gratification.

In cases of seduction in custody, the punishment has been enhanced to that of rape laid down in Indian Penal Code.

The earlier provision of the Act providing for the facility of release of convicted persons on probation of good conduct or after due admonition and on security from habitual offenders for good behaviour has been omitted from the new Act.

Provision has been made for medical examination of all persons removed from a brothel after a search has been carried out under Section 15 of the Act.

Women or girls removed in pursuance of a search made under Section 15 shall be interrogated only by women police officers and when no women police officers are available they shall be interrogated only in presence of a woman social worker.

Enabling provisions have been included in the Act to empower the Central government to set up special courts with jurisdiction to try offences, which have inter-state ramification.

Apart from the Central Act, many states have also enacted statues to prevent trafficking in women and girls.

However, in spite of the various legal provisions that are in existence the Trafficking in women have increased over the years and everyday we come across the news of hapless girls falling victim of such unscrupulous people in the society. There are innumerable instances where girls coming from poor economic background have been lured from their homes with the promise of a job or a better life, have been found languishing in brothels in different parts of the country far away from their homes. Even after the girls are rescued, there is a tremendous social problem in rehabilitating such rescued girls. More often than not their own family refuses to take them back. They are socially ostracized and many times it is found that finding no other alternative these girls go back to the brothel.

If we are to tackle the problem of trafficking in women and girls, apart from a wide change in the existing legal system by making penal provisions most stringent on the traffickers or the persons responsible for the trafficking of women creating social awareness us a must.

The message must percolate down to every level of the society that trafficking in women and girls is a most heinous crime, and is an offence against humanity.

Above all the judiciary is required to be more proactive and sensitive in dealing with cases involving trafficking in women and girls. Persons found guilty should be handed with the maximum sentence possible. There has to be a change in the mindset that the girls involved in the trafficking is not the perpetrator of the crime but the victim.

The public awareness as to the impact on Society due to the crime of Trafficking in women should be carried out on a war-footing. The government and various voluntary organizations should come together and work in tandem towards achieving this goal.

It has been seen down the history of mankind that enacting law alone does not prevent crime it only acts as a deterrent but in order to prevent and ultimately achieve the goal of eradication of crime, though utopian in concept, can only be achieved when the legal machinery works together with other social organizations in order to increase public awareness.

Another aspect, which I wish to highlight here, is that while dealing with the case relating to trafficking in women and girls the judiciary must not get bogged down with the technicalities but instead try to do substantial justice having regard to the purport of the Act.

In the decision of *State of Uttar Pradesh Vs. Bhagwati Kishore Joshi* reported in A.I.R. 1964 S.C. 221, the Hon'ble Supreme Court had occasion to deal with non-fulfillment of certain technical aspects. After having examined the relevant provisions of law the Hon'ble Supreme Court observed that the accused not having been prejudiced by the illegality committed by the police, the convictions could not be set aside on the ground of mere irregularity or illegality in the matter of investigation. It is a common experience of most of the members of the judiciary that investigation carried out by the investigating agency sometimes are lacking in materials, faulty, lackadaisical, fraught with mistakes. Even then it is the duty of the judiciary to unearth the truth amongst the maze and/or web of faulty investigating materials before it.

The lacunae of the investigating agency can be due to sheer inefficiency or may be due to vested interest. Since trafficking in women and girls is not ordinary crime but is to be considered a crime against humanity, it should be viewed from a different standpoint than an ordinary crime. But this does not mean that the investigating agency can completely disregard the technical provisions of the Act. The legislature in its wisdom has provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling

of delicate situations in respect of females. But the entire proceedings and the trial are not vitiated owing to the non-observance of or non-compliance with the directions contained in the Act. The Court, however, has to be very careful and circumspect in weighing the evidence where there has been such failure on the part of the investigating agency, but as observed by the Hon'ble Supreme Court unless and until some prejudice is shown to have been caused to the accused person or persons, the conviction and the sentence cannot be set aside.

The Court must realize that a defect or an illegality of the investigation, however, serious has no direct bearing on the competency or the procedure relating to cognizance or trial of an offence and that whenever such a situation arises, Section 465 of the Criminal Procedure Code is attracted and unless the irregularity or the illegality in the investigation or the trial can be shown to have brought about a miscarriage of justice. In this connection the decision of *H.N. Rishbud and Inder Singh Vs. State of Delhi* report in A.I.R. 1955 SC 196 may be referred to.

To end the discussion I would like to point out that what is lacking in the various statutory provisions is that there is no clear message to the perpetrators of the crime that once they are caught of having committed the offence under the Act they shall be very severely dealt with. The message, according to me, must be loud and clear that “the perpetrators of the crime be aware that if found guilty shall not be spared.”

The investigating agency and the judiciary too should be sensitized in dealing with cases relating to Trafficking in women and girls. Various governments should also be made aware as to the magnitude of the problem. Trafficking is an ugly aspect of the society which should not be kept under wraps but we must come forward and recognize the existence of the problem and its magnitude. Unless there is a concerted effort from all concerned mere enactment of law will not be enough to deal with the problem of trafficking in women and girls.

Hon'ble Sharif Uddin Chaklader, Justice, Bangladesh High Court

Let me start with a quotation from our national and greatest poet, Kazi Nazrul Islam, who, in one of his poem, wrote “hungry child do not want independence/want a handful of rice and little salt/days grazed without food/little stomach now turns to burning woven.’ In such situation one can do anything. Poor and poverty are not same. Poor means having little money or it may be said, not having enough money for basic needs. Poverty may be said the state of being poor i.e. not able to buy basic things one need such as food, clothes and pay somewhere to live. No one looks for

these people. Most of the victims are from this poverty engulfed areas. Poverty is the mother of all crime.

Trafficking of child or women is a heinous offence. Traffic originally means trade and ordinarily means transportation of merchandise for the purpose of trade. In wider sense it may be used for buying and selling or exchange of goods for profit. Gradually meaning of it embraces sinister or evil connotation i.e. dealing or bargaining in something which should not be made subject of trade. It now used for disgraceful, unscrupulous and illegal trading, like trafficking of women and children.

Victims are naturally lives in backward places where amongst other, economic crisis are clearly exposed. Poverty stricken villages are foremost consideration. For better lively hood, economic solvency, the children and women become subject matter. Sometime voluntarily or willingly and sometime non-voluntarily or unwillingly. Generally child or women do not have self control as such they can be easily moved. It is seen havenaughts are the victims and is also seen generally the area the poverty rate is high of trafficking is higher. For a hope of better life other, employment should be provided which in one hand, give the victim and his/her family some short of economic solvency and on the other hand, make them busy with work as idle brain is devil's workshop.

Trafficking may be a problem of a single country but to control it, a regional effort is required as the victims are transported to rich neighbouring country and also to far country. This might be a national problem but it requires effort to solve. SAARC and its convention gives a light for taking the burden regionally and for this, a SAARC tribunal may be formed so as to punish the offender who may not be amendable to the laws of victim's country. It is the foremost duty of all the SAARC countries to prevent, amongst other, this heinous crime. The verses quoted first of the topic, is the cry of all of this economic handicapped victims.

Hon'ble L.K. Wimalachandra, Justice, Court of Appeal, Sri Lanka

Trafficking in human beings has become a very profitable business for organised criminals. This is a criminal problem as well as a human rights concern.

The root causes of trafficking in women and children has increased due to globalisation, modern communication, liberalization of economies and improved transportation between countries.

Some of the factors that encourage organised criminals to engage in trafficking are the high profits involved, inefficient law enforcement, corruption and the trafficking of persons being more lucrative and risk free unlike drug trafficking.

Certain other factors which enable traffickers to entice victims into consenting to being taken illegally from the origin country to another are economic disparity, disruption of traditional livelihoods, lack of education, the deprived status of women in the society, political instability, civil unrest and internal armed conflicts.

Trafficking for the purpose of sexual exploitation is a contributory factor for the spreading of sexually transmitted diseases such as AIDS and HIV. This has caused one of the biggest predicaments not only in countries of this region but in most part of the world. Countries in the SAARC region are increasingly becoming aware of the gravity of this problem. Most of our countries in the SAARC region are making a genuine attempt to curb dangerous organised groups from working their way into the sex industry. In this regard the main issues for consideration are,

- (a) the prevention of the trafficking of women from countries
- (b) the protection of victims of trafficking and the initiation of victim protection schemes
- (c) the efficient detection and prosecution of traffickers.

In my opinion, it is not the responsibility of only the Police to eradicate this menace but the responsibility of Governments and Non Governmental Organisations as well. In this regard our main aim should be to promote the broadest possible mutual assistance between the countries of the SAARC region. Investigation into the trafficking of women and children will not be successful if we do not exploit the possibilities of exchanging information among the countries in this region. Co-operation between the countries in this region can become complicated if our laws on trafficking are different.

All countries in the SAARC region identified this problem of trafficking in women and children for sexual exploitation and discussed this at length at the ninth SAARC Summit held in Male, Maldives, in 1997. At this SAARC Meeting, countries in the South Asian region decided to strengthen and streamline regional efforts in addressing this issue. At the eleventh SAARC Summit held in Kathmandu on 5th January 2002, all nations in the SAARC region adopted the *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*. This is a meaningful and vital step in the right direction. Even though the Convention does

not address the trafficking in women and children in a broader prospective, it is by and large an achievement for the region.

Recommendations

While commending the initiatives taken in the Convention to prevent and combat trafficking of women and children, the following suggestions can be tabled for discussion.

- The definition of ‘trafficking’ provided in Article I of the Convention focuses only on “the moving, selling or buying of women and children for prostitution.” The term trafficking however should not be limited only to prostitution. It must have a wider definition to include other forms of sexual exploitation, forced labour or services, removal of organs, slavery and forced marriage.

Moreover, illegal adoption should also fall under this definition. This will provide a good ground for prosecuting all forms of trafficking of human beings.

Further, the definition of ‘trafficking’ should not place emphasis on women and children as it regards them as weaker segments of the society. Moreover, even men are trafficked for various purposes. It is submitted therefore that the better approach would be to widen the definition to read as ‘human beings.’ This would also place the SAARC Convention in line with the UN Protocol Against Trafficking (2000) which recognises anyone who is subject to trafficking as a victim, regardless of age or gender.

- Article III deals with offences. Although pornography is one of the purposes of trafficking, it has not been included as an offence in the Convention.

Additionally, there is no clearly defined provision in the Convention to criminalize the conduct of persons who knowingly remove, conceal or destroy evidence relating to human trafficking. Similarly, steps should be taken to criminalize persons who knowingly possess incriminating documents such as forged immigration documents while in the course of trafficking or intending to do so.

- Article V of the Convention dealing with ‘Judicial Proceedings’ should provide for the protection of witnesses who give evidence. Prosecution witnesses and victims of trafficking are vulnerable and need protection. The Convention must recognise the importance of protecting the identity of victims and prosecution witnesses from facing retaliation from traffickers. In this regard the

State parties could provide protection and if necessary bring in legislative changes.

- Article VIII deals with the ‘Measures to Prevent and Interdict Trafficking in Women and Children.’ This Article appears to be comprehensive with regard to the prevention of trafficking in women and children. However the following preventive measures should be included as well.
 - (i) State parties to the Convention may establish victim protection schemes and measures to aid women and children who are sent back to their countries.
 - (ii) Since victims are frightened to give information to the Police as they are usually afraid of retaliation against themselves and their families by the traffickers, provisions should be included to protect victims.
 - (iii) Provision that State parties shall strengthen as far as possible, such border controls as may be necessary to prevent and detect trafficking in persons. This clause should be carefully worded in such a way so as to strike a balance between the freedom of movement and border controls.

This Article should be improved to provide for new techniques in investigatory matters for prosecutors and law enforcement officers to apprehend traffickers and efficiently prosecute trafficking cases. To this end, the Convention can encourage the conduct of comprehensive regional training programmes for prosecutors and law enforcement officers of the SAARC countries, which would *inter alia* help create awareness among the officers of the distinctive issues specific to each country. Such familiarity would be of immense benefit in providing mutual legal assistance.

- Article IX provides for the ‘Care, Treatment, Rehabilitation and Repatriation of the Victims.’ However it does not provide for the physical safety of victims of trafficking while they are within the territory of the recipient State.

Furthermore Article IX does not speak of awarding compensation for victims. It does not guarantee the right to compensation for victims. Additionally, the Convention does not deal with the recipient country’s accountability in the rescue and repatriation of victims.

It is further submitted that in the interest of recognizing the rights of victims against arbitrary arrest and detention, this Article should include provisions against the forced detention of victims of trafficking in protective homes or shelters in the receiving State until the completion of administrative matters.

- One of the practical problems that can be faced in complying with the provisions of the Convention is identifying the distinction between migration and trafficking. The Convention should not restrict the right to freedom of movement, recognized in Article 12 of the International Covenant on Civil and Political Rights (ICCPR). Identifying this distinction is of much importance to the SAARC region, as remittances from migrant workers constitute a major foreign income source to the South Asian economy. The need arises therefore for the formulation of clear policies among the State parties to distinguish between migration and trafficking.

Further Recommendations

The Convention requires a wider definition to the concept of trafficking.

- The Convention must also make provisions for other offences connected to trafficking, such as forced labour, slavery, begging, forced marriages etc.
- Security and support systems should be provided to the victims. State parties must take steps to remove the stigma and discrimination attached to the victims.
- There must be a comprehensive health programme to treat victims of trafficking who contract sexually transmitted diseases such as HIV/AIDS. They require constant care and support. There must be a mechanism guaranteeing the human rights of such victims.
- The Convention must make provisions to introduce laws to allow electronic surveillance, wiretapping and other special investigative techniques to apprehend perpetrators of this heinous crime and use the evidence so obtained or procured in legal proceedings.
- There must be a mechanism to determine whether a State party is making sincere efforts to comply with the provisions of the Convention and making significant efforts to bring themselves into compliance.
- All types of trafficking related activities such as conspiracy, aiding and abetment, harbouring people involved in the business of trafficking and corruption among law enforcement officials should be criminalized.
- State parties should take measures to empower women and protect children. This would significantly reduce the vulnerability of women and children to trafficking.

- State parties should also make efforts to promote awareness among the community of the causes, effects and dangers of trafficking in persons. This would help prevent victims being lured by false promises of employment and better living conditions.
- State parties must also attempt to address contributory factors such as economic disparity, illiteracy, gender discrimination and poor living conditions in order to reduce the attraction of seeking greener pastures and becoming victims of trafficking.

Conclusion

In conclusion, it must be borne in mind that any amendments to the Convention must serve the following main purposes.

- (i) Prevent and combat trafficking,
- (ii) Apprehend, prosecute and punish those responsible for trafficking,
- (iii) Protect, rehabilitate and repatriate victims of trafficking and
- (iv) Promote co-operation among the State parties for these purposes.

Declaration

The South Asian judges also worked on a declaration to be followed on after the workshop. A committee of five judges was formed who drafted the declaration, which was later discussed in a open floor and was finalized.

Kathmandu Declaration against Human Trafficking

The Workshop of South Asian Judges on Combating Trafficking in Women and Children, have been a real eye opener. Members of the judiciary of different countries have been deliberating on this issue of trafficking of women & children for the past three days, which in itself was very thought providing. Crucial issues were discussed, and debated upon. There appears to be an absolute ad-idem amongst the participating members that there is a greater need for formulating news laws, new means and new methodology to combat this despicable and heinous crime for trafficking in women and children. The cause may vary from country to country due to difference in economic, social, religious and other allied issues. But the ultimate result is as devastating as in any country. The ill effect of trafficking of women and children is felt in the same way in every society and in every country. The problem

gets aggravated when this crime transcends regional boundaries as it becomes even more difficult to tackle, primarily because the law enforcement agencies in different countries act under different legal structure. Unless we have a uniform codified system cross border or regional trafficking will be extremely difficult to control far less to eradicate which should be our ultimate goal. Trafficking in women and children is like a contagious disease, which knows no boundary, does not distinguish between any religion, cast or creed, but affects every one equally.

After having discussed on this issue, an idea which was first mooted by Mr. Justice Sharif Uddin Chakalader and Justice Tariq UL Hakim, of the Bangladesh, that we members of south Asian community should have a centralized tribunal or court , to deal with this regional trafficking received a general acceptance from all members present. The idea by itself is like a small step towards a giant leap for the mankind hence, we this day of 25th September, 2005 do hereby declare and propose that a Tribunal or Court of South Asian Countries be constituted to deal with the cases relating to regional trafficking of women and children. A draft instrument is required to be prepared for constituting such a tribunal under the active participation of National Judicial Academy and circulated amongst the members of the South Asian Countries for their respective invaluable suggestion and comments, before it is finalized. In the event the proposal is accepted by all the members of the South Asian Community, then modalities will have to be finalized as to how best we can achieve this objective of creating a tribunal or court to deal with cases relating to trafficking of women and children involving South Asian countries.

Let a copy of this declaration be sent to the SAARC secretariat so that the constitution of a SAARC court/ tribunal included in the agenda for deliberation by the leaders of the SAARC countries in the SAARC summit to be held in Dhaka in November 2005.

Concluding Remarks

Hon'ble Justice Mr. Soumitra Sen from Calcutta High Court, India

I would like to extend thank to National Judicial Academy and UNIFEM for inviting me in a very thought-provoking workshop. I note the workshop was an opportunity to share common and individual experience to combat the trafficking in women. We should need to share the good practices among the judiciaries in SAARC region to fight against trafficking in human. It would work strengthening law enforcement

agencies to combat trafficking of women and children within the region. Lastly, I thank NJA's Executive Director and staffs for excellent arrangement of the workshop.

Hon'ble Justice Rohini Perara, Court of Appeal, Sri Lanka

I would like to extend the appreciation to NJA and UNIFEM for inviting to participate in the workshop. I make a note that the problem of trafficking in women and girls in this region is a serious humanitarian problem. It is a common problem of each country within the region. Therefore, there is a need to develop better relation among the judiciaries and the law enforcement agencies. It worked to a success of the confronting problem. I am happy to participate such a thought-provoking program. Last but not least, I express my gratitude to the Executive Director of NJA and staffs for excellent organization of the workshop.

Hon'ble Justice Tariq UL Hakim, Bangladesh High Court

On behalf of the Bangladesh delegation, I would like to thank the NJA and UNIFEM for providing me an opportunity for participation in the workshop. I got a wonderful chance to share experiences to the brother judges of the region. It has been a common platform to combat in trafficking in women in the region. I must take the opportunity, to thank the NJA team led by Justice Kalyan Shrestha for excellent management and untiring efforts a success the workshop.

Ms. Sangeeta Thapa, Senior Program Officer, UNIFEM Nepal Office

I am feeling honoured to be with such an eminent justices of the region. We at the UNIFEM are very happy that your contributions have made the workshop successful. UNIFEM has been working against the crime through law and policy reformation as well as through judicial awareness. I would like to take this opportunity to acknowledge the support of Hon'ble Kalyan Shrestha, who is indeed a pride of our country. His sensitive approach towards this particular issue and looking at the whole issue of gender equality is noteworthy. It is an eminent personality like him that takes for creating a better future free of violence.

I would like to especially thank Justice Keshari Raj Pandit for his support and guidance, we look forward to his leadership at the NJA. I would also like to acknowledge all the other staff members of the National Judicial Academy whose efforts have contributed towards successful completion of the workshop. I would like

to thank my colleague Aruna for being here at the workshop and providing her inputs. I would also like to thank Salina, who has been with us throughout the process and contributed towards the success of the workshop. Last but not the least, I would like to thank all the justices from the region for coming to the workshop and contributing to address the crime of trafficking.

Vote of Thanks

Hon'ble Keshari Raj Pandit, Judge, Appellate Court & Deputy Executive Director, NJA

At the moment we are about to close this three day workshop on South Asian Judges Workshop on Combating Trafficking in Women and Children. Your gracious presence and participation in this pertinent issue have honored the National Judicial Academy. I am sure that Workshop has made us all avail the opportunity to share and learn the seriousness of the crime of trafficking and its different dimensions. In addition, the findings of the workshop on combating trafficking of human persons, and in particular children and women would be a useful tool toward the solution of the problem.

Distinguished Participants, All of your efforts are remarkable to make the Workshop happen here. We take note of all your support at different levels of the Workshop. I believe it is the proper time to mention Justice Kalyan Shrestha, Supreme Court of Nepal, who specifically took initiative to organize this very important Workshop. I am sure that without his generous efforts this event would not have been happened. I therefore, wish to extend sincere thanks to Justice Shrestha for all his endeavors to make this Workshop happen.

On behalf of the National Judicial Academy I want to extend sincere thanks to UNIFEM South Asia Regional Office and its Director Chandni Joshi, Senior program Officer Sangita Thapa and Aruna Thapa for their generous support to organize this Workshop.

Our special thanks goes to participating judges from Bangladesh, India and Sri Lanka who allotted their precious time within very short notice, despite their busy schedule. We duly note if, any kind of inconvenience occurred during your stay here in Kathmandu.

I wish to extend our sincere thanks to fellow justices of various Courts of Appeal in Nepal for their unconditional support and commendable participation in the workshop. We feel proud of your impressive presence and lively participation, Sirs.

We specially note the help that we received from Salina, and my team from the National Judicial Academy, with special mention to Rajendra Kharel as lead person for the Workshop Management, for their very effective support prior and during the Workshop.

Finally on behalf of the National Judicial Academy, once again I want to say my warm thanks and words of appreciation for your kind support from respective fields.

Closing Remarks

Hon'ble Justice Kalyan Shrestha, Supreme Court of Nepal

I am happy that the workshop has come to a closure after a very fruitful exercise of three days from the judges of the South Asian region. Honestly, I feel that we were able to facilitate a very good discussion and that we learned from each other. I would like to thank the NJA group who worked extensively towards making this workshop happen. I am very happy to see my colleague Hon'ble Keshari Raj Pandit taking charges of NJA and I am sure in his leadership NJA will indeed take a right direction. I am thankful to all the judges who participated from nationally and regionally who made a huge contribution towards addressing trafficking through their presence and deliberations. We would always be in-debt to UNIFEM, especially Chadaniji who is a pride of our country, Sangeetaji and Arunaji who has been with us in this endeavour. I would like to thank my entire group of NJA, especially Rajendra Kharal, Gyanendra Kafle and all the others without whom this workshop would not have been possible. I would like to thank Salina and FWLD who have been providing us support to see this workshop through. I would like to congratulate and thank all the justices from the region for their valuable participation and support.

The workshop came to a closure with the distribution of participation certificate from Hon'ble Justice Kalyan Shrestha, Supreme Court of Nepal.

